

in hunc effectum, for the more formal proceeding to an election, and that their office ceased immediately after the election. That the *Procuratores*, chosen by means of Mr Cata-nach's vote, on the 13th of May, must be rejected, and those chosen on the 27th of November, after the vacancy had actually happened, were the only legal *Procuratores* entitled to vote at the election; and in support of this, they produced a particular form of record of elections of several instances where *Procuratores* were chosen *in hunc effectum*, after the vacancies had happened.

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The following interlocutor was pronounced:—"On report
" of the Lord President, in place of Lord Alimore, the Lords
" repel the reasons of suspension, and find the letters orderly
" proceeded; and with respect to the reduction and declarator,
" they sustain the defences, assoilzie the defender, and
" decern."

On reclaiming petition, the Court adhered.

Against these interlocutors, the present appeal was brought Mar. 10, 1762. to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors herein complained of be, and the same are hereby affirmed, and that the appellant do pay to the respondent £50 costs for the suit.

For the Appellants, *W. Blackstone, Al. Forrester.*

For the Respondents, *C. Yorke, Tho. Miller.*

NOTE.—Unreported in the Court of Session.

JOHN SPOTTISWOODE of Spottiswoode, . Appellant;

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JAMES BURNETT, Esq. of Craigend, . Respondent.

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v.
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House of Lords, 22d March 1763.

SUPERIOR AND VASSAL—NON-ENTRY—PENALTIES.—In a decla-rator of the right of superiority combined with an action of non-entry. Held (1), That the right of superiority was in the Crown and not in the appellant. Reversed in the House of Lords. (2) In the House of Lords the vassal was held not to

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be liable for the penalties of non-entry, that is, the full maills and duties of the lands, except from the date of citation in this declaratory action.

Soon after the Reformation, the Barony of New Abbey, comprehending the whole lands, *property*, and *superiority* which belonged to the Abbot and Convent of New Abbey, was annexed to the Crown by the Annexation Act, 1587.

Sir Robert Spottiswoode, the appellant's great-grandfather, was seized in the Barony of New Abbey, by virtue of a charter under the Great Seal from James VI., which declared, that the vassals of New Abbey should hold *in capite* of Sir Robert; and promising that an Act should be obtained in the next Parliament for dissolving the said barony from the Crown.

Accordingly, in 1633, such an Act passed in the Parliament of Scotland; and this Act is expressly excepted from the general act, by a *salvo jure cujuslibet*, at the end of that Act of Parliament.

1634.

King Charles I. having agreed with Sir Robert for the purchase of New Abbey at £3000, the lands were resigned into the King's hands *ad perpetuam remanentiam*; and immediately after the King, by charter under the Great Seal, annexed them unalienably to the See of Edinburgh, just then erected.

In place of money, however, *Sir Robert* only received King Charles' bond for the price. But the Bishop of Edinburgh was immediately let into possession.

In 1640, Episcopacy was abolished by Act of Parliament; but the antecedent right of the king to the estates which he had purchased for the new erected See of Edinburgh having been reserved, his majesty, by his royal signature (reciting the purchase from Sir Robert Spottiswoode, the grant to the bishopric, the abolition of the Episcopacy whereby the barony returned to the king, and that the price had not been paid), regranted, and gave back the said lands and barony to Sir Robert and his heirs.

The public disorders which ensued, and the share Sir Robert (who was attainted and beheaded for his adherence to the king) had in them, prevented him from getting possession, as well as from obtaining a charter and infestment on the signature.

In 1660, on the Restoration, Sir Robert Spottiswoode's forfeiture was reversed by Act of Parliament, and, in Octo-

ber 1660, his son, Alexander, obtained a new signature from King Charles II., reciting the former one of 1641; and that, by the death of Sir Robert, the foresaid lands, as well as the bygone rents thereof belonged to Alexander, his eldest son, and therefore directing a charter to pass under the Great Seal in favour of him, his heirs, and assignees.

In consequence of this grant, Alexander Spottiswoode did attain possession; but dying soon after without completing his title by charter and infeftment; and Episcopacy having been restored by Act of Parliament in 1662, the Bishop of Edinburgh (*Alexander's* children being infants), got possession, which possession continued till 1689, when Episcopacy was again abolished, whereby the possession as well as the right of all bishop's lands, returned to the Crown.

