ploded the doctrine that *mobilia non habent sequelam.* So in the cases of *Lord Daer*, and the *Heirs of Lord Banff*, and afterwards in the cases of *Davidson* against *Elcherston, and Henderson.* Let the judgments on this point be altered elsewhere; I cannot help it. But God forbid that the Court should vary from what is fixed in our law. The case of *Brown of Braid* was a single judgment, on a single overly report to a thin bench, and there was no reclaiming petition. The lawyers of that time were satisfied of the decision being erroneous.

On the 19th January 1785, "The Lords sustained the defences, reserving claims for terce."

Act. Ilay Campbell. *Alt.* A. Wight.

Reporter, Hailes.

1785. *February* 1. ANDREW BLANE *against* DAVID MORRISON and OTHERS.

HYPOTHEC.

A landlord having granted to a tenant power to subset, found to have no hypothec over the effects of the subtenants; but there were particular circumstances in the case.

[*Faculty Collection, IX.* 321; *Dictionary,* 6232.]

BRAXFIELD. Here there are difficulties on each side. If a subtenant be in possession, the master's hypothec must be over his goods or nowhere. If payment by the subtenant to the principal tenant were to relieve the subtenant, the master would be obliged to sequestrate *currente termino.* On the other hand, when the principal tenant subsets his lands, from whence is he to pay his rent, if he may not be allowed to levy rent from his subtenant? Different cases are to be distinguished: When a landlord gives no power to introduce subtenants, he is not excluded from attaching the goods of the subtenants, being upon the ground: no rent can be paid to the principal tenant while the hypothec remains; the master may lay hold of the goods of any subtenant for payment of his rent. But when the lands are subset, with consent of the landlord, the case is different. Consent by the master is in three ways: 1*st*, By his signing the subtack; 2*d*, By receiving rent; 3*d*, Which, is the most common case, by allowing the tenant to subset. Does not consent imply that the subtenant is permitted to pay to the principal tenant, and to obtain discharges for it. Still a principal tacksman may be restrained in the mode of subsetting: for instance, should he subset for a forehand rent, or take a grassum, and after it a smaller rent than what he himself pays to the landlord. While the rent is *in medio*, and the subtack fair, the master has not only a hypothec, but a preferable claim to

the rent: *that* was the case of *Anderson and Provan* against *The Town of Edinburgh.* The landlord ought to make intimation to the subtenant, that he may be put on his guard not to pay to the principal tenant. Here the rent, payable by the principal tenant, was payable at Martinmas; by the subtenants at Whitsunday and Martinmas. The principal tenant exacted no more than payment at Martinmas, because his own rent was only payable at that term; but he insisted to have it *then*, and, accordingly, the subtenants paid regularly. It would be cruel to oblige them to pay over again.

SWINTON. Hypothec is, from the Roman law, founded on a *præsumpta voluntas;* and, 24 Dig. *Locat. Conduct.* gives a hypothec against subtenants. Nothing but payment can remove the hypothec. A subtenant does not pay *bona fide.* I deny that there can be a *bona fide* payment to a person not having a preferable right. Even a purchaser must repeat the goods, in order to make the hypothec effectual. I think that, when the master consents to subsetting, each subtenant is only answerable for his own rent, and not for the whole rent payable by the principal tenant to his landlord.

MONBODDO. There is no doubt that there is a hypothec established in favour of the master. *Fructus pendentes* are *pars soli.* If separated, they become the property of the *colonus pro cura et cultura;* but under this condition, that the rent of the landlord be secured to him. It is said that the circumstance of the tack being let to subtenants varies the case. A nineteen years' lease implies power to subset—see *lex* 6, *Cod. Locat. Conduct.*—unless the contrary be stipulated. This is different from the case in which the consent of the master is expressly obtained. The Roman law is our law, and it is express as to rural tenements. I cannot set the authority of Lord Bankton against the Roman law.

JUSTICE-CLERK agrees with Lord Braxfield. From the whole circumstances of the case, it is plain that the landlord did not mean that the principal tacksman was to possess in person. This does not rest on conjecture, for the principal tacksman has a special power to subset. Sub-tacks were granted in 1772, immediately after the date of the principal tack, and under the eye of the proprietor. The principal tacksman regularly demanded and received payment from the sub-tacksman for ten years. The subtenants, therefore, were *in bona fide* to pay to the principal tenant; and it would be singular should the law, or the decisions of this Court, oblige them to pay over again. The factor says to the principal tacksman, "You ought to be duly prepared, and to *exert yourself* at Martinmas." How could he be so, unless by levying the rents from the subtenants? I am satisfied, from the opinion of lawyers and from decisions in this Court, that the hard principle of the Roman law is not received with us.

KENNET. The favour of landlords is great, but the subtenants also have a right to be secured. No act and deed, to which the master has not consented, can hurt his security; but here there is an antecedent and a subsequent consent of the master.

