

sertion of a notary, cannot prove till the warrant of it be produced. ANSWERED, he shall produce the charter *cum processu*. This was FOUND RELEVANT.

*Secundo*, ALLEGED,—The property of this moor could never be declaimed at the Duke's instance, because it was offered to be proven for Stainebyres, and divers other gentlemen who lie adjacent to the moor, that they stood infest in their lands by the abbots of Kelso, (of which abbacy, Lesmahago and their lands were a part,) and in whose place, the Duke, as lord of erection, was come; and were in possession of this moor as a commonty past all memory of man, and so had prescribed a right of pasturage there, and so can never be declared the property of any other man; yea some of them were infest in their lands *cum communi pastura*, which could be exponed of no other commonty but this moor. And in fortification of this their possession, it is offered to be proven, that the Duke himself, under his own hand, gave warrant to some of his own vassals having also a common interest in that moor, for dividing the said moor betwixt them and the said defenders.

REPLIED,—That their exception, being only upon a servitude of pasturage, was very consistent and compatible with his declarator of property; and therefore he craved the property might be declared to appertain to the Duke, and reserve them action for constituting a servitude therein, as accords.

*Act.* Harper.

*Alt.* Lockhart and Wallace.

*Advocates' MS. No. 72, folio 81.*

1670. *July 13.* LORD ELIBANK *against* WALTER and JAMES SCOT.

MY Lord Elibank having sold his wood of \_\_\_\_\_ to Walter and James Scots for 17,000 merks: and they being by contract obliged to cut the same in seven years, and to inclose and fence the same yearly as they cutted it, they neglected the fencing of it. Whereupon my Lord charging them for damage and interest sustained by him in not fencing;

They SUSPENDED on this reason,—That by the contract, they were not obliged to enclose the same yearly as they cutted it, that being a thing almost impossible, but only to enclose it after it was wholly cut.

The contract being read and considered, it was found they were bound yearly to fence it. Then they offered to purge the failyie, by fencing it in time coming, and craved a day betwixt and which they might do the same.

ANSWERED,—That can never assoilyie them from the damage already sustained, through the not timeous fencing thereof.

The Lords appointed them to inclose betwixt and such a day; and, in the interim, a visitation of the wood, for considering in what condition the same is, and what prejudice my Lord has sustained through the suspenders their default.

*Char.* Eleis and Sinclair.

*Alt.* Pringle and Lockhart.

*Advocates' MS. No. 73, folio 81.*