It was observed that a pursuer could not know how far the litigiosity of his party might go, and that it would be inequitable to refuse him his just expenses because he had not concluded for them: That the case may be different as to damages; for every pursuer may know, at the time of raising his libel, what damage he has really suffered.

It was also observed, that the contrary had been found in the case of *Marshall* against *Carnieson;* but that, in a later case, stated by Lord Stonefield, at the foot of the table, the Lords repelled the objection.

Act. Ch. Hay. *Alt.* D. Rae. Concluded cause.

1773. *March* 10. JOHN CARR of Cavers *against* ALISON CAIRNS.

TAILYIE.

Import of a clause in a tailyie, that it shall be lawful for the heirs of entail to set tacks, the same being only for the lifetime of the setter, or for fifteen years, without an evident diminution of the rental, and, if made otherwise, to be void, and deemed a deed of contravention, and of a lease granted by one of those heirs for nineteen years, containing a clause of warrandice in common form, with an exception, that, in case the granter shall happen to die before the expiration of this tack, the obligation of warrandice shall not be extended any farther than what is consistent with the powers he hath by the entail with respect to granting tacks.

[*Faculty Collection, VI.* 286; *Dictionary,* 15,523.]

MONBODDO. The warrandice is for nineteen years, if Mr Carr lived; if he died after fifteen years, the warrandice ceased.

JUSTICE-CLERK. The clause in the tack only goes the length of secluding an action of warrandice. This is not an action of warrandice. The tenant says he desires to be continued in possession. The entail, not being recorded, is not good against singular successors. A tacksman has the benefit of a singular successor, because the entail is not recorded.

KAIMES. As the entail is not recorded, the proprietor is absolute proprietor, and the lease will be good to the end of the world. Cavers says, I can set for fifteen years, and no more; yet he sets for a longer space. *Quær.* Can the tenant, who is partaker of this legal fraud, derive any benefit from it?

AUCHINLECK. If the clause, mentioning the entail, were not here, there would be nothing in the plea on the part of the master, because the entail is not recorded. The plea is, The tenant is not entitled to found on the not recording the entail, because not a *bona fide* contractor. The tack provides that it shall only be effectual in so far as consistent with the entail.

GARDENSTON. I think the tack is good. Such prohibitions are odious, interrupting the most rational acts of administration. There is no direct prohibition here. The second point is conclusive. If the tack had been granted

without the clause of restriction, it would have been good against all the world. The clause of warrandice implies only, that, if the granter has no power, there shall be no recourse.

KENNET. The intention of parties is clear: *contra bonam fidem* for the tenant to plead as he now does.

COALSTON. I doubt as to the first point. It is an established point that tailyies are not to be extended by implication. The prohibitory clause in the entail strikes only against altering the course of succession and contracting debts. There is a clause seeming to suppose that there was a prohibition as to tacks.

PITFOUR. We must not supply a prohibitory clause in entails. We must not hold it the same thing whether an entail is recorded or not. The reference in the tack will not supply the want of recording. If you argue upon *bona fides* and *mala fides*, the Act of Parliament is at an end.

ALVA. This question seems to depend upon the intention of parties in the contract: and there I think there is no ambiguity.

MONBODDO. I have changed my opinion. There is no prohibition in the entail to set tacks for nineteen years. I will not supply the prohibition.

PRESIDENT. If we give this entail fair play, I do not see that we can hold it to mean any thing else than a prohibition to grant tacks for more than fifteen years.

On the 10th March 1773, the Lords repelled the bill of advocation of the Sheriff's sentence decerning in the removing.

Act. H. Dundas. *Alt.* J. Swinton, junior.

Reporter, Pitfour.

Diss. Justice-Clerk, Gardenston, Coalston, Pitfour, Stonefield, Monboddo.

Absent. Strichen.

1774. *January* 18. GARDENSTON. The entail does not extend to this case. We must not increase the burden of entails by interpretation.

KENNET. We ought to consider the covenant between parties. Cairns did not stipulate any thing contrary to the entail, nor did Cavers mean to transgress the entail.

KAIMES. Cavers did not limit the lease, but only the warrandice. He leaves the tenant to make the most of any argument which arises from the import of the entail.

PITFOUR. I relish much this distinction. I do not understand this method of making entails good against a singular successor though not recorded. Inhibition is nothing, unless published and registered. The same is the case of entails. There is a difference between rights *jure naturæ* and by statute. If I know of a former sale, I do a fraud in purchasing; not so in questions of statutory prohibitions.

AUCHINLECK. Suppose it had been said, Whereas there is an entail of my estate, but not recorded, and therefore I do not grant warrandice; will this hinder the tenant from pleading that the entail is not recorded, and consequently not effectual.

KAIMES. This entail was prior to 1685. It cannot have a stronger effect

than if it had been made in consequence of the Act 1685. By that Act I may safely purchase when the entail is not recorded. If I may purchase, I may bargain for a lease. I approve of Lord Pitfour's distinction between moral and legal wrongs.

MONBODDO. The clause of warrandice cannot determine the tack. The setter had a doubt of his powers, and therefore he declared that he would not warrant the tack beyond his own life, or fifteen years. We have a good rule for the interpretation of entails, according to the legal and grammatical sense of the words. The words of the entail are clear, but then it is not recorded. Private knowledge is nothing. The entail is mentioned in the tack, but then it is not provided that the tack shall submit to its regulations; the tenant is left to take his hazard.

COALSTON. The case of this tenant is exceedingly favourable. I am sorry that the master has taken the advantage of the entail. This entail, not having been recorded, would have been ineffectual had it not been for the clause in the tack. I admit that private knowledge can have no effect: the entail only supports tacks for fifteen years on the life of the setter. It seems that the clause in the tack implies a consent by the tenant that the tack should only subsist as long as the entail authorised it.

On the 18th January 1774, the Lords sustained the reasons of suspension.

Act. H. Dundas. *Alt.* A. Lockhart. *Reporter,* Kaimes.

Diss. Alva, Hailes. *Non liquet,* Coalston. *Absent.* Strichen, Justice-Clerk, Elliock, Alemore, President.

1774. *January* 25. JAMES SIMPSON of Man *against* COLONEL ROBERT SKENE.

THIRLAGE—PRESCRIPTION.

The plea of the Negative Prescription, founded upon only a partial possession having been had by the dominant tenement, not admissible to limit the extent of a thirlage of *omnia grana crescentia* constituted by writ, where the obligation of thirlage, as originally constituted, has been repeated in the successive investitures of the servient tenement, the latest whereof, in favour of the defender himself, was much within the years of Prescription.

[*Faculty Collection, VI.* 262; *Dict.,* 10,746.]

COALSTON. The investitures imply an astriction as to *omnia grana crescentia,* but the practice is for liberty. The defence is, that the clause of *omnia grana crescentia* has been limited by means of the negative prescription: the negative prescription cannot operate against the superior; but whenever the superior dispones the mill, the thirlage becomes the subject of a prestation to a third party, and may be the subject of negative prescription. The case of *Grahame of Dougalston,* in 1735, is as strong as any thing can be.