her provisions under the said trust-disposition and settlement?"

Argued for the first parties—The claim for mournings was a provision given by the law to the widow out of the deceased's estate to enable her to appear decently at the funeral, and as such was part of her legal rights, and fell within the discharge operated by acceptance of the provisions under the settlement.

Argued for the second party—The claim for mournings was a privileged debt and part of the funeral expenses, and therefore was not excluded by such a clause as was here founded on—*Buchanan* v. *Ferrier*, February 14, 1822, 1 S. 299 (1st ed. 323)—Fraser, Husband and Wife, 2nd ed. pp. 967-8.

LORD SALVESEN—[*After dealing with questions with which this report is not concerned*]—The sixth question seems to be concluded by authority, the law of Scotland holding that an allowance for mournings is a debt of a privileged nature, just as funeral expenses are, and that a widow's claim to that allowance is not excluded by such a clause in a settlement as the one to which we were referred in this case, and which is in these terms—"[. . . *quotes*, v. *sup.* . . .]" Accordingly I am of opinion that the sixth question should be answered in the affirmative.

LORD GUTHRIE—[*After dealing with questions with which this report is not concerned*]—The sixth question is the only one which raises a question of general application, and I agree that it is conclusively settled by authority in favour of the view maintained by the second party.

The Court answered the question of law in the affirmative.

Counsel for First Parties — Sandeman, K.C.—Hon. W. Watson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Second Party — Graham Stewart, K.C. — Cowan. Agents—R. R. Simpson & Lawson, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Lord Cullen, Ordinary.

DUKE OF ARGYLL *v.* CAMPBELL AND ANOTHER.

Prescription—Title—Habile to Prescribe—Title by Progress—Construction by Earlier Writs—Possession Attributable to Title but not Adverse to Opponent—Conveyancing and Land Transfer (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 34.

C. held the lands of D., with their parts and pertinents, under charters which, in addition to the feudal services of watching and warding, bound the vassal to make the castle of D. patent and open to the granter and his heirs and successors at all times when required, and to uphold and maintain the fabric. The castle itself, however, was not included in the grant. It was burned down in 1810 and was not rebuilt. A., the superior, having in 1911 claimed the castle in property, C. pleaded ownership in virtue of prescriptive possession for twenty years, following on a decree of special service in favour of his father recorded in 1880, and a similar decree in his own favour as heir of his father recorded in 1908.

Held that the special service was not a habile title in the sense of section 34 of the Conveyancing and Land Transfer (Scotland) Act 1874 on which the prescriptive possession claimed could be founded, in that it was not a service to the castle of D. but to the lands of D. with the pertinents, but that it was subject to construction by the earlier titles to which it referred, and these titles showed that the possession was not exclusive and adverse to the superior, and was therefore inept to establish the prescriptive right.

Property—Title—Parts and Pertinents—Fortress—Ward Holding—Clan Act 1747 (20 *Geo. II, cap.* 50).

C. held a grant of the lands of D. with pertinents under a reddendo which included, in addition to the services of watching and warding the castle of D., the duty of making the castle patent and open to the granter and his heirs and successors at all times when required, and of upholding and maintaining the fabric. According to the law at the time the castle was not included in the original grant of the lands.

Held, in an action at the instance of A., the superior, against C., that the abolition of military services by the Clan Act of 1747 had not effected any change in the ownership of the castle.

The Conveyancing and Land Transfer (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 34, enacts—"Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate register of sasines shall be sufficient foundation for prescription, and possession following on such recorded title for the space of twenty years continually and together, and that peaceably without any lawful interruption made during the said space of twenty years, shall for all the purposes of the Act of Parliament of Scotland 1617, c. 12," anent prescription of heritable rights, "be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced, according to the provisions of the said Act. . . ."

The Duke of Argyll, *pursuer*, brought an action against Angus John Campbell of Dunstaffnage, Argyllshire, and his mother Mrs Jane Campbell, widow of A. J. H. Campbell of Dunstaffnage, as his curator appointed in his father's antenuptial contract of marriage, *defenders*, for declarator "*First*, that the subjects following, *vide-*

licet, All and whole the castle of Dunstaffnage, with the whole houses, buildings, gardens, yards, and other enclosures and pertinents thereof lying within the lordship and barony of Lorne and county of Argyll, pertain and belong heritably in property to the pursuer; and *second*, that the defender the said Angus John Campbell has no right or title of any kind in and to the said castle of Dunstaffnage, houses, buildings, gardens, yards, and other enclosures thereof, or any of them, *except in so far as he may require to enter into or occupy the same for fulfilment of the prestations due by him for the lands of Pennycastle and others under and in terms of his titles thereto*," with a conclusion for removal. [The words in italics were added by amendment in the Inner House.]

The pursuer pleaded—"(1) In respect of his titles to the lordship and barony of Lorne, the pursuer is entitled to decree in terms of the conclusions of the summons. (2) The defender is barred by the terms of the titles to his said estate from insisting in his present defence."

The defenders pleaded—"(1) The action is irrelevant. (2) The defender having, in virtue of his title, good and undoubted right to the castle of Dunstaffnage as part of the lands of Pennycastle of Dunstaffnage, should be assoilzied from the conclusions of the summons. (3) The defender and his predecessors having possessed the castle of Dunstaffnage along with the lands of Pennycastle for the prescriptive period under the titles referred to, should be assoilzied from the conclusions of the summons. (4) The defenders having in any event, in virtue of his title, good and undoubted right to the office of Marnichty of Dunstaffnage, is entitled to occupy the said castle of Dunstaffnage in respect of his holding that office, and should be assoilzied from the conclusion of the summons craving that he should be ordained to flit and remove therefrom. (5) The defender should be assoilzied from the conclusions of the summons in respect that they do not define the lands and others which the pursuer maintains belong to him, and that the defender would not know, if decree were pronounced conform thereto, what lands he was ordered to flit and remove from."

The *facts* of the case and the material portions of the titles founded on appear from the opinion of the Lord Ordinary (CULLEN), who on 22nd October 1910, after a proof, assoilzied the defenders from the conclusions of the summons.

Opinion.—"In this action the pursuer concludes for declarator that he is proprietor of 'All and whole the castle of Dunstaffnage, with the whole houses, buildings, gardens, yards, and other enclosures and pertinents thereof lying within the lordship and barony of Lorne and county of Argyll,' and that the defender Angus John Campbell of Dunstaffnage has no right or title of any kind in and to the said subjects or any of them. There is also a conclusion for removing against the defender, but in the course of the proof the pursuer intimated that he did not insist in it.

"It will be observed that there is here no specification or delimitation by boundaries or otherwise to make definite on the face of the conclusions what is the area of *solum*, or what are all the various items of existing heritable property which are intended to be included within the above general description. Throughout his condescendence the pursuer denominates the totality of the subjects claimed by him as 'the castle of Dunstaffnage.' The evidence led under the allowance of proof before answer has not served to remove this vagueness from the pursuer's claim.

"The defender, who otherwise negatives the pursuer's claim of property, pleads, *inter alia*, that the pursuer is not entitled to decree in respect the summons does not duly define the lands and others which he seeks to vindicate. This appears to me to raise an important question to the pursuer's claim when the actual nature of the subjects is considered. The former castle of Dunstaffnage, with its precincts of offices, gardens, yards and other enclosures, no longer exists as a totality capable of identification. The main building of the castle was destroyed by fire in 1810. There is now no castle in any proper sense of the word, but only a considerable extent of ruined masonry. The ruin stands on a site of rock situated on a promontory at the entrance to Loch Etive. Like many other ruins throughout the country, some of them of the most fragmentary character, it is commonly known by the name of the fortress of which it now only embodies the memory. It stands surrounded by lands belonging to the defender. A part at least of the totality of subjects claimed by the pursuer, that is to say, everything of the nature of outer precincts of the former castle—gardens, yards, &c.—have been long possessed by the defender and his predecessors as their own. At the hearing it was intimated by the pursuer's counsel that so far as these are concerned the pursuer did not maintain that he was entitled to succeed, and that he now confined his claim to what, without any attempt at delimitation, he styled 'the castle itself.'

"I shall now advert to the state of the title. As regards the pursuer it is clear that he and his predecessors have for centuries held a title under the Crown to the lordship and barony of Lorne including Dunstaffnage Castle. By charter dated 24th June 1502 Archibald, 2nd Earl of Argyll, granted in feu to Archibald Campbell Kere, the defender's ancestor, and the heirs-male of his body, All and whole the lands of Pennycastell of Dunstaffniche, Penny Chaniche and others, being the lands now belonging to the defender, and known as the estate of Dunstaffnage, within which the ruins of the castle stand. The lands are not described save by general names. The reddendo is in these terms:—'Dictus vero Alexander et sui heredes masculi prout predicitur in firma custodia custodiensis ac

sine lesione nobis aut heredibus nostri tenentibus castrum nostrum de Dunstafynche et semper inibi tenentes et habentes sex homines probos et decentes cum armatis et armis licitis pro guerris et custodia dicti castri et sufficientes ostiarium et vigilem ad numerum in toto octo personarum in tempore pacis et si forsan contingat guerram existem in Ilis partibus qua patriam vastare contingerit nos et heredes nostri propriis expensis tenebimus demediatatem hominem et expentarum in illo nostro castro ad numerum necessarum pro custodia et firma detentione ejusdem castri Insuper dictus Alexander et sui heredes ut predicitur invenient nobis et heredibus nostris annuatim focalia pro cameris coquina pistoria et le brouhousis et semper prima nocte pro aula toties quoties nos aut heredes nostri contingimus ibidem esse etiam dictus Alexandro et sui heredes prout priusdicitur solventes nobis et heredibus nostris triginta bollas farrine et duas bollas ordei annuatim pro omnibus exactionibus et demandis.'

"At the date of this charter Dunstaffnage Castle was, as it for long after continued to be, an important fortress. The general rule of construction of conveyances of lands at this early period as regards buildings situated upon them is stated by Craig to be, that while ordinary buildings passed with the *solum*, 'non tamen turres et fortalitia solo cedunt nisi aut expresse nominentur aut is, qui dispositionem habet, cum jurisdictione et imperio mero dispositam habeat' — Jus Feudale, Lib. 2, Dieg. 8, sec. 3. The terms of the reddendo clause in the present case seem to me to evince clearly enough the application of this rule to Dunstaffnage Castle.

"The said lands of Pennycastell of Dunstaffnage and others continued to be held by the successors of Alexander Campbell Kere until the forfeiture to the Crown of the estates of the Marquis of Argyll in 1661. Upon the restoration of these estates Archibald, 9th Earl of Argyll, made a new grant of the said lands of Pennycastell of Dunstaffnage and others, by charter dated 7th October 1667, in favour of Archibald Campbell of Torrie, from whom the defender derives right. The description of the lands, which is by general names, is the same as in the titles of the forfeited feu. The reddendo follows so far the reddendo in the charter of 1502, but in addition binds the vassal to make 'our said castell' patent and open to the granter and his heirs and successors at all times when required and to uphold and maintain the fabric.

"After the passing of the Act for the abolition of Wardholdings (20 Geo. II, cap. 50) the services specified in the reddendo, so far as affected by the Act, were commuted for a money payment, the remaining obligations which continued to be expressed in the writs by progress being those relating to the making open of the castle to the superior when required, the supplying of fuel to him when there, and the maintenance of the fabric. It is remarkable that after the period of the Act, the writs granted by the superior cease to speak, as the older writs consistently did, of the castle as 'our' castle. The relation of the vassal to the castle in connection with the military services contained in the original reddendo had entirely ceased. It seems, nevertheless, to be contemplated in the reddendo as inserted in the writs granted after the Act that the vassal should reside or have the right to reside in the castle, throwing it open to the superior when required. And I do not think that there is anything in the tenor of these writs, taken by themselves, which is sufficient to exclude the castle from the grant. It may perhaps have been intended, in view of the effect of the Act, that the castle, which had come to have the character of a place of residence merely, and which had all along been the actual residence of the Dunstaffnage family, should be merged in their property under the obligation to make it open to the superior, &c., and this may perhaps explain the disuse of the word 'our.' There was, however, no novodamus. That the castle was looked upon as the family mansion-house of the Dunstaffnage family, and included in their property, is shown by the fact that when Dunstaffnage was entailed in 1795 the entail expressly excluded from the computation of free rental in estimating family provisions the castle of Dunstaffnage or other principal family mansion for the time, and the offices and gardens thereto belonging, &c., and provided that these should be always reserved for the use and accommodation of the heir of entail for the time. The entail was followed by a charter of resignation incorporating its terms and dated 9th August 1815.

"In 1810 the castle was reduced to ruins by fire. It was not rebuilt. As a place of strength it had ceased to have any *raison d'être*, and it was apparently not considered worth the expense to rebuild it for use as a residence. It has not been contended that the vassal's obligation of upkeep extended to rebuilding it after the fire. The proprietor of Dunstaffnage thereafter took up residence in a house on the estate at some distance from the castle. So far as the superior is concerned, the ruins of the castle were simply left derelict. There is no evidence of any act done by him in relation to the castle up to 1900, when the present pursuer, then under the erroneous impression that the castle had been a royal castle of which he held the office of Hereditary Keeper, set about obtaining subscriptions for putting it in better repair, and suggested to the proprietor of Dunstaffnage various fanciful devices for increasing its attractiveness to sightseers, with a corresponding increase in the gate-money.

"Turning now to the actings of the proprietors of Dunstaffnage in relation to the subjects after the castle was reduced to ruins by the fire of 1810, it appears that they have possessed and absorbed in their surrounding lands all that is embraced in the pursuer's claim, as stated

in his summons, in the nature of ground or offices formerly attached to the castle so far as these are susceptible of beneficial possession. The evidence is, I think, sufficient to show that they have had full and continuous enjoyment of these for more than the prescriptive period. And, as I have already stated, the pursuer now concedes that he is unable to vindicate right to the totality of the subjects claimed in the summons, although he has not followed this up by any attempt to formulate a habile description of the residuum to which he now confines his claim for declarator of property.

