

money. Likeas *de facto* there were 20,000 merks paid at Whitsunday 1615, the pursuer craved that the Lords would peruse the said contracts, and this they repeated in *modum probationis*.

Which dispute the Lords also having considered, together with the writs produced for the pursuer, they found the reply above written, upon the points of the said summons, sufficiently proven by the contract and remaining writs fore-said produced for the pursuer; and therefore repelled the allegiance founded on the defender's right, as flowing from Lord Lovat; and gave forth their decret in manner underwritten. They find and declare, that the irredeemable right of property of the said lands, barony of Cairnebulge, &c. comprehending such and such lands, &c. with the teinds, pertain and belong to the pursuer; and that the same is established in favours of the said pursuer, as heir by progress to the deceast Lord Fraser, his goodsire: and, therefore, the said Lords discharge the said defenders from all farther troubling, pursuing, or anyways inquieting the said pursuer, in his said right of the said lands in all time coming, &c.

*Act.* Sir John Fletcher, king's advocate; Sir Peter Wedderburn of Aberlady; Mr. Robert Sinclair, Mr. George Norvell, Mr. Andrew Birnie, Mr. George Mackenzie, and Sir Thomas Wallace. *Alt.* Sir Jo. Nisbett, now king's advocate; Sir Jo. Baird, Mr. Jo. Cunnyngname, Sir Geo. Lockhart, Pat. Fraser and Ja. Brown.

The dispute is most incorrect in the register. Da. Dick.

*Signet MS. No. 40, folio 48.*

1665. *February 4.* WALTER OGILVY of Boynd *against* The EARLS of FINDLATER, AIRLEY, and HADDINTON, SIR PATRICK OGILVIE of Inchmartin, LORD BAMFF, and OTHERS.

IN *anno* 1626, the lands of Boynd, belonging to Pat. Ogilvie of Boynd, falling in ward through the heir's non-age, the same are disponed by the king to the Lord Bamff. He, by his assignation, constitutes Ja. Earl of Airley, donatar thereto; who, by virtue of the gift and assignation thereto, intromits with the maills and duties of the whole barony or Thanedom of Boynd, from 1626 exclusive to 1636 inclusive. Then the heir, Walter Ogilvie, calling the said Earl to an account for his intromissions, there is a submission condescended to by both parties, wherein Thomas, Earl of Haddinton is oversman. Upon it follows a decret arbitral, in March 1637; conform to the tenor whereof the said Laird of Boynd grants a discharge of their whole intromissions with his living, during his minority, to the said Lord Bamff, and Earl of Airley his assignee; *item*, grants discharges to Ja. Earl of Findlater, Lord Deskfoord, and Sir Pat. Ogilvie of Inchmartin, his curators, of their intromissions and tutor counts. Then for 19,000 merks lent him by the Earl of Findlater, he wadsets to him the lands of Over and Nether Dol-lachies: *item*, for 50,000 merks alleged borrowed from Inchmartin, Boynd wadsets to him the manor place of Boynd. Both thir contracts are in 1644. Upon thir wadsetts, having once used horning and denunciation, the Earl of Findlater, made assignee to Inchmartin, in 1649 apprises Boynd's lands, and is thereon infeft. Boynd raises a summons in the English time against Earl of Findlater, Earl of Airley, Earl of Haddinton, Inchmartin, Lord Bamff, and others, for ex-

