

*non residentibus*, requires two conditions: 1mo, That there be lesion and prejudice by the absence. 2do, That they be *moniti et requisiti revertere*: none of which can be subsumed here. And Sir William Primrose was not deposed for non-residence, but for not bringing in the notary's prothocal books, conform to the 22d Act Parl. 1617. And it is by the injunctions of the books of Sederunt that Commissaries must reside.

And yet this was not required by the decision, 6th February 1666, *Archbishop of Glasgow against Logan*.

This case being submitted to the President, the Doctor got 2700 merks for his 4000, and the intermediate profits. *Vol. I. Page 483.*

1687. November 30. *ERSKINE of ALVA and STIRLING of AIRDOCH against GEORGE RAMSAY.*

THE case of Erskine of Alva and Stirling of Airdoch *against* Major George Ramsay, was reported by Kemnay. Sir Alexander Hope of Granton having given his Lady, Dame Anna Bill, a disposition to his moveables, it was quarrelled by thir legatars of Sir Alexander's, as *donatio inter virum et uxorem*, and revoked by his posterior testament leaving thir legacies. The Major, as assignee to the Lady, for fortifying it, offered to prove it depended on this onerous cause, that Sir Alexander got £2800 sterling of tocher with her, out of the Chamber of London. And a commission having been granted for proving it, the term was circumduced, and decret given: which was suspended on this reason, that, the commission being directed in 1684, they could not then get it executed, because, the King having issued out his writ of *quo warranto* against the city of London's charter, it was declared void, by the Lord Chief-justice Sanders, and there was no access to their writs and archives; and so they were not *in culpa aut mora*; and it was only an act before answer. REPLIED, —The onerous cause was admitted only to be proven by a writ under Sir Alexander's own hand, and not by extrinsic records, as recognizances, and statute staple, which are not probative with us; but the Lords had reserved to themselves to consider what these should operate.

The Lords, on Kemnay's report, turned the decret into a libel, and reponed the defenders, they paying £40 of expenses for that decret; and renewed the commission to London, to be reported against the 10th of January next.

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1686 and 1687. *ALEXANDER HAMILTON against SIR JOHN RAMSAY of WHITEHILL and DAVID PLENDERLEITH of BLYTH.*

See the prior part of the Report of this case, Dictionary, page 16,404.

1686. December 17.—*ALEXANDER Hamilton against Ramsay and Blyth,*

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-