

*dissent.* Coalston *et* Gardenston, who thought it was better, either to return to the ancient practice, which was proper and regular, or to give up the modern practice altogether, and to hold, that, where the decerniture is personal, the simple decerniture is sufficient to hold him as confessed, without the operation of the extractor, for which there is no warrant from the Judge.

---

1767. July 3. KAY *against* SIR ROBERT GORDON.

THIS was a question concerning the proving of the tenor of a right to land, in which the Lords found:—*1mo*, That where the right consisted of a contract of alienation and a charter from the granter following thereupon, it might be proved by parole evidence, without any adminicle in writing, that the contract contained a procuratory of resignation. This I thought a dangerous decision, as those old contracts of alienation (for this was in the 1675,) do not ordinarily contain a procuratory of resignation, and the charter following upon it to be held of the granter, according to which the possession has been ever since, is a presumption that it did not.

*2do*, That the charter being proved by a written adminicle, viz. the sasine upon it, which sasine did not bear the holding, it might be proved by parole evidence that the holding was blench, especially as the possession had been accordingly.

*3tio*, There being a deed of settlement of the same lands upon certain heirs, with clauses irritant and resolute, and there being a written adminicle of the deed with the substitutions, but no such adminicle of the irritant clauses, the Lords found that the deed was proved without those clauses, as the defender had no interest in them. And, lastly, The Lords found that a clause of pre-emption in a contract of alienation might be proved by witnesses singly, without any adminicle in writing; but this I think was a most dangerous judgment, and, as it was of little or no importance to either party, was not sufficiently considered by the Lords.

---

1767. November 13. The TOWN of LINLITHGOW, &c. *against* CHARLES ELPHINSTON.

THERE is upon Charles Elphinston's ground a collection of water, partly from the higher grounds, which are marshy, and partly from one small spring, which appears at one end of the loch, and it is probable there are some more springs, though they do not appear. Out of this loch Mr Elphinston and his predecessors had brought water by an *opus manufactum*, and contrary to its natural course, to a mill of his, and after serving that mill it ran into the water of Avon, out of which there were above 30 mills supplied. And besides this water which came from Mr Elphinston's mill to those mills, when at any time the loch overflowed, the water in its natural course ran into the water of Avon; but with respect to the water which came from Mr Elphinston's mill, in the forced channel abovementioned, his miller

was in use to take the entire direction of it, shutting it up or letting it out as it best suited the convenience of the mill. Mr Elphinston wanted the use of the water of this loch for a coal-engine, which made it necessary for him to take it off in a channel different from that of the mill, and by which it was not carried to the water of Avon. This work the proprietors of the mills upon Avon interrupted, upon this ground, that, by immemorial possession, they had acquired a right to the water of this loch for the use of their mills. Mr Elphinston's defence was, that this was no perennial flow of water, but a pool of stagnated water, collected chiefly of rain water which fell upon the higher grounds; for proof of which it was said, that, in the hard frosts in winter, and in the heat of summer, it afforded no water at all, so that though there might be a perennial spring or two in it, yet these were not sufficient to supply the waste by evaporation, the loch covering above 70 acres of ground; and that therefore this piece of water was to be considered as a *stagnum* or *torrens*, which not having *perpetuam causam* there could be no servitude of *aquæductus* upon it, and it was to be considered like any other pool upon Mr Elphinston's grounds, of which he might make what use he pleased: and this defence was sustained by a great majority of the Court.

What stumbled some of the Lords was, that an inferior heritor, having a mill upon a burn, acquires by prescription a right to the water of that burn, so that the superior heritor cannot divert it to any other purpose; and there was no reason why the heritors of the mills of Avon should not in like manner have acquired a right to the water of this loch. But the true answer is, that the inferior mill upon a burn has not that right by prescription, but upon this principle, that a burn is a *flumen* in the sense of the Roman law, being perennial and having an established channel or course; it is therefore, according to the doctrine of the Roman law, *publici juris*, so that no man through whose ground it passes can stop or alter the course of it. But a *stagnum* or *torrens* which has not a perpetual course, is entirely *privati juris*, and therefore the heritor upon whose ground it is may make what use of it he pleases. And though, after he has made use of it, it may go to the inferior heritor, yet it is impossible that such inferior heritor can thereby acquire a right of servitude, for there is no patience or endurance of the servient tenement, from which such a right can be inferred. And if such a collection of water should in its natural course, and without any *opus manufactum*, fall down upon the inferior tenement, it would still be more absurd to say that thereby any servitude could be acquired to the inferior tenement; for upon that tenement there is a servitude imposed by nature, of receiving the water from the superior, but it never can acquire any upon the superior.

*N. B.*—In this case it was proved, by an experiment tried by order of the Court, that the water here was not perennial; for the loch being close shut up during all the month of June last, the water, so far from increasing, decreased at the rate of two inches and three-fourths of an inch of perpendicular height over the whole surface.

---