The Lord Ordinary ordained the pursuer to find caution for expenses with certification.

Counsel for the Pursuer—John Wilson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defenders—Vary Campbell—Cosens. Agents—Wylie, Robertson, & Rankin, W.S.

Tuesday, October 21.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF BUCCLEUCH *v.* BOYD.

Superior and Vassal—Casualty—Prescription—Possession—Extrinsic Objection.

The proprietor of M, which had formerly been held of a subject-superior, with a feu-duty of £3, 6s. 8d. Scots, obtained from the Crown a title which bore that the Crown had right to grant the same by virtue of the Acts of Annexation, and which reserved to the subject-superior, as Lord of Erection, the feu-duty of 6s. 8d. Scots. The said proprietor when informed by the factor of the subject-superior of the discrepancy between these sums, paid feu-duty to the subject-superior at the rate of £3, 6s. 8d. Scots. After the lapse of the prescriptive period since the date of the Crown charter, and also since the date of the factor's communication, the subject-superior sued for a casualty of composition from the lands.

Held (1) that the Crown title being *ex facie* valid, the pursuer's contention that the Acts of Annexation had been wrongly invoked was an extrinsic objection, and was therefore excluded; (2) that payment of feu-duty to the subject-superior being directed by the Crown title, was consistent with possession thereunder; and further, that possession was not interrupted by the excess of feu-duty paid over the sum demanded by the Crown title.

This was an action of declarator and for payment of a casualty of composition in respect of the five merk land of Maxpoffle. The pursuer claimed to be superior of the lands as representing the Lord of Erection of Melrose. He produced a charter dated 16th July 1627, granted by Thomas Earl of Melrose, afterwards Earl of Haddington, in favour of Nicolas Carncroce of, *inter alia*, the five merk land of Maxpoffle. The reddendo for the lands of Maxpoffle was in these terms—"Ac reddendo annuatim pro dictis quinque mercatis terrarum de Maxpoppill summam trium librarum sex solidorum et 8d. et trium solidorum et 4d. in augmentatione rentalis monetae prescriptae ad terminos antedictos per prefatas equales portiones." The pursuer alleged that at least since the date of the Erection in 1609, and particularly since 16th July 1627, the defender's predecessors in the lands had until the beginning of the present century entered under various charters by progress with his predecessors as superiors. The last-entered vassal in the lands on whose entry a casualty was paid was James Newbigging, who entered with the then Duke of Buccleuch by charter of confirmation dated November 30, 1776. It was assumed that Newbigging died before 1861. The pursuer alleged—"(Cond. 3) The defender made up his title and is now infeft in the said lands and others in virtue of a decree of special and general service in his favour as nearest and lawful heir in special and heir-in-general of his father John Boyd of Maxpoffle, residing at No. 2 York Place, Edinburgh, dated the 14th and recorded in Chancery the 17th days of October, and in the new General Register of Sasines, &c., at Edinburgh, the 8th day of November, all in the year 1861. The defender is entered with the pursuer as superior of the said lands and others in virtue of the provisions of the Conveyancing (Scotland) Act 1874, and a composition exigible from a singular successor is payable by the defender to the pursuer."

The defender claimed to be a Crown vassal (1) in virtue of the Acts of Annexation, and (2) by prescription on certain Crown charters. The case was argued under both heads, but the judgments of the Lord Ordinary and the Inner House proceeded entirely on the ground of prescription.

It appeared from the titles that the Cairncross family had sub-feued the five merk land of Maxpoffle to several parties, including one Duncanson, the defender's predecessor in that part of the whole lands in respect of which the present claim was made. The representatives of Cairncross in 1771 sold the superiority of the whole lands to James Newbigging, who bought from the representatives of Duncanson the *dominium utile* of the lands in question. The subsequent transmissions of the lands were shown by the following titles—"(1) Disposition by James Newbigging, sometime writer in Edinburgh, to William Scott younger of Raeburn, dated 27th July 1807. (2) Instrument of sasine following thereon, in favour of the said William Scott, dated the 5th and recorded in the General Register of Sasines, &c., at Edinburgh, 12th days of September 1808. (3) Charter of confirmation under the Great Seal in favour of William Scott of Raeburn, of the above lands as being part of the old Lordship of Melrose held of the Crown by virtue of the Acts of Annexation, dated 21st, and written to the Seal, registered and sealed 30th December 1818. This charter confirms Nos. 1 and 2 before mentioned. (4) Charter of confirmation by the said William Scott in favour of himself, dated 15th November 1830. (5) Procuratory of resignation *ad remanentiam* by the said William Scott in favour of himself, dated said 15th November 1830. (6) Instrument of resignation *ad remanentiam* following thereon, in favour of the said William Scott, dated and recorded in the General Register of Sasines, &c., at Edinburgh, the 15th November 1830."

