

superior to enter in the vassal's name; to which the latter, provided all expenses are paid by the creditor, is not entitled to object.

The Lords repelled the objections to the pursuer's title; but found, that such of the defenders as are in non-entry, are entitled to retain their feu-duties until they are entered by the superior.

Lord Reporter, *Dreghorn*.

Act. *Maclaurin*.

Alt. *Rolland*.

Clerk, *Home*.

D. D.

*Fol. Dic. v. 4. p. 313. Fac. Coll. No. 96. p. 215.*

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SECT. XVIII.

Effect, as to Superiority, of the Dissolution of the Royalty of a Burgh.

1758. *January 17.*

WILLIAM URQUHART of MELDRUM, *against* JOHN CLUNES of NEILSTON, and Others.

The village or town of Cromarty was anciently erected into a royal burgh by charter from the Crown. Its privileges as such continued for many years. The lands within its territory were held *more burgi*, and the proprietors infest in them as usual by the Bailies of the burgh.

In 1670, the Magistrates and Council of the burgh, with consent of some of the burgesses, disposed to Sir John Urquhart, to whom they were indebted, the whole burgh-lands and common good of the burgh, saving all rights of property formerly made and granted by them, or their predecessors, to Sir John himself, or any other persons; but without prejudice of Sir John's immediate right of superiority of the whole of the said lands disposed.

In 1672, the Magistrates and Council, with concurrence of certain burgesses and inhabitants, presented a petition to the Parliament of Scotland, setting forth their poverty and want of trade; praying to be relieved of the burden of sending a commissioner to Parliament; and granting procuratory for resigning their privileges as a burgh-royal, in the hands of his Majesty, or his commissioners, the estates of Parliament, Lords of Exchequer, and convention of Royal burghs, to remain with his Majesty *ad perpetuam remanentiam*. An act was accordingly passed in the same year, whereby the King, with consent of the estates of Parliament, accepted of this resignation, and ordained the name of the burgh to be expunged out of the rolls of Parliament, and, "That thereafter they should have

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The inhabitants of a Royal burgh, upon the abolition of its Royalty, are the Crown's vassals.

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In 1681, another act of Parliament was passed, exempting the town of Cromarty from the payment of supply; and in 1685, the convention of royal boroughs expunged the town from their rolls; and in 1686, all these acts were ratified by another act of Parliament.

In 1685, George Viscount of Tarbat, afterwards Earl of Cromarty, purchased Sir John Urquhart's estate at a judicial sale, including the subjects disposed to him by the borough of Cromarty in 1670; upon which the Viscount expedited a charter in 1685, containing a *novodamus* of the town and lands of Cromarty. In the same year 1685, that charter was ratified in Parliament, and the Viscount obtained another act of Parliament, erecting the village and town of Cromarty, with the lands thereto belonging, into a borough of barony, with power to the Viscount to appoint Bailies, &c. and further, declaring the town to be the head borough of the shire, notwithstanding its being deprived of its privileges as a royal borough.

From the Viscount of Tarbat, the lands and subjects contained in the charter 1685, came by progress to Mr. Urquhart of Meldrum; who brought a process of improbation against John Clunes, and certain other proprietors of lands within the ancient Royalty of Cromarty, in order to oblige them to acknowledge him as their superior, and take charters from him.—The defenders had taken no investitures from any superior since the year 1685, but they now maintained, that they were entitled to hold their lands of the Crown.

Pleaded for Meldrum: *1mo*, The royal borough of Cromarty being utterly extinguished, every thing belonging to it, particularly the borough-lands, came to be in the same condition as if the charter of erection had been revoked, or never granted; that is to say, the same reverted to the Crown, and were, by the charter 1685, vested in the pursuer's author, who had already, in the year, 1670, purchased from the community of the borough all right they could give him. The former possessors of borough-lands might be satisfied with not being ejected, and cannot complain of the King's interposing a superior between them and the Crown on that occasion; as the act 1690, in favour of the vassals of Bishops and chapters, does not extend to them.

*2do*, Where there is no borough, there can be no burgage holding; as by that holding the borough or corporation, holds of the Crown; and every burges, as a member of that corporation, holds also of the Crown upon the same condition of watching and warding. Now, this borough being dissolved, the burgesses can hold the borough-lands no longer by that tenure; and the town being since erected into a borough of barony, in favour of the pursuer, the old borough-lands must necessarily hold of him, as baron of the borough.

Answered for the defenders: *1mo*, During the subsistence of the Royalty, the proprietors of borough-lands were the King's vassals, and only received infeftment from the Bailies, as the King's commissioners, not as superiors. It was even then competent for the vassals to have taken infeftments directly from the Chan-

cery; of which there are examples on record; Rol. 4. Robert. II. No. 84.; and Rol. 9. Robert. II. No. 1. The council of the borough, and burgesses, might, with consent of Parliament, make an effectual resignation or surrender of its privileges as a community; but they could not surrender the rights of the burghage-holders, who had no concern in the acts and charters founded on by the pursuer. The borough lands, upon the suppression of the borough, could only revert to the Crown so far as the same were possessed and resigned by the borough; consequently the borough's property-lands, and the duties formerly paid to it, might thereafter be at the Crown's disposal; but the defenders' predecessors having been *ab ante* vested in the property of their lands, and the borough having had no superiority over them, it could resign or surrender no right to the one or the other; the defenders must have continued proprietors of their lands holding of the Crown.

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*2do*, Burghage holding is a species of ward-holding, Craig, Lib. 1. Dieg. 10. § 31. and as ward-holding is now abolished, the defenders are entitled to hold blanch of the Crown, in terms of the late statute. *Non agebatur*, by the erection of the town into a borough of barony. to effect the rights of the defenders, who were third parties not in the field, and that, as well as the other acts and charters referred to, were granted *salvo jure*. The grant of the superiority of the borough of barony, as a community, could never import a grant of the superiority of all the lands within the ancient Royalty, in prejudice of the Crown's vassals in such lands.

And, *3tio*, Neither Sir John Urquhart, nor any other of the pursuer's authors, ever before laid claim to the superiority of the defenders' lands; and therefore, if they had any right to it, it is now lost *non utendo*.

Replied by the pursuer, the right to the superiority could not be lost *non utendo* since 1685, seeing the defenders cannot say, that they have, during that time, taken charters from the Crown, or any other superior. No right of lands, whether property or superiority, can be lost by disuse of possession, unless possessed by another, and acquired to him through prescription.

“The Lords found, That the pursuer had no right either of property or superiority to the defenders' lands; but that the same formerly held burghage, and now hold of the Crown; and therefore assoilzied and decerned.”

Act. Burnet, Ferguson.

Alt. Hamilton-Gordon.

Reporter, Shewalton.

D. R.

Fol. Dic v. 4 p. 313. Fac. Coll. No. 89. p. 158.