"As regards the ruin of the main building of the castle itself and the rocky portion of the promontory on which it stands, the proprietors of Dunstaffnage have not, naturally, had the same kind of possession and enjoyment of these sterile subjects as they have had of the surrounding ground. They have, however, since about 1867 appointed a caretaker to look after the ruins and regulate the admission of the public to view them, and for many years a charge for admission has been made. They have occasionally lodged fishermen in a bothy in the ruins during the fishing season. They have fitted up a small building in the ruins called the tea-house, which has been used by them and for the entertainment of their friends when visiting the ruins. These acts of possession are said to be more or less casual, and to fall short of full possession. I think, however, that in order to appreciate the extent of the possession, regard must be had to the totality of the subjects which the pursuer claims. In absorbing the ground about the ruins capable of beneficial occupation, and in treating the ruins and their sterile site as they have done, it seems to me that the proprietors of Dunstaffnage have possessed the subjects, taken as a whole, in the same way as would ordinarily be done by any undoubted proprietor of land on which a former castle or fortalice on a sterile site has become obsolete and fallen into ruin and decay. I am of opinion that, assuming the existence of a habile title, there has, for the prescriptive period, been sufficient possession of the subjects claimed by the pursuer to enable the defender to maintain a claim of property thereto.

"As a basis for his prescriptive possession the defender appeals to the recorded services of his father and himself, the former of which was recorded in the register of sasines on 20th April 1880. These vest the lands without qualification, and appear to me to be an *ex facie* valid irredeemable title to land capable of serving as a basis for prescribing a right to the subjects in question which are situated on these lands.

"The pursuer, however, maintains that *esto* there has been possession, it has not been *cum animo domini*, but that it is to be explained as possession by licence of the superior as under the early titles. It appears to me, however, that after the fire of 1810 had reduced the castle from a habitable structure to a mass of ruins, which, with the acquiescence of the superior, were left to moulder in decay, a situation was created and continued which was not contemplated at all in the reddendo clause of the charters, and I am unable to accede to the pursuer's view that the proprietors of Dunstaffnage in possessing and absorbing the ground about the ruins, and in dealing with the ruins themselves as they have done, fall to be regarded as having been merely occupying these subjects with a view to making open when required a non-existent castle to the Duke of Argyll, and supplying him with fuel therein, &c.

"Following these views, I am of opinion that the defender is entitled to absolvitor from the conclusions of the action."

The pursuer reclaimed, and argued—Defenders had no right of property in the castle at all. They had no title capable of including the castle. At the date of the grant in 1502 the castle did not pass and could not pass unless expressly mentioned, and the original contract between superior and vassal could not be altered by services or other writs of progress taken out since. The castle in 1502 was a place of strength, and at that date places of strength were reserved and not granted out. The defenders admitted this, but argued that with the passing of the Clan Act in 1747 (20 Geo. II, cap. 50) the reasons for regarding it as a place of strength disappeared, and that with this change in the legal status the charters which before had been incapable of carrying it now became capable. It was, however, a false argument that because all the reasons for exclusion had gone, therefore exclusion was to be read out and inclusion to be read in. Further, in 1502 a castle did not fall under a clause of parts and pertinents in a grant of lands unless expressly mentioned—Erskine ii, 6, 13, and 17. This was the law at Erskine's death in 1768—Craig, Jus Feudale, II, iii, 24 (p. 201), and II, viii, 3 (p. 251); Hope's Minor Practicks, viii, 16; Stair, ii, 3, 65; Ross's Lectures on Conveyancing, ii, pp. 166 and 172, dealing with the words "*cum domibus*"; *Home* v. *Home*, June 16, 1612, Mor. 9627. It was not sufficient to prove that the alleged pertinent was occupied *with* the principal subject. It must be occupied *as belonging to* the principal subject. Something more than mere joint possession was necessary—*Lord Advocate* v. *Hunt*, January 31, 1865, 3 Macph. 426, February 11, 1867, 5 Macph. (H.L.) 1; *Rose* v. *Ramsay*, June 17, 1779, Mor. 9645, and Appendix; Duff's Feudal Conveyancing, 63. The defenders maintained that he had a right to the castle (1) because he was proprietor, and (2) because he had the office of "marnichty" or captain, but he never had a feudal title to the office of captain, and the earliest mention of captain was prior to the grant of the lands. There was no plea that the reddendo conferred a right of occupancy or the office of captain, and it was inconsistent with the idea that the castle had passed—*Hutton* v. *Macfarlane*, November 11, 1863, 2 Macph. 79, *per* Lord Neaves, p. 88; *Agnew* v. *Lord*

Advocate, January 21, 1873, 11 Macph. 309, *per* Lord Justice-Clerk Moncreiff, p. 325, 10 S.L.R. 229. No doubt the Clan Act of 1747 had abolished military services, but there still remained the duty of opening the castle and of supplying victual and fuel. But even if the latter services had never been in, the argument would have been the same—*Edmonstone* v. *Jeffray*, June 1, 1886, 13 R. 1038, 23 S.L.R. 646. The Clan Act 1747 had not by abolishing these services operated a transfer of property. Further, there was no prescription by possession. There were two uses of possession—(1) by the Act of 1617, c. 12, under which possession had the effect of curing a bad title and making it unchallengeable by third parties, who if they had come forward timeously might have cut it down; and (2) *longi temporis possessio*, the effect of which was to explain what the true import of the grant was. The latter assumed something in the grant not express but capable of being made express by the exercise over a long period of proprietary rights. Defenders were not entitled to go to the Act of 1617 unless their title was challenged, and pursuer did not challenge their title—*Officers of State* v. *Earl of Haddington*, June 4, 1830, 8 S. 867, at p. 875. It was impossible to throw away an old title and utilise another in a question with the author. No amount of possession could ever enlarge the grant, though long usage might explain it if ambiguous—Stair, ii, 1, 27; Erskine, ii, 1, 30; Napier on Prescription, 280 and 288. But this charter was not ambiguous—*Officers of State* v. *Earl of Haddington*, September 24, 1831, 5 W. & S. 570, *per* L.-C. Lyndhurst, at p. 591. This made it imperative that the defenders should have as the foundation of their explicative title something capable of including the castle—*Duke of Argyll* v. *Campbell*, July 9, 1891, 18 R. 1094, 28 S.L.R. 813. But it was impossible for them to show this and therefore to gain a title by prescription, because (1) the castle was not expressly conveyed; (2) being *inter regalia* it was not a pertinent; and (3) the fact of possession being common ground could not be referred to to interpret *quo animo* it was possessed so as to found prescription. During the whole of the period founded on pursuer possessed the lordship of Lorne and the castle of Dunstaffnage through his keeper, and his possession had never ceased. There was no act of possession from the beginning which was contrary to possession by the Duke. Whether before or after 1747 defenders were bound to keep the key of the castle and supply fuel and victual when pursuer stayed there. In other words, in order to implement his duty under the reddendo, even after 1747 personal occupation by defender was absolutely necessary, and throughout the whole period of prescriptive possession that duty was on defender. Pursuer could not dispense with these duties except by a novodamus. Possession therefore was not against the title, but quite consistent with it. If parties allowed the obligation to be worked out by defender living in the castle, this could not be founded on as hostile to the grant, even though probably pursuer could not have ejected him. To help defender's case then there must be some act of possession inconsistent with pursuer's right, and which called on him to stop it—*Lord Advocate* v. *Hunt*, January 31, 1865, 3 Macph. 426, *per* Lord Deas, p. 454, foot. Here there was no grant of custody and no feu, though if a grant had been given, it could not have been recalled—*Officers of State* v. *Earl of Haddington*, *cit. sup.*; *Boyd* v. *Bruce and Others*, December 20, 1872, 11 Macph. 243, *per* L.P. Inglis, p. 246. The castle was not in the dispositive clause either directly or indirectly by grant of custody or by parts and pertinents—*Earl of Dalhousie* v. *M'Inroy*, March 3, 1865, 3 Macph. 1168, *per* the Lord Ordinary (Mure) at p. 1171; *Lord Advocate* v. *Sinclair*, 5 Macph. (H.L.) 97, per Lord Cranworth at p. 104.

Argued for defenders—The two services of 23rd February 1880 and 26th May 1908 entitled the defenders to succeed. The earlier service was a habile title, on which the defender might prescribe on showing possession referable thereto. Defender's possession was referable to the title and was in a different character from any duty owing by him to the Duke. If that were so, it was incompetent to go back to the original grant to see whether the subject was included—Act of 1594, cap. 218; Act of 1617, cap. 12; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 34; Erskine, ii, 6, 17; Duff's Feudal Conveyancing, 176; *Munro* v. *Munro*, May 19, 1812, F.C., Ross's Leading Cases Land Rights, iii, 373, *per* Lords Gillies and Meadowbank; *Earl of Argyll* v. *Macnaughton*, February 15, 1671, Mor. 10,791; *Auld* v. *Hay*, March 5, 1880, 7 R. 663, and *per* Lord Deas, p. 672, foot, 17 S.L.R. 465; *Scott* v. *Bruce Stewart*, 1779, Mor. 13,519, *per* Lord Braxfield; *Fraser* v. *Lord Lovat*, February 18, 1898, 25 R. 603, 35 S.L.R. 471. If the services were not sufficient the charter of resignation in 1815 afforded a real foundation for prescription. This charter followed on and incorporated the terms of a deed of entail in 1790, which expressly excluded from the estimate of family provisions the castle of Dunstaffnage or other principal family mansion for the time, and therefore the charter of resignation must be taken to be a recognition by the pursuer's ancestor that the castle was the property of defender's author and must be equivalent to a novodamus. This was consistent with the change in the law brought about by the Clan Act of 1747, which abolished the military services and substituted a money payment, and the obligations which remained were not inconsistent with defender's absolute right of property in the castle. The effect of the Act was to convert residence as keeper into occupation as owner. Unless defender's tenure after 1747 involved residence in the castle he was there either by tolerance or neglect, and in either of these cases he could effectively prescribe, and the first title after the Clan Act would form a basis for pre-

scription—*Forbes* v. *Livingstone*, November 29, 1827, 6 S. 167, Ross's Leading Cases, iii, 342; *Duke of Buccleuch* v. *Cunynghame*, November 30, 1826, 5 S. 57, Ross's Leading Cases, iii, 338; Rankine on Land Ownership, p. 29. Prior to the Clan Act castles were reserved by the superior as *pars et instrumentum jurisdictionis* — Craig, Jus Feudale, II, viii, 3. But the reason for this reservation ceased with the abolition of heritable jurisdictions. Further, it was admitted that defenders had a good title to the lands of Dunstaffnage, and that these came right up to and surrounded the castle. The defender's original titles contained a grant of these lands with pertinents, and the castle of Dunstaffnage was a part and pertinent of the lands. Possession on such a title would therefore give the defenders a right even as against an express inclusion in the titles of the Duke — *Countess of Moray* v. *Wemyss*, February 20, 1675, Mor. 9636; *Crawford* v. *Maxwell*, 1724, Mor. 10,819; *Magistrates of Perth* v. *Earl of Wemyss*, November 19, 1829, 8 S. 82; *Earl of Fife's Trustees* v. *Cuming*, January 16, 1830, 8 S. 326.

At advising—

LORD PRESIDENT—The castle of Dunstaffnage is one of the oldest fortalices or strong places in Scotland. The date of its building is lost in antiquity. It played its part at a time when kingly power could scarcely be said *de facto* to extend over the lands of what is known as Scotland. In after days it was one of the strongholds of the great feudal chief of the Campbells, where, to use the quaint words of an old memorial, "was the only sanctuary against the insults of the M'Leans, the Macdonalds, and all the other clans."

Since 1810, when it was burnt, it has been a picturesque semi-ruin of interest to the historian and the antiquary. And now it has become before your Lordships the subject of a litigation which it is impossible not to regret. For the parties to it, without so far as I can see any very real dispute, have slid into a process in which I think nothing can be determined except the repelling of the extreme claims which pursuer and defender have alike put forward at some stage of the process.

The case comes before your Lordships by reclaiming note against the interlocutor of the Lord Ordinary, by which he assoilzies the defender from the conclusions of the summons.

The conclusions of the summons assert at least (I shall revert to them more particularly hereafter) a right of property in the pursuer in the castle, and the defender puts forward, *inter alia*, the following plea, viz. — "(3) The defender and his predecessors, having possessed the castle of Dunstaffnage along with the lands of Pennycastle for the prescriptive period under the titles referred to, should be assoilzied from the conclusions of the summons." It is not therefore doubtful that the application of the Lord Ordinary's interlocutor would mean that the sole right of property in the castle belonged to the defender and not to the pursuer.

The Lord Ordinary bases his decision on the view of prescriptive title consisting of possession of the ruin by the servants of the defender and his father, following upon a registered service of his father in 1880 for more than twenty years—a title which he looked upon as excluding further inquiry, and it was upon this view that the defender's counsel mainly, if not entirely, relied. I shall explain subsequently the fallacy which in my opinion underlies and vitiates the argument. But I think it will be convenient first to approach the matter in the historical order of time, as indeed the Lord Ordinary has done, and examine the state of the title at each of what I may call the critical dates in the history.

It is, I think, immaterial to decide whether Dunstaffnage was or was not originally a royal castle. Even if it was it could be carried by charter if so expressed; and Stair ranks Dunstaffage by name as one in such a position. Whether it was or was not originally a king's castle, it is perfectly clear that by the year 1470 it was the property of Colin, first Earl of Argyll, who got a Crown charter in that year to the lordship of Lorne *cum castris et fortaliciis*. And the importance of Dunstaffage is still further recognised when by the Crown charter of 1540 the castle of Dunstaffnage is made the principal messuage for sasine of the whole barony and dominion of Lorne. With these titles the present pursuer is admittedly connected by an unimpeachable progress.

