

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, MARRION, 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.

N.B.—The other defences in this case were so involved in fact, that it would serve no purpose to state the reasonings of the Lords upon them.

1771. December 5. ELIZABETH PRIMROSE *against* ROBERT CRAUFURD.

COURTESY.

The right of the husband sustained over the lands which the wife had got by a disposition, but in which she was *alioqui successura*, and held to have acquired *præceptione hæreditatis*.

[*Faculty Collection, V. p. 345 ; Dictionary, Appendix I. ; Courtesy, No. 1.*]

PITFOUR. There is a decision, not in the Dictionary, but observed by Forbes, 12th December 1712, *M'Cauly of Arncliffe*, which determines that provisions in a marriage-contract do not exclude the *jus relictæ*. A point settled so long ago, as to *jus relictæ*, will not be unsettled now. The same rule applies to *courtesy*. Many opinions have been given by lawyers of eminence : many judgments, in the Outer-House, have been pronounced and acquiesced in upon the footing of the decision of *M'Cauly*. It is a fixed point, that *courtesy* extends not to conquest. The reason of this may possibly be found in the civil law, whence we derived the *courtesy* ; but, be that as it will, *servate terminos quos patres vestri posuere* : it is certainly a part of our consuetudinary law. As to the present question, there may be *heritage* when there is a *præceptio hæreditatis*. If a father disposes to three daughters, they will be liable *passive* for his debts. In so far as the wife, *here*, took *præceptione hæreditatis*, will the husband take by *courtesy*. I also think that the wife's holograph deed will be effectual, although some of the subjects mentioned in it are not mentioned in the marriage-contract. The holograph deed was rational. I doubt how far she could alter it : it must be proved to have been executed *in liege poustie*.

GARDENSTON. The marriage-contract might be, in so far, in implement of the holograph deed, as it contains subjects mentioned in the holograph deed. But its omitting any subjects will not invalidate the obligation in the holograph deed.

HAILES. The nature of this holograph deed is misunderstood : it expressly relates to a contract to be extended, and contains a warrant for extending such contract. The contract followed, and was regularly signed by the parties. From that time its warrant must be held as out of the question. The husband cannot plead upon the warrant, while the deed itself, made out in consequence of the warrant, exists. If the last deed contains fewer particulars than the first, *that* must be imputed to a change of will in the parties ; for it is impossible to suppose that the parties themselves did not know the one meant to *give* and the other to *receive*.