1777. *July* 29. SIR ROBERT POLLOCK *against* THOMAS PATON.

TACK.

The effect of a Paction that the Tenant should pay at the rate of L.100 Scots per Acre, in case he should plough more than a certain given quantity.

[*Fac. Coll. VII.* 468; *Dict. App I. Tack, No. IV.*]

MONBODDO. A stipulation for an *interesse* is here liquidated, and the Court cannot interpose.

ELLIOCK. This is plainly a conventional stipulation, " If you let the land remain in grass, you shall pay so much,—if you plough it, so much more."

GARDENSTON. This is not a *penalty* but a *paction*: the clause does not properly stipulate a rent. It would be ruinous to the improvement of the country were such clauses held elusory.

COVINGTON. I do not well know the foundations of the *nobile officium* of the Court of Session; but this is certain, that by it the Court does modify penalties. This covenant is calculated to elude the *nobile officium* of the Court. If the L.100 Scots bore any proportion to the value of the subject, it ought to be found exigible; but that is not the case, and therefore the provision is penal, just as if L.100,000 had been stipulated. The argument of the landlord concludes for L.100,000, if that had been mentioned, as much as for L.100 Scots.

BRAXFIELD. I have often thought of this question, and was clear in my determination. Here there is a lawful covenant, and parties must be bound by it. Parties are entitled to put a *pretium affectionis* on their property. It is not reasonable to restrict this to the quantum of patrimonial damage. When we speak of equity, there is a great difference between an obligation *aliquid præstare* and *aliquid non facere*. As to the first, a court of equity might be apt to interpose, because a man, through accident or misfortune, might be prevented from fulfilling; but as to the second, when I say, " You shall not do so or so," is there, or can there be any accident or misfortune that may prevent the fulfilling of that contract?

JUSTICE-CLERK. If the *nobile officium* were to interfere here, the consequences would be destructive to the country. If the estimate had been absurdly high in the case of ploughing up the grass, the court might interpose to render the bargain intelligible.

PRESIDENT. The case is simple. There is no penalty, for there is no transgression. The man is allowed to plough, and he does plough: let him therefore pay, according to covenant. A master may let his ground under any conditions not reprobated by law. If the claim is not held good, how can tenants be kept to their covenants?

On the 29th July 1777, " The Lords decerned for L.100 Scots per acre

with deduction of the rent corresponding to each acre, according to the tack;" which they modified to twenty shillings per acre.

Act. Ilay Campbell. *Alt.* G. Wallace.

Reporter, Mr David Dalrymple of Westhall, Lord Probationer.

1777. *July* 29. EARL of MORAY *against* MISS ANNE BRODIE of LETHEM.

PATRONAGE.

Alternate Right to present.

[*Fac. Coll. VII.* 442; *Dict.* 9937.]

HAILES. When a parish is made up of parts taken from two old parishes, the patrons of the old parishes will be presumed to have a vice-patronage in the new one. That the quantity taken from the one parish happens to be a little larger than what is taken from the other will make no difference; for indeed it is scarcely possible that the parts should ever be exactly equal, yet possession may make a difference, and establish another rule. Here there is pleaded for Lord Moray a possession of 150 years; but when that possession comes to be canvassed, it appears that he has had no more possession than if he had had only a vice-presentation. The first opportunity of presenting occurred in 1665, and Lord Moray presented; the *second* in 1670, and the Bishop, not Lord Moray, presented, probably because Lethem, a violent republican, did not choose to interfere in the settlement of an episcopal minister; the *third* in 1752, when Lord Moray presented, as was his turn at any rate, and *this* under a protest taken by Lethem: and thus his possession proves to be just what Miss Brodie's argument admits.

BRAXFIELD. Where a new parish is composed of two old ones, having different patrons, the rule is, that the patrons of the former parishes shall have the alternate patronage. A considerable part was taken from Rafford, where Lethem had a right: possibly, if only an inconsiderable part had been taken off, there might have been a difference. The question is, Whether is Lethem's right cut off by the negative prescription, while Lord Moray's is established by the positive? For this, two things are requisite,—a title and possession. Neither of them is here. I cannot presume, without evidence, that a person without a title as sole patron, did present as sole patron. It is plain that Lord Moray did not present in 1670. Lord Hailes has offered a plausible conjecture why Lethem did not present in 1752. When Lord Moray presented, Lethem protested. Neither was there any title in Lord Moray. A right to the patronage of Alves will not give right to the patronage of Kinlos, a parish partly made up out of Rafford. The case of *Hutton* and *Fishwick* does not apply, for *there* the Crown had a good title *jure coronæ*, as presumptive patron to all the churches in Scotland. If the Crown should present for more than 40 years to all the churches in Scotland, it would be universal patron.