1779. *February 22.* Sir ——— DILLON *against* JOHN CAMPBELL of BLITHSWOOD.

TAILYIE.

Tailyie of Burgage Tenements.

[*Fac. Coll. VIII.* 190; *Dict.* 15,432.]

COVINGTON. The heir of entail is not personally bound; but it is another question whether this burgage tenement is a proper subject of entail. The area of the ground was entailed, but not the building, which is a new subject created. Although, in a common case, *inedificatum cedit solo*, yet here the tenant is entitled to remove the subject. [Mr Ilay Campbell, for Blithswood, delared his willingness to suffer the tenant to carry off or remove all his buildings.]

PRESIDENT. In consequence of the buildings, Blithswood draws a high rent. He is repelled, *exceptione doli*, from taking the subject.

MONBODDO. I must presume that the rent was increased on account of the liberty to build. I do not think that the Act of Parliament authorising entails was meant to extend to burgage tenements. The purpose of that act was to preserve the feudal system of lords and barons: burghers were *then* of no account or estimation. At any rate, the heir of entail cannot take the *meliorated* subjects; on this principle, that *nemo debet locupletari aliena jactura.*

ALVA. The tenant has built houses which it was not the intention of the lease he should build: if he suffer by building, he has himself to blame.

GARDENSTON. The present tack is such as is usual, and for the benefit of the heir of entail, and therefore must be good against the heir of entail.

JUSTICE-CLERK. As the heir of entail has confessedly a power of letting leases for nineteen years, he has the power of inserting wise and judicious clauses. In *rural* tenements it is common to insert an obligation to pay the expense of inclosures; in *urban*, the expense of building.

BRAXFIELD. I am willing to go into any scheme which may relieve the pursuer. Entails are no favourites of the public at present, but they must have fair play. The doctrine which I have heard to-day, if well-founded, will cut down all entails, without the aid of a statute. The maxim, *nemo debet locupletari aliena jactura*, does not apply to this case; for the heir of entail cannot be benefited to the value claimed, he being merely a liferenter. Supposing this to be the case of a rural tenement, the same principles would apply. If the heir of entail is bound to pay for meliorations, they must be a burden on the subject entailed, and then entails may, in process of time, be undermined altogether. Nevertheless, relief may be given to a certain extent. There is no justice in allowing the heir of entail to pocket excrescent profits: the tenant may continue in possession until he is reimbursed.

ELLIOCK. When I see justice, I do not look to consequences. The pursuer ought to possess until he is indemnified. It is impossible that L.5 *per annum*

was the real value of this waste ground, for then the ground would have been let at L.20 *per* acre.

On the 22d February 1779, "The Lords found the heir of entail bound;" altering Lord Braxfield's interlocutor.

Act. R. Cullen. *Alt.* J. Swinton.

Diss. Alva, Elliock, Stonefield, Hailes, Ankerville, Braxfield.

N. B.—The number of dissenters was owing to the manner in which the vote was put; for there were Judges, as Braxfield, Elliock, and Hailes, who were willing to give relief to the pursuer, though not in that *large* way proposed in the vote and carried by the interlocutor.

1779. *February* 26. Messrs Gibson and Balfour *against* George Goldie.

ARRESTMENT.

An Arrestment betwixt the hours of four and six, preferred to one betwixt six and nine.

[*Fac. Coll. III.* 45; *Dict.* 824.]

Braxfield. Goldie's arrestment in the hands of the managers and clerk is good; so that the only question is as to the priority of arrestment. When particular hours are mentioned, the meaning is, that, although the messenger is not certain as to the precise minute, he is certain that such a thing was done *between* one hour and another: This excludes any after hour. In this view, the two competing arrestments can never interfere.

Hailes. So it was determined, after very mature consideration, in the case of *Mrs Jean Cameron* and *Thomas Boswel.*

President. The argument in that case seemed conclusive on a case put. There is one arrestment between seven and eight, another between six and seven, and another between five and six: if the arrestment between seven and eight be considered as preferable *pari passu* with *that* between six and seven, it follows that the arrestment between six and seven is preferable *pari passu* with the arrestment between five and six; and consequently the arrestment between seven and eight, and that between five and six are on a footing. The same argument might be carried on from sun-rising to sun-setting, and the necessary consequence would be, that all arrestments executed on the same day are preferable *pari passu;* for this, there is no authority.

[The unavoidable consequence would be, that an execution of arrestment, between six and seven in the *morning*, would be preferable *pari passu* with one between six and seven in the evening; which is absurd.]

Monboddo. Goldie's debt is not proved, and therefore his arrestment cannot compete with an arrestment on a debt proved.