ment of a year's rent, whether the settlement be by a sale or by a gratuitous disposition. The difficulty, in this case, is, that the person who demands the entry is also heir of investiture. It matters not whether the form of the title is singular or not. Strip the deed of substitution to strangers, and the superior might be obliged to grant a charter even with prohibitive clauses, &c. The superior does not suffer by the line of succession being continued. The heir must insert the whole substitutions. He is allowed to do that, but the statute 1685 does not hurt the interest of the superior; on the contrary, it has reserved it. *Query*, May not the superior throw in a reservation? If he does not, he cannot afterwards claim, for the granting of the first charter is an enfranchisement of all the subsequent disponees.

PRESIDENT. How can the vassal be obliged to pay for an event which may never happen? Suppose that an entail should not prohibit to sell, then the composition ought to be less. By what rule are we to walk? The Act of Parliament, 1685, excepts *casualties*, but that can only be understood of *casualties* actually existing. If the decision of *Lockhart of Carnwath*, pronounced with great unanimity, did not stand in the way, I should think it very reasonable that, whenever the line is cut, the casualty should be paid.

COVINGTON. It would be hard to anticipate the right of a future superior by decreeing the benefit *now*, and to burden the present heir with what a future disponee should pay. I do not think that the single decision in the case of *Carnwath* is sufficient to establish the law.

JUSTICE-CLERK. I am perfectly clear that the superior is not entitled to exact from the present heir.

GARDENSTON. The decision of *Carnwath*, if held as law, gives great ground for the present demand; for the superior demands from the heir a year's rent, because, by giving the charter, he exempts the future disponees.

On the 4th July 1777, The Lords found that Mr Mackenzie, the pursuer, is not entitled to a composition at present; reserving any claim that the superior may have on the succession opening to an extraneous substitute, and to the said substitute his defences as accords.

Act. A. Elphinstone. *Alt.* Ilay Campbell.

Reporter, Justice-Clerk.

1777. *July* 8. SIR WILLIAM GORDON *against* MRS LINDSAY HAY.

TAILYIE.

The institute, or disponee, ought not, by implication from other parts of the deed of entail, te be construed within the prohibitory, irritant, and resolutive clauses, laid upon the heir of tailyie.

[*Faculty Collection, VII.* 452; *Dict.*, 15,462; *App.* 1, *Tailyie, No.* 2.]

COVINGTON. I have not the least doubt that old Sir Robert Gordon intend-

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