1771. *July* 26. ANDREW FERGUSSON *against* JAMES SMITH and OTHERS.

BANKRUPT.

Evidence of Absconding.

[*Woodhouslee's Dict. III.* 54; *Morrison's Dict.* 1,109.]

PRESIDENT. I doubt whether a search implies *absconding*, and whether *insolvency* must be presumed without proof.

GARDENSTON. In the case of one *Stewart* from Perth, a search was found to be evidence of absconding.

COALSTON. It is a good evidence, *prima facie*, but may be redargued. As to insolvency, the defenders have taken from the debtor all his goods they could find, and offer a proof of other effects.

On the 26th July 1771, the Lords "found that the debtor fell under the Act 1696;" adhering to Lord Barjarg's interlocutor.

Act. A. Rolland. *Alt.* D. Armstrong.

1771. *July* 30. PATRICK GRAHAM and OTHERS *against* SIR ROBERT POLLOCK.

CLERK OF SESSION.

Security of the Clerks of Session over papers produced in Process, for payment of their Fees.

[*Facts in Supp. V.*, 416.]

COALSTON. By the constitution of this Court the clerks have only dues of office, no salaries. Although processes are transacted, they have still right to dues. For this end they have two means, retention of the pieces, and a claim of payment against each party for one half. The claim is for trouble, and that claim lies, although no writings are produced to found an hypothec.

PRESIDENT. I doubt as to some of these principles: the hypothec is total. If one of the parties becomes bankrupt, are the clerks to have only one-half of their dues?

GARDENSTON. The demand is, that the clerks be ordained to give up the pieces. As there has been no extract taken, this cannot be done.

ALEMORE. Till the price of extract is paid, the clerk must keep the pieces. Let the petitioners pay, and then bring an action against Sir Robert Pollock for his share of the expense, if such share is exigible by them from him.

On the 30th July 1771, "the Lords found the clerks entitled to retain the pieces, till a certificate of an extract is produced; and therefore refused the petition."

Act. J. M'Laurin. *Alt.* Ilay Campbell.

1771. *January* 22. ALEXANDER GORDON of Culvenan *against* JEAN MACCULLOCH, JAMES DEWAR of Vogrie, &c.

TAILYIE—JUS QUÆSITUM TERTIO.

The proprietor of an estate having duly executed an entail proceeding on a mutual contract, in his own favour, as liferenter, and to his institute as fiar, with a substitution of heirs; and the deed having been recorded, and an investiture expede thereon,—the said liferenter, and fiar, cannot, by their joint act, alter or revoke the entail to the exclusion of the substitute heirs.

[*Faculty Collection, V.* 300; *Dict.* 15,579.]

AUCHINLECK. The entail in question is nearly as foolish as old *Barholme's* entail: but, if people will play the fool, there is no help for it. We must judge according to the rules of law. When the maker of an entail has reduced himself to the state of a liferenter, and when the institute is reduced to the state of a limited fiar, they can do no more jointly than they can do severally. We might as well say that the institute and the next in the entail, may, by concurring, disappoint the entail. This indeed is more specious than the present case; for these two have a greater interest in the subject than the liferenter and institute have. Many decisions are quoted, but I wish to have seen principles. As to the case of *Lindores*, the entail there was not executed: it lay in the hands of the consignatar for the behoof of all concerned; and, therefore, first of all, for the behoof of the entailer himself. The case of *Balnagown* was determined, as the judgment bears, upon circumstances. How can we find that two men, under fetters, become free by joining together.

MONBODDO. Every settlement of succession by the law of Scotland, however different in form, is of a testamentary nature. It is of the essence of a testament that no man can so bind himself as not to reserve the power of altering. That a deed should be a testament, and yet out of the power of the testator, is a contradiction. Upon the supposition that the entail in question had been the sole work of the father, it would have gone for nothing; but the difficulty is, that the interest in the subject was divided betwixt the father and the