No. 168. forfeiture of the right, which may not continue so long as the assignation. In fine, it would seem somewhat different from equity, if the Court sustained a virtual assignation, (which is scarcely disputed in the present case) where any ordinary assignation differing in nothing but the form, could not be pleaded for by the most sanguine lawyers.—A Court of Justice can never, upon its own authority, violate the agreements of private parties, so as to do a wrong to the one, in order to favour the other, from considerations of public utility. And if, from the contract itself, and from the interpretation of the law, it is evident, that the rights of the husband are inconsistent with those of the landlord, there can be no dispute which should yield.

The Court, upon advising informations, ordered a hearing, and afterwards determined the point by the following judgment :

" The Lords remit the cause back to the Sheriff *simpliciter*."

Act. *J. Dickson.* Alt. *Ilay Campbell.* Clerk, *Ross.* Reporter, *L. Probationer Covington.*

Fol. Dic. v. 4. *p.* 325. *Fac. Coll. No* 170. *p.* 79.

1786. *February* 5. WILLIAM ROSS *against* JAMES MONTEITH.

No. 169.
Bygone rents unpaid, an inseparable burden on an assignment to a lease.

A tacksman of lands assigned his lease to certain persons, as trustees for his creditors. These trustees having entered into the possession, were sued for payment of the rents of two years antecedent to the assignment in their favour.

The Lord Ordinary found, That by accepting the assignation the defenders had subjected themselves to payment of the arrears of rent then due.

A reclaiming petition being presented to the Court, it was held to be perfectly clear, that those arrears were a burden inseparable from the right to the lease; and therefore,

The petition was refused without answers.

Lord Ordinary, *Alva.* For Petitioners, *Cullen.*

S. *Fol. Dic. v.* 4. *p.* 328. *Fac. Coll. No.* 155. *p.* 390.

1788. *January* 22.

PATRICK ALISON *against* MARGARET PROUDFOOT and ADAM LITSTER.

No. 170.
Lands let for 19 years, not to be subset, without a special authority from the landlord.

Patrick Alison let part of the lands of Newhall, for nineteen years, to James Wilson, " secluding his heirs, executors, adjudgers, and assignees, except in the event of his wife's surviving him, in that case he shall have power to assign to her what years of the tack shall be then to run."

James Wilson assigned the lease to Margaret Proudfoot his wife, who immediately after his death subset the lands to Adam Litster. An action was brought by Mr. Alison, the landlord, for setting aside this sub-lease, when it was

Pleaded in defence; The contract of location is not, in its own nature, personal or intransmissible. In the Roman law, even with respect to lands, a lessee might transfer his right to another, provided the lessor could suggest no relevant objection to his character or circumstances.—L. 1. C. Locati. No. 170.

It is true, that, in very ancient times, this agreement was, by the construction of our Courts of law, put on a different footing. This, however, entirely arose from circumstances of a temporary nature; from the rudeness of the age, landlords then relying more on the fidelity of their tenants and retainers than on the protection of the laws; from the municipal regulations of the country, which rendered proprietors of land responsible for the conduct of those which resided on their estates, and also from the nature of the prestations then exigible from tenants, which, consisting almost entirely of personal services, brought them nearer the state of menial servants than that of a modern farmer. Hence it was, that a lease, during these periods, was considered as a contract *stricti juris*. If given to a woman, it fell by her subsequent marriage; if to a man, it became void by his death. It was alike incapable of voluntary or of judicial transmission.

But for more than a century past, this contract, being ever wisely enforced by our Judges, in conformity to the sense of the country, has regained much of its original nature. It is no longer the personal services of the tenant, or his peculiar qualifications, (leases of land being frequently exposed to public roup), but the rent in money, which he can afford to pay, which a landlord has in view. Hence, the heirs of a tenant are now uniformly admitted, unless particularly excluded. His creditors, in the same manner, if they will undertake to pay the rent, may, in virtue of legal diligence, enter into possession of the farms, either by themselves or by their factor. A tack granted to a woman does not fall by her marriage. And it has been expressly found, with regard to a lease for nineteen years, even although assignees had been specially excluded, that the lands might nevertheless be subset. From that time, also, it has become usual for landlords to express, in the leases granted by them, the whole restrictions they intend to impose; and thus the presumption in favour of the tenant is, in case of their silence, rendered altogether decisive.

Indeed, what purpose could it now serve, to create, by implication, a prohibition either against assignees or subtenants, when, instead of a landlord's well-grounded expectation of having only for his tenant the person he contracted with, he must, on the demise of the original lessee, admit, in their order, all persons who are in the remotest degree related to him, although they be minors, ideots, or irretrievably bankrupt? or why should he have a power of rejecting an industrious assignee or subtenant, when, in case of the tacksman's bankruptcy, judicial assignees, altogether ignorant of the art, and perhaps, from their poverty, equally destitute of the means of cultivating the farm, must be admitted, unless the lessor has taken care, by a special provision, to exclude them? Balfour, *voce* Assedation; Craig, Lib. 2. Dieg. 5.; Gillon *contra* Muirhead, No. 168. p. 15286.

