to consequences in time to come, no man will be able to set his lands without his wife's consent. A liferenter takes with the burden of tacks: there is no such thing as that drawing back of her rights, mentioned by some of the judges. I do not think that, in 1449, it was in the power of the liferentrix to remove tenants. I think that Lord Moray was bound, and, consequently, Lady Moray. This will not hurt singular successors; for the record of tacks is *possession*. The purchaser can always see *who* is in *possession;* if he does not, the blame is his own.

On the 22d July 1772, the Lords found that the late Earl of Moray, notwithstanding the prior liferent, by way of locality granted to the Countess, and her infeftment thereon, had right to grant tacks of the lands, contained in said locality, effectual against the Countess: But found that the *tack* in question, (it should have been writing,) not having been regularly executed by said Earl, is not effectual against the Countess; and, therefore, in so far adhere to their former interlocutor, finding the letters orderly proceeded.

On 5th August 1772, refused a reclaiming petition as incompetent.

Act. H. Dundas, R. M'Queen, A. Lockhart. *Alt.* G. Buchan Hepburn, A. Crosbie, Ilay Campbell.

Diss. Alemore, Gardenston, Kennet, Auchinleck, Stonefield, President.

1772. *February* 21 and *July* 29. JAMES CATHCART of Carbieston *against* JAMES ROCHIED of Inverleith.

JURISDICTION.

Brief of division among heirs-portioners. Sheriff of the county, where the lands are situated, the only judge competent thereto. Advocation from him, when *in cursu* of obtempering a brief at one party's instance, for dividing so much of the common estate as lay within his territory, to the Macers of the Court of Session, as Sheriffs specially constituted for dividing the *universitas* partly situated in another county, in virtue of brieves to that effect issued upon the application of the other party interested in the division—*Refused.*

[*Faculty Collection, VI.* 21; *Dictionary*, 7,663.]

GARDENSTON. The division ought to proceed before the macers, because the lands lie in different counties.

PITFOUR. Such brieves have seldom occurred, because generally estates were limited to heirs-male, and division thereby prevented. It will be difficult to say how the Sheriffs have the power of division, or that the Court of Session ever refused to advocate the brieves of division. If this matter is left with the Sheriff, it will be inextricable; for the whole estates must be divided. One portion in each estate cannot be given to one, and another to another: the different shares of the heirs-portioners must be laid together in one shire or another.

HAILES. The argument for Mr Cathcart contains many things new to me. The notion that, in former times, females were generally excluded, is undoubt-

edly erroneous. It is certain that the brieve of division among heirs-portioners was well known, and that it proceeded before the Sheriff. The estate of Gilmerton, in Mid-Lothian, was divided among the heirs-portioners of Spense of Condie, advocate to Queen Mary. There are, no doubt, many instances of the same kind; but, as they go not into any record, they lie concealed in the archives of private families. There is nothing which requires a total division of all the lands of the co-heirs, wherever situated. The notion of laying the portions together is new: at this rate, if the subject divisible be superiorities and property, the superiorities may be given to one and the property to another. There is no reason for this: the right of each co-heir is the same before division as after it, only the mode of possession is changed. Why leave the ancient track, by advocating from the Sheriff? Why may not the Sheriff of Mid-Lothian proceed in this division? And, when the parties incline, why may not the Sheriff of Berwick proceed in the division within his own shire?

AUCHINLECK. Of late years brieves of division have been rare. Before the Act 16th Geo. II., they were common, for the special purpose of dividing the *old extent*. The question between the parties is, *where* shall the division proceed? In the case of division every man gets his share of every estate. Suppose that part of the estate lay in Orkney or Shetland, part in Mid-Lothian, would you send one of the co-heirs to Orkney or Shetland, and keep the other in Mid-Lothian? How can we compel parties to this? Each must have his share.

