TRUSTEES of the late WM. FORBES of Callendar, Appellants.— No. 46.
Thomson—Cranstoun—Maconochie—Alison.

Reverend Dr. WILSON, Minister of Falkirk, Respondent.—
Gifford—Connell.

Stat. 1633, *c.* 21.—*Grass Glebe.*—Held, (reversing the judgment of the Court of Session,) that certain lands which had been held in commonty by the Abbey of Holyroodhouse and the family of Livingstone of Callendar were not kirk lands, liable to be allocated to the minister of the parish as a grass glebe.

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2D DIVISION.
Lords Newton, Craigie, and Reston.

PRIOR to the Reformation, the town and lands of Falkirk were divided into two halves, the whole being held directly of the Crown, without any feudal dependency upon each other,—the one belonging to the Livingstones of Callendar,—and the other to the Abbey of Holyroodhouse. Accordingly it appeared that in 1458 James the Second granted a charter of confirmation to James first Lord Livingstone, by which he confirmed to him 'omnes 'et singulas terras baroniæ de Callendar,' and in which the reddendo clause was thus expressed:—'Reddendo annuatim pro præ-'dicto castro de Calentare, et viginti librat. terrarum antiqui ex-'tentûs baroniæ de Calentare, superscript. viz. 'le Strath, le "Forest de Calentare, qui sunt quinque librat. terrarum antiqui "extentûs; *dimidietat. villæ de Falkirk*, quæ terræ sunt quinque "mercati terrarum antiqui extentûs; duas Carmuirs, quæ sunt "decem mercat. terrarum antiqui extentûs; duas Auchingavins, "cum lie Glen, quæ sunt quinque mercat. terrarum antiqui ex-"tentûs; necnon terras de Easter Jal, quæ se extendunt an-"nuatim ad duas mercatas terrarum, cum dimidia mercat. "terræ antiqui extentûs; alba firma pro uno denario argenti, "usualis monetæ regni nostri Scotiæ, solvend. apud castrum de "Calentare, nomine albæ firmæ, si petatur tantum, non obstan. "tota baronia de Calentare, aliisque de nobis tent. in wardo et "relevio." In the subsequent titles which were granted to the family of Livingstone, the conveyances were expressed in similar terms. There was, however, a muir attached to the lands of Falkirk, called the South Muir, which was held in commonty by the Abbey and the Lords Livingstone.

After the Reformation, the half of the lands of Falkirk belonging to the Abbey came into the possession of the family of Bellenden; and in 1606 it was conveyed by Sir James Bellenden to Alexander, seventh Lord Livingstone, and first Earl of Linlithgow and Callendar, by whom a Crown charter of resignation was expede. These two halves were accordingly engrossed in future in the titles of the family of Livingstone.

In 1646 a royal charter was granted, erecting the estates be-

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longing to that family in Stirlingshire into a regality, of which Falkirk was to be the head burgh, and in which the clause of union was thus expressed: 'Insuper nos et unimus et erigimus 'prædictam villam de Falkirk, tam illam partem quæ ab antiquo 'tenebatur de Abbatibus de Holyroodhouse, quam residuam par- 'tem dictæ villæ de Falkirk, quæ ab antiquo fuit pars prædictæ 'baroniæ de Callendar, prout eadem ex utraque Eatene publicæ 'viæ nostræ ejusdem jacent, in unum integrum et liberum bur- 'gum regalitatis, burgum de Falkirk nuncupat.' &c.

Previous to the time when these two halves came into the possession of the family of Livingstone, feus had been granted, and servitudes of pasturage were acquired by the feuars over the South Muir. The lands and barony of Callendar and Falkirk having been forfeited in 1715, they were sold by the Crown to the York Buildings Company, and were afterwards acquired by Mr. Forbes at a judicial sale in 1783, including the part called the South Muir. This muir consisted of about 150 acres of land which had never been cultivated, but was of a nature susceptible of improvement. In 1808, Mr. Forbes brought an action of division of the common; and 110 acres were allotted to him as proprietor of the barony of Callendar. In 1809, Dr. Wilson, the minister of Falkirk, presented a petition to the presbytery of Linlithgow, setting forth that he had no grass glebe, and that there were kirk lands in the parish, out of which he prayed that a sufficient quantity should be allocated to him in terms of law. The presbytery, on the 1st of December 1809, after making inquiry, found that the South Muir were kirk lands; and that, as they had never been in an arable state, they were subject to the minister's claim for a grass glebe; and allocated 20 acres for that purpose out of the part which, in the process of division, had been allotted to Mr. Forbes. Against this judgment he presented a suspension; and having proceeded to improve and cultivate the lands, Dr. Wilson brought a suspension and interdict against his doing so, on which the Lord Ordinary on the Bills granted an interim interdict. Both cases having come before Lord Newton, his Lordship conjoined the suspensions; 'and in 'the suspension and interdict at Dr. Wilson's instance, in respect 'there is no evidence produced to instruct that the lands assigned 'by the presbytery were kirk lands, recalled the interdict, and 'found the letters orderly proceeded; and in the suspension at 'Mr. Forbes's instance, suspended the letters and charge sim- 'pliciter.' In a representation against this judgment, Dr. Wilson founded on a charter granted in January 1546 by Alexander Lord Livingstone to Robert Oswald and his spouse and son, in

