

1769. *January 25.* PETER LESLIE GRANT of Balquhaine, *against* JAMES GORDON of Cobairdy.

PRESCRIPTION—TAILYIE.

Import of a Clause in a Tailyie—Prescription of an Entail.

[*Faculty Collection, IV. p. 158 ; Dictionary, 15,422.*]

MONBODDO. The father, by his reserved powers, might have insisted against the son to resign the lands and take them in terms of the entail; but he did not do this. The marriage-contract, 1706, rendered the lands unentailed. The interlocutor might have stood upon that ground: it may also stand upon the ground of prescription. My father makes an entail,—I make up my titles upon the former investitures, and possess for forty years,—there is an end of the entail.

PITFOUR. I do not think that here there ever was an entail: if there was, it is now prescribed. A substitution to heirs of entail, without more, signifies nothing, and binds nobody. Whatever the intentions of Patrick may have been, it matters not, for intentions will not fetter property.

On the 25th January, 1769, the Lords assoilyied, sustaining the defences in general.

Act. D. Græme. Alt. R. M'Queen. Reporter, Auchinleck.

1769. *January 25.* ROBERT STEPHEN, and OTHERS, *against* JOHN CRAICK and JAMES MITCHELL.

POINDING.

A Messenger who, without letters of Open Doors, had removed Trees which served as a barricade to the door of a Wood-yard, and so made entry and Poinded, was assoilyied from reduction of the Poinding.

[*Faculty Collection, IV. p. 152 ; Dictionary, 10,539.*]

GARDENSTON. The action is groundless: It is plain that the proprietor must have been in use to open his door from the inside, and it could be opened from the outside, by putting away three trees set against it.

HAILES. The door could not be opened without some degree of violence. It was so little intended for opening from the outside, that, being opened as it was, the poinders could not have shut it again : Had there been a flock of sheep in the yard, instead of a cargo of deals and logs, and had the poinders paid themselves by pointing one sheep, it is plain that all the rest of the flock must have been scattered over the country ; for there was a fence broke down, which no one from without could have repaired ; and, therefore, the poinders must either have locked themselves up or set the sheep loose. That the yard contained logs and not sheep, will not vary the determination in law. I cannot see how the act of the messenger can be more legal in this case, than if he had used a ladder to get over the rail, executed the pointing, and then returned by the way he got in.

KAIMES. Lock or no lock makes no difference. The old law of Scotland is, that every man must be at peace within his own home : no man must break into another's house without authority. He who is possessed of letters of caption may break into a house, for caption is supposed to be executed only against those who are in open rebellion ; but here the question is as to a yard, not to a house.

AUCHINLECK. Suppose the case of a workhouse : If locked, there can be no access without letters of open doors. There is a specialty here : the door was not locked, but closed in the inside. Suppose the messenger had drawn out the nails, this would have been a more legal entry : he might then have put every thing in *statu quo* ; but here he could not shut the gate if once opened.

PITFOUR. If a messenger finds an open door, he may come in and execute his letters ; but he cannot use force, less or more, to make open a place that is shut. The right of securing every man's property, respects out-houses as well as dwelling-houses.

PRESIDENT. A man's warehouse for timber is as much railed in and closed up as any other workhouse. There is nothing in law or practice which authorises a messenger to make good his entry when there is opposition of any kind, unless he has letters for open doors.

JUSTICE-CLERK. I cannot distinguish between this case and an entry into an inclosure for cattle, where carts or stakes happen to be placed against the gate to prevent the issue or entry of cattle.

On the 25th January 1769, the Lords assoilyied from the reduction, altering Lord Barjarg's interlocutor.

On 2d March, adhered.

Act. D. Rae. *Alt.* A. Lockhart.

Diss. Strichen, Pitfour, Auchinleck, Barjarg, Hailes, President.

Non liquet, Monboddo.

At the second hearing, Auchinleck was for the interlocutor, as also Monboddo, who had been *non liquet*. Kaimes was against it conditionally, for the sake of his darling *pari passu*.