PRESIDENT. If the heir of entail had sold, Would not the sale have been good as to the purchaser?

JUSTICE-CLERK. I am no great friend of entails, yet, when they appear in legal form, I will do justice to them; that is, when the necessary clauses are to be found in them, clear and intelligible to every one: which is not the case here.

MONBODDO. The cases of *Hepburn of Keith* and *Sinclair of Carlowrie* are contrary to the opinion given by Lord Braxfield. I think that, in this case, there are clauses sufficient for preventing the estate from being burdened. Is not this implied in the clause, that it shall not be in the power of a creditor to eviet or adjudge?

PRESIDENT. Implied irritant clauses are not to be received. If implication is sufficient, the case of *Carlowrie* was wrong adjudged. This entail is absurd, for it irritates the right, and yet leaves the estate to be sold.

On the 28th January 1779, "The Lords found that the sale must proceed;" altering their interlocutor of ———.

Act. G. Ferguson, Ilay Campbell. *Alt.* J. Belches, D. Rae.

Reporter, Covington.

1778, *December* 3, and 1779, *January* 28. MICHAEL LADE *against* ROBERT and WALTER SCOTT.

PRESUMPTION.

Presumption in favour of Life.

HAILES. This is an exceeding frivolous dispute. Lady Cranston might put an end to it by writing twice a-year, *I am alive, J. Cranston;* but since she will not indulge the defender in this, I do not see how she can be compelled, as long as she has a known domicile in England: were she to go out of the British dominions, I would require some evidence of her being alive. I do not think that the presumption of life to an hundred years is sufficient.

BRAXFIELD. The husband is *in petitorio*, and he must prove the fact that Lady Cranston is alive.

COVINGTON. When Lady Cranston leaves London, she must intimate that she is going to some other place, that so the persons concerned may not lose sight of her.

GARDENSTON. Why may not Lady Cranston certify that she is alive, when by marriage she assigns her right to her husband? Ought he not still to give the same evidence of her being alive which she would have done before, by signing discharges?

KAIMES. I do not see that the purchasers, the defenders, have any interest in this matter: as long as Lady Cranston resides in London, there is no use for a certificate.

ALVA. Lady Cranston's jointure is secured at Crailing: in strictness of

speech, she ought to come *there* to receive it: if that is not convenient, she ought to give evidence that she is alive, that the person whom she has authorised may receive it.

JUSTICE-CLERK. Mr Lade is entitled to draw the annuity, without the necessity of any discharge by Lady Cranston. If it is so certain that evidence must be brought of the annuitant's being alive, it is strange that the demand now made has never been made before: the law presumes that a liferenter, fairly entered to the possession of her annuity, by herself or her assignee, is alive until the contrary is proved. I see no reason for distinguishing this case from that of any other annuitant. The habitation of Lady Cranston is known, and the parties have access to know whether she is alive or not; if any special matter was mentioned that there was a doubt of her being alive, the case might be different. I hope that this Court will not consider a residence in London as a thing as little known as a residence in France or Italy. The case of annuities payable to annuitants by Government will not apply; 1*st*, Because the mode of ascertaining life is required by Act of Parliament; 2d, Because Government cannot inquire into the case of every individual annuitant.

On the 3d December 1778, "The Lords found that Lady Cranston must either concur in granting discharges, or that evidence of her being alive must be produced by certificate from a Justice of the Peace;" altering the interlocutor of Lord Auchinleck.

Act. H. Dundas. *Alt.* A. Elphinston.

Diss. Kennet, Covington, Hailes, Justice-Clerk.

JUSTICE-CLERK. Mr Lade is *in possessorio*, and not *in petitorio*. If Messrs Scotts will say that Lady Cranston is dead, and that her death is concealed, the Court will order an exhibition of the lady.

MONBODDO. By our interlocutor, in attempting to make the law better, we have made it worse. A factor is entitled to levy rents: if the tenant has any doubt of the constituent being alive, he may suspend. What is to be done when a wife is froward, and will not concur in signing the receipt? And what if the Justice of the Peace on whom the interlocutor relies, should not know Lady Cranston to be the widow of the late Lord?

GARDENSTON. There can be no good reason for refusing to comply with the terms of the interlocutor: the very refusal justifies suspicion.

KAIMES. What moves me, is the possibility of playing tricks. Lady Cranston may be locked up for twenty years, and yet the Messrs Scotts cannot swear that there is reason to believe that she is dead.

PRESIDENT. It is not required that they should swear. It is admitted, that whenever there is any reason for suspicion that Lady Cranston is dead, the Messrs Scotts may withhold payment. The statutes requiring oaths as to life, show that this is a legislative power, and not a power at common law.

BRAXFIELD. If the mode laid down in the interlocutor is blamed, I shall agree to any other mode. Messrs Scott are not bound to pay without some sort of evidence that Mr Lade has right to demand payment. Mr Lade's right depends on his wife's being alive: he must satisfy the debtor that he is the husband of the wife at the time of his granting the discharge: as often as

an annuity falls due, he comes to be *in petitorio*. The creditors have an interest to be heard *here*: if Lady Cranston is really dead, it will be no apology for Messrs Scott that they paid *bona fide*.

On the 28th January 1779, "The Lords found that Mr Lade was not obliged to produce Lady Cranston to a Justice of the Peace, without prejudice to Messrs Scotts' withholding payment, on showing reasonable cause of belief that Lady Cranston is dead;" altering their interlocutor of ———.

Act. D. Rae. *Alt.* H. Dundas, H. Erskine.

Diss. Kaimes, Gardenston, Stonefield, Ankerville, Braxfield.

1779. *January* 29. JOHN CROOKS and OTHERS *against* JOHN TAWSE.

SOCIETY.

Creditors, in debts contracted by *socii* in a joint adventure, are preferable on the proceeds to the particular creditors of either of the *socii*.

[*Fac. Coll. VIII.* 113; *Dict.* 14,596.]

BRAXFIELD. This is not the case of a copartnery, but of two persons having a joint right in an area, and agreeing to build jointly: the building is the property of both *pro indiviso*: each might have pursued a division; but, instead of that, they agreed to sell. The price comes in the place of the subject. This is different from the case of a company, where the right of each individual is a share in the *universitas*. The method of affecting this subject is by an adjudication of each share. When a man makes furnishings for a building, he has his employer personally bound, but he has no real lien on the subject.

ELLIOCK. I never understood that there was a copartnery here, but merely a common property: this was so much the case, that, when the parties sold a storey, they divided the balance.

KAIMES. The money laid out is *in rem versam* of the partner, and consequently of his creditors.

GARDENSTON. Copartneries may be carried on in every thing that is the subject of industry. When a joint purchase of an area is made, and a house built at common expense, this is a copartnery. Creditors trust the builders on the faith of the adventure; but I think that there was an end of the adventure by the sale of the subjects.

BRAXFIELD. *That* will not do; for, if once there is a copartnery established, the creditors will have right to the funds of the company, even after its dissolution.

MONBODDO. The question, here, is not with respect to a common *property*, but with respect to a common *business*.

JUSTICE-CLERK. I admit Lord Braxfield's principles, but I deny their application to the present case. Two tradesmen, engaged in building a tene-