We now come to the origin of the defender's titles. From the earliest times there seems to have been a Campbell as captain of Dunstaffnage. There is produced an old title of 1490, with a gift to a person so designed of some merk lands situated in Perthshire. The first title, however, of the lands of Pennycastell of Dunstaffnage and others dates from 1502, when there is a charter by the second Earl of Argyll in favour of Alexander Campbell Ker, the predecessor of the defender. This is a grant of various parcels of land, and is a proper ward holding. There is no money reddendo, but the services are set forth which are to be rendered by the vassal. They are not expressed as services *dicta et consueta*, but are set forth with great minuteness and consist in the watching and warding of the granter's castle of Dunstaffnage, with a provision of six armed men and two others in times of peace; with certain provisions for finding fuel for the different rooms to be occupied by the superior when he came to the castle. There was also a yearly payment of meal and beer. By this charter there is no question that the castle could not and did not become the property of Campbell. But the reddendo which imposed on him a duty gave him also the clear right to possess and occupy the castle as and for the superior his lord. The lands became involved in the attainder of the Argylls, but upon the restoration of the forfeited estates to the Argyll family were

again made over to the family of Campbell of Dunstaffnage by the disposition of 1667. This deed contains a practical repetition of the old reddendo, mainly amplifying the services as to providing fuel, by first inserting an obligation to make the castle patent and open to the superior when required. This reddendo was repeated in all the titles for the next century. To sum up the situation, under the earlier titles, *i.e.*, up to 1747, it seems to me abundantly clear that the position was as follows—1. The Argylls were proprietors of the fortalice or castle. 2. The Dunstaffnage Campbells were vassals, and as such, proprietors of the *dominium utile* of the penny lands of Dunstaffnage and others, and were also heritable captains and custodiers of the castle. 3. The holding was a ward holding. 4. The reddendo consisted in the ordinary ward services, and also in particular services which had to be done in the castle, and could only be done if the vassals occupied and possessed the castle. 5. Such services to be performed upon the superior's property were quite recognised by the ancient feudal tenures both of ward and also of one form of soccage (Ersk. ii, 6, 13). 6. The upshot of the matter for the present purpose is that the vassal has not only a right but a duty to occupy and possess the castle, which, nevertheless, remained the property of the superior, never having been gifted to the vassal, the possession of the vassal *qua* captain and guardian being in law the superior's possession.

So matters remained seemingly unchanged till we come to the passing of the Act 1 Geo. I, after the rebellion of '15, and the Clan Act after the rebellion of '45. By those Acts ward holdings were abolished—that is to say, the casualties of ward recognition and marriage were no longer exigible, and certain classes of services, viz., personal attendance, hosting, hunting, watching and warding, were prohibited. But services other than those prohibited were not struck at. The question therefore next comes to be, what was the effect of these Acts on the Dunstaffnage reddendo? It is superfluous to say that the Act of 1 Geo. I and the Clan Act effected no change of property from superior to vassal, or *vice versa*.

Now on this point I think we have very satisfactory evidence both in the later stage of the title itself and in recorded decision.

The first charter which we find of date posterior to 1747 is a charter of adjudication granted by Argyll in favour of Campbell of Ederline, who had adjudged the lands of Campbell of Dunstaffnage for debt. This charter, with a dispositive clause which is identical with that in the ancient charters, inserts a reddendo where there is for the first time a payment of £20, 17s. Scots, upon a recital of this being the commuted value of the ancient services and casualties so far as struck at by the Clan Act as evaluated by the Act of Sederunt of 1749, then goes on to state the old victual duty; and then proceeds with a recital of the obligation to open the castle, to provide fuel, and further, to keep the castle wind and water tight, with a counter obligation on the superior to compel his other tenants to help the tenants of the lands of Pennycastle, &c., to assist in the work of reparation so often as reparation should be required.

This reddendo is inserted in the conveyance which reconveyed the lands to the Campbell family — the debt for which adjudication had been laid having been paid—and appears in all subsequent titles. It is therefore evident that the conveyancers of the period considered that while the casualties of ward, marriage, and recognition, and the services of keeping armed men were struck at by the Act, the obligation to keep the castle, to make it open to the superior, and to furnish fuel, &c., were still good services not struck at by them. And this, I think, was the correct view as evidenced by decision. There is a case which was not quoted in the argument, which has, I think, an important bearing on the question. That is the case of *Duke of Argyll* v. *Creditors of Tarbert*, M. 14,495. It is in the year 1762, that is, after both the Acts above mentioned. The feu-charters of the estate of Tarbert, granted by the family of Argyll, contain, *inter alia*, the following reddendo: —"Una cum nave sex remorum, tempore belli et pacis, quam navem sufficienter tenebuntur ornare armamento, omnibus necessariis, cum sex remigibus et nauclero, lie *steersman*, pro servitio S. D. N. Regis. et nostris nostrorumque haeredum et liberorum, ad transportandum nos nostrosque praedict, a Tarbert ad Strondour, Silvercraigs et Lochgear," and then various other places where they were to be ferried across, "Et similiter, dict. Archibaldus M'Alister ejusque praedict. tenebuntur fideliter, firmiter, et secure, custodire, defendere, et tueri, dict. castrum et fortalicium, pro usu et utilitate nostra nostrorumque praedict. ab invasionibus hostilium et inimicorum nostrorum, et recipere et custodire in dicto castro captivos, lie *prisoners*, sumptibus nostris, nostrorumque praedict. quandocunque mandatum acceperint a nobis, nostrisque praedict. aut nostris deputatis, a tempore in tempus. Et quod fideles et obedientes erunt nobis, nostrisque praedict. in omnibus aliis rebus incumbentibus ad officium custodiae dict. castri, sicuti reliqui capitanei et custodes aliorum nostrorum castrorum et domuum, infra vice-comitatum de Argyl, tenebuntur et solent praestare. Ac etiam conservare et sustantare dict. castrum de Tarbert sartum et tactum, lie *wind et water-tight*, omni tempore futuro, sumptibus et expensis dict. Archibaldi M'Alister, ejusque praedict et hospitio recipere nos nostrosque supra-script. gratis, quandocunque ad dict. castrum venimus, sicuti alii custodes castrorum nostrorum facere solent."

M'Alister of Tarbert having allowed the castle to go into disrepair, the Duke of Argyll brought a process against him, concluding that he should perform the several prestations contained in the above

clause, and that they should be declared real burdens upon the lands.

M'Alister having become bankrupt, compearance was made for his creditors, who objected that these prestations of keeping up a house and a boat for receiving and entertaining the superior and transporting him from one place to another fell under the Act 1mo. G. I. cap. 54, section 10, which discharges all personal services, and attendance of vassals upon their superiors, and ordains the same to be converted into an annual value in money, to be ascertained by the Court of Session, in case the parties themselves cannot agree upon it.

In the course of the process his Grace admitted that so much of the reddendo as obliged the vassal to keep and defend the castle for the use of the superior against the invasion of his enemies, or for the reception of his prisoners, could not now be lawfully exacted, the same being against the public law of the kingdom, but maintained that all the others were good. And then they seem to have come to a sort of bargain that inasmuch as the old castle had gone into disrepair the Duke said he would not exact what he was asking as to making the old castle wind- and water-tight if the vassal would promise on his part to allow this prestation to apply to a modern mansion-house which he had built upon the estate. That was really, so to speak, a transaction between themselves. The Lords found "that the pursuer's vassal in the estate of Tarbert is bound, upon his own proper charges and expenses, to keep and uphold a boat of six oars and to provide the same with six rowers and a steersman, and all things necessary for the use of the superior and his family, in terms of the former feu-charters thereof; and also to keep the mansion-house, now built upon said estate, wind- and water-tight; and find that the prestations are not personal services, and do not fall under the statute of G. I. founded on." And then they were not quite certain about the provision which made the vassal have to feed the Duke *gratis* when he went there, and they remitted to the Lord Ordinary for further inquiry upon this subject.

It is not quite certain whether that castle of Tarbert was actually upon the feu or was not. I have looked up the session papers, but unfortunately they do not give the old feu-charters, nor do the old reports in the Faculty Collection. Parts of the argument point the one way, while on the other hand there is a part of the argument which points more to keeping up an edifice on the feu. But I do not think it matters whether the castle of Tarbert had up to this time passed to the M'Alister or remained with Argyll. That would, of course, depend upon the charter, and whether there was a grant *cum fortaliciis* or not. The importance of the case is that it shows that these services of keeping the castle wind- and water-tight were not services, in the view of the Court, which were struck at by the Act of 1 Geo. I. or by the Clan Act. Applying that case to this, there was after 1747 still a duty and necessarily a right in the vassal to remain in the castle, and his possession there would necessarily be the possession of the superior.

The result is that, in my view, the right and duty of the keeper and custodier to occupy and possess the superior's castle remained just as before, only with this difference, that he might occupy with peaceful servants instead of armed men, ready to perform the humble duty of *patefacere* instead of the harder task of keeping out the M'Leans, Macdonalds, and other unruly persons. And this duty and right was expressed in the altered reddendo which appeared in all the subsequent investitures.

No more need be said till we come to the event of the fire in 1810, which rendered the castle so uninhabitable that the captain no longer lived there. Now, I do not think that it is necessary to discuss whether the vassal's obligation to keep the castle in repair reached to the repairing of the damage, &c., caused by fire. Very likely it would not. But he was, I think, clearly entitled, and indeed bound, to go on with such occupation as the subject now permitted of, while waiting till either he or the superior repaired the ravages of the fire. At least it is, I confess, an entirely novel idea, that the fact of a fire could change the legal aspect of possession. No such idea at least entered the minds of the parties, for the reddendo with its expressed duties continued after the fire exactly as before.

We now come to the last important date, viz., 1880, when the father of the defender succeeded and made up his title by registering a decree of special service in the register of sasines. The possession of the ruined castle continued as before. The Lord Ordinary has held that the registered service being an *ex facie* irredeemable title is a good foundation for prescription; that possession such as the subject permitted of being retained for twenty years, it must be held that the castle now has been possessed as "part and pertinent" of the Pennycastle lands, and that that is a title to exclude, and therefore ends the matter.

In my opinion this reasoning errs in assuming what cannot be simply assumed, viz., that the possession of the castle was a possession of it as part and pertinent of the Pennycastle lands, and in shutting one's eyes to the most cogent evidence of what that possession must really be ascribed to, viz., the terms of the title itself. And when I say the title itself I mean not simply the recorded service itself, but what that recorded service really is in law. It is a temptation too often yielded to—of which the argument of the defender's counsel presented a good example—to forget that shorthand methods of modern conveyancing must never be taken as expressing only what the words used express,

but must be taken along with the statutory interpretation which is impressed upon the words so used.

I shall now examine what the recorded service really meant and effected. If, in doing so, I am compelled to say what will really resemble a lecture in conveyancing, my justification must be that the inquiry was steadily avoided in the argument of the defender; and as it is possible that this case may go further where there cannot be familiarity with the progress of our conveyancing statutes, it is as well to treat the matter from the beginning. It is not necessary to begin with very ancient times. We may pass at once to the time when feus had long ago been recognised as hereditary, or, in other words, to the practice as to title before the reforming legislation which began in 1845, and was continued in 1847, 1858, 1868, and 1874. Now at this time when the ancestor infeft in the *dominium utile* died, it was absolutely necessary to have recourse to the superior before the heir could be infeft in the lands which his ancestor had held. It is not necessary to consider the various positions arising where the ancestor was not himself infeft, or where the ancestor left a disposition *mortis causa* dealing with the estate. For my purpose I take the simple case of the ancestor infeft with a destination which pointed at the heir. The heir would naturally make up title, for if he did not, the lands were in non-entry, and the superior by declarator of non-entry could enter into possession. No doubt in many cases where the relief duty was trifling and the superior careless, an estate might be possessed for years on apparency. That, however, is only to be mentioned to show that the proposition as to the heir being bound to make up title was not universal. We are here dealing with the case where he did make up title. Now, the only person who could give him infeftment was the superior, and he was in use to do so by a deed known as a precept of *clare constat*. The warrant for such deed was usually, as the name denotes, the common knowledge of the superior himself that the person demanding the entry was really the heir of the investiture. But the warrant might be a retour of his service as heir exhibited to the superior, and though originally the deed following thereon was called a precept, and not a precept of *clare*, yet by the time that Duff wrote his Feudal Conveyancing, the deed had come to be called a precept of *clare* indiscriminately whether the warrant was the private knowledge of the superior or a retour exhibited to him. If a superior on production of a retour would not grant the precept, there were ways of getting past him to the next immediate superior, and so on to the Crown, who never refused an entry—which I need not detail.

Now what was the precept of *clare*? It was a deed by the superior which recited the fact that the heir applying was the heir under the destination contained in the deed which regulated the lands, which deed was specified; it narrated the tenendas and the reddendo of the original charter, or, in other words, the terms on which the lands were held of the superior, and then it appointed a bailie to proceed to the lands and give the heir heritable state and seisin there. Provided with this deed, the heir by himself or his attorney went to the lands accompanied by the bailie and a notary, and seisin was there delivered to him; the notary executed an instrument or record of the transaction, which set forth the precept as the warrant and the fact of actual delivery of the seisin, and the instrument, duly attested, was thereafter registered in the register of sasines, and the title was now complete, the heir being infeft on a warrant flowing from the superior, and therefore holding public.

It will be seen at once that a setting forth of the reddendo is an integral part of this performance.

So matters remained until the Service of Heirs Act in 1847. This Act primarily simplified the process of service itself, but in section 21 it proceeded also to deal with the making up of title. It provided that service in the new form recorded in Chancery should contain a precept of sasine. This was an entire novelty, the function of a service of which the retour was the proof being hitherto merely to establish the character of heir. But though a novelty it was quite logical, because by section 21 it was provided that the retour with precept of sasine when recorded in the books of Chancery should operate exactly as a disposition of the deceased. In other words, the precept in the retour was made equivalent to a precept in a disposition *mortis causa* by the deceased to the heir. If, therefore, the heir chose he could take infeftment on this precept, and record in the register of sasines the instrument following thereon. This holding, however, be it observed, was not public. The whole rights of the superior were preserved intact by a proviso in said section 21. The lands, accordingly, would in the case supposed be in non-entry, and the holding would not be made public and unimpeachable till the superior granted a charter of confirmation which confirmed the base infeftment.

This method was not obligatory, as there was nothing to prevent the vassal forbearing to use the precept in the retour, and going to the superior as before for a precept of *clare*, infeftment on which made his holding public at once. But again it is to be noticed that if the new method was taken the charter of confirmation, which was absolutely necessary to perfect the title, necessarily set forth the reddendo of the original grant.

In 1858 came the great change by which it became no longer necessary to expede instruments of sasine, but a registration of the conveyance itself operated as both the execution and registration of this instrument. The effect of this on the procedure above detailed was to make it unnecessary to execute an instrument upon the precept in the retour, and instead to allow of the

registration in the register of sasines of the retour itself; but so far as the superior was concerned, it left things exactly as they were, *i.e.*, a title so made up was ineffectual against him till he had confirmed it.

The 1868 Act repealed the Service of Heirs Act and the Act of 1858, but reenacted their provisions in practically identical terms.

