WILLIAM FORBES, Esq. and Tutors, Appellants. No. 56.

JOHN LIVINGSTONE, Esq. and his Tutor, Respondents.

Prescription.—Question raised, but remitted for reconsideration, Whether a party had a sufficient title and possession to acquire a prescriptive right to coal?

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2D DIVISION. Lords Newton and Craigie.

THE Earls of Linlithgow and Callendar were proprietors of the barony of Haining, and in the seventeenth century they feued out to the predecessor of the respondent, Mr Livingstone, Parkhall and certain other parcels of the barony, and by a separate charter the lands of Whiterig, which also formed part of the barony of Haining, but under a reservation of the coal and limestone, expressed in these or similar words:—'Exceptand and 'reservand to the said Earl, and his foresaids, liberty and privi- 'lege to win coal and limestone, making of shanks, &c. within 'any part of the said lands, for payment to the said Alexander 'Livingstone and his foresaids of what skaith or loss they shall 'sustain upon their arable land thereby, exceptand always to 'the said Alexander and his foresaids to win limestaine within 'any part of the said lands, to their own use allenarly.' The estates of the Earls of Linlithgow and Callendar having been forfeited to the Crown, on the attainder of the then Earl for his accession to the rebellion of 1715, Livingstone of Parkhall applied to the Barons of Exchequer for a Crown-charter of the lands held by him as vassal of the Earl of Linlithgow and Callendar, under the Clan Act, (1st Geo. I. c. 20.), which provided that vassals holding lands and tenements of the superiors who should be convicted of treason, but who themselves should continue in dutiful allegiance to King George, should be entitled to hold 'such lands and tenements' of the Crown; and which empowered the Court of Exchequer, on production of the superior's attainder, to pass signatures 'in favour of such vassal or vassals 'of the said lands or tenements above-mentioned respectively.'

The Barons of Exchequer accordingly granted to Livingstone, in 1716, a charter under the Great Seal, which proceeded on the narrative of the above-mentioned Act of Parliament, and in virtue thereof granted de novo in one charter, and for payment of a single nominal reddendo, the several parcels of land previously held feu of the attainted Earl, but without any reservation of the coal, the grant being in the usual general terms of lands with their pertinents. On this charter Livingstone was infeft in 1735, and the successive investitures of the family were

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In 1809 the late Mr Livingstone, father of the respondent, having again commenced to work the coal under his lands of Parkhall, &c. Mr Forbes, the appellant's father, brought an action to have it declared that he had an exclusive right to the coal, in virtue of his titles derived through the York Buildings Company from the Earls of Callendar and Linlithgow, and to have Mr Livingstone ordained to desist from working it in all time coming; and Mr Livingstone raised a counter action of

declarator of his right. These two processes having been conjoined, and Mr Livingstone having founded a plea of prescription on the possession of the surface alone, the Lord Ordinary, (the late Lord Newton), 'in respect Mr Livingstone has not 'condescended on acts of possession of coal within the lands 'libelled on for forty years past, and that it was decided in the 'case between the lessees of the York Buildings Company and 'one of Mr Livingstone's predecessors, both in this Court and 'the House of Lords, that a charter similar to that here founded 'on was not sufficient to carry the coal in the lands of Madiston, 'without actual possession of the coal, as contradistinguished 'from the lands,' decerned against Livingstone in the action at Forbes's instance, and in the counter action assoilzied. Lord Craigie afterwards adhered by an interlocutor, in which he found, 'that by the charter granted in 1716 by the Barons of Exche- 'quer in Scotland to the representer (Livingstone's) predeces- 'sors, (in pursuance of the Act 1st Geo. I. statute 2. chap. 20. 'usually termed the Clan Act), though conceived in unlimited 'terms, no greater or more extensive right to the coal or lime- 'stone could be granted, than had been formerly competent to 'the representer's predecessors,—the only purpose of such char- 'ter being to enable the representer's predecessors to hold of the 'Crown those lands which they formerly held as vassals of the 'Earls of Linlithgow and Callendar: That the whole of the 'feudal property and rights which in 1715 belonged to the Earl 'of Linlithgow and Callendar, who was attainted in that year, 'including the right to the coal and limestone to be found on 'the lands already mentioned, having been vested in Parliamen- 'tary Commissioners, were by them sold to the York Buildings 'Company, and thereafter, by a decree of sale obtained by cre- 'ditors of the Company, transmitted to the respondent: That in 'virtue of the reservation of the coal and limestone in the ori- 'ginal feu-rights already mentioned, these minerals continued a 'part of the estate belonging to the granters, as much as if no 'feu-rights had been granted, and consequently that the pro- 'perty thereof could not be lost by the negative prescription: 'That though the charter obtained from the Barons of Exchequer 'in 1716, combined with those which followed, and which are 'in the same terms, might afford a proper title of prescription, 'whereupon the representer (Livingstone) and his predecessors 'might have acquired right to the coal and limestone in ques- 'tion, the representer has not proved, or offered to prove, pos- 'session such as to establish a prescriptive right; therefore, as 'well as in respect of the precedent in the case of Madiston or