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which he alleged it was stated that the muir had belonged to the Abbey of Holyroodhouse. This deed, however, he did not produce, but stated that it was in the possession of a person of the name of Smith, of whose titles it formed a part. Being afterwards required by the Lord Ordinary to produce all the documents on which he founded, and having obtained a diligence for that purpose, he put into process a paper which was said to be an excerpt from it, made and attested by one George Home, who designed himself 'one of the clerks of his Majesty's Regis-'ter-house at Edinburgh,' but who, it was afterwards explained, held no official situation whatever, and had made the excerpt under the authority of Dr. Wilson alone. That gentleman also stated (and it so appeared on a proof,) that Smith had subsequently destroyed the original deed, for reasons which were not satisfactorily accounted for. In these circumstances, Dr. Wilson contended that the excerpt ought to be received as the best evidence, and as conclusive on the point at issue, or at least as confirming the other evidence of the lands having belonged to the Abbey, and so kirk lands. On the other hand, Mr. Forbes maintained, that the circumstances under which the excerpt had been made, were so suspicious that it could bear no faith; and that it was plain from its terms that it was not a faithful copy, as there were inconsistencies on the face of it. The excerpt was, however, produced and received by the Court, the material part in it being the tenendas clause, which was thus expressed: 'Te-'nen. et habend. totam et integram præfatam dimidietatem ter-'rarum mearum, et villæ de Falkirk antedict., cum pertinen., præ-'fatis Roberto et Elizabeth suæ sponsæ, ac eorum alteri diutius '.....in libero tenemento et vitali redditu, pro toto tempore ipsor-'um vitæ, et Alexandro Oswald, filio secundo genito, &c. in feo-'difirma et hæreditate in perpetuum, per omnes rectas metas 'suas, &c. prout jacen. in longitudine et latitudine, in domibus, 'ædificiis, &c. ac cu. co. pastura sup. morâ vulgariter dictâ 'Southm^{r}· p. me Monasterii Sanctæ Crucis prope Edinburg. cõi-'ter. tenta, liberoq. introitu et exitu, ac cum omnibus aliis et 'singulis libertatibus, potestatibus, juribus, privilegiis, &c. in præ-'fata mea originali carta contentis, datis et concessis, cum suis 'pertinen. quibuscunque, tam non nominatis quam nominatis, '&c.; reddendo inde annuatim dicti Robertus Oswald et Eliza-'beth Williamsoun, ejus sponsa, &c. mihi, hæredibus meis et as-'signatis, summam duarum mercarum, usualis monetæ regni Sco-'tiæ, ad duos anni terminos consuetos, festa, viz. Pentecostes et 'Sancti Martini in hieme, per æquales portiones, nomine feudi-'firmæ,' &c.

July 24. 1822. Lord Craigie, having succeeded as Ordinary to Lord Newton, reported the case on memorials; and the Court having allowed a proof relative to the circumstances under which the charter 1546 had been destroyed, thereafter, on the 1st February 1817, found 'that the lands in question are subject to the designation of a 'grass glebe in favour of the pursuer (Dr. Wilson); and remitted to Lord Reston, instead of Lord Craigie, to hear parties 'further on the extent of the glebe which has been designed by 'the presbytery, and to do thereanent as he shall see cause;' and found Mr. Forbes liable in £750 of expenses.

In the mean while, and after the interdict had been recalled by Lord Newton, Mr. Forbes had proceeded to cultivate the lands which had been allocated to Dr. Wilson, and by which he alleged that he had so much improved them, that they were now worth £100 per annum. He therefore contended, that the extent of the ground allocated ought to be restricted to that which was sufficient for a grass glebe, in terms of the statute 1663, cap. 21. To this it was answered, that Dr. Wilson was entitled to the ground which had been allocated by the presbytery, and that their decree could not be affected by improvements and alterations made pendente lite. Lord Reston found, that 'the charger 'is entitled to such a quantity of the ground in question as was 'sufficient to pasture a horse and two cows, according to its ac-'tual state and situation at the time of his application to the 'presbytery for a grass glebe,'—reserving any claim of relief for meliorations made upon the ground in question. To this judgment the Court adhered by refusing two petitions, with answers, on the 14th of January and 10th of June 1818.*

Mr. Forbes having died, his trustees were sisted as parties in his place, and appealed against these judgments, on the ground,

1. That there was no evidence that the lands in question were kirk lands, and that it was incumbent on Dr. Wilson to make out that fact; that the excerpt of the charter of 1546 was not entitled to any faith; and that it was plain that the words 'per me *Monas-'terii* Sancti Crucis prope Edinburg cõiter tenta,' which Dr. Wilson translated as meaning 'holden by me in commonty *of* 'the Abbey of Holyroodhouse,' could not be those which were originally in the charter; but that, if such a deed ever existed, the words must have been, 'per me *Monasterio* Sancti Crucis, &c., 'cõiter tenta,'—meaning, in reference to the muir, that it was 'held by me in common *with* the Abbey of Holyroodhouse,' which was consistent with the fact, and with the other titles.

