

mentioned 1st December 1686. The Lords, on a bill given in by the defenders, allowed Alexander the pursuer, in fortification of his writs, to prove that the defenders, their tenants, or authors, had been these 40 years bygone in use to come to his mill; and allowed the defenders to prove interruptions: for he did not condescend on the usual ways of constitution of thirlage; for their lands were not astricted by his charter *per expressum*; and their own charters did not mention any thirlage, but in the *tenendas bore cum molendinis et multuris*, though not in the dispositive part; and their feus from the Convent and Abbot of Newbottle were older than the feu of the mill; and he had no bond of thirlage, nor any acts, or rolls of Court, nor decreets against them for abstracting; but only pretended it was the mill of the barony, and he was in possession. The use to come to a mill is *meræ facultatis; et nunquam præscriptus jus astrictionis* except in *molendino regio*; which some also extend, with Craig, to *ecclesiasticum*. Vide 1st December 1687. *Vol. I. Page 438.*

1687. December 1.—The probation led at Alexander Hamilton's instance, against Sir John Ramsay and David Plenderleith, as mentioned 17th December 1686, for proving their astriction to his mill, was debated; and the President was of opinion, that his rights of the mill from the Abbots of Newbottle not thirling expressly the lands of the barony, and their feus being prior, without any mention of astriction; they were not liable, seeing there was not forty years' uninterrupted possession, but they had gone and come *pro libitu*; and there being no writ to constitute the thirlage, nor sentences nor other compulsitors, the possession should be very full and clear. And, accordingly, this case being advised on the 16th of December, the Lords assoilyied them from the thirlage; finding no constitution of it, either in the charter of the dominant or servient tenements, nor by bonds of thirlage, sentences, seizures, and interruptions *via facti*, nor so much as Acts of Court. See Stair, 12th December 1673, *Pittarow*; and the other cases in his Index, *voce Thirlage*. But, on a bill of Alexander's, read by the Lords on the 23d of December, when the Session was up, and when they were only meeting about the cleansing of the streets, and their other public business, they stopped extracting of the decret absolvitor till the 12th of January: and on that day, upon his allegiance, that, in the register of the Abbacy of Newbottle, in my Lord Lothian's custody, there were decreets of thirlage or Acts of Court, they granted a diligence for recovery thereof; though he was pursuer, and should come *paratus*, and know his author's rights, and not seek new diligences and propone new allegiances in a concluded and advised cause. *Vol. I. Page 486.*

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1687. December 2. ROBERT and JAMES CLELAND *against* JAMES ROME and ANDREW IRVING.

THE case of Robert and James Clelands, against James Rome and Andrew Irving, was reported by Carse. It was a competition between the rebel James Weir's assignee, and the donatar to his escheat. The assignation is for satisfy-

ing a debt contracted prior to the Rebellion, but is dated posterior thereto. And the assignee also has an arrestment, but does not pursue on the arrestment, but on the voluntary assignation; and obtained a decret. After this, Rome is made donatar to the escheat, and obtains a general declarator; and then alleged for preference, there was *jus quasitum regi et fisco* by the denunciation, after which the rebel could not, by any voluntary assignation, denude himself of the right of this debt, though it was not then gifted: and though he had an arrestment, yet it was not insisted on: and that it was so decided *in terminis*, 14th February 1678, *Sir William Purves* against *James Deans*. ANSWERED,—The King never excluded the diligence of creditors if there was a donatar made; as was clear from *Dury*, 24th February 1637, *Pilmuir*; and *Stair*, 19th February 1667, *Glen*; and he conjoined his arrestment here, though he had not made use of it, because his debtor had given him an assignation.

The Lords demurred much, if an assignation after rebellion ought to have the effect and privilege of a legal diligence by arrestment; and therefore ordained that point to be heard in their own presence.—But here the assignation was not merely voluntary, but to satisfy the debt for which the arrestment was laid on.

And this cause being fully debated, (anent which, see *Stair*, 19th December 1676, *Grant*;) the Lords, on the 17th December, advised it; and, following the President's opinion, they preferred Robert Cleland, the assignee, to James Rome, the donatar of escheat: but if the donatar allege, on the Act of Parliament 1621, that James Weir, the party denounced, was insolvent the time of granting the assignation, or that the debt due to the assignee before denunciation was not just and lawful, ordain the parties to be heard thereanent. And Robert Cleland qualifying, that though there were hornings against Weir, yet he had not fled, and had paid after it L.100 sterling to Mr David Scrimzeor, and so was in credit; therefore the Lords repelled the reason of reduction upon the Act of Parliament 1621.

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1687. December 2. WILLIAM KEAPPIE against JOHN DICK.

The case of William Keappie against John Dick, metster in Leith, was reported by Drumcairn. The Lords turn the bailie of Leith's decret into a libel, because it was pronounced in vacance without a dispensation, and they had refused to admit the intrinsic qualities of his oath; and therefore reponed him to his oath.

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1687. December 3. The HERITORS of ACHTERDIRAN against BOSWELL of BALMUTO.

BOSWELL of Balmuto's case was debated. He being patron of Achterdiran