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June 29. 1825. 'Craigend, mentioned in the interlocutor of the former Lord 'Ordinary,' his Lordship refused the representation, and adhered to the interlocutor represented against.

Mr Livingstone then reclaimed, and, after a first petition had been refused, offered a proof of possession of the coal, which having been allowed, a proof was led which established the facts above narrated. The Court, on the 24th May 1821, found, 'that Mr Livingstone has proved that he and his predecessors 'have had sufficient possession in the lands of Tappuck or Tap- 'puckstone to support a prescriptive title.' And on the 31st January 1822 they adhered, and found, that these lands formed part of those comprehended in the Crown-charter 1716 in favour of Livingstone's predecessors, and therefore assoilzied him.* In the meanwhile both parties died, whereupon their respective sons and their guardians were sisted in their place.

Mr Forbes and his guardians having appealed, and contended, 1st, That the title founded on by Livingstone was not available so as to acquire a prescriptive right to the coal; and, 2d, That supposing it were so, there had been no prescriptive possession,—the House of Lords ordered, 'that the cause be 'remitted back to the Court of Session, to review generally the 'interlocutors complained of; and, in reviewing the same, the 'Court is especially to consider whether the respondent has pro- 'duced a sufficient title on which prescription can be founded, 'and whether the acts of possession, and taking of the coal in 'Tappuck or Tappuckstone, and Whiterig, respectively, in proof 'in the cause, are sufficient to establish a title by prescription in 'the respondent to the coal under the lands of Nicolton, Weet- 'shot, Hillside, Gilmeadowland, and Parkhall, and under the 'lands of Whiterig, or any of them: And it is further ordered, 'that the Court to which this remit is made do require the 'opinion of the Judges of the other Division, in the matters and 'questions of law in this case, in writing, which Judges of the 'other Division are to give and communicate the same; and 'after so reviewing the interlocutors complained of, the said 'Court do and decern in this cause as may be just.'†

LORD GIFFORD.—The next case which stands before your Lordships for judgment is one of very great importance—perhaps of as great importance as any that has occurred in discussion before your

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* See 1. Shaw and Ballantine, No. 322.

† See 6. Shaw and Dunlop, p. 167. for the result of the remit.

Lordships in the course of the present Session, as it affects the law of Scotland. It is the case of Forbes v. Livingstone.

My Lords,—The great question in this cause was, whether, under certain titles acquired by the predecessor of the respondent Mr Livingstone, and by certain acts of enjoyment with respect to coal found under certain land, he had acquired by positive prescription a right to the coal; or whether the appellants, having originally a preferable right to those coals, have, under the circumstances I shall state to your Lordships, lost that right, in consequence of the acquisition of it by prescription in the respondents.

