1813.

DUFF v. MAGISTRATES AND TOWN-COUNCIL OF INVERNESS.

Ante vol. iii. p. 666.

LORD PRESIDENT CAMPBELL.—"This lease is not silent as to the matter in hand. But I shall speak to general doctrines. Is a very long tack within the statute 1621? I have looked at all the authorities, even the case of Scott *v.* Straiton, which was sustained in the House of Lords, though it was a lease from nineteen years to other nineteen years, and so on for ever. But the ground of the judgment there was homologation, and long possession for more than eighty years, so that it was safe by prescription. In Hopeton's case, the judgment went on a personal objection—on the clause of warrandice undertaken by him. In Belladrum (?) was a question with *heirs*: So held both here and in the House of Lords. So I hold that a tack must have an ish to prevail against purchasers. At same time, I should have difficulty to say that a tack for two, three, four, or five, nineteen years, is not good. At same time, that question is not the same as this. It is allowed that a very long term will not be good."—Vide Hume's Collection of Session Papers.

Against the interlocutors of the Court of Session the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the appeal be, and the same is hereby dismissed, and that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellants, *Alex. Maconochie, J. H. Mackenzie.*
For the Respondent, *Sir Samuel Romilly, G. Cranstoun.*

NOTE.—This case was decided on the endurance of the lease alone, independent of the grassum. Accordingly, a subsequent question was raised on the Wakefield lease, of this nature: Admitting it to be bad as a lease for ninety-seven years, but no otherwise objectionable, except on account of its duration,—Whether it could be sustained for any shorter period, and for what term,—the entail having conferred power to grant leases during the lifetime of the heir of entail? This question was involved in the subsequent declarator and reduction, as to the leases granted for grassums, and for alternative periods of duration.—Vide Infra.

HUGH ROBERT DUFF, Esq., . *Appellant;*

MAGISTRATES AND TOWN-COUNCIL of Inverness, ... } *Respondents.*

House of Lords, 13th December 1813.

PROPERTY—COMMON—BOUNDING CHARTER — POSSESSION. — Circumstances in which the appellant claimed a piece of ground, near to the burgh of Inverness, as his absolute property. The respon-

dents stated, in defence, that they held the land as commonty for the use of the burgh, and had possessed it as such, while the appellant's charter was a bounding charter, which did not entitle him to any thing beyond the bounds. Held the defences good; reversed in the House of Lords.

An action of declarator of property was raised by the appellant against the respondents, the Magistrates of Inverness, in regard to a piece of marsh ground, or salt marsh, about thirty-five acres in extent, and which formed a narrow stripe surrounded by the property belonging to the appellant, except at the west, where it was limited by the Moray Frith, and east end, where it contracted to a point, and terminated in the river Ness.

It was stated by the appellant that this piece of marsh had, until lately, been subjected to the flow of the tide, which covered it completely at high water. But that the operations of the Caledonian Canal, the bason of which ran along the south side, had excluded the tide on that side, and the raised road, called the Bow Bridge, had kept off the River Ness at the other end, the arable lands of Merkinch having formed the marsh into an island. This island lay almost surrounded by his estate of Muirtown and Merkinch.

This marsh was called the Aban, sometimes the Naban or Carse; and by the title deeds of Merkinch, acquired from the town of Inverness, he contended that these titles did convey and vest in him the said Aban, or piece of marsh ground, as a part and pertinent, and that, in the second place, that this right had been confirmed and explained by possession.

In defence to this action, the respondents stated that the appellant's titles to the lands of Muirtown, on examination, proved that the ground in question could never be acquired as a part and pertinent of these lands, and, with respect to the title deeds of the lands of Merkinch, these last originally belonged to the burgh of Inverness, and that the appellant and Mr. Frazer of Torbreck could acquire no more than was conveyed to them; but so far from the ground having been conveyed to them, it would appear, by the examination of the title deeds of the burgh, and those of the appellant and Mr. Frazer, not only that it never was conveyed to them, but that the same remained with the burgh as a separate tenement, their right to which was uniformly asserted and exercised, as would appear from the evidence both written and parole.—They further stated, that the appellant's titles were of the nature

1813.

