No. 99.

Marquis of Argyle, albeit it was *post commissum crimen*, yet the crime was latent, proceeding upon missive letters of his, that were found out of the English hands, which the defender could not know.

The pursuer answered to the whole, That he opponed the decreet of Parliament, which ought not to have been suspended by the Lords of Session, who are not judges to decreets of Parliament, who may dispense with the diets and solemnities of law; and the pursuer insists not upon the benefit of the five year's possession, but upon this ground, that the defender's rights from the house of Huntly, or from Argyle, were holden base of Argyle, and not confirmed by the King, and therefore by the forefaulture of Argyle, the superior, who, by his right, came in Huntly's place, these unconfirmed base rights fall;

Which the Lords found relevant; and, in the same process, mails and duties being but generally decerned, without expressing the quantities,

The Lords ordained the pursuer to condescend upon the quantities, and gave him a term to prove.

Stair, *v.* 1. *p.* 272.

1773. *March* 4.

ALEXANDER DUKE of GORDON, *against* JAMES EARL of FIFE, and Others.

No. 100.

Consent in terms of the act 53. 1661, not inferred from the circumstances that a proprietor of church-lands, after having been infeft on Crown-charter, recently took from the lord of erection a charter of the same lands, bearing the lands to be holden of him and his heirs *in perpetuum*, whereon he was infeft; and, adjecting to a copy of this charter, in the granter's chartulary, a

The lands of Over Mefts, (the superiority of which was the object of the present suit) were part of the ancient priory of Pluscardine, which, after the Reformation, was erected into the temporal lordship of Urquhart, in favour of Alexander Seton, afterwards Earl of Dunfermline. But, as these lands of Over Mefts, before the Reformation, were granted in feu by the Priory, the aforesaid grant, in favour of the Earl of Dunfermline, only carried the right of superiority; and which having again accrued to the Crown through the last Earl of Dunfermline's forfeiture, Jean Countess of Dunfermline, in 1698, obtained from the Sovereign a grant of the lordship of Urquhart, and was infeft on a charter under the Great Seal.

The lands of Over Mefts came by progress to belong to David Stewart of Newton, who was infeft in these lands in virtue of a charter under the Great Seal, granted in his favour, of date 14th February, 1679.

On 16th September, 1686, James Earl of Dunfermline granted a charter of the foresaid lands of Over Mefts, in favour of the foresaid David Stewart:—"Tenen. et haben. totas et integras dict. villam et terras de Over Mefts, cum terris molendinariis, et terris brueriis earund. et universis pertinen. jacen. ut prædicitur, præfat. Davidi Stewart, et Mariæ Meldrum, ejus dict. sponsæ, eorumque alteri diutius viven. in conjuncta infeodatione, et vitali reditu, et hæredibus inter ipsos legitime procreat. seu procreand.; quibus deficien. propinquioribus et legitimis hæredibus dict. Davidis Stewart, et assignatis suis antedict. hæreditarie, et irredimabiliter, de nobis, hæredibus et successoribus nostris, in capite, in feudifirma et hæreditate, in perpetuum, per omnes rectas metas," &c.

To a copy of this charter, inserted in the chartulary of the family of Dunfermline, is subjoined a docquet in the following words: "And the said David Stewart, in token of his acceptation of the foresaid charter of confirmation, upon the conditions above expressed, has subscribed these presents, day, year, month, and place foresaid, and before these witnesses above designed. (Signed) *David Stewart. R. Colvill*, witness, *James Wiseman*, witness." And, upon the foresaid charter, infeftment followed.

No. 100. writing, declaring his acceptance thereof on the conditions therein expressed; so as to bar singular successors in these lands from recurring to the Crown as superior.—No *termini habiles* for the lord of erection's plea of prescription on that charter.

Sir Harry Innes having, in 1711, got a conveyance to the lands of Over Mefts, from Emelia and Janet Stewarts, nieces and heirs of David Stewart, who had established no title in their persons, he deduced an adjudication in implement of the disposition in 1726.

In 1764, Sir James Innes, the son of Sir Harry, obtained a charter under the Great Seal of these lands of Over Mefts, in virtue of the above adjudication in implement. And Lord Fife having purchased these lands from Sir James, a charter under the Great Seal was expedited in his favour in 1770.