My Lords,—It appears that the Earls of Linlithgow and Callendar were proprietors of certain lands in the baronies of Almond and Haining in the county of Stirling. In the seventeenth century they feued out various portions of this estate to the predecessors of Mr Livingstone of Parkhall. These feus comprehended various parcels of land known by different names, Nicolton, Weetshot, Hillside or Hillhead, Gilmeadowland, Parkhall, Rowantreeyard, &c.; and it appeared, in granting these feus the family of Callendar reserved a right to win coal and limestone within the feu. The reservation was contained in general in the following terms:—'Exceptand and reservand always to the 'said Earl and his foresaids liberty and privilege to win coal and lyme-'stone, making of shanks, casting of holes and sinks, and making of 'wayes and passages thereto, within any part of the said lands, for 'payment to the said Alexander Livingstone and his foresaids of what 'skaith or loss they shall susteane upon their arable land thereby, at 'the sight of two honest men, one to be chosen by the said noble Earl, 'and another by the said Alexander.' My Lords, an exception occurred in all the grants other than that of Rowantreeyard, to which that reservation did not apply, and I may dismiss from your Lordships' consideration any thing relating to that parcel of land called Rowantreeyard, that question being determined by an interlocutor in this cause, with respect to which there is no appeal.

My Lords,—The matter thus stood in 1715; the right to coal, as I have stated to your Lordships, remaining in the Earls of Linlithgow and Callendar, and the right to the surface in the feuar. When, in 1715, the Earl of Callendar and Linlithgow forfeited his estates in consequence of being engaged in the rebellion at that time, his estates were escheated to the Crown, and in that escheat were comprised the property of the barony of Almond, with all its parts and pertinents, and, among the rest, the right to the coal in the lands belonging to Mr Livingstone.

My Lords,—It may be known to your Lordships, that in the year 1715, in consequence of the state of Scotland, an Act was passed, commonly called the Clan Act, which Act of Parliament was for the purpose of encouraging all superiors, vassals, landlords, and tenants, who do and shall continue in their duty and loyalty to his Majesty King George, and for discouraging all superiors, vassals, landlords, and tenants there,

June 29. 1825. who have been or shall be guilty of rebellious practices against his said Majesty. By that Act it was enacted, that every vassal who shall continue peaceable and in dutiful allegiance, holding lands or tenements of any such offender who holds such lands or tenements immediately of the Crown, shall be vested and seized, and are hereby enacted and ordained to hold the said lands or tenements of his Majesty, his heirs and successors, in fee and heritage for ever, by such manner of holding as any such offender held such lands or tenements of the Crown at the time of the attainder of such offender; so that your Lordships see the object of this was, that a vassal should no longer hold of a superior who had rebelled against his Majesty, but that he should hold the lands immediately of the Crown, according to the same manner of holding as the superior had previously held those lands: and in order to carry that measure into effect, the Court of Exchequer in Scotland were directed, on production of any such attainder, to revise, compound, and pass signatures, and that without paying any composition, in favour of every such vassal or vassals, and his heir or their heirs, of the said lands and tenements above-mentioned respectively, to be holden of his Majesty, his heirs and successors, in fee and heritage for ever, and by such holding as is above-mentioned. Your Lordships perceive, therefore, the only authority vested in the Court of Exchequer in Scotland, with respect to this Act of Parliament, was, that where a vassal had previously held his lands of an attainted superior, he should hold the same lands immediately of his Majesty.

My Lords,—In consequence of that, Mr Livingstone, the then proprietor of these lands, in 1716, availed himself of the provision of this Act, and applied to the Court of Exchequer for a grant of the lands of Nicolton, Weetshot, Hillhead, Gilmeadowland, and Parkhall, which he held of his attainted superior the Earl of Callendar, and he accordingly obtained a charter. But, my Lords, in that charter, so granted under this Clan Act, there was no express reservation of the coals under this land, which had been reserved to the Earls of Callendar when they had granted a feu, but which right to coals was escheated to the Crown in consequence of the attainder; but the grant, which was obtained from the Court of Exchequer, describes these lands particularly, and you have the general words, conveying all the parts and pertinents belonging to these lands to Mr Livingstone. The charter is printed in these papers, and it grants to him all these lands, portions of the barony of Haining, called Nicolton, Weetshot, Hillhead, Gilmeadowland, and Parkhall, with the houses, edifices, and the usual words: it then adds, 'as those lands were then possessed and 'occupied by Alexander Livingstone and his servants:' it then grants him all the lands of Rowantreeyards, with respect to which there is no question in this cause; then it grants him all the lands and houses, with the parts, pendicles, and pertinents of the same, and other lands; and which lands, they say, belonged to Alexander Livingstone, and

were held by him of James, late Earl of Linlithgow and Callendar, who held the same immediately of the Crown.

