

William Brown, with consent of Coustoun his assignee to Cruickstoun, for a duty payable to the assignee. Gib the heritor having granted right to John Paton for some years of the tack-duty, who finding both Brown the tacksman, and Cruickstoun the sub-tacksman insolvent, pursues Coustoun assignee to the tack, for payment of the tack-duty, as he who was tenant in place of the principal tacksman, and who possessed by the sub-tacksman, having consented to his sub-tack, bearing, "the duty payable to the assignee," whereupon there is a decret of the Sheriff of the Shire, finding him liable upon that ground; which being now under reduction, it was alleged for Coustoun, assignee to the tack, that the accepting an assignation to a tack, could not oblige the assignee for the tack-duty, unless it contained an obligation to pay the same, or relieve the tacksman; albeit if the assignee had possessed or intromitted, he be liable for the rent *de jure communi*, as meddling with the fruits, yet not as assignee, for he might forbear to possess by the assignation, or might quit the possession when he pleased, as any other tenant without a tack; and albeit he consented to a sub-tack, bearing the duty payable to himself, yet he had gotten no payment, nor had any intromission.

The Lords sustained the decret, and found that the assignee did possess by the sub-tacksman, who was in natural possession, and was obliged to pay the duty to the assignee.

Fol. Dic. v. 2. p. 424. Stair, v. 2. p. 283.

1680. November 16.

DRUMMOND and The ARCHBISHOP of ST. ANDREW'S *against* DALRYMPLE.

In anno 1609, the Archbishop of St Andrew's set a tack of the teinds of Kirkliston to John Dundas of New-Liston, and to his heirs-male, entering and succeeding, during his life, and to the next heirs-male entering and succeeding, and to his heirs and assignees, for the space of three nineteen years after the decease of the second heir-male. This tack being adjudged, and the adjudication adjudged, and assigned to Sir John Dalrymple in his contract of marriage with Dame Elizabeth Dundas, heir of line to the said John Dundas, who having sub-set the teinds of Carlowrie to George Young, he having pursued thereupon, and Carlowrie, with concurrence of the Archbishop, raised a reduction of this tack, having obtained a new tack of his teinds, upon this reason, that New-Liston's tack was only granted to his two first heirs-male, entering, but not to their assignees;—*ita est*, The first heir-male entered, but not the second; so that he not entering, had no right, and consequently an adjudication against him could give no right. It was answered, *1mo*, That the entering to a tack requires no service or retour, but the propinquity of blood alone establishes the right. *2do*, The second heir-male being charged to enter heir, the act of Parliament anent charges to enter heir, doth declare, That sicklike process shall sustain against the heir charged, as if he were actually entered; so that the adjudication against him being charged to enter heir, is alike as if

No. 160.

A tack of teinds granted to an heritor and his first two heirs entering, was carried by adjudication against the second heir, though it bore no assignees.

No. 160. he had actually entered, and owned the tack by possession ; which certainly he had done, if he had not been excluded by the adjudication, for sums exceeding the value of the tack. *3to*, There is no interest of the Archbishop designed by that clause, for, after the two heirs-male, there are three nineteen years to their heirs and assignees whatsoever ; so that the adjection of assignees in the last part of the clause, according to the ordinary style, relates to the whole clause, and so to the assignees of the two first heirs-male. *4to*, Though it could be constructed that their assignees could be secluded, yea, though they were expressly excluded, yet apprisings or adjudications do unquestionably carry such rights where assignees are excluded, as reversions expressly secluding assignees are carried thereby, and even personal faculties. It was replied, That the word " entering," must have some import, and it can be no other than that the two heirs-male should own the tack, and enter in possession, which was found in the process of the Duke of Lauderdale against the Earl of Tweddale, No. 31. p. 6472. for the teinds of Pinkie. It was duplied, That though that allegiance was mentioned in the debate, yet there is no interlocutor thereupon, but the decision annulling Tweddale's tack, is expressly upon other grounds.

The Lords found the adjudication carried the right of this tack, and that this point was not decided *pro* or *con*. in the Duke of Lauderdale's process.

Stair, v. 2. p. 798.

* * * Fountainhall reports this case :

In this cause the practise between the Duke of Lauderdale against the Earl of Tweddale was cited, done in 1678, whereby a tack set to Rankeillor of the lands of Pinkie, and of his heirs succeeding to him, was found not to belong to Tweddale, because he was only a singular successor, and not an heir ; but Sir John Dalrymple denied it was decided on that point, but on a different head ; viz. That Tweddale could not found on Rankeillor's tack, because it was past from by taking a posterior tack from Queen Anne. The Lords found the adjudication transmitted the right of this tack ; but there were three of them demurred thereon :— If the apparent heir nearest *in sanguine* had got the right of this tack, *per exceptionem hereditatis*, by a disposition from his father, (as is usual to do in their son's contract of marriage) many thought that would have carried it too, seeing it is only done to shun the expense of a service.

Fountainhall MS.

1685. *December.* THOMAS FRASER *against* ANDREW DUNCAN.

No. 161.

In a process of removing against a tacksman and sub-tacksman, where the tacksman was only warned,

It was alleged for the sub-tacksman : That he ought also to have been warned, since his being in the natural possession was known to the master.

The Lords repelled the defence.

Harcarse, No. 954. p. 268.