ous heirs of William; and therefore the pursuers their children ought likewise to be so. It is agreeable to law, that what is provided in favours of a man, is understood to be also in favours of his heirs, *L.* 30. *Cod. De fideicommissis*, 5th January 1670, Innes against Innes, No 60. p. 4272. No 13.

Pleaded for the defenders, The pursuers not being called in Robert's settlement, can only claim as representing Janet and Mary, who never having any right, could transmit none to them. The maxim, That what is provided to a man is provided to his heirs, does not apply; for though it may hold in a settlement of an estate on a man, that it goes from him to his heirs, though not mentioned; yet if he is only the substitute in an entail, and dies before the institute, his heirs can have no claim.

The testator appears to have preferred William and his children, and failing them, Janet and Mary; but here the deed stops; and it does not appear that he preferred their representatives to all others.

THE LORDS repelled the objection, That Mary and Janet Walkers were dead before William Walker, and found that their heirs had right to the subject, on making up proper titles.

Reporter, *Lord Justice-Clerk.* Act. *Gillon.* Alt. *H. Home.* Clerk, *Forbes.*

D. Falconer, v. 1. *p.* 22.

1747. *December* 4. WILLIAM ELLIOT *againtt* DUKE of BUCCLEUCH.

No 14.
A tack was let to a party and his heirs, and such assignees as the proprietor should approve of, excluding all other assignees. Found not adjudgeable.

THE Duke of Buccleuch, in the year 1739, set a tack of the land and miln therein mentioned to William Scot and his heirs, 'and such his assignees as 'the said Duke shall approve of, excluding all others his assignees,' for the space of 19 years, and for a rent of L. 101: 5s. Sterling. William Scot becoming bankrupt, his creditor William Elliot writer in Edinburgh brought a process of adjudication, comprehending the said tack among other heritable subjects. Compearance was made for the Duke, for whom it was objected that the tack could not be adjudged, in respect it was granted to Scot and his heirs personally, that it was not transmissible to his assignees without the Duke's consent, and that he did not consent that the tack should be conveyed to Mr Elliot.

In answer to this objection, the following arguments were urged in behalf of the pursuer. A tack is a mutual contract implying in its nature the choice of a person; and for that reason the tacksman can no more substitute another to labour the ground for him, than an undertaker can substitute another to build a house which he himself undertakes to build. And though tacks are made real by statute, and good against purchasers, yet still it continues law, that a tack granted to a man personally for a limited time, is not assignable by him; for it would be rendering the landlord's choice ineffectual, if he could put ano-

No 14. ther in his place. But as to tacks of long endurance, to a man and his heirs, where there can be no *delectus personarum*, such tacks were found early assignable. And no wonder; for such a tack, being considered as an estate in the tacksman's family, of which they cannot be disappointed, even by a purchaser of the land, it was natural to apply the common rules of law to this case, as well as to property, by admitting voluntary conveyances.

This introduced a distinction among tacks, as assignable or not assignable; and the question was, What tacks were of one species and what of the other? The following rule came to be established, arbitrary no doubt in its nature, but now fixed in practice. That liferent-tacks, and tacks for 19 years may be assigned, unless the contrary be specified in the tack. And the foundation of this rule will be discovered upon comparing two passages of Craig; talking of those who have power to grant tacks, he has the following passage: Lib. 2. Dieg. 10. § 5. 'Assedatio pro novemdecim annis, ut et assedatio ad vitam, 'species est etiam alienationis, adeo ut qui alienare in jure prohibentur, neque 'ad novemdecim annos, neque pro vita assedare queant.' This rule naturally produced the other, That supposing no prohibition to alien, a liferent-tack, and a tack for 19 years, may be alienated or assigned by the tacksman. And accordingly Craig, lib. 2. Dieg. 9. § 23. declares this to be an established rule, 'Et in his assedationibus observandum, quod eas transferre in alios, *i. e.* assig-'natos facere, non possunt assedatarii, nisi aut vitalis sit assedatio, aut id spe-'cialiter sit permissum in sua assedatione.' Here indeed mention is only made of liferent-tacks, but certainly without any view to exclude the other kind; since both are put upon the same footing in every other part of his book.

