1769. *March* 1. EARL of GLENCAIRN *against* The MAGISTRATES of KILMARNOCK.

IMPLIED ASSIGNATION.

A baron, feuing out his barony with baron-bailie powers, conveys no privilege to the vassal which is not specially granted in the feu-right.

[*Faculty Collection, IV.* 167; *Dictionary*, 6313.]

MONBODDO. There seems no difficulty either in the law or the fact. This burgh has nothing but what the superior gave: he did not give the power of naming clerks; besides, he himself has constantly exercised that power. The nomination of clerk is not inherent in jurisdiction.

GARDENSTON. I think that the grant of a burgh of barony, and of its jurisdiction, implies a power to name clerks. This is the most natural construction that can be. A judge may be his own clerk if he pleases, and may write his own judgments. The only thing that can occasion difficulty is the practice; but practice cannot take away an inherent right. I am glad to see this little republic asserting its privileges.

PITFOUR. This right of nomination *inest naturæ rei.* An exception may be introduced *rebus ipsis et factis*; but nothing of this kind occurs here: there has been an acquiescence, and no more.

KAIMES. A judge may write his judgment himself, or name another to do it; but the powers of the clerk are different. He is to certify the judgment by an extract, which the judge cannot do. When a man voluntarily gives away any right, I will not suppose more given away than expressed. I do not see any clerk ever named by the magistrates.

AUCHINLECK. The grant here was not voluntary or gratuitous, but for a valuable consideration: the town purchased its freedom from the superior. Clear that, when a jurisdiction is given by the Crown, a power to name a clerk is implied. If the superior here has the power of naming, he may refuse to name, and so render the jurisdiction elusory. I think little of the practice; for the superior and the town were in good understanding together, and the town's agreeing to employ the baron-clerk was for private conveniency.

PRESIDENT. A community may exist without this power: thus, in this very burgh, the superior, upon the matter, has the nomination of the magistrates. The commissions in process bear expressly to "be clerk to the town," and the town settles a salary upon the clerk so named. If the superior should neglect or refuse to name a clerk, the town would, from the necessity of the thing, have a power of naming.

JUSTICE-CLERK. When a jurisdiction is granted by the Crown, a power of naming officers for extricating that jurisdiction is also granted, from the nature of the thing; but, here, a baron grants a jurisdiction over part of his territory, and says nothing as to the nomination of clerk. The question is, Whether is

that implied? I observe, that particular powers, as to naming some officers of less importance, are expressly granted. The superior might choose to retain the nomination of clerk; because there was an intimate connexion between the jurisdiction bestowed and the jurisdiction retained. The meaning of parties is ascertained by the invariable practice.

On the 1st March, 1769, "the Lords found the right of naming the clerk to be in the Earl of Glencairn."

Act. W. Campbell. *Alt.* D. Dalrymple.

Reporter, Auchinleck.

Diss. Pitfour, Gardenston, Auchinleck.

1769. *March* 7. ROBERT RUTHERFORD *against* WILLIAM and THOMAS BELLS, &c.

ADJUDICATION.

An adjudication sustained as a security, notwithstanding a *pluris petitio.*

[*Faculty Collection, IV.* 173; *Dictionary*, 117.]

AUCHINLECK. There are three separate accumulations, but the error is only in one. I would restrict as to the heritable bond: every thing else is regular enough.

PITFOUR. It is averred that the only intromissions, not allowed in accounting, were after the summons. I doubt as to cutting down all adjudications *in totum*, on that account.

GARDENSTON. When a creditor takes a rigorous decreet of adjudication, he must beware and not wilfully demand more than is due. Here there is evidence of a recent payment; and that this payment was after the summons raised, is so much the worse.

KAIMES. The case here is with a debtor, not with competing creditors. Where there is a malicious *pluris petitio*, the Court may go far in way of punishment. The circumstances of this case show that there was no intention of a wilful *pluris petitio*. I would, however, take away all accumulations.

PRESIDENT. The interlocutor is rigorous: there was no intention to deceive. The adjudication must subsist as a security for principal sum and annualrents, from the date of the adjudication.

On the 17th March 1769, "the Lords found that the adjudication quarrelled must subsist as a security for principal sum and interest, from the date of the adjudication;" altering Lord Gardenston's interlocutor.

Act. W. Nairne. *Alt.* J. Swinton, jun.

Diss. Gardenston, Kennet.