

No 47. chosen in their presence, there being neither decret-arbitral, nor submission in writ.

THE LORDS repelled the reasons, in respect of the answer, and declared, that if the land fell in the superior's hands, by recognition, non-entry, or otherwise, the decret should not prejudice him if he were not called. See PROCESS.

Fol. Dic. v. 1. p. 135. Stair, v. 1. p. 95.

1662. February.

The LAIRD of LIVINGSTON *against* The FEUARS of Falhouse.

No 48.
Found in conformity with the above, and seems to be the same case.

THERE being an action of molestation pursued before the Sheriff of Linlithgow, betwixt the Laird of Livingston and the feuars of Falhouse, anent some marches betwixt them, wherein mutual probation was adduced; and it being proven for Livingston, That his author, the Earl of Callander, and the feuars, having submitted the cognition and determination of the marches to indifferent arbiters, they did set the march stones by consent of the parties, in respect whereof the Sheriff decerned the march stones to be fixed, and kept according to the former determination; this decret being called in question, the reasons of reduction were mainly these two; 1st, There was nothing to verify the submission, and it could not be proven but *scripto*; 2do, The Lord Torphican, superior to the said feuars, was not called, and now he concurred in the reduction.—To the *first* it was *answered*, That betwixt neighbours, the matter of marches might very well be determined by a verbal reference to indifferent friends, and both submission and determination might be proven *prout de jure*, without writ; To the *second* it was *answered*, That the superior had no prejudice, and consequently no interest; and if the property should fall in his hands by any casualty, a decret given against him, he not being called, will not prejudice him.

THE LORDS assoilzied from the said reasons, in respect of the answers, which they found relevant. See PROOF.

Fol. Dic. v. 1. p. 136. Gilmour, No 27. p. 22.

No 49.
In a declarator of property, which was in effect a fixing of marches, it was found sufficient to call a disponent, though not infeft; and not the disponent who held the feudal right.

1663. January 3.

NICOL *against* HOPE.

PATRICK NICOL merchant, as heritor of the lands of Easter Grantoun, pursues a declarator of property against Sir Alexander Hope, heritor and possessor of the lands of Wester Grantoun, and to hear and see him decerned to desist from molesting the pursuer in his possession of the lands libelled; and namely, for demolishing that part of a dyke within these few years built within the bounds of the pursuer's lands.—It was *alleged*, That there could be no process, because all parties having interest were not called, viz. the heir of the Laird of Craighall, who stood last infeft in the lands of Wester Grantoun, the defender not being in-

feft.—It was *answered*, That the defender bruiked the lands as heritable possessor ; likeas, by a heritable disposition, and procuratory of resignation, the same lands were resigned in favours of the defender ; and his not expeding an infeftment, could not in law nor reason put the pursuer to cite his author, who is minor.

No 49.

THE LORDS repelled the allegiance in respect of the answer.

Fol. Dic. v. 1. p. 135. Gilmour, No 58. p. 42.

* * * Stair reports the same case :

PATRICK NICOL pursues a declarator of property of his lands of Grantoun, and that he had good right thereto, conform to the bounds libelled. It was *alleged* for Sir Alexander Hope, *imo*, All parties having interest are not called, this being an action, that in effect terminateth upon a perambulation, or determining of the marches. It is a real action, and there is necessity to call the heirs of Sir John Hope, who died last vest and seased in the other adjacent lands. The pursuer *answered*, That he offered him to prove, that Sir John had disposed in favour of Sir Alexander, and resigned in his time. It was *answered* for Sir Alexander, That Sir John was not denuded, seeing no infeftment followed, and the disposition is but an incomplete personal right, so that some having the real right must be called.

THE LORDS repelled the defence, in respect of the reply. It was further *alleged* for Sir Alexander, That he had built a park-dyke upon a part of the ground in question, before the pursuer's right, *sciente et astante domino* ; the former heritor having never opposed, nor contradicted, which must necessarily infer his consent. The pursuer *answered*, That it was not relevant to take away any part of the property, upon such a presumptive consent, neither was he obliged to dissent, seeing he knew that which was built upon his ground, would become his own, as *edificatum solo cedit*.

THE LORDS repelled this defence also ; but they thought that the taciturnity might operate this much, that Sir Alexander might remove the materials of his wall, or get from Patrick Nicol *quantam partem est lucratus*, by the building of the wall.

Stair, v. 1. p. 153.

SECT. XIII.

Citation in Declarator of Servitude.

1628. February 9. L. WARDIS *against* TENANTS.

IN an action by L. Wardis against the Tenants of the L. of Dunkintie, for doing of services to the pursuer's mill, as possessors of the land astricted thereto,

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No 50.
Found incompetent to pursue declarator of servi-