DUFF v. MAGISTRATES AND TOWN-COUNCIL OF INVERNESS.

of a bounding charter, which excluded all beyond the bounds described. That their own titles gave them the Aban, and that they had possessed them, either as a town property or commonty. And they founded upon a decree of cognition, obtained in 1631, in which the judgment found and declared that the "heal carse of Merkinch, out with the dikes of the "manured lands and rigs thereof, as the flood mark gives "and flowes, to be the commonties to the burgh of Inver-"ness in all time coming."

1638. Muirtown Titles.

In the titles of Muirtown, the marsh is alluded to in the description of these lands thus, "the sea called Roodpoole and "fluddes betwixt the lands of Merkinch and the said lands of "Muirtown at the north, and the water of Ness and the bor-"row ruids of the borough of Inverness, at the east parts re-"spectivè, "cum dominibus, edificiis, hostis, pomaris, silvis, pis-"cariis lie, yairis, wraik, weath, wair, *carsis*, *garsingis*, toftis, "croftis, annexis, connexis, partibus, pendiculis et pertinen., "addictas terras juste spectat, jacent infra dict. baroniam," &c.

The appellant stated, in regard to this grant, that it proved three things, 1st, That the north boundary of these lands of Muirtown is distinctly stated to be "the sea." 2d, That there is here a broad and explicit grant of "parts, "pertinents and pendicles;" and, 3d, That in the anxious enumeration of these parts and pertinents, the Carse is particularly mentioned.

In 1741 the same lands of Muirtown were conveyed by Mr. Grant, the then proprietor, to the appellant's grandfather. In this disposition the word Carses was omitted, but, in the enumeration of the pertinents, there were expressly named "muirs "and marshes." And, under this disposition, feudal titles were made up, and the lands, with their whole parts and pertinents, possessed for a period beyond the years of prescription.

Merkinch Titles.

1605.

The lands of Merkinch, lying on the north side of the Aban, belonged anciently to the town of Inverness. Of this date, the appellant's authors acquired right to one-fourth part of these lands, described as follows: "Totam et integram "quartem partem villæ et terrarum de Merkinch existen. "quatuor lie oxgate land* antiqui extent, et ad summam sex "solidarum et trium denariorum monete lie mailing, cum "domibus, ædificiis, toftis, croftis, annexis, connexis parti-"bus, pendiculis, et cæteris suis pertinen. cum communi "pastura earundum solita et consueta jacent, intra territo-"rium de Inverness et vicecomitatem ejusdem." To be held in feu of the said burgh, for payment of a small feu-

* Sic.

duty, and " per omnes netas metas suas antiquas et divisas " pro ut jacent in longitudine et latitudine, limitibus et " bondis, solitis et consuetis ex omni parti in domibus, ædi- " ficiis, toftis, croftis, annexis, connexis, partibus, pendiculis, " et pertinen. earundem; cum communi pasturi solita et " consueta, constructis et construendis liberoque introitu et " exitu ac cum omnibus aliis et singulis suis libertatibus " commoditabus proficiis easiamentis ac tristis, *suis pertinen.* " *quibuscunque* tam non nominatis quam nominatis, tam " subter terra quam super terram procul, et prope ad pre- " dictam quartem partem terræ villæ et terrarum de Merk- " inch," &c.

There was no reservation on the part of the town of Inverness, of any burden or servitude, but the title flowing from them was absolute. The other three-fourths of Merkinch estate were feued out by the town to the authors of Mr. Frazer of Torbreck; the oldest charter in this part of the property being conceived in these terms " Totas et Aug. 1608. " integras tres quarturas partes villæ et terrarum de Merk- " inch, cum domibus, ædificiis, toftis, croftis, annexis, con- " nexis, partibus, pendiculis et cæteris suis pertinentibus, " quibuscunque jacentis intra territorium burghi de Inver- " ness et vicecomitatem ejusdem."

This charter was without any boundary, and without any servitude or restriction, or reservation whatsoever.

The three subsequent charters belonging to these three-fourths, contained an express conveyance of parts, pendicles, and pertinents, together with " grazings," which latter term could only apply to the flooded grounds, as all the unflooded lands were runrig and arable.