John Spottiswoode, the eldest son of Alexander, applied to the Parliament of Scotland by petition, setting forth the facts as above stated, and praying for relief; his petition was remitted to a special committee, who, after hearing counsel, as well for the Crown as for the petitioner; and “ Having
 “ considered the foresaid petition with the remit thereof, and
 “ the several writs founded upon therein, and in presence of
 “ his majesty's advocate, revised and considered the same;
 “ they find, that *Sir Robert Spottiswoode* did acquire from
 “ Sir John Spottiswoode, gentleman of the bed-chamber, all
 “ and hail the lands, baronies of New Abbey, &c., and that
 “ he was lawfully infeft in the lands and others above speci-
 “ fied, upon the 16th day of March 1624, as the sasine and
 “ warrant thereof produced bear; and that King Charles I.
 “ acknowledges the lands and barony of New Abbey, and
 “ others abovementioned, to pertain to Sir Robert, and had
 “ been at the king's earnest desire resigned *ad perpetuam*
 “ *remanentiam*; the king having then of purpose to modify
 “ and annex the same to the bishopric of Edinburgh; and
 “ that Sir Robert had never received any satisfaction there-
 “ for; and because the estate of bishops had been thereafter
 “ suppressed, that his majesty disposed back the foresaid
 “ lands and barony of New Abbey to Sir Robert, as the
 “ signature under the king's hand, the 29th day of October
 “ 1661 produced, bears. And they found that King Charles
 “ II. makes mention of the foresaid acknowledgments made by
 “ King Charles I., and, therefore, gave of new again to Mr
 “ Alexander Spottiswoode, eldest son to Sir Robert, the said
 “ lands and barony of New Abbey, and others foresaid, in
 “ the same manner as King Charles I. had disposed them to

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“ Sir Robert his father, with the bye-gone rents, not paid to
 “ him since the year 1641; as the said signature under the
 “ king’s hand, dated the 26th day of October 1660 produced,
 “ bears; which signature did not obtain its effect in respect
 “ of the clauses in the Act of Parliament 1662, restored
 “ bishops. And, therefore, it was, and is the opinion of the
 “ said committee, that it ought to be declared, that the said
 “ clause in the Act of Parliament 1662, restoring bishops,
 “ cannot prejudice the petitioner; and that the price never
 “ being as yet paid, the said lands and barony of New Abbey,
 “ and others, do pertain to him, at least the price. And that,
 “ therefore, the petitioner ought to be effectually recom-
 “ mended to the King’s Majesty and the Lords Commis-
 “ sioners of the treasury and exchequer, for passing a new
 “ signature thereof in favours of the petitioner, conform to
 “ the signature formerly granted to his grandfather, in the
 “ year 1641, and that he ought to be presently reponed to
 “ possession accordingly unless he get the price.”

In consequence of this report, an Act of Parliament was passed declaring that the clause in the Act of Parliament 1662, restoring bishops to their estate and possession, as by them enjoyed in the year 1637, cannot prejudice the petitioner; and that the price never having been paid by the king, these and the barony of New Abbey ought and do thereby belong to the said John Spottiswoode, or at least the foresaid price thereof, together with the annual rent. And this Act ordered him to be put into possession, unless the foresaid price be paid.

The appellant was the eldest son of the said John, and heir to him as well as to Alexander and Robert Spottiswoode. He brought an action of declarator in the Court of Session against the officers of State for declaring his right to the lands and barony of New Abbey under the titles above stated.

It was admitted by the Crown that the appellant’s family had been very unfortunate in respect of the sale of this estate in the year 1633, to King Charles I., and that Sir Robert Spottiswoode divested himself fully of the property, without getting payment or effectual security for the price; and that at no time betwixt and the Revolution, had any satisfaction been made.

June 28, 1740.

The Court of Session, by interlocutor of this date, found,
 “ That although it appeared to them that the pursuer was
 “ justly entitled to a charter from the Crown, of the lands of

“ *New Abbey* in question, or to the payment of the price thereof, in virtue of the Act of recommendation of the Parliament of Scotland, in the year 1695, in favour of Mr John Spottiswoode, his father, deceased, they, the said Lords, had no jurisdiction to grant any execution upon that Act for obtaining such charter, or recovery of the price. And find, that until such charter is obtained, the pursuer has no real right to the said lands in question, whereupon to maintain an action of declarator of property, or for mails and duties; and therefore sustain the defence against the action of declarator, or mails and duties, leaving the pursuer to make his humble application to the Crown for a proper charter, in terms of the said Act of Parliament, as he should be advised.”

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The appellant accordingly obtained his late majesty's charter of the said barony on which infestment passed, and in virtue of this he had possession and was acknowledged as superior by many of the vassals of the barony. Dec. 1741.