Lastly came the Act of 1874. This abolished the granting of charters by progress—save and except precepts and writs of *clare constat*—and provided that registration of the conveyance, which had already been made equivalent to infeftment, should also be equivalent to entry "to the same effect as if the superior had granted a writ of confirmation (which under the Act of 1858 was equivalent to a charter of confirmation and necessitated the exhibition by the vassal of a charter or other writ showing the tenendas and reddendo)," but under the Act of 1874 "such implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands, &c., in the last charter or other writ by which the vassal was entered therein." Let us now apply these enactments to the facts here. When Alexander Campbell, the father of the defender, served heir in special to his cousin in the lands of Dunstaffnage and others, he established his character as heir under the regulating deed, or in other words, his character as heir of provision under the entail of 1790. By recording the retour in the register of sasines he first of all, in virtue of the Act of 1868, operated an infeftment in favour of himself to the same effect as if he was under the old law disponee in a disposition from his ancestor containing a precept of sasine, had taken infeftment in virtue of the precept, and had recorded the instrument following therein in the register of sasines; and he also, in virtue of the Act of 1874, was entered with his superior by having that infeftment confirmed in the same way as if under the old law he had received a charter of confirmation from the superior with all usual and necessary clauses. Now one of the usual and necessary clauses was the reddendo; and that reddendo set forth the right and duty of the vassal to occupy and possess the castle of Dunstaffnage, not as part of his own property, but as doing service to the superior on his property, to repair it, and to *patefacere* the same when called on. How, then, in the face of this title—and that is the only title he has got—can the vassal be heard to say, "I do not ascribe my possession to the duty which is set forth in the reddendo of the title under which I hold, which possession is in law the possession of my superior; but I ascribe my possession to my clause of parts and pertinents, which is a possession antagonistic to my superior, and has the effect, after the years of prescription be run, of enlarging the grant which I originally got." It is just as if A took a lease from B and then proceeded to say, "I ascribe my possession to another better and inherent title in myself." Of course the mere fact of taking a lease will not prevent A showing that he has another and superior title. But that title will have to prevail *ex proprio vigore*, and it cannot be justified by the possession which was given and accepted under the lease. So in a case with a superior, a vassal may quarrel with his superior as to the right of property in a certain subject. He may show that he has an express right to it contained in a title flowing from some one else, and he may show that that title will prevail against the superior's title *proprio vigore*, or he may show that he has had prescriptive possession on that title; but if the latter, he must be able to show that the possession was attributable to that title and not to the title he took from the superior, if the true construction of the title he took from the superior left the subject with the superior and did not give it to him.

The method which the judgment under review adopted of assuming that because possession of the castle is concurrent with a title which gives parts and pertinents, that therefore the possession must be ascribed to the parts and pertinents is not only wrong, as I think, on clear principle, but it is directly in the teeth of the judgment of the House of Lords in the well-known and authoritative case of the *Lord Advocate* v. *Hunt*. To quote the words of the Lord Chancellor — "The title under which the possession commenced may have been an infirm or invalid one, but if the party can show that he has possessed the subject of the infeftment for forty years he is safe from all further interruptions. So the subject claimed need not be expressly mentioned in the charter, but may be comprehended with the terms parts and pertinents. But in such a case it will not be sufficient to prove that the alleged pertinent has been occupied with the principal subject, it must be occupied as belonging to such subject; for while the statute says that the parties must be able to show and produce a charter of said lands and other foresaids granted to them, it seems clear that something more is necessary to be proved than a joint possession of the principal subject of the charter with that which is alleged a part and pertinent of it."

The House of Lords, agreeing with Lord Deas and the Lord Ordinary, Lord Mackenzie, held that Mr Hunt had not discharged the *onus* of showing that his possession of the Palace of Dunfermline (which was undoubted) was really ascribable to the clause of parts and pertinents in his barony title of the lands of Pittencrieff. On the facts it seems to me that this case is really *a fortiori* of that. It is also particularly instructive as showing that all the Lords, except perhaps Lord Ardmillan, thought themselves not only justified but bound to inspect the whole progress of the defender Mr Hunt's titles far outwith the prescriptive period. Now in that case the titles disclosed no possible

reason for possesion, except possession as part and pertinent. In other words, the only alternative was mere usurpation without a title at all. Whereas here, the moment you look at the defender's title expounded from the shorthand form, you find an obvious reason for possession consistent with the view of the superior and inconsistent with the idea of possession as a part and pertinent. Moreover, the two last findings expressed in Lord Deas' opinion might be taken literally, substituting "fortalice" for "palace" and "lands of Pennycastle of Dunstaffnage" for "barony" and applied to this case. "I am of opinion," he says, "(2) that it does not appear as matter of fact that the possession had of the palace for the prescriptive period was possession as part and pertinent of the barony; (3) that as matter of law—though *bona fides* is not required in the long prescription—a party cannot prescribe in the face of his own title, and here the defender's titles show, on the face of them, that the palace was neither part nor pertinent of the barony."

By this he necessarily means the whole titles; and here the whole titles are such as that, in view of the law as it then stood, it was a feudal impossibility for the fortalice as at the date of the original grant to be included under the general words of part and pertinent of the lands. There is another way of putting what in truth is only another aspect of the same thing, which perhaps it may be as well to add. If there is one thing better fixed than another in our law of prescription, it is that possession must be adverse, that is to say, that the party against whom it is pleaded must have been in a situation to oust that possession if *his* title was good. The numberless decisions on the plea known as *non valens agere* are all illustrations of one form of this general proposition. As Lord Braxfield said in *Maule* v. *Maule* in 1782 (*vide* note at foot of pages 531-2 of 7 S.)—"It would be a solecism in law to say that a right could be lost by prescription which no action could be brought to interrupt." And the same principle was given effect to in the well-known cases of double title—*Smith and Boyle* v. *Gray*, June 30, 1752, Mor. 10,803; *Durham* v. *Durham*, March 5, 1811, F.C.; and *Yuille* v. *Morrison*, March 4, 1813, F.C., speaking of which Lord Fullerton said in the *Panmure* case—*Maule* v. *Maule*, March 4, 1829, 7 S. 529, and Appendix at p. 55—"One condition, however, of the admissibility of prescription in such cases (*i.e.* double titles) might be anticipated, and is indeed necessarily involved in those principles on which all prescription is understood to operate. That necessarily implies the competency or possibility of interruption."

Try the present case by this test. The theory is that after recording his service in 1880 Alexander Campbell, who *ex hypothesi* had no right of property before that, began to possess the castle as part and pertinent of the lands. Now supposing the Argyll of the period, in order to avoid the running of the years of prescription, had attempted to bring an ejection, what chance would he have had of success? The answer would have simply been to produce any of the precepts of *clare* granted to his ancestors which showed the reddendo, and it would have been seen that the very services demanded of the vassal gave him a right of possession of the castle.

The truth is that this idea of not being able to look at anything but the service of 1880 is partly based upon the erroneous notion of treating the service as an expression of merely what the words say, instead of expanding it, as I have already explained, into what it really means according to law—but is also based on a complete misapprehension of two cases on which the defender particularly relied. The first is the *Earl of Argyll* v. *Laird of M'Naughton* (M. 10,791). The Earl of Argyll pursued the Laird of M'Naughton to remove from the lands of Benbowie as being part of his barony of Lochawe. The defender's counsel fastened on the rubric of the case, which is as follows:—"In the positive prescription, founded upon the possession of heirs, it is sufficient to produce the naked sasines without either the precepts of *clare constat* or retours upon which they are founded." And seeing there was in the case a question of parts and pertinents, he sought to apply that rubric as a doctrine to instruct that we must look at nothing but the naked sasine represented in modern times by the recorded service. But when the case is looked at carefully, it will be noticed that the Laird of M'Naughton had two defences. His first was that he had a title *per expressum* to the lands of Benbowie on which he had had prescriptive possession. This title he proposed to instruct by a sasine of date 1527, which was for this defence the only title he had to show. Now, of course, a sasine *per se* is not in the strict sense a title; it is the evidence of delivery in respect of a title. Accordingly the superior answered that he must produce a title, *i.e.*, the warrant for the sasine, which in this case, as might be seen from the recital in the sasine, was a precept of *clare*. The Lords held, upon the terms of the Act 1617, that this was not necessary; it was enough to show that he had bruiked the lands on the sasine. But the particular sasine they found insufficient, because there never had been forty years' possession by the person seised, and the sasine was never renewed in the successors, all possession since being in apparency.

In their own words, "The Lords found that there was no necessity to produce or instruct that there was a precept or retour otherwise than by the relation to the sasine, but found that the sasine not having forty years' possession by the life and bruiking of the person seased and never being renewed in his successors, it is not a sufficient title of prescription, and therefore repelled the defences."

But then the report goes on—"In this process the defender was permitted to allege the lands in question to be part and pertinent of his other lands whereof he

show a full progress, and allege continual possession by doing all deeds of property that the subject was capable of."

When therefore it came to be a question of parts and pertinents, the title upon which this possession was to be instructed was not a naked sasine but a full progress, *i.e.*, charters either original or of progress or precepts of *clare*, and there is absolutely no warrant for the proposition that in instructing the possession it would not have been proper, as was done in the case of *Hunt*, to examine each and all of the titles to see if they could throw light on the possession. In other words, the rubric only bears on the one part, viz., that if there is a sasine with possession alleged on it, it is not necessary to show a warrant for the sasine. But still the possession must be proved to be referable to the sasine.

The other case was that of *Munro* v. *Munro* (19th May 1812, F.C.).

Here again it is a case of taking the rubric as expressing a general proposition and applying to another class of case from that to which it is appended. The rubric is, "Heirs are entitled to found a prescriptive title upon instruments of sasine, one or more continued and standing together without producing their charter, though there be a charter extant."

Now in one sense this case was not a case of prescription at all, although prescription both positive and negative entered into the defence made.

The actual case was an action to have lands redeemed on payment of 1000 merks redemption money. It was really an electioneering case—probably the parties had changed their politics—because the "lands" dealt with were really only a mid-superiority. But of course from a feudal point of view that makes no difference.

Sir Robert Munro, infeft on a Crown charter in the barony of Foulis, comprehending, *inter alia*, the lands of Contulich, disponed to his second son George the superiority of the lands of Contulich. Upon this disposition George in 1708 got a Crown charter, was infeft and exercised his franchise till his death in 1764. The original disposition contained a clause of redemption in favour of the granter and his heirs on payment of 1000 merks.

In the Crown charter the clause of redemption was not inserted except by reference to the disposition.

George died, and his son John was infeft by a Crown precept in 1765. This narrated only the Crown charter without reference to the disposition. John died and was succeeded by his son George, who got another Crown precept in like terms in 1767. In 1775 George executed a disposition in favour of himself and heirs and assignees with a procuratory of resignation and made no mention of the charter.

On his death his brother Duncan by general service came in right of the procuratory upon which he expede a charter of resignation on which he was infeft. He afterwards upon his own resignation obtained a Crown charter upon which he was infeft, and then conveyed the superiority to Munro of Nova. None of the titles contained any reference to the charter of 1708. The pursuer, who was the grandson and heir of Sir Henry, the original disponer, brought an action against Duncan and Munro of Nova his disponee, in which he sought reduction of all the later titles as inconsistent with the original disposition, and declarator that he was entitled to a conveyance on payment of 1000 merks.

The defence was title to exclude as on the positive prescription, and want of title in the pursuer as upon the negative prescription. Both defences were held good by the Court. Now here there was no question as to possession at all. The point was that there had been infeftments proceeding on precepts of *clare* from 1765 down to date 1812, *i.e.*, for the forty years, and it was held that that being so the defenders might stand on them without producing and referring to the original charter of 1708, just as he might if the charter of 1708 had been lost. But that is miles away from the proposition that you could not look at the precepts of *clare* to see the terms of the holding. Here there was, of course, no question with the superior at all. So the words of Lord Meadowbank, "He produced what the law held to be an exclusive title, and he is the judge whether he will produce any further title or not: And *quoad* all the world the charter is to be held as not extant if he does not choose to found upon it," must be taken as all words in judgments, *i.e.*, *secundum subjectam materiem*. Lord Meadowbank never meant to say anything so absurd as that in a question with the superior you could look at nothing but instruments of sasine if you could allege a prior possession for forty years. The absurdity of such a proposition is perhaps best pointed out by showing that it would necessarily lead to the vassal being able to refuse payment of the feu-duty. For an instrument of sasine never did and never could bear any reference to the feu-duty, which is naturally mentioned in the reddendo, which no instrument of sasine in ordinary form ever mentioned, it being, as I have said, the evidence of delivery under a title but not a title itself. And it is settled beyond all contradiction that no continuation of non-payment of feu-duty for the years of prescription will ever free the vassal from the payment when demanded, though of course the negative prescription will cut off at the proper time an action for arrears. See also *Campbell*, 5 Brown's Suppl. 512.

Lastly, it is to be observed that cases of the class of *The Isle of Shapless* and *Auld* v. *Hay* do not touch the first question. In the latter of these possession *qua* owner was admitted; in the former it was allowed to be proved. But both were cases between third parties, and no question could be raised in *Auld* v. *Hay* as to what was the character of possession. Lord Deas, who agreed in *Auld* v. *Hay*, was the very Judge who had insisted on the necessity of showing that the possession could be referred

to the title in *Hunt's* case. No one doubts that if your title is habile, *i.e.*, is a title at all, and does not contain the idea of the exclusion of the subject on the face of it, you may prescribe something that is included *per expressum* in the titles of another, whether that other is your superior or not. But to do so you must show exclusive possession clearly referable to the title you say includes it, and you can never prevent the opponent from showing from your own title that your possession was given you as an agent for another.

The result is that, in my opinion, the decree of absolvitor is wrong, and the pursuer is entitled to a declarator of property. But it follows from what I have said that he is not entitled to any decree of exclusion for the defender who is charged by the titles flowing from and continually renewed by the pursuer's authors with the very duty of occupancy which a decree of exclusion would shut him out from. The result, as I said, is therefore to settle nothing, for there is no real dispute between the parties so soon as the extreme claims are denied to both.

I therefore propose to your Lordships that we should decern in terms of the first conclusion and assoilzie the defender from the said conclusion.

The proposed amendment in the second conclusion for the pursuer was only made after the case had been nearly all heard, and comes too late, and further, does not go to clear up any existing dispute between the parties. I am therefore not for admitting it. As both parties have overpled their case I think there should be no expenses found due to either party.

LORD KINNEAR—I have had the advantage of reading the opinion which has been delivered by your Lordship, and I agree with it so entirely in all respects that I do not think it would be a reasonable or useful occupation of your Lordships' time if I were to give any opinion in detail or at any length for the purpose of stating my own reasons. I shall therefore confine myself to stating what appear to me to be the main points requiring consideration and my own opinion on them as shortly as I can.

