

The Lords, in respect of the offer to sustain his title, advocated the cause to their macers, they signing their offer ; and named assessors for directing them, if any difficult points of law occurred in the service.

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1707. July 30. ELLIOT against THOMAS RUTHERFORD of that ilk.

THOMAS Rutherford of that ilk, having disponed some lands of Wells to Elliot, and likewise being debtor to Elliot, and charged ; he suspended on the reason, That he behoved to have compensation, because you have intromitted with a nursery, set by me, of young trees ; which he offered to prove was worth £500 Scots.

ANSWERED,—The lands being disponed to me irredeemably, with orchards, trees, and all other planting, the nursery fell under my disposition, unless they had been specially excepted and reserved : and, by the Roman law, *tit. De Rer. Divis. Sata et plantata cedunt solo ut pars fundi* : and, at this rate, *sylva cædua* might be pleaded as undisponed ; because it is designed to be cut and sold, and not to remain constantly on the ground.

REPLIED,—The design of nurseries is to transplant or sell them ; and not constantly to remain in the beds and seed plots where they stand, and are no more understood to belong to the buyer than the corns growing on the ground, and the hangings on the walls of the house, unless expressly mentioned : and Lord Dirleton thinks they fall under executry ; and about London there are nurseries worth many thousand pounds sterling : and, among ourselves, gardeners that have long tacks, plant nurseries, and sell them ; yea, remove them at their departure : And *Voet. tit. De Rer. Divis. sec. 13, 14*, tells, that in Flanders such plantations are reckoned amongst moveables, not being there *animo perpetuo remanendi*.

DUPLIED,—The common sense of all buyers and sellers has sufficiently explained the case : for, when I buy an orchard, I buy all therein contained, unless excepted ; otherwise I may be deprived of the use of my property, seeing they may not be fit for transporting before sundry years, being but lately sown ; especially when it was not the seller's custom to sell his young trees, but only brought them up to plant in his outfield-ground, and that there is a full adequate price paid for the whole. And the parallel of corns is not alike, for they are *inter fructus industriales* ; and the custom in Flanders is confessed to be *speciali legislatione*. But the clear rule of law is, *Quæ fundæ cohærent, pro immobilibus habentur*, and so *in metallis et lapidicinis, quæ cæsa et eruta sunt, mobilibus accensentur* ; but if they be still in the mine and quarry, unseparated, they are reputed *pars fundi*, and immoveable.

The Lords found that this nursery fell under the general words of the disposition, unless it had been specially reserved.

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