vassal. The question is, Whether this can be held to be *jus tertii* as to the freeholders? I incline to think that it is not: the superiors must show that their feudal right is good. Sir John Anstruther does not consent, but, on the contrary, objects. Besides, here was a thing which could not be divided.

PRESIDENT. I could never bring myself to think that the subtle arguments as to *jus tertii* were solid. The House of Lords has gone far. I will go as far, but no farther, in support of fictitious votes. Has the House of Lords ever said that the vassal may not object? *Here* he does object. It is admitted that Lord Eglinton did an illegal thing, but that it may be good if the vassal consents. Now the vassal does not consent, but opposes. The objection to the splitting the blanch-holding is also strong. The charter does not convey the lands.

On the 29th February 1780, "The Lords dismissed the complaint."

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

Reporter, Stonefield.

Diss. Elliock; *non liquet* Covington.

1780. *June* 21. ROBERT ANDERSON, *Charger, against* WILLIAM KER, Commissioner for the DUKE of ROXBURGH, *Suspender.*

HYPOTHEC—TACK—SEQUESTRATION.

By tack, dated April 1774, the Duke of Roxburgh let the farm of Plenderleith to John Wright, excluding assignees and subtenants, for seven years from Whitsunday 1774. The tenant becoming embarrassed, he, on 11th April 1780, applied for and obtained a sequestration of his estate, under the bankrupt statute of 12th Geo. III. c. 72; and the charger was appointed factor. On 25th April 1780, the charger intimated these circumstances to the suspender, and stated at the same time that Wright was to remove at Whitsunday next, and to renounce his lease, and that he, the factor, meant to dispose of the whole stocking on the farm, which was a sheep-farm. These measures were opposed by the suspender, who, upon a roup being advertised for the 22d of May, applied, by bill of suspension, for an interdict to stop the sale.

PLEADED by the suspender,—1*mo*, It is implied in a tack that the farm must be properly stocked by the tenant, that it may be properly cultivated, and also that the landlord may have security for his rent; Ersk. 268; Stair, 2. 9. 31; Bankt. 2. 9. 21.; *Randiford,* February 1623. Independently, therefore, of his hypothec altogether, the landlord is entitled to prevent the tenant from displenishing his farm by disposing of his stock *per aversionem* during the lease. 2*do*, Even in virtue of the hypothec alone, the landlord may prevent the stock, as a *universitas,* from being entirely carried off. Although the stocking is said to be hypothecated only for one year's rent at a time, yet the effect of it is the same, in reference to the present question, as if it were more extensive; because the subject of the hypothec may be detained by a sequestration for the current year's rent till the conventional term of payment arrives, when, and no

sooner, the landlord may have as much sold as is necessary to pay the rent, and then what remains is instantly hypothecated for the succeeding year's rent. 3*tio*, The notice of renunciation was given only three weeks before the term; but, as a tenant is entitled to forty days' warning before he can be removed, even at the end of the lease, so, if a tenant is to renounce his lease, especially during the currency of it, (supposing him entitled to do so,) the landlord ought to have the like notice; Craig, 2. 9. 2; Bankt. 2. 9. 48. But the tenant has no right in the present case to renounce his lease. His bankruptcy, on the one hand, does not liberate the landlord, and neither can it, on the other, entitle the tenant, without the landlord's consent, to renounce; *Crawford* against *Maxwell*, 28th June 1758. 4*to*, These principles apply to the tenant's creditors as much as to himself.