I agree with your Lordships as to the order in which it is useful to examine the titles. I think it is perfectly logical to start with the earlier titles, notwithstanding that the defender puts forward a title beginning in 1880 as the foundation of what he alleges to be a prescriptive right. It is perfectly true that possession upon a habile title, if it has been continuous and exclusive possession, absolves the person pleading it from the duty of producing any earlier title. He is quite entitled to say, "I will not inquire whether the title upon which I found is in itself valid or not if it is sufficient to support prescription." But, then, the title put forward in the present case is in the first place a title by progress, and secondly, does not give any right in express terms to the subject in dispute, and therefore it is subject to construction; and for the purpose of construing the title itself irrespective of any question of possession it would be, I think, unreasonable to say you are not to look at the earlier titles, which are in fact produced and brought before the Court by both parties, in order to understand the history of the right supposed to have been acquired by prescription, with which this particular title is dealing.

To begin with, it is common ground that the castle of Dunstaffnage belonged to the Earls of Argyll. I do not think it is of consequence to inquire whether it was a royal castle in the strict sense of the term, whatever it may mean, since it is not disputed that the Duke of Argyll's title to the castle stands on a valid grant from the Crown, nor could the defender, who alleges that he has derived right from the Duke's predecessors, have been allowed to dispute his superior's title. Again, there is no question that when he granted out the lands which now belong to the defender he did not give the property of the castle of Dunstaffnage along with them. I take it to be settled law, and I do not think it is disputed, that under our old law castles and fortalices did not pass except by express grant, and the conveyance of lands contained in the earliest grant in 1502 certainly does not convey any right in the castle of Dunstaffnage. That alone would perhaps be sufficient. But not only is the property not conveyed, but the terms on which the lands are conveyed make it perfectly clear that the property was retained by the granter, because the condition upon which the grantee is to hold his lands is for certain feudal services, and among others for keeping open, maintaining, and repairing the granter's castle of Dunstaffnage, with the obligation of admitting the latter when he chose to come and live there, and providing him with fuel for his comfort when he came; and therefore the legal effect of the original grant is beyond all question.

The next question that is raised is whether the abolition of ward holding had any effect upon this title of property, and the Lord Ordinary seems to hold that it had some effect, although he is a little vague as to its extent and method of operation. I think with your Lordship that the Clan Act had no effect whatever upon the property of the castle. It abolished the military services, but it did not abolish all the other services for the benefit of the superior, and in particular it did not abolish the duty of the vassal in the lands to keep the castle open and in repair, and to admit the superior and provide him with fuel. I think that follows from the decision to which your Lordship referred. But even if there were any doubt about the continuance of the services, I should still be unable to infer a transference of any right of property from the superior to the vassal. It may very well be that if a superior had granted lands to be held ward, the vassal when ward services were abolished would continue to hold the lands without rendering any services at all. But if the superior has granted a property on

condition of his grantee performing services upon another property which he does not grant, I do not see how the abolition of these services could ever operate as a transference of the property which he had kept to himself. The Lord Ordinary says that "the relation of the vassal to the castle in connection with the military services contained in the original reddendo had entirely ceased. It seems, nevertheless, to be contemplated in the reddendo as inserted in the writs granted after the Act that the vassal should reside or have a right to reside in the castle, throwing it open to the superior when required." I think that is perfectly true; I think that was the implication of the original grant, because the service he was required to render involved a right and a duty of occupation; but his Lordship goes on to say that "it may perhaps have been intended, in view of the effect of the Act, that the castle, which had come to have the character of a place of residence merely, and which had all along been the actual residence of the Dunstaffnage family, should be merged in their property." If that means that the vassal might naturally come to consider that the castle which stood upon his lands and which he was required to keep open and maintain was his property, it may very well be; but if the learned Lord Ordinary means to suggest that property can pass from superior to vassal by any such operation as he describes, I disagree with him. It is elementary and fundamental that property in land cannot be voluntarily transferred from one to another except by grant. No amount of possession will infer a right unless it is supported by a written title, and no intention to give or acquire the castle in property could be of the slightest avail if it were not embodied in a written grant. A limited right may be merged in a wider and more absolute right, as when a tenant or liferenter acquires the fee, but the notion of a transference of a separate object from one owner to another by merger is altogether unknown to the law of Scotland. If the property of the castle therefore remained with the superior after the original grant of the lands, it could not pass from him to his vassal except by force of a novodamus or new grant, and the Lord Ordinary says correctly that there was no novodamus. There was indeed no title which could operate as a novodamus, because all the titles which connect the various successors in the lands with the original grant were of course titles by progress, and these could have no effect in law to enlarge the grant as it was originally made, or to alter the conditions of the grant. I think that was clearly decided in the case to which Lord Johnston referred of *Hutton* v. *Macfarlane* (2 Macph. 79). The question there was whether the vassal had acquired a right to minerals which were reserved in the original charter, but which he said were given to him by a charter by progress, and the grounds of judgment are stated there in the clearest way. The Lord Justice-Clerk says—"It is said in this case that the vassal's estate has been enlarged from what it was in his original feu-right, inasmuch as he has become the owner of the minerals, which were not included in the original feu-right, and it is said that this change has been brought about, not by any new conveyance of the estate and the minerals, but by reason of the terms of the charters by progress—of the omission in the charter of confirmation and precepts of *clare constat* —which have had the effect of enlarging the estate of the vassal, and of making him the owner of the coals, metals, and minerals, just as if they had been embraced in the original feu-right. Now I think it is not competent to effect such a purpose by the mere terms of charters by progress without a novodamus. I can quite understand that the thing might be accomplished by a charter by progress by throwing in a clause of novodamus. But confirmations and precepts of *clare constat* are not conveyances of rights, but are recognitions of a certain person as vassal in a certain feu constituted by other writings." That is the sole effect which the various charters by progress can have; they recognise the heirs of the existing investiture and do nothing more. The same law is laid down in a case reported in the same volume of Macpherson, *Hope* v. *Hope*; and in that case Lord Deas states the law as to the effect of precepts of *clare constat* in exactly the same way as the Lord Justice-Clerk does in the case of *Hutton*. The question then comes to be whether the defender has produced any title which will support prescription. Now, the only title alleged is a recorded service, and upon the face of the service as recorded there is no mention of the castle of Dunstaffnage. But it is said that the decree of service of 1880 vests the heir in the lands of Pennycastle of Dunstaffnage with the pertinents. I do not know whether the defender maintains that he could have made any progress in his case without the addition of the words "with the pertinents." I do not know that he argued that a service to the lands would carry the castle upon the principle of *ædificatum solum solo cedit*, but at all events it is certain that that doctrine does not apply to castles and fortalices. The contention, then, is that this is a good title to found a prescriptive right to the castle of Dunstaffnage as a pertinent of the lands of Pennycastle. I agree with your Lordships that there is no title here that will support such a prescription. The effect of the Service of Heirs Act, as was decided in *Moreton* v. *Lockhart* (16 D. 1108) is merely to provide machinery for enabling an unentered heir to complete a feudal title so as to enable him to deal with the estate without going to the superior for an entry. A service is not a conveyance; and the reference in the Act to a hypothetical disposition does not, according to the decision, operate as a conveyance, but merely as a statutory warrant for a base infeftment to be effected by registration. It follows that the registration of the

service did not in itself create the relation of superior and vassal, and could not in any way alter the scope or conditions of the original grant. And when the Act of 1874 came in to operate the entry of the heir who had been infeft base, under the Service of Heirs Act, it expressly provided that the implied entry should not be held to confer or confirm any rights more extensive than those contained in the original charter or other writ by which the last vassal was entered. The hypothetical writ of confirmation, therefore, which is the supposed basis of the alleged prescriptive right, must be deemed to contain in its terms all the clauses, and particularly the reddendo, which show that the castle in dispute still belonged to the superior, and that it was part of the vassal's obligations as vassal in the lands conveyed, which do not include the castle, to maintain it as the property of the superior. And even if there were any doubt as to the effect of the title, I apprehend there is none whatever as to the effect of the possession. Nothing can be clearer in the law of prescription than this, that the possession must be exclusive and unequivocal, that it must be ascribed to the title which is alleged to be its basis, and that it must be adverse to the conflicting right brought under controversy. I find nothing in the possession here to satisfy anyone of these conditions.

I cannot think it doubtful, after the case of the *Lord Advocate* v. *Hunt* (5 Macph. (H.L.) 1), that although no effect ought to be given to prior titles for the purpose of invalidating an alleged prescriptive title, they may nevertheless be taken into account for the purpose of explaining the possession. It is not enough to prove actual possession of the subject in dispute. It must be shown that the possession is to be ascribed to the alleged title; and when the subject is not expressly described in the title, but is said to be included in a grant of pertinents, it is necessary to show that it has been in fact possessed not merely along with but as a pertinent of the subject described. For that purpose it was found in the *Lord Advocate* v. *Hunt* to be competent to examine the whole history of the subject as shown in a series of titles much earlier in date than that put forward as the basis of prescription.

I agree with your Lordship in the chair in thinking that this is a simpler case for the application of that doctrine than the *Lord Advocate* v. *Hunt*, because the possession proved in that case was a much more unequivocal assertion of a right of property than anything that is alleged in the present, inasmuch as Mr Hunt had taken the old palace which was in dispute into his grounds and had exercised all the proprietary rights which were suitable to the subject, and also because there was no other title to support any right whatever in the subject, except a grant of barony with parts and pertinents. But the earlier titles showed that it was a royal palace and not a part of the barony. It followed that although he had possessed the two subjects together he had not possessed the palace as a pertinent of his barony. It was therefore held that he had no title to support his possession, and consequently that he had acquired no prescriptive right. In the present case the defender has a title to explain his possession irrespectively of any right of property, and has had no enjoyment and exercised no right which is not consistent with his admitted character of custodier of the castle. There was no adverse possession, for the reason your Lordship has given; and there was nothing done for which the Duke of Argyll, alleging a right of property in the castle, could have ejected his vassal in the lands, inasmuch as in the occupation of the castle the vassal was only fulfilling the conditions of the grant of his lands.

I cannot help saying, as your Lordship did at the outset of your opinion, that it is very much to be regretted that so much expense and research should have been thrown away upon the settlement of a question which, of whatever academical interest, is of no practical importance to the parties in this case, since the result of the decision must be to leave the possession and enjoyment of the subject in dispute exactly where they were before. The only result of the case is that your Lordships find that the legal right of property is in the pursuer, but that the pursuer is not entitled to turn out the defender in terms of the second conclusion of his summons. Therefore I agree that the case should be disposed of as your Lordship proposes, by giving the declarator in terms of the first conclusion and assoilzieing the defender with regard to the second conclusion.

LORD JOHNSTON—The leading conclusion of the summons is that "the castle of Dunstaffnage, with the whole houses, buildings, gardens, yards, and other enclosures and pertinents thereof lying within the lordship and barony of Lorne and county of Argyll, pertain and belong heritably in property to the pursuer" the Duke of Argyll. That is a positive proposition. But there is a second conclusion which involves a negative counterpart of the above, viz., "That the defender the said Angus John Campbell has no right or title of any kind in and to the said castle of Dunstaffnage, houses, buildings, gardens, yards, and other enclosures thereof, or any of them."

It was proposed after the debate to add to this conclusion the words "except in so far as he may require to enter into or occupy the same for the fulfilment of the prestations due by him for the lands of Pennycastle and others under and in terms of his titles thereto." I agree that that amendment comes too late. But I do not think that, had it been allowed, it really would have substantially altered the case as submitted to us, while it would have called for an answer and led to further debate.

I pass over the operative conclusion which follows the declaratory, as it is not pressed.

I have specially noted at the outset these double or counterpart conclusions, because

I think, first, that in the result his Grace succeeds in supporting the positive proposition and in establishing his right to the bare declarator of property, but fails in sustaining the negative proposition and establishing his adversary's entire absence of right and therefore his own exclusive right; but, second, that though in the process there is probably material for determining what is the measure of the defender Angus John Campbell's subordinate right, there are not in the summons and would not have been, even if amended as proposed, any *termini habiles* for declaring it.

This arises from the fact that the parties both in pursuit and defence have attempted a higher flight than their wings will carry them.

There is a secondary question, which also I think we can hardly reach in the present record, viz., the limits of application of the positive declarator which the pursuer seeks to obtain, that is to say, what is included in the castle and its pertinents.

I do not think that any good purpose would be served by detailed consideration of the record, particularly as it does not disclose the defender's real line of defence as it was developed in argument. Suffice it to say that the pursuer founds his right to the castle of Dunstaffnage and its pertinents on his title to the lands, lordship, and barony of Lorne, which goes back to 1470. He describes the defender as his vassal in the lands of Pennycastle of Dunstaffnage and others, which admittedly surround, but, it is maintained, do not include, the castle and its pertinents, in support of which he points to the reddendo for the said lands in the original grant to the defender, which includes, *inter alia*, the safe keeping and maintenance of the granter's said castle of Dunstaffnage to the effect set forth in the charter of the lands. While the conclusions of the summons ignore any such right, the condescendence substantially admits a heritable keepership, and this was, I think, conceded in argument.

The course which the pursuer found himself bound to take, though I think that he has unfortunately allowed himself to be led to take up somewhat too extreme a position, was deemed to be imposed upon him by the equally extreme and untenable contention of the defender. The latter's attitude is shortly put in answer 13—"Explained that the right of the defender in the castle is a right of property and a right of possession."

The defender having set forth his title, states the two pleas:—"2. The defender having in virtue of his title good and undoubted right to the castle of Dunstaffnage, as part of the lands of Pennycastle of Dunstaffnage, should be assoilzied from the conclusions of the summons. 3. The defender and his predecessors having possessed the castle of Dunstaffnage along with the lands of Pennycastle for the prescriptive period under the titles referred to, should be assoilzied from the conclusions of the summons."

The pursuer's answer is contained in his first two pleas:—"1. In respect of his titles to the lordship and barony of Lorne, the pursuer is entitled to decree in terms of the conclusions of the summons. 2. The defender is barred by the terms of the titles to his estate from insisting in his present defence."

These pleas indicate, I think, correctly and completely the lines on which consideration of the case may be most conveniently approached.