hibition of the said decret arbitral in 1637; of the discharges and acquittances following thereupon; of their tutor counts, the grounds, and instructions thereof; of the said two contracts of wadset, with the letters of horning, denunciation, and apprising; and the charters and seasines following thereupon; to be seen and considered by the said commissioners, to be reduced by them; to be declared to have been granted by the said Laird of Boynd *dolo malo*, in relation to the unjust and unreasonable tutor and curator count; and, therefore, that the saids defenders ought to count and reckon with him for their intromissions *de novo et ab initio*: *item*, that they (after count and reckoning) may be decerned to restrict their bonds, comprisings, infeftments, &c. to such sums as shall be found truly resting to them by the pursuer; and that during the dependence of this action, they may be decerned to desist from troubling the pursuer with horning or personal execution. At the calling of this action there is in 1657 a commission granted to Mr. Laurence Oliphant, David Heriot, and Robert Burnet, advocates, as auditors, to hear the said count and reckoning, and to report; who upon trial by oath of parties, writ, and witnesses, found, that by result of the last count fitted in 1636 and 1637, the Earl of Airley was addebted to Boynd in L.3,338, with annual rent from Martinmas 1639; and that, in respect the said Earl intromitted with the rents of the Forrestlands appertaining to Boynd, which fell not under the gift of the ward. Thir auditors again, with consent of both parties' procurators, grant a subcommission to Hary Elphinston of Calderhall, Urquhart of Dumlitgus, and Mr. William Stewart of Oxhill, to take the depositions of some witnesses anent the true rental of the estate of Boynd, and other articles; who also made their report. At both which commissions the said Earl of Airley, by his procurators, protested, that he should not be put to count and reckoning again *de novo*. This action of reduction and compt and reckoning is wakened in 1662; and Sir Robert Nairn of Strathurd, is appointed by the Lords to consider the reports made upon the foresaid acts of commission granted by the English Judges. After which the cause being called, the pursuer's procurators declared that *hoc loco* they insisted against the Earl of Airley allenary; and craved sentence conform to the report given in by Mr. David Heriot, &c.; desired the Lords would advise the same at their convenience.

Whereupon it was ALLEGED for the Earl of Airley,—That, after a great count and reckoning amongst the whole friends of the said Earl and the Laird of Boynd, and a submission betwixt them, and decret following thereon, and a discharge of all intromissions on that decret; till all which be taken away by reduction, the said Earl cannot be made to count; neither is he libelled against in the principal summons; so that an act of count and reckoning against the said Earl, being both illegal and unjust, cannot be advised.

Whereunto it was REPLIED for the pursuer,—That they quarrelled neither the discharge proceeding upon count and reckoning, nor the submission whereon proceeded the decret arbitral; but in so far only as Airley was liable to count for several articles contained in the additional charge given in, in this count and reckoning. *2do*, For the particulars contained in the Earl of Airley's back-bond, at the receipt of the foresaid discharge, which he thereby was bound to instruct. *3tio*, For intromissions since the alleged discharge, and so not included therein. So then the foresaid report craved to be advised, being founded on these particulars clearly proven, should be advised by the Lords after so long a delay.

Which allegiance and reply the Lords having considered, in 1663 they remitted the process to my Lord Lee, to consider and report what he found. Who, making no report, in 1664 its again called; and the Earl of Airley, having repeated his former defence, added, that he could neither count for bygones, nor for the additional or subsequent articles; because the summons whereon the pursuer insists, was only a reduction of some discharges, granted by Boynd to Airly, Findlater, and Bamff, *ex capite minoris ætatis* when he granted them; and only an extraordinary clause of count and reckoning, (notwithstanding of thir discharges yet standing unreduced,) subjoined; which as the same is most unusual and illegal, so Airley is only cast in by the bye; so that the act of count and reckoning should never have been extracted, nor the report following thereon been extended, *quoad* him. Likeas the said report was carried on *viis et modis*, and the defender damnified thereby. But to show how ready the Earl of Airly is to clear the business betwixt the pursuer and him, he is content of new to count before any of the Lords, providing no respect be had to the foresaid report.

