

*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