With regard to legal assignees the rule is still more general, That tacks of whatever nature are carried by escheat, adjudication, &c. And this rule is probably as old as the statute, which converted tacks into real rights. For as, by that statute, a tack in the person of the tacksman became a real right and an estate in him, it could not fail to be carried to singular successors by every kind of legal or judicial transmission which carry other subjects; especially in a 19 years tack, and in a tack for life.

The only difficulty in this case is, that assignees are excluded by an express clause in the tack. But it is *answered*, That a prohitive clause can have no stronger effect here than in the settlement of a land-estate by a deed of entail. If a man be possessed of property, his creditors must have access to affect the same for payment of their debts; and a prohibitive clause cannot bar creditors, because it does not limit nor qualify the debtor's property, which must be carried by adjudication *tantum et tale* as it subsisted in him. To bar legal assignees an irritant clause is requisite, which, by forfeiting the possessor, has the effect to withdraw the subject from his creditors; for an adjudication can only carry what belongs to the debtor. The same must hold with regard to the property that is established in the tacksman by the tack. This real right must be carried by adjudication *tantum et tale* as it is in him; and a clause prohibit-

ing assignees, as it has not the effect to limit or qualify the real right, so it cannot bar an adjudication. Such a clause may have the effect to bar voluntary assignees, who, seeing such a clause in the tack, are put *in mala fide* to contract with the tacksman; but such a clause cannot put creditors *in mala fide*, who, after lending their money without being acquainted with the tenor of the tack, must do the best they can to recover payment by the force of law, when their debtor fails to do them justice. And this doctrine has been received in our earliest practice with regard to all tacks whatever, without distinction. Colvil, 3d Dec. 1578, Borthwick *contra* Archbishop of St Andrews, has the following case, No 39. p. 10363. A tack being set with this clause, That it should not be assigned to any man of higher degree than the tacksman himself, and the said tack thereafter falling with other things under the tacksman's escheat; it was found, that the Lord of Regality, in whose hands the escheat fell, might assign the tack to a person of whatever degree, notwithstanding the said clause; because 'hoc casu dominus utebatur jure fiscali; et licitum est fisco de rebus 'suis disponere, quando et cui libuerit, sine ulla personarum distinctione.' And Hope, 25th January 1615, Elphinston *contra* Lady Airth, observes the like decision, *voce* TACK. And if this hold with regard to escheat, the case of creditors is much more favourable. To fortify this reasoning, it was observed, that there is a great difference put in our practice betwixt voluntary and legal assignees; a vassal cannot dispone his feu without consent of his superior, yet the right may be carried by adjudication for payment of debt, and even by an adjudication in implement; and, to bring the argument nearer home, a tack of a shorter endurance than 19 years cannot be assigned by a voluntary deed, and yet may be adjudged; and if a legal prohibition cannot have effect to bar adjudgers, a prohibition by paction cannot have a stronger effect. No 14.

On the other hand, it was *pleaded* in behalf the Duke, That the foregoing arguments proceed all upon an erroneous foundation, by not distinguishing betwixt property and real rights affecting property. With regard to land or other subject of property, it is true that a paction, which limits not the right of the proprietor, but has only the effect of a personal prohibition, cannot bar legal assignees, whether by escheat or by adjudication. But burdens affecting property are in a very different condition; it is obviously consequent upon absolute property, that the will of the proprietor should regulate the terms of the grant made by him to affect his property. If a proprietor execute an heritable bond, entitling the creditor to uplift a certain sum out of his estate yearly for his life, or perhaps for the life of two or three of his heirs, but expressly excluding assignees, whether voluntary or legal; it is inconsistent with the principles of law that this heritable bond should be carried by adjudication. For to make it adjudgeable would be to deprive a man of his property without his consent; or which comes to the same, it would be entitling a third party without his consent to enter upon his property and to levy his rents. The case is the same with regard to a tack; no man is entitled to take or hold possession of my pro-

No 14. perty without my consent; and, if I have given that privilege to one for however long a time, the privileged person has not power to put another in his place, especially where he is debarred by express paction. Hence it is obvious, that to give way to the adjudication of a tack excluding assignees, is so far from being agreeable to the principles of property, that it is directly repugnant to them; it is in effect maintaining, that a limited right upon property may be extended further than the terms in which it is granted. A prohibitive clause adjected to such a right must have its full effect; because it limits and qualifies the real right itself. A prohibitive clause adjected to the conveyance of property cannot, from the nature of the thing, have such an effect; if property be conveyed whole and entire, such a clause can only have the effect of a personal prohibition.

