1771. *December* 4.

FRANCES WALLACE DUNLOP, and JOHN DUNLOP, Esq. her Husband, *against* The EARL of STAIR.

No 356.
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.

IN the year 1760, Lady Wallace, the pursuer's mother, as proprietrix of the lands of Lochryan, in the parish of Inch, and county of Galloway, brought a process against the Officers of State, John Dalrymple of Stair, tacksman of the teinds, and others having interest; concluding for reduction of a decree of locality, in favour of the Minister of the parish, pronounced and approved of in the year 1755.

The grounds of reduction were, 1*st*, The decree had been in absence as to the pursuers; 2*d*, The locality had proceeded upon an erroneous rental of the pursuer's lands; 3*d*, The tack, to which Dalrymple of Stair, the tacksman, pretended right, being upon the point of expiring, was no sufficient ground to give him a privilege of exempting his own lands *in perpetuum*, and burdening the rest of the parish.

A proof was allowed the pursuers of the rental of their lands prior to the year 1755; from which it appeared, that the rental, then given in by the Minister, exceeded the true proved rental in L. 92 : 15 : 7 Sterling.

The process lay over till the year 1768, when the Earl of Stair's tack of the teinds had expired; it was then carried on at the instance of Mrs Dunlop, who had been served heir of entail to Lady Wallace, her mother; and a summons of valuation was, at the same time, repeated of the teinds of Lochryan.

In support of the reduction, the pursuer *pleaded*;

1*mo*, Though several of the heritors had appeared in the process, the decree of locality in 1755 had been entirely in absence of Sir Thomas Wallace, his Lady, and their Son, the parties who, for their interest, should have been called; and as that had been the case, they would fall, of course, to be reponed against whatever had been done to their prejudice.

2*do*, The decree was, on two different grounds, erroneous; 1*st*, In the rental given in, and in the decree of locality which followed, no lands or teinds were stated as belonging to Lady Wallace, or her husband. Lochryan was said to belong to Sir Thomas Wallace's son; and in the decree, the stipend was allocated upon the teinds of Lochryan, belonging to Thomas Wallace, son of Sir Thomas Wallace. The defender must accordingly find out where these lands were; for the pursuer's lands, as he died in a state of apparency, never had belonged to the son; 2*d*, The error in the rental was obvious. The random scheme of the rental of these lands, erroneously said to belong to Thomas Wallace, and upon which he was held as confessed, stated them at L. 3490 Scots; but by the proof in the present process, allowing for the proper deductions, they amounted to L. 2376 : 12 : 11; which left a difference or overcharge of L. 1113 : 7 : 1 Scots, or L. 92 : 15 : 7½ Sterling.

No 356. 3*tio*, The prorogated right of tack, by which the Earl of Stair, at the time of the allocation, had a right to the teinds, was now expired; and as he had entirely exempted his own lands, though he had above one half of the parish in property, the locality should now be so altered, as to include these lands, and thereby to lay the burden of the stipend proportionally upon the whole heritors. A tack of teinds was merely a temporary right; and, in various enactments, the right of the tacksman was accurately distinguished from that of the titular. By the King's decreet-arbitral, the right of the tacksman, in the case of a sale, was declared to be conform to the years of the tack to run; and by the act 1617, c. 3. though prorogations of tacks were declared to be valid, it was expressly provided, that the power to grant tacks shall, on the expiry of those current, return and pertain to the titulars. The arbitrary power of allocation, exercised in this case, not only to hold during the subsistence of his own right, but imposed upon the heritors *in perpetuum*, was repugnant to the nature of a tack, and to the intendment of the Legislature. Titulars might thereby find their property, at the end of a tack, entirely alienated without their consent; whilst the benefit allowed to heritors by the Crown, that they shall be proportionally burdened to the extent of their teinds, would be entirely counteracted.

The defender *answered*;

1*mo*, The decree could not be considered as in absence *quoad* the pursuers. One Counsel was marked as appearing for Agnew of Sheuchan, and other Counsel as appearing for the hail other defenders, which must comprehend the pursuers' predecessors as much as any other within the parish; and as they were regularly held as confessed upon the rental given in by the Minister, *sibi imputent* if they were thereby hurt.

2*do*, The erroneous rental given in by the Minister could afford no objection to the decree of locality now under challenge. The intention of that rental was only to give a view to the Court, that there was sufficiency of funds for an augmentation; but neither titular nor tacksman were bound to regard it in the locality. As the tacksman had a right to the whole teinds of the parish, he was entitled to allocate those of any heritor to the full amount. It was of no moment to the heritors, whether they paid their teinds to the Minister, or the titular, or his tacksman; so that, as they had neither title nor interest, it was *jus tertii* to object to an allocation; where, as in the present instance, it was confined within the extent of their teinds.

3*tio*, According to the statute 1693, c. 23. the power of allocation was competent to the tacksman as well as to the patron or titular; and as the enactment made no distinction whether the tack was near being expired or not, it was equally competent for the tacksman to give in a locality, the last as the first year of the tack.

There was no ground for limiting the effect of such locality to the duration of the tacksman's right. The allocation fell to be considered as an exercise of

the privilege, or as an act of possession naturally resulting from a right in the tithes; and as, in its own nature, it was intended to have a perpetual effect, *viz.* to regulate the proportional payment of stipend in all time coming; so, whenever that power was exerted by the person who had the right at the time, the effect must, in every case, be the same. No 356.

Where a patronage was granted for a single *vice*, it would be no objection to the Minister's drawing the stipend in all time coming, that, upon granting the presentation, the patron was divested of his right. Where a right of titularity was granted in wadset, there could be no doubt that the wadsetter would be entitled to make an allocation; nor would any objection arise to it on the wadset's being redeemed.

The Judges were, in general, inclined to question the tacksman's power to make an allocation, to endure after the termination of his temporary right. As they were clear, however, upon the other points in the cause, *viz.* that the proceedings had been in absence, and that there had been an error fallen into, and a wrong done, they did not think it necessary to pronounce a positive judgment upon that abstract point. They accordingly sustained the reasons of reduction of the decree. (4th December 1771.)

For Wallace Dunlop, *W. Wallace.* For the Earl of Stair, *Macqueen, D. Dalrymple.*

R. H. *Fac. Col. No* 113. *p.* 335.

1798. *May* 16.

DR JOHN SMITH and DR GEORGE ROBERTSON *against* The DUKE of ARGYLE.

No 357.
A decree *in foro*, approving of a subvaluation, to which the minister was a party, cannot be called in question by his successor.

PART of the teinds of the parish of Campbelltown, belonging to the Duke of Argyle, were valued by the sub-commissioners in 1629; and in 1772 his Grace got the report approved of by a decree *in foro*.

In 1797, Dr Smith and Dr Robertson, the ministers of the parish, the former of whom had been settled subsequent to the decree of approbation, brought a reduction of it, on the ground that the valuation had proceeded without proof, and without the consent of the minister; 4th February 1795, Fergusson against Gillespie, *voce* TEINDS.

In defence, the Duke founded on the decree of approbation, and contended, that supposing the plea of the pursuers to be otherwise well founded, it was barred by the exception of competent and omitted.

THE LORD ORDINARY "repelled the reasons of reduction."

In a reclaiming petition, the pursuers

Pleaded; The defence of competent and omitted is good only against the parties in the former litigation, having the full administration of their own property, or their representatives; Erskine, B. 4. Tit. 3. § 3. Hence it cannot be pleaded against minors; Bankton, B. 1. Tit. 7. § 89.; Erskine, B. 1. Tit. 7.