First, then, how stands the pursuer's title? During the century or two centuries which preceded 1450, Argyll, which then included Argyllshire and Inverness-shire and the Isles, was only in course of being reduced to an integral part of the kingdom of Scotland, and being changed from a Celtic to a feudal tenure. And even in the end of the fifteenth century one has some hesitation in applying to things Argadian the strict rules of the feudal law as they are handed down in the standard authorities. What the precise position constitutionally of the lordship of Lorne prior to 1470 was it is impossible to ascertain with any approach to historical accuracy. From practical independence it had passed through semi-independence into more close relations with the Crown, as feudal superior rather than as sovereign, when in 1470, on the partition of the possessions of the Stewart lords of Lorne by a family arrangement, when the male line of the Stewarts failed, Colin, first Earl of Argyll, obtained the lordship of Lorne as his share by virtue of his marriage to one of the heirs-female. More than this cannot be said, and I only refer to it as bearing on the position of the castle of Dunstaffnage. It has always been reputed a royal castle. But I more than doubt whether it ever was so in the proper sense. It was the chief strength of the lords of Lorne, and so far royal as they were independent. But it was not erected by licence of the Scottish Crown, and never apparently passed into the hands of the Crown.

Accordingly when in 1470 the lordship of Lorne was transferred from Walter Lord of Lorne to Colin Earl of Argyll, the Crown charter granted in the latter's favour, on a resignation *in favorem*, bore to confirm "totum et integrum dominium de Lorne cum tenentibus et tenandiis ecclesiarum donationibus, pendentiis, castris fortaliciis et pertinentii eorundem"; and *castra* or *castella et fortalicia* appear in the *quæquidem* and all the formal clauses of the charter, which for purposes of infeftment unites the subject of the grant into a barony. Dunstaffnage is not named, but was undoubtedly the chief fortalice, and included among the *castra* and *fortalicia* generally conveyed. There was a good deal of discussion on the old feudal law of property in castles, and citation was made of Craig, Stair, Erskine, and Walter Ross. etc. But I do not think that it is necessary to give any detailed consideration to this subject. The authorities say that fortalices were, *inter regalia minora*, by feudal custom appropriated to the sovereign, and not "presumed to be conveyed by the charter unless it is expressed" (Erskine,

ii. 6, 13); or, as Mr Erskine further explains, they were naturally pertinents of lands, but by feudal custom were understood to be excepted from the grant unless expressed. Be it so, the charter of 1470 to Colin Earl of Argyll is a sufficient expression of the grant of fortalice to carry any particular castle, subject always to the operation of the rules of prescription. It is important to note, however, what Stair says (ii, 3, 65)—"By fortalices are understood all strengths built for public defence, whether that appear by common fame or reputation, such as all the King's castles, whereof many are now in private hands, as proprietors or heritable keepers thereof, or constables of the same"; and then as examples of the former class he gives "such are the castles of Dunstaffnage, Carrick, Skipness, and others belonging to the Earl of Argyll," and of the latter class, "the constabulary of Forfar belonging to the Earl of Strathmore; the constabulary of Dundee, &c." Writing thus in or about 1681, Stair, while I think in error in assuming it ever to have been a royal castle, recognises Dunstaffnage as now in the private hands of the Earl of Argyll as proprietor. And this is consistent with the charter of confirmation of the barony and lordship of Lorne, enlarged by further acquisitions, by James V in favour of Archibald, fourth Earl of Argyll, in 1540. Two things are to be noted. While *cum castris, turribus, fortaliciis,* &c., follow as formerly the grant of the lands and lordship of Lorne, &c., there are expressly added to the old lordship and barony "Terras et baroniam de Kilmun, Terras de Bordeland cum custodia castri de Donune," and also "totas et integras terras et baroniam de Kilmychell cum custodia castri de Swyne," drawing thus a distinction between the Castle of Dunstaffnage and other castles within the lordship, and the castles of Dunoon and Swyne in the lands and baronies added to it. And further, after erecting and uniting the lands confirmed in the charter into a new and extended barony and lordship of Lorne, the charter ordains the castle of Dunstaffnage to be the principal messuage of the lordship and barony, at which sasine of the whole might be taken. And this at a date subsequent to that at which the defender's title to the castle is alleged to commence.

It is unnecessary to refer to the titles which raise the estate from a lordship to an earldom and from an earldom to a dukedom. It is enough to say that they preserve the above distinction between the tenure of the various castles within the bounds, and that while they recognise Inveraray as the principal messuage they still retain a separate reddendo for the barony and lordship of Lorne of 1540, payable at the castle of Dunstaffnage.

If, then, the castle of Dunstaffnage was from 1470 vested in property in the Argyll family, whatever its previous history be, equally it was from that date alienable as any other heritable property. It is on that ground hat I think it beside the mark to consider further the law regarding royal castles.

The defender maintains that the castle of Dunstaffnage is now his property by virtue of his title, or by virtue of possession under his title. There are a series of what I may for shortness call changes in the situation which it is convenient here to note—(1) The grant to the defender's predecessor in 1502; (2) the re-grant in 1667 after the forfeiture and rehabilitation of Argyll; (3) the passing of the Clan Act in 1747; (4) the entail of Dunstaffnage in 1790, and charter of resignation following thereon in 1815; and (5) the present title, which, if the years of prescription only are looked to, stands on the decree of special service in favour of defender's father in 1880 and the similar decree in his own favour in 1908.

I do not think that it would be doing justice to the strength of the defender's case as developed in argument if I was to take his defence based upon title alone, as would otherwise be natural—first, because he is entitled to stand on a prescriptive title, and need not produce more than composes his prescriptive title. A prescriptive title is an exclusive title, and precludes the examination of anything which precedes it, and therefore to examine first what precedes it would make it difficult to concentrate attention on the prescriptive title itself. But then the prescriptive title must be habile to sustain prescriptive possession, by which I understand intrinsically valid and *per se* sufficient to support the possession which is attributed to it. Hence the defender is entitled to require that the title on which to found prescription be examined without reference to prior titles. But at the same time he must show that this title is sufficient to sustain prescriptive possession, and that the possession on which he founds has been possession on such title. It follows that to give proper consideration to the defence it is convenient, if not necessary, to work backwards on the five points which I have noted above, and I shall therefore take them in their reverse order.

First, then, the defender alleges prescriptive possession for twenty years on recorded decrees of special service in favour of his father in 1880 and himself in 1908.

The alternative title for prescription under the statute of 1617 appropriate to the case of an heir on which the defender founds is thus expressed—". . . Or where there is no charter extant, that they show and produce instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours or upon precepts of *clare constat.*" The period is now twenty years, under the Conveyancing Act 1874, sec. 34.

Two things have been decided. The party pleading prescription on an instrument of sasine cannot be required to produce a charter, even if it exists (*Munro,* 19th May 1812, F.C.), and cannot be required to produce the retour or precept of *clare,* or to "instruct" such "otherwise than by

the relation of the sasine" (*Earl of Argyll*, 1671, M. 10,791). But no case has as yet, so far as I am aware, occurred where the title has been made up by service in modern statutory form by which the instrument of sasine disappears and the recorded decree of special service takes the place of retour and sasine, so that there is nothing to represent the instrument of sasine unless it be the extract of the recorded decree.

The difficulty which occurs in applying the rules of prescription to a title made up in this modern shorthand way will be apparent from an examination of the decrees of service founded on by the defender. On such examination a question at once arises under the provision of the thirty-fourth section of the Conveyancing Act 1874, which prefaces the reduction of the years of prescription, and is meant to bring the statute of 1617, cap. 12, into accordance with modern methods of making up title. It says—"Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate register of sasines shall be sufficient foundation for prescription," and proceeds to provide that possession following on such recorded title for twenty years shall for the purpose of the Act 1617, cap. 12, be equivalent to possession for forty years "by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced according to the provisions of the said Act." What is the "*ex facie* valid irredeemable title" which is to stand for the infeftment of former times? The importance of the question lies in this, that where title is made up by service under the Conveyancing Acts 1847-1874, the proposition above stated, viz., that you cannot look beyond the instrument of sasine, is at once challenged on the ground that its equivalent, the recorded decree, is not a title self-contained but a title by reference. My meaning will be plain if I refer to the actual decree of service in the present case.

The decree of service of the defender in 1908 finds that the late Alexander James Henry Campbell of Dunstaffnage, and nineteenth hereditary captain of the royal castle of Dunstaffnage in the county of Argyll (this is the first instance in which the hereditary captaincy is introduced into the title, or the quality "royal" asserted for the castle, and I think it may be discarded as merely foreshadowing the rise of the present dispute), "died on or about the ninth day of March 1908, last vest and seized in . . . As also in All and Whole the lands of Pennycastle of Dunstaffnage, Pennychenich, the one penny land of Gannivan, the one penny land of Penginaphuir, the one penny land of Garpengerie, the one penny land of Kilmore, and the one penny land of Davagavach, with the pertinents lying in the lordship of Lorne and sheriffdom of Argyll, together with the office commonly called Marnichty . . . conform to extract decree of special service of the said Alexander James Henry Campbell, as nearest lawful heir of tailzie and provision in special of the late Sir Donald Campbell, third and last Baronet of Dunstaffnage [dated 23rd February and recorded 20th April 1880]; but always as regards the whole of the said lands with and under the whole conditions" of the entail of 1790. And then the said decree finds "that the petitioner is the eldest son and nearest and lawful heir of tailzie and provision in special of the said Alexander James Henry Campbell in the lands and others foresaid under and by virtue of said deed of entail," and therefore serves him as such in the said lands under the conditions of the said entail.

Passing back to the service of the defender's father in 1880 we find that it sets forth that his predecessor Sir Donald, the last baronet, died last vest and seized as heir of the late Sir Angus Campbell, Bart., in the lands of Pennycastle of Dunstaffnage, &c., described in the same words as in the service last mentioned, "conform to writ of *clare constat* by His Grace George Douglas Glassell Campbell, Duke of Argyle," in his favour, dated 20th and recorded 25th April 1865, but always under the conditions of the entail of 1790.

If these two writs are to be treated as self-contained, and not importing by reference, the first mentioned the prior service, and the second the prior precept of *clare*, it is obvious that the infeftments upon them by recording would be heritable infeftments in certain specified lands with their pertinents upon which possession might follow, and I assume has followed in fact, reserving the question whether the possession of the castle can be attributed to such infeftments. But before that question is reached it has, I think, to be determined whether they are in themselves, in the sense of the Act of 1874, "valid irredeemable titles to an estate in land," beyond which, in applying the law of prescription, it is incompetent to look. Personally I do not think that anything can be so described which does not link on with the superior, or show or give the means of ascertaining the tenure. Shorthand as the statutory conveyancing may be, this link would be afforded by the instrinsic reference back to the prior deeds of transmission if it is competent to look at them. Light, I think, upon this point is afforded by examining the history of the modern statutory conveyancing.

In 1847 was passed the Act amending the law and practice of service of heirs in Scotland. It ended the practice of service by brieve from Chancery, or otherwise than as according to the provisions of the Act, and substituted a petition of service to the Sheriff, including the Sheriff of Chancery. The form of petition of special service prescribed in Schedule B contains the words "last vest and seized in . . . conform to charter [or disposition or precept of *clare constat*, or whatever else was the deed on which the ancestor's infeftment proceeded, here specify it], dated , and to instrument of sasine following thereon recorded. . . ." But at the same time section 4 of the Act enacts that it

shall not be necessary to set forth in the petition, *inter alia*, of whom the lands are held, or by what service or tenure they are held; section 5, that the conditions of any entail need not be inserted at length, but only by reference in the petition of service and decree following thereon; and section 6, that real burdens, conditions, or limitations appointed to be fully inserted in the investitures of such lands, need not be fully inserted, but also only by reference. Sections 9 and 10 make the petition of service equivalent to the former brieve and claim, and the Sheriff's judgment thereon of the verdict of the jury under the brieve of inquest. By section 12 the Sheriff's judgment was to be recorded in Chancery and an extract transmitted and delivered to the party serving, and by section 13 the decree of service so recorded and extracted was to have the full legal effect of a service duly retoured to Chancery, and to be the equivalent of a retour of a service under the brieve of inquest, and the extract the equivalent of the certified extract of the retour.

Such being the new and simplified procedure introduced by the Act of 1847, section 21 contains a provision regarding the completing of the feudal title of the heir so served, which is all important to the present question. Reading it shortly, every decree of special service shall contain a precept of sasine, and when recorded and extracted shall have the effect of a disposition in ordinary form by the party deceased and last infeft in favour of the heir so served and to his other heirs entitled to succeed under the destination of the lands contained in the deceased's investiture thereof, but under the whole conditions and qualifications of such investiture as set forth or referred to in such extract decree of special service containing obligation to infeft by two several infeftments and manner of holding, the one *de me* blench of the deceased and his heirs, and the other *a me* under the immediate lawful superiors in the same manner that the deceased, his predecessors, and authors have or might have holden the same, "and that by confirmation;" and in order that such sasine might be so taken by and the feudal title be completed in the person of the heir so serving, it was made lawful for him to use such decree of special service in the same manner and to the same effect as if such decree were actually a disposition of the nature above mentioned, but all "without prejudice to the right of the superior to require such heir to enter forthwith as accords of law, and to deal otherwise with such heir as a vassal unentered." Lastly, section 26 left the practice of entering by precept of *clare* unaltered.

It is unnecessary to go back in detail upon the practice prior to the Act of 1847. It is sufficient to say that the more elaborate procedure ended in a retour, but that while the retour operated a transference from the deceased to the heir it did not operate an investiture of the heir. For that the intervention of the superior was requisite and could be compelled, *e.g.*, under 20 Geo. II, cap. 50, sec. 12. The customary mode of entry had come to be by precept of *clare constat*. The production of a retour was often dispensed with by the superior, but production of prior titles to show the holding was always required. On the precept infeftment was taken. Hence the position of the superior was amply protected. It was equally so, as is shown above, under the procedure introduced by the Act of 1847, for not only must the conditions and qualifications of the investiture be set forth or referred to in the extract decree of service, but the infeftment effected by recording such decree remained base and therefore did not affect the superior till confirmed; and reference may be made to section 6 of the relative Transference of Lands Act 1847, cap. 48, under which confirmation might be compelled, but "provided also that such superior shall be entitled to insert in the charter to be granted by him the clauses of tenendas and reddendo contained in the former charters of such lands and heritages, and all other clauses and conditions contained therein, in so far as the same are usual and necessary, and are not set forth in such instruments of sasine or duly referred to in terms of this Act or of an Act passed in the present session of Parliament entituled 'The Service of Heirs Act 1847, cap. 47.'" The purpose and effect of section 21 of this Act is examined and explained in the case of *Morton's Trustees*, 16 D. 1108.