The Duke of Gordon, now in the right of the lordship of Urquhart, as heir to his father, who was infeft as heir to the aforesaid Jean Countess of Dunfermline, the Crown's grantee, brought an action of reduction and declarator against the Earl of Fife, and others deriving right from him, for setting aside the above mentioned Royal charters, as erroneous, and having it found and declared, that the Earl was bound to hold the lands of Over Mefts of him.

The defence against this action was, That, as from the titles to the lands of Over Mefts, it appeared that these lands had belonged to the Priory of Pluscardine, and were feued out prior to the Reformation; therefore the defenders were entitled, in virtue of the statute 1633, Cap. 14. to hold these lands immediately of the Crown; and, that the pursuer, as in place of the lord of erection, had no more than a claim for payment of the feu-duties.

To which plea the pursuer opposed the exception in the later statute, 1661, C. 53. and the transaction, in 1686, between the Earl of Dunfermline and David Stewart, then proprietor of these lands, as bringing the present case under that exception.

Argued by the defenders: It is understood to be a fixed point, that the simple taking of an infeftment from a lord of erection, does not bar either the vassal, or his successors, to recur to the Crown; and so it has been found by the Court in sundry instances. There is nothing more than common in the tenor of the charter alluded to, or that can import any obligation on the vassal, and his successors, to hold the lands of the lords of erection in all time coming. It is not incumbent on the defenders, singular successors, to account, at this distance of time, for David Stewart's taking from the Earl of Dunfermline this charter 1686, notwithstanding he stood infeft in the lands upon a charter under the Great Seal. Many reasons, however, might have occurred to him for taking this step, without supposing an intention to bind himself to hold of that family forever, in place of the Crown, his real superior. The charter itself is intrinsically void and null, and

No. 100. could vest no right whatever in the vassal, even although the Earl of Dunfermline had been the proper superior. It did not proceed, either on the resignation of John Maver, who was the former vassal, and David Stewart's author, or of David Stewart himself, who then stood fully invested in the fee of the lands by his charter and infeftment from the Crown. In short, the charter proceeded without any warrant. It was therefore altogether ineffectual in law, and could not be the proper warrant of any infeftment to follow thereon. And this faulty charter notwithstanding, David Stewart's infeftment on his charter under the Great Seal remained firm, and he, of consequence, continued immediate vassal of the Crown.

2dly, The docquet subjoined to the copy of the charter in the chartulary, in the *first* place, is not a probative writing, not being authenticated in terms of the statute 1681. *2dly*, Were it probative, yet it is not such a consent as is required by the statute 1661. It plainly imports no more than a declaration on the part of the vassal, that he was willing to accept of the charter in the terms in which it was conceived, and, of consequence, to perform the several prestations therein covenanted. When the vasssal takes infeftment upon the charter, he thereby declares his acceptance in the strongest terms, *rebus et factis;* and therefore it is plain that the above declaration cannot have a stronger effect than if the vassal, without any such declaration of acceptance, had shown his acceptance, *rebus et factis*, by taking infeftment on the charter.

Answered: The act has not prescribed any mode or form by which the consent of the vassals, for holding of the lords of erection, was to be given The only thing requisite, was a vassal's declaring his willingness to hold the lands of the lord of erection *in perpetuum*. In the present case, the consent meant in the act of Parliament was given by David Stewart, in a manner as proper as any that has occurred under the authority of the act 1661. If the Legislature had intended that church-lands, which, by that and preceding statutes, were declared to be held of the Crown, should be made to be holden of the lords of erection, when the owners were so inclined, in a feudal manner, the statute would have ordered, that the proprietor of church-lands, so intending, should execute a procuratory for resigning the lands in the hands of, and taking out a new charter from the lord of erection. But the Legislature, omnipotent in dispensing with form, having only required the consent of the proprietor, and declared such consent to be tantamount to a resignation in favour of the lord of erection, it must have the same effect as if such resignation had been made. The statute has declared the consent to be the *modus vacandi*, and to be a sufficient authority for the lord of erection's granting a charter.