The appellant's quarter of Merkinch, and the three-fourths which belonged to Torbreck, lay thus until the year 1794, when, on the joint application of the two proprietors to the Sheriff, in terms of well known statute, these lands were divided according to a plan prepared under the authority of the Sheriff, who, of this date, found: " from the local Oct. 2, 1794. " situation and contiguity of the lands of Merkinch, the ex- " change proposed in the petition was expedient; and, for " the advantage of both parties, find that the marsh be- " tween the said parties ought to be the line shaded on the " said plan with blue, and marked with the letters A, B, C, " and D, and that the lands and *pasturage* belonging to the " petitioner, Alexander Frazer, and situated to the south of " the said line, ought to be given to the petitioner, Captain " Hugh Robert Duff, in exchange for the lands and pastur-

1813.

DUFF v. MAGISTRATES AND TOWN-COUNCIL OF INVERNESS.

" age belonging to him, and lying to the north of the said " line, and that such exchange would be just and equal for " both parties; and authorized them to enter into a contract " of excambion accordingly, in terms of the statute." A contract of excambion was made out in these terms, of this date; and it was contended by these titles the appellant had acAug. 19, 1796. quired right to the piece of ground in question.

The Lord Ordinary (Glenlee) ordered the parties to give in condescendences of what they offered to prove. Upon these being given in, his Lordship, before answer, allowed a proof of possession; and when the proof was reported, he reported the same to the Court with memorials.

From the proof exhibited by the titles of Muirtown, with its parts and pertinents, comprehending the *Carse*, as well as from the titles of Merkinch, the appellant stated, it was established that the piece of ground in question was a part of his absolute property. By the parole evidence he also proved, by his tenantry and others, the long and continued possession of the Aban, by the appellant and his tenants pasturing thereon cattle and sheep without interruption.

Nov. 16, 1808. The Court pronounced this interlocutor: " Upon report " of Lord Glenlee, and having advised the mutual informa- " tions for the parties, the Lords sustain the defences, as- " soilzie the defenders, and decern; find the defenders en- " titled to expenses, and appoint an account thereof to " be given in, and, when lodged, remit to the auditor of " Court to examine the same and to report." On reclaiming petition the Court adhered.*

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The appellant, under his titles of Muirtown, is the proprietor of the whole of the Aban, or ground in dispute; and if these titles do not give him the whole of the ground in dispute, that, at the very least, they give him *exclusively* a part thereof. 2. That whatever part of the Aban (if any), which is not the appellant's, by virtue of the Muirtown titles, is his by virtue of his Merkinch titles; he being now the absolute owner of that part of Merkinch which adjoins the Aban. That, in this view of it, the Aban, or ground in dispute, which was flooded twice in the twenty-four hours, may be considered as the boundary between Muirtown and Merkinch; which

* This was come to by a narrow majority.

boundary being now reclaimed from the waters, the same does by law belong to the owners of the opposite banks and shores; and as the appellant unites in his person the ownership of both shores, therefore he is entitled to the whole land in dispute. 3. That the defenders being originally the owners of Merkinch, have, by their feus, granted to the appellant's predecessors, and to the predecessors of Mr. Frazer of Torbeck, (in whose right as to the grounds in question the appellant now stands), parted with their whole property in, and right, benefit, and title to all of Merkinch, without reservation of any right of commonty over the grounds in question, or any other reservation whatever, save the feu duties; and, therefore, whatever heretofore belonged to the defenders is now, *quoad* the grounds in dispute, absolutely vested in the appellant. 4. That, on evidence, it appears that the appellant's uninterrupted possession has been in strict conformity to his titles as above described.

Pleaded for the Respondents.—1. The appellant has no right to the ground in dispute, in so far as the lands of Muirtown are concerned, for the charter of these lands being a bounding one, cannot carry any right beyond the bounds mentioned; and, 2. As to the lands of Merkinch, it is sufficient to found on the decree of cognition obtained in 1631, where these very Carse lands are, in a question with Frazer of Torbreck, ordained and declared to belong to the town, as commonty in common with him and the appellant. Besides this, there were certain acts of council in 1689 and in 1726, respecting the cutting feal and divot on the common Carse of Merkinch; and the inhabitants of the town, it was proved, had cut turf, and peat, and other materials, from the grounds in question, without molestation; so that, from the evidence adduced, there was no doubt of the exercise of the right on the part of the town.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby reversed. And the Lords find that the appellant is entitled to the property of the whole land in question.

For Appellant, *Sir Samuel Romilly, Charles Wetherall.*
For Respondents, *David Moneypenny, Wm. Adam.*