1803. *March* 8. CUNNINGHAM *against* GRIEVE.

No. 176.
A lease to heirs, secluding assignees, for thirty-eight years and a life, cannot, without the landlord's consent, be settled by the tenant on any but the heir-at-law.

James Whitefoord of Dunduff, (18th January, 1759,) "in tack and assedation, lets to William Grieve and his heirs, secluding assignees and subtenants without the heritor's consent, all and whole the lands, &c. and that for the whole time and space of thirty-eight years, and the life-time of the said William Grieve, if then alive, or of the heir or heirs of the said William Grieve, who shall at the end of the said thirty-eight years have succeeded to, and shall then be in possession of, the said lands."

The original lessee (2d September, 1790,) having executed a settlement, disinheriting his eldest son, Adam, and nominating William, his second son, to be his heir, died, in 1796, before the expiration of the lease. The second son, the heir by destination, entered to the possession of the farm. Colonel Francis Cunyngham was the proprietor, in virtue of a deed of entail of the estate; and discharges were produced, granted by his factor to William, the second son, for the rent due at Whitsunday 1797, the last year under the specific endurance of thirty-eight years, as well as for that due at Martinmas 1797, the first term's rent arising from the subsequent life-rent.

As the tenant was not the heir-at-law to his father, an action of removing was brought against him, (9th March, 1799.) The Lord Ordinary decerned in the removing, (5th March, 1800,) "reserving to Adam Grieve, the eldest son and heir of line to his father, to claim the possession of the farm in question, if he is so advised, and to the proprietor his defences, as accords."

The tenant reclaimed, and

Pleaded: The eldest son settled in trade as a weaver at Paisley, and, from his habits and pursuits, was neither inclined nor qualified to do justice to himself nor his landlord in the management of this farm. The original lessee, therefore, nominated the defender to succeed him, and laid him under all the conditions contained in the lease. It is not an assignation or subset, but a deed *mortis causa* in favour of one of the heirs of the disponer's body.

Formerly, tacks did not descend to heirs, unless specially called; but such strictness has been long since relaxed, and has now given way to the change of manners: Even a widow does not forfeit her tack by marriage; Gillon against Muirhead, No. 168. p. 15286. And a clause excluding assignees and subtenants did not debar the heir of a bankrupt tenant from appointing an overseer to manage for the creditors; Laird against Grindlay, No. 172. p. 15294. The lease is granted to the tenant and his *heirs;* which is a generic word, descriptive of a character comprehending every kind of heir known in law, and it was used for the benefit of the tenant and his family, who stipulated this succession to his children. An

heir is either the heir-at-law, or the heir by destination; and this last is always preferred, as it is only on his failure that the other is ever called to the succession. The landlord, by the length of the lease, could have no *delectus personæ;* and he could never mean that it must go to the eldest son, whether capable or incapable, willing or not willing, to become the tenant; nor, in the event of his death, that it might possibly be the mismanaged portion of a number of female heirs. The clause secluding assignees and subtenants does not affect the defender, who is a disponee or heir; the deed not being an assignation, but a nomination of one of his children to be his heir. If the heir-at-law is the only person who can succeed in such cases, as almost all leases are made out in the same form, it effectually introduces a tailzie of tacks, fettering the industry and abilities of the eldest son of every tenant, and virtually obliging him, at all events, to follow the trade of his father. No. 176.

In Lord Minto against Deuchar, No. 174. p. 15295. the disponee was a stranger to the succession, and called in, not as an heir, but as a mere assignee, constituted by words *de præsenti*, and assignees and subtenants are expressly excluded.

Answered: The character of *heir* is affixed to the person who is, by law, entitled to succeed as nearest in succession by blood; and when this lease, which was granted to the tenant and his heirs, has been assigned or given away to one who can be heir only by destination, it is plainly contravening the terms of the lease from which the only title to possession flows. The landlord cannot be forced to accept of a tenant different from him to whom the devise in the tack itself has been expressly made. The eventual life-rent is bestowed upon his heir, and not his assignee; and as it is the landlord's interest that this life-rent should be as short as possible, it is plainly his interest to prevent the lease from being assigned to a young man, at the pleasure of the tenant. The deed calling the second son, though disguised under the name of a nomination of an heir, is effectually an assignation of the tack without the landlord's consent, which is expressly excluded in it. The case of Lord Minto ought to regulate the decision of this. The assignee was the husband of the daughter of the tenant; and the party competing was the infant grand-daughter, who, as the heir-at-law, was found entitled to the lease, though less qualified for the various purposes of agriculture than an able and industrious tenant.

On advising a petition, with answers, the Court adhered to the Lord Ordinary's interlocutor, (15th May, 1802.)

On advising a reclaiming petition, with answers, a hearing in presence was ordered.

