

THE LORDS, before answer, granted commission to examine witnesses *binc inde*, concerning their possession of property and commonty; and having advised the testimonies, found that the matter was not so clear as to be the ground of a contravention; and, therefore, assoilzied both parties; but declared it should be free to them both, or either of them, to turn their libel into a molestation, and to reform the same accordingly thereanent. They granted again commission before answer, to examine witnesses *binc inde*, anent either's possession, and the endurance thereof, which was not cleared by the former commission.

No 642.

*Stair, v. 1. p. 162.*

1668. June 13.

Sir JOHN GIBSON *against* JAMES OSWALD.

SIR JOHN GIBSON and James Oswald having mutual declarators of property of a piece of controverted ground, lying on the march between two gairs, or bentish stripes of ground, through a moor; equal number of witnesses being examined for either party, one witness for either side proved 40 years constant possession of the party adducer, and that they did interrupt the other party, and turned away their cattle when they came over: Some of the witnesses did prove either party to have had possession above 40 years since; but did not prove that they knew the same constantly so bruiked, neither did they know any thing to the contrary; and many witnesses, on either side, proved not only that the meiths libelled by the party who adduced them were holden and reputed the true marches for a very long time, but did not express how long, but some of them deponed, that stones in the meiths were commonly holden and reputed to be march-stones; and so the testimonies were contrary; and if there had not been mutual probation, either party would have proved sufficiently; and neither party having bounding charters, the question arose, Whether the pregnantest probation should be preferred, to give the property to that party, and exclude the other; or if both parties, proving so long possession, and mutual interruptions, the probation should infer a promiscuous possession and right of the controverted piece of land, and so resolve into a commonty, albeit neither party claimed nor libelled commonty?

No 643.

Commonty foundinferred, on mutual declarators of property of ground lying on the marches of two estates, where in both parties proved 40 years possession, and mutual interruptions.

THE LORDS found the testimonies of the witnesses to infer a commonty to either party of the ground in controversy; albeit they found that Sir John Gibson's witnesses were more pregnant, yet not so far as to exclude the others; but declared, that if either party desired that piece to be divided, they would grant commission for dividing the same, and setting down of march-stones.

*Fol. Dic. v. 2. p. 270. Stair, v. 1. p. 540.*