ed to bind his son. That difference was not then known which has been since invented between *institute* and *heir*. The judgment of the House of Peers, in the case of *Duntreath*, must be our rule. Since we cannot root up entails, we must satisfy ourselves with lopping off their branches.

KAIMES. I cannot suppose that the maker of the entail meant to bind his son, for he has not said so. Even a separate writing under his hand would not be sufficient. Intention may go far in equity as to matters of gift, but not as to penalties such as burdening is.

HAILES. I voted for the interlocutor of this Court in the case of *Duntreath*, not so much on the merits of the cause as on account of a former decision of the Court; but since the House of Peers has overthrown this, I readily agree with their judgment as corresponding with my own.

On the 8th July 1777, "The Lords decerned and declared in terms of the second conclusion of the libel."

Act. D. Rae. *Alt.* A. Murray.

Reporter, Justice-Clerk.

1777. *July* 8. ARCHIBALD MACARTHUR STEWART *against* JOHN BANNATYNE and OTHERS.

TRUST—PROOF.

Trust allowed to be proved by facts and circumstances.

[*Supp. V.* 631.]

HAILES. I would not wish to impinge on the Act 1696, which is a valuable statute. But this case falls not within the Act. The right of the defenders cannot surely be better under a general disposition than if the L.627 had been specially conveyed by Mrs Stewart. Now, even in this last case, I think that the proof was proper, and is convincing, for it tends to show that Mrs Stewart could not, without fraud, convey the L.627. Besides, there is written evidence coinciding with the depositions of witnesses, and proving that, *here*, in the sense of all parties, there was no real conveyance, but merely a trust.

COVINGTON. Independent of the circumstances of the case, Mrs Stewart was creditor to her brother, and it is impossible to suppose that a donation was meant.

BRAXFIELD. The Act 1696 is declaratory of what was law before. It is not competent to establish a trust by the evidence of witnesses; for the common law says that writ shall not be taken away by the evidence of witnesses; and this is founded on good sense and the reason of things. But witnesses may be allowed to prove facts sufficient to show that a writ has been taken away by payment. Even taking the Act of Parliament literally, I think that there is proof by writing here. There are no less than six docqueted accounts after the assignation. This plainly shows that Mrs Stewart did not understand herself to be a

creditor in the L.627. On the other ground, stated by Lord Covington, the presumption in law is, that the assignation was given in payment.

PRESIDENT. There is real evidence of the trust arising from the writings as well as from parole evidence.

GARDENSTON. Slight evidence by writing, joined to strong parole evidence, will remove this case from the Act 1696.

On the 8th July 1777, The Lords found that there is sufficient legal evidence, from the writings produced, the parole evidence, and all the circumstances of this case, that the assignment by Blackbarony to his sister, Mrs Mary Stewart, was granted as a trust in her person, and for his behoof, that the debt might be kept up against the entailed estate; adhering to Lord Gardenston's interlocutor.

Act. Ilay Campbell. *Alt.* A. Crosbie.

1777. *July* 9. WILLIAM JOHNSTON and OTHERS *against* GEORGE WARDEN.

HYPOTHEC.

Extent of preference for repairs under a jedge and warrant.

[*Supp. V.* 479.]

HAILES. The controversy here appears to be occasioned by two different things being vulgarly called by the same name of jedge and warrant. No man can touch his own house, in the way either of demolition or reparation, without the authority of the Dean of Guild, and this authority is called jedge and warrant. Any thing done in consequence of this authority is legally done; but the persons employed by the proprietor either to demolish or repair, have no hypothec on the subject,—they are just in the state of common tradesmen. There is another thing called a jedge and warrant: When the Dean of Guild, as an officer of police, empowers certain persons to execute work about a house, they have a hypothec, or preferable right, for payment of their labour, and indeed they would not work without such privilege, for the Dean of Guild, acting as a judge, could not be personally bound in payment.

BRAXFIELD. Attempts have been made of late to bring back upon us a part of the Roman law, which is not consistent with the commercial interests of this country. Here there is a jedge and warrant granted to the proprietor: it is absurd to say that the proprietor can have a real lien. Although a person, other than the proprietor, should get a real lien, by a jedge and warrant, that lien will not go to the tradesman whom he employs.

GARDENSTON. The jedge and warrant is nothing more than an order of the Dean of Guild to the proprietor for building consistently with the police of the burgh. Lord Hailes has properly stated the distinction.

KAIMES. This point has not even an appearance.