The Court was divided in opinion upon this cause. A great majority, however, thought, that there could be no distinction between an assignation *inter vivos* taking place *de præsenti*, and a testamentary assignation; or between a stranger assignee

No. 176. and one of the tenant's family; otherwise, the exclusion of assignees might, in all cases, be fraudulently evaded: That the landlord had an interest in refusing to admit assignees, of any kind, without his consent: And that this was the express agreement of parties in the lease, which could not be got over: And, further, that there was a specialty in this case, on account of the life-rent given to the heir, which must be presumed to mean the heir *alioqui successurus*, otherwise it would be in the power of the tenant to substitute a better life in place of a worse. On the other hand, it occurred to some of the Judges, that a tack let to the tenant and his heirs was an heritable right, and that the *delectus personæ* could not reach heirs who were always uncertain till the death of the predecessor: That the landlord could have no right to regulate the succession of the tacksman; nor did the exclusion of assignees import a tailzied fee on any particular heir, when heirs in general were admitted by the contract of lease, but meant only, that the tacksman should not alienate the subject, but continue upon the farm himself, as the person who was alone to be responsible to the landlord so long as he lived; after which he was to be succeeded by an heir, no matter whether by law or deed; and this heir was, in like manner, to be tied up from alienation: That the appointment of an heir, by a *mortis causâ* deed, was very different from a sale or alienation *inter vivos*, though the form of the instrument might be the same, or nearly so, in both cases. A conveyance by disposition or assignation is the proper form of regulating succession, as well as of transferring the subject to a purschaser; but this accidental circumstance cannot vary the substance of the transaction. In tailzies, (it was said), it is one thing to alter the order of succession, and another to sell; yet the name of the deed by which these things are done may be the same. The one, however, is revocable, the other not; the one is generally for a price, the other gratuitous; the one implies warrandice, the other not; the granter of the one may be inhibited, the granter of the other cannot; the grantee of the one does not represent his author, of the other he does, and is liable for his debts *in valorem*. These things can easily be discriminated. Besides, the second son is truly one of the heirs-at-law; for the eldest son may collate with him; the one throwing in the tack, and the other the stocking. If a tack granted to heirs, but secluding assignees, must be considered as a tailzied fee to the heir-at-law, the eldest son should, in all cases, be entitled to his share of the moveables, without collating; though this has never been understood. It would be against the interest of the landlord to consider it as a tailzied fee; for then, if the tenant happens to have many daughters, and no son, it is out of his power to prevent the lease from being divided into many parcels; and as to the possibility of a tenant's abusing this power of naming his own heir, he ought not, on that account, to be deprived of the fair exercise of his right, when nothing fraudulent or evasive can be alleged. Fraud or collusion must always be an exception; but why turn the exception into a general rule? What if it should be a tack of *teinds*, with a very long duration, which

is often the case; must this also go to the heirs of line, and not to the heir succeeding to the estate, contrary to the plain meaning of the original transaction? No. 176.

The Court adhered to the former interlocutor.

Lord Ordinary, *Armadale.* For Landlord, *Hay, Jo. Clerk, Campbell, junior.*
Agent, *James Gray.* For Tenant, *Solicitor-General Blair, Cay, Reddie.*
Agent, *Ro. Jamieson, junior, W. S.* Clerk, *Colquhoun.*

*F.* *Fac. Coll. No. 95. p.* 208.

*** On the same day, in consequence of the specialties of the case, the Court gave an opposite judgment, in Darroch against Rennie, by finding the second son entitled to continue in possession of the farm, as he had already continued in quiet and unchallenged possession, having paid the rent for sixteen years to the landlord, who did not find any fault with this change of the heir.

*** The case of Cunningham against Grieve having been appealed, was by the House of Lords remitted back to the Court of Session to be re-considered. This Court have continued to adhere to their original judgment; but new occurrences have taken place in the cause, which are still (December 1806) in dependence. See APPENDIX.

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*** See 5th February, 1667, Traquair against Howatson, No. 6. p. 10024. *voce* PAYMENT BEFORE-HAND.

*** *December 5,* 1806.—The Court this day heard the report of a Lord Ordinary of a case between the Earl of Cassillis and M'Adam, in which the opinion given by a majority was, That a tenant having a lease for 21 years was not entitled to subset without the consent of his landlord. See APPENDIX.

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## SECT. XI.

### In what Cases must the Tenant find Caution for the Rent?

1594. *June* 22. LAIRD of KINNABER *against* RANYE. No. 177.

The Laird of Kinnaber obtained decreet against Ranye to find him caution for payment of the duty of a tack of two mills set by him to the said Ranye, albeit there was no provision of caution in the tack, because the said Ranye was owing to him two years' duties, *et vergebat ad inopiam.*

*Fol. Dic. v. 2. p.* 425. *Haddington MS. No.* 420.