

ALVA. Have persons on whom such rights have been conferred, ever pretended to exclude others?

JUSTICE-CLERK. I will not inquire into the general question. There is a just foundation for a rent established on houses, boats, and fishing. From the conveniency of situation, fishers can afford to give a rent. Here is a fixed standing rent. There are such rents on many parts of the coast of Scotland.

On the 6th August 1773, "The Lords found that the freeholders had done right in enrolling Mr Duff."

Act. H. Dundas. *Alt.* D. Rae.

Diss. Alva. *Non liquet*, Coalston.

1773. November 17. SIR JOHN NISBET and OTHERS *against* The KIRK-SESSION of WESTKIRK.

KIRK SESSION.

Heritors have no vote in the election of a Precentor and Session-clerk.

[*Fac. Coll. VI. 228 ; Dictionary, 8016.*]

KENNET. The Act 1696 gives no right to the heritors, neither does practice give them a right. My only doubt is, whether the session is not barred from their exclusive right of election by the agreement 1770.

HAILES. I think that the session did not surrender its right, and that it could not surrender its right.

COALSTON. There are no words in the agreement strong enough to bind the Kirk-Session in time coming.

On the 17th November 1773, "The Lords assoilyied;" adhering to Lord Auchinleck's interlocutor; and found expenses due since that time.

Act. Ilay Campbell. *Alt.* J. M'Laurin.

1773. November 30. JOHN COWAN and COMPANY *against* HENRY and KATHERINE STORARS.

MUTUAL CONTRACT.

[*Dictionary, p. 9142.*]

AUCHINLECK. This subject was moveable, and fell under the *jus mariti*. The aliment was *ex pietate*; for the subject did not, at that time, bear interest.

MONBODDO. The sum was not heritable, for it did not bear interest.

PITFOUR. The old form, in bonds, was to become bound to restore the sum borrowed at the next term, or else to grant an annuity till payment. If the debtor paid, at the term, no interest was due; if not, the debt became heritable.

COALSTON. The only difficulty is as to the wife's claim of retention till she is provided in an aliment. That claim is very equitable, but there is no law for it; the wife's aliment, during the subsistence of the marriage, must depend on the state of the husband.

On the 30th November 1773, "The Lords found that Henry Storar is not entitled to take credit for any expense which may have been incurred by him in alimentering, clothing, and educating Katherine Storar while her bond of provision was not exigible and bore no interest: also, Repelled the claim made by Katherine Storar, in her own right, and preferred John Cowan and Company;" (the creditors of her husband;) adhering to Lord Hailes's interlocutor.

Act. A. Bruce. *Alt.* R. Blair.

1773. December 3. CHARLES BARCLAY MAITLAND *against* JOHN TAIT and OTHERS.

COMMONTY.

[*Fac. Col. VI.* 69; *Dictionary*, p. 2485.]

COALSTON. If the proprietor had constituted a servitude for a certain number of cattle, he could not afterwards possess, so as to encroach upon a servitude so constituted; but that is not the case here.

KENNET. This is the only rule that can be followed, if possession goes as far back as the proof.

PRESIDENT. If the grant of servitude is according to use and wont, and the proprietor also possesses according to use and wont, his title is just as good as that of the person to whom he made the grant: this is agreeable to the decisions of the Court, particularly in the case of *Moffat*.

On the 3d December 1773, "The Lords found that the defender has a right to a servitude according to use and wont; but that the pursuer has a like right of possession, in so far as ascertained by immemorial possession; and remitted to the Ordinary to proceed accordingly."

Act. R. M'Queen. *Alt.* Ilay Campbell.

Reporter, Auchinleck.