

unclear, the Marquis takes forth of the chancery a brieve of perambulation, directed to the steward-depute of Annandale, for settling the controverted marches betwixt them. Of this brieve, Sir Patrick Maxwell raised an advocation to the Lords, on these reasons, *1mo*, The judge to whom it is directed is most incompetent and suspected, being the Marquis's own depute, he being principal steward: *2do*, Some of the lands lie within the Duke of Queensberry's regality of new Dalgarno, and who will be a more fit and impartial judge: *3tio*, Sir Patrick has a declarator of property of these lands, craved to be perambulated, depending, which is a prejudicial action, and must be first discussed. *Answered*, The cause must necessarily be remitted, seeing the Lords are not judges to perambulations and molestations in the first instance, as appears by the 79th act 1579, and act 42d 1587, these causes being best discussed on the ground of the lands by a sworn inquest of neighbouring gentlemen, where the judge, witnesses, and inquest, can visit and perambulate the marches, which the Lords cannot possibly do at Edinburgh, but behoved to remit it *ad probos et fideles homines patriæ*; and therefore Stair, B. 4. tit. 3. § 14. & B. 4. tit. 27. says, it must be remitted to be tried in the country, there being no remeid to clear marches, but to red them on the ground controverted. And to the first reason of advocation, it was *answered*, There is nothing more usual than for principals to pursue actions before their own deputies. But here it is the concern of Graham of Mosknow, Irvine of Cove, and other neutral gentlemen, as well as the Marquis's. To the 2d, *Non constat* any of them lie in a regality, it is *gratis dictum*; but though it were, the regality is situated within the stewardry, and so has no privilege. To the 3d, *Esto* he had a declarator of property, the same is most compatible with this perambulation, which is *actio finium regundorum*; they are not quarrelling his right of property: The only quarrel here is about the marches, which his property cannot hinder. THE LORDS repellèd the reasons of advocation, in respect of the answers, and remitted the cause back to the steward-depute.

Fol. Dic. v. 1. p. 496. Fountainhall, v. 2. p. 682.

SECT. III.

Actions peculiar to the Court of Session.

1618. November.

A. against B.

No 116.

FOUND, That a declarator of nullity of a right cannot be pursued in an inferior court, albeit the party so oblige himself by contract.

Fol. Dic. v. 1. p. 497. Kerse, MS. fol. 46.

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