Item, John Boswell's action against William Cunninghame, in Lington of Abbotshall, and his wife.

Item, My Lord Cardross and his Lady's advocation against Robert Campbell, apothecary, about his infeftment in the thirteen oxengates of land in Strathbrock, formerly belonging to Mr William Oliphant and Blackcraig. Of which, see Dury, 1631,

Item, Sir John Harper against Inglis of Murdiston.

Item, Brown of Nunton against the Town of Kirkcubright; for whom this allegeance was sustained,—They stand infeft, *cum piscationibus* in general, without mentioning *salmonum;* and, by virtue therefore, in forty years' peaceable possession of salmon-fishing; which, albeit *inter regalia*, yet this was enough for a burgh-royal. See Stair's System, page 231. See Dury, *26th March* 1628, *Maxwell.* See, *7th December* 1678, thir same parties.

Item, The Lords of Session refused an aliment to the heir of Kingston, furth of his father's estate, during the dependance of his reduction, founded on his uncle Archibald Douglas of Whittinghame's tailyies; and rejected his bill.

Advocates' MS. No. 718, *folio* 317.

1676, 1677, *and* 1678. SIR JOHN SETON of GAIRLETON *against* GEORGE SETON of BARNS.

1676. *July.*—SIR John Seaton of Gairleton convenes George Seaton of Barns before the Secret Council, for oppression and riot, in casting down a dry-stone dyke Gairleton was building on the march betwixt them, for taking in a park.

Barnes ALLEGED he had done no wrong; because he had encroached upon his land, and was going to enhance, appropriate, and inclose a well, which not only served his beasts, but also made a mill he had to go, with some derived help. *2do*,—He had used civil and legal interruptions, *per novi operis nuntiationem super damno infecto, quod nondum quidem factum est, sed fieri timetur*; (see these titles D. and C.;) and they not desisting nor finding caution, he might stop *per viam facti.* Yet see *Joannes Vandus, libro 2, Quæstio* 30; who says, it must be *authore prætore. Vide supra*, in the case of *Kirknes*, No. 475, [*June* 1676.]

And whereas he pretends he had power, by the 17th Act of Parliament 1669, to keep his dyke straight, to take somewhat of the adjacent neighbour's lands,

It is ANSWERED, 1*mo*,—That is for encouragement of parking; but this cannot be called a park. *2do*,—Since he has appealed to that Act of Parliament he must stand to it. It appoints the same to be done at the sight of the sheriff, and not *privata authoritate.* See the rest in the Informations.

The difference was settled by the mediation of my Lord Dundonald; and it was but reason it should be so: for as Abraham said, in a like contest about a well, to Lot,—"Why should we contend together, for we are brethren."

Advocates' MS. No. 485, *folio* 250.

1677. *February.*—In the declarator pursued by Seton of Barnes *against* Seton of Garleton, anent his right to the aqueduct of his well, &c. Garleton

offering to prove it was in his ground, a visitation act and commission was appointed by Colinton, before whom it was debated. Then, upon a bill given in by Barnes, the Lords named Newbyth and Gosfoord to perambulate and take inspection of the ground, and receive the depositions of witnesses to be adduced by either party, anent the property, and possession past memory, &c. (See the information.) Who met, upon the ground, on the 9th of May, and considered, from point to point, if my Lord Dundonald's decreet-arbitral betwixt them was fulfilled; then examined four witnesses for either party, anent the property of the strand and aqueduct, and Barnes his use of casting the same, &c. *Advocates' MS. No. 553, folio 278.*

1677. *November* 14.—Sir John Seton of Garmilton having charged George Seton of Barnes, upon a decreet of the Sheriff of Hadington, finding that some of Barnes his cattle had come upon an inclosure in Garleton's ground, and therefore fining him in £5 Scots for each beast, conform to the Act, in the Parliament 1661: Of this decreet Barnes raised suspension and reduction, upon iniquity, that the sheriff had refused a visitation, and found it to be an inclosure, upon the testimonies of some of Garmilton's own servants; and that it truly had none of the qualifications required, by the foresaid Act of Parliament, to a privileged inclosure.