Whereunto it was REPLIED for the pursuer,—That they repeated their former declaration and desire; *videlicet*, That they insisted not *hoc loco* for a reduction of the foresaid discharges *in anno* 1637; but on Airley's intromission with the rents of the lands, mentioned in the report made by Messrs. David Heriot, &c. as are not included in the said discharge; *2do*, To count and reckon conform to the back-bond foresaid, given by Airly at the receipt of the said discharge; *3tio*, For his subsequent intromission since the date of the said discharge, and other articles of the said report; which the pursuer craved might be advised, since all that could be said, was already said and discussed therein *parte comparente*. And as to the overture of a new count and reckoning, its replied, *Imo*, That the same could not be, after the loss of so much time and charges. *2do*, There were many witnesses adduced for probation of the particulars above written in the said report, who are now dead. *3tio*, Many papers and evidents are lost. *Item*, Airley, being an old man, may die.

Which dispute the Lords having considered, notwithstanding of the discharge in 1637, they recommended to the Lord Strathurd to consider the report made in 1657, in so far as concerns the three particulars insisted on by Boynd. *Item*, ordained the parties and their procurators to compear before the said Lord auditor at such diets, as he should appoint them; and him to report. He having heard them, and being ready to give in his report of what he had heard and found, the parties' procurators being called in before the Lords, it was of new alleged for Airly, that no process could be sustained against him, on the foresaid summons of reduction, for count and reckoning, because the same is a clear summons of reduction, and a clause of count and reckoning is only cast in by the bye. To which it was answered, that the libel stands good for count and reckoning; it being expressly libelled therein, there being auditors appointed thereon, both in the English time and now; and to cast the progress of the count and reckoning for that, were iniquity, and an endless labour. *2do*, That the commission directed for empowering the former auditors, Mr. David Heriot, &c. was only to state the count betwixt Findlater and Boynd, and not betwixt Boynd and Airley, conform to his protestation foresaid, made at the entry of the said count and reckoning.

ANSWERED,—The same ought to be repelled; and that in respect of the report, bearing the commission, and the express words thereof. As to the protestation, the same is *contraria facto*, the said Earl compearing, and making up his discharge in

the said count and reckoning, and so behaving himself as formally a party therein. *3tio*, Alleged, that the report made by Mr. David Heriot, &c. cannot be respected, because the same proceeded on their subcommission they granted to Calderhall, Dunlugas, &c. for taking the oaths of parties anent sundry articles, which they had no power to do; *delegatus enim non debet delegare*.

ANSWERED,—Allegeance ought to be repelled, in respect of the said subcommission was granted with consent of all parties or their procurators. Yea, Airley acknowledged the same, by giving procuratory to Pat. Stewart, to compear at the day of compearance contained in the said subcommission, to object against the witnesses to be led; as appears by an instrument taken in a notary's hands by the said Pat. which is so far from being a dissent, that, to the contrary, it is a homologation of the same.

ALLEGED,—That the auditors could not decern annualrent for the sums decerned due in their report; because the said Earl being only an assignee to the ward and marriage of the said laird of Boynd. *Item*, there being no *usuræ debitæ*, but *ex pacto*, the said auditors did wrong in decerning of the same annualrent.

ANSWERED,—That Lord Bamff, cedent, and Airley assignee, being bound by their bond to his Majesty's treasurer to make the ward furthcoming for the said W. Ogilvie of Boynd his own use, were in law *quasi tutores*, who are liable for annualrent, seeing the minor's stock should not be idle and useless. Likeas in the last count and reckoning they did get allowance of annualrent for the superplus of what they had expended yearly.

Then it was ALLEGED for Airley,—That there could be no count and reckoning for particulars preceding the said count and reckoning, and discharge granted thereon in 1637; because the said discharge could not have been reduced, but *intra quadriennium utile*. But so it is, the said *quadriennium* is elapsed and no reduction intended.

ANSWERED,—That Boynd is not to reduce that discharge; only craves count and reckoning for what is omitted in the first count and reckoning that was made before the Lord Innerpesser and Sir Patrick Hamilton; and for the articles not instructed in the said count, which Airley was bound by the same count to do; and for three years' intromission after the said count: which three particulars are not taken away by the said discharge, and therefore Airley should now account for the same.