The Titles to Land Act 1868 consolidated and superseded the prior modern conveyancing statutes. In services the procedure of 1867 was substantially retained, and section 46 replaced section 21 of the Act of 1847. But section 46 was expressed in somewhat different terms. Eliminating all reference to the case of lands held burgage, it provided, reading it shortly, that every recorded and extracted decree of special service should be equivalent to a disposition in ordinary form of the lands contained in such service by the deceased last vest and siezed in the lands in favour of the heir served and the other heirs of investiture, "but under the whole conditions and qualifications of such investiture as set forth or referred to in such extracted decree, containing the various clauses set forth in No. 1 of Schedule B hereto annexed." Now these clauses are "with entry at the term of ; to be holden the said lands and others . . . *a me* (or *a me vel de me*, as the case may be), and I resign the said lands and others . . . for new infeftment or investiture." Section 46 then proceeded to provide for completion of the feudal title or investiture in the person of the heir so served in the same terms and to the same effect as did section 21 of the Act of 1847, including the "without prejudice to the right of the superior to require the heir so served . . . to enter forthwith as accords of law, and to deal otherwise with the heir so served . . . as vassal unentered."

The position of the superior therefore remained conserved under the Act of 1868, in the same manner as under that of 1847.

I come now to the effect on the situation of the Conveyancing Act 1874, abolishing direct entry with the superior by a writ of progress and substituting the implied entry of section 4 of the Act. The implication is that (sub-section 2) by the registration of his writ of transmission he shall be held to be "duly entered" with his superior "to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice . . . but such implied entry shall not be held to confer or conform any right more extensive than those contained in the original charter or feu right of the lands, or in the last charter or other writ by which the vassal was entered therein." And further (sub-section 3), "All the obligations and conditions in the feu right prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming." Hence I think it is clear that, notwithstanding the effect of the Act of 1874 upon section 46 of the Act of 1868, and the modification of the decree of special service consequent thereon, and especially the elimination of the right of the superior to require the heir served "to enter forthwith as accords of law," the position of the superior is preserved as it stood under the Act of 1868, and in particular that neither the infeftment on a special service nor the implied entry now involved in recording the retour of such service can, prescriptive possession or no prescriptive possession, obviate recourse to the last writ of investiture. I therefore conclude that the services of 1880 and 1908 cannot be regarded as either of them *per se* an "*ex facie* valid irredeemable title" on which prescription can run, without importing by reference the conditions and qualifications of the investiture. This they do in a sufficient though sketchy manner—that of 1908 by stating the last vassal Alexander James Henry Campbell to have been infeft conform to the extract decree of special service in his favour of 1880, and that of 1880 by stating Sir Donald, the last preceding vassal, to have been infeft conform to writ of *clare constat* by the pursuer's predecessor in his favour dated in 1865. When the writ of *clare constat* of 1865 is examined, it is found that it proceeds on a decree of special service or retour in favour of Sir Donald as heir of his brother Sir Angus, and declares the lands embraced are "to be holden of me, my heirs and successors, in manner and for payment of the duties specified in the precept of *clare constat* in favour of the said Sir Angus Campbell before mentioned." That precept, again, was granted in 1851, and does not, as subsequent ones do, import the tenure merely by reference. On the contrary, it sets it forth thus—that Sir Donald Campbell (the first baronet, father of Sir Angus) died last vest and seised in all and whole the lands of Pennycastle, &c., but always with and under the conditions and limitations of the entail of 1790; that Sir Angus was his eldest son and nearest heir of tailzie and provision, "and that the foresaid lands with the fishings and pertinents are held of me and my heirs and successors in feu farm, fee, and heritage for the annual payment by the said Sir Angus Campbell and the heirs of entail succeeding to him" (then follows an enumeration of the feu-duties substituted for the ward services abolished by the Clan Act of 1747)—"Moreover, the said Sir Angus Campbell and his heirs shall be bound to open the said castle of Dunstaffnage to the said Duke and his foresaids at all times whensoever they shall be required thereto, as also that they shall supply the said Duke and his heirs and successors annually with peats and elding for vaults, and bakehouse, and brewhouse, and hall, as often as the said Duke and his heirs shall happen to be therein, as also the said Sir Angus Campbell and his foresaids shall be bound to maintain all the houses and buildings of the said castle of Dunstaffnage in all time coming upon their own proper charges and expenses, and whatever buildings are erected therein or shall be erected, they shall be bound to maintain in sufficient repair; the feuars and tenants of the said Duke in the lands of Lorne, which were formerly in use to supply service for the said castle of Dunstaffnage, shall always be bound to the same services in future towards carrying all necessaries for the maintenance and repairing of the said castle as use is, and likewise the tenants of the said lands performing service at the said castle of Dunstaffnage as often as the said Duke and his foresaids shall happen to be thereat and when they shall be required thereto with the others of the said feuars and tenants of the said Duke of the other lands in Lorne according to use and wont."

The services of 1880 and 1908 cannot therefore be regarded as "*ex facie* valid irredeemable titles" in the sense of the Act of 1874, section 34, except as incorporating by reference this last clause. If that clause be read into them, it follows, I think, that the title is not sufficient to sustain the possession, *qua* proprietor, of the castle, which is attempted to be attributed to it, for the clause in the reddendo which bears on the vassal's obligation regarding the castle is not consistent with a full right of property. It must be read along with and as qualifying the description of the lands.

Farther, to support prescription there must be a habile title. By habile I understand to be meant a title which, though it does not in terms bear to convey, is conceived in terms capable of being construed as conveying the subject in question. It may be general, indefinite, or even ambiguous, so that it remains doubtful whether the particular subject is conveyed or what is the extent of the subject conveyed. But if the title is couched in terms susceptible of a construction which will embrace the subject in question, that is enough. Prescription intervenes and does the rest. More shortly put, the party

pleading prescription need not produce a title which *ex facie* comprehends, but only one which may comprehend (*per* L.J.C. Moncreiff in *Auld* v. *Hay*, 7 R. 663). The door is then open for prescriptive possession. Where the title is thus habile, inquiry into more ancient writs is excluded.

Now a precept of *clare* or a special service describing the lands as All and Whole the lands of Pennycastle of Dunstaffnage, &c., is general and indefinite, and I am even prepared to say ambiguous, for the lands of Pennycastle of Dunstaffnage rather indicate something distinct from than identified with "the castle and one penny land of Dunstaffnage," which, having regard to the importance of the castle, is the description which would naturally convey what the defender contends. The expert witnesses engaged appear to consider the lands of Pennycastle as equivalent to the one penny lands of the castle, and fail to see any distinction between lands described as the lands of Pennycastle, and again of Pennychenich, and those described as the one penny lands of Gannivan, the one penny lands of Penginaphuir which follow in the enumeration of lands. If there were no such contrast I would concede that the affix "penny" had reference to an old Celtic Scandinavian division of land for purposes of taxation, and that the lands of Pennycastle of Dunstaffnage might mean the one penny lands of Dunstaffnage Castle. But I venture to think that the affix "Penny" in Pennycastle is something quite different, and is descriptive of some local peculiarity of situation or formation. This is not by any means the only Pennycastle in Argyllshire. Pennycross and Pennygael in Mull are also well-known. There is also a less important Pennymore on Lochfyneside. The suffix "more" is in itself contradictory of the idea of a one penny land.

But the terms of the description are capable of construction as including the castle and its site. Hence, had the writs founded on contained nothing else, I should have been prepared to say that a habile title had been produced, and that the only thing that remained was to examine the possession alleged. But the precept of *clare* to which the services revert by reference contains something more than the mere description above quoted. It contains a clause in the reddendo which, though it does not definitely speak of the castle, makes provisions which are quite inconsistent with its being conveyed with the lands of Pennycastle in absolute property to the vassal. Hence it is that I have examined the conveyancing so particularly, the result of the examination being, in my opinion, that the writs adduced to found prescription cannot receive such a limited reading, but must be construed as importing by reference that which renders the title inhabile to support prescription, for it renders it incapable of including the castle and its site in property, though leaving it uncertain what the precise rights in the castle are, and relegating that question to what other proof there may be.

In this conjunction I may refer to the case of *Hutton* (2 Macph. 79), where Lord Cowan (Lord Neaves agreeing) expressed *obiter* a similar opinion. Though it was not necessary for the disposal of the case, he stated that he was diposed to think that there was no habile title for prescription, because the title by referring to the original feu-charter and to the ancient rights and infeftments might be held to be *in gremio* qualified and restricted.

But the alleged prescriptive title is one "with pertinents"; and it is said, be it that the castle is not included in the description "the lands of Pennycastle of Dunstaffnage," it is one of its pertinents, and has been possessed as such. Whether a royal castle or not, Dunstaffnage Castle was in 1470 the property of Argyll, and I cannot gainsay that, whatever might have been held by our predecessors prior to the '45, for the last century, and probably more, it must have been deemed capable of passing as a pertinent. But then arises the question, Has the possession been as of a pertinent? I do not feel perfectly confident in the correctness of the following distinction between a title which is capable of being construed as including a subject, and one which cannot be so construed but of which the subject may be a pertinent. In the former case, I think, if the description in the title is capable of being construed as including the subject, the title precludes inquiry into more ancient writs. If the possession is consistent with the title so construed, that is sufficient. But in the latter case the question must, in my opinion, always arise, Is the alleged possession attributable to the title adduced or to something else? For possession of the so-called pertinent may be on a totally different title. In that case there is no ground for restricting proof to the prescriptive period or for refusing to look at more ancient writs, which may throw light on the possession of the alleged pertinent. For they would not go to affect the title, which must be accepted as habile to sustain prescription. They would go to the very different question whether the possession which might quite well have been under the title has not been really under something else, This I humbly understand to be the explanation of the case of *Lord Advocate* v. *Hunt* (3 Macph. 426 and 5 Macph. (H.L.) 1), and its reconcilement with the other decisions on prescription, such as *Auld* v. *Hay* (7 R. 663). Like the seashore in *Lord Advocate* v. *Agnew* (11 Macph. 309), there is *ex hypothesi* no presumption that the castle is a pertinent of the lands, but it may be proved such by possession. Yet the question remains, Did the possession follow on the grant of the lands or on something else? That it did follow on something else will be seen to be clear when the matters bearing on the other points to be considered come to be examined.

2. The next step backwards is the entail of Dunstaffnage in 1790 and charter of

resignation thereon in 1815. I confess it is a little difficult to follow the argument founded by the defender on the entail. It entails his lands according to the usual description, and it expressly excludes "Dunstaffnage castle or other principal mansion-house for the time, the offices and gardens thereto belonging, and the five enclosures next adjacent thereto, consisting of about sixty-five acres Scotch measure and the large and small islands also adjacent thereto" from the lands to be localled for a liferent infeftment or annuity in favour of a wife or husband of an heir of entail, and also from the power given to lease the lands. This is read as an assertion of a right of property in the castle and its precincts, and I am willing to accept it as such, though I cannot but recognise that it is susceptible of another construction, viz., that as regards the castle and its adjuncts, whatever might be the case with another mansion-house, it is an acknowledgment that it could not be included in the locality lands or let by reason of the title of possession not being a title of property. But giving it the defender's reading, it is not the entail which affects the superior, but the charter by progress which follows on the entail. Though I cannot say that the Duke's rights were very well understood or attended to by his commissioner Mr Ferrier, P.C.S., still in the first place a superior cannot be hurt or a vassal's right enlarged by a charter by progress (*Hutton*, 2 Macph. 79), and, in the second place, the charter of resignation just contains that saving clause inconsistent with the castle of Dunstaffnage being included in property in the subjects conveyed and explaining its exclusion from a locality of lands in a liferent provision. I cannot, therefore, see that the defender takes much from the terms of the entail. If his contention comes to anything, the terms resolve at best into an adminicle of evidence of possession inconsistent with the title.

3. There is next the Clan Act of 1847, the same which has already been cited for another purpose as the Act 20 Geo. II, cap. 50. I need not do more than note that there is produced a precept of *clare* by the third Duke of Argyll in 1745, just before the passing of the Clan Act, for infefting Neil Campbell of Dunstaffnage in the lands of Pennycastle of Dunstaffnage and others, the reddendo expressed including the keeping of "our castle of Dunstaffnage, &c., on which sasine was taken in 1751, and that the first title by progress after the passing of the Clan Act is a charter of adjudication by the fourth Duke of Argyll in 1763 in favour of Colin Campbell of Edderline, truly in trust for Angus Campbell of Dunstaffnage, the lands passing back to Dunstaffnage in 1767 when the trust purpose was fulfilled. This charter of 1763, then, while following in the main the older titles, has a new and altered reddendo in money, "nomine feudifermæ et hoc vice et loco divoriarum et servitiorum quæ dicto Duci tanquam superiori pro aut ex dictis terris aliisque antea solubilia erant nomine casualitatum Wardæ, Relevii et maritagii quando occurrirent," which casualties and services, it is explained, were abolished and converted by virtue of the Clan Act 1747, and in terms of the Act of Sederunt following thereon. And after expressing the alteration in the reddendo necessitated by the Act, the reddendo proceeds—"Insuper dictus Colinus Campbell ejusque hæredes obligati erint dictum castrum de Dunstaffnage dicto Duci ejusque prædict patefacere omnibus temporibus quando cunque ad hoc requisiti fuerint;" and then follows in full an obligation to supply fuel to the Duke and his heirs whenever he should happen to be at the castle, to maintain the buildings of the castle, the tenants or feuars in Lorne to be astricted or bound to perform the customary services in the matter of carriage to that end, and likewise the tenants of the lands of Pennycastle, &c., performing along with the other feuars and tenants in Lorne the customary services to the Duke whenever he should be at the castle of Dunstaffnage, all in terms of the prior titles, eliminating only the military services.

It is contended that at least from this date the castle became the property of the Campbells of Dunstaffnage. But I am not quite sure of the reasoning on which this conclusion is reached. It is clear that the Clan Act, and anything done by virtue of it, did nothing more than alter the tenure and substitute feu for ward. It did not affect the vassal's right of property, if before it was something short of that right. And it cannot be regarded therefore apart from the more ancient rights on which it followed from the precept of 1745 backwards.