The respondent, however, refused to acknowledge the appellant as superior, and he had taken out a charter from the Crown of the lands of Craigend being part of the lands held of the barony, and the appellant was under necessity of bringing action of declarator to have his right to the superiority of these lands declared; and that the same were in non-entry, and for the mails and duties.

After hearing both parties, Lord Alimore, Ordinary, by interlocutor, of this date, found, “ That as the charter from the Crown, in favour of the pursuer, anno 1742 (1741?) proceeds upon the narrative of the charter 1624, the signature 1641, the signature 1660, the declaration of Parliament 1695, and the decree 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 Spottiswoode, the pursuer's great-grandfather, in the year 1634, when he resigned the same into the hands of the Crown, for a price which was never paid. Finds, that by virtue of the charter 1624, and the Act of dissolution 1633, Sir Robert Spottiswoode, was, in the year 1634, entitled to the superiority of the lands formerly held of the Abbacy of New Abbey. Find 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 Dec. 10, 1761. .

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“ 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 prejudice the pursuer’s father.
 “ And, therefore, find that the pursuer is entitled to the supe-
 “ riority of the defender’s lands in question, which had con-
 “ fessedly been held of the Abbey of New Abbey; and that
 “ these lands are in non-entry; and decerned and declared
 “ accordingly.”

Feb. 24, 1762.

On representation, the Lord Ordinary adhered.

On reclaiming petition from the respondent, he admitted, that his lands of Craigend held originally of the Abbot and convent of New Abbey, and afterwards of the Bishop of Edinburgh, but contended, that by virtue of the several Acts of Parliament, he was entitled to hold immediately of the Crown.

The appellant answered, That though several Acts of Parliament, had declared the just title of this family to the lands in question, yet none of the succeeding heirs of the family were able to obtain possession of the lands until his late Majesty, in compliance with the recommendation of his Parliament, and the decree of the Court of Session, was induced to grant the charter 1741, and, therefore, that these lands ought to be considered as vested in the appellant, in the same manner, and as fully as his great-grandfather had possessed in 1634, before he resigned.

That the possession of the bishops and of the Crown after the signature 1641, was without a just title and to the prejudice of the appellant’s family; and even though there had been an apparent legal title, yet, as it is now admitted that the substantial right, though uncompleted, was all the time in the appellant and his ancestors, and is now *really* and completely vested in him, by his late Majesty’s charter and infetment following thereupon, the possession of the bishop and of the Crown, so circumstanced, could only affect this right, in the case of a *bona fide* alienation to a stranger for a full consideration and without notice; all gratuitous and voluntary Acts to defeat the right which remained in the appellant’s family must go for nothing; and from the same principle, the Act 1690, which gave the vassals of bishops the privilege of holding immediately of the Crown, cannot be extended to the lands in question, which, though at the time wrongfully in possession of the bishop, yet truly belonged to another person.

July 14, 1762.

The Court of Session pronounced this interlocutor: “ Find

“ James Burnett is entitled to hold his lands of the Crown,
 “ and, therefore, assoilzie the said defender, and decern.”

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On reclaiming petition the Court adhered.

Against these last two interlocutors the present appeal was brought to the house of Lords.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby, reversed; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of the 10th of December 1761, be, and the same is hereby, affirmed, with an addition after the words (“and that these lands are in non-
 “ entry”); of the following words, viz., (“but so as not to
 “ affect the respondent with any penalties on account
 “ of such non-entry, except from the commencement of
 “ the present action”); and it is further ordered, that the said Court of Session do give the proper directions for carrying the judgment into execution.

Journals of
 the House
 of Lords.

For the Appellant, *C. Yorke, Tho. Miller, Al. Wedderburn.*

For the Respondents, *Al. Forrester, H. Dalrymple.*

[Thomson on Bills, p. 164.]

ALEXANDER BREBNER, Merchant in Portsoy, *Appellant;*
 JOHN HALIBURTON AND COMPANY, Merchants
 in Edinburgh, *Respondents.*

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 BREBNER
 v.
 HALIBURTON,
 &c.

House of Lords, 13th December 1763.

BILLS—NEGOTIATION—NEGLECT.—The appellant sent three bills to the respondents (with whom he had dealings in business) for the purpose of negotiation and payment, indorsing them for that purpose. The respondents delayed timeously to present the bills for payment, and failed otherwise in duly negotiating the same, but they sent them to Boyd in Glasgow, with whom they had dealings, who failed with the proceeds in their hands. Held (1), That there was no culpable negligence on the part of the respondents to subject them in liability, and (2) As regarded the sum of £200 sent by Boyd to Haliburton, on 25th March, sought to be imputed *pro rata* of this debt, this remitted to the