

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
Vol. XX.

No 19. pertinent of the lands of Nether Fardin *alias* Rigfoot, wherein the pursuer is infest in liferent.

For the Old Lady, *Stevenson.*

Alt. *Boswell.*

Clerk, *Gibson.*

Bruce, v. 1. No 24. p. 32.

1716. June 28.

Lady MARY BRUCE, and her Husband, *against* Colonel JOHN ERSKINE.

No 20.

A disposition to a house, yard, and parks, found to comprehend the coal within the same as part and pertinent.

THERE HAVING BEEN a submission entered into by Colonel Erskine for himself, as purchaser (by a decret of sale) of the estate of Kincardine, and in name of the creditors, on the one side, and Lady Mary Bruce, to whom the said estate was conveyed, by the late Earl her brother, and the Countess her mother, on the other side; there followed thereon a decret-arbitral, wherein, among other things, the Colonel is ordained to dispone to Lady Mary the house, yards, and parks, by virtue whereof she also claimed right to the coal within the same, which coal had been anciently in a separate author's hands from him that possessed the lands. This decret coming to be quarrelled in a suspension, among many other points, this touching the coal was objected against by the Colonel.

And it was *contended* for him, That, in the decret-arbitral, the coal ought to have been reserved for him, seeing, by the decret of sale, he had right to the whole coal of the estate of Kincardine; and that the arbiters had made an infringement upon the same, by finding, that Lady Mary had right to a part of the lands, without mentioning the coal; yet finding that the Colonel had right to the hail remainder of the estate; therefore the coal must be understood reserved to him.

Answered for the Lady; That the coal being part and pertinent, and she being found by the decret arbitral to have right to such lands, she must likewise have right to the coal thereof.

Replied for the Colonel; That it is no unusual thing that the coal will be thus separate, and that there are different proprietors of land and coal; and being originally separate in the present case, and *distincta tenementa*, a decret-arbitral with respect to lands only ought not to be understood to comprehend the coal.

THE LORDS found, that the house, yards, and parks, to be disponed to Lady Mary by the decret-arbitral, comprehended the coals within the same.

Act, *Boswell.*

Alt. *Sir Walter Pringle.*

Clerk, *McKenzie.*

Bruce, v. 2. No 7. p. 11.