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* See Fac. Coll. June 10. 1818, No. 170.

2. That the evidence which had been produced established that the muir had not been the absolute property either of the Abbey of Holyroodhouse, or of the family of Livingstone, but was enjoyed by them in commonty, and that such lands were not subject to allocation; and,— July 24. 1822.

3. That the extent of ground which had been allotted to Dr. Wilson was too great; and it was perfectly competent, where the ground has been subsequently improved, even pendente lite, to restrict the decree to that which is sufficient to afford pasturage to a horse and two cows. To this it was answered by Dr. Wilson,—

1. That there was evidence to show that the whole lands of Falkirk, including the muir in question, originally belonged to the Abbey of Holyroodhouse; and that this fact was put beyond doubt by the charter 1546, the excerpt from which was, in the existing circumstances, entitled to complete faith, to the effect of supporting the other evidence; and,—

2. That it was not competent to alter the state of matters pendente lite, so as to restrict the decree of the presbytery, which alone had jurisdiction to fix the extent of the glebe.

The House of Lords found, 'That the paper-writing, purporting to be an excerpt from a charter bearing date the 11th January 1546, from Alexander Lord Livingstone of Callendar to Robert Oswald and Elizabeth Williamson, his spouse, and Alexander Oswald, their second son, and his heirs-male lawfully procreate of his body, appears upon the face thereof to be so imperfect and inconsistent, as not to be deserving of credit for the purpose of determining the question between the parties in this cause, independent of any other objection which may arise from the circumstances stated in evidence concerning the same: But find that it appears from the whole of the evidence produced in the Court of Session, that the land called the South Muir was held in commonty by the Abbey of Holyroodhouse, and the Lords Livingstone, as seised of the barony of Callendar, subject to certain servitudes of common pasture thereon; and that the said William Forbes having become entitled to the rights in the said South Muir, both of the Abbey of Holyroodhouse, and of the Lords Livingstone, in respect of their said barony of Callendar, subject to such servitudes, did proceed to obtain a division of the said muir, and that 110 acres, part thereof, were allotted to the said William Forbes, without distinguishing what part thereof did belong to him in respect of the rights which he derived from the Abbey of Holyroodhouse, or what part thereof belonged to him in respect of the rights which he

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'derived from the Livingstone family in right of their barony of 'Callendar, in commonty with himself, as deriving title from the 'Abbey of Holyroodhouse, in undivided shares: But find that 'the undivided part or share in the said muir, which did belong 'to the said Abbey of Holyroodhouse, was kirk land within the 'intent and meaning of the act 1663, and that therefore part of 'the said 110 acres ought to have been allotted to the said Wil-'liam Forbes in respect of the right which he derived from the 'said Abbey of Holyroodhouse, and another part ought to have 'been allotted to him in respect of his rights in the barony of 'Callendar; and in as much as the presbytery found that the 'entirety of the muir of Falkirk, on the south side of the town, 'was kirk land, and thereupon proceeded to set out 20 acres of 'ground, part of the said 110 acres, as kirk land for the accom-'modation of the minister, for grazing a horse and two cows, as 'a grass glebe, whereas only a part undivided of the said 110 'acres was kirk land, and consequently only an undivided part of 'the 20 acres, part of the said 110 acres so set out by the pres-'bytery, was kirk land; so that the proceeding of the said pres-'bytery, in setting out the said 20 acres, as if the entirety of the 'said 110 acres had been kirk land, was erroneous; and it is 'therefore ordered and adjudged that the several interlocutors 'complained of be reversed.'

Appellants' Authorities.—2. Ersk. 10. 62; 4. Ersk. 1. 54. 56. 58; Quon. Attach. c. 53. § 7; M. of Avondale, Jan. 10. 1733; 4. Stair, 32. 9; 2. Ersk. 10. 62; Grierson, June 26. 1778, (5162); Min. of Dollar, July 9. 1807, (F. C.); Forbes, Nov. 26. 1755, (5127); 2. Ersk. 10. 62; Min. of Dunfermline, March 25. 1812, (F. C.); Massie, July 12. 1785, (8377.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 36.)

No. 47.

WILLIAM TAYLOR, Appellant.—*Brougham.*
SAMUEL LITTLE, Respondent.—*Moncreiff—More.*

2 Ct. II 355

II 363

Stat. 54. *Geo. III. c.* 137.—*Bankrupt—Sequestration.*—Held, (affirming the judgment of the Court of Session,)—1.—That a coal-lessee dealing in coal, although not buying it, is liable to sequestration; and,—2.—That it is no objection that the affidavit of the creditor applying for sequestration has been made before a Justice of the Peace in Ireland.

July 26. 1822.

1st DIVISION.

THE appellant, Mr. Taylor, held leases of several very extensive coal-works in the county of Ayr, the produce of which he disposed of chiefly by exporting it to the Irish market. His affairs