1804.

DAVIDSON v. FLEMING.

have argued with much ability. Though I may not be inclined to give more than its due weight to this circumstance, that this judgment was unanimous, yet it weighs considerably with me, as it respects the interpretation of an agreement executed in Scotland by Scotch parties, and conceived in technical language of the law of Scotland.

"Having listened with much attention and anxiety to the argument maintained for the appellant, I cannot say that, in my opinion, I have heard any thing to convince me that the Court below had misconceived the meaning of the parties in this agreement. The rules of the House do not allow me, in a case of affirmance, to state the grounds upon which I think this judgment may be supported. I shall therefore content myself with moving an affirmance in the usual form."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *Wm. Adam*, *Samuel Romilly*, *Francis Hargrave*, *Mat. Ross.*

For Respondents, *Sp. Percival*, *C. Hope*, *Wm. Alexander.*

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(Mor. p. 8599.)

HARRY DAVIDSON, W.S., one of the Freeholders of the county of Stirling, } *Appellant;*

The HONOURABLE CAPTAIN CHARLES ELPHINSTONE FLEMING, . } *Respondent.*

House of Lords, 18th April 1804.

RETOUR—FREEHOLD QUALIFICATION—VALUATION OF LANDS.—Objections having been stated to the enrolment of a freeholder in the county of Stirling, in respect that he had not the requisite qualification in land to the amount and value required by act of Parliament. Circumstances in which this objection was repelled, his retour of service containing sufficient evidence of the value of the lands, distinct from the office of coroner, which office, it was alleged, was of no appreciable value.

At a meeting of the freeholders of the county of Stirling, for electing a commissioner to serve in Parliament for that county, a claim was presented for the respondent to have him enrolled as a freeholder, as heritably infeft in all and whole the lands of Easter Glenboig, together with the office of Coroner in the county of Stirling.

The appellant objected to this claim of enrolment, on the ground, 1. That no *mandate* or authority had been produc-

ed by the respondent's agent who lodged this claim, such being necessary in regard to persons out of the kingdom at the time. 2. That there was no proper evidence of the separate *old extent* of the lands of Easter Glenboig, which he claimed.

A majority of the freeholders repelled both objections; the case was then taken to the Court of Session, who sustained the first objection, and ordered his name to be expunged from the roll. No judgment was given on the second point. But the respondent having returned to Scotland, at the first meeting of freeholders which occurred thereafter (namely, in July 1802,) for the purpose of electing a member to represent the county in Parliament, he appeared personally, and lodged a new claim, founded both upon his title to the lands of Glenboig, &c. and also as *apparent heir* of his grandmother Clementina Lady Elphinstone. Objections were stated to this claim, to the effect that the retour of his service to the lands of Glenboig did not afford sufficient evidence of the *separate old extent* of the lands of Easter Glenboig, exclusive of the office of Coroner, or "Crownaire" of the Sheriffdom of Stirling, and the latter being a mere heritable office, was not an estate in law which could support his title to be enrolled. The court of freeholders repelled these objections, whereupon a petition and complaint was brought before the Court of Session. The retour ran thus: "Hæc inquisitio facta fuit in prætorio burgi de Striviling," &c.; "Obiit ultimo vestitus et sasitus," &c. "de totis et integris quinque mercatis terrarum de Eister Glenboig, alias Eneboig, cum molendino, terris molendinariis, astrictis multuris ejusdem, et suis pertinentiis quibuscunque jacentibus infra vicecomitatum de Striviling, una cum officio coronatoris dict. vicecomitatus de Striviling. The descriptive clause was then followed by the valent clause thus: "Et quod dict. terræ de Easter Glenboig, cum molendino, terris molendinaris, astrictis multuris ejusdem, et suis pertinentibus una cum officio coronatoris prædict. valent *nunc* per annum summam dicem librarum monetæ Regni Scotiæ; et quod valuerunt *tempore pacis* summam quinque mercarum monetæ prædict.," &c.

The respondent contended that when the valent clause and the descriptive clause were taken together, the retour proved that the lands of Easter Glenboig, and the pertinents, are 40s. of old extent and upward. The descriptive clause, stating Easter Glenboig to be a five merk land, and

1804

DAVIDSON v. FLEMING.

that sum agreeing with the valent clause, thus affords sufficient proof itself that the value retoured was for the lands and the proper pertinents of the lands alone, and not for the lands and the office of coroner jointly. The appellant contended that the office of coroner was, by the retour, taken in conjunction with the lands of Easter Glenboig, and the mill, mill lands, and pertinents. That the lands and office were extended or valued together in one sum of five merks of old extent; and as it was impossible to say how much of that sum was the value of the lands, and how much the value of the office, so as to discriminate the one from the other, there was no legal evidence of the subjects he possessed being a 40s. land of old extent, as required by the act 1681. It was answered by the respondent, that no part of the five merks mentioned in the retour was to be ascribed to the office, but that the whole was the extent or value of the lands and pertinents.

