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they should the last year of the ward be double of what they were at the superior's entry, the relief will be due according to the improvement, as the rents are the subsequent year; and, in general, *ædificatum solo cedit*, so that if the superior has any right at all to a year's rent, he must have it at the time it is payable; for, if upon pretence of improvements, we should look back, the same argument that would allow the rate to be imposed three or four years backward, might carry the defender to the rent that was payable out of the land, when it was originally feued out, which were very absurd. *3tio*, It is not the purchase that is the immediate cause of demanding the year's rent, but the entry of the new vassal, and for the superior's granting a new charter, and so the superior cannot compel the purchaser immediately to enter after the purchase, nor has he any access to the fee, but upon the death of the former vassal; and therefore the year's rent must be due as the rents are at the opening of the fee, which in the present case happened long after the improvements were made. *4to*, If the reverse of the case be considered, that is, if the rent of the lands should, for want of due improvement, &c. decrease, certainly the superior could not claim what they were the time of the purchase, but only the present rent; as was lately found betwixt the College of Glasgow and the Laird of Dalziel *, where the Lords did not regard the old rental, though instructed by tack, but proceeded upon the probation of the latter rental.

"THE LORDS found the present rental is the rule; but remitted to the Ordinary to hear parties procurators, whether the defender, who made the improvements, being in the natural possession, is only liable for a year's rent, as the same paid at his entry to the possession." See SUPERIOR and VASSAL.

Act. *Graham.* Alt. *Sir Walter Pringle.* Clerk, *Gibson.*

Bruce, *v.* 1. No 109. *p.* 135. *and* No 131. *p.* 173.

1758. *February* 4.

SPOTTISWOODE of that Ilk, *against* The CREDITORS of the deceased JAMES NASMITH of EARLSHAUGH.

No 55.
A person was infeft in lands which had belonged originally to an abbey. They were acquired afterwards by the Crown, and mortified for the use of a bishoprick. Found that

IN the ranking of the creditors of the said James Nasmith, a question occurred, Whether certain lands, which had belonged to him in property, called Howell, Balfier, &c. held feu of the Crown, or of Mr Spottiswoode of that ilk, who claimed the right of superiority?

Sir Robert Spottiswoode, Lord President of the Session, in 1624, was infeft, by a charter under the great seal, in the barony of New Abbey, containing the lands which had belonged to the abbacy of New Abbey.

In 1633, King Charles I. formed the design of purchasing from Sir Robert the foresaid lands of New Abbey, in order to mortify them for the use of the

* Examine General List of Names.

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the superiority was in the Crown, after the abolition of Episcopacy.

bishoprick of Edinburgh; but it was thought proper, as they were church-lands, and consequently had been annexed to the Crown by the act 1587, first to get them dissolved; and accordingly an act was obtained for that purpose in the year 1633, by which 'the abbacy of New Abbey, with the whole lands, ba-'ronies, kirks, teinds, patronages, and others pertaining to the said Abbey, as 'well temporality as spirituality of the same, and particularly with the right of 'superiority of the kirk-lands of Dunrod, &c. are dissolved from whatever acts 'of annexation were made in this present or any preceding Parliament; and 'specially from the act 1587, the 11th act, Parl. 10. and act 121. Parl. 12. 'James VI. forbidding the erection of kirk-lands and teinds into temporal lord-'ships.' And the above act of dissolution is expressly excepted from the act *salvo jure cujuslibet* of that Parliament.

After this dissolution, Sir Robert Spottiswoode, in pursuance of the King's design, disponed to the King the foresaid lands of New Abbey and others, for the agreed price of L. 3000 Sterling; but this price was not paid by his Majesty to Sir Robert.

In the same or following year, his Majesty, by a charter under the great seal, erected the bishoprick of Edinburgh, and mortified the foresaid lands and others, as a constant revenue of the new erected see, and the bishop of Edinburgh appears to have been in possession of them in the year 1637.

By the 6th act of Parliament 1640, Episcopasy was abolished, and the revenues of the new-erected bishoprick of Edinburgh reverted to his Majesty; and as he had no further use for them, it was thought just that Sir Robert should have back his lands again; and accordingly, in 1641, Sir Robert obtained a signature from his Majesty, reciting the purchase of the lands from Sir Robert, and the mortification in favour of the bishop of Edinburgh, the return of the same to the Crown by the abolition of Episcopacy, and that the price had not been paid, and therefore giving back the lands to Sir Robert, as also the lands and barony of Dunrod, comprehending, among others, the lands in question; but, by the confusion of the times, and the misfortunes of Sir Robert, which soon after ensued, this grant was not carried into execution by charter and infeftment, nor was possession attained by Sir Robert.

Upon the restoration of King Charles II. Alexander, eldest son and heir to Sir Robert, obtained a new signature, narrating and confirming the signature in the 1641, and directing a charter to be expede under the great seal in favour of Alexander and his heirs; and, in consequence of this grant, Alexander entered into possession.

