

1701. December 5.

The CREDITORS of TULLICOULTRY against Sir ROBERT MURRAY of Abercairnrie.

THERE being mutual declarators of property and molestation betwixt the Creditors of Tullicoultry and Sir Robert Murray, as heritor of the barony of Ogilvie, for clearing and declaring the limits and marches of the said respective baronies; Abercairnrie produced his own and his predecessors' infestments of the said barony, with part and pertinent, and libelled a bounding, comprehending a considerable piece of ground, as part and pertinent, which the Creditors of Tullicoultry alleged to belong to them; and they produced a bounding charter, under the Great Seal, in favour of Rollo of Duncrub, proceeding upon the Earl of Stirling's resignation, in the year 1644, comprehending the ground controverted, and containing a *novodamus*. Either party having founded upon their respective possessions, "The LORDS, before answer, allowed a conjunct probation of their own and their authors' possession, as part and pertinent of their respective baronies, and upon their several deeds of property, possession, and interruptions; reserving the consideration of the import of the bounding charter till the conclusion."

The probation being led, it appeared, that either party had pastured upon the controverted ground for 40 years, and that they had mutually interrupted each other; so that neither had prescribed a right by uninterrupted possession, nor lost any right competent to them *non utendo*.

It was *alleged* for the Creditors of Tullicoultry; That Abercairnrie was only infest in the barony of Ogilvie, with part and pertinent, and had not proved the lands in question to be peaceably possessed as a part of his barony; whereas, they did produce a charter, under the Great Seal, in the year 1644, expressly comprehending the lands in question, and an ample *novodamus*, with an infestment thereon, and progress downward, whereby their right was sufficiently constituted, the King being the fountain of property of lands, and that right was since preserved by possession.

It was *answered*; No regard to that charter; because the Earl of Stirling, Duncrub's author, being Secretary of State, and a man of interest, had procured a former charter, with a bounding and *novodamus*, in the year 1634, upon his own resignation, which is produced in process, and the said former charter being null, as contrary to the 138th act, 12th Parliament, King James VI. *in anno* 1592, which provides, that bounding infestments, in favour of a vassal, on his own resignation, albeit the same contain a new gift, shall noways be extended to the prejudice of any third person, anent his bounds and marches, either in property or community, but shall be judged as if no bounds had been therein contained; the charter 1644, proceeding upon the resignation of the same Earl of Stirling, ought to be in no better case, being merely a transcript of the former, and obtained by the same means.

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Effect of a bounding charter with *novodamus* in a proof of property and possession.

No 645.

It was *replied*; The Creditors did only libel upon the charter 1644, and produced the former, for the Lords' satisfaction, which is noways in the case of the said act of Parliament, nor prejudicial to Abercairnne, who had no right constituted; for the act of Parliament relates only to a bounding charter upon the obtainer's own resignation; whereas, the charter 1644 is in favour of Rollo of Duncrub, upon the Earl of Stirling's resignation; and the former charter could put the Earl of Stirling in no worse condition, than if he had not obtained it; in which case, the charter in 1644, in favour of Duncrub, a singular successor for an onerous cause, was good beyond exception.

"THE LORDS found the objection against the charter 1634, in favour of the Earl of Stirling, proceeding upon his own resignation, could not operate against the posterior charter on the Earl's resignation, in favour of Duncrub."

Fol. Dic. v. 2. p. 271. Dalrymple, No 27. p. 34.

* * * Fountainhall reports this case :

THE Lord Tullicoultry, as purchaser at the roup, and the other Creditors of Tullicoultry, having raised a declarator of property of a large parcel of ground, lying in the Ochil Hills, and Murray of Abercairnne having raised the like declarator, as part and pertinent of his barony of Ogilvie; and a conjunct probation being led as to their mutual possessions; and this day both right and possession coming to be advised, it was *alleged* for Abercairnne, That no regard could be had to Tullicoultry's charter *in anno* 1634; because, it was a new bounding charter, which, by the 138th act 1592, prejudices no third party, as to their marches. *Answered*, That act militates only against new bounding infestments, proceeding upon the vassal's own resignation, *in favorem* of himself; but so it is, that, besides this charter, there is another *in anno* 1644, flowing upon the Earl of Stirling's resignation, in favour of Rollo of Duncrub, where the said bounding is repeated; and the disparity between charters of resignation, in favour of the resigner, and charters in favour of singular successors, is plain; for one resigning in his own favour, may be under temptation to project advantages, by encroaching on his neighbour's marches, which he will not adventure to do, when he resigns in favour of a buyer; because there, for the most part, he is liable in absolute warrandice of what he disposes. *Replied*, The original title being a charter, which the act of Parliament reprobates, the subsequent charter in 1644 is nothing but a continuation and transcript of the former, and so can add nothing to the right, but passes *cum labe reali*, that the first stood affected with, and passed, of course, as a repetition of the former, and can never prejudice Abercairnne, from whom, *sine facto suo*, his right cannot be taken away. THE LORDS found the second charter in 1644 fell not within the prohibition of the foresaid act of Parliament, it not being in favour of the resigner himself, but of a third party. The next question was, Which