The suspension coming first to be called,—Newton repelled the reasons, as not instantly verified, and found the letters orderly proceeded; superseding extract for a month, in which time Barnes might insist in the discussing of his reduction. Before the elapsing of this time, on the 21st of November, we gave in a bill to the Lords, representing, that our reduction was now ready; and, for the speedier dispatch, to verify our reasons, the process led before the sheriff, and the principal depositions of the witnesses would be necessary; therefore craved a warrant against the sheriff-clerk, to send them in.

The desire of this bill the Lords granted. And Barnes having charged him with horning, he transmitted the haill process to Mr Thomas Hay; after which, upon a new bill, we got it remitted to Newton, to compare the probation with the decreet, and with the reasons libelled against it, and, after perusal, to report:

Which he having done on the 26th of February 1678, the Lords found the said decreet unjust; and therefore reduced and suspended *simpliciter*.

We were not expecting so much; but only that the Lords should have turned it to a libel, and appointed a visitation and perambulation on the ground, for cognoscing if it was truly such an inclosure as was meant by the foresaid Act of Parliament. See the copy of the decreet, and reasons against it, *apud me*. Anent the evoking and transmitting processes in inferior courts, see an instance, *supra, num.* 623, *Sir A. Ramsay*, [*26th July* 1677.]

Advocates' MS. No. 655, folio 307.

1678. *February* 2.—In the declarator of property, or cognition and perambulation of molestation of the meiths and marches, between Seton of Barns and Seton of Garmilton, (of which *vide supra*, No. 553,)—the probation and report of the commission being this day advised, and the Lords having considered the report made by the Lords Newbyth and Gosfuird, visitors, adhere to the said report, in so far as they have determined the matter in question. And siclike, having considered Garmilton's oath and deposition, and the testimony of the witnesses adduced, they find, by Garmilton's deposition, That the stone dyke of the park is rightly situated, according to the Earl of Dundonald's

decreet-arbitral; and find that Garmilton should make a stone pend in the park-dyke, sufficient to let the water go out, not being of that wideness to let in or out beasts. And find that the water-gang, from the park-dyke to Barnes his mill, ought to continue in the old channel; and that the channel wherein it now runs is the old channel; and that the said water-gang, from the ston park, is the march betwixt Barnes' and Garmilton's lands; and that the water running therein can suffer no division; and the diversion made by Garilton ought to be restored, so that the water may run entire in the old channel. And find that Garilton's feal-dyke, at the east end thereof, is built, by the space of a pair of boots, on Barnes his land; and that therefore the same ought to be demolished, by the said space of a pair of boots. And find that both Barnes and Garmilton may, at their pleasure, cast the foresaid aqueduct and water-gang; and that, in their casting, they ought to do no prejudice, either of them, to other's lands, or to the feal-dyke built by Garmilton, except in so far as the same is ordained to be demolished; and that the mud and earth, to be cast out by either party, when they dight the aqueduct, ought to be casten, the one half thereof on Barnes his side of the aqueduct, and the other half on Garmilton's side: and decerned accordingly.

On the 6th of June 1678, Garmilton having given in a bill to the Lords, complaining of this decreet, (for it was not then extracted,) and craving the Lords would readvise the probation; and answers being made to it,—The Lords refused the bill, and adhered to their interlocutor.

Advocates' MS. No. 719, *folio* 318.

[See the subsequent part of the Report of this Case, Dictionary, page 10,476.]

1678. *February.* ANENT INHIBITIONS.

ONE serves inhibition on a personal bond,—himself is afterwards inhibited by one of his creditors,—he, notwithstanding, uplifts the money, and discharges the bond. *Quæritur* if his creditor who inhibited him can reduce the discharge *ex capite inhibitionis.* Some think he cannot; because such a bond is not made heritable by the inhibition *quoad* the succession, so as to make that bond fall to an heir: others affirm he can; because, at least, it is heritable *quoad* the security. *Vide supra, num.* 281, [*Eleis* against *Wishaw, 5th December* 1671.]

ANENT ADJUDICATIONS.

II.—*Quæritur* if one may adjudge in the new form, according to the Act of Parliament in 1672, lands already apprised, whereof the legal is not yet expired; or, if they must, of necessity, apprise them by that act; and whether the said act makes it *necessitatis* or *voluntatis* to the creditor.

ANENT *JUS RELICTI.*

III.—Where a man dies having no estate but bonds bearing annualrent, out of thir his relict can have no third, because they are heritable *quoad relictam,*