

No 184.

suer is entitled to have his whole additional stipend assessed and collected, in the same manner as has hitherto been practised.

To the *second* defence ; It appears from the minutes of the presbytery, that it was insisted on, that this additional stipend should be made not only to Mr Stirling personally, but as an addition to the former modified stipend of the minister of this parish ; and for that purpose it was agreed, that the bonds to be granted should be recorded in the books for plantation of kirks ; which certainly was done, though these records are now lost ; and the constant continuance of payment for so long a course of time, in consequence of that agreement, not only to Mr Stirling, but to two other subsequent ministers, is irresistible evidence of the design and import of these obligations. And this is further confirmed from the decret of disjunction and new erection of the second minister, which contains an express proviso, " That the benefice of the present kirk of Greenock should not be thereby diminished in any sort." And accordingly the defenders continued the same regular payment of the stipend due to the pursuer as formerly for five years after the new erection.

" THE LORDS found the feuars and inhabitants of the town of Greenock liable to the pursuer in payment of the additional stipend of L. 25 Sterling yearly libelled on ; and found, That the method of levying the same is, by stent-masters, and a collector to be named by the Bailies of the burgh ; and ordained the said Bailies to appoint such stent-masters and collector for levying, collecting, and paying the said additional stipend for bygones, and in time coming, according to former usage."

Act. Miller.

Alt. G. Brown.

G. C.

Fol. Dic. v. 4. p. 96. Fac. Col. No 75. p. 127.

 DIVISION IV.

Vicennial Prescription of Retours, and of Holograph Writs.

1673. *January 11.*LAMB *against* ANDERSON.

No 185.

A younger brother being retoured as heir to his father upon the supposed death of an elder brother

WILLIAM LAMB being entered as heir to his father in certain tenements in and about Stirling, and infeft therein, and having granted bond to John Anderson containing an assignation to the mails and duties of the lands, John entered into possession, but shortly thereafter, Christopher Lamb, William's elder brother, who was out of the country when William was served heir, re-

turning home, the said John having obtained a bond from him, he thereupon charged him to enter heir to his father, and apprised the same tenements from him as charged to enter heir, and hath possessed thereby twenty years, long after the expiring. Now the said William Lamb pursues the said John Anderson for exhibition and delivery of the writs of the lands, who *alleged*, Absolvitor; because the lands and writs belonged to himself, having right thereto by an expired apprising, led against Christopher Lamb, the pursuer's elder brother. It was *answered*, That the defender could make no use of the apprising against this pursuer; *imo*, Because he having entered in possession by a right from the pursuer, he could not intervert the same by an apprising led against his brother, but must first restore the possession and writs, and pursue upon his other right, as accords; *2do*, By the act of Parliament anent the prescription of retours, subjoined to the general act of prescription, it is expressly provided, That if retours be not reduced within twenty years from their date, they shall not be reducible hereafter. *Ita est*, this pursuer, albeit second brother, being served heir in the absence of his eldest brother, supposed dead, and who is now dead, and did never quarrel his brother's retour, the same is now unquarrelable; and it were most ridiculous and unjust, that the defender should not only intervert the pursuer's possession, but by an expired apprising exclude him for ever, when now he is the certain and uncontroverted heir, his brother being dead. The defender *replied*, That he did no wrong in apprising from the eldest brother, who returned shortly after his right from the second brother, because the second brother's right could not have maintained him in any judgment petitory nor possessory, but his service became null and void *ex evidentiâ facti*. without necessity of a reduction; and albeit parties deriving possession from others, cannot clothe themselves with other rights, but must restore that possession when the possession could defend them in a possessory judgment, or were of any advantage, yet when it could have no effect, either to defend the author or his assignee, it holds not; for if the eldest brother had pursued the second brother, or his assignee, for the mails and duties; if they had defended themselves upon the second brother's retour and infeftment, it would have been null by reply without any reduction, as hath been oft-times found by the LORDS. And as to the act of Parliament, it takes only place in retours that require reduction, as when the controversy arises between several kinds of heirs, as of line, male, tailzie, and provision; but in the cases between two brothers pretending heirs of the same kind both of line, the very appearance of the eldest brother makes the retour of the second to evanish without reduction. The pursuer *duplied*, That supposing that the second brother's retour might be void by exception or reply, yet it importeth not in this case, where the eldest brother was never retoured, and is now dead; neither was the matter ever in question, or the retour declared void, either by exception or reduction, so that now it must stand unquarrelable. It was *triplied*, That albeit the eldest brother never retoured himself, yet the equivalent was done, in so

No 185.

who was out of the country; the elder brother afterwards returned, but died without impugning the service. The retour was found null by exception at the instance of a creditor of the defunct, who had charged him to enter within the 20 years, notwithstanding of the anent reduction of retours.

No 185. far as the defender charged him to enter heir, and as charged to enter heir, apprised from him, and the act of Parliament anent charges to enter heir, and the charge itself, bears, That as to the creditor charged, the party charged shall be in the same condition as if they were actually entered; neither was their need of any process, seeing the defender was in possession, and whensoever the second brother's retour is made use of, the exception or reply against him, that it is null, is receivable *ope exceptionis*, and doth annull it *ab initio*; for though in reductions the effect sometimes is only from the sentence, and not *ab initio*, yet that which is null by exception, is always null *ab initio*.

In this case, the LORDS first moved Anderson to declare his apprising redeemable by this pursuer within a year, and he having declared so, the LORDS found, That the second brother's retour was null by exception, and that he had not the benefit of the act of Parliament anent retours, seeing within the twenty years the eldest brother returned, and apprising was led against him as lawfully charged to enter heir, and possession thereupon.

Fol. Dic. v. 2. p. 113. Stair, v. 2. p. 148.

1692. November 17. HAMILTON against HAMILTON and Others.

No 186.

The act 9th
Parl. 1669
introducing
the vicennial
prescription
of holograph
bonds found
to extend to
bonds granted
before that
statute.
See No 188.
p. 10990.

IN the case pursued by Archibald Hamilton, late Dean of Guild of Edinburgh, against Hamilton of Hagg's and others, the LORDS found a holograph bond prescribed, because not pursued for within 20 years after the act of Parliament 1669, though it was of a date prior to that act; and so they found, that the act extended not only to holograph writs subsequent to the act, but even prior to it, though laws commonly *futuris tantum dant formam negotiis*; and antecedent to that act, holograph writs did prescribe in 40 years, till they were abridged by this act to 20. And found, that a compensation founded upon in a process, within that 20 years, was a sufficient interruption, though the account under Hagg's hand, which was the ground of the said compensation, bore no date, only one article of it mentioned the year 1667; and found, though the said account bore not to whom it was due, yet the haver and present producer of it now was presumed to be the creditor therein, unless they instructed, that it belonged to another than him who now makes use of it.

Fol. Dic. v. 2. p. 113. Fountainhall, v. 1. p. 519.