My Lords,—This charter being granted, it appears that afterwards the York Buildings Company purchased from the Crown the right to the barony of Haining, which belonged to the Earls of Callendar and Linlithgow; and your Lordships will find that is settled by an interlocutor, against which there is no appeal; and under a conveyance from the Crown to the York Buildings Company, and afterwards from them to the ancestors of the appellants, the coal under these lands was clearly conveyed.

It appears, my Lords, that somewhere about 1809 or 1810, coals being about to be dug, or having been dug by Mr Livingstone under a part of these lands, a question arose, whether he had a right to those coals, or whether Mr Forbes, who, as I have said, derived a title under a conveyance from the York Buildings Company, was entitled to those coals; and, in order to bring this question to a decision, Mr Forbes brought an action of declarator in the Court of Session, in which he libelled on the terms and conditions of the feu-right granted to the respondent's ancestors by the Earls of Callendar; on the right since acquired by the York Buildings Company, and afterwards by the late Mr Forbes, to all the reserved property of coals, lime, and limestone, in the appellant's lands, which formerly belonged to the families of Callendar and Linlithgow; and, lastly, on the judgment of the Court of Session, and of this honourable House, as to the reserved right of coal in the lands of Craigend. The summons concluded, 'that the defender should exhibit the feu-charters, contracts, 'or other grants of lands, and the various subsequent titles and in-'vestitures thereof; and that it should be found and declared, that the 'pursuer, his heirs and successors, had the only good and undoubted 'right and title to the whole coal, lime, and limestone, in the foresaid 'lands of Nicolton and others before-mentioned.'

My Lords,—Another action of declarator was brought by Mr Livingstone, a cross action, in which he sought to have it found, 'that 'the coal in the said lands is the sole and peculiar property of the 'said pursuer, and that he and his predecessors and authors have not 'only been in the continual and uninterrupted possession and use of 'the coal contained in the said lands, as a pertinent thereof, from the 'year 1716, but also by secluding and debarring all other persons 'therefrom.' Your Lordships find defences were put in by Mr Livingstone to Mr Forbes's action, by which he contended, that he had an undoubted right to the coal under the original feu-rights. It was contended, they were sufficient to carry the coal; and whatever may have been the import of the reservation contained in the other feu-rights, the defender's ancestors were entitled, in virtue of the Clan Act, to have right to their lands free from any burden in the person of their superior. Then he went on to contend, that the charter of 1716, to which I have called your Lordships' attention, contained no reser-