And it can have no influence in this question, that David Stewart took a charter from the Crown. The acts 1633 and 1661 had annexed the superiority of the lands to, and declared that he held them of the Crown. He therefore was as much the vassal of the Crown before taking out the charter as after. Strictly, he could take his charter from no other superior; and he was as much at liberty to give that consent required by the act 1661, after taking out the charter from

the Crown, as he was before. The statute has not specified when such consent is to be given. The general position of the law is, that the superiorities of all church-lands are annexed to the Crown, and their owners are the vassals of the Crown; but the owners are left at liberty to become, when they think proper, the vassals of the lords of erection, by consenting to hold their lands of them. No. 100.

2dly, The docquet subjoined to the charter in the chartulary of the family of Dunfermline, *ex concessis*, is not an ordinary concomitant of a charter; and, therefore, such, when appearing on the copy of this charter, granted by the Earl of Dunfermline to David Stewart, must afford conclusive evidence of a transaction between them, that, in place of holding the lands of the Crown, he was thereafter to hold of the lord of erection.—The objection, that the writer of the docquet is not designed, in terms of the statute 1681, ought to have no effect; for that, as the lands were possessed for more than the years of prescription, under this charter, and the docquet thereto subjoined, it is not now competent for any person to object a defect of this kind.

Replied: Prescription has clearly nothing to do in this question; and it would be of no moment, although the charter 1686 had been the only title in David Stewart's person. It is impossible that it could have the effect to render the null docquet a probative writ. In that view of the case, the charter and sasine 1686 would have been considered as the investiture under which David Stewart held the estate; but the docquet in question was no part of that investiture. It was only subjoined to a copy of the charter, engrossed in the Earl of Dunfermline's chartulary; and, as it is not a probative deed, the law authorises the defenders to say, that it was not the deed of David Stewart.

There is therefore nothing to distinguish this case from the common case of a vassal in kirk-lands accepting a charter from the lord of erection; and it is a proposition totally untenable, that the vassals of church-lands, by taking an entry from the lord of erection, do thereby become bound to hold of them in all time coming.

The pursuer misconstrues the exception in the statute 1661, as if any consent on the part of the vassal to hold his lands of the lord of erection, were the consent pointed at by the act of Parliament, and sufficient to tie down the vassal and his successors to hold of the lord of erection in all time coming. It is not a simple consent interposed between the vassal and the lord of erection that is meant in the statute, but a consent between the vassal and the Crown, consenting to the superiority granted by the Crown in favour of the lord of erection, and agreeing to hold of the lord of erection in place of the Crown. This is the natural import and construction of the words of the statute. "It is always declared, that, notwithstanding of this act, any who have gotten, or shall get, any new infeftment of superiority of kirk-lands, the same shall stand good as to such vassals who have given their consent to the said right of superiority; in regard that such a consent, as to his Majesty, is of the nature of a resignation of their property in favour of the said superior, to be holden of the King."

No. 100. And, indeed, this construction of the statute is perfectly consonant to the established principles of the feudal law of Scotland. By the statute 1633, the superiority of church-lands is annexed to the Crown, and the vassal of the church is thereby made the immediate vassal of the Crown; the natural consequence of which was, that the infeftment in the person of the lord of erection was an anomalous right; which, though it might import a conveyance to the issues and profits of the *dominium directum*, yet it did not vest in him such a feudal right in the lands as could entitle him to grant a valid and effectual investiture to the vassals of the Crown; and therefore it would be absurd to suppose, that, because the vassal had erroneously taken an entry from a person who had not truly the right of the lands in him, that therefore he should be bound to hold his lands of him in all time coming. But, as any person may be effectually interposed between the superior and the vassal, by the mutual consent of superior and vassal, and that, either by resigning his property in the hands of the superior, in favour of the interposed superior, or by consenting to such resignation made by the interposed superior; as the interposed superior becomes thereby the immediate superior of the vassal, so the statute has, with great propriety, enacted, that, in every such case, the vassal must, and, indeed, can only hold of the lord of erection, who, by the consent of the superior himself, was interposed between him and the Crown.

The nature of such consent is further apparent from act 33d of the rescinded Parliament 1647, entitled, "Act anent the vassals of kirk-lands." This statute, after enacting, that the Lords of Exchequer, and keeper of the Seals, shall not have any power to grant or pass, hereafter, any new grants, rights, or infeftments, of the superiorities of the foresaid kirk-lands, &c. contains the following clause; "Excepting always from the said restraint the signature granted to the Earl of Eglington, and the Lord Montgomery, of the Abbacy of Kilwinning; with this declaration always, that, if the Exchequer shall please to pass the signature of Kilwinning, the same shall be without prejudice to the Lairds of Blair, Montgreenans, Achinyards, Hill of Beath, Halpland, and Mainishill, and all others who have not consented, nor will consent, to the supplication given in by the vassals of Kilwinning, desiring to hold of the said noble Lords;—all which persons so excepted are allowed to enter presently, and in all time coming, by the Exchequer, to any lands holden of the said Abbacy of Kilwinning."

