

1703. *December 15.* FORBES of BALLOGY *against* SIR THOMAS BURNET of LEYS.

THE mutual declarators of property of the Hill of Fair, betwixt Forbes of Ballogy and Sir Thomas Burnet of Leys, were this day advised and decided. Charteris of Kinfauns, as Baron of Lumphanan, was heritor of a great part of this hill, consisting of sundry mountains, glens, and straths nine or ten miles in circuit; he, in 1570, grants a charter of the lands of Ballogy, lying at the foot of the said hill, to Gordon of Abergeldy, Forbes of Ballogy's author by progress, bearing, in the dispositive clause, *una cum monte de Fair ad eas terras spectan.*; and by many subsequent rights the hill of Fair is always expressed therein. Leys, by himself or his vassals, was in possession of sundry lands adjacent to the said hill, feued out by Kinfauns prior to Abergeldy's right, mentioning common pasturage and other privileges in some parts of the said hill particularly bounded; as also, he had right from Cuming of Coulter to the barony of Tilnaboy, contigue to some parts of that hill; and so contended with Ballogy for the property thereof.

The *first* question was, If these words in Kinfauns's charter 1570 of Ballogy, *montem de Fair ad eas spectan.* were demonstrative and universal of the whole hill, or rather taxative and restrictive to a proportion effeiring to that part of the hill which fronted Ballogy's lands.

And the Lords found these words behoved to carry all the right to the hill which then stood in Kinfauns's person, whereof he was not denuded by the anterior feus granted by him; and that it conveyed the whole, in so far as his lands surrounded the hill, and were then undisposed.

The next point was, If Sir Thomas, being only superior, had an interest to declare the property where his vassals were not pursuing.

And the Lords found, the feu-rights containing common pasturage *et potestatem culturandi et manurandi*, he, by his *dominium directum*, had a sufficient interest to preserve these privileges, seeing he was proprietor, against all third parties except only his own vassals, and none else could exclude him but they: and where his rights were defective or unconnected, Louson's charter being so eaten through that it was illegible, and the Laird of Skene's was only a notorial copy, the Lords declared they would advise the probation, to see if such an immemorial possession by forty years was proven as would constitute a right by itself though the titles were never so lame.

*Vol. II. Page 200.*

---

1703. *December 21.* DRYSDALE *against* SCOTLAND and MOODIE.

JOHN Scotland being debtor to Drysdale in a certain sum, he raises an adjudication of his lands; and compearance being made for the defender, ALLEGED it was the first adjudication, and he would give him a progress and lands effeiring to his sum. One Moodie, agent for Drysdale the pursuer, produces a disclamation under Scotland's hand, bearing, That he passed from his compearance, and consented the adjudication should pass; whereupon the Ordinary pronounces decreet, and it is accordingly extracted. Scotland getting notice of this, he applies by a bill to the Lords, representing, that he never owned nor granted any