The effect of Nos. 4, 5, and 6 was to consolidate in Scott's hands the estates of *dominium directum* and *dominium utile* of the lands in question bought from Duncanson. He continued to be mid-superior of the other portions of the said five merk land. "(7) Extract registered disposition by the said William Scott in favour of John Ainslie, dated 16th November 1830, and registered in the Books of Council and Session 26th June 1833. (8) Instrument of sasine following thereon, in favour of the said John Ainslie, dated 4th and recorded in the General Register of Sasines 6th December 1830. (9) Extract registered factory and commission by the said John Ainslie in favour of Francis Brodie and John Brodie, W.S., dated 3rd and registered in the Books of Council and Session 20th March 1834. (10) Disposition by the said Francis and John Brodie, as factors and commissioners for the said John Ainslie, in favour of William Bisset of Lessendrum, dated 4th July 1839. (11) Instrument of sasine following thereon in favour of the said William Bisset, dated 5th and recorded in the General Register of Sasines 11th July 1839. (12) Extract registered procuratory of resignation of the above lands by the said William Bisset, in favour of himself, dated 18th and registered in the Books of Council and Session 23rd December 1840. (13) Charter of resignation and confirmation under the Great Seal, in favour of the said William Bisset, in virtue of the foresaid Acts of Annexation, dated 3rd February, and written to the Seal, and registered and sealed 3rd June 1841. This charter confirms Nos. 7, 8, 10, and 11 above mentioned. (14) Disposition by the said William Bisset, in favour of John Boyd, York Place, Edinburgh, dated 25th September 1849. (15) Instrument of sasine proceeding on precepts of sasine contained in Nos. 13 and 14 above mentioned, in favour of the said John Boyd, recorded in the General Register of Sasines 22nd October 1849. (16) Extract decree of special and general service by the Sheriff of Chancery, in favour of John Boyd, 34 Albany Street, Edinburgh, as eldest and only surviving son of the said John Boyd, as heir to his father, dated 14th and recorded in Chancery 17th October, and also in the Register of Sasines 8th November 1861."

The Crown charter of 1818 in favour of Scott provided, *inter alia*—"Tenendas et habendas totas et integras dictas quinque mercatas terrarum de Maxpoffil cum pertinentibus supra scriptis per dictum Gulielmum Scott ejusque praedictos de nobis nostrisque regiis successoribus ut devenientibus in loco Monasterii et Abbatiae de Melrose per Abolitionem Religionis Papalis in Scotia et secundem deditionem terrarum ecclesiasticarum et actorum annexationis in feudifirma feodo et haereditate pro perpetuo," &c., . . . Reddendo inde annuatim dicto Gulielmo Scott ejusq. praedict. nobis nostrisq. regiis successoribus immediatis legitimis superioribus earundem aut nostris Donatoribus erecti Dominii de Melrose aut illis jus habentibus ex iisdem summam sex solidorum et octo denariorum monetae Scotiae et trium solidorum et quatuor denariorum in augmentationem rentalis," &c.

The Crown charter of 1841 in favour of Bisset provided, *inter alia*—"Tenens. et habens. Totas et Integras dict. quinque mercatas terras aliaque cum pertinentiis supra script. per dict. Gulielmum Bisset ejusque praedict. de nobis nostrisque regiis successoribus immediatis legitimis superioribus earundem ut devientibus in loco Monasterii et Abbatiae de Melrose per abolitionem religionis papalis in Scotia et secundem deditionem terrarum ecclesiasticarum et acta annexationis in feudifirma feodo et haereditate pro perpetuo," &c., . . . "Redden. inde annuatim dict. Gulielmo Bisset ejusque praedict. nobis nostrisque regiis successoribus immediatis legitimis superioribus earund. vel Donatoribus nostris erecti Domini de Melrose vel iis ab illis jus haben. summam sex solidorum et octo denariorum monetae Scotiae et trium solidorum et quatuor denariorum in augmentationem rentalis."

The pursuer alleged that the feu-duty of £3, 10s. Scots or 5s. 10d. sterling contained in the above-named charter of 1627 had been paid by the successive proprietors of the lands of Maxpoffle to the pursuer and his predecessors since the date of the purchase of the lordship in 1723 up to the present time. With regard to the Crown charter of 1818 he alleged—"This is the first Crown charter that was ever granted to a proprietor of the lands of Maxpoffle, and there is in that charter reserved to the Lord of Erection a duty of 6s. 8d. Scots and 3s. 4d. in augmentation of the rental. The duty here reserved is not the duty under the various charters by progress above referred to as flowing from the pursuer and his predecessors, which, as already mentioned, has all along been paid to the pursuer and his predecessors. The said charter was obtained from the Crown outwith the knowledge of the then Duke of Buccleuch, the true superior, and under error as to the true state of the facts. The pursuer did not know that the said Crown charters had been granted until the present claim was made." With regard to the Crown charter of 1841 he alleged—"(Cond. 16) After a number of transmissions the lands came to belong to a William Bisset, who completed his title by a Crown charter of resignation and confirmation dated 3rd February, and written to the seal and registered 3rd June 1841. Mr Bisset was not infeft upon this charter, and conveyed the lands to John Boyd, residing at No. 2 York Place, Edinburgh, who was infeft by instrument of sasine proceeding upon the open precept contained in the Crown charter of 1841 and the conveyance by William Bisset, which sasine was recorded in the General Register of Sasines at Edinburgh on 22nd October 1849. Mr Boyd was succeeded in 1861 by his son, the present Mr John Boyd of Maxpoffle."

