

cured, she may either intend to re-employ the money, or to gift it to her husband. *Donatio non presumitur* ; therefore she must be presumed to have meant to re-employ it.

GARDENSTON. The strongest evidence of intention would not do: an assignation to the husband would have been infinitely stronger than the action, and yet the assignation would have been revocable as long as the money remained unpaid.

PRESIDENT. In so far as the wife uplifted, and did not employ, the money, if extant, would be moveable; not so to what has not been uplifted.

On the 1st December, 1772, the Lords preferred the wife; altering Lord Alva's interlocutor.

Act. Ilay Campbell. *Alt.* A. Bruce.

1772. December 4. JUSTICES OF PEACE OF CLACKMANNANSHIRE *against* The
MAGISTRATES OF STIRLING and THOMAS CAMPBELL.

HIGHWAY—JURISDICTION.

Omission of the requisites in Act 1669, c. 16, previous to an order of the Justices of the Peace, for the change of the road, fatal to the proceedings.

[*Faculty Collection*, VI. 101; *Dictionary*, 7619.]

HAILES. I have no doubt of the upright and public spirit of the Justices; but their public spirit must be limited by law. There is nothing more apt to check public spirit than statutes, yet this can only be remedied by more statutes. I think that the present road, properly widened and repaired, may be just as good as the rest of the roads of the country. I also doubt how far the Justices can turn about a road more than 200 yards because it thereby becomes shorter to some of the inhabitants of the country. This is no reason, for that it must always happen from the nature of the thing.

GARDENSTON. The Act, 1669, ought to be liberally interpreted. If the old road *cannot well be continued*, there is a discretionary power of alteration. I doubt, however, of the application of the maxim to this case. The suspender offers ground sufficient to make the old road wide and safe: the new road cuts his property unmercifully in pieces.

PRESIDENT. I do not dispute the powers of the Justices, but here they have been too precipitate. The law requires that, first of all, the damage should be ascertained, instead of leaving this to be adjusted after the damage is done.

JUSTICE-CLERK. Public utility is not apparent in this case: As the Justices may turn about the road *a fortiori*, they may widen it. They have turned the road without attempting to widen it.

COALSTON. The powers of Justices of the Peace are liberal, but not arbi-

trary. The only objection not obviated is a new one, that the road may be washed away. This also may be obviated by going so much farther back into Mr Campbell's ground, without ruining his inclosures and intersecting his little property.

On the 4th December 1772, "In respect that the decret does not proceed upon sufficient evidence of the necessity of changing the road, and that the damages were not previously ascertained, the Lords suspended the letters, reserving to the Justices again to take the matter under their consideration and to proceed according to the Act 1669."

Act. H. Dundas. Alt. A. Lockhart. Reporter, Coalston.

1772. December 9.

PUBLIC OFFICER.

Validity of a commission to a party and his son, as conjunct clerks; with a survivancy.

IN the Teind Court, upon production of a commission to Mr Joseph Williamson and his son, as conjunct clerks, with a survivancy, a question occurred as to the validity of the commission.

COALSTON. I would have moved for remonstrating to the King, had this been the first case of the kind; but I see evidence of practice.

HAILES. Since we are to receive the commission, let it be upon a preamble of the practice, that posterity may be put upon its guard.

ELLIOCK. A preamble will serve no purpose, because what is done in the Teind Court will be no notification in any other.

PRESIDENT. The practice proved in other courts or offices, affects not me. My opinion is, that, in matters where judgment is required, there can be neither conjunction nor survivancy. *Here* the office is merely ministerial.

The Lords having considered the precedents produced, and that the office is purely ministerial, and that Mr Williamson's commission gave a power of deputation, ordered the commission to be received.
