

1771. July 3. HUGH DALRYMPLE of Nunraw *against* The EARL of EGLINTON.

## TEINDS.

In a process of valuation of lands, let at an advanced rent, payable in future,—the tack-duty payable when the action is raised and proof taken, held to be true rental.

[*Fac. Coll., V. 277 ; Dictionary, 15,759.*]

MONBODDO. By the statute, *rent paid*, not *rent payable*, must be the rule. There is no dependance to be had upon new rents, especially when not yet exigible.

PITFOUR. There are no words in the statute, 1633, which point at any other rent but that constantly payable.

HAILES. I do not approve of the pursuer's hypothesis,—that the commissioners taking a proof under the authority of this Court, are to be considered as the sub-commissioners of the last century. Nevertheless, I am clear that this case cannot be differenced from that of the *Duke of Argyle* and the *Heritors of Dollar, July 1770*. That case is referred to by the one party, and not contradicted by the other.

JUSTICE-CLERK. There have occurred various cases, within these twelve-months, where even payment of a new rent for a year was disregarded.

On the 3d July 1771, "The Lords Commissioners of teinds found that the old rent must be the rule, and decerned accordingly."

*Act. D. Dalrymple. Alt. A. Lockhart.*

N. B. Sundry specialties were urged, rendering Mr Dalrymple's plea more favourable; as that the additional rent was partly occasioned by his objection to lime, inclose, &c.; but the judgment of the Court went entirely on the general point.

1771. July 17. THOMAS MANSON *against* JOHN ANGUS.

## BANKRUPT.

Reduction upon the Act 1696, c. 5.—Deposition of a Bill of Exchange, in security of a former debt, falls under the statute.

[*Faculty Collection, V. p. 280 ; Dictionary, Appendix I. ; Bankrupt, No. 7.*]

MONBODDO. The being of the statute, 1696, depends upon our determination in this case. If we give countenance to Angus's practice, a door will be

opened to disappoint the purposes of the law. A creditor will not take an assignation to a bond due to his debtor; for that would be taking security, in terms of the Act 1696; but he will take possession of the bond itself, retain it till due, and then go with his debtor to the debtor in the bond: his debtor receives payment, and pays the money over to him. Such would be the consequences of Angus's practice. If I could not find principles I should not judge from consequences. I am here clear, upon principle, that there was an impignoration, making Angus preferable to an after assignee. If here there was nothing more than the *possession* of an instrument of debt, I would be clear for Angus: *here* there is more,—a paction of impignoration in security. This would have been good against Farquhar pursuing an exhibition, and also good against Farquhar's creditors. His creditors arresting could not be in a better situation than himself. (There are no pledges now of heritable rights. Heritable bonds, &c. are only rights in security: these rights of security are said, by an Act of James III. to be a novel invention.)

GARDENSTON. I hold that *here* there is a *legal* though not an *actual* fraud. Were I to write a treatise upon the maxim of the Roman law, that *fraus est ubi aliud agitur, aliud simulate concipitur*, I could not find a more apt illustration than the present case. What was truly done, was to get the benefit of indorsation: What was meant to be done, was to avoid the retrospect of the statute.

PITFOUR. Payment falls not under the Act 1696, and indorsation in security does. Many a fair deed may be struck down by the Act 1696, for no man can foresee the future condition of his debtor. The bill was indorsed, and in Angus's hands before payment, no matter for how short a time: as to that, the law makes no difference.

KAIMES. The question, Whether, here, a *security* was meant or a *payment*? There is no law in any country with such a retrospect as that in the Act 1696. Here the transaction has every mark of a payment: the first step was to demand payment; the last to make payment. If *this* is not considered as payment, what will become of draughts on the bank which are not immediately paid?

AUCHINLECK. I cannot subscribe to the opinion first delivered. Can an impignoration of a bill have the effect of creating a security on the debt therein contained, any more than an impignoration of titles can have the effect of creating a real right on lands? The question here is, Was payment or security meant? If the bill was indorsed, it must have been originally intended as a security. This case comes within the Act 1696.

COALSTON. Were Angus to prevail, the Act 1696 would be eluded. Impignoration is not sufficient to disappoint creditors, yet the transaction falls under the sense of the Act: the Act, being to prevent frauds, must be liberally interpreted. An indorsation in payment would fall under the Act, were it not for the decisions to the contrary. I should have thought that voluntary payments fell under the Act: a *virtual* disposition falls under the Act, as much as an *actual*. Supposing that the bill was not indorsed till after it came into Angus's hands, it still remained in Angus's hands; and so the creditors, Johnston and Smith, understood the fact.

JUSTICE-CLERK. I think that actual payments are rightly found not to come within the statute: the contrary doctrine would be fatal to commerce. No man has his estate in ready money laying by him. There is no danger in suffering a man to pay his just debts, in so far as he has money by him; but the law does not suffer him to touch upon his securities. The line therefore is well drawn by our decisions, and I will keep strictly to it. The case of draughts on the bank does not apply: *there* the holder of the draught gives up his voucher of debt; *here* the bill was not given *in solutum*, but as a security, no matter how short the security was to last.

KENNET. This was no ready money payment: the receipt given by Angus is sufficient to fix my opinion. Angus gives a receipt for two bills, one of them at a distant day of payment, and far exceeding the sum due to him.

PRESIDENT. I do not think that deposition of a *nomen* is effectual by the law of Scotland, nor that an actual payment falls under the Act, nor that a draught on the bank or on a factor falls under the Act, for that such draught is supposed to be payment. This case however falls under the Act, for a security was meant.

On the 17th July 1771, "the Lords sustained the reason of reduction founded on the Act 1696;" altering Lord Elliock's interlocutor.

*Act.* Ilay Campbell, A. Lockhart. *Alt.* R. Blair, R. M'Queen.  
*Diss.* Kaimes.

1771. July 18. WILLIAM TOSHACK *against* ALEXANDER SMART.

#### PUBLIC OFFICER.

Statute 1696, cap. 26.—In the election of a Parochial Schoolmaster, Heritors who, by their title-deeds, are liable in payment of cess and parish burdens, have a title to vote, whether their lands stand separately valued on the cess-roll or not. The liferenter, in the right of voting, preferred to the fiar.

[*Fac. Coll. V. 286; Dictionary, 13,134.*]

AUCHINLECK. It is a strange idea that no man can have a vote in the election of a schoolmaster unless his valuation is separate in the cess-books. In the choice of a member of Parliament, a certain valuation is required to entitle a man to a vote. In the division of commonties, it is necessary to know the valuation, in order to ascertain the portion to be allotted to every one having interest: *here* it is admitted, that the voters are heritors, and that they paid cess. No more is required.

KENNET. The rule is well laid down in the case of *Kirriemuir*.

COALSTON. I even think that the same ought to be the determination, although the authors of the parties had been bound to relieve them of the cess. All are entitled to vote who have a valued rent.