Besides these titles the defender produced the following correspondence between the late Andrew Fyfe, S.S.C., agent for the defender, and Messrs G. & J. Oliver, solicitors, Hawick, factors for the pursuer:—

"*Edinburgh, 9th May* 1866.

"Mr Boyd sometime ago handed me your letter to him of 4th ult. requesting payment of seven years' feu-duty of Maxpoffle at 5s. 10d. a-year, being £2, 10s., as due to the Duke of Buccleuch. Would you be so good as explain how this feu-duty arises, for Maxpoffle is held of the Crown. Is it a payment to the Duke as Lord of Erection, or in what character?—ANDW. FYFE."

Edinburgh, 3rd October 1867.

Mr Boyd of Maxpoffle spoke to me to-day regarding a renewed application made for feu-duty of Maxpoffle claimed by you for the Duke of Buccleuch. On 9th May 1866 I wrote to you the letter of which I annex a copy, but to which I never received an answer. I examined the Crown charter to-day with Mr Boyd and find the feu-duty payable by Mr Boyd to the Crown or to those having right as Lord of Erection of the Lordship of Melrose of 6s. 8d. Scots money and 3s. 4d. Scots in augmentation of the rental, 10d. sterling. If you can give me any satisfactory explanation of the claim Mr Boyd is quite ready to settle.—ANDW. FYFE."

"*Hawick, 4th October*, 1867.

"We have to acknowledge yours of yesterday @ the feu-duty of Maxpoffle. We find that your letter of May 1866 was received, but it has been mislaid somewhere or another and been entirely overlooked. Had we remembered it we should have written to you and not to Mr Boyd. The annual feu-duty is 5s. 10d. sterling, and it has been regularly paid by the proprietors for the last one hundred years at least, and is due to his Grace as Lord of Erection of Melrose. We cannot explain about the sums of Scots money you mention, but there should have been in the charters a reservation of the 5s. 10d. sterling payable to the Duke. It is possible that the reservation may have been omitted in Mr Boyd's charter, but the Duke cannot suffer from this, as he is no party to the granting of it. Perhaps the older charters may contain a reservation. Will you be so good as to look into them. Should the difficulty not be cleared up, we will have to refer you to Messrs Gibson, W.S., his Grace's Edinburgh agents, who may be able to explain more fully than we can, as we have nothing but the rentals, but meantime we shall be glad to hear from you again.—G. & J. OLIVER."

"*Edinburgh, 7th October* 1867.

"*Maxpoffle.*

"I had your favor of the 4th curt. relative to the feu-duty claimed by the Duke of Buccleuch. The sum is so trifling that it is not worth corresponding about, yet I was anxious to get the matter put on an understandable footing. None of the old charters from the Crown were delivered to Mr Boyd, and the only one he has bears the reddendo I formerly mentioned. So that I cannot get any more light on the subject without applying to Messrs Gibson, and I am unwilling to trouble them on the subject. So soon as I see Mr Boyd I shall take his instructions about settling.—ANDW. FYFE."

The defender alleged that he and his predecessors had held the lands directly of the Crown as immediate superior for upwards of 79 years. "The pursuer or his predecessors have for many years, and at least for a time beyond the prescriptive period, been aware of the existence of the said Crown charters. During the whole time no objection has been made to them by the pursuer or his predecessors, nor has any such claim of superiority as is now alleged been made by them."

The pursuer pleaded—"(1) The pursuer being superior of the lands and others described in the summons, and not having received any casualty in respect of the infeftment and consequent implied entry of the defender, is entitled to decree as concluded for. (2) The defender being justly indebted and resting-owing to the pursuer the casualty sued for, and refusing or at least delaying to make payment of the same, the pursuer is entitled, in virtue of the Conveyancing (Scotland) Act 1874 or at common law, to decree for payment of the sum sued for, with expenses. (6) The Crown charters of 1818 and 1841 having been granted without the knowledge of the pursuer or his predecessors, and the defender and his predecessors not having possessed the lands in virtue thereof, the pursuer's rights cannot be affected thereby."