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The case came on before the Lord Ordinary in 1810, and he pronounced this interlocutor: 'Assoilzies the defender Mr Livingstone, 'as far as concerns the lands of Rowantreeyards, from the conclu- 'sions of the libel at Mr Forbes's instance.' As I have stated to your Lordships, there was no original reservation of coal under that land; and it was admitted, that as to that there could be no question as to the right of Mr Livingstone to get coals out of it. The interlocutor then proceeds, 'And before answer as to the other lands, appoints 'the defender, Mr Livingstone, to give in a condescendence of the facts 'and circumstances he offers to prove, both as to his title and posses- 'sion, and that against next calling.' A condescendence was accordingly given in for Mr Livingstone, which was followed by answers; and the Lord Ordinary upon that pronounces this interlocutor: 'In respect 'Mr Livingstone has not condescended on acts of possession of the coal 'within the lands libelled on for forty years past, and that it was de- 'cided in the case between the lessees of the York Buildings Company, 'and one of Mr Livingstone's predecessors, both in this Court and the 'House of Lords, that a charter similar to that here founded on was 'not sufficient to carry the coal in the lands of Madiston with- 'out actual possession of the coal, as contradistinguished from the 'lands in the process of declarator at Mr Forbes's instance, decerns 'against Mr Livingstone, conform to the conclusions of the libel, ex- 'cept as to the coal lying in Rowantreeyards, with respect to which 'Mr Livingstone was assoilzied by a former interlocutor now final; and 'in the declarator at Mr Livingstone's instance against Mr Forbes, 'assoilzies Mr Forbes from the conclusions of the libel, under the fore- 'said exception within the Rowantreeyards.' My Lords, a short representation was given in against this interlocutor, which was refused by Lord Newton; but a full representation having afterwards been given in for Mr Livingstone, it was followed with answers for Mr Forbes. But Lord Newton having died in the mean time, the processes were remitted to Lord Craigie, who, upon the 21st of December, pronounced this interlocutor: 'Having considered the process, 'and particularly the representation for the defender, and answers 'thereto, with the remit of the Court, and writings produced hinc 'inde, Finds the lands mentioned in the pleadings were feued out in 'the seventeenth century by the Earls of Linlithgow and Callendar to 'the representer's predecessors, reserving to the granters the liberty 'and privilege of digging and winning coal, lime, and limestone, upon 'payment of surface damages, and with liberty to the feuars to win 'limestone for their own use only: Finds, that by the charter granted 'in 1716 by the Barons of Exchequer in Scotland to the representer's 'predecessors, though conceived in unlimited terms, no greater or

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'more extensive right to the coal or limestone could be granted, or 'was intended to be granted, than had been formerly competent to the 'representer's predecessors,—the only purpose of such charter being 'to enable the representer's predecessors to hold of the Crown those 'lands which he formerly held as the vassal of the Earls of Linlithgow 'and Callendar: Finds, that the whole of the feudal property and 'rights which in 1715 belonged to the Earl of Linlithgow and Cal-'lendar, who was attainted in that year, including the right to the coal 'and limestone to be found in the lands already mentioned, having 'been vested in Parliamentary Commissioners, were by them sold to 'the York Buildings Company, and thereafter, by a decree of sale ob-'tained by the creditors of the Company, transmitted to the respon-'dent.' Your Lordships therefore perceive, by this finding, Lord Craigie finds, 'That the feudal rights of that property which in 1715 'belonged to the Earl of Linlithgow and Callendar, who was attainted 'in that year, including the right to the coal, having been vested in 'Commissioners, were by them sold to the York Buildings Company, 'and thereafter, by a decree of sale obtained by the creditors of the 'Company, transmitted to the respondent: Finds, that in virtue of 'the reservation of the coal and limestone in the original feu-rights al-'ready mentioned, these minerals continued a part of the estate belong-'ing to the granters, as much as if no feu-rights had been granted, and 'consequently that the property thereof could not be lost by the nega-'tive prescription: Finds, that though the charter obtained from the 'Barons of Exchequer in 1716, combined with those which followed, 'and which are in the same terms, might afford a proper title of pres-'cription, whereupon the representer and his predecessors might have 'acquired right to the coal and limestone in question, the representer 'has not proved, nor offered to prove possession, such as to establish 'a prescriptive right. Therefore, as well as in respect of the prece-'dent in the case of Madiston or Craigend, mentioned in the interlo-'cutor of the former Lord Ordinary, refuses the representation, and 'adheres to the interlocutor represented against; and as the merits of 'the question have been already very fully stated on both sides, pro-'hibits any further representation.' A short petition was afterwards lodged against this interlocutor, praying for leave to lodge an additional petition; which being granted by the Court below, a full petition was accordingly lodged; upon considering which, with the answers, their Lordships, on the 27th of May 1812, superseded advising thereof, until a hearing in presence took place on the points at issue. Such a hearing took place accordingly, and, after a full discussion, the following interlocutor was pronounced: 'The Lords having resumed consider-'ation of this petition, and advised the same, with the additional peti-'tion and answers thereto, and whole process, and heard Counsel 'thereon in their own presence, adhere to the interlocutor reclaimed 'against, and refuse the desire of the petition.' At this stage of the cause, as far as the titles were concerned, it is clear the right to the

