

feft.—It was *answered*, That the defender bruiked the lands as heritable possessor; likeas, by a heritable disposition, and procuratory of resignation, the same lands were resigned in favours of the defender; and his not expeding an infeftment, could not in law nor reason put the pursuer to cite his author, who is minor.

No 49.

THE LORDS repelled the allegiance in respect of the answer.

Fol. Dic. v. 1. p. 135. Gilmour, No 58. p. 42.

* * * Stair reports the same case :

PATRICK NICOL pursues a declarator of property of his lands of Grantoun, and that he had good right thereto, conform to the bounds libelled. It was *alleged* for Sir Alexander Hope, *imo*, All parties having interest are not called, this being an action, that in effect terminateth upon a perambulation, or determining of the marches. It is a real action, and there is necessity to call the heirs of Sir John Hope, who died last vest and seased in the other adjacent lands. The pursuer *answered*, That he offered him to prove, that Sir John had disposed in favour of Sir Alexander, and resigned in his time. It was *answered* for Sir Alexander, That Sir John was not denuded, seeing no infeftment followed, and the disposition is but an incomplete personal right, so that some having the real right must be called.

THE LORDS repelled the defence, in respect of the reply. It was further *alleged* for Sir Alexander, That he had built a park-dyke upon a part of the ground in question, before the pursuer's right, *sciente et astante domino*; the former heritor having never opposed, nor contradicted, which must necessarily infer his consent. The pursuer *answered*, That it was not relevant to take away any part of the property, upon such a presumptive consent, neither was he obliged to dissent, seeing he knew that which was built upon his ground, would become his own, as *edificatum solo cedit*.

THE LORDS repelled this defence also; but they thought that the taciturnity might operate this much, that Sir Alexander might remove the materials of his wall, or get from Patrick Nicol *quantam partem est lucratus*, by the building of the wall.

Stair, v. 1. p. 153.

SECT. XIII.

Citation in Declarator of Servitude.

1628. February 9. L. WARDIS *against* TENANTS.

IN an action by L. Wardis against the Tenants of the L. of Dunkintie, for doing of services to the pursuer's mill, as possessors of the land astricted thereto,

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No 50.
Found incompetent to pursue declarator of servi-

No 50.
tude against
tenants, with-
out calling
the proprie-
tor.

wherein the L. of Dunkintie their master, who was not called in the process, compearing and admitted for his interest, *alleged*, That no process ought to be granted in this case, tending to constitute a servitude upon his ground, except he had been summoned to this pursuit. THE LORDS found no process therein, while the master be called ; and this was found, albeit the master himself compeared for his interest, and proponed this exception himself, and not with the tenants.

Act. *Nicolson.*

Alt. *Hope.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 136. Durie, p. 343.

* * The same case is reported by Spottiswood :

THE Laird of Ward-house pursued the tenants of Christ's-kirk for payment of their thirled multures to him, and for doing of certain services, as leading stones to the mill, bigging of the dam, &c. Compeared the Laird of Dunkintie, and *alleged*, No process against the defenders, who were his tenants, because he was not summoned, which not being done, they could not constitute any servitude upon his tenants and lands. This exception, if it had been proponed for the tenants, was very relevant ; but it was thought by many of the LORDS, that he compearing at the bar uncalled, could not be heard to allege that he was not summoned ; yet the most part sustained the exception proponed by Dunkintie himself.

Spottiswood, p. 318.

SECT. XIV.

Citation in Declarator of Redemption.

1542. May 23.

RAMSAY *against* DAMPERSTON.

No 51.
This excep-
tion to an or-
der of re-
demption
was admitted,
that the per-
son from
whom the
lands were
craved to be

HENRY RAMSAY called William Damperton to hear and see the lands of N. be decernit be decret of the Lords, lawfully redeemed as use is. The said William *answered*, the same should not be, because the heritable possessor of the lands, viz. his son, was not wairnt to the redemption of these lands, and that he was but liferenter of the same, and so that he could not remove and overgive these lands, property, and possession thereof ; and seeing the heritable fiar was not wairnt, as said is, the lands should not be decernit lawfully redeemed, and offered him to prove sufficiently his allegiance, and desired an term thereto.