Mar. 9, 1803. The Court found "that the freeholders did right in enrolling the said Hon. Charles Elphinstone Fleming, in virtue of his titles to the lands of Glenboig and others, and therefore dismiss the complaint, and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

"The question at issue in this cause is, Whether, according to the true exposition of a certain retour, the respondent is entitled to be enrolled as a freeholder of the county of Stirling?

"It arises out of an act of the Parliament of Scotland, passed in

1681. c. 21. 1681, amended by an act of the 16th of his late Majesty. By the first act, it is provided, that no person should vote in the election of

16 Geo. II. c. 11. commissioners for shires or stewartries in Scotland, unless he was infeft and in possession of a 40s. land of old extent. By the other, it is provided that such old extent should only be proved by a retour of the lands of a date prior to 16th September 1681. Upon these acts we are called to decide, whether or not the respondent, claiming on the lands of Easter Glenboig and other subjects, has duly proved that his lands are of the value duly required by law?

"When this claim was made to the Court of Freeholders, the respondent was admitted to the roll. This produced a complaint to the Court of Session by Mr. Davidson, one of the freeholders, praying the Court to find that the freeholders had done wrong in enrolling the claimant.

"In this complaint, he insisted upon this more especial ground, that it did not appear from the retour, that the respondent had a sufficient qualification. In his pleadings, however, he alluded to another ground of complaint, made by another freeholder, that the respondent was not the apparent heir in a certain estate. It had been upon a claim, and on two grounds, jointly, namely, the apparency and the qualification, instructed by the retour, that the freeholders had enrolled the respondent.

"Upon this point an objection has been stated on the relevancy by the respondent. With deference to the rules that may obtain in such cases in the Court of Session, I have little difficulty in saying, that those of your Lordships who are acquainted with the proceedings in the courts of this country must feel surprised that one person could avail himself of the objections stated by another. If such a matter had come before an English court, it would have been difficult to have given judgment on a ground of complaint, which was only stated in a different complaint brought by a different party, and therefore which could only be effectual when coupled with the complaint of that person.

"But I pass this by, as merely a point of practice of the Court of Session. In matters of this nature, I know of no principle more safe than to adhere to whatever I find sanctioned by established practice.

"When the question was further agitated before the Court below, I should be doing great injustice were I to withhold my warmest commendation from the most anxious, the most learned, and most efficacious endeavours of the counsel on both sides. The Court, at pronouncing judgment, was nearly equally divided. In the notes of their opinions, which have been handed to us, it was very obvious that they have felt great anxiety to do justice in this difficult subject.

"The cause was also argued at your Lordships' bar with great ability. I pledge myself to the parties, to your Lordships, and to the public, to have given myself the most anxious attention to this subject; and if I am in an error in having formed an opinion, that it would not be fit to reverse the interlocutors in the present case, I can only say that I have not adopted this opinion without the most mature consideration. I have also attended to all the decisions upon similar questions, which were within my research, and of those decisions I may say, that it is out of the reach of my talents to reconcile them with each other.

"When the question is asked, if this retour affords sufficient evidence of the requisite old extent of the respondent's lands, I take it that this question is to be answered by a critical attention to all parts of the retour, to all that is found within its four corners (to use a phrase of Lord Kenyon's), and by attending also to the decisions which have been given on similar subjects.

1804.

DAVIDSON *v.* FLEMING.

Descriptive clause.

"This brings me to consider the words of the retour itself, premising, that each and every part of it is given upon the oaths of the inquest. (Here his Lordship read the retour, and afterwards recurred to the different clauses.)

"Obiit, &c. 'de totis et integris quinque mercatis terrarum de Eister 'Glenboig, cum molendino terris, molendinariis, astrictis multuris 'ejusdem, et suis pertinentibus, quibuscunque jacentibus infra vice-'comitatum de Striviling, una cum officio coronatoris dict. vicecomitatum de Striviling,' &c. Upon this part of the retour, I may observe, that I should have thought, what was introduced by the word '*cum*' was to be understood as a different subject from what preceded it, were I not persuaded from other retours, and the decisions upon them, that this word was not necessarily an introduction of a new subject.

"I lay little stress on the word '*pertinentiis.*' I lay more on the words '*jacentibus,*' &c. as importing a conclusion of the subject first introduced. Here the office of coroner is mentioned.

"If the construction depended only upon this descriptive clause, I can put no sense upon it but this, that it was meant to describe a five merk land, or land of the value of five merks; and this, whether the office had any value attached to it or not. It was not very strongly pressed that such an interpretation as I have stated was not to be given to the *descriptive clause,* if it was ruled by the *valent clause.*

"It was strongly put at the bar, and in the Court below, that the mill and mill lands were also included in the descriptive clause; and though the mill lands were of some pecuniary value, yet they were included with the other lands in the valent clause in the cumulo value of five merks; so, in like manner, it was argued, that some part of this value was to be ascribed to the office.

"'Et quod, &c. est legitimus, &c. de dictis terris cum molen-'dino et pertinentibus ac officiis,' &c. Here you will observe that the mill lands are not specially mentioned, but included under the words '*dictis terris;*' and the office is again mentioned as a distinct species of property.