of the two had best right to the property? Which Tullicoultry claimed by his bounding charter, and Abercairn, as part and pertinent of his lands, and which he had proved by several witnesses, to be generally so habite and repute; but neither of them had proved such a peaceable possession for 40 years, as was free of mutual interruptions on either side: And the LORDS, by plurality, found Tullicoultry had the preferable right to the property, but so as to leave it entire, to be determined, whether Abercairn had not clearly proved a commonty and servitude of pasturage on the whole ground controverted. Sundry of the LORDS were of opinion, that neither party had a good title to the property; but the plurality carried it in favour of Tullicoultry, because they thought if the property was in neither before the year 1644, then the King's charter, by a *novodamus*, carried and conveyed it to Tullicoultry. Abercairn further *urged*, That the lands of Tullicoultry are designed to lie within the sheriffdom of Clackmannan, and the barony of Ogilvie, in the shire of Perth, and that the boundary established betwixt these two shires by our historians, as Buchanan and Monypenny, are the rising tops of the Ochil Hills, as wind and weather shears, and the water falls; but *ita est*, the bounds controverted lie on the north side of these summits and tops, and so in Perthshire; and, consequently, are parts of the barony of Ogilvie, which are designed by their charters to lie locally within the shire of Perth. *Answered*, Lands are designed from the shire wherein they principally and mainly lie; but this does not hinder where they lie on the confines of two shires or jurisdictions, but a part of them may lie in another shire: And our historians are not exact geographers; neither was that their principal design in writing; and, therefore, it is no wonder they have misled Cambden, a stranger. THE LORDS did not seem to lay much weight on this allegiance for Abercairn, anent the distinguishing the shires, but inclined to repel it; and ordained them to be farther heard, how far Abercairn had proved commonty, or a servitude of pasturage, ranging and herding.

1702. *January 8.*—ABERCAIRNIE having reclaimed against the interlocutor marked 5th December 1701, in Tullicoultry's favour, and answers having been given in for my Lord Tullicoultry and the Creditors, who, besides the former debate, urged from Durie's Decisions, that a bounding charter, with possession conform, was always found preferable to part and pertinent, fortified with an interrupted possession, and that the prevalency of a special or express infeftment was always sustained before a general one; as was found, 25th and 30th of June 1629, Douglas *contra* Turnbull, No 134. p. 10874. in the case of a muir; and 22d July 1635, Scot *contra* Lindsay, *voce* PROPERTY, where one was infeft in a loch *nominatim* designed, and the other in a lake in general, though there was no other in the bounds, and that he had constantly fished with net and wand, yet the express was preferred: And the LORDS having advised the bill and answers, they, by a plurality, adhered to their former interlocutor; though many of the LORDS inclined to think Abercairn had prescrib-

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ed at least a servitude of pasturage in the bounds controverted ; yet Abercainrie not being satisfied with that, gave in his protestation for remedy of law at the Bar.

Fountainhall, v. 2. p. 126. & 136.

No 647.

Proved or not proved, that a disposition of heritage had been granted.

1766. December 17. DRUMMOND and Others, *against* HUNTER.

JOHN DRUMMOND, having seven children, and being possessed of a considerable moveable estate, with two houses in Edinburgh, executed a trust-deed in 1706, upon this narrative, ' Forasmuch as I have declared my opinion, and made settlement and division of my estate among my wife and children, by a paper apart, of the date hereof ; which houses,' after an enumeration of the particulars of his estate, ' annualrents, bonds, obligations, heritable and moveable subjects, or others, which shall belong to me the time of my decease, are to be divided in eight parts or shares among my children, two parts to my eldest son, and the remaining six parts among my other children.'

A regular book of accounts had been kept by the Trustee, to whom the subjects were assigned, for behoof of the children ; and to this book there was a docquet annexed, which was signed by all the children, and bore, that John Drummond, deceased, ' in the settlement of his affairs, did make division of his fortune, real and moveable, into eight shares,' &c.

In 1713, John Drummond, the eldest son, executed a discharge and renunciation, ' of all he could ask or claim, by virtue of any bond of provision, or other writ conceived in his favour, or by any other right or title competent to him.'

At the distance of 60 years, William Hunter, the grandson of John Drummond, the eldest son, served heir to his great grandfather in the two houses, which had been made over by the younger sons to their sisters ; and they, having no feudal title in their persons, brought an action against William, concluding, that he should be decerned to make up titles, and convey in their favour.

As the deed referred to in the settlement was not produced, a great deal of argument was used, and many decisions quoted on both sides, upon the question, how far the settlement could be effectual to carry heritage. Most of these are to be found, Dictionary, *voce* TESTAMENT. Some more recent decisions were also appealed to ; particularly, 18th January 1764, Burgess *contra* Stanton, No 42. p. 4484.

But it is unnecessary to recapitulate the arguments more fully, the Court having taken up the case upon a different medium, and pronounced the following interlocutor :

" THE LORDS, having considered the narrative of the deed executed by John Drummond elder, with the docquet subjoined to the fitted account, signed by