No. 173.

Pleaded: Formerly, when leases, like feudal rights, were so strictly personal to the tenant, that he could not, in the common case, transmit them even to his heir-at-law, without an express clause to that purpose, it might have been doubted how far, in the case of a lease for a period far exceeding the ordinary duration of human life, a power of subsetting was not implied; but as leases now descend to heirs, unless expressly excluded, and the *delectus* supposed in the contract is confined to the family, rather than to the person of the lessee, there seems no reason why the duration of the lease should have any effect on the power of transferring it. Indeed, if it were to be established as a general rule, that a right of subsetting is implied in every case where the landlord must have laid his account with a change in the person of his tenant, his age, and the other circumstances of his situation, must, in every case, be taken to the account, as well as the duration of the lease. It is a fixed point, that a power of subsetting is not implied in a lease for nineteen years; Alison against Proudfoot, No. 170. p. 15290.; neither should it in the present.

The Lord Ordinary repelled the reasons of reduction, " in respect it cannot be supposed, that the representer (pursuer) and his factors were unacquainted, for five years together, how and by whom the farm libelled was possessed."

The Court, upon the general ground, that a power of subsetting is implied in a lease of thirty-eight years, unanimously " refused " a reclaiming petition, without answers.

Lord Ordinary, *Stonefield*. For the Petitioner, *R. Craigie*. Clerk, *Simclair*.

D. D. *Fol. Dic. v.* 4. *p.* 329. *Fac. Coll. No.* 117. *p.* 260.

1798. *November* 20.

GEORGE DEUCHAR *against* LORD MINTO, MARY PETER, and her CURATORS.

No. 174.
A clause in a lease " secluding assignees," found to prevent the lessee from conveying it to his son-in-law.

Lord Minto, in 1788, let a farm for nineteen years to John Peter and his heirs only, secluding assignees and subtenants voluntary or legal.

John Peter had a son, James, and two daughters, the youngest of whom was married to George Deuchar.

In 1794, John Peter executed an assignation, by which he conveyed the lease, at his death, to his son, in life-rent, and, after his decease, to George Deuchar, his heirs and successors.

At the date of this deed, James, the son, was married, and had an only child, Mary Peter.

John Peter died in 1794, and was succeeded in the lease by James, who died in 1796.

On his death, George Deuchar brought a removing before the Sheriff, founded on his father-in-law's assignation, against James's daughter, Mary Peter, who, in defence, contended, that the deed was void, the lease excluding assignees.

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The Sheriff sustained the defence; but Deuchar having complained of the judgment by advocation, the Lord Ordinary "decerned in the removing." And a reclaiming petition for Mary Peter was refused, without answers, the Court being of opinion, that it was *jus tertii* for her to plead the alleged nullity of the father's deed, if the landlord had acquiesced in it.

At this stage of the cause, Mary Peter repeated a reduction of the deed; and Lord Minto having desired to be heard against it, the Court "admitted him as a defender" against the action of removing, and ordered memorials.

The defenders

Pleaded: Assignees are excluded in leases, from the nature of the right, unless where it is granted for life, or for an uncommonly long term of years; Craig, Lib. 2. D. 10. § 3.; Spottiswood, *voce* Tack, p. 325.; Stair, B. 2. T. 9. § 26.; Bank. B. 2. T. 9. § 11. & 46.; Ersk. B. 2. T. 6. § 31. & 32.; Elliot against Duke of Buccleugh, No. 14. p. 10329. *voce* PERSONAL AND TRANSMISSIBLE; Sanderson against Marquis of Tweeddale, No. 87. p. 10407. IBIDEM; Alison against Proodfoot, No. 170. p. 15290.; Grant against Lord Braco, No. 163. p. 15279.; Bowack against Croll, No. 164. p. 15280.; Durham against Henderson, No. 167. p. 15283. *A fortiori*, therefore, must an assignation be incompetent, where assignees are specially excluded.