It is from thence clear, that a single consent, passing between the vassal and lord of erection, was not understood to be sufficient, even to entitle the vassals of the church-lands to hold of the lord of erection; far less to oblige them to hold of him in all time coming, when, by the public law of the land, he was not truly their superior. But, in order to entitle the vassal to hold of the lord of erection, and to tie him down to hold of him in time coming, it was understood to be necessary that there should be a consent given on the part of the vassal to the Crown, or commissioners of the Crown, at granting the right of superiority in favour of the lord of erection, and that leave should be asked by the vassal, and granted by the

Crown, allowing them, in time coming, to hold of the lord of erection, in place of the Crown. No. 100.

This construction is also founded in reason, and the nature of the thing; for as, by the public law, the superiority of church-lands was annexed to, and vested in the Crown, whereby the vassals of church-lands became the immediate vassals of the Crown, so it was not in the power of these vassals to disclaim their real superior; and no private agreement between these vassals and the lords of erection, would entitle the vassals to withdraw themselves from the Crown, their true superior, and to hold of any third party whatever: and, in that case, a supplication, on the part of the vassals to the Crown, to be allowed to hold of the lord of erection in all time coming, was a proper and an expedient measure, and which accordingly appears to have been the method followed out by such of the vassals of the Abbacy of Kilwinning as wanted to hold their lands of the lord of erection.

But, 2*do*, Supposing the consent that was adhibited, in this case, were such a consent as brought David Stewart under the exception in the statute 1661, whatever effect that might have against David Stewart, and his heirs, to oblige them to hold of the lord of erection in all time coming, it can have no effect against onerous purchasers. It is an established point, that no latent deed, appearing in no record, can affect the right of an onerous purchaser. Sir Harry Innes purchased from David Stewart's representatives the lands of Mefts, as they stood vested in his person, and on the faith of the public law, by which he knew he was entitled to hold these lands immediately of the Crown, and from which privilege he could not be debarred, by simply taking a charter from the lord of erection; and he could not be hurt by any latent personal deed, limiting or qualifying that right, which did not appear on the face of any record.

Duplied: If the Legislature had meant, that the election of a vassal, to hold of a lord of erection, in place of the Crown, was to be notified, in a public manner, to the lieges, some record or other would have been pointed out, by which the publication was to be made; but no such thing is done; nor, indeed, does it well occur in what manner the publication alluded to by the defender could have been made. In many particulars, the records do not give full security to the purchasers, nor complete information; but they must inform themselves otherwise, in the best manner they can. And, in the present case, the purchaser could not miss to be ripely informed of the state of his purchase.

II. The next point argued by the pursuer, was, that, as more than 40 years elapsed between the date of the charter 1686, and the after charter that was expedited under the Great Seal by Sir Harry Innes; therefore the right of the lord of erection is secured by the positive prescription. This is clearly founded in the words of the statute 1617. The last charter of these lands was, so far back as 1686, granted by the Earl of Dunfermline; they were held under that right by David Stewart during his life, and by his heirs, to the year 1726, that is, for the space of above forty years, and thereafter by the purchasers from those heirs, till the erroneous charter and infeftment was expede by Sir James Innes in 1764.

No. 100.

Answered: It is an established rule in law, that every person possessed of different titles, can ascribe his possession to that title which he shall judge to be most beneficial to him. No third party has a right to set up the one title against the other; and, therefore, David Stewart, and those in his right, may ascribe their possession to the charter and sasine 1679, which was the only proper title in his possession, and not to the charter 1686, which was a deed totally inept.

2do, The infeftment 1686 did not subsist for the one half of the long prescription, David Stewart having died in the year 1705; and, when David Stewart stood infeft upon the charter 1679, which neither was nor could be vacated by the inept infeftment 1686; and, as the next investiture was a charter and infeftment under the Great Seal, it is inconceivable by what rule the pursuer is entitled to bring, *in computo*, the period between David Stewart's death, and the subsequent renewal of the investiture, in order to create a prescriptive right in favour of the lord of erection.

