1785. *July* 14. MARGARET and MARY MACARA *against* The PRINCIPAL of the UNIVERSITY of ST ANDREW'S, and OTHERS.

TESTAMENT.

How far the mortmain statute of 9 Geo. II, and c. 36, extends to settlements made in Scotland, with regard to money invested in the British funds?

[*Dict.* 15,948.]

SWINTON. The subjects in the public funds do not fall under the trust. As to heritable subjects, how can they be possessed *feudally* by persons designed as having offices, either for life or during pleasure?

BRAXFIELD. The subjects in England must be judged by the law of England; but still they must be judged in this Court. It is true, we may, in such a case, more probably go wrong than in judging on our own law. I think that the subjects in England cannot fall under the trust. Scotsmen cannot be called foreigners with respect to a British statute. Englishmen, having subjects in Scotland, fall not under the statute of mortmain; but Scotsmen, having subjects in England, do. As to the heritable subject, it goes to the trustees by the very conception of the bond itself. The trustees may serve heirs of provision; and they having been once served, there will be no need for a renewal of the investiture.

HAILES. This deed, though oddly worded, is not without meaning. Macara wished to breed up some of his clan to literature, and thus to civilize their manners: the persons on whom he chose to bestow his favour were to be chosen out of the country, probably because he imagined that persons residing in towns had less need of being civilized. We applaud government for its attempts in the way of civilization, by founding schools and the like: this poor individual meant to do the same thing on a smaller scale. If the subjects which he left be not sufficient at present for that purpose, there may be some delay till they are sufficiently accumulated. Not one half of what Heriot left for his hospital was ever made good to his executors, and yet the hospital was completed, and remains at this day in a tolerable condition. It is asked, How can a subject be possessed feudally by persons designed as having offices either during pleasure, or for life? It is answered, That this actually takes place in Watson's hospital, where one of the trustees is the eldest minister of the Old Church of Edinburgh.

MONBODDO. We cannot presume that the mortifier meant to have his trust-right subsist after two-thirds of the subject was cut off for want of power in him to make such a deed.

GARDENSTON. I doubt as to the English funds: the construction that I put on the statute is, that the prohibition should not extend to Scotland.

ELLIOCK. A Scotsman is as much a foreigner as to his moveable property in England, as a Frenchman or a Dutchman is.

JUSTICE-CLERK. The statute of mortmain is a statute of the Parliament of Great Britain. Such statute extends to Scotland, unless Scotland be specially excepted, or it appear, from the phrases used, that an exception was meant: one purpose of the statute was to prevent the subjects of commerce from being

withdrawn, and put out of commerce. The clause in question excepts lands and others lying in Scotland: the legislature left people in Scotland to do with their estates and bonds what they pleased; for *that* did not interfere with the principle of the statute. The heritable bond falls under the trust; but my difficulty is as to the trustees named: the right is vested in the whole; how is the title to be made up? *All* have not accepted; how can a jury serve a *part* as heirs of provision?

BRAXFIELD. I have no doubt that *five* may make up a title.

HENDERLAND. I am clear as to the heritable bond. The trustees and administrators may make a title: the conveyance is to twelve trustees; but the powers of the quorum of five are sufficiently extensive, and they may make up titles. As to the money in the funds, the statute of mortmain goes to prevent, *sub modo*, improvident grants in mortmain. There is no mention of the danger that might ensue to the public funds in the statute: had that been meant, it would have been expressed: had nothing been said as to Scotland, I should have thought that the statute did not extend: the subject in the funds is the property of the creditor, and its *situs* is that of the creditors.

On the 14th July 1785, "The Lords repelled the reasons of reduction as to the heritable bond."

Diss. Swinton.

"But, as to the funds in England, they superseded till the 1st of January 1786, that the question may be tried in England."

Act. ———. *Alt.* G. B. Hepburn.

Reporter, Henderland.

1785. *July* 20. ANTHONY, EARL of KINTORE, *against* The UNITED COLLEGE of ST ANDREW'S.

TEINDS.

In a valuation, deduction is not allowed of additional rent paid on account of exemptions from multures.

[*Fac. Coll. IX.* 394; *Dict.* 15,766.]

MONBODDO. Twenty years ago multures were paid: now, no rent is paid for the mill at all. The additional rent has come in place of mill-rent.

BRAXFIELD. Where a proprietor has a mill, and a rent is paid for the industry of the miller, the subject is not teindable: but when a tenant pays rent to be free from a mill, *that* is a rent for the lands. A value, however, ought to be put on the obligation on which Lord Kintore has become bound to keep up *the mill-graith.*

ESKGROVE. How can I say that all the rent is payable for the lands, when it appears that part of it is mill-rent.