The defender pleaded — "(1) The averments of the pursuer are irrelevant. (2) No title to sue. (4) The defender being entered with the Crown in virtue of the Conveyancing (Scotland) Act 1874, he is not indebted to the pursuer in the casualty sued for. (6) The defender and his predecessors in the said lands having, in virtue of their titles since 1808, without challenge or interruption held the same directly of the Crown as immediate superior, he is entitled to absolvitor. (7) The pursuer and his predecessors having beyond the prescriptive period been aware of the existence of the Crown charters under which the defender and his predecessors have held their lands, and no objection having been taken thereto, the defender is entitled to absolvitor."

On 30th November 1889 the Lord Ordinary (KINNEAR) assoilzied the defender from the conclusions of the summons, and decerned.

"*Opinion.*—This is an action for payment of a casualty which is said to have become due to the pursuer in consequence of the death of James Newbigging, the last entered vassal. The pursuer does not undertake to specify the date of Newbigging's death. But there can be no doubt that if his death caused the lands to fall in non-entry, they had been in non-entry for a long period of years before the passing of the Act of 1874, because he had acquired the property in 1771, and was entered with the pursuer's ancestor Henry, Duke of Buccleuch, in November 1776. The casualty which the pursuer claims in consequence of this vassal's death is said to have become due on the 8th of Novem-

ber 1861, the date of the registration of the defender's infeftment in the lands. This appears to me to be an inaccurate statement of the liability which the action is brought to enforce whatever view may be taken of the pursuer's right. But the meaning, as I understand it, is that the casualty became due upon the defender's entry with the pursuer on the date mentioned, because the Act of 1874 is so far retrospective that a proprietor infeft in lands at the date when the Act passed is to 'be deemed and held to be duly entered' with the superior as at the date of the registration of his infeftment. The basis of the action would therefore appear to be that the defender being the proprietor infeft has been entered with the pursuer by force of the statute. It is true that the statutory action for a casualty may be brought against a proprietor who is not infeft. But it is not alleged that the defender is in that position. On the contrary, his infeftment is set forth in the conclusions of the summons, and in more detail in the condescendence. But every proprietor duly infeft must, since the passing of the Act, be also entered with his immediate superior—that is to say, with the nearest superior whose title is indefeasible at the will of the vassal, and who under the former law might have been required, and would have been entitled to confirm his sasine. It follows that the defender, since he is admittedly infeft, must necessarily be entered either with the Crown or with some subject-superior, and if that superior should be found to be the Crown and not the pursuer, it would appear to me to be impossible to sustain this action. For no one can have a claim against an entered vassal for payment of a casualty in respect of his entry except the superior with whom he has been entered.

"Now, it appears to me very clear, according to the pursuer's statement of the titles, that the defender is duly entered with the Crown.

"The statement is that in 1807 James Newbigging conveyed the lands to William Scott of Raeburn, who obtained from the Crown a charter of confirmation dated the 21st, and written to the Seal, and registered the 30th of December 1818, and from that time the lands have been held directly of the Crown. After a number of transmissions they came into the hands of William Bisset, who obtained a Crown charter of confirmation and resignation in 1841, and without taking infeftment conveyed the lands to the defender's father, the late John Boyd. Mr Boyd completed his title by taking infeftment on the open precept contained in the Crown charter of 1841, and upon his death in 1861 the defender completed his title by expeding and recording a decree of special and general service as eldest son and heir of line to his father. All that remained for the defender to do in order to complete his title under the Crown was to obtain a Crown charter or writ of confirmation, and that has now been done by force of the Act of 1874 to the same effect as if an actual charter had been granted. It cannot be maintained that in that state of the titles the Act operated to enter the defender with the pursuer, because the lands have been held by the successive proprietors upon Crown titles since 1818. The proprietor is entered by the statute to the same effect as if the superior had granted a writ of confirmation according to the law and practice existing at the date of the Act. There can be no doubt that the Crown could have confirmed the defender's sasine, or that he must have obtained a charter for that purpose if he had applied for it, and it is equally certain that no valid confirmation could have been granted except by the Crown. As the titles stood in 1874, a charter or writ of confirmation by the pursuer, assuming him to have been the true superior, would have been altogether inept and ineffectual. The defender therefore is not entered with the pursuer, and I do not think it doubtful that he is duly entered with the Crown.

"The pursuer may or may not have right to have the Crown titles set aside. But so long as they stand the action for a casualty is in my opinion incompetent. The action, by the provisions of section 4, sub-section 4, is competent only to a superior who but for the Act would be entitled to sue a declarator of non-entry; and by the law and practice which existed before the Act the pursuer could not have brought a declarator of non-entry without first reducing the whole series of titles upon which the defender holds the lands from 1818 downwards. His remedy would have been an action of reduction and improbation which might have been combined with or followed by a declarator of non-entry. But a simple declarator of non-entry, based on an averment that the lands were held by a proprietor who was infeft directly of the Crown under a series of titles which had subsisted for seventy years, could not have been sustained.