GARDENSTON. We ought to confine ourselves to the case before us. I am not sure that there is any difference between an express and an implied power of subsetting. In this case the hard doctrine of the Roman law does not apply.

PRESIDENT. This cause can be determined without going into the general question. The principal tenant had a power to subset, and, in the nature of the thing, must have subset. The subtenants paid regularly for *ten* years: was there no *bona fides* to pay in the *eleventh?* I am also of Lord Braxfield's opinion on the general point. If I give a power of subsetting, I limit my right of hypothec. The case of *Clubb* is in point. The word *acknowledge*, in that decision, must mean that there was no antecedent power to subset. When there is a power to subset there needs no acknowledgment.

ESKGROVE. Were judgment to be given on the principles of Lord Braxfield, it would overturn the law of Scotland. The right of the master is founded on the civil law, and also on the feudal law. A power to grant sub-infeudations will not diminish the right of the superior. I see no difference between lord and vassal, and master and tenant. *Bona fide* payment by sub-feuars will not liberate. Is the right of an heritor less favourable? A power to subset does not liberate the subtenants from the consequences of the principal tenant's neglect to pay. I am a sub-vassal myself. I considered myself as liable in the full feu-duties payable by the vassal, and therefore I obtained a confirmation from the superior. So, in the case of *Clubb*, the master *acknowledged* the subtenant by receiving rent. *Then* the subtenant becomes as principal tenant. A master has a personal right to draw his rents, and, over and above, has a right of hypothec. The power of subsetting may diminish the personal right, but not the right of hypothec. No master, in his senses, would ever grant a tack without excluding subtenants. Could subtenants, by paying on the term-day, relieve themselves from the master's demands? If this case can be decided on specialties, I shall not object.

ROCKVILLE. If Lord Braxfield's opinion should be followed, every master will interpel the subtenants from paying rent to the principal tenant. This will create much confusion. [This observation might be retorted. If Lord Braxfield's opinion should not be followed, every subtenant will withhold payment from the principal tenant for three months after the term.] It is not generally understood that a master, by granting a power to subset, means to renounce the hypothec.

PRESIDENT. The Judges have not said that the master has no hypothec.

HENDERLAND. There is here not only a consent to subset, but a consent to a division as to each subtenant. There is a great difference between the right of a superior and the master's right of hypothec. A superior is proprietor, unless so far as he has given away his right; but, in the case of a master, it is only *ex præsumpta voluntate* that he is understood to have even a hypothec. It is easier to get free of a *præsumpta voluntas* than of the property of the superior.

MONBODDO. It has been said that a subtenant may make payment safely, if not interpelled. *This* is contrary to law. I see no approbation, by the factor, of the payments made by the subtenants. [At the second hearing.] This cause cannot be determined on its specialties, but on the general point, which is of great moment to landlords. Leases for nineteen years are almost universally granted to subtenants. If subtenants, by paying a few days after the

term, may deprive the landlord of his hypothec, the consequences will be fatal. The Roman law is clear. There is one decision with us, and possibly there may have been more, though not collected. I do not value the opinions of modern lawyers, who wrote after the Roman law had ceased to have full authority with us.

ESKGROVE. [On the second hearing.] Unless sub-tacks be expressly excluded, the landlord, by this judgment, will lose his hypothec. If the landlord intimate to the subtenants not to pay to the principal tenant, he thereby takes them for his own tenants. [This will not diminish his right as to the principal tenant.] Every landlord has two rights and securities, the personal one against the tenant, and the right of hypothec on all the goods on the ground.

On the 1st February, 1785, "The Lords sustained the defences;" altering the interlocutor of Lord Eskgrove.

Act. G. Ferguson. *Alt.* R. Corbet, R. Blair.

Diss. Stonefield, Monboddo, Ankerville, Eskgrove, Swinton, Rockville.

N.B. The opinions of the Judges are fully stated, though it cannot be said that the general point was determined. It was proposed, but very improperly, to make *two votes; one* on the general point and *one* on the specialties.

1785. *February* 23. ALEXANDER TENNANT and OTHERS *against* ANDREW JOHNSTON and OTHERS.

BURGH-ROYAL.

Qualifications of a Bailie,—Non-residence.

[*Fac. Coll. IX.* 318; *Dict.* 1888.]

SERVICE ON MR ANSTRUTHER.

BRAXFIELD. Prayer for a warrant to serve is sufficient.

PRESIDENT. Warrant to serve implies warrant to serve regularly; and the service has been regular, as the party was out of the kingdom.

NON-RESIDENT.

BRAXFIELD. If an unqualified person is put on the leet, the leet is good for nothing.

PRESIDENT. Three bailies are always on the leet. If *one* unqualified person may be put on the leet, *three* may, and then, in effect, there will be no leet at all, and the bailies must be chosen.