

1779. *June 25.* DAVID PATTILLO, *Suspender, against* SIR WILLIAM MAXWELL and OTHERS.

JURISDICTION.

Power of Review inherent in the Court of Session not excluded by the Comprehending Act.

[*Dictionary*, 7386.]

COVINGTON. The commissioners do not specify the grounds of their sentence.

HAILES. I formerly doubted, and I still doubt of that incontrollable Parliamentary power vested in the commissioners; but although we should hold that, in matters of opinion, their judgment cannot be reviewed, yet in matters of mathematical demonstration it may: and if they choose to find that a person falls under the statute, who demonstratively does not, I cannot suppose that they act under the statute,—their decree cannot make a man taller or younger than the statute requires.

GARDENSTON. Approved of the distinction between judgments in matters of opinion and judgments in matters of demonstration.

JUSTICE-CLERK. The suspender must show that he does not fall under the statute.

PRESIDENT. It is dangerous to limit legal remedies: he who applies by suspension, must verify his reasons; but he cannot verify them while he remains a prisoner.

On the 25th June 1779, “The Lords remitted to the Lord Ordinary to pass the bill;” altering Lord Ankerville’s interlocutor.

*Act.* A. Crosbie. *Alt.* J. M’Laurin.

*N. B.*—Lord Ankerville gave judgment, contrary to his own opinion, in consequence of what he understood to have been the sense of the Court in other cases.

1779. *June 29.* JAMES GOOD *against* CHRISTIAN SMITH.

INDEFINITE PAYMENT.

The creditor, in an account, of which a part was prescribed, was found entitled to impute partial payments, in satisfaction of articles of his account, three years preceding the date of such payment; though these articles were part of those which had fallen under prescription.

[*Faculty Collection*, VIII. 158; *Dict.* 6816.]

MONBODDO. The statute 1579 is a most beneficial statute, and the Court has done well in applying it to the case of tradesmen’s accounts; but I have a

doubt as to its application with respect to the partial payments in controversy. The question is as to indefinite payments; they must be applied to the prior debt, that is, within the three years. The application, by our law, goes upon the presumption of what would have been the application, that is, to the eldest debt, and of which the prescription is nearest run.

BRAXFIELD. If it is admitted that the account was actually due at some prior period to the three years, the indefinite payment falls to be applied to the elder debt; but that is not the case. Yet still I have doubts: it is pleaded, that the payments made were of a former account. Now, suppose this were the case of a house possessed from year to year for a long time,—that payments have been made indefinitely:—I bring an action for three years' rent. Says the tenant, Here are receipts. The just answer would be, You was tenant before, and the indefinite payments must go to the payment of rents of former years.

PRESIDENT. By the short prescriptions, the debt is not prescribed. It is only the mode of proving that is limited. I must consider things in the state that they were in at the time.

JUSTICE-CLERK. Candidly gave up his opinion.

On the 29th June 1779, "The Lords found that the payments made within the three last before citation, must be imputed to the eldest of the debts not prescribed at the dates of those payments;" altering the interlocutor of the Lord Justice-Clerk.

*Act.* J. Dickson. *Alt.* J. M'Laurin.

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1779. June 30. Mrs FRANCIS BELCHER *against* ANDREW MOFFAT and CHARLETON PALMER.

TERCE.

No terce due from Collieries.

[*Faculty Collection, VIII. 159; Dictionary, 15,863.*]

BRAXFIELD. It is a point well established in our law, that there is no terce out of mines and minerals. The only question here arises from this, That there is a creditor having right both to the coal and the land, who is willing to hold by the coal, and to leave the land to the tercer. Thompson is a catholic creditor; he is not entitled to betake himself solely to the one subject or the other: he must draw rateably and proportionally out of both. A creditor in his situation must only rank for the annualrents: if he were preferred also for the principal sum, hard would be the case of widows, for what estate is there that may not have heritable debt on it?

JUSTICE-CLERK. It is absurd to suppose that a lady-tercer should have right to mines and minerals, which are *pars soli*. I do not think that it was the intention of the law of Scotland that heritable creditors should have it in their power to draw payment of principal sums to the prejudice of the terce.