

No 56. lands in question, which had confessedly been held of the Abbey of New Abbey; and that these lands are in non-entry.'

The interlocutor was altered upon a petition, and the COURT found, 'That James Burnet is entitled to hold his lands of the Crown.' But, upon an appeal, this judgment was reversed, and that of the Lord Ordinary affirmed.

Mr Copland endeavoured to diversify his case from that of Craigend; but without success: And accordingly the LORDS 'repelled the defences, and decerned in the declarator.'

Act. *Lockhart, David Dalrymple.*

Alt. *Maclaurin, Crosbie.*

G. F.

Fac. Col. No 62. p. 302.

1771. June 13. & July 25.

JOHN SPOTTISWOOD of Spottiswood, Pursuer, against JOHN FRASER of Lagan, Defender.

No 57.
Decided in conformity with the above, and contrary to No 55. p. 8000.

THE pursuer, in the year 1741, obtained a Crown-charter; by which he was put in place of the Bishop of Edinburgh, with respect to certain heritable subjects, which had anciently belonged to the Abbacy of New Abbey.

The facts relative to Spottiswood the pursuer's right and acquisition of these subjects, are stated in the Decision, 4th Feb. 1758, Spottiswood *contra* the Creditors of Nasmith, No 55. p. 8000., where it was decided, that a vassal of that Abbacy was entitled to hold of the Crown. Opposite judgments were afterwards given, *first*, In a process of declarator and non-entry against Burnet of Craigend, determined in the House of Lords in 1763; and, *secondly*, In the case of the 19th Dec. 1767, Spottiswood *contra* Copland of Collieston, No 56. p. 8003. *supra*; in both of which it was found, that Spottiswood was entitled to the superiority of the respective lands in question, which had been held of the New Abbey, and that these lands were in non-entry.

In the year 1765, Spottiswood brought a declarator of non-entry against the defender, as heritable proprietor of certain lands which had formerly held of the Abbacy; when it was stated in defence, *imo*, That as the defender and his father had possessed their lands as vassals of the Crown, upon charter and sasine, for upwards of 40 years without challenge, he had acquired a prescriptive right to hold of the Crown. *2do*, That the defender's public infeftment excluded any claim for non-entry during his lifetime; at least he could only be bound to enter with Spottiswood, not as a singular successor, but as heir to his father, who died publicly infeft before Spottiswood had got his right from the Crown. *3tio*, That, at all events, the lands could be found in non-entry only from the decree in the pursuer's favour.

The Lord Ordinary, on the 23d November 1770, found, 'That the pursuer, in virtue of the charter and sasine libelled on, has good and undoubted

right to the superiority of the lands of Nether Yet, &c. and to the feu-duties and other casualties of superiority payable forth of the same; and is entitled to enter and receive the vassals of these lands by charters and precepts of *clare constat*, in the same manner as the ancient abbots and convent of New Abbey could have done before the Reformation; and that the foresaid lands are and have been in the pursuer's hands as immediate superior of the same by reason of non-entry, since the date of the pursuer's charter from the Crown, and infeftment thereon in the year 1742; and finds that the pursuer has right to the full rents, mails, and duties, payable for the said lands since the 20th May 1765, the date of the citation of the defender in this process, and in time coming until he be lawfully entered, and to a year's rent of his lands on his being entered therein.'

In a reclaiming petition, the defender *pleaded*:

1mo, That his case was very different from that of Burnet of Craigend and Copland of Collieston, whose titles were found not sufficient to maintain the plea of prescription. In the present case, the defender's father had adjudged in implement of a disposition granted by the former proprietor; had, in 1722, obtained a charter from the Crown; had paid a composition as a singular successor, had then got infeft, and on that title had, during his life, voted as a freeholder in the county. Upon his death, his son the defender had been retoured his heir, and had been again infeft by the Crown; and as the present action had not been brought till 1765, the prescriptive period had run, and the defender was of course entitled to hold his lands of the Crown.

2do, The pursuer had no right to insist that the defender should enter with him as a singular successor, or even as an heir; but as the fee was then full, the public infeftment in his person should stand good to him during his life. In 1722, when the defender's father entered with the Crown as a singular successor, the Crown alone was *in titulo* to grant him infeftment, and had the real right to the superiority; and justice would not permit that double payment should be exacted of this composition as a singular successor, first by the Crown, and now by the pursuer.

When the case was attentively considered, it did not appear that the defender was obliged to enter even as an heir. As the fact stood, the defender was in *optima fide* to believe that his lands held of the Crown. The brief for service had been proclaimed, and the lands retoured as holding of the Crown, without any objection being stated. No challenge was brought for fourteen years thereafter; whilst several strong acts upon the part of the pursuer, such as disposing the teinds, and accepting feu-duties, had in the mean time intervened.