"It was a common form in such action, by the older practice, to combine reductive with the declaratory conclusions, because it was only by this means that the vassal could be forced to produce his titles. But it was indispensable when, as in the present case, the defender held by a title *ex facie* valid, which would exclude the pursuer from the property. The fundamental assumption on which the action of declarator of non-entry proceeded was that the pursuer by virtue of his titles had the property of the lands libelled; and that assumption could not be made if the defender held the lands by a title flowing directly from the Crown. I do not think it doubtful that if an action of declarator of non-entry had been brought against the defender before the passing of the Act of 1874, he would have been entitled to stand upon his Crown charters and infeftments, and to exclude the pursuer from the lands until these titles were challenged and set aside in a competent action.

"For these reasons the defender would have been entitled to have the action dismissed without consideration of the question that has been raised as to the validity

of his Crown title. But he has stated no plea for this purpose. There is a plea to title which cannot be sustained, because the pursuer has undoubtedly a title to sue, although he cannot prevail in the action if the defender has a good title to the lands flowing from the Crown. But there is no plea to competency, and the defender concurs with the other party in inviting a judgment upon the merits.

"I am not sure that this concession would have relieved the case of all difficulty if the pursuer's claim had been otherwise well founded, because the defender cannot be made liable to the pursuer for a casualty unless he holds the lands of him as his immediate superior; and he cannot be placed in that position so long as his title from the Crown stands unreduced. But, at all events, the pursuer has the same onus as if he were pursuing an action for reduction of the defender's title; and in such an action I am of opinion that he must have failed.

"The first Crown title to which the defender traces his right is the charter of confirmation under the Great Seal of 1818, already mentioned, by which King George III. confirms the disposition by James Newbigging to Scott of Raeburn and Raeburn's sasine in the lands of Maxpoffle, which are to be held of the King and his royal successors as come 'in the place of the Monastery and Abbacy of Melrose, by the abolition of the Papal religion and the Act of Annexation,' for payment to the King and his successors, as immediate lawful superiors of the lands, or to the King's donatory of the erected lordship of Melrose, of six shillings and eightpence and three and four pence yearly; and under this charter, and by the progress of titles following upon it, the lands have undoubtedly been held by Scott of Raeburn and his successors, including the defender, ever since. The pursuer alleges that the charter of 1818 was granted *a non habente potestatem*, because his ancestor was at that time the true and undoubted superior under the Crown. The defender concedes that his lands were at one time held of the Dukes of Buccleuch and their predecessors. But he maintains that they were kirk lands, as appears from the terms of the charter itself; and therefore that the vassals, for whatever time they had held of the lords of erection, were entitled to recur to the Crown and to be entered as Crown vassals. There can be no question as to the general rule upon which the defender founds, and, therefore if the facts asserted by the charter are true, or if they are to be accepted without inquiry, the title is unimpeachable. The charter asserts that the lands were held of the Abbacy of Melrose by the predecessor of the vassal infeft, and it assumes that the superiority has come into the hands of a lord of erection, and in that situation the King asserts the right of entering the vassal immediately of the Crown itself for payment of a feu-duty to the lords of erection. The title is therefore *ex facie* perfectly valid. But it is said to be ineffectual, because an investigation of the prior titles will show that the lands were not in fact in the situation alleged. The pursuer does not dispute the general law as to the right of Church vassals. But he maintains that it is inapplicable on two grounds—First, because the defender's predecessors in the *dominium utile* were not Church vassals but sub-feuars; and secondly, because the Statutes of 1633 and 1661, upon which the right to hold of the Crown depends, cannot be made applicable to the lands in question because of the special terms of the Act of 1609, by which the Abbacy of Melrose was erected into a temporal lordship in favour of the pursuer's predecessor Lord Haddington. Both of these points would have required serious consideration if the question had been open. But as the case stands, I do not think it necessary or proper to decide them, because I think all such questions are excluded by the defender's title and possession. I am not satisfied that the pursuer's argument is sound upon either point; but whatever weight might have been due to it otherwise, it is irrelevant, because since the Crown charter of 1818 has been followed by an uninterrupted possession, the defender has acquired a prescriptive right which cannot now be challenged on the ground of any defect of power or right in the Crown to grant the charter. When prescription has run, there is a presumption of law which cannot be redargued that a title which is habile in form was also good and valid in substance. It is incompetent therefore to go beyond the charter in order to discuss upon extrinsic grounds the merits of the right which the Crown alleges as justifying the grant. The case of the *Duke of Buccleuch* v. *Cunynghame*, 5 S. 57, appears to me to be directly in point. In the case of the *Lord Advocate* v. *Graham*, 7 D. 183, this was referred to as a very strong case indeed because of its deciding the exact point which the pursuer raises in the present case. 'It was not,' says the Lord Justice-Clerk, 'the case of a party onerously acquiring from a former holder, but of a party beginning and making his prescription title by going as it was said to a wrong superior, the Crown, and taking a charter from that superior. Yet the Court sustained the prescriptive title as a title to exclude.'

