

1771. December 13. ADAM WILSON and OTHERS *against* DAVID JOBSON.

TITLE TO PURSUE—SOCIETY.

An action, sustained at the instance of a majority of private individuals, who had united themselves for religious purposes, into a society called the Antiburgher Associate Congregation of Dundee.

[*Faculty Collection, V. 354 ; Dictionary, 14,555.*]

COALSTON. Any number of men may enter into society for all lawful matters, and may act as a copartnery; but I doubt how far they can associate themselves into a corporation with a perpetual succession. Royal boroughs are corporations aggregated, in the language of the law of England. What are we to understand to have been the congregation? I do not see evidence of what it consisted. We see the contributors; but there may have been members of the congregation who were not contributors. This case is not so narrow as *Gibb's* case; for *there* the right was in subscribers who were known: *here* in a congregation of which we see not the members.

PITFOUR. In this case action lies: there is no body-corporate, but we must enforce *bonam fidem*. A trustee who has undertaken a trust must fulfil it. Individuals who are no body-corporate may acquire a subject in name of a trustee. *Here* a description used of congregation, which is sufficiently explicit.

AUCHINLECK. I never heard of any society which professed to hold that a man might violate his trust. The pursuers are a majority of the original society, and therefore have a title to declare the trust.

HAILES. The pursuers assume a style which a court of law cannot acknowledge:—"Commissioners constituted by the associate congregation of Dundee, subject to and under the inspection of the Associate Synod, and other judicatories, in a regular subordination through Scotland." This sounds odd. I know of no judicatories ecclesiastical but those in the Church established by law. I do not see evidence that the pursuers are a majority of the original society. There must have been many persons who were of the congregation, though not contributors,—persons, who, from conscientious scruples, seceded with empty purses. There is no difficulty of knowing *who* were the members of the congregation: they who partook of ordinances under the ministry of Mr Scott. His roll of communicants in 1764 will go nigh to ascertain this with the utmost exactness.

PRESIDENT. The name which the pursuers assume cannot be admitted: that must be struck out. I never liked the decision in *Gibb's* case. Unless Jobson will show that the pursuers are a minority, from my wish to support trusts, I will hold them to be a majority.

JUSTICE-CLERK. Jobson was trustee for the congregation. It is ascertained

that the pursuers are the majority of the congregation : he must therefore discharge the duty of trustee and denude.

On the 13th December 1771, "The Lords ordained the denomination which the pursuers give themselves, to be expunged ; and, in respect the defender has admitted, in his deposition, that he understood the right of the meeting-house in question to be a trust in his person, for behoof of the congregation, at the time of the trust, and that it appears that the pursuers, with those that concur with them, were a majority of that congregation at the time of the trust,—sustained the pursuers' title to carry on this action ; and found that the defender is bound to denude himself of said trust, in their favour, upon being reimbursed of the money laid out by him whereof he is not already indemnified."

Act. A. Lockhart. *Alt.* R. M'Queen.

Reporter, Monboddo.

Diss. Coalston, Hailes, for the reasons assigned in their opinions, but no vote was put.

1772. January 16. JOHN ADAM and WILLIAM SHAW *against* JOHN ALSTON and WILLIAM FLEMING.

PROCESS—ADVOCATION.

Defender's claim for expenses incurred in a successful opposition to a bill of advocacy at the pursuer's instance, ought to be made in the original action still pending, and not by a separate one, though before the same judge.

[*Fac. Coll.* VI. 1 ; *Dict.* 12,239.]

BARJARG. When a bill of advocacy is refused, the proceedings on it may be considered as a branch of the proceedings before the Sheriff, and the expenses incurred concerning it may be properly given by the Sheriff. I have more doubt as to the expenses in a bill of suspension.

COALSTON. Any expenses incurred before the Sheriff may be awarded in the original process. As to expense of bills of advocacy, most just that there should be indemnification. The practice is not uniform. A general regulation is necessary. Cannot blame the parties for going before the Sheriff.

KENNET. Here there was a depending action. The new action was irregular. How far the Sheriff could give the expense of a bill of advocacy, cannot be tried here. If the new action is incompetent, I should think that in the old action the Sheriff might have given expenses.

JUSTICE-CLERK. I do not like Acts of Sederunt where common law is sufficient to give remedy. It is wrong to present a groundless advocacy. There is no wrong without remedy. The Ordinary on the Bills, by remitting to the