No. 163. But the Lords came to no resolution; for the petition being appointed to be seen, the matter was taken up by the parties.

Kilkerran, No. 2. p. 532.

1748. *June* 22. BOWACK *against* CROLL.

No. 164.
An assignee to a tack preferred to one who had obtained a sub-tack previous to the intimation of the assignation, he being proved to have been in the knowledge of the assignation.

Import of a tack let to a man and his sub-tenants.

The deceased Garden of Troop, in 1732, set a tack for nineteen years to Thomas Jamie during his life, and after his death, to John Beaty his son-in-law, their heirs, sub-tenants, and helps, of no higher degree than themselves. Thomas Jamie died in 1743, and John Beaty, on whom the right devolved, allowed John Croll, who had been servant to Jamie, and had married one of his daughters, to continue in the possession, but without any sub-tack or assignation; and upon the 14th December that year, Beaty granted an assignation of the tack to James Bowack, which, upon the 29th February thereafter, he intimated to John Croll, who was in the natural possession in the manner that has been said.

Notwithstanding this assignation, Beaty, on the 23d February, 1744, granted a sub-tack to John Croll of the whole subject, and therein declared his possession to have been and begun from the Whitsunday 1743 preceding; and in the action of removing pursued by Bowack the assignee, against Croll, before the Sheriff of Forfar, Croll having founded upon his sub-tack as the preferable right, the Sheriff, by his interlocutor of the 29th May, 1744, found, "That Croll, being in possession, was *in bona fide* to take the sub-tack from Beaty before the intimation of the assignation, Beaty the cedent not being then denuded; and assoilzied from the removing."

Bowack having advocated his own cause, the Ordinary, at discussing the advocation, "repelled the reasons of advocation, and remitted the cause." Against which, Bowack reclaimed on the following grounds:

1*mo*, That Croll was *in mala fide* to take the sub-tack, having been at the time in the actual knowlegde of the prior assignation to him, which he offered to prove. 2*do*, Supposing the sub-tack to have been taken *bona fide*, and attaining the first possession to be preferable to the prior assignation, yet the Sheriff had erroneously taken in the circumstance of Croll's being in possession, as if thereby his sub-tack had been clothed with possession; for that although he was in the natural possession, yet it was not such as could clothe the sub-tack with possession, having begun upon a different title, which, during the currency of the term, he could not change to the prejudice of a third party who had acquired an anterior right, and that nothing could clothe the sub-tack with possession but an overt act of possession upon the sub-tack itself; and as that could not be alleged, it necessarily followed, that both were *in pari casu* in that respect, neither of them having obtained possession in virtue of the titles under which they claim. And farther, 3*dly*, In order to obviate an objection that had been made for Croll the sub-tacksman,

and which appeared to have had weight with the Ordinary, viz. That the assignation was void, the tenant having no power to assign; it was answered, that such nullity was only competent to the master, and a writing was produced under the master's hand, waving the objection, and consenting to the assignation. No. 164.

And a proof coming to be advised, whereby it was made appear that Croll had been in the knowledge of Bowack's prior assignation when he took the sub-tack, and no evidence being brought of Croll's allegeance, that the assignation was to be given up in case he should find caution for the rent; the Lords, without determining any particular point, by a general interlocutor, "Preferred the assignee, and decerned in the removing."

N. B. As the fact stood in this case, it is thought that the judgment fell to have been the same, though there had been no proof of Croll's knowledge of the prior assignation.

Where a tack is not granted to the tacksman and his assignees, but, as in this case, to him, his heirs, and sub-tenants, an assignation by him is void; and it is lawful for any other, thereafter to take a sub-tack of a part of the subject, even while in the knowledge of the prior assignation; because, being different rights, the one void, the other valid, the knowledge of the prior void right does not infer any *participatio fraudis* in granting double rights. Nay, should even the master concur with the assignee after the sub-tack is granted, the sub-tack will nevertheless remain effectual, in respect of the sub-tacksman's *jus quæsitum*. But where a man has a tack to him and his sub-tenants, and gives a sub-tack of the whole subject, which was the fact in the present case, such sub-tack is no less void than an assignation would be; the difference between a tack bearing to assignees, and a tack bearing to sub-tenants, lying singly in this, That a tack to assignees may be wholly assigned, and a tack to sub-tenants imports only a power to sub-set a part; and where the tenant sub-sets the whole, such sub-set is void, so that the assignation to the one, and sub-set to the other, were equally void in this case; and as neither of them had a better right than the other, the nullity was only competent to the master, as to whom it makes no difference which of the two obtained the first possession, or whether the obtainer of the last right was at the time in the knowledge of the former or not: Though such knowledge of the prior right might have influence as between themselves when the master did not interpose; yet where the master does interpose, as he did in this case, to which ever of the rights he gave his consent, it must prevail, and upon that ground, the assignee, to whose right the master consented, must at any rate have been preferred. But as the fact, as it came out upon the proof, concurred also to support the assignee's right, in the question as betwixt themselves, it being only competent to the master, and to neither of them, to object the nullity of the other's right, the interlocutor, as has been said, was pronounced in general terms.

Kilkerran, No. 7. p. 534.

*** D. Falconer's report of this case is No. 10. p. 1695. *voce* BONA ET MALA FIDES.