

And it is evident there can be no expenses decerned against him, seeing he had probable grounds of pleading.

ANSWERED,—His witnesses were not overawed by any; and such allegiances cannot be received now in a concluded cause; and interruptions *via facta* are never refused; and who knows better their master's bounding than herds? and, allowing that deed of his author's, there is eighty years' prescription run since 1619.

The Lords refused the bill, and adhered to their former interlocutor.

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1706. *February 7.* LORD BELHAVEN *against* LORD DAVID HAY OF BELTANE.

LORD Belhaven being to inclose some ground in a park, for making his dyke regular, he pursues Lord David for two acres of his adjacent lands of Beltane, that they may be adjudged to him, conform to the 17th Act of Parliament; and offers him either as much ground equivalent, or money to the value of what shall be taken in.

ALLEGED, *1mo*,—This was depending before the justices of peace of the district of Dunbar, and so there was *lis pendens*, which could not be transported to the Lords, except by an advocacion; so that my Lord Belhaven could not insist now before the Lords.

ANSWERED,—That which was tabled before the justices of peace was only a complaint, which was never litiscontested, and so might be deserted: likeas, since King William's death, there has been no commission for justices of peace renewed throughout the kingdom; and the Lords and sheriffs, in their respective shires, are as competent as they; and it was a mistake to think the justices privative in the first instance.

The Lords repelled this dilator, and sustained process.

*2do*, ALLEGED,—This privilege was only introduced for such as inclosed four acres of ground yearly, conform to the 41st Act 1661; which my Lord Belhaven had not done. ANSWERED,—That Act gave the inclosers an encouragement to be free, for nineteen years, of cess, for all such ground; but the Act in 1669 bore no such limitation. The Lords also repelled this.

*3tio*, It was CONTENTED,—Belhaven could not insist, seeing he produced no right to the land he was inclosing. ANSWERED,—When the ground comes to be adjudged or exchanged, then he shall produce his right; but at present his possession was title enough.

The Lords repelled this dilator, he producing his infestment *cum processu*; and appointed some of their number to perambulate and visit the ground, and to take trial and probation of the value of the ground sought to be inclosed, and how it might be done with the least inconvenience to Lord David Hay, and what compensation should be made to him, either in land or money, for what should be judged necessary to be taken from him.

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