Pleaded for the pursuers, That, in the present circumstantiate case, no argument can be founded on the statute, albeit no warning was used 40 days preceding Whitsunday 1739, in regard that the warning, upon which this removing is founded, is certainly 40 days before the term of Whitsunday 1740, and, of consequence, sufficiently supports the same with respect to the removing from the mansion-house, office-houses, and slent in the haugh, at that term; and, if that is so, the defender must of consequence remove from the park, garden, and dovecote immediately; because it is evident, from the whole clauses of the tack, that the house is what appears to be principally set, and the yard or park adjacent thereto, but as accessories to, or pertinents of the same. Here then is a set, not of a *prædium rusticum*, where the house was for the conveniency of labouring the ground, but of a *prædium urbanicum, habitandi causa*; and, therefore, since the warning from the house is unexceptionably good, the exception to it, with respect to the accessories, must go for nothing. No 80.

THE LORDS found, That this case fell under the act 1555, anent the warnings of tenants, and therefore sustained the objection to the warning.

C. Home, No 146. *p.* 251.

1742, *January* 28. Earl of DARNLAY *against* CAMPBELL.

No 81.

WHERE a tacksman of feu-duties had, after expiry of the tack, continued to possess by tacit relocation, it was found not necessary for the granter of the tack, intending to remove him, to use a formal warning, but that any intimation of the granter's will, to discontinue the tacit relocation, was sufficient.

Fol. Dic. v. 4. *p.* 223. *Kilkerran*, (REMOVING.) *No* 3. *p.* 481.

1743. *February* 22. HUGH Earl of MARCHMONT *against* JOHN FLEEMING.

No 82.

It is not necessary to warn a subtenant who possesses under a tackman, whose lease excludes assignees; nor to summon him to remove on six days.

ANNO 1725, the late Earl of Marchmont let a tack of several mills, &c. to James Rae, and his heirs, secluding assignees, for the space of seven years, and, in the 1733, he renewed the lease in the same terms. On the 22d of August 1741, Rae renounced this lease, upon which Lord Marchmont granted a new lease to John Hunter of this possession, to commence *quoad* the mills at the Lammas preceding, and *quoad* the lands at the Martinmas thereafter.

When Hunter came to take possession, John Fleeming opposed it, as having a subset from Rae of the mill &c. of which he had been in possession many years. Whereupon the Earl lodged a complaint against Fleeming before his baron-bailie who decerned him to remove from the mill against the 28th of the said month

No 82. of August, and from the land at Martinmas thereafter. He suspended, and *pleaded*, That James Rae, the principal tacksman, could not renounce to his prejudice, especially betwixt terms, so as to expose him to be violently thrown out, who possessed the lands originally, by virtue of a written subtack, and continued therein by tacit relocation.

That the act 1555, anent warning of tenants, ordains, That in all time coming the warning of tenants, and others, to flit and remove from all lands, &c. shall be in manner as therein set furth, which comprehends subtenants to tacksmen, that have no power to set, which the suspender does not admit is the case here, as the tack only excludes assignees. And whether he is a tacksman or putative heritor who assumes that power, does not alter the case; the poor tenant is not presumed to look into the setter's right, but only his being possessor of the subjects set. It is true, that after a setter's right ceases, the maxim will take place *resoluto jure dantis*, &c. the right from him must give way, and thereby the proper owner would have power to warn and remove a tenant, notwithstanding of a tack for years to run, from a person who had no right to set the same; but still there must be a regular warning used. Thus, in the case of a liferenter setting a tack for a number of years, and dying before the end of the term, the tack is at an end by her death, and yet the tenant cannot be summarily removed; and much less betwixt terms, as in this case. Further, the statute requires, that all summonses of removing be upon six days; but the suspender had not six hours, he being cited and decerned all in one day, which was great oppression; especially as he had possessed and paid rent to the tacksman for fifteen years, and so could not be deemed an intruder, or violent possessor.

Answered for the charger, That tacks are *strictissimi juris*, and can neither be assigned nor subset, unless an express power is given for that effect, which proceeds on this principle, or foundation in the Roman law, That a creditor cannot substitute another creditor in his place without consent of the debtor, and so *vice versa*. In like manner, if I oblige myself to dispone my land to Mævius, I am not bound to assign to his assignee. It is true, a procuratory *in rem suam*, or an assignation, may be effectual with regard to obligations relative to money or fungibles, but cannot answer the purpose in the case of personal prestations, tacks, reversions, or such like.

This doctrine must hold *a fortiori* in the present case, where assignees are expressly excluded; under which, no doubt, must be comprehended by a subtack, who have a full right conveyed to them, as an assignee to the tack itself has: Nor do these different forms of conveying make any difference *quoad* the landlord, because in either case the principal tacksman remains bound; and both are equally against the nature of the contract, by which there is a *delectus personarum*; the tacksman is chosen, and is bound himself to possess, therefore cannot devolve his possession upon another. 2*do*, The privilege of warning is only bestowed on lawful possessors; it would be absurd to give it to a *mala fide*

possessor. No doubt a tack, set by a person in possession *qua* proprietor, will defend until warning, because the granter had the *jus possidendi* upon a colourable title; but surely a tack granted by one who never was in possession, nor ever had a colourable title, is not so privileged; and one who takes an assignation, or subset from him, cannot have a *bona fides*, but must know that he is stipulating a thing the granter cannot give him. No 82.

And with respect to the complaint, that the suspender ought to have had a formal summons of removing, it was *answered*, That he was no more entitled to that than to warning; nay, it was not a clear point but he might have been removed *via facti*, as any other servant of the former tacksman might have been.

THE LORDS found the letters orderly proceeded.

Fol. Dic. v. 4. p. 223. C. Home, No 232. p. 378.

1753. *December* 18.

Mrs. PENUEL GRANT and other Tutors to WILLIAM GRANT of Ballendalloch, *against* JAMES GRANT in Chapeltoun.

No 83.
The infant heir of a late tacksman must be warned to remove; and it is not sufficient to warn a person who is in possession for his behoof.

IN April 1741, the deceased Alexander Grant of Ballendalloch set in tack to the deceased William Grant and his heirs, the lands of Chapeltoun, for the space of nineteen years, from Whitsunday 1741. William Grant accordingly possessed the lands, and paid the rent stipulated by the tack till 1747, when he died. After this, his relict continued to possess and manage the farm; William Grant's son being an infant.

In 1749, the relict purposing to marry James Grant, there was a written agreement entered into betwixt her and the infant's two uncles on the father's side; whereby it was stipulated, that the relict should become bound to pay at the next term of Martinmas 200 merks for behoof of the infant-heir, 100 merks to each of two infant daughters, and to aliment and educate all the three for the space of ten years; and the uncles became bound that she should possess the tack during the years yet to run thereof. Soon after this agreement she married James Grant, who gave his obligation to the infants for the said sums. They were also kept in family with him and his wife, and he possessed the lands and paid the rent to Alexander Grant during his life, and for some years to the tutors of his infant-son William Grant.

In 1751, William Grant's tutors warned James Grant to remove from the lands, and obtained decreet of removing against him before the Sheriff-substitute of Bamff.

James Grant obtained a suspension of the decreet, and *pleaded*, That the infant-son and heir of William Grant, the late tacksman, was neither warned to remove, nor made a party to the process of removing, though the person chiefly