

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

such paper, but it was wholly forged ; and he offered to improve the same as false : and craved that Drysdale, and Moodie his agent, may be cited summarily to abide at it *sub periculo falsi* ; and, if they decline, then to be punished as falsaries and users.

It was ANSWERED for Drysdale,—That the affair is a great surprise to him : He knows nothing of the manner how his adjudication was obtained, only he knows it is led for true and just debts, and he has no accession more or less to that disclamation and consent produced, nor never heard of it till of late ; neither will he abide at the truth of it, seeing his adjudication, though stopped for a time, cannot fail but to go at last ; and for him to participate its extract, there can be no reason to think he would be so foolish as to forge a paper.

And as to Moodie, it was ANSWERED,—The post of Alloa brought him a letter subscribed by nobody, wherein the said consent was inclosed ; and he thinking it a true deed, like a messenger's execution sent to one, produced it in the clerk's hands, and is not obliged to stand to its verity.

The Lords finding the paper disowned, they ordained the adjudication to be brought back and cancelled ; but finding it was allowed and recorded, they demurred, and first ordained the forgery and using to be tried, in order to punishment of the guilty ; for it seems to be a slender excuse to say, It was sent me, I know not by whom, and I now pass from it ; for every forger may bring off himself that way, if it were allowed as sufficient : And then the Lords would consider how far they would recal the adjudication, and grant warrant to mark its being cancelled on the margin of the register where it stands recorded.

*Vol. II. Page 202.*

1703. December 21. JAMES LESLIE against PATRICK COMRIE.

JAMES Leslie, writer in Edinburgh, gave in a complaint against Patrick Comrie, factor to Campbell of Lawers's estate, bearing, That he being agent for Lawers, and reasoning with Patrick about his client's business, Patrick did beat him in the face in the Outer-House, in presence of sundry advocates, while the Lords were sitting determining causes ; and so was guilty by the 173d Act 1593, discharging any to invade another, while the Lords are sitting, under the pain of death,—the injury receiving an aggravating, atrocious circumstance from the place where it is perpetrated ; and, therefore, craving a warrant to apprehend him ; which the Lords granted. But sundry questions arose on this case ; *1mo*, If the said Act founded on was truly an Act of Parliament, seeing it mentions only the King and Lords of the Articles in the narrative, who have no statutory power alone, without the concurrence of the three estates. But this was only thought to be a specialty in the style ; and it has ever since been esteemed as an Act of Parliament, and founded on as such. *2do*, If the beating of a party's agent in a depending plea, by the other's agent, will fall under the compass of the Act of Parliament, making the certification of beating one another *pendente lite* to be the loss of the cause on the invader's part ? But there seemed to be no reason for such an extension in a penal statute, which precisely relates to the parties themselves only, and not their doers. See the case of the *Tenants of*