June 29. 1825. coal by this interlocutor had passed to the predecessors of Mr Forbes the respondent, and therefore that, under the charter of 1716 alone, Mr Livingstone had no title to the coal; but in as much as the Lord Ordinary found that that charter might afford a proper title of prescription whereupon Mr Livingstone and his predecessors might acquire a right, Mr Livingstone put in a petition, praying that he might be admitted to prove the acts of possession that had taken place by his ancestors as to these coals. The petition was given in by Mr Livingstone in the month of February 1813, in which it was stated, 'It was with the view 'of affording some explanations with regard to the actual possession 'of the minerals themselves upon the estate of Parkhall that the peti-'tioner's Counsel moved their Lordships for permission to lodge a 'minute, or a short additional petition, to embrace what he had to 'state upon that subject, suggested by one of the conclusions of Mr 'Forbes's summons, so that an answer might be made at the same time 'to both petitions;' and after stating various facts and circumstances regarding the working of the coal by the petitioner and his predecessors, the additional petition prayed their Lordships, inter alia, before answer, to allow the petitioner a proof of his actual possession of the coal in question; and in the month of March a petition was presented to examine some old persons, for fear of their evidence being lost; and a condescendence was put in, in terms of the Act of Sederunt, of the facts which he averred and offered to prove with regard to the possession of the coal in question; and in the month of July the following interlocutor was pronounced by the Court below: 'The Lords 'having advised the condescendence and answers, allow the defender 'to prove the facts set forth in his condescendence, as explained by the 'prefixed minute; allow the pursuer a proof of the facts set forth in his 'answers; and allow to both parties a conjunct probation, and grant 'commission to the Sheriff-depute of Stirlingshire to take the proof.'

My Lords,—In consequence of that, the evidence was taken. Afterwards Mr Forbes died, and Mr Livingstone also dying, for some time no proceedings were taken in the cause. However, the cause was afterwards revived, or, in the language of the law of Scotland, wakened; and in the month of May 1821 this interlocutor was pronounced: 'Having resumed consideration of the petition of Mr 'Livingstone of Parkhall, with the answers of Mr Forbes of Callendar, 'and advised the same, with the condescendence, answers, writs pro-'duced, proof adduced, prepared state, mutual memorials, and heard 'the Counsel for the parties viva voce; find, that Mr Livingstone has 'proved that he and his predecessors have had sufficient possession of 'the coal in the lands of Tappuck or Tappuckstone to support a 'prescriptive title; but, before further answer to this article, appoint 'the party to give in memorials on this question, whether Tappuck or 'Tappuckstone is a part of the lands granted to Mr Livingstone's 'predecessors in the charter of 1716, or make part of the lands which 'Mr Livingstone and his predecessors have continued to hold by

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'charters from Mr Forbes and his authors, containing a reservation of 'the coal to the superiors, or of any other lands, neither contained in 'the charters 1716, nor in the charters from Mr Forbes, or his 'authors.' My Lords, a petition against this interlocutor was lodged by the appellant, which was followed by answers for the respondent, and memorials; and, finally, this interlocutor was pronounced: 'The 'Lords having resumed consideration of this petition, and advised 'the same, with the answers, mutual memorials for the parties, and 'former proceedings, and heard the Counsel viva voce, refuse the pe-'tition, and adhere to the interlocutor complained of: Find, that 'the lands of Tappuck or Tappuckstone make part of the lands 'comprehended in the Crown-charter anno 1716, in favour of the de-'fender's predecessors: Therefore sustain the defences, and assoilzie 'the defender from the conclusions of the libel: Find no expenses 'due to either party, and decern.' My Lords, that interlocutor was submitted to the Court for review, and they pronounced an interlocutor on the 1st of February 1822; and by that interlocutor your Lordships find, that they sustain Mr Livingstone's right to the coals in the land in question, in consequence of the acts of possession he has proved within the place called Tappuckstone.