Nor is there any thing to be found in our practice contradicting these principles. It has indeed been found, that a liferent-tack is assignable, though assignees be not expressed; upon this presumption, that in a liferent-tack there is no *delectus personæ*, no choice of a good tenant, but a simple constitution of a right in favour of the liferenter. And for the same reason a liferent-tack falls under escheat. See act 15th Parl. 1617. But it was never found in any case, even with regard to reversions, that either legal or voluntary assignees can come in when they are expressly excluded. And in this matter the respondent agrees with the pursuer, that a legal prohibition of assignees is equivalent to a prohibition of paction. And therefore that a tack of any shorter endurance than for life can neither be escheated, adjudged, nor assigned.

" Found, that this tack, as it expressly excludes assignees, is not adjudgeable."

N. B. To prove that legal assignees are excluded from tacks which do not mention assignees, Craig's authority was cited, lib. 2. dieg. 10. § 6. where he says, that a tack granted to a widow is forfeited by a second marriage. His words are: ' Si viduæ locatio sive assedatio facta fuerit, et illa maritum super-' induxerit, poterit removeri, etiamsi fundus ei pro tota vita assedatus fuerit; ' nam cum ei, ut viduæ, facta sit assedatio, quæ strictissimi juris apud nos est, ' adeo ut nec assignatum admittat, non potest vidua sine voluntate sui domini ' novum colonum, nempe maritum suum, ei obtrudere; quod et observandum ' est, sive clausula hæc (quamdiu vidua permanebit,) in assedatione fuerit ex-' pressa, sive non; ne dominus eum quem nunquam voluit, colonum habeat.' But the pursuer made an answer to this authority, which appeared to be solid, viz. That this doctrine has been copied by Craig from the old law, and very unguardedly adopted by him, and from him by Stair. At the time when it was a forfeiture for a female heir to marry without consent of her superior, the same forfeiture was extended to a tackswoman marrying without consent of her landlord. It was not skill in husbandry that was chiefly consulted in those days; tenants as well vassals were part of the Lord's following, when he had occasion to wage war with a neighbour; and no enemy, nor even stranger, was to be admitted

into the number. But when, in process of time, our laws and our manners became milder, such severities wore out of fashion, so as not even to subsist in wardholding, far less in tacks. In the next place, Craig himself lays it down, that a liferent-tack may be assigned. His thoughts then have been wandering, when he gives it as law, that a woman who has a liferent-tack forfeits the same upon marriage. For if a direct assignation of a liferent-tack be effectual, an indirect assignation by marriage cannot be null, far less a forfeiture. And, in the third place, How, at any rate, can marriage operate an asssignation of a subject which is not assignable? And therefore, supposing a liferent-tack not assignable, all the effect that marriage can have, is, to bestow the power of administration upon the husband, leaving the tack to subsist in the wife as formerly.

No 14.

Rem. Dec. No 84. *p.* 135.

*** Kilkerran reports this case:

WILLIAM ELLIOT writer in Edinburgh, being creditor to William Scot of Meikledale in L. 500 Sterling by bond, pursued an adjudication of a tack which Scot had from the Duke of Buccleuch for 19 years from Whitsunday 1739, for payment of L. 101 : 5s. Sterling of yearly rent. In this process compearance was made for the Duke, whose Chamberlain had, on Scot's becoming bankrupt, and his whole stock being swept off the ground by his creditors, let the farm to other tenants, and for whom it was alleged that the tack being set to Scot in these terms, 'To him, his heirs, and such his assignees as the Duke 'would approve of, excluding all others his assignees,' the same could not be adjudged by the pursuer without his consent.