"From this part of the retour, it appears that the whole of what was landed property in the retour, would have passed under the description of 'quinque mercatis;' and that, if the office of coroner had formed no part of the retour, that the cumulo valuation of five merks would have covered not only this five merk land, but also the other landed property.

"'Et quod dictæ terræ, &c. cum molendine, &c. una cum officio, '&c. valent,' &c. It has been argued, that this clause is the one principally to be regarded; that it contradicts the descriptive clause; that it imports that the office was of some value, though the precise value was not set out; and that as the five merks value was put upon the whole subjects, it meant, that the whole taken together were of the value of five merks.

"In my opinion, the grounds for forming an opposite conclusion, and affirming the decision of the Court below, are satisfactory. First, I take the words, '*dictæ terræ*,' to be the same as if the words of the descriptive clause had been repeated in the valent clause, and then the valent clause would have stood thus:—'Et quod quinque 'mercatæ terrarum, &c. cum molendino, &c. una cum officio, &c. 'valent,' &c. This, in English, would have been that the lands of Easter Glenboig were a five merk land, but that these lands, when joined to the mill and mill lands and office of coroner, were only of the value of five merks.

"If the valent is to be construed as if *totidem verbis*, the same with the descriptive clause, and thus stating the lands to be a five merk land, it is impossible to put the construction upon it contended for by the appellant, if it can be shown that, in other cases which have received judicial decision, offices of the same or of a similar nature, have been retoured as having no valuation. Now, I think that more than one decided case appears, where lands and an office are retoured as of a cumulo value, but which were so dealt with, the office being not more than mentioned in the *valent* clause, was held as nothing, and that the valuation was to be laid on the lands alone. In some of these cases, the office of coroner was in this situation.

"If, as I understand the words '*dictæ terræ*,' the lands alone are to be held as a five merk land, it necessarily follows that the office must be held as having no valuation. This appears to have been the opinion of the majority of the Court. I have had infinite difficulty in bringing my mind to assent to this, but it is the conclusion I have ultimately come to.

"Of the cases formerly decided, I shall not enter into any examination; I may barely state, that if the opinion of some of the judges can be reconciled with all former cases, the judgment now in question cannot be so reconciled. This judgment appears to me to coincide with some of these cases, but to be contradictory to others of them. Some of the former decisions I never can accede to, others appear to me to be satisfactory.

"Though it may be unusal in this House to state any grounds for moving the affirmance of a judgment. I deemed it right to say so much in the present case. The whole question is, if there be within the four corners of this retour sufficient evidence that the respondent's lands are of the value required by law? I answer that, in my opinion, there is. And, in making this answer, I give due weight to every part of the retour; for whether more or less weight is to be given to the *valent* clause, we are bound to give *due* weight to every clause, construing any one part by the whole; and construing the valent by the descriptive clause, if such a construction be necessary, from the import of the whole.

"I shall move, in the usual form, that the decree should be reversed, meaning to vote in the negative of this proposition."

1804.

DAVIDSON v. FLEMING.

EARL OF ROSSLYN.

"I do not entertain a doubt but this judgment ought to be affirmed. In a maze of contradictory cases, the Court appears to have proceeded in a safe way.

"The cases formerly decided upon similar subjects, may be ranged in two classes. I recollect the circumstances of many of these. One class is extremely strict and severe, and fickle in their interpretation of the instruments called retours. Retours are often drawn up with inaccuracy, nor are they, strictly speaking, framed in the words of the Jury, but prepared by the clerk to the Inquisition. This class of cases had its origin in a practice then very common, the making of nominal and fictitious votes, to which the Court was adverse. This practice consisted in a person possessed, for instance, in a £20 land of old extent, dividing it into ten freeholds of forty shillings each, so as to make ten votes. To prevent this, the act 16 Geo. II. said that you should be obliged to show, in proof of your qualification, a retour prior in date to 1681.

"These retours were also found very convenient for the purpose of making nominal and fictitious votes. And the retours themselves, which were entitled to great indulgence from their antiquity, often suffered by the decisions of the Court, from being found in bad company.

"But now that these votes are utterly gone, and all apprehensions with regard to them removed, the Court has adopted a more liberal mode of interpretation with regard to retours. I feel great satisfaction in the determination they have given upon this case."

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

For Appellant, *Wm. Alexander, Math. Ross, Wm. Robertson, David Boyle, J. Abercromby.*

For Respondent, *Wm. Adam, Henry Erskine, John Clerk, Wm. Erskine.*

Appellant's authorities, Sir Michael Stuart *v.* Campbell, 22d Feb. 1745, Falc. Dec.; Murray of Broughton *v.* Clark, 14th July 1774, (Wight's Election Cases, p. 170); M'Dowall *v.* Buchanan, 20th Feb. 1787, Fac. Coll.

Respondent's authorities, Campbell *v.* Freeholders of Renfrew, 18th Jan. 1745; Colquhoun of Luss *v.* Voters of Dumbartonshire, 5th Feb. 1745, Falc. Dec.; Fletcher *v.* Ferrier, 23d Jan. 1781, (Wight's Election Cases); Tod *v.* Miller, 20th Feb. 1787, Fac. Coll.