

MONBODDO. A cautioner may demand an assignation, both by the Roman law and ours.

GARDENSTON. There are two very old decisions, and an opinion of Mr Erskine, founded on; but still I think that the decisions and the opinion are erroneous. A thing which is *innocuæ utilitatis* to the creditor, and may be useful to the other party, must be done; and it is peevish to oppose it.

ALVA. When a man does no more than pay his own debt, he cannot demand assignation.

PRESIDENT. A creditor is entitled to take his payment, but he must not do it emulously. In the case of the creditors of *Buchan*, it was found that creditors were not obliged to assign.

JUSTICE-CLERK. In the case of bills, it is not understood that the creditor is bound to assign.

BRAXFIELD. The granting of an assignation may not seem a matter of much moment to one who is not conversant in the negotiation of bills; but when L.500 bills pass through a man's hands every day, it would be a great embarrassment to commerce were he bound to assign as many of them as debtors pleased: the very loss of time, and the necessity of giving attendance on such occasions, would be distressing. The granting of assignations was introduced into the law of Scotland, from principles of equity, in the case where the secondary creditor had no right to the subjects without assignation. A creditor has no business to enter into the question, How the co-obligants are bound to each other. If the co-obligant can point out any relief which he may obtain by the assignation, and which he has not at common law, then the creditor must assign *ex equitate*.

PRESIDENT. I shall not dispute the obligation to assign bonds; but, as to bills, it would introduce inexpressible confusion.

[The Lords did not determine the general point, but laid hold on the particular circumstances of the case; and so avoided a vote.]

On the 14th January 1780, "The Lords, in respect that diligence had been done, and a decret obtained, found that the creditor must assign the decret, in order to operate relief;" altering Lord Alva's interlocutor.

Act. G. Buchan Hepburn. *Alt.* R. Sinclair.

1780. *January 14.* ANDREW CRANSTON *against* JOSEPH SYMINGTON.

WARRANTICE.

Whether a proprietor is bound by a general clause of warrantice to relieve his tenant of a thirlage?

[*Fac. Coll. VIII.* 192; *Dict.* 16,637.]

BRAXFIELD. Supposing thirlage to have been constituted, I think that the

landlord is not liable on the warrantice of the tack : were he liable, the greater profit that the tenant made of his malting, the greater loss would the master sustain. The question is, Whether does the warrantice in a lease imply an exemption from the consequences of the thirlage : the tenant must certainly carry his grain to some mill. The master warrants that the tenant shall possess the subject, but not that he shall not be obliged to carry his grain to some mill. The master ought to have mentioned the thirlage to the tenant ; but then, on the other hand, the tenant ought to have inquired whether there was a thirlage. The one was just as naturally to be adverted to as the other.

KAIMES. According to the defender's argument, the master, instead of reaping profit, might be obliged to pay to his tenant what is equivalent to a rent. All that the tenant can demand, is to be relieved in equity from his lease, on the footing of *casus incogitatus*.

MONBODDO. The extent and consequences of the obligation do not move me ; for I can suppose a case in which eviction will go beyond the value of the subject let. If the tenant knew that the lands were subject to thirlage, the warrantice will not be incurred.

COVINGTON. In the country, a tenant may naturally suppose that the lands which he possesses are thirled ; but there is a wide difference between that case and the case of *invecta et illata* in an urban tenement. Such thirlage is unfavourable, and not to be presumed. Both parties are to blame ; the one in not mentioning the thirlage, and the other in not inquiring about it. This is a *casus incogitatus*.

GARDENSTON. It is a clear rule, that all real servitudes are burdens on tacks. This is certainly the case as to roads : and so also as to thirlage. I cannot distinguish between thirlage in a rural and in an urban tenement.

HAILES. If the defender did not know of this thirlage, his case is singular ; and he is the only brewer of that quarter that is ignorant of it. In the course of this century it has been the subject of two decreets *in foro contentiosissimo* ; and it has been supported by different decreets of the Barony-Court. Cranston could not defend Symington against the owner of the thirlage ; for his own author had been a party in the former action, and had failed after a most obstinate defence. Why should the subject in question be called an *urban tenement* ? It is in no other sense an *urban tenement* than that contiguous houses have been erected within the barony of Broughton.

PRESIDENT. It would be dangerous to enter into inquiries concerning the knowledge of the landlord and the ignorance of the tenant. The landlord let the tenement, but he did not warrant against thirlage : he did not warrant against burdens on the materials used in the work. The tenant had only his rent to pay, whether he malted more or less.

JUSTICE-CLERK. The reason why a tenant is not entitled to recur on the warrantice, as to thirlage, is, that the landlord warrants the possession, not the mode of the possession.

KENNET. I have a tenant who distils 12,000 bolls of barley each year, but I do not warrant him from thirlage ; I only warrant the tacks.

On the 14th January 1780, "The Lords found the master not liable."

Act. A. Wight. Alt. G. Ferguson.

Reporter, Covington.

Diss. Monboddo, Covington. [Lord Covington was not satisfied as to the evidence that a thirlage existed; which, however, is a thing of the utmost notoriety.]

1780. January 18. MARGARET, LADY GRAY, *against* MRS ISOBEL BLAIR.

RUN-RIG.

The Statute found not to authorise exchanges to a larger extent than four acres at one place.

[*Fac. Coll. IX. 37; Dict. 14,151.*]

ELLIOCK. The thing proposed is for the advantage of the parties as to the small parcels; but, as to the large parcels, I think that the law will not admit of the division: it is in truth an excambion.

MONBODDO. If the legislature has made a statute for a certain purpose, and if that purpose is not thereby answered, the legislature must make a new statute; we cannot. The only thing which embarrasses me, is the *series rerum similiter judicatarum*, which gives a very wide interpretation to the statute.

HAILES. This course of decisions may be said to have been interpreted by the decision, *Buchanan against Clark*, which put a strict interpretation on the statute. In truth, most of the decisions are not inconsistent with the tenor of the statute. The Court gradually enlarged the interpretation. The former decision was always an authority for enlarging the next. In the case of *Bruce of Kinnaird*, the judges made a wider stretch: they did not mean to hurt Mr Bruce, when out of the country, but they consulted his interest when out of the country; and went farther for his benefit than perhaps they would have done had he been present. It is high time to stop; and it is better to go back into the limited interpretation of the statute than to go forwards into an interpretation which will render all property insecure.

KAIMES. We must not interpret run-rig to mean merely *single ridges*. It relates to cases where agriculture cannot be profitably carried on without division. This, however, will not extend to fields of twenty or thirty acres. I would limit the excambion to five acres.

JUSTICE-CLERK. The legislature could not have meant to allow the division of great parcels; for it does not mention the Court of Session as judges: it never meant to make over large parcels of ground from one heritor to another.

COVINGTON. Such a process of excambion would not have been sustained at common law: the action is on the statute. Run-rig means *interjected lands*, whereby agriculture is prevented from improvements; but when the parcels are large, the purpose of the statute, which is improvement in agriculture, may be attained without division.

On the 18th January 1780, "The Lords found that the Act of Parliament does not extend to large fields, belonging to different proprietors; and remitted