"No," says the petitioner, "take my estate, and be my factors, answerable to me."

GARDENSTON. Although a man wantonly and extravagantly dissipates his fortune, he may still have the *flebile remedium*, though with the disgrace of the habit. But I do not see how there can be a *cessio bonorum* when a man does not instruct that he is *lapsus bonis*. Every single creditor is not bound to have patience while there is a fund ready for payment. The rights of creditors are sacred in our law.

JUSTICE-CLERK. If Sharp had shown that he had done every thing in his power, if he had produced an advertisement offering to borrow L.200, or L.300, or if he had proposed to sell a small part of his estate, I should have listened to him.

PITFOUR. Supposed erroneously that Sharp was under an absolute prohibition as to selling his estate, and on that supposition was for altering the interlocutor.

MONBODDO. If the pursuer says that he is willing to hold himself a bankrupt, and absolutely gives up his estate, it is well. But, instead of this, he says "I will pay you with a trust-right."

On the 8th March 1775, The Lords found the pursuer not entitled to the *cessio bonorum*; adhering to their interlocutor of 4th February 1775.

Act. A. Rolland. *Alt.* H. Erskine.

1775. *March* 10. JOHN GILLON, Esq. *against* KATHERINE MUIRHEAD and HUSBAND.

TACK.

Tack granted for a term of years to a man and his wife, and longest liver, and the heir of the longest liver, secluding assignees, the wife surviving and continuing possession of the farm,—Whether does her subsequent marriage irritate the tack?

[*Faculty Collection, VII.* 79; *Dict.* 15,286.]

MR Alexander Lockhart of Covington, Lord Probationer, Reporter. This question is now of importance, though in former days it may have been of little moment. Tacks were *formerly* granted for a short endurance; *now* for many years. When the subject is small, and the tenants propose to erect buildings, tacks are granted to endure for many centuries. If a tack becomes void when the female heir marries, after succeeding to the tack, or when the tack devolves to a female heir already married, the industry of a hundred years may be swept away by the landlord in one day. I think that our elder lawyers have been misunderstood by our more recent lawyers, and hence that the principle has been received in books, but not in the practice of the nation, "that a tack falls on

the marriage of the female heir when assignees are excluded." The passage from Craig proves no such thing: it only means that when a tack is granted to a widow *qua* widow, it falls by her marriage; because, if she marries, the condition upon which she is supposed to have held the tack ceases. Nothing more is said by Balfour and Spottiswood. Lord Stair, indeed, delivers the maxim in its full latitude, and gives this reason for it,—that marriage is a virtual assignation. *This* is a mistake; for a tack, being an heritable subject, falls not under the *jus mariti*, and consequently is not virtually assigned to the husband, as that he gets a right of administration, not by the will of the wife, but by the disposition of the law. Other authors have copied Lord Stair without reflection. There is only one decision, in 1734, adopting this principle;—but one decision signifies nothing in opposition to principles. As to the sense of the nation, it is said that this may be hurtful to heritors who have a tenant thus forced upon them against their consent. I answer; 1*st*, That this is owing to their own fault, for they may provide against that event by a special clause, as was frequent in the fifteenth century, and which has been proved from the chartulary of Aberbrothock. [It was from that chartulary that I first suspected that our authors were in a mistake. I pointed it out to the parties; and Mr Ilay Campbell, in his pleadings, made excellent use of it.] 2*d*, He is in no worse a condition than he who chances to have an infant tenant with a tutor, or a fatuous tenant with a curator. I think that our lawyers have erred, and that we have power to correct their errors; as has been done in the case of personal rights being carried by the first personal diligence; in the power of a wife with respect to tacks of locality lands; in the preference of a wife with respect to her provisions; in the indefeasible nature of the *jus mariti*, *&c.*;—in all such cases the Court has corrected the errors of writers on law, though sanctified by decisions.

GARDENSTON. I have great respect for the opinions of ancient lawyers, such as Craig and Stair; but I do not hold them to be infallible. The later lawyers have just followed the *blunders* of the old ones, and have perpetuated those *blunders*. They have proceeded on this fundamental mistake,—that by marriage a woman conveys her right to her husband. This is not so: it is no more than giving the *administration* to the husband by a legal mode: the *right* still remains with the wife, for which the husband is accountable. The ideas of lawyers as to tacks have been altered by the benignity of more modern times and more modern notions. We still say that tacks are *strictissimi juris*. It is high time to lay aside that phrase, for in practice we have found them to be *bona fide*.

ALEMORE. I may chance to be singular in my opinion. If I fall, I shall lie with Craig, Balfour, Spottiswood, Stair, Bankton, and Erskine. I do not like to hear the opinions of all our lawyers treated as so many blunders. It is well laid down in the civil law, *omnium quæ de majoribus constituta sunt ratio reddi non potest*. If I saw reason to alter the law, I would not say that our ancestors *blundered*. Whether from feudal ideas or from ideas of conveniency, that ought still to prevail, a man may choose to exclude assignees from the benefit of a tack. The reasons given by some of our lawyers may be insufficient reasons. It is dangerous to give reasons for an opinion. I have seen cases where the Court adhered to an interlocutor, and yet condemned the reasons expressed

in it. There is a slip in Stair, where he makes marriage to be a legal assignation. *That,* however, is not the reason given by our more ancient lawyers: they say, that the tack falls on marriage lest strangers should be brought in. If *assignees* may be excluded, I would exclude the *husband* here. When I give a tack to a man's heirs, it is not from any predeliction for them, whom I know not, but from my liking to the man himself. An honest man, I hope, may be presumed to have an honest son. The case of tutors acting for a pupil does not impinge on my opinion, for tutors act not in their own names, and are not accountable.