Now, two questions have been agitated in this cause; first, Whether the charter 1716 afforded a sufficient title, with the infeftment that followed upon it, to Mr Livingstone's predecessors, upon which to found a title by prescription? And next, assuming that that was sufficient, Whether the acts of possession which Mr Livingstone has proved by the evidence, to which I shall presently call your attention, was sufficient to establish a title by prescription to this coal, the preferable title being decided to have been originally in the appellant's predecessors.

My Lords,—The question upon the law of prescription turns upon the terms of the statute of 1617, which introduces the prescription. By that Act it is enacted, That 'whomsoever of his Majesty's lieges, 'their predecessors and authors, have bruiked heretofore, or shall 'happen to bruik in time coming, by themselves, their tenants, and 'others having their rights, their lands, baronies, annualrents, and other 'heritages, by virtue of their heritable infeftments made to them by 'his Majesty or others, their superiors and authors, for the space of 'forty years continually and together following and ensuing the date 'of their said infeftments, and that peaceably, without any lawful in-'terruption made to them therein during the said space of forty years, 'that such persons, their heirs and successors, shall never be troubled, 'pursued, nor inquieted in the heritable right and property of 'their said land and heritages foresaid by his Majesty or others, their 'superiors and authors, their heirs and successors, nor by any other 'person pretending right to the same, by virtue of prior infeftments, 'public or private, nor upon no other ground, reason, or argument 'competent of law, except for falsehood, providing they be able to

June 29. 1825. 'show and produce a charter of the said lands and others foresaids, 'granted to them or their predecessors by their saids superiors and 'authors, preceding the entry of the saids forty years' possession, with 'the instruments of sasine following thereupon.' Now, my Lords, it is contended on the part of Mr Livingstone, that the charter of 1716, granted to him by the Barons of the Exchequer in pursuance of the Clan Act, containing no reservation of coal, but purporting to convey to him all those lands, with every thing belonging to them, though they might have exceeded their powers in granting that charter, still it purported to grant it to him, and was a sufficient right upon which they could found their title by prescription, supposing they could show enjoyment for the period prescribed by the Act. On the other hand it was contended, that the Clan Act enacted this only, that the vassal, instead of holding what he held of his attainted superior, should hold the same subject-matter of the Crown; and that, therefore, all the authority of the Barons of the Exchequer was to grant to the vassal that which he had held, to be held in future of the Crown, instead of being held, in this instance, of the Earl of Callendar. The charter itself so expresses it—describes the lands that were then possessed by Mr Livingstone; and therefore it was said, this was not a sufficient title to found a right to prescription.

Now it is said on the other hand, that this question came before this House, in the case of Madiston, in 1772. I apprehend that case did not decide the question either way: there had been no act of possession; it was a question whether the charter obtained from the Barons of the Exchequer under the Clan Act did or did not give a right by prescription? But, there being no act of possession, there could be no title. Although there was much reasoning, it does not appear that the Court below pronounced any definitive opinion upon the subject. I observe, in the first interlocutor of the Lord Ordinary, he considered the case of the York Buildings Company a precedent,—that a charter similar to that here founded on was not sufficient to carry the coal in the lands of Madiston without actual possession. Undoubtedly it was there argued, that without actual possession no title by prescription is to be acquired; but it does not appear to me, in looking at the reasons of this case, or the interlocutor, that any definite opinion was given whether the charter alone was or not sufficient. Lord Craigie thinks this charter might afford a title by prescription. Upon this point I should observe, that the Court below, who differed upon the other question, appear to have entertained no difference of opinion as to the sufficiency of the charter to found a prescription; the difference that existed turned upon the acts of possession that were proved on the part of Mr Livingstone. As to these acts of possession, it appears that they took place at three different periods. The earliest period was about the year 1762, or thereabouts.