But, *3tio*, There are not here *termini habiles* for prescription. It is a clear case, that the simple taking of a charter from the lord of erection does not oblige the vassal to hold his lands of him for ever. And this was found, though the vassal had taken charters from the lord of erection for the space of 40 years running; 9th June, 1714, Herriot's Hospital against Hepburn, No. 54. p. 7986. and 24th January, 1730, Earl of Dundonald against Fullarton, (See APPENDIX.) And, if these two decisions are well founded, they are totally destructive of the pursuer's plea of perscription.

Indeed, the case does not admit of any possession sufficient to create a prescriptive right. The only possession that can be condescended on, is uplifting the feuduties, to which the lord of erection has a sufficient right, and which he is entitled to levy from the vassal, although the vassal had stood infeft on a charter flowing from the Crown only; and, therefore, as the family of Dunfermline, in this case, have had no other possession than they were entitled to, if the charter and sasine 1686 had never existed, it is difficult to conceive how they can pretend, in this case, to have acquired a right by prescription.

Observed on the Bench: Clear, that the taking a charter from the lord of erection is not sufficient. *2dly*, The docquet is not a formal deed: *Esto* it were, it may be doubted if it imports such a consent as is intended by the statute; therefore no evidence of such a consent as is requisite. At any rate, it was a latent deed, and not effectual against singular successors. And as to the plea of prescription urged by the pursuer, no *termini habiles* for it.

"The Lords repel the reasons of reduction, and assoilzie the defenders."

N. B. The interlocutor reported as of this date was properly the second interlocutor in favour of the defenders, and an adherence to a former, of date November 18th, 1772, upon a report of the Lord Ordinary, as the cause then stood. Against which the pursuer having reclaimed, and obtained production of certain writings called for, as in the hands of the defender, this occasioned a remit to the

Ordinary, who again reported the cause, upon memorials, respecting the new production; which, with the petition and answers being this day advised, the Court adhered to their former opinion. And it was judged proper to comprise the case in this form, stating the whole of the arguments used, *hinc inde*, at once. No. 100.

It may be farther observed, that, in this question, the Court adhered to the former rule respecting an incidental point, namely, that a party is not bound, in virtue of a diligence which the other had obtained, *parte inaudita*, for recovering writings at large, to produce any writings in his custody other than those specially condescended on, and wherein he that calls for production of them can show that he has an interest.

Act. *Dean of Faculty, Sol. General.* Alt. *M'Queen, Elphinston.* Reporter, *Alva.* Clerk, *Pringle.*

Fol. Dic. v. 4. *p.* 317. *Fac. Coll. No.* 66. *p.* 157.

*** This case was appealed. The House of Lords, 25th January, 1774, "ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed."

1779. *February* 3.

SIR LAURENCE DUNDAS *against* The OFFICERS of STATE, HONEYMAN of GRAEMSAY, and Others.

No. 101.
Effect of a grant from the Crown of the casualties on the entry of vassals.

The estates which antiently belonged to the Crown in Orkney and Zetland were granted by Q. Mary to Lord Robert Stewart, her natural brother. The charter conveys "totas et integras terras de Orkney," &c. *cum tota superioritate libere tenentium.*

In 1581, this grant was comfirmed by a new charter, in the same terms, and by which the subjects conveyed were erected into the Earldom of Orkney and Lordship of Zetland.

The whole of the estates having returned to the Crown by the forfeiture of Patrick Earl of Orkney, son to Robert, were annexed by an act of Parliament, in 1612.

In 1643, William Earl of Morton obtained a wadset of the earldom and lordship from the Crown, redeemable on payment of £.30,000, alledged in the grant to have been applied to his Majesty's use. The subjects are conveyed, "una cum superioritate omnium et singulorum hæreditariorum vassalorum dict. comitatus, dominii," &c. An act of Parliament followed, dissolving the earldom, &c. from the Crown, and confirming the charter. But this grant, and a subsequent wadset of the estates in favour of a trustee for the family of Morton, were both set aside by the Court of Session in an action at the instance of the Crown, and the earldom, in 1669, was of new annexed to the Crown.