3tio, As the case was very doubtful, and the defender's *bona fides* apparent and unquestionable, the non-entry duties ought, at any rate, to be found due only *a tempore sententiæ*, from the date of the interlocutor, as to which the legal authorities were express. Bankton, B. 2. T. 4. Par. 19.

No 57.

The pursuer *answered* :

1mo, The defender's plea of prescription had no foundation either in law or fact. His right, as a vassal from the Crown, commenced, not upon any new grant, or even upon a charter of resignation, but upon a charter of adjudication. In granting this charter, the Crown was only continuing the possession of the bishop, and acting *vice episcopi*. The infeftment on it, so far from being derogatory from, was in reality an act of exertion of the bishop's right. The King, with whom that right for a time was vested, could exercise it only by granting this charter; but being once granted, it could not prove prejudicial to the same right of the bishop, now habily vested in the pursuer.

The prescriptive period was not run; for in the year 1746, the pursuer had brought a general action of reduction and declarator of his right, against a number of his vassals in the lands of New Abbey, with regard to the thirlage and teinds, in which the defender was called, and compearance made for him *nominatim*.

2do, The other defences resolved not into a bar of the action, but into an exception against the amount of the claims made by the pursuer in virtue of his right of superiority. The defender fell clearly to be considered as a singular successor. His father had indeed acquired a charter of adjudication from the Crown, which had been set up as a title of possession against the pursuer, both in the reduction in 1746 and in the present action. That title having been found insufficient, was the same thing as if it had been totally reduced; and hence, before he could have any feudal title to the lands, he would be obliged to expedite a new charter from the pursuer as superior. That charter must necessarily be a grant to a singular successor; and hence the casualty usually paid on that event was legally due.

3tio, The defender's allegation of *bona fides*, to excuse himself from the penal consequences of non-entry, was without foundation. He had served himself heir in special to his father, and expedite an infeftment on that service, after his right had been brought under challenge, in the most formal manner, by an action of reduction and declarator, so that he could not pretend ignorance of the pursuer's right.

The Judges were clear that the plea of prescription was ill founded. They also thought that the defender's father had been properly entered in the 1722, as at that time the Crown was truly the superior. Some were of opinion, that as the case was doubtful, and as there was no contempt, it would be hard to subject the vassal in the full mails and duties but from the time that the point in dispute was decided.

The following interlocutor was accordingly pronounced, 13th June 1771:

" Find, that the lands within mentioned have been in the pursuer's hands as lawful superior thereof, by reason of non-entry from and since the death of Hugh Fraser the defender's father; and that the defender is entitled to enter as heir therein, and is not obliged to enter as a singular successor: but

in respect that the original libel concludes for more than is now found due, and that the process was allowed to lie over and fall asleep from the 1765 to the 1770, find that the pursuer has right only to the retoured duties from the father's death till the 23d November last, the date of the Ordinary's interlocutor reclaimed against, and to the full mails and duties since that time during the non-entry; and with these variations they adhere to the Lord Ordinary's interlocutor."

The pursuer reclaimed against this interlocutor, so far as it found that he had right to the full mails and duties only since the date of the Lord Ordinary's interlocutor; maintained he was entitled to them from citation in the action; and in support of his argument, referred to the following authorities: Stair, Dirleton, 25th July 1666, Harper, *voce* NON-ENTRY; 12th June 1673, Faa against Laird of Powrie, *IBIDEM*; 18th July 1678, Fullerton *contra* Denholms, *IBIDEM*.

The defender, in an answer, still contended he was liable only from the date of the interlocutor, and referred to the following authorities and decisions: Lord Stair, b. 2. t. 4. § 24. Bankton, v. 1. p. 624. § 19. Forbes, 22d Jan. 1706, Maitland *contra* Brand, *voce* NON-ENTRY; Bruce, 24th June 1715, Heriot's Hospital *contra* Hepburn, No 54. p. 7986.

THE LORDS found, 'That the pursuer had only right to the retour-duties from the defender's father's death till the 10th May 1770, the date of the citation in the summons of wakening; and to the full mails and duties since that time during the non-entry.'

Lord Ordinary, *Ellick*.
Clerk, *Ross*.

For Spottiswood, *Crosbie*.
For Fraser, *Maclaurin*.

R. H.

Fac. Col. No 97. p. 289.

S E C T. V.

Personal Services.—Suit in Presence at Head Courts.

1662. June 27.

WATSON *against* ELIES.

ALL personal services are taken away from superiors of kirk-lands, by the act 10th Parl. 1633.

Fol. Dic. v. 1. p. 531. Stair.

*** This case is No 46. p. 7975. *b. t.*