1771. *July* 31. EDWARD TYSON *against* ALEXANDER CUNNINGHAM, &c.

## ADJUDICATION.

**Effect of Objections thereto in a Ranking.**

[*Faculty Collection, V. p. 295; Appendix I.; Adjudication, 5.*]

HAILES. The only purpose of this adjudication was to draw L.200 sterling out of the subject, to the prejudice of Dunbar's creditors: The debt had been due little more than a year, when the adjudication was deduced without any diligence. It was preferable to all Dunbar's creditors. The only preferable debt to it was Janet Fleming's, and that debt was so small, and the fund of payment so large, that no one would have thought of adjudging merely for security.

COALSTON. There was a *summum jus* in leading this adjudication. A creditor may adjudge for his security, and we cannot enter into the question whether that measure is necessary or not; but I would lay hold of the objection as to the summons being too soon called, and restrict the adjudication.

PRESIDENT. If you sustain the adjudication in this case, for penalties, you must in every one; for never was there an adjudication deduced upon less occasion.

On the 31st July 1771, "The Lords restricted the adjudication to principal, annualrents, and necessary expenses accumulated at the date of the adjudication;" altering Lord Gardenston's interlocutor.

*Act.* Ilay Campbell. *Alt.* R. M'Queen.

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1771. *June* 21. COLIN ALISON, Wright in Edinburgh, *against* ELIZABETH FORBES and ANNE and MARGARET ALISONS, his Daughters.

## PROOF.

**Trust, how competent to be proved.**

[*Faculty Collection, V. p. 299; Dictionary,* 12,760; *Supplement,* 5—630.]

MONBODDO. The heir of a party may be examined, as well as the party himself, for proving the trust. Witnesses may be examined, not for proving the trust, but for proving circumstances which may infer trust.

GARDENSTON. I would adhere to the strictness of the law. There is no favour here, for the alleged trust is founded on an avowed fraud. A proof of fraud, in matters of trust, has been allowed by the evidence of witnesses, where the fact was recent, and alleged to have happened at a public roup, where there could be no writing; but this case is totally different.

JUSTICE-CLERK. The case of *Loch*, and the others mentioned, related to what passed at a public roup. This cause is not a favourable one. A fraudulent concealment is averred by the pursuer.

ALEMORE. I incline to adhere to the words of the statute. Before the statute 1696 was enacted, many questions arose as to trust-rights: the legislature was obliged to fix down a rule. Few questions of that sort have occurred as to the proof of trust-rights since that time, and consequently we do not feel the inconveniences of the former practice. Parties ought to know the law. If they neglect the law in making their bargains, they are hurt by their own neglect, not by the judges who apply the law.

KAIMES. I never could reduce the exceptions introduced as to the statute 1696 to any certain rule. I never saw a case more directly under the statute than this.

PITFOUR. I would allow a proof. There is no difference between a man and his heirs. Fraud alleged in the original trust is no reason for the heir of the trustee keeping the estate. Here there is already some evidence in writing. This is sought to be confirmed by the testimony of witnesses.

PRESIDENT. If Thomas Alison were alive, Colin could only prove the trust by his oath, or by writing, not by circumstances. How can the death of Thomas alter the nature of the proof. The cases of *Maxwell*, *Balbirnie*, and *Loch* are not in point: they all related to bargains of land which were brought into judgment *de recenti*.

AUCHINLECK. The Act 1696 was intended to prevent disputes both as to the constitution and extinction of trusts. In this case it is competent to bring evidence by the oath of parties, and by that alone.

ELLIOCK. I had no doubt that the heir might be examined; but that was not brought before me.

On the 21st June 1771, "the Lords found a proof by witnesses not competent, without prejudice to take the oath of the heir;" adhering to Lord Elliock's interlocutor.

*Act.* J. M'Laurin. *Alt.* D. Armstrong.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered:—]

1771. *July* 31. COALSTON. The difficulty arises from the words of the statute 1696. If they are too strictly interpreted, the interlocutor must be supported; but this interpretation has not been observed in former judgments. An entry in Thomas Alison's books would have been as valid if it had acknowledged the trust, as a back-bond would have been; and yet the Act says nothing as to such mean of proof. Thus also, if the defenders had been major and acknowledged the trust, relief would have been given. Facts and circumstances

have been found sufficient to establish a trust, as in the case 1762, *Earl of Lauderdale* against *Sir David Cunningham*, and again in a case of *Mr Alexander Ross*, the solicitor, where, without back-bond, facts and circumstances were found sufficient. Here it is already proved, *scripto*, that Colin Alison had levied the rents.

PRESIDENT. The case of *Sir David Cunningham* was attended with many strong circumstances, and it went as far as could well be gone. The case of *Alexander Ross* was different; for there *Ross* swore, but in such a way that the Court would not believe him.

ALEMORE. I must go upon the words of the Act of Parliament. When the words of an Act of Parliament are clear, I will not regard a decision to the contrary, if there is any such.

PITFOUR. The article for repairs, in Alison's books, is a strong written adminicle of the trust.

HAILES. It seems to me that that article is misunderstood by the parties. It runs thus—" To cash paid to Thomas Milne, for my houses in Conn's Close, L.2: 17s. sterling. *Nota*, There is one shilling and seven-pence *mine* for the shop-shade, &c." If Thomas Alison meant, as is admitted, that Colin should have the liferent of the house in Conn's Close, it was natural for him to separate the expense of the repairs on them from the expense of the repairs on subjects wherein Colin was to have no liferent; and this seems to be the sense of the entry.

MONBODDO. A trust may be inferred from the *res gesta*, without declaration, back-bond, or oath of party. Facts and circumstances may be sufficient if proved by writing; but if you allow them to be proved by witnesses, you circumvene the statute. *Here* even a direct proof of the trust is sought by witnesses. I do not oppose an examination of the parties.

JUSTICE-CLERK. Lord Hailes's observation is strong. Had the books contained an acknowledgment of the trust, it would have been good; but that is not the case.

PRESIDENT. I doubt whether the parties may be examined previous to oath; for the statute 1696 requires *oath* singly.

PITFOUR. This was done in the case of *Sir James Wood of Bonnington* and *The Earl of Northesk*.

COALSTON. Although the heirs were infants at the time of the transactions, they may be examined as to what they heard their father say.

On the 31st July 1771, " the Lords refused to allow the proof *hoc statu*, but remitted to the Ordinary to examine the heirs;" varying in some form the former interlocutor.

*Act.* J. M'Laurin. *Alt.* D. Armstrong.