That tacks not bearing to assignees are not assignable, except they be liferent tacks, or for a term of years of more value than a liferent, is an established point; but that nevertheless tacks, though not bearing to assignees, may be adjudged, is what we find said in our law-books, Stair, B. 2. T. 9. § 26. Sir George M'Kenzie, B. II. tit. 6. though at the same time it must be owned, that there is no decision to be met with which determines that point one way or other; as it must also be, that the case of tacks and reversions differs in this, that a reversion is a right competent to the reverser, which he may use at his pleasure, and having redeemed he may dispone the lands, which therefore, in justice to his creditors, he ought to do; and if he refuse, the law justly interposes and allows it to be adjudged; whereas a tack is not the estate of the tenant which he may use at pleasure, but only a right to possess himself, and he cannot alter the nature of it by transferring it to another without the master's consent; though at the same time it would be somewhat uncouth and unreasonable if the law of Scotland so stood, that such an interest vested in the tenant (as some tacks are of great value) and descendible to his heirs, could by no form of process be reached by his lawful creditors: And the case of tenants

No 14. seems not much to differ from the case of vassals, who, though upon the principles of the feudal law, they could not introduce a stranger upon the superior; yet, as commerce encreased, a remedy was found for changing the vassal by adjudcation in implement against the vassal disponer; and as tacks, not being assignable, flowed from the like principle, there is at least equal reason for the like remedy.

There was however no occasion to determine the general point, as in this case not only did the tack in question not bear to assignees, but assignees were expressly excluded; and although it was for the pursuer argued, that the exclusion of assignees when expressed could have no stronger effect than it has when implied of the law, that is, to exclude voluntary assignees, which gave a fair occasion to determine the general point, yet the LORDS avoided it, and taking the case upon that specialty, found, " That this tack, as it expressly secludes assignees, is not adjudgeable."

N. B. In the argument in this case, it was *pleaded* for the Duke *ex absurdo*, that were tacks adjudgeable, it might be done by twenty different creditors, who being within year and day of one another, the master would not know whom he had for his tenant, and would at best be obliged to admit strangers whom he would not have trusted with his ground. To which it was further added from the Bench at advising, as a difficulty which pressed much in point of expediency, What was a master to do in case a tack was found adjudgeable, and adjudged, and all the tenant's effects poinded, and that the adjudger or adjudgers did not appear? Was the master to let his ground lie waste? To this it was *answered*, That the argument proved too much, for that the same difficulties occurred in the case of tacks bearing to assignees, which none could doubt but that they were adjudgeable; and in direct answer to the difficulty stated, that in the case supposed, the heritor was safe to let his land, as is above set forth to have been in this case done by the Duke, and the adjudgers have themselves to blame, if, by not appearing to claim the possession, they be disappointed.

Kilkerran, (PERSONAL AND TRANSMISSIBLE.) *No* 3. *p.* 396.

*** D. Falconer reports this case:

WILLIAM ELLIOT, writer in Edinburgh, being about to adjudge from William Scot of Meikledale a tack set to him by the Duke of Buccleuch, compearance was made for the Duke and Earl of Dalkeith, as having right to the subject set; and it was *pleaded*, That tacks could not be assigned, nor especially this, which was to the tenant, ' his heirs, and such of his assignees as the Duke should approve of, excluding all other his assignees.'

THE LORD ORDINARY, 2d July, ' found the tack might be adjudged.'

Pleaded in a reclaiming bill, That by law, tacks which do not mention assignees, are personal, and exclude even legal assignees; so that a woman pos-

sessed of a tack, by marrying loses her right thereto; because otherwise, during the standing of the marriage, the possession would necessarily belong to her husband; Craig, L. 2. D. 10. § 6.; Spottiswood, Tit. TACKS; Stair, B. 2. T. 9. § 26.; — January 1734, Home of Manderston against Taylor, see APPENDIX. Besides, this tack expressly excludes all assignees not consented to by the heritor. No 14.

Answered; When tacks are granted to a person and his heirs for a long endurance of time, there can be no choice of the person of the tenant; they are therefore reckoned an estate vested in him, in so much that persons who have not the power of alienation cannot set such long tacks, the terms of this inability being settled at nineteen years, or a liferent tack, Craig, Dict. loc. § 5.; and § 6. it is said, that tacksmen cannot assign, unless they have an express power, or a liferent tack, where a tack for nineteen years is not excluded, which in the former paragraph, and throughout the book, is equalled to a liferent. This is the limitation of voluntary assignations, but legal ones affect tacks of any endurance. It was found, 3d December 1578, Lord Borthwick against the Archbishop of St Andrew's, observed by Colvil, No 39. p. 10363. that a tack containing a clause, that it should not be assigned to any of higher quality than the tenant, falling under escheat, might by the Lord of Regality be assigned to any person whatsoever; and the like, Hope, Tit. TACKS, 25th January 1615, Elphinston against Lady Airth, *voce* TACK. And if this obtains in the case of an escheat, the case of creditors' diligence is more favourable.

