

July 2. 1823. ' from those of the other in said accounts, and that it does not
 ' appear from the productions in process that Alexander Scott
 ' Learmonth ever held himself out, or conducted himself as a
 ' partner of Learmonth and Sons, or 'drew or bore any share of
 ' the profit and loss of that concern.' The Court, on the 17th
 November 1819, thereupon adhered;* and Learmonth and Com-
 pany having appealed, the House of Lords ' ordered and ad-
 ' judged, that the interlocutors complained of be affirmed, with
 ' £350 costs.'

GATTIE, HADDEN, and GATTIE,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 21.*)

No. 65. ARCH. STIRLING, Esq. Appellant.—*Fullerton—Shaw Stewart.*
 CLAUD ALEXANDER, Esq. Respondent.—*Gifford—Forsyth.*

Freehold Qualification—Member of Parliament.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) That a party was not entitled to be enrolled as a freeholder.

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 1ST DIVISION.

THE Earls of Glencairn were originally the proprietors of the barony of Duchal in Renfrewshire; which they feued out to the families of Porterfield, Maxwell, Cunningham, and others. The family of Porterfield, having acquired the part including the mansion-house, assumed the title of Porterfield of Duchal; while that of Maxwell, having got the part which was denominated the Overmains, took the title of Maxwell of Overmains, including several smaller pendicles. The property of Overmains was subsequently sold by the Maxwells to the family of Porterfield, and was incorporated with that of Duchal.

The Earls of Glencairn created out of these lands a number of freeholds, and among others there was exposed to sale, as affording a superiority, certain lands described in the Crown charters of the barony of Duchal as ' terras de Overmains de Corruith.' This was purchased by the late Mr. Handyside, writer to the signet, in virtue of which, and certain other lands, he claimed to be enrolled as a freeholder, and produced evidence to show that the lands of Overmains stood valued in the cess-books at £383 : 6 : 8 Scots. He was accordingly enrolled, and his claim was afterwards sustained by the Court of Session. On the death of Mr. Handyside, his son and heir was served in special to these subjects, the retour

* Not reported.

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bearing that his father had died infeft ‘ in terris de Overmains et Corruith.’ Having been infeft, he sold them to Sir John Maxwell, who thereupon executed the procuratory of resignation, and obtained from the Barons a charter conveying to him ‘ totas et integras terras de Overmains et Corruith, cum tenen. tenan. libereque tenen. servitiis omnibusque pertinentiis earundem, jacen. infra dictam baroniam de Duchal, et vicecomitatum prædict. ; quæ terræ de Overmains et Corruith comprehendunt, inter alias, quadraginta solidat. terras vocat. *Overmains de Duchal*, viginti duas solidat. terras de Wreaths vel Wraes, et tredecim solidat. et quatuor denariat. terrarum de Creuchhill, omnes jacentes infra dictam baroniam de Duchal, ac terras de Corruith, pertinen. in proprietate ad Cunningham de Cairncurran.’ Sir John then granted a disposition and assignation to the appellant Mr. Stirling, by which he conveyed to him ‘ the said forty shilling land called the Overmains of Duchal, with tenants, tenancies, and services of free tenants of the same, lying within the barony of Duchal and sheriffdom of Renfrew foresaid ;’ and Mr. Stirling was infeft in virtue of the unexecuted precept contained in the Crown charter. He then claimed to be enrolled as superior of the forty shilling land of Overmains of Duchal ; and, to prove the valuation, he produced a retour, dated 26th September 1678, of Sir George Maxwell as heir to his father in various lands, and, among others, ‘ in totis et integris quadraginta solidatis terrarum vulgo vocat. the Overmains of Duchal, cum suis pertinen.’ Having been accordingly enrolled, the respondent Mr. Alexander, one of the freeholders of the county, presented a petition and complaint, in which he contended that the titles produced by Mr. Stirling were not sufficient to entitle him to be admitted to the roll. In support of this he gave the above history of the lands, and stated that the subjects which had been conveyed to Sir John Maxwell were not ‘ Overmains et Corruith,’ but ‘ Overmains, de Corruith :’—that, with the view of making up freehold qualifications, the heir of Mr. Handyside had been served to the lands of ‘ Overmains et Corruith,’ which thus appeared to be two subjects, but was truly only one ; and that a comprehending or descriptive clause had been introduced into the Crown charter, bearing that these lands of ‘ Overmains et Corruith’ comprehended Overmains of Duchal, but that it was impossible to point out any lands corresponding with that description. He therefore maintained,—

1. That the Crown charter founded on did not *dispone* the Overmains of Duchal, but only the lands of Overmains and Corruith :—that the former were merely said to be *comprehended* within the latter ; but that it was well known that in practice the

