

No 17. Vinnius *ad tit. Inst. De act.* tells us *iudices compromissarii* must proceed as to material justice *eodem ordine*, that the *veri iudices* do. *Replied*, There is neither dubiety nor ambiguity in the clause of the decreet-arbitral, for it expressly determines that Tilligart shall be taken for eight chalders of the ten, and Captain Bruce can least quarrel this of any man living; for two years after the decreet-arbitral he set a tack of it for that. THE LORDS, by plurality, found he behoved to take it for eight chalders of victual, suppose it should now pay less. The next point disputed was, he claimed an orchard at some distance from the house, as falling under the designation of the yards obliged to be disposed to him. *Alleged*, That word comprehended no more but the yards and gardens adjacent to the house, which they were willing to dispo to him; but there were sundry acres of land interjected betwixt this orchard and the mansion-place; and there is a coal-sink put down in the midst of it, and it is of a great extent; and in the enumeration of charters, *cum hortis et pomariis* are different things; the first, in our stile signifying a yard, and the other an orchard set with fruit trees. *Answered*, They are truly synonymous words of the same import and signification. Littleton deriving the Latin *hortus* from *ortus*, *quia ibi arbores et olera oriuntur*. THE LORDS found the yards comprehended likewise this orchard, and gave Captain Bruce right thereto.

*Fountainball, v. 2. p. 545.*

1714. July 2.

SIR ROBERT DUNBAR of Northfield against SINCLAIR of Dun and SINCLAIR of Lyth.

No 18.

In a declarator of right in a commonity, the pursuer was required to produce a progress of rights for 40 years, as a warrant of his author's possession.

IN the action at the instance of Sir Robert Dunbar against Sinclair of Dun and Lyth, for declaring his right of commonity in a muir lying betwixt his lands of Gilloch and those possessed by the defenders; the pursuer founded upon his charter and sasine in the said lands, with their parts and pertinents in the year 1708, and offered to prove, that the muir in question was always reputed to pertain in commonity to the said lands, and was possessed as such by him and his authors time out of mind.

THE LORDS found no process at the pursuer's instance, unless he could produce a progress 40 years backward as a warrant of his authors' possession; and ordained him to produce his authors' rights.

Albeit it was *alleged* for the pursuer, That he standing possessed of the undoubted property of the lands of Gilloch by virtue of the charter and sasine produced, his authors *præsumptione juris* are understood to have had the same right which was a title as sufficient for their possession, as his infetment is for his, unless his title be reduced. *2do*, In the present question, he does not pretend to have acquired right by possession as of a separate tenement, in

which case, he should certainly have been obliged to produce a prior title; he only pleads that the commonity of that muir is part and pertinent of those lands, which are and have been his author's unquestionable property, and alleges possession as a proof, not as a title of prescription.

No 18.

Forbes, MS. p. 75.

1714. November 17.

JANET CRAWFURD LADY DALEGLES, Elder, *against* JOHN CRAWFURD, now of Dalegles, and MARGARET CUNNINGHAM, his Mother and Tutrix.

THE Lady Dalegles, elder, by her contract of marriage, was infeft in liferent of the one merk land of Nether Fardin *alias* Rigfoot; and there being a moss called Fardin Moss, which lies betwixt the said land and the one merk land of Dalegles, but contiguous to both, the old Lady contends, That the said Fardin Moss is part and pertinent of Nether Fardin, her jointure lands; and Dalegles, her grandson, contends it to be part and pertinent of the one merk land of Dalegles.

No 19.

A moss, with the same name as the lands contiguous, found to be part and pertinent.

*Alleged* for the Lady; *1mo*, That the very name of Fardin Moss shows that piece of ground to belong to Nether Fardin; *2do*, The same appears from the thing itself, since otherwise there would be a very odd inequality betwixt the rents of the two several merk lands, the rent of Dalegles being betwixt 3 and 400 merks, and the rent of Fardin Moss 70 merks, and the remainder of Nether Fardin but 110 merks; so that Dalegles will be above a third more than Nether Fardin, comprehending Fardin Moss, and three times as much as the remainder, wanting Fardin Moss; an inequality too great to be presumed between neighbouring tenements of the same valuation.

*Answered* to the *1st*, That the lands of Nether Fardin are also called Rigfoot, and so denominated in the Lady's contract; whereas there is another room not liferented by her, which is called Over Fardin, also contiguous to the moss in question; so that if any argument can be drawn from the name, it would more naturally apply to the Over Fardin, which still keeps the name of Fardin, than to Nether Fardin, which has also another name. To the *2d*, *answered*, That the disparity betwixt the rooms can be no argument, otherwise the pursuer, to make an equality, might contain not only the moss, but the third more of Dalegles; since, even though the moss were joined to Nether Fardin, by the pursuer's own computation, the lands of Dalegles would be double the rent thereof; and, if two neighbouring merk lands could differ so far, the small addition of the rent of the moss can afford no argument.

THE LORDS found the lands of Fardin Moss, in controversy, to be part and  
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