

The Lords ordained Magnus Morton's books to be produced, and Sir Walter Seton, then conjunct tacksman, to depone on sundry particulars.

*Vol. I. Page 442.*

1686 and 1687. JANET ALISON *against* GEORGE SHIELL.

1686. *January 15.*—JANET ALISON, relict of Adam Steven, against Mr George Shiell, minister at Prestonhall. He having taken out a diligence after the 1st of November last, (which was the day to which it was granted,) it was objected against. He ALLEGED,—It was formal and *tempestive* enough to execute it any time before she extracted the act; and circumduced the term against him; as had been decided between *Sir Alexander Forbes and Tolquhon*.

This being reported by Saline, the Lords had no regard to the diligence, as not being *debito tempore* executed; but, *ex gratia*, allowed him to the 1st of February to adduce and close his probation, and to procure what writs and documents he was to make use of, to prove the inventory of the testament was exhausted, or that the debtors were irresponsal. *Vide 22d January 1687.*

*Vol. I. Page 392.*

1687. *January 22.*—In Janet Alison's charge against Mr George Shiell, mentioned 15th January 1686; he offering assignations to debts, and she refusing them now, seeing he had not done diligence for many years; the Lords, at advising the cause, allowed Mr George Shiell, suspender, to assign, to the charger, as many of the debts contained in the inventory of the testament, as may satisfy the sum modified for her legacy, deducing a proportional part of the expenses of confirmation, and other necessary expenses debursed by him, at the sight of the Lord Redford, who heard the cause; the suspender always proving that the debtors in these sums are as responsal now as they were at the time of the confirmation; and ordain the diligence that shall be done by the charger, for recovery of these sums, to be upon the suspender's expenses.

*Vol. I. Page 442.*

1684 and 1687. SIR PATRICK HOME *against* HOME of LINTHILL.

See the prior parts of the Report of this case in the Index to the Decisions.

1684. *November 21.*—SIR PATRICK HOME and Linthill's case, mentioned 24th November 1683, was debated and decided; and Linthill alleging that Sir Patrick could not lay his dam upon his ground:—ANSWERED,—The ground on the other side was the commonty of Eyemouth, wherein Sir Patrick had also interest. *2do*, Thir mills being built *super flumine publico; usus riparum* in such rivers is public.

But this is only for unloading goods, but not for a permanent burden: § 4, *Institut. de Rer. Divis. et l. 5, de eodem tit.* And Craig, *lib. 2 feud. dieg. 8,*

asserts, that, even *in flumine privato, pro reparando aquæductu vel clusa molen-  
dini, licet imponere ligna vel lapides in fundo vicinorum, iis invitis.*

Yet the Lords found Linthill had proven his interruption, *tam viâ facti quam  
juris*, of Sir Patrick's forty years' possession of that mill; and that Sir Patrick's  
mill makes Linthill's restagnate; and therefore assoilyied Linthill from his  
declarator, and found Sir Patrick could not impose a servitude of laying over  
his dam-head on Linthill's side of the water.

But Sir Patrick now thinks that his mill will go, though he do not build his  
dam-head close to the other side of the water, but mid-stream and more.

The words of the interlocutor were:—The Lords sustain Linthill's inter-  
ruptions *via facti*, notwithstanding the agreement in 1625 produced, betwixt  
the Laird of Ayton and the Laird of Wedderburn; both because it is not in-  
structed that Ayton was Linthill's author in thir lands, and that the said con-  
tract is only a personal deed, and Linthill is a singular successor; and there-  
fore assoilyie Linthill from that point, whereby Sir Patrick craved power to  
affix the land-staill of his dam-head on the other side of the river, whereof  
Linthill has either right of property or commonty.

That reason of its being personal seems not good; for, in servitudes,  
(*v. g.* a bond of thirlage, &c.) a personal right is sufficient to constitute them  
without infestment, even against a singular successor, where the bond is  
clad with possession. See Dury, 18th January 1622, *Turnbull* against *Blan-  
erne*; and 12th March 1630, *Town of Edinburgh* against *Leith*, where an old  
servitude of girnelling is declared. *Vol. I. Page 313.*

1687. *January 22.*—Sir Patrick Home, advocate, against Home of Lint-  
hill, anent the mill at Eyemouth, mentioned 21st November 1684. The  
Lords, having considered the report of the probation, found this mill occa-  
sioned no restagnation to Linthill's mill; but, the land on the other side be-  
ing Linthill's, they would not suffer Sir Patrick to lay his dam-head on that  
land, but to keep it on the trough of the water, and so *in alveo* as that it  
be not in the dead water, but in the middle of the current or stream.

*Vol. I. Page 442.*

1687. *January 28.* CHRISTIAN JUSTICE against BUCHANAN of LENY.

THE case of Christian Justice, relict of John Buchanan, against Buchanan  
of Leny is reported by Kemnay. Leny, by a contract, was obliged to denude  
himself of the right of two sums due to her husband by Clackmannan and  
Seaforth, with warrandice from his own fact and deed; which two sums  
were evicted by Buchanan of Arnprior, on a former right he had got from  
the husband; but, by a posterior clause, Leny is obliged to warrant all her  
provisions, whereof this was alleged to be one.

The Lords found this posterior warrandice did not extend to make him liable  
for thir evicted sums, the warrandice being specific, only from his own fact and  
deed. And this being reclaimed against, the Lords adhered.

*Vol. I. Page 443.*