PRESIDENT. I think that former lawyers went on feudal principles, that a tenant could not be brought in, either by adjudication or marriage. I agree with the Lord Reporter, that there is no example, of late years, wherein a landlord took the benefit of this right. A more liberal interpretation has taken place. It is an absurdity to say, that a woman succeeding after marriage to a tack should thereby forfeit it; and yet this is the necessary consequence of the pursuer's plea.

PITFOUR. *Amicus Plato, sed magis amica veritas.* Our lawyers have sometimes held opinions, which at length have been with justice exploded. Our lawyers long held, that the first personal diligence was sufficient to carry a personal right: this case was mentioned by the Lord Reporter: it was an error of most destructive consequences, and yet was held *bona fide* for ages.

COALSTON. The principles on which this cause falls to be determined, have been so fully stated by the Lord Reporter, that it would be improper to repeat them in many words. When Craig and Stair wrote, tacks were of short endurance, and of little moment; now, they are long, especially in East Lothian. If the fact were inquired into, it would be found that there is no such notion in the country as that of a tack falling on the marriage of the female heir when assignees are excluded. I have great respect for the opinion of our lawyers; but they proceeded upon feudal ideas, or upon a mistake, that a tack fell under the *jus mariti.* We are not bound to *follow* the errors even of the greatest of men. I presume that my brother (Lord Gardenston) meant to says *errors;* for he must have a great respect for the writers from whom he has learned so much.

MONBODDO. I do not think that I am wiser than the lawyers and judges that went before me. This question was fully heard, and unanimously determined in 1734. I admit that Lord Stair has fallen into a mistake as to the reason of his opinion. *Here* assignees are expressly excluded: the husband, therefore, is excluded. In the opinion of all lawyers, the husband cannot renounce the right of administration; and *that* is the material thing. My only difficulty was as to the fate of the tack, in case of the husband's death; but that also is provided for by the clause declaring the tack null if assigned.

AUCHINLECK. It is strange to say, that, because a woman takes a help-mate to herself, she should forfeit. I am satisfied by the arguments of the Lord Probationer.

JUSTICE-CLERK. We are here construing the import of a clause in a tack: it must receive a fair interpretation, as all onerous contracts must. It is impossible for me to say that the tack was granted merely through the interest of the husband; for the terms of it imply that it was obtained through the joint

interest of both husband and wife. It is now demanded that this woman should be forfeited because she has *assigned* by marrying. A hard construction in the eye of the law. She has done nothing but what the law of God and man allows, and even encourages. This is the harder, as it is possible the woman did not mean to offend her master. How can I suppose that the collateral heirs of the woman were provided for, and not the heirs of her own body? How can she be forfeited for marrying, without which she could have no heirs of her body? I thought that, even although the old law were to be continued in force, and although Lord Stair were now sitting on the Bench, the woman would have been maintained in possession. Whatever words may have dropped from any of us, we all venerate the great lawyers from whom we have learned all that we know. They proceeded upon old ideas, and have been copied by later writers. I am much moved by Lord Coalston's observations as to the custom of the country. I know, in the west of Scotland, examples similar to those which he has mentioned in the east. To the opinions of lawyers add the general consent of a country, and I shall give up all arguments of expediency.

On the 10th May 1775, "The Lords sustained the defence."

Act. J. Dickson, R. M'Queen. *Alt.* Ilay Campbell.

Diss. Alemore, Monboddo.

Report by Lord Justice-Clerk, Ordinary, then hearing in presence; and then Report by Mr Alexander Lockhart of Covington, Lord Probationer.

1775. *June* 15. KIRK-SESSION of DUMFRIES *against* KIRK-SESSION of KIRKCUDBRIGHT and KELTON.

POOR.

The Poor of the parish where the wager was laid, is entitled, by the Act of Parliament 1621, to the surplus of money won upon a horse-race above 100 merks.

[*Faculty Collection, VII.* 88; *Dict.*, 10,580.]

AUCHINLECK. Dumfries was the *locus contractus* and *locus delicti*, and ought to be preferred.

GARDENSTON. I think that Kirkcudbright ought to be preferred. The Legislature thought of what generally happens: the winning generally happens where the contract is made; but here the winning fell out in the parish of Kirkcudbright. Kelton can have no right, because the winning did not *fall out* until Major Maxwell arrived at Kirkcudbright. Indeed, if he had not gone there, the wager would have been a drawn bet.

COVINGTON. If we hold this to be a *casus improvisus*, Major Maxwell has a better plea than any of the kirk-sessions, for he might plead that his case falls