

1767. December 15. ANDREW WAUCHOPE of NIDDRY *against* ARCHIBALD HOPE.

REMOVING.

The Act 1555, with regard to Warnings, does not apply to Coal-works.

[*Faculty Collection, IV. p. 121; Dictionary, 13,847.*]

COALSTON. I wish that Mr Hope had been more explicit in confessing or denying facts. The question is as to the Act 1555. It relates to lands, and has been so understood by the practice of the Court: it does not apply to houses in towns or to houses in the country without lands, to soap-works, to coalleries. Removing is not necessary. Notification was given.

MONBODDO. I give great weight to the old decisions; *Hope* gives the true reason of the law, "*because, in coal-works, there are no terms.*" In rural tenements there are *terms* or times for sowing, &c.; so that a tenant must know whether he is to be allowed to reap that which he sows. In a case, 1741, *Lord Darnley*, no warning was required after the expiry of a tack of feu-duties. There is nothing in the objection of Captain M'Dougall not being called, for the tack was assignable, and was assigned.

AUCHINLECK. A case of the same kind occurred within these few weeks. Baird had a tack of the dung of Portsburgh: he pretended that a warning was necessary. This was justly repelled by the Court.

"The Lords remitted to the Sheriff to discern in the removing."

Act. D. Rae. Alt. R. Blair. Reporter, Stonefield.

1767. December 24. CAPTAIN JAMES STEWART *against* ALEXANDER ROBERTSON.

FREEHOLDER.

The Court of Session cannot receive new evidence from a complainer against a judgment of the Freeholders.

[*Faculty Collection, IV. 123; Dictionary, 8874.*]

BARJARG. We cannot touch the first question, because the House of Peers has found that it is *extrajudicial* to determine *in causa*. When there is a preliminary objection, this case is like that of *Sir John Gordon*.

KAIMES. The freeholders did right in not admitting the complainer without evidence.

COALSTON. There is a difficulty here. The practice in the cess-books was, to name the heritor instead of the lands: Is it necessary to require a connected progress to shew what the lands were?

AUCHINLECK. The proprietor for the lands at the time, pays cess, and this fixes what lands are meant; but here Lord Strathmore's valuation is *in cumulo*, so that it does not appear to whom the Laird of Nevay's lands belonged. Suppose that no progress were produced, could we take it for granted that the lands of the Laird of Nevay, in 1683, were the Kirkton, &c.? If we could not, how could the freeholders?

KENNET. A man does not know what objection may be made; he therefore is not bound to come prepared with his whole proof.

PITFOUR. There is an enix declaration in the judgment of the House of Peers on Sir John Gordon's case, which points out the rule for us to walk by.

ELLIOCK. New arguments may be brought before this Court, but not new titles. It matters not what lands the Laird of Nevay had: How does the complainer connect with him?

On the 19th December 1767, "The Lords found that the freeholders did right in refusing to enrol Captain Stewart; and therefore dismissed the complaint, and found him liable in the penalty and expenses."

On the 24th December, they adhered.

Act. Ilay Campbell. *Alt.* A. Elphinston.

1768. January 14. MAGISTRATES of LINLITHGOW, and OTHERS, *against* CHARLES ELPHINSTON of Cumbernauld.

PROPERTY.

Can a River be appropriated, or any of its feeders?

[Kaimes's *Select Decisions*, 331; *Dictionary*, 12,805.]

KAIMES. What is a river? Not only the main stream, but its branches: all partake of the same nature. Neither a river nor any of its branches are to be diverted. Every one has an equal right to them in their course. I distinguish between water *publici juris et privati juris*. *Perennis aqua* is *publici juris*; but *here* I see no proof of *perennis aqua*. There is a lake or morass. If the water in it were to be sacred, so as not to be diverted while within the property of the heritor of the whole circumjacent ground, this would be extending the rights of a river much too far: there is no evidence that this loch is part of the river. The Roman law, and common sense, have connected the idea of a