"It is said that the defender's possession is inconsistent with a prescriptive right because during the period of prescription he has paid feu-duties to the pursuer. But the condition of his title requires him to pay to the Lord of Erection. The only point that can be raised upon the fact of payment is that the sums paid to the pursuer and his predecessors are in accordance with the earlier titles granted by them and not in exact accordance with the *reddendo* of the Crown charter. I do not consider how this discrepancy arises, because there has been no proof on the question of possession and I am not satisfied that the facts as to the use of payment have been fully ascertained. But taking the facts as the pursuer represents them, I am of opinion that they constitute no interruption of possession. On the contrary, these payments can only

be ascribed to the vassal's right under the Crown title. For the pursuer's case is that the lands have been in non-entry—that is to say, that no vassal has held under him for more than forty years—and for a much longer period he and his predecessors have been receiving feu-duties from successive proprietors of the lands who were not their vassals but were holding under the Crown. Now, the Lord of Erection could have no right to exact feu-duties from anybody except from a proprietor infeft either of himself or of the Crown, and therefore the acceptance of feu-duties by the Dukes of Buccleuch from successive proprietors who did not hold of them, but who held of the Crown, appears to be very like a recognition of the Crown title. At all events, it precludes the pursuer from denying that the Crown vassals were in possession of the lands or alleging that the exaction of payment by himself and his predecessors was an invasion of that possession. And the point is of no importance unless it can be held that the payment of feu-duties interrupted the possession because the amount to which the pursuer is entitled as successor to the Lord of Erection is not in question in this action.

"The better answer, however, is that the possession on which the defender is entitled to found is his actual and continuous occupation of the lands under Crown charters and infeftments for more than forty years, and this possession requires no further proof than the pursuer's averments on record. It is for this reason that I thought it important to point out that it is only by the defender's concession that the question between the parties can be tried in this action, because in the appropriate action it would have been apparent, on the face of the pleadings, that the true point in question is the validity of the defender's title to his lands. If the pursuer had brought a declarator of non-entry under the former practice the foundation of his action must have been that the lands belonged to him unless the defender could exclude him from the *dominium utile* by entering as his vassal. And the statutory action for a casualty rests upon the same basis. But if the pursuer had brought the proper action for establishing this legal basis of his claim by reducing the Crown title, and so bringing the defender into the position of an unentered vassal having no other right but to hold of the pursuer himself, the answer would have been conclusive. The defender would have pleaded a title to exclude, and by producing his own title and the previous titles under the Crown with which it is connected, and averring the continuous possession of the lands which the pursuer does not dispute, he would have excluded all inquiry into the respective merits of the pursuer's title and his own prior to the charter of 1818. It would have been enough that he had possessed under Crown titles *ex facie* valid. The Lord President points out in the case of *Cunynghame* that the Crown is superior of all the lands in the country, and therefore, that if no other superior grants a title the vassal may always obtain one from the Crown. To challenge such a title after forty years' possession upon grounds involving a historical investigation of the rights of Church vassals and their sub-vassals in the end of the sixteenth century would appear to me to be inadmissible, and the question whether a Crown vassal holding under such a title had paid more or less to the Crown's donatory than the exact number of shillings Scots specified in the *reddendo* would have been altogether immaterial."

The pursuer reclaimed, and argued—Let it be assumed that in 1839 the pursuer was superior. The defender's predecessor Bisset, unknown to the pursuer, took the Crown charter of 1841, and did no more. It was argued that that was enough to exclude all inquiry before 1841. But at this time Bisset had a good standing title in his disposition of 1839. Possession of the lands should be referred to this, for the law would prefer if possible to attribute possession to the true title instead of to a title *a non habente*. Besides, possession had in fact proceeded on the true title, for the feu-duty was paid in terms of the charters by progress from the pursuer and his predecessors, and not in terms of the Crown charters. The argument of the defender implied that the pursuer might be made the victim of a device of which he was kept in ignorance by the payment of the usual amount of feu-duty. The question of possession put the present case outside of *Duke of Buccleuch* v. *Cunynghame*, 5 S. 57. It was almost identical with the unreported case of *Duke of Roxburghe* v. *Scott of Wooden*, 1871, decided by the late Lord Gifford, and acquiesced in by the parties after a reclaiming-note had been lodged. The Lord Ordinary had found for the pursuer in circumstances very similar to the present.

