

promise of payment to Doctor Wright's oath ; and a day being taken to produce him to depone in January last, the term was circumscribed against him for not compearing : but conditionally, not to be extracted till the 5th of June ; that if he compeared betwixt and that time, he should be admitted and received. He now gives in a bill, with a testificate of his indisposition and inability to travel, and craves a commission to depone at Glasgow, where he dwells.

ANSWERED,---No respect to his testificate, being impetrated from chirurgions depending on him ; and it is notour he goes up and down the city of Glasgow visiting the sick ; and although he cannot ride, yet he may come in by coach. And the debt will be lost if a commission be granted ; for Mr Buchanan has two persons who heard him say to confront with him, for refreshing his memory, which two he cannot persuade to go to Glasgow ; so he must depone here.

The Lords thought the commission was too long a-seeking, and that the testificate was not positive : therefore they refused it ; and prorogated the diet for his coming in till the 1st of July next, but so as to keep the circumduction fast. But the doctor offering to be at the expense of their journey to Glasgow and back again, to be confronted with him, the Lords, in these terms, gave him a commission ; and, in case he should die before that time, that the decret holding him as confest should go out against him and stand good, notwithstanding the prorogation of the term as to his deponing, that being only given him *ex gratia*.

*Vol. II. Page 332.*

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1706. June 11. ANDREW ABERDEEN and OTHERS *against* HELEN SHAND and her HUSBAND.

MR Andrew Aberdeen, and the other heritors and magistrates of the town of Old Aberdeen, pursue a declarator against Helen Shand and her husband, to hear and see it found and declared, That they have the undoubted right to the ground on which they have founded their tolbooth and new prison ; and that the said market-place and streets belong to the community of the said burgh, and not to the said Helen ; and that, therefore, she and her husband be discharged to impede, hinder, and interrupt the building in all time coming ; and to refund their damages in stopping the said work, and the expenses of plea.

The defender raised a counter-declarator, ALLEGING, The ground on which the town was building the new tolbooth and prison was no part of their common good, but belonged to her in property ; and that she has the houses adjacent, whereof she is heiress ; and if the ground be Shand's property, then *inædificata solo cedunt soli illius domino* ; and her tenants threaten to give over if the said work proceed ; because they will be hourly disturbed with the noise of the clock and chime of bells.

The Lords, before answer, allowed a conjunct probation as to the property or commony of the said ground. And accordingly the town adduced several witnesses, who proved, that, these forty years back and more, the said ground was ever reputed to belong to the town ; and that in the year 1649 they had built a house thereon ; and never knew them interrupted till the year 1702, that this woman and her husband pretended right thereto.

The Lords found the town had right to this ground, and therefore decerned

and declared in their favours. And, as to the accidental inconvenience of noise, a public good was not to be stopped on that account ; though the French lawyers tell, that a professor having complained that a smith dwelling next him disturbed his own and his scholars' studies, the judge ordained him to flit and remove to another part of the town. And yet a smith is as necessary a member of society and republic as any professor of law : Both are useful in their own kind. And, as to expenses, the Lords ordained the pursuers to give in a condescendence and account of the same, that they might consider thereupon.

It was OBJECTED against some of the witnesses, That, being burgesses, they were parties ; and so might tine and win *in re civitatis*.

The Lords thought, If it were in a common pasturage belonging to the city, where all the witnesses had a liberty to put in their goods, there might be suspicion ; but there was no ground for it here : and so repelled the objection.

*Vol. II. Page 333.*

1706. *June 12.* LORD LINDORES *against* WILLIAM FOULIS and SIR JOHN FOULIS.

DAVID Lesly, now Lord Lindores, gives in a petition, representing, That he was infest by his father, *in anno* 1694, in the fee of the lordship of Lindores ; and the seasine duly registrate by Sir John Foulis : But that, the principal seasine being amissing, he had applied to John Macfarlane, who was notary to it, and got another principal from his protocol-book ; and, by good providence, two of the witnesses being still in life, he had got their subscriptions and attestations likewise : but when he brings it to Mr William Foulis, now keeper of the register of seasines, and to Sir John, his father, who had marked the former, they both declined to do it :—Sir John, because he was *functus* and exauctorate, having demitted in favours of his son, who is now *in officio* ; and Mr William refused, because it would be a sort of falsehood in him to mark a seasine of a date long prior to his entry, and when he was not keeper.

The Lords thought such a defect ought not to want a remedy ; but some proposed a proving of the tenor. Others said it might be granted *periculo petentis* ; but the plurality thought they might warrantably ordain Mr William, the present keeper, to mark it : and that there neither might be alteration, nor vitiation of the registers, which were dangerous, they appointed their act and warrant to be marked and inserted on the margin of the register where it was first recorded ; which would bear the *res gesta* : and this was no new thing, for they had granted the like to Sir Andrew Ramsay on his supplication, as is observed by Stair, *January 2, 1678.*

*Vol. II. Page 333.*

1706. *June 21.* GILBERT MONTIER *against* JAMES MACJARROW.

GILBERT Montier, factor at Rotterdam, gave in a petition, representing, That, on a commission from James Macjarrow, merchant in Air, he had sent him a parcel of indigo and other goods to the value of 187 guilders, in George Walker, skipper in Borrowstonness, his ship ; but, before arriving of the ship, the said