

1773. *January 19.* ALEXANDER HUME of Coldingham *against* ALEXANDER DONALDSON.

PRESCRIPTION.

The vicennial prescription, in terms of 1669, c. 9, of a holograph missive letter of relief, found to commence precisely from its date, and that the Act admits not of any latitude in that respect, even in a question with the heir of the creditor, pleading both ignorance of his right and that it was in its nature not an absolute obligation, but pendent upon a condition, and therefore the prescription could only begin to run from the time of the distress, as in the case of warrandice.

(*Faculty Collection, VI. 122; Dictionary, 10,992.*)

KAIMES. I doubt whether the vicennial prescription can take place while there was no distress. Besides Hume was *ab agendo*.

AUCHINLECK. The law distrusts such holograph obligations, and, therefore, after twenty years, holds them to be good for nothing, unless instructed by oath. The subsistence of such obligation depends on its age, not on the casual condition of the granter.

On the 19th January 1773, the Lords sustained the defence of vicennial prescription; adhering to Lord Stonefield's interlocutor.

Act. James Grant. *Alt.* John Douglas.

1773. *January 19.* ANDREW GARDINER *against* ROBERT EWING.

DECREET-ARBITRAL.

No good objection found to lie on the ground of defect of proper evidence of the arbiters' having differed in opinion, so as to make way for the decision of the oversman, against decret-arbitral pronounced by him, seeing that the decret bore a recital of his own appointment by the two arbiters, conform to a minute subscribed by them, naming him to be their oversman, in regard they could not precisely agree touching the decision to be pronounced with respect to the matter thereby submitted; his taking upon him the determination in that capacity, and his having, in conjunction with one of the arbiters, made choice of a clerk conform to another minute, subscribed by the said arbiter and him, and produced.

[*Dictionary, 559.*]

GARDENSTON. I am not satisfied with the decision in Dalrymple. It is suf-

icient evidence of the arbiters having differed, that the oversman undertook the office. I would never overturn decreets-arbitral upon niceties of form. But I doubt as to the reference, as it is not a probative deed : such reference is, in effect, a new submission, and ought to have all the solemnities of a submission.

PRESIDENT. Lord Gardenston requires too much form in decreets-arbitral, while at the same time he would support the informal. The reference is an *actus legitimus*, and would have been good, even in the shape of a minute.

KAIMES. As to the case in Dalrymple, I presume the decreet-arbitral *there* was very iniquitous, and that the Court laid hold of every objection.

On the 19th January 1773, the Lords found the letters orderly proceeded ; adhering to Lord Stonefield's interlocutor.

Act. Ilay Campbell. Act. W. Campbell.

1773. January 20. DOCTOR JOHN ROEBUCK and Company *against* WILLIAM and ALEXANDER STIRLINGS.

PRIVILEGE.

[*Fac. Coll. XIII. p. 218 ; Dictionary, App. I. ; Privil. No. 2, Note.*]

AUCHINLECK. The Ordinary did properly in passing the bill, without stopping the works, for the cause is not clear.

ALEMORE. It is a rule in law that every man is entitled to continue in possession of his rights till he is put out in form of law. There is no doubt of the king's power of granting the patent. Roebuck is in possession of the patent : he must not be turned out *brevi manu*, which he would be in a certain degree, were Messrs Stirlings allowed to prosecute their works.

GARDENSTON. I cannot agree to that part of the interlocutor which allows the work to go on. The very purpose of a suspension of a *novum opus* is to keep matters entire. There is no hardship in this, but there would be in the contrary.

KAIMES. Admitted that he could not recollect the ground of his interlocutor.

PRESIDENT. If other people *are de facto* in possession of the same sort of work, why stop Stirling ?

MONBODDO. If this were not *novum opus*, there might be difficulty.

JUSTICE-CLERK. The interlocutor of Lord Hailes was right as it related to the buildings. The interlocutor of Lord Kaimes was wrong as it related to the work. Roebuck and Company have done all that they could to certify and interpel : other persons who have got into possession may possibly not be stopt but by declarator ; Messrs Stirling may be by suspension.