Argued for the defender—1. He was infeft in the lands as averred by the pursuer. He was therefore entered with his nearest lawful superior. This was the Crown. It was sufficient to begin with the Crown chaeter of 1841. The pursuer's argument assumed that the disposition to Bisset in 1839 connected him with a chain of which Newbigging, the last-entered vassal, was also a link. But the pursuer failed to realise the effect of Bisset's resignation to the Crown. Even assuming that Bisset had some personal title derived ultimately from the pursuer's vassal, he unclothed himself of this by his resignation—*Molle* v. *Riddel*, 2 Ross' L.C. 619. Bisset's right under the charter was personal until feudalised, and this he transmitted to the late John Boyd, but it was a personal right to the lands flowing from the Crown, and it was feudalised by the instrument of sasine in favour of the late Mr Boyd, No. 15 of the inventory of writs. If the pursuer's argument amounted to an objection to the late Mr Boyd's infeftment, that was inadmissible in view of the pursuer's averments in Cond. 16. 2. But it was said the Crown titles were insufficient to found prescription (1) as proceeding *a non habente potestatem*. Even if so, it was immaterial. This was an extrinsic

objection, and the titles were *ex facie* valid and irredemable—*Duke of Buccleuch* v. *Cunynghame*, 5 S. 57; *Ferguson* v. *Gracie*, January 17, 1832, 3 Ross' L.C. 370; *Moreton* v. *Lockhart*, August 15, 1853, 25 Jur. 559. (2) It was objected that the defender's possession was inconsistent with prescriptive possession. The pursuer confused payment of feu-duty with possession. The only possession to be looked at was possession of the lands. There had been all along actual and continuous occupation and detention of the lands by the defender and his predecessors as owners. Payment of feu-duty could only be treated in an inquiry to what possession the payment was referable. Payment of feu-duty to the pursuer was consistent with the defender's theory that he had a right to enter with the Crown so long as he paid the feu-duty to the Lord of Erection. No doubt more feu-duty had been paid than what the charter demanded, but the correspondence produced showed that the excess of feu-duty over the sum demanded was treated as a matter of indifference by the defender while the existence of the Crown charters was made known to the pursuer.

In the course of the argument the following joint minute was lodged:—"BOYD, for the defender, did not dispute that the feu-duty of £3, 10s. Scots, or 5s. 10d. sterling, has been paid by the successive proprietors of the lands of Maxpoffle to the pursuer and his predecessors since the date of the purchase of the lordship in 1723 until the lands were acquired by the defender's father in 1849."

"DUNDAS, for the pursuer, and BOYD, for the defender, concurred in admitting that since the defender's father acquired the lands the said feu-duty has been paid by the defender and his father to the pursuer and his predecessor, and that receipts, of which Nos. 105 to 108 of process are specimens, have been granted therefor. Further, that the copy correspondence between the late Andrew Fyfe, S.S.C., and Messrs G. & J. Oliver, solicitors, Hawick, Nos. 70 and 71 of process, is a correct copy of the letters which passed between the parties of the dates which they respectively bear."

The receipts for feu-duty were in these terms:—

"Received by me, Chamberlain to His Grace the Duke of Buccleuch and Queensberry, from John Boyd, Esq. of Maxpoffle, per Messrs A. & J. Freer, writers, Melrose, the sum of Five shillings and tenpence sterling, being the year's feu-duty of his lands at Maxpoffle due for crop 1886, income-tax being allowed as noted.

"£0 5 10 "W. ELIOTT LOCKHART.
2

£0 5 8."

At advising—

LORD YOUNG—I agree with the Lord Ordinary that the existing Crown title, fortified by prescription, is a conclusive answer to the present action. I think that the title made up by the defender's predecessor in 1841 was a good *ex facie* title, subject no doubt to challenge by the Duke of Buccleuch if he might think that his rights were prejudiced. I think that the Crown charter was a good foundation for prescription, and after the prescriptive period had passed a challenge that a title ought not to have been made up with the Crown at all, but that it ought to have been taken from the Duke, is excluded by the lapse of time.

Plainly on the face of it, like its predecessors—it is not necessary to go further back—the title under the Crown was made upon the footing that the lands were Church lands, and that the vassal, the proprietor of the *dominium utile*, was entitled to elect under whom he would hold; whether he would hold under the Crown or under the Lord of Erection, reserving, however, to the Lord of Erection the feu-duties originally stipulated for. That, I think, was the footing upon which the title was made up.

It was admitted by Mr Low, in answer to a question from the bench, that but for the fact that the defender had all along paid to the Duke of Buccleuch a feu-duty of £3, 6s. 8d. Scots, while the feu-duties reserved to the Lord of Erection in the Crown charters were 6s. 8d. and 3s. 4d. Scots, the pursuer would have had no stateable case, and I agree with him in that.

Then the case stands thus—Does the circumstance that £3, 6s. 8d. Scots was continued to be paid to the Duke of Buccleuch after the Crown charter had been obtained, constitute a bar to prescription running upon it, the charter bearing that only 6s. 8d, was to be paid. I do not think so, and I do not know upon what legal ground that would affect the validity of the title or its sufficiency to be fortified by prescription against any challenge of that description.

