

1771. December 4. MRS FRANCIS AGNES WALLACE, and HUSBAND, against JOHN, EARL of STAIR.

TEINDS—PROCESS.

A decree of Locality, in respect it had been pronounced in absence, and that an error had been fallen into, and a wrong done, reduced.

[*Fac. Coll.*, V. 335; *Dictionary*, 12,213.]

MONBODDO. The question is, Whether is the allocation to be sustained after the expiry of the tack? I do not see how this can be. The case of a wadsetter put by the defender, is not in point; for a wadsetter is proprietor for the time, and, if no order of redemption is used, may be proprietor for ever. *Here*, the tack being expired, there is an end of the tacksman's exemption of his own lands.

PITFOUR. In 1693, when the law gave the same privilege to tacksmen and to titulars, most of the tacks subsisting were for a great number of years yet to run. They had been granted about 1618, to endure from seven times nineteen years to ten times nineteen years. The right of property, after the expiry of such tacks, was a mere trifle, perhaps two or three years' purchase: but when a tack is either *de facto* expired, or within a few years of expiring, so that its end is within sight, no reason can be assigned for giving the tacksman a power of perpetual allocation. While a long tack subsists, it matters not in which way the allocation is made. It is just the question, "Whether shall I take the money out of my right or out of my left pocket?"

AUCHINLECK. Here is a reduction of a decret of this Court: The question is, Can that decret be got the better of? I think it can; *1st*, Because the decret was in absence; *2d*, Because the rent of the pursuer's lands was grossly overstated; *3d*, Because the allocation is of the lands, as belonging to a person who had no right whatever in them. If the decret be once set aside, we must local anew, and then, the tack being expired, all are *in pari casu*. I would have been clear, if the short term of the tack had been stated, to have sustained the objection, even in the former locality.

COALSTON. The pursuers are not tied by the decret; but I think that the pursuer must also prove injustice in the locality; for, if no injustice, why set the locality aside? The consequence of overturning this locality, may be to overturn all localities pronounced by this Court. A distinction has been made between the consequences of long tacks and short tacks; but *where* is the line to be drawn? In many cases, one, having but a temporary right, may create a perpetual right.

KAIMES. It is the Court which establishes the locality, not the tacksman. If the Court establishes a perpetual locality, it will be good, whatever the right of the tacksman may have been. This will solve one of Lord Coalston's diffi-

culties. In such case the heritors who objected not *sibi imputent*: Their plea is competent and omitted; but here the decret is void and null for want of parties. The Court must begin *ab ovo*: there is now no tacksman; all are *in pari casu*.

PRESIDENT. We cannot both set aside the decret and rectify it.

On the 4th December 1771, "The Lords sustained the reasons of reduction."

*Act.* W. Wallace. *Alt.* D. Dalrymple.

N.B.—The question of the power of a tacksman to allocate, whether the term of his lease to run was long or short, did not receive a determination, nor could it in the present shape of the process. I have, however, set down the opinions of the Judges as pointing at the ideas of the Bench.

*Diss.* Coalston.

1771. December 6. BOYD PORTERFIELD of Porterfield, *against* JOANNA, MARION, and SILIAS PORTERFIELDS.

#### PRESCRIPTION—TAILYIE.

An obligation to execute an entail cut off by the Negative Prescription.

[*Faculty Collection*, 340; *Dictionary*, 10,698.]

PITFOUR. The obligation, by Hapland, is in 1716, "Sicklike, I bind and oblige me, and my foresaids, to make an destination and tailyie, that, failing of me and heirs-male of my body, the lands and estate of Hapland, or what parts thereof I shall happen to acquire, is wholly to accresce to the said Alexander Porterfield and the heirs-male of his body." Nothing was done upon this deed till 1768. It is lost by negative prescription. The course of the prescription would not be stopped by the estate continuing in Hapland's male descendants, because Alexander Porterfield was *non valens agere cum effectu*. But, here, from the very moment of the deed, Alexander Porterfield might have called upon Hapland to execute an entail. If he neglected this for 40 years, his claim is lost.

COALSTON. Doubted as to negative prescription, because Alexander Porterfield could take nothing by it.

On the 5th December, 1771, the Lords sustained the defence of negative prescription, (and also the other defences;) adhering to Lord Monboddos interlocutor.

21st December 1771, adhered.

*Act.* J. Swinton, junior. *Alt.* A. Lockhart.

*Diss.* Coalston, as to prescription.