No. 170. Answered: Although some of the reasons which, in former times, contributed to a limited interpretation of the tenant's right do not now exist, it is still of the utmost importance to landlords, that they shall have a power of rejecting, without assigning any reason, those persons, in the character of assignees or subtenants, with whom they are dissatisfied.

A proprietor of lands is no longer indebted to the faithfulness of his tenant for his personal safety. He is not answerable to the State, or to individuals, for his tenant's conduct in society.—But he must ever depend on his tenant's personal industry for the payment of his rents; on his peculiar qualifications as a farmer, especially at a time when farming has become a science, for the right cultivation of his lands; and on his peaceable and neighbourly disposition, not only for his own quiet, but for that of the other tenants on his estate. A thousand instances might be given, where a man, to whose character and circumstances no legal objection could lie, might, as a tenant, bring the greatest inconveniency and loss on his landlord.

The few alterations, some of them perhaps scarcely justifiable, that have occurred in the interpretation of this agreement, do not go so far as has been stated. A lease, where assignees are not excluded, may be carried by adjudication; the favour of creditors making way for this exception from the general rule. From a presumption, that a tenant's representatives, generally the descendants of his body, will inherit the same dispositions, and follow out the same methods of cultivation, another exception has been introduced in favour of heirs. And it has been once found, in the case of a lease granted to a woman, which did not at any time become forfeited by her marriage, but was merely suspended during the coverture, that the husband, in the wife's right, might continue to possess the lands; this being equally advantageous to the proprietor as to the lessee.

But, unless in tacks of such an endurance as brings them almost on a footing with rights of property, all the other restraints are still in force. Without a power of assigning, assignees are excluded; and although, in one case, which was attended with peculiar circumstances, it appears to have been found, that an exclusion of assignees did not prevent subsetting, no determination has been since pronounced which has given a sanction to that precedent. With the exception, too, of Mr. Erskine, who speaks doubtfully on the subject, all our writers, ancient and modern, have uniformly held, that sub-leases are not permitted, unless in virtue of a special authority from the landlord, or in consequence of particular circumstances, which do not here occur; Balfour, *voce* Assedation, C. 40.; Dirleton, *voce* Tack; Stair, B. 2. Tit. 9. § 22, 26.; Sir George Mackenzie, B. 2. Tit. 6. § 8.; Bankton, B. 2. Tit. 9. § 15.; Bowack against Croll, No. 164. p. 15280.

Both parties endeavoured to obtain some confirmation of their several arguments, from the peculiar circumstances of the case. And the determination of the Lord Ordinary, though he also expressed an opinion, in favour of the defenders, on the general point, was chiefly founded on these. But the final decision of the

cause was rested on this principle, That in a lease of no greater endurance than nineteen years, neither assignees nor subtenants were admissible, unless in virtue of a special paction. No. 170.

The interlocutor of the Lord Ordinary was in these terms:

" Having considered the principal tack libelled on, which sets the farm for nineteen years to James Wilson, secluding his heirs, adjudgers, executors, and assignees, without mentioning subtenants, but allows him to assign the tack to his wife, in case she survives him, and which farm she accordingly subset to the defender, Adam Litster, for the remaining years of the tack; therefore sustains the defence," &c.

After advising a reclaiming petition, with answers, a hearing was ordered on the general point; and the Court, by a considerable majority, altered the interlocutor of the Lord Ordinary.

The Lords found, " That Margaret Proudfoot, the defender, had no right to grant the sublease under reduction; and therefore reduced the same."

Lord Ordinary, *Justice-Clerk.* Act. *Wight, Rolland, Geo. Fergusson, Geo. Robertson.*
Alt. *Dean of Faculty, Macintosh, Ro. Craigie.* Clerk, *Sinclair.*

C. *Fol. Dic. v. 4. p. 325. Fac. Coll. No. 17. p. 29.*

1791. *March* 8. EARL of PETERBOROUGH *against* WILLIAM MILNE.

No. 171.
Subsetting not permitted, when that power is not specially granted.

Lord Peterborough granted to Robert Shand a missive of tack, as follows: " I hereby agree to give you a lease of the farm of Essie and Pilmuir, &c. for the space of nineteen years; for which you are to pay me £.60 of yearly rent, in terms of the articles and regulations established by me on the estate of Durris, and to which reference is hereby had. And you are to enter into regular and formal tacks with me, on stamped paper, when required, under the penalty contained in the said regulations."

Those regulations, which related chiefly to the terms of payment of the rent, to certain reservations in favour of the landlord, to burdens imposed, or privileges conferred, on the tenants, and to the modes of culture, comprehended no express permission or prohibition of subsetting; although, in one part of them, mention was made of " tenants and sub-tenants;" and, in another, of tenants, as distinguished from possessors.

In one instance of a lease on this estate, which was formally executed, it appeared, that a special power of subsetting was given; but all the other farms, of which there were several, were held under such missives as that stated above. It was, however, admitted to be customary for the tenants to let small portions of their lands to sub-tenants.

Shand having subset his farm to Milne, an action of removing was brought by Lord Peterborough against the latter, as holding possession without any proper authority; the missive of tack not containing a power to subset.