

1632. December 7. LAIRD of PENNIEMUIR, &c. against ———

No. 3.

In conformity
with the
above.

THE Laird of Penniemuir, and Sir Andrew Fletcher of Innerpeffer, pretending them to be infeft in a certain part of the lands of Doune, seek a declarator against sundry to hear and see it declared, that the common muir belongs only to the said barony, and portioners thereof, and to hear and see the defenders specially summoned to desist and cease from pasturing and casting within the said muir. It was excepted, for Mr. Alexander Wedderburn, heritor of ———, That no declaration can be granted against him, because he produced a writ granted to his father, *in anno* 1604, by the Earl of Crawford, then heritor of the said barony, and author to the pursuer, of liberty to him, his heirs and assignees, to have committed in the said muir of Doune, and, by virtue thereof, have been in possession since the granting of the said servitude. To which it was replied, That licence was personal, and wanted charter and sasine, and so was no real right against the singular successor; *2do*, That the lands of Kinkene lie not contiguous to the muir; *3tio*, That the Earl of Crawford was rebel when he granted the servitude. The Lords found the exception relevant, notwithstanding of the reply.

Fol. Dic. v. 2. p. 373. Auchinleck MS. p. 213.

1662. February 26. JOHN KINNAIRD against LAIRD of FENZIES.

No. 4.

What extent
of possession
requisite?

JOHN KINNAIRD pursues a declarator of property of a mire or marsh, in the Carse of Gowrie, against the Laird of Fenzies, who had his land on the other side thereof, alleging, that he and his predecessors and authors have been forty years in possession of the mire, as proper part and pertinent of the barony of Rossie, and that the same is severally kend and known by march and meith, and a dike inclosing it from the defender's lands. It was alleged for the defender, That he, his predecessors and authors, these forty years, have been in possession of the said mire, by doing all the deeds libelled by the pursuer, which must give them right at least of common pasturage fail and divot therein; and therefore craves the defence to be found relevant, and admitted to his probation, at least that a cognition might be by an inquest, conform to the act of Parliament, and witnesses led, *hinc inde*. The pursuer replied, That he offers him to prove, that, by the space of forty years, he, his predecessors and authors, possessed the said mire, not only by the deeds libelled, but also did divide the same in several parcels to each tenant in the barony, and was accordingly possessed by them, which is sufficient to show that they bruiked the same as property, and not a promiscuous commonty. And as for the defender's allegiances of commonty by pasturage, &c. the same ought to be repelled, because the pursuer offers him to prove, that he interrupted and debarred the defender from time to time, which