JUSTICE-CLERK. This Court is a paramount court; but, in ascertaining the exercise of our powers, we ought to inquire how our predecessors have exercised them. There is no occasion now for us to go farther than they did. There is no evidence of any precedent advocating to the macers. The sheriff is the ancient and the proper judge. It makes no difference that the estates lie in different shires: the division may go on separately. There is no necessity to have recourse to the macers here. The macers might take the aid of a jury in Edinburgh, but how can they do that in Berwickshire. Either party may say, I have a share in each estate, and will not take compensation out of the other estate. Cases may occur where the law will take a latitude in dividing, so as to give different farms to different heirs-portioners; but this is none of them.

BARJARG. There is a contingency in the estates, and therefore it is proper to bring the whole before the macers.

KENNET. It is not necessary to determine the powers of the macers, for there occurs no reason for removing this question from the sheriff.

PRESIDENT. The first question is,—How far is it competent to advocate the brieve of division. I think the advocation is not competent. This is a pleadable brieve, as is observed in Mr Rocheid's memorial. There is no example of an advocation. It is the part of a jury to cognosce upon the brieve of division, judging from their own view of the ground. The brieve of perambulation resembles the brieve of division. In it the Act of Parliament requires a jury, if possible, out of the neighbourhood. How can an Edinburgh jury give their opinion of lands in Berwickshire which they never saw. As to the expediency of this advocation, it would be expedient were Darnchester to be awarded to one, and Innerleith to another. *There* the interposition of this Court might be

necessary; but I see no law for such allotments. By the same rule, when lands lie in different counties, a widow might have the whole lands in one county allotted to her as her terce. If you divide an estate thus, and one of the portions is evicted, where will the redress lie?—against the party whose portion is not evicted?

ELLIOCK. The question here is, as to the competency, not the mode of division. There are good reasons for denying the advocation. The sheriff is the only competent judge. It is said, that, if Inverleith were the only estate, the objection against advocation would be good; but *here* there is another estate, in another county,—Darnchester. What then? May not the sheriff of each county expedite the division of each estate? There is no example of advocation from the sheriff to the macers. It is impossible to follow that plan of giving one estate to the one, and another estate to the other; and yet upon this the advocation is founded.

COALSTON. The distinction between brieves, retourable and not retourable, is not arbitrary: in retourable brieves the macers have a jurisdiction. *There* they have nothing to do but to report the opinion of the jury: In *pleadable* brieves the case is different; for *there* the macers must go to the lands with the jury and assessors: are the macers to give decreet in this case, in their own name, or in the name of the Court? They can do neither. If one half of the estate consisted of houses, the other of lands, would you give the houses to one of the co-heirs, and the lands to another?

On the 21st February 1772, "The Lords remitted *simpliciter* to the sheriff."

Act. J. Montgomery. *Alt.* R. Blair.

Reporter, Stonefield.

Diss. Kaimes, Pitfour.

PITFOUR. I was against the decision, from the analogy of the Roman law in the question *familiæ erciscundæ*. I now perceive that the analogy does not hold. With us, heritage cannot be divided *in cumulo*, because lands may hold of different superiors. With us, every action of this kind must be *communi dividundo*. Mr Cathcart's argument does not apply to pleadable brieves. Expediency has introduced the practice of brieves before the macers in matters not pleadable. There is no reason for delegating to macers the power of all inferior judges. If we delegate to them this part of the sheriff's jurisdiction, why may we not every other part?

MONBODDO. The brief of mortancestry and the brief of inquest were anciently different, as appears from Glanville and Balfour: that of mortancestry was pleadable, that of inquest not.

PRESIDENT. Quoted the decision in Fountainhall, *28th February* 1694, *Lord Arbuthnot*, to show that formerly even the brieve of tutory was not advocated to the macers without cause shown; and said he was glad that Lord Pitfour had now come over to the opinion of the Court, for the very same reasons which he, the President, had formerly suggested.

On the 29th July 1772, "The Lords adhered to their interlocutor of the 22d February 1772."

Act. A. Lockhart. *Alt.* H. Dundas.