4. In the year 1667 the forfeiture of the Marquis and rehabilitation of his heir the ninth Earl coincided with the financial involvement of the Campbells of Dunstaffnage. According to the law as then understood, "the Captain and his predecessors being infeft in the lands of Dunstaffnage holding of the Earl of Argyll, the said rights not being confirmed by the king did in law fall under the Marquis of Argyll his forfeittrie. And this Earle as donator to the forfeitrie will have right to the saids lands." I quote from a memorandum for the captain of Dunstaffnage dated 11th January 1667. Consequently, as there was no intention on the part of Argyll to take advantage of the situation created by this state of the law, an arrangement was come to which was carried out by a disposition by the ninth Earl of Argyll in favour of Archibald Campbell of Torrie, dated 18th May 1667, as an interposed person, for the protection of John Campbell of Dunstaffnage and Alexander Campbell, his son, with an obligation of same date to infeft said John and Alexander Campbell on a new charter, freely and without composition, whenever Archibald Campbell of Torrie should make due resignation in his hands. The disposition above mentioned states as the cause of granting that the lands of Pennycastle of Dun-

staffneis were originally feued out to the predecessors of Johnne Campbell now of Dunstaffneis and Alexander Campbell his eldest lawful son "for the service of keeping of the Castell of Dunstaffneis and other duties and services underwren," and that the granter was desirous that "our said Castle of Dunstaffneis should be keeped and upholden by Archibald Campbell of Torrie and his successors after mentioned trulie and faithfullie for the use of us and our successors." The disposition contained an obligation according to the conveyancing of the day on the granter to infeft the grantee and that by "ane sufficient infeftment and charter of alienation with precept of sasine, sasine and possession following thereupon in due and competent form" for a reddendo comprising along with the "services, feu ferme duties and others underwren," this, viz.: "the said Archibald Campbell and his foresaids keeping in sure custodie, and without hurt to us, our aires and successors, holding our said Castell of Dunstaffneis, and ever keeping and holding therein six able and decent men with armour and arms sufficient for warr and keeping of the said Castell. And ane sufficient portar and watch at least extending in the haill to Eight persones in tyme of peace. And if warr shall happin to fall out in these parts wherthrow the Countrie shall happen to be wasted, we and our aires shall be holden on our own propper charges to be at the halff of the expense to be necessarlie bestowed for the keeping and sure detaining of the said Castell over and above the saides eight persones to be keeped therein be the said Archibald Campbell and his forssaids on ther owne charges as said is. Moreover the said Archibald Campbell and his aires above-wren shall be obleest to make our said Castell patent and open to us and our foresaids at all tymes whensoever they are required thereto. As also to furnish to us, our aires and successors foresaids yeerlie peats or aldin for chambers, kitchine, bakehouse and brewhouse, and for the hall alss oft and sua oft as we or our aires shall hapin to be ther. And sicklyk the said Archibald Campbell and his aires foresaids shall be astricted, bund and obliged to sufficientlie uphold and maintaine the haill house and buildings of our said Castell of Dunstaffneis in the samen conditione everie way as the said Archibald Campbell does presentile or shall heirafter hapin to enter or receive the samen, the fewars and tennants of our Lands in Lorne, who wer formerlie in use of doeing service to our said Castell of Dounstaffneis being alwayes astricted thereto in tyme coming for careage of all materiallis necessarie for the upholding and repairing of the samen according to use and woint. As also the tenants of the foresaids Lands of Pennychastell," etc., "doeing also service at the said Castell of Dounstaffneis, als oft as we or our foresaids shall hapin to be ther. And as they shall be requyred thereto with the rest of the fewers and tennants of our other lands in Lorne astricted as said is conform to use and wont. And in like maner the said Archibald Campbell and his heirs foresaids payand to us our aires male and successors above wren threttie bolls meall and twa bolls bear yeirlie."

This disposition was followed on 7th October 1667 by a formal charter in favour of Archibald Campbell of Torrie, which, so far as the lands of Pennycastle were concerned, contained in Latin form precisely the reddendo stipulated in the preceding disposition. And sasine followed. In 1681, the object of the trust having been fulfilled, resignation was made by Torrie, and a charter of novodamus was granted by Argyll in favour of the Alexander Campbell above mentioned, repeating the terms of the charter of 1667.

It is true that the view of the law on which the conveyancing of 1667 proceeded is doubtful, if it was not upset by subsequent decision. But the conveyancing stands as a fresh start to the title of the defender's authors, and it completely explains the condition of that title, not only prior to the Clan Act of 1747, but subsequent thereto and down to the present day, and shows conclusively on what the possession of the defender and his authors has proceeded. It has been possession by virtue of an obligation involving possession for its implement and not possession by virtue of property. In referring to these prior titles to explain the ground and circumstances of possession I am, I think, entirely supported by the judgment of the House of Lords in *Lord Advocate* v. *Hunt* (5 Macph. (H.L.) 1).

5. It is only necessary for completeness to refer shortly to the original grant of Dunstaffnage to the defender's predecessor in 1502. It is abundantly clear from its terms that though the Campbells, since of Dunstaffnage, may have held the office of captain of the castle of Dunstaffnage from an earlier date, whether personally or heritably, the grant of 1502 was an original grant of the lands of Pennycastle of Dunstaffnage. It contains in slightly shorter form the whole conditions of tenure of the subsequent titles. At that date, had the castle been intended to be conveyed, it would certainly have either been included *nominatim*, or there would have been a clause *cum castris*. Instead, there is an assertion that the castle is the superior's and to remain the superior's, for the reddendo for the lands is the keeping of "our castle." The castle could not therefore be included in the lands conveyed.

I do not think that it is necessary to canvas the nature of the possession had. Till the pacification of the Highlands after 1745, and even to a later date, the possession was completely consistent with the title. Since then, and particularly since the fire of 1810, the possession has been such as naturally grew out of the circumstances, and though, if we knew nothing more, it might be assumed to be possession on a title of property, when the history of the title is known it is shown that it was not possession which could be attributed to such a title, and is therefore unavailing to establish prescriptive possession as pertinent.

But I think it follows from the review that the keepership of the castle is an here-

ditary and heritable office, carrying with it a right of possession of the castle subject to the conditions of the keepership so far as now applicable, and that therefore the pursuer is only entitled to his positive decree of bare property and not to the negative decerniture which he asks. More than that I do not think can be decided as the record stands.

I should not omit to add that the office of marnichty, now in desuetude, has nothing to do with that of captain of the castle. It was a Celtic equivalent of a baron bailieship and gave authority, not as constable of the castle merely, but as commissioner over a district of which, as many of the documents produced show, the castle was the central point.

In conclusion, I do not think we are in a position to decide to what area the pursuer's declarator of property can be extended. Stair says of castles (ii. 3, 65), where these are disponed either in property or custody the infeftments carry not only the bounds of the castle but the dependencies, gardens, orchards, parks, meadows, etc., possessed by the king or keeper for the use of the castle. I can only say that there is considerable ground for surmising, but not more, that a guide to determining the proper pertinents of the castle is to be found in the clause of exclusion in the entail of 1790, viz. "the offices and gardens theretobelonging, and the five enclosures adjacent thereto consisting of about sixty-five acres Scotch measure, and the large and small islands also adjacent thereto.

Accordingly, though if I could agree with his premises I should also agree with his conclusion, I am obliged to differ from the Lord Ordinary, and think that his interlocutor should be recalled, and decree in terms of the first declaratory conclusion only pronounced.

LORD MACKENZIE—The question here is one between superior and vassal. The pursuer as proprietor of the lordship of Lorne owns the places of strength within its bounds. Certain of his titles contain an express grant of fortalices. Dunstaffnage was a fortalice, and the question is whether it was ever parted with by the predecessors of the Duke. The case of the defender is founded on possession for the prescriptive period. This case, in my opinion, fails. The Lord Ordinary has held that the defender has an *ex facie* valid irredeemable title in the recorded service produced, and that this is sufficient foundation for prescriptive possession. This is not a case in which the title of the defender is challenged. If it were, then the same effect would be given to the recorded service here as was done in *Fraser* v. *Lord Lovat*, 25 R. 603, 35 S.L.R. 471, where it was pointed out that it was irrelevant to say that if the history were investigated it would be found that the title was ultimately traceable to an invalid grant or to a granter who had no right. Prescriptive possession is not here pleaded to cure a bad title proceeding *a non domino*. The question is with the granter of the title, who refers to the terms of the title he granted as the basis of his case. It is maintained by the defender that he cannot do so. This is to mistake the part which the recorded service plays. There is no right of property under it. Its terms may disguise, owing to the shorthand method of conveyancing, but cannot alter the terms of the right which flows directly from the superior. By express declaration *in gremio* of the service itself the extent of the grant can only be ascertained by reference back through the charters by progress to the terms of the original grant.

It is common ground that the terms of the original grant—the charter of 1502—were not sufficient to carry the castle of Dunstaffnage. The links which intervene between this and the service of 1880 are charters by progress, none of which enlarged the original grant. There was no novodamus. It was argued by the defender's counsel, on the authority of *Forbes* v. *Livingstone*, 6 S. 167, 173, that on a charter by progress more may be prescribed than was in the original grant, but in that case there was a novodamus. The position of matters therefore on this branch of the case is that the defender must put forward a title other than the charter of 1502 as the foundation of his prescriptive possession, and this he has failed to do.

Down to the date of the Clan Act in 1747 the possession of the castle was plainly referable to the reddendo in the charter. It was maintained that the rights of parties were affected by the provisions of that Act, which abolished ward holding, the argument being that this made the old possession impossible in law. After the Act the services in the reddendo, so far as affected by that Act, including the provision of armed men, ceased. In lieu thereof there was a commuted money payment. The prestations which remained included the obligation (contained first in the charter of 1667) to make the castle patent and open to the granter and his heirs, the supplying of fuel to him when there, and the maintaining of the fabric. The defender says that after 1747 his possession of the castle was not under the reddendo but as part and pertinent of his Pennycastle lands. He maintains that after the Clan Act none of the obligations in the reddendo as altered gave him or his predecessors a right to live in the castle, and that therefore what he did could not be referred to the performance of services due, but was in exercise of a right conferred. This argument seems to imply that although the day before the Clan Act was passed the defender's predecessor was possessing on the reddendo, the effect of the Act was that the day after he was possessing the castle as a pertinent. In order, however, to make anything of the change in the law in 1747, it would be necessary for the defender to show that there were thereafter acts of possession on his part which the superior knew of and could have stopped. The defender has failed to prove this. Either the acts were such that the superior cannot fairly be

presumed to have had knowledge of them —as, for example, the proposed inclusion of the castle in the subjects exposed for judicial sale by the creditors of Donald Campbell, fourteenth captain in 1797, though the common agent was also agent of the Duke—or were acts the superior saw no reason to object to—as, for example, the terms of the deed of entail in 1790—or they were just such acts as would be done consistently with the tenure under which the defender and his predecessors held the castle. In no view was the possession adverse to the superior's own title to the subjects in dispute. Unless it was adverse it cannot avail the defender in this case.

The result of my opinion is that the conclusion of the summons should be disposed of in the manner proposed.

The Court recalled the interlocutor of the Lord Ordinary, refused the minute of amendment, found and declared that the subjects following "*videlicet*, all and whole the castle of Dunstaffnage with the whole pertinents thereof lying within the lordship and barony of Lorne and county of Argyll" pertained and belonged heritably in property to the pursuer; *quoad ultra* assoilzied the defenders, and found no expenses due to or by either party.

Counsel for the Pursuer and Appellant —Clyde, K.C. — Macphail, K.C. — A. M. Trotter. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Defenders and Respondents—Cooper, K.C.—Scott Brown. Agents —Mitchell & Baxter, W.S.

Friday, March 1.

FIRST DIVISION.

[Sheriff Court at Orkney.

REID AND ANOTHER *v.* NORTH ISLES DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF ORKNEY.

Expenses—Sheriff Court—Employment of Counsel in Sheriff Court—Taxation as Between Agent and Client—A.S. 10*th April* 1908—*Table of Fees, cap.* 1, *sec.* 16.

The Table of Fees annexed to the Act of Sederunt of 10th April 1908 regulating fees in the Sheriff Court contains the following entry:—"The following fees to be allowed as judicial costs where the employment of counsel is sanctioned. . . ." In a Sheriff Court case counsel were employed by the defenders without sanction having been previously obtained from the Sheriff-Substitute, and though a motion for sanction was subsequently made before the Sheriff the latter was unable, owing to the case having been appealed to the Court of Session, to dispose of it. The defenders, who had on appeal been awarded expenses as between agent and client, objected to the auditor's report disallowing the expenses of the employment of counsel.

The Court *allowed* the defenders an opportunity of applying to the Sheriff for sanction of counsels' employment, but *observed* that the motion for sanction should have been made to the Judge who tried the cause, *i.e.* to the Judge of first instance, and that in future the motion, if not so made, would only be granted on its being shown (1) that the employment was right, and (2) that very good reason existed why it had not been made before.

Expenses—Sheriff Court—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*)—*Skilled Witnesses—Certification — Taxation as Between Agent and Client—A.S.* 10*th April* 1908, *General Regulations, sec.* 8 — *Table of Fees, cap.* 10, *sec.* 5 (*b*).

The General Regulations annexed to the A.S. 10th April 1908, regulating fees in the Sheriff Court provide, sec. 8—"This Table of Fees shall regulate the taxation of accounts as well between agent and client as between party and party. . . ." The Table of Fees contains the following entry—"Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expenses of such persons, . . . provided that the judge who tries the cause shall, on a motion made either at the proof or trial, . . . or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons for such charges."

In a Sheriff Court case certain skilled witnesses were employed by the defenders without certification having been obtained from the judge who tried the cause, either at the time or within eight days thereafter. The defenders, who had on appeal been awarded under the Public Authorities Protection Act 1893 expenses as between agent and client, objected to the auditor's report disallowing the expenses of their employment, their contention being that the entry in the Table of Fees above quoted was only applicable where the taxation was to be as between party and party. *Held* that the entry in the Table of Fees applied where the taxation was as between agent and client, and that accordingly the expenses of their employment could not be subsequently recovered.

Expenses—Sheriff Court—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*)—*Debate Fee—Attendance Fee—Taxation as Between Agent and Client—A.S.* 10*th April* 1908, *General Regulations, sec.* 6—*Table of Fees, cap.* 1, *secs.* 12 *and* 15.

The General Regulations annexed to the A.S. of 10th April 1908, for regulating fees in the Sheriff Court, provide,