July 2. 1823. Barons of Exchequer allowed a party to introduce into his charter any lands he thought fit, as comprehended within those disposed, and that this was done merely for the sake of description, and was inserted *periculo petentis*:—that, further, it was proved by the previous titles that the lands disposed were not the two separate subjects of Overmains and Corruith, but one subject only—the Overmains of Corruith; and as these titles had been deviated from in the charter, it was impossible to ascertain whether *de facto* the Overmains of Duchal were embraced within the Overmains of Corruith or not: And,—

2. That Mr. Stirling could not point out any portion of ground within the county of Renfrew as the Overmains of Duchal, on which he could have a right of freehold.

To this it was answered,—

1. That the history of the lands given by Mr. Alexander was erroneous, and that it was proved by the titles that there was a separate and independent subject denominated the Overmains of Duchal.

2. That as the respondent had produced a Crown charter, conveying Overmains and Corruith, including the Overmains of Duchal, these latter lands were of necessity disposed as part of that in which they were embraced; and as he had shown, by a retour dated prior to 16th September 1681, that the lands were a forty shilling land, he had produced all the evidence which was necessary in order to be enrolled; and that it was not competent *in hoc statu* to revert to the former titles, in order to contradict those on which he founded: And,—

3. That although it was now difficult, from the division and subdivision which had been made by the vassals, to point out the precise bounds of the lands in question, yet there could be no doubt that such lands did exist within the county of Renfrew, and the right of the superior could not be affected by the acts of the vassals, in rendering it difficult to point out the boundaries.

The Court at first ‘found the complaint irrelevant,’ and dismissed it; but thereafter, on the 26th of November 1818, altered, and found ‘that the freeholders of the county of Renfrew, at their Michaelmas meeting of 1817, did wrong in enrolling the respondent Archibald Stirling in the roll of freeholders of said shire,’ and granted warrant to expunge his name accordingly; and to this interlocutor they adhered on the 18th of February 1819.*

* Not reported.—In the Respondent’s Case it is stated, in reference to the objection that Mr. Stirling was unable to point out the lands and show his possession, that the Judges of the Court of Session were ultimately convinced that this objection *per se* was fatal to the appellant’s claim.

Against these judgments Mr. Stirling appealed ; but the House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

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Appellant's Authorities.—(2.)—Burns, Feb. 17. 1779, (8852) ; Adam, July 4. 1809, (F. C.)

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

(*Ap. Ca. No. 22.*)

EARL of SEAFIELD and CURATOR, Appellants.—*Gifford—Corbet—Mackenzie.*

No. 66.

Sir GEORGE ABERCROMBY, Respondent.—*Connell—Hope.*

Teinds—Allocation—Relief—Stat. 1690, c. 23.—The patron of a parish having acquired a tack of all the teinds of the parish, which was subsequently prorogated ; and having assigned part of the teinds so held by him to a third party, who was to bear the burden of future augmentations, &c. according to an equal proportion with the rest of the teinds of the parish ; and thereafter the patron having acquired right by the statute 1690, c. 23, to the teinds of the parish not heritably disposed, and an augmentation having been subsequently granted to the minister—Held, (remitting with special findings to the Court of Session,) That, in a question with the patron and cedent, the assignee was only liable to be allocated in proportion to the other teinds of the parish, and that the patron could not insist on the teinds so assigned by him being entirely allocated *primo loco*.

IN 1604 Patrick Darg, parson of the united parishes of Fordyce and Cullen in the county of Aberdeen, with consent of the bishop of the diocese of the synod of Aberdeen, and of Sir Walter Ogilvie of Findlater, the patron of the parishes, let the whole teinds thereof to James Ogilvie, eldest son of Sir Walter, for 38 years, at a certain rent. The tack stated, that he had done so ‘ for ane certain soume
‘ of money in name of grassum, payd to me be James Ogilvie,
‘ eldest lawfull son of the said Sir Walter, and be utheris in his
‘ name, quhairof I hold me weill contented, satisfeit, and pleasantlie payit ; and thairfor, for me, my airis, executors, assignais, and successors, exoneris, quyt claims, and discharges the
‘ said James, his airis, executors, and assignais thereof, for now
‘ and ever renunceand the exception of not numerat money, and
‘ all utheris quilk may be proponed in the contrar ; as also, for
‘ the utilitie and weill of the kirk and successoris thairof,
‘ ministers at Fordyce and Cullen, speciallie for the augmentation
‘ of the sum of five hundreth merkis, usual money of this realm,

July 16. 1823.

TEIND COURT.
Lords Reston
and Cringletie.