

1683 and 1684. SIR JOHN SEATON of Garmilton *against* SIR ROBERT SINCLAIR of STEVENSTON.

1683. *March 14.*—BETWEEN Sir John Seaton of Garmilton, and Sir Robert Sinclair of Stevenston; the Lords found Garmilton could have no other servitude on Stevenston's land for his mill-dam, save what he has been in possession of; and assoilyied Stevenston from damages. But see this altered 30th current. *Vol. I. Page 225.*

1683. *March 30.*—The Lords alter the interlocutor of the 14th current, and found Stevenston liable to refund and make up Garmelton's damage, that the water ran not towards his mill as it was wont to do: though all the servitude which Stevenston owed him in law was only a *nuda patientia* through his ground, and that the channel of the water was diverted *casu* and by speat, without any fact or deed on Stevenston's part, and could not be returned to the former channel. *Vol. I. Page 231.*

1684. *January 11.*—Sir Robert Sinclair, upon a new advising, is assoilyied from the damages libelled by Sir John Seaton of Garmilton, as done to his mill. Anent which, *vide* 30th March 1683. *Vol. I. Page 259.*

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1684. *January 12.* JEAN CALLANDER and her HUSBAND *against* SIR ANDREW BIRNY, LORD SALINE, &c.

THE cause, Jean Callander, and her Husband, against Sir Andrew Birny, Lord Saline, and his Children, took up the whole forenoon in advising; and the Lords, from the writs and depositions, repelled the defence founded on Gray of Wariston's apprising, assigned to Torwoodhead, and the gift of escheat; in respect of the answer, that Alexander Short was denuded in favours of the Lord Saline, before the date of the apprising and denunciation to the horn: which they find proven, by comparing the date of the said writs with Saline's rights, as it is narrated in the decret of preference produced; as also, they repel the defence founded on the certification, in respect the bond was produced before the said decret of certification was extracted; and repel the defence founded on the decret of preference produced, because they find, by that decret, that the defenders were only put in possession till the rights were cleared; and repel all the other defences founded on Oliver Murray, her last husband's intromission with the money or rents belonging to James Short, in so far as the same is obruded to the pursuer's infetment of liferent of the annualrent of the bond of 2400 merks since her husband's death; which they find her husband could not innovate nor discharge to her prejudice, the bond being originally granted to her in liferent, and the husband standing debtor to her before by her contract of marriage, in so far as she is not satisfied otherways of the same. And likewise repel the defence founded on Robert Andrew's money, paid to the husband; in respect of the answer, that Oliver the husband had right from a third party, and that there is no trust proven: but prejudice

to the defenders to declare the trust, as accords. And they sustain the defence founded on the L.1000 bond, and the precept and receipt thereof; as also the defences founded on Stirling of Herbertshire and Oliver Murray's intromission with the rents of the lands, to extinguish Herbertshire's adjudication, and to affect the fee of the heritable bond *pro tanto*. And find it proven, that Herbertshire and Oliver Murray did intromit with the rents of the acres, from 1673 inclusive to 1678 exclusive; and that Lord Saline did enter to the possession the year 1678; and that the rents of the said acres so possessed, are 45 bolls of bear yearly, L.16 of money, and a dozen of fowls; out of which there is to be deduced 9 bolls to the minister, and L.9 of feu-duty paid to the Town of Stirling, superiors, and the cess, which they allow according to the fiars; and remit to the Lord Kemnay, who heard the cause, to consider and regulate the said deductions, and to hear the parties on any other grounds of re-compensation, and to do therein as he finds just, and to order the decret to be extracted accordingly.

Saline having given in a bill against this, and the same being answered; the Lords advised both on the 14th March, and found that Herbertshire's adjudication does not fall under the decret of certification extracted by the petitioner; and that the pursuer needs not produce Herbertshire's commission from the Lords of Session, in respect the same is related to in the depositions of the witnesses adduced by the pursuer, and in the discharge granted by Herbertshire to the tenants, likewise produced by them; and also find that the pursuer is not obliged to produce her contract of marriage; and that the L.1000 intromitted with by Oliver Murray, must be applied for extinguishing the sums of the adjudication, in so far as the said L.1000 did exceed the annualrents due to the said Oliver, the time of his receipt of the said L.1000; and remit to the Lord Kemnay to order the count accordingly.

Then, on Saline's new bill, the Lords, on the 21st March, adhere to their former interlocutor; only they ordain the Ordinary, in the calcul, to restrict Herbertshire's apprising to the principal sums, annualrents, and just expenses, in place of sheriff-fees and penalties, at his modification.

Then, on the 22d and 27th March, on new bills, the Lords refused to stop the going out of the decret, reserving to the defenders their action of declarator, on the grounds of their bills, as accords; but discharge the giving out of the decret, until the Lords Marcus and Drumcairn order it to be delivered to the pursuer; to which two, the Lords recommended to endeavour to agree the parties.

And accordingly they forced the pursuer to agree and accept of less.

There was also another answer to that first defence of Gray's apprising, *viz.* that it was extinct by a renunciation, upon payment, given by Gray's tutors; but that they were afterwards induced by Saline to take back their renunciation, and give an assignation of it to his son-in-law, Baillie of Torwoodhead; which answer was also relevant.

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