The position laid down by Craig, that a woman forfeits her tack by marriage, has been taken from the old law, when a vassal could not marry without the Lord's consent; but when he wrote, marriage could be no forfeiture, as an express assignation was not, as himself observes, § 3. and liferent tacks were assignable; and therefore it has been inadvertently laid down.

Stair, on the title TACKS, gives his opinion, that tacks do not exclude legal assignations, citing, 16th Nov. 1680, Drummond against Dalrymple, (*voce* TACK); and the exclusion in the tack of assignees must only be understood of voluntary ones; or if intended to extend to the legal, there is no law to make this provision effectual against the diligence of creditors, any more than a prohibition of alienation in the settlement of an estate, when not secured by an irritancy; and reversions, though competent only to a person, without passing either to heirs or assignees, are yet adjudgeable.

THE LORDS, 4th November 1747, 'found that the tack, as it expressly secluded assignees, was not adjudgeable.'

Pleaded in a bill for the pursuer; The present tack is granted to assignees, indeed with a limitation, but it was surely with an intent to give the tenant a greater power over it than if they had not been mentioned, which would be rendered of no effect, if the heritor could arbitrarily reject all assignees; but whatever be the force of the clause, it cannot be of greater than the sanction of the law, excluding assignations of short tacks, and yet these are adjudge-

No 14. able. The reason of putting it out of the power of tenants to dispose of their estates, was the same why vassals were hindered from disposing of their's, but in both cases this prohibition has worn out; and though voluntary conveyances are not effectual, they may be carried off by adjudication. And if any inconvenience should happen by the *pari passu* adjudication of several creditors, it may be obviated by a sale, or one trustee possessing for the whole. If the heritor had intended to exclude the effect of diligence, he ought to have made its being led an irritancy in the tenant's right, both with regard to adjudications and the falling of his escheat, under which it is certain tacks fall, 15th act, Parl. 1617.

Answered; The interpretation put upon the clause, restricting the power of assigning to such as the Duke should approve of, would make this case the same as if the tack had been granted to assignees simply, which surely was not the intention; for there an heritor would be allowed to make reasonable objections, and there are several instances where an express stipulation of what obtains at common law, has greater effect than leaving the matter upon the foundation of the law: As, for example, legal irritancies, when made conventional, are not purgeable. The alteration of the state of the country has made it reasonable to allow to proprietors the right of disposal; but reasons still remain why it should not be in the power of a tenant to force another upon his master, especially when he has stipulated the contrary. Nor is it necessary, in order to this, that it should be made an irritancy in the tenant's tack; for there is no absurdity, that a grant should be made to a person, not transmissible to others, which yet he may hold; though, generally speaking, diligence will break the tack, by making the tenants incapable to possess it. And again, it is not clear that the law itself does not make this an irritancy, as well as marriage, which is a legal assignation; that this irritates the right, being affirmed not only by Craig, but by the other lawyers mentioned. It is denied that tacks indiscriminately fall under escheat; nor does it follow from the 15th act, Parliament 1617, which only distinguishes what kind of escheat carries different sorts of tacks which fall under either of them. But unassignable tacks, it is apprehended, do not fall; and no lawyer has said, that a tack for nineteen years can be assigned. The opinion cited from Stair, that all tacks are adjudgeable, is by him founded on a decision which does not come up to the case; for that related to a tack of teinds set for three nineteen years to heirs and assignees. Lastly, reversions granted, excluding assignees, would not be carried by adjudication; Hope's Minor Practicks, No 171.

THE LORDS adhered.

Act. *W. Grant & H. Home.* Alt. *R. Craigie & Ferguson.* Clerk, *Forbes.*

D. Falconer, v. 1. No 217. p. 299.