PLEADED by the Factor for the Creditors,—It is true the tenant, besides being bound to pay the rent, is bound to stock the farm, and to keep it stocked, and the landlord is his creditor for the performance of all these obligations. But he is not a *preferable* creditor in all of them. He is a preferable creditor for one year's rent; but for every other claim he is merely an ordinary creditor. Hence, if a creditor of the tenant poinds his stocking, the landlord can stop the poinding till he is satisfied of the year's rent; but he cannot stop it on the pretence that his farm will thereby be displenished. A sequestration under the bankrupt act has precisely the same effect; *Fraser* against *Gordon*, 22d November 1772. Whatever, therefore, may be the extent of the landlord's claims as an ordinary creditor, they cannot entitle him to prevent the factor from applying the bankrupt's effects in payment of his debts, under the statute. As to the renunciation, the case quoted does not apply. The bankruptcy of the tenant in the present case *did* liberate the landlord, because the tack excluded not only assignees but subtenants; and therefore, as the creditors would not have been entitled to maintain the possession without the landlord's consent, they cannot be compelled to it. But, supposing it were otherwise, and that the tenant has here no right to renounce, still the landlord is merely a personal creditor for the performance of the tenant's obligations; and, although he may claim damages for the non-performance, he cannot stop the sale of the tenant's effects.

The following opinions were delivered:

MONBODDO. If a tenant is bound to stock, he is bound to keep on a stock. The tenant must find security for this as long as the lease lasts; and, if *he* must, so also must the creditors in his place.

BRAXFIELD. I can figure cases where a master may have security for more than a year's rent. Had not the sequestration taken place when it did, the Duke of Roxburgh might, for three months, have pleaded on his old hypothec, for a preference as to the current rent. In the case that happened, the Duke of Roxburgh had security for the year to Whitsunday 1780: The Duke is entitled to vindicate this in an action at common law, and therefore he says he may detain the stock. The premises may be true, and yet the conclusion may be false, for then it would follow, that no creditor could ever put out his hand without first securing the landlord in payment of all subsequent rents. I take

a sequestration to be just like a poinding. The Duke is not bound to accept of a renunciation: he will still be a creditor for rent and for claim of damages, but only a personal creditor.

COVINGTON. The law has given the proprietor a privilege *contra communis juris regulas*, to the extent of one year's rent, but for no more. The Duke does not plead on his hypothec *here*, but on a common law right, from the terms of the contract: this cannot give a real preference.

MONBODDO. I do not doubt that a poinding would be good; but a sequestration differs from a poinding.

JUSTICE-CLERK. The factor was *in cursu* before Whitsunday 1780, and he was vested in the subjects: this has the same effect as a poinding. The Act of Parliament orders goods poinded, within 30 days of sequestration, to be returned under the sequestration: Thus the Act equiparates sequestration to any other diligence.

ELLIOCK. The goods are vested in the factor, subject to the hypothec claim of the landlord.

On the 21st June 1780, "The Lords refused the bill."

Act. J. M'Laurin. *Alt.* Ilay Campbell. *Reporter*, Hailes.

Diss. Monboddo. *Non liquet*, Kaimes.

1780. *June 22.* Captain DAVID MITCHEL *against* DANIEL MORGAN.

PACTUM ILLICITUM.

Action denied for breach of a Smuggling Contract.

[*Supp. V. 533.*]

MONBODDO. The mandatory is not bound to perform a mandate like this.

BRAXFIELD. There is no question here as to point of honour or honesty: the great hurt to honest men, is when rogues are true to each other.

ALVA. I deny that there was any smuggling contract here.

JUSTICE-CLERK. It is extraordinary to say that there was no smuggling contract, when such contract is confessed by the parties themselves.

HAILES. This case is not strait, as others which have been determined by the Court. For some time a distinction was attempted between *malum in se* and *malum prohibitum*, and smuggling in general was said to be merely a *malum prohibitum*. I never could relish the distinction, and the Court at length disregarded it. *Here*, however, the *malum in se* is obvious, for Captain Mitchel was under covenant to serve faithfully, and the goods could not be smuggled on shore without bribing the custom-house officers: this is fairly admitted. Now, this is subornation of perjury in a moral sense of the phrase, and consequently the contract is founded on a *malum in se*, incapable of being the foundation of any action in a court of *justice*.