

1630. December 15. LORD YESTER *against* ———.

No 6.

THE Lord Yester being Baron of ———, pursuing a declarator of non-entry of the lands of ———, which were libelled in his summons, to be parts and pertinent of the said barony; and it being questioned, if it was necessary before sentence, to prove, that the lands foresaid, whereof declarator was sought, were parts and pertinent of that barony, seeing the pursuer's sasine of the barony produced made no mention of these lands; the LORDS found no necessity to prove, that they were part and pertinent, but decerned without that probation, which I think strange, for the sentence must affirm the summons to be proven, albeit nothing be used to prove that part.

Act. Stuart.

Alt. ———.

Clerk, Hay

*Durie, p. 548.*1632. March 1. ANDREW FORSYTH *against* DURIE.

IN a removing from a rigg of land, as part and pertinent of two acres of land in Dalkeith, wherein viz. the said two acres, the pursuer was infest, the defender *alleging*, That he was in possession of the rigg libelled these ten years bypast, without interruption peaceably, and this pursuer cannot by virtue of this title, which is acquired lately since his possession, and only of two acres of land, and not of this rigg specially, have interest to remove him upon this pretext, as that the rigg libelled were part and pertinent of the said two acres, seeing he offered to prove that the said rigg lyes discontinue from the said two acres, and there are other lands, pertaining to other heritors, interjected betwixt the same; and the pursuer *replying*, that the discontinuity could not be found relevant, to make the rigg cease to be pertinent of the said two acres, seeing, albeit it might thereby appear not to be a part thereof, yet it remained a pertinent thereof, for there are many other heritors and possessors of acres in Dalkeith, who have their acres lying in sundry portions discontinue, as these libelled do; and he offers to prove, that the pursuer's author hath been many years before the defenders possession, in possession of the said rigg libelled, as a part and pertinent of the said two acres, neither hath the defender, nor is he able to shew any right or title to the said rigg: THE LORDS repelled the exception, in respect of the reply, which they admitted to probation, and found that discontinuity made not the rigg to cease to be part and pertinent of the said acres, especially where there was no right alleged to the rigg, in the person of the excipient.

Clerk, Gibbon.

*Fol. Dic. v. 2. p. 26. Durie, p. 526.*

No 7.

In a dispute about a ridge of land as *pertinent*, it was found that discontinuity was no competent exception where the excipient showed no right.