brought a process against Andrew for having it found and declared, that the land was redeemable in terms of the missive letter. No 86.

The defences made for Andrew were, That the letter not being holograph was not probative. 2*dly*, *Esto* it were, the reversion being only personal to William Neill, was not assignable.

Before answer to the *first*, The Ordinary having appointed Andrew to confess or deny whether the subscription at the missive was not his subscription, he acknowledged the subscription; but added, that the communing which the missive was intended to express was truly no more than this, that William Neill himself should have power to redeem within the seven years if his circumstances would allow it; and thereupon *pleaded*, 1*mo*, That the acknowledgement of the subscription did not render the unholograph letter obligatory, and that therefore he was no farther bound than so far as he had acknowledged the communing and agreement, viz. That the reversion was limited to William Neill himself, and not to go to assignees. 2*dly*, Supposing the missive to become obligatory by the acknowledgement of the subscription, as the reversion was not expressly granted to assignees, it was not of its nature assignable.

The Ordinary having reported the case, the LORDS were clear, that by the acknowledgement of the subscription, the letter became obligatory, agreeable to what had been found 20th December 1746, Foggo *contra* Milliken, *voce* WRIT: But then as it had been admitted that the price had been 22 years purchase, and that therefore the bargain could not have been a wadset but a sale, they were of opinion the reversion was personal to the seller: That Lord Stair was in the right when he says that a disposition granted to a man without mentioning his heirs, is nevertheless presumed to be to him and his heirs; but that a reversion granted to a man without adding his heirs is presumed to be to himself only.

Accordingly, the LORDS found, "That the reversion could not be assigned, and assoilzied the defender."

A separate defence might also have been pleaded, that the seven years were now elapsed without using the order of redemption; but there was no occasion for it.

Kilkerran, (PERSONAL and TRANSMISSBLE.) *No* 4. *p.* 398.

1756. *November* 24.

WILLIAM SANDERSON *against* The MARQUIS of TWEEDDALE and JOHN CARFRAE.

No 87.
A lease granted to a man, 'his heirs, 'executors, 'and assig.

THE Marquis of Tweeddale granted a lease of the farm of Gamilstone to Walter Hay, "his heirs, executors, and assignees whatever, of no higher degree than himself, and with whom the Marquis shall be content and accept of allenarly." This lease was to endure for forty-five years and a life.

No 87.
'nees whatsoever, with 'whom the 'proprietor 'shall be content, and 'accept of 'allenarly,' is not assignable even in security of a debt, without the proprietor's consent.

Hay assigned this lease to Sanderson, but reserved to himself a faculty of resuming his right, on payment of all the money which Sanderson had advanced for him, or expended upon the farm.

Sanderson brought on action for encroachments against Carfrae, a neighbouring tenant. The Marquis of Tweeddale appeared for his interest, and objected, that action was not competent at the instance of Sanderson, as not being an assignee accepted by him; and he laid his plea on the clause aforesaid in the lease to Hay, and on the decision 4th December 1747, Elliot against the Duke of Buccleugh, No 14. p. 10329.

Pleaded for Sanderson; This clause by which all assignees are, with one limitation, admitted, is neither equivalent to a clause expressly secluding, nor to a clause admitting all assignees; the limitation must imply, that the Marquis may refuse an assignee, providing always that he show some reasonable cause for such refusal. No such cause is here pretended. Had the Marquis meant to have reserved to himself an arbitrary power of refusal, he would have expressly secluded assignees; but this has not been done, although most usual in leases. Nor can a lease which is granted to executors import a total exclusion of assignees. The decision Elliot against the Duke of Buccleugh is not in point; in that case, the tack was conceived "to heirs and such of the tenant's assignees as the Duke should approve of, excluding all others his assignees." The Court found, "that the tack, as it expressly secluded assignees, was not adjudgeable." There assignees were particularly excluded; here they are not. Further, there is a difference between the adjudication of a lease and an assignation of a lease, granted, as in this case, in security of a debt. The former becomes, at the expiry of the legal, an absolute right, and substitutes a new tenant in the place of the original tenant. The latter leaves to the cedent the right to the lease, and the faculty of resuming the exercise of that right. Hereby the proprietor is not prejudiced, but benefited; for that the cedent continues, and the assignee becomes liable to him.

Pleaded for the Marquis of Tweeddale; The clause imports, that the lease shall go to such assignees only as the Marquis shall be pleased to accept, nor is he bound to show cause for not accepting; such obligation would be productive of frequent law-suits. No argument can be drawn from the insertion of the word executors. It is a word of style inadvertently employed; and, were the question with executors claiming right to the lease, it would be held *pro non adjecto*. The case of Elliot is in point; there the lease was to such assignees as the master shall consent to, excluding all others; here to such assignees as he shall accept of allenarly. In both cases it is provided, that the lease be assignable only with consent of the master. According to the judgment in the case of Elliot, this lease is not adjudgeable; and if not adjudgeable, it cannot be assigned; for that an adjudication is a legal assignation; and if a legal assignation be not effectual, a voluntary assignation cannot. Neither does it vary the case, that the assignation to the pursuer is not absolute, but in

security for a debt; for that if the tenant may thus assign the lease to one creditor, he may, by parity of reason, assign it to all his creditors successively, whereby he and they would alternately possess the farm; no master can be presumed to have granted a lease on terms so manifestly detrimental. No 87.

"THE LORDS found that the pursuer had no title to insist in this action."

Act. *Garden, D. Dalrymple.* Alt. *Hay, A. Pringle, Lockhart.* Clerk, *Kirkpatrick.*

D. *Fac. Col. No 218. p. 316.*

1759. *February* 14. GEORGE HEPBURN *against* JOSEPH BURN.

No 88.
A tack, tho' excluding assignees and subtenants, may yet be assigned by the tenant to his eldest son.

IN this case, a tack having been granted "to a tenant, his heirs, and executors, secluding assignees and subtenants of no higher degree that himself, and whom the heritor should be content with, and accept of allenarly;" and the tenant, who had fallen in arrear of rent, and become bankrupt, having executed an assignation of his tack, of which fifty years were to run, in favour of his eldest son, who new-stocked the farm, and entered into possession thereof; and thereafter the heritor having obtained from the father a renunciation of his tack, upon which a process of removing was brought against him before the Sheriff of the county, compearance was made for the son, the assignee. The Sheriff found, "That the assignation being cloathed with possession long prior to the date of the renunciation, was preferable thereto; and therefore dismissed the removing."

A bill of advocation was offered against this judgment, and reported to the Court.

Pleaded for the heritor; A tack, excluding all assignees without distinction, cannot be effectually assigned to the tacksman's eldest son. Tacks are understood to be *strictissimi juris*. The convention of parties here expressly excludes all assignations; and it may be of bad consequence to proprietors in general, if assignations such as the present should be sustained. At this rate, when a tenant becomes bankrupt, he may elude the master's just right and privilege of removing him from his possession if he cannot find caution, by a conveyance to his eldest son, though an infant; and then, as administrator-in-law for his son, he continues to have the full administration and enjoyment of the tack, as fully, in every respect, as if he had never been divested thereof.

2*do*, The assignation founded on, was a latent deed, without any intimation; and the pretence of possession upon it by the son, was a mere sham, while the father continued to dwell openly upon the farm; it was a fraudulent and collusive contrivance to disappoint the master, who, being ignorant thereof, gave the father an onerous consideration for the renunciation.

Answered to the *first*; The landlord, by granting the tack to heirs, has given them an indefeasible right to take and hold that tack. The heir, upon his