Answered: Tenants anciently formed part of the retinue of their master; and, on this account, he was not obliged to acknowledge any person in that character who was not of his own choice; Craig, Lib. 2. D. 10. § 6. But since the contract of location has become, in a great measure, a pecuniary bargain, much less regard has been paid to the *delectus personæ* of the landlord; Hepburn against Burn; No. 88. p. 10409. *voce* PERSONAL AND TRANSMISSIBLE; Laird against Grindlay, No. 172. p. 15294.; Simson against Gray and Webster, No. 173. p. 15294. Whenever, indeed, a landlord grants a lease to heirs, he abandons the privilege of selecting his tenant; as he cannot foresee who may be the heir of the original lessee at the end of the lease. There comes, then, to be only a *delectus familiæ* on his part; and, consequently, in fair construction, a clause secluding assignees ought not to prevent the lessee from giving the lease to any member of his family whom he may judge most fit to manage it. But this is precisely what John Peter has done; for, although the assignation be granted to the pursuer, the benefit of it results to the granter's daughter and her family; and it has, in fact, the same legal consequences as if it had been granted to herself.

Three of the Judges thought, that the pursuer should prevail in the removing. The word "heirs," it was observed, is a flexible term, denoting representatives in general; and consequently heirs of provision as well as heirs-at-law. It is highly expedient for both parties, that the lessee should have the right of naming his own heirs.—The eldest son may be an ideot or a spendthrift, or the lease may get into the hands of heirs-portioners, if this power of disposal were taken from him. The doctrine of the defenders would allow the landlord to interfere in the

lessee's domestic arrangements, which there is surely the best chance of his regulating in the way most for the advantage of the estate.

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The rest of the Court were, however, of an opposite opinion. It was observed, that the term " heirs " is flexible only when it occurs in the destination of accessory rights: That tenants have it always in their power to remedy the evil complained of, by taking the lease to a certain destination of heirs, or with power to convey it to any member of their family. But as no such power occurred in this case, and as the pursuer could not take the lease except by a deed of the tenant, he was of course an assignee, and in express terms excluded.

The Lords " altered the interlocutor of the Lord Ordinary, and assoilzied the defenders."

Lord Ordinary, *Meadowbank*. Act. *Cha. Hay*.
Alt. *Solicitor-General Blair, Geo. Fergusson*. Clerk, *Sinclair*.

R. D. *Fac. Coll. No.* 90. *p.* 208.

1801. *December* 8. HAY and WOOD, Petitioners.

No. 175.
A clause excluding assignees pleadable only by the landlord.

The late John Marquis of Tweeddale (12th December, 1755,) let the lands of Sheriffside to David Hay, and his heirs, secluding assignees. In this farm, he was succeeded by his eldest son, John; who (26th December, 1799,) assigned the lease to James Hay, his natural son, failing heirs lawfully procreated of his own body. He died a few days afterwards, without other children. Nicholas Hay, the daughter of the original tacksman, and Andrew Wood, his great-grandchild, expede a service as heirs general to him, and raised a summons of reduction against James Hay, the assignee of the lease, in as much as assignees are expressly secluded, and as they, as heirs-at-law, are entitled to enter into possession.

The cause came before Lord Armadale, who (24th June, 1801,) found, " That the clause secluding assignees contained in the tack entered into between the now deceased John Marquis of Tweeddale and the also deceased David Hay, was a clause entirely in favour of the said deceased Marquis, the proprietor of the subjects contained in the tack; and as the heir and representative of the Marquis does not concur with the pursuers in the present action, finds, That the pursuers are not entitled to found on the clause."

The Court were quite agreed, that it was *jus tertii* in the heirs of the tenant to challenge the assignation; that this right was altogether personal to the landlord; and refused the petition reclaiming against the Lord Ordinary's judgment, without answers.

Lord Ordinary, *Armadale*. For the Petitioners, *Baird*. Agent, *Ja. Marshall, W. S.*
Clerk, *Home*.

Fac. Coll. No. 91. *p.* 22.