But we have a correspondence between the parties which I think makes it clear that the duties payable originally to the Earl of Haddington and latterly to the Duke of Buccleuch were £3, 6s. 8d. Scots, and that by some error—how to be accounted for I do not know—the sum of 6s. 8d. Scots was erroneously introduced into the Crown charter. It was an insignificant blunder, and when it was brought to Mr Boyd's notice on a claim for arrears of feu-duty, his agent wrote pointing out that 6s. 8d. Scots was the feu-duty stated in the charter. The Duke of Buccleuch's agent wrote that the reservation in the Crown charter ought to have been for 5s. 10d. sterling, but that if the difference was supposed to be worth fighting about, he must communicate with the Duke's Edinburgh agents. Mr Boyd did not think it worth fighting about, and continued to pay on the footing that 5s. 10d. sterling ought to have been inserted in the Crown charter instead of the smaller sum. But payments upon that footing will never interfere upon any legal or rational ground with the validity of the title or the force of prescription to exclude inquiry as to whether the title should have been so made

up or not. I am therefore of opinion, and on the grounds stated by the Lord Ordinary in his note, that the interlocutor ought to be affirmed.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

Counsel for the Pursuer—Asher, Q.C.—Low—Dundas. Agent—Robert Strathern, W.S.

Counsel for the Defender — Graham Murray—Boyd. Agent — William Boyd, W.S.

Saturday, October 25.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

RAMAGE & FERGUSON *v.* FORSYTH.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42)—*Precautions for Safety of the Servant — Specific Statement of Duty Neglected.*

A workman engaged on board a vessel was injured by falling into a man-hole in the engine-room as he stepped over some pipes which lay on the deck between him and the man-hole, and prevented his seeing it. In an action of damages he admitted that he knew man-holes existed on board the vessel, and that they were necessary for the use of the workmen, but averred that he did not know of the existence of the man-hole in question, that the light in the engine-room being dim the place of the accident was therefore imperfectly lighted, and that the man-hole had been covered so as to be invisible upon the two previous occasions on which he had been there; it was further averred that it was the duty of the employers, or their foreman, in order to prevent accidents to the workmen, to have had the man-hole "covered or protected."

The Court *dismissed* the action as irrelevant, holding that the pursuer's averments showed that he had failed to take proper precautions for his safety, and also that he had not shown how in the circumstances the man-hole could have been protected.

The pursuer was an engineer in the employment of Messrs Ramage & Ferguson, shipbuilders and engineers, Leith, and upon 19th May 1890, when he was injured by falling through a man-hole in the engine-room as after mentioned, he was engaged in fixing on the mountings of the boilers of the steamship "Talune," which the defenders had recently launched. The "Talune" is a "tank-bottomed" ship. Inside the tanks, of which the bottom is in such vessels formed, there is a large number of pipes, bolts and nuts for fastening down the engines, and other fittings, and it is necessary that the workmen engaged upon the engines should have freedom of access to these tanks. Access is customarily provided by means of man-holes, and it is necessary that these should be kept open while the work is proceeding. The pursuer was aware that such man-holes were necessary and existed, but averred that he was "unaware of the existence of the man-hole in question," and that previous to the accident he "had been only twice in the engine-room, and upon these occasions the said man-hole was hidden by timber or other material having been thrown over it, as he did not notice it."

Prior to 19th May 1890 the pursuer's way to his work was by means of the forward hatch, but upon that day the forward hatch was blocked up, and he had to proceed to his work by means of the after hatch, and through the engine-room in which the man-hole in question was. The averment relating to the accident was—"At the time above-mentioned"—viz., 10 o'clock a.m.—"there were some lead pipes on the one side of the said man-hole, but it was otherwise quite unprotected, and on making his way to the boilers on the morning in question the pursuer on stepping across the foresaid lead pipes went into the man-hole, and fell violently upon the other side of it, breaking three of the ribs of his left side, and otherwise sustaining serious bruises and injuries." The averments of fault are contained in the following passages—"It was the duty of the defenders, or of their foreman the said James Aitken, to cover or protect the said man-hole in order to prevent accidents to their workmen, but although they had received repeated warnings of the danger by other workmen stepping into the said hole previous to the pursuer's accident, they failed to cover or protect the said man-hole, although this might have been done without in the least hindering the work and at insignificant expense. In so failing the defenders or their said foreman were guilty of gross carelessness and neglect, and it is averred that this was the cause of the accident to the pursuer. At the time of the said accident the light in the engine-room was dim, and there was no lamp burning to show the pursuer the open man-hole. The defenders in failing to have the said engine-room properly lighted were in fault, and their failure in this respect contributed to the pursuer's accident."

The Sheriff-Substitute (RUTHERFURD) allowed parties a proof of their averments by interlocutor of 11th July 1890, and the case came up on appeal by the defenders.

Argued for the appellants—There was no relevant averment on record of a duty neglected by the appellants. The man-holes were necessary, and necessarily left open. To cover or protect them was impossible consistently with despatch in completing the ship, and in any case no way was suggested by which the protection of them could be accomplished. The case as disclosed on record was one of carelessness on the part of the pursuer, who had not fulfilled his first duty to look where he was going. The averments were weaker than