

1783. August 8.

LADY MARY CAMPBELL *against* GEORGE EARL OF CRAWFURD.

THE estate of Crawford, when disposed by William Earl of Crawford in the year 1678, to trustees for his creditors, stood devised to heirs-male by investitures completed in 1648.

In the year 1748, John, then Earl of Crawford, in order to bring the trustees to account for their intromissions, and to regain possession of the inheritance of his family, granted a trust-bond to Mr George Ross, who, upon it, led an adjudication against the estate.

By the terms of the backbond granted by Mr Ross, he became bound to denude 'in favour of Earl John and his heirs, or any other person or persons to be named by him.'—Upon the death of that Earl, therefore, it came to be doubted, whether the benefit of this obligation devolved to Lady Mary Campbell, his sister and heir of line, or to George Earl of Crawford, the heir male.

For the purpose of determining this point, Mr Ross called both these parties in a multiplepointing; in which the Earl of Crawford produced, as his interest, the investitures in 1648, already mentioned; and Lady Mary Campbell insisted for a diligence against havers for recovering certain writings. In support of this demand, it was

*Pleaded*; Lady Mary Campbell's title as heir of line to her brother, the truster, is undoubted; nor is her interest in recovering the writings called for more questionable. The obligation on the trustees to reconvey, considered as relative to the investitures exhibited for the Earl of Crawford, it may be admitted in the present argument, transmits to the latter as heir-male. But as, on account of prior settlements and limitations, these investitures may have proceeded *a non habente*, it must be competent for Lady Mary to insist for exhibition of the contracts of marriage entered into by Earl William and his father Earl John, in which such limitations may be contained.

The merits of this competition farther may depend, in a great measure, on the intention of the truster, when stipulating, in the backbond granted by Mr Ross, a reversion in favour of his heirs. They must be finally ascertained by a nomination, if such exists, executed by the truster agreeably to the powers contained in the same deed. It is therefore exceedingly material for Lady Mary to recover the contracts of marriage between the two Earls, her father and brother, and their respective ladies;—the nomination by the latter, in terms of the trust-bond, of the persons to whom Mr Ross is to denude;—the testaments executed by him; the assignations and dispositions in favour of himself and his heirs;—together with all letters of correspondence, backbonds, and declarations of trust, occurring between him and the persons he employed in transactions respecting the estate of Crawford.

No 15.  
Where particular writings are called for, the haver is not at liberty to depone that they are of such a nature that they cannot benefit the pursuer.

No 15.

*Answered*; Demands of this sort, which may be made for the purpose merely of discovering the latent defects of title-deeds, are to be granted with the utmost circumspection, and under such restrictions as are requisite to the security of those whose writings are thus endeavoured to be exposed to public disquisition. On this principle no person is permitted to require inspection of a charter-chest *per aversionem*; but a condescendence must be given in, not in the unlimited and general terms here used, against which the same reasons may be urged as against a demand for a general exhibition, but specifying in a particular manner the dates as well as the designations of the writings called for, No 12: p. 3966.

Nor is this alone sufficient. The tenor and import likewise of the writings must be so qualified, that their influence on the subject of debate; in favour of the person by whom the diligence is sought, shall be apparent and decisive; the other party being entitled to withhold the writings possessed by him, if he can swear that they do not answer the description.—Thus, by the investitures already produced, the estate in question being inheritable only by heirs-male, no antecedent settlements, unless guarded by strict prohibitory clauses in favour of heirs of line, can in the smallest degree aid Lady Mary's pretensions. Any exhibition, therefore, at her instance, must be confined to such settlements alone. Hence, too, with regard to those writings which are condescended on for the purpose of ascertaining the intention of Earl John in the back-bond stipulated from Mr Ross, the exhibition being measured precisely by the interest of the party demanding it, must here be limited to such as import a departure from the ancient investitures, in favour of heirs general.

Lady Mary likewise insisted for production of a decret of sale in 1724, of the house and parks of Struthers, part of the estate of Crawford, together with an heritable security granted over these subjects to Colonel Charteris. A great deal of argument too was introduced with regard to the effect of prescription as to the settlements anterior to the year 1648, and the efficacy of particular writings, such as testaments, letters of correspondence, declarations of trust, &c. in regulating the succession of landed property, This last, however, being considered as premature, was disregarded by the Court.

A great majority of the Judges were of opinion, that the condescendence, although not accurate as to dates, was however sufficiently special, and that the writings called for were either such as might throw light on the question between the parties, or belonged to Lady Mary as heir of line to her predecessors. No person, it was farther *observed*, could with propriety give his oath respecting the legal consequences of the whole writings in his custody. To permit, therefore, a supposed haver, without naming particular writings, to be examined in general as to his possession of deeds of a certain effect and quality, was liable to the same objections with a demand for a general exhibition, which was now most justly reprobated in practice. On this ground, in the noted question between Mr Scott and Lord Napier, No 27. p. 358. the Court refused

to compel his Lordship to swear, whether the writings in his custody imported an interruption of prescription, or a continuation of the trust alleged by his opponent. But when, on the other hand, particular writings were condescended on, to permit the holder to swear as to their tenor and import, by placing him in the situation of a judge in his own cause, would open a door to much prevarication and improper procedure.

Some of the Judges, however, were of a different opinion as to the extent of the exhibition. In every case, it was said, a party craving exhibition was under a necessity to rely on the faith of the supposed haver, in whose power it was, if he chose to perjure himself, to conceal the writings in his possession. Little prejudice, therefore, could arise from the restriction insisted for on the part of the Earl of Crawford, while a contrary practice tended to render insecure the titles of landed property, by giving occasion to disputes altogether foreign to that in which the exhibition was demanded, and to claims in favour of those who were parties to the action.

THE LORDS, before answer, granted warrant for letters of incident diligence against havers, for recovering the writings which have been mentioned.

Lord Ordinary, *Ellick*. For the Earl of Crawford, *Solicitor-General Campbell*,  
*Mackintosh, Wight, Sir John W. Belscher*. For Lady Mary Campbell, *Lord Advocate*  
*Dundas, Crosbie, Henry Erskine, Alex. Fergusson, Neil Fergusson, Morthland, Ro. Dundas*.  
 Clerk, *Menzies*.

*Fol. Dic. v. 3. p. 195. Fac. Col. No 118. p. 184.*

\* \* \* This cause was appealed :

THE House of Lords, 24th July 1784, pronounced the following judgement :  
 ' IT IS DECLARED, *in hoc statu*, the respondents are entitled to the production sought for in the condescence, without prejudice to any other question in this or any other cause between the parties ; and therefore, ORDERED and ADJUDGED, That the interlocutors complained of be affirmed.'