Whereunto it was DUPLIED for Airley,—That all controversies anent his intromission with the estate of Boynd being formerly submitted to the then Earl of Haddinton, he, by his decret arbitral, decerned Airley free of all intromissions had with the said estate *quocunque modo*.

To which it was TRIPLIED,—That the allegeance founded on the decret arbitral cannot now be received, unless it were instantly verified and instructed; in respect that, by the late commission, Airley was ordered to produce all his papers he intends to make use of, with certification, if he did it not, the same should be holden as produced; and thereafter that he should not be heard to allege or produce any thing thereanent.

All which dispute, with the report of the Lord Strathurd, being heard by the Lords, they repelled the foresaid allegeances, in respect of the answers made thereto, and gave forth decret in manner underwritten. Ratify and approve the report made by Mr. David Heriot, &c.; decern conform thereto, Airley to pay to Boynd L.3338, with annualrent from 1639; and thus unless Airley produce the decret arbitral betwixt and such a day. At which day Airley, by



supplication, meins himself to the Lords; deduces the dispute; then shows he cannot produce the said decret, the same being a common evident to Boynd, Bamff, and himself, and so either in Boynd's hands, or at least in the auditor's to whom it was given up. The Lords ordained Boynd's procurators to see this bill, and to answer; who gave in the answer following:—That the desire of the foresaid bill was most unjust, to crave a term to prove that all intromissions before 1637 were discharged seeing that is not the thing Boynd now insists on, but on the three particulars before mentioned. *Item*, Airley proponing the same defence before the Lord auditor; it being answered that it was not *ad idem*, the auditor most justly found that the foresaid decret arbitral and discharge did not comprehend these articles now acclaimed; yet being ordained to produce the same, they so failyied therein that the term was five or six times conditionally circumduced against them; so that it were most unjust now, after fourteen years' dependence, to stop Boynd's decret, on pretence of the said decret arbitral, which they of purpose have kept up because they know it will not be the article insisted on.

Which answer the Lords having considered, they adhered to their former interlocutor; and ordained the decret to be extracted, unless the Lord Strathurd should see cause to delay the same, or to discharge the clerk for that effect. Whereupon Jo. Ogilvie, (I take it to have been Jean D'Orleans,) gives in a new supplication, shewing that the Lords have approved a report made in the English time, which was allenarly before answer, and wherein all Airley's defences were reserved to him; that Airley is very deadly sick; his son, the Lord Ogilvie, is at London; his advocate has no information; therefore for a time entreats the Lords would forbear to advise the said report.

Notwithstanding of which supplication, the Lords ordained the decret to be extracted, superseding execution thereon till December 1665; and if betwixt and then the decret arbitral alleged upon be produced, then the Lords ordain Airley to have suspension of this decret without caution or consignation.

*Act.* Sir Peter Wedderburne, Mr. Jo. Cunningham, Pat. Fraser. *Alt.* Sir Thomas Wallace, Sir George Lockhart, Mr. David Falconer.

*Signet MS. No. 47, fol. 53.*

*February 4, 1665.*

THOMAS FRASER'S DAUGHTERS *against* RENTON of Lamberton.

IN 1650, the Earl of Hartfield, (now of Annandale,) Home of Plenderghast, Home of Blaisterton, and Renton of Lamberton, oblige them to pay to Thomas Fraser merchant in Edinburgh, 8000 merks. In 1656 he gets a decret against them for the same. His daughters, on this decret, charge Lamberton's son therefore. He suspends, *1mo*, Because he, being a minor, scarce yet fourteen years, must have the privilege of the law granted to minors; that is, that the letters must be suspended as to all execution against his person, that he be not hindered in his education at schools and colleges during his minority. *2do*, The suspender and his *correi debendi* have taken the benefit of the act of debtor and creditor; and, conform thereto, have paid the chargers a year's annualrent