By the first act of Parliament 1662, Episcopacy was restored, and particularly the bishops were restored to their rents and possessions, as they had stood in the year 1637; and Alexander Spottiswoode having died soon thereafter, leaving his children infants, no further steps were taken till the year 1695, when Mr John Spottiswoode, eldest son and heir to Alexander, applied to the Parliament of Scotland, by petition, setting forth the fact as above stated, and pray-

No 55.

ing relief. This petition was remitted to a Committee, who, after hearing counsel in behalf of his Majesty, and of the petitioner, made their report; and thereupon the Parliament 'found and declared, That the clause in the act of 'Parliament 1662, restoring bishops to their estates and possessions, as by them 'enjoyed in the year 1637, could not prejudge the petitioner; and that the 'price never having been paid, that the said lands and barony of New Abbey, 'and others, do appertain and belong to the said John Spottiswoode, or at least 'the foresaid price thereof, with the annualrent ever since Sir Robert ceded 'and gave up his possession; and therefore they recommended, that a new signature be passed in favour of the said John Spottiswoode, conform to the signature formerly granted to his grandfather in the year 1641.'

This recommendation, however, was ineffectual, and Spottiswoode was at last obliged to bring a declarator of his right against the Officers of State; and having obtained a judgment and recommendation by the Court of Session, he at last got a charter from the Crown, in terms of the signature 1641, whereupon he was infeft in 1742.

It was agreed betwixt the parties, that the above-mentioned parcels of lands were church-lands, belonging of old to the Abbacy of Holyroodhouse, and parts of the barony of Dunrod. And Spottiswoode claimed the superiority of them upon the signature 1641, which expressly gives him the barony of Dunrod.

Objected for the Creditors, These lands became bishops-lands by the foresaid charter of erection of the bishoprick of Edinburgh in 1633, and were possessed by the Bishop of Edinburgh till the year 1637; and again possessed by his successors from the year 1662 down to the Revolution; and therefore must be found to hold of the Crown, as the other lands belonging to Bishops; and by the act 1690, cap. 29. the King cannot interpose an intermediate superior betwixt himself and the vassals that held of the Bishops, which these lands formerly did, having been feued out by the Bishops while in possession.

Answered for Spottiswoode, The act 1690 refers only to the superiorities which *de jure* belonged to the Bishops at the abolition of that order, and not to superiorities which did never belong to them, nor to the King their author, although they usurped the possession for some time. After the repeated declarations in the signatures, and acts of Parliament above-mentioned, that the lands belonged to Spottiswoode and his predecessors, in regard the sale made by them to the Crown never took effect, and that their right was not prejudged by the laws made in favour of Bishops, it can never be maintained, that they were included under the general clause in the act 1690, which applies only to the superiorities that of right pertained to the Bishops, while that order subsisted, and devolved to the Crown upon its abolition: And although the Legislature thought fit, for good reasons, to forbid the interposition of a new superior above the vassals who formerly held of those dignified clergy, that cannot apply to the present case, where the King is interposing no new superior, but restoring the lands to the former proprietor, who was never justly divested of them, as the contract

of sale with the Crown was never completed. And therefore these lands do now belong to him, in the same manner as they did to his predecessor Sir Robert Spottiswoode; and it ought to be found that he is the true superior.

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'THE LORDS found, That the superiority of the lands in question not having belonged originally to Spottiswoode, but being granted by the Crown to the Bishop of Edinburgh, fall under the prohibition of the act 1690; and that Spottiswoode could not be interposed as superior between the King and Mr Nasmith the vassal.'

Act. *Dav. Dalrymple Ferguson.* Alt. *Burnet.*

G. C. *Fac. Col. No* 93. *p.* 165.

1767. *December* 19.
SPOTTISWOOD of Spottiswood, *against* COPLAND of Collieston, and Others.

No 56.
Decided contrary to the above.

THE question occurred, upon the same *species facti* as in 4th February 1758, Spottiswood of Spottiswood *contra* Creditors of Nasmyth of Earlshaugh, No 55. p. 8000. where a vassal of the Abbacy of New Abbey was found entitled to hold of the Crown.

Here, however, the judgment was different; and Spottiswood prevailed in a declarator of superiority and non-entry, against Copland elder and younger of Collieston, and certain other vassals of the Abbacy.

Some time before, a similar action had been brought by Spottiswood against Burnet of Craigend, one of the vassals; and the interlocutor pronounced by the Lord Ordinary, in that case, will sufficiently point out the principles upon which the present question was decided.

'Found, That as the charter from the Crown in favour of the pursuer, *anno* 1742, proceeds upon the narrative of the charter 1624, the signature 1641, the signature 1660, the declaration of Parliament 1695, and the decreet of the Court of Session 1740, that charter ought to receive the most liberal construction, in order to restore the pursuer to the full right and title of the lands and barony of New Abbey, &c. as the same stood in the person of Sir Robert Spottiswood, the pursuer's great-grand-father, in the 1634, when he resigned the same into the hands of the Crown, for a price that was never paid: Found, that by virtue of the charter 1624, and the act of dissolution 1633, Sir Robert Spottiswood was, in the year 1634, entitled to the superiority of the lands formerly held of the abbacy of New Abbey: Found, that the act 1690, declaring the superiorities which pertained to Bishops to belong to the Crown, ought not to be extended to the superiority of New Abbey, in respect that, by the declaration of Parliament 1695, it is declared, that the act 1662, restoring Bishops to their possessions, as in the year 1637, did not prejudge the pursuer's father: And therefore found, that the pursuer is entitled to the superiority of the defender's