My Lords,—The acts of possession on the part of Mr Livingstone's predecessors at that time were two. The first was proved by a person of

the name of Margaret Anderson: she stated, that about fifty years before she was examined, she bore coals in the lands of Tappuck; and she speaks to the taking of coal by persons of the namé of Sneddons, in a place called Tappuck, or Tappuckstone, part of these feued lands; that they were taken by those persons, and that some remuneration was paid to Mr Livingstone for the taking of those coals; and it appears that continued for some considerable space of time,—she speaks for five or six weeks, other witnesses speak for a longer period. My Lords, your Lordships perceive that took place, I think we may say about the year 1763,—in other instances âbout 1756 or 1757. The working at that time does not appear to have been very considerable; they dug with pick-axes, and they dug in an old place, where it was evident that coals had been formerly taken: but when those coals were formerly taken, you have no evidence at all; whether anterior to 1716, or subsequent to it, no evidence at all was given; but there was the appearance of an old working. Your Lordships will perceive, a working before 1716 would have no effect upon the question, provided the charter was sufficient to found a prescription.

My Lords,—After that time there was a cessation of any working for thirty or forty years. The second working of Tappuckstone did not take place till 1785. There was an interval of more than thirty years up to 1785 before any other workings took place; they are spoken to by a person of the name of Ferguson; they were begun by Andrew Rae and James Beg. The workings on that occasion are much more considerable than they were in the period I have first mentioned, and continued for a considerable time,—three years; and they attempt to shew, that during that time coals from those workings were purchased by the servants of Mr Forbes. Whether they were taken from the workings under these feu-lands, or whether they were taken from the workings under a place called Burnside, which has no bearing upon this case, may admit of some question; but it is attempted to be shewn, not only that those workings went on for a considerable time, but that they must be known to Mr Forbes, who lived in the neighbourhood, and that his servants fetched coals from there. That shews that the workings must have excited the attention of those who had a claim to them, which Mr Forbes had, under the title from the York Buildings Company.

There is a third set of workings spoken of in Whiterig,—they are proved to have been about twenty-six years before the examination, by a person of the name of Alexander Sneddon. I mention this, because no distinction is made in the interlocutor pronounced as to the other lands contained in the charter in 1716; but, anterior to that, Whiterig had been held under a distinct charter from the other lands which formed the Parkhall lands generally, but having different names. Now, Tappuckstone formed a part of the Parkhall estate, and though there was a question at one time in the cause, whether it did form a part or not, it appears satisfactory evidence was given to the Court below,

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shewing that Tappuckstone did form a part of the Parkhall estate. Now, in addition to that, they produce certain tacks granted by Mr Livingstone's predecessors, in which there is a reservation of the right of coal. But, my Lords, those contracts between him and his tenants do not seem to me very materially to affect the rights of a third person in whom the right of coal is vested; it is a secret contract between him and his tenant, and the party claiming to be interested cannot be considered as bound by any such act.

And here I must observe, that I cannot but regret upon these questions of fact, that a more satisfactory mode has not been taken to ascertain the facts; but whatever your Lordships' judgment may be in this case, it would be unjust to the respondent now, supposing your Lordships were of opinion that these acts that appear upon the evidence are not sufficient to satisfy you that the party gained a title by prescription, if further inquiry was requisite, perhaps it would be unjust to the respondent, considering the ages of those witnesses, to proceed to the other mode of taking evidence. Then the question comes, whether these are such continuous acts of enjoyment for forty years as come within the meaning of the statute of 1617? Now, with reference to the acts of enjoyment, they must be considered with reference to the subject-matter; it is not to be expected, that if the question is, who is entitled to coal? that you can prove the use, de die in diem, for forty years. On the other hand, the question is, whether these, which are but slight acts of ownership, at the distance of four or five years, were such as to bring to the notice of the other party what was doing as to his right of coal, so as to call upon him to interfere to prevent the exercise of that right by another? And then when, with reference to that, you find an interval of upwards of thirty years, (speaking in round numbers), when there is a cessation of any act of enjoyment for that period, and when it is resumed, whether you will connect those two acts of possession so as to say, if the first shews the possession, being an act adverse to the right of the other party, it shall be considered as continuing, to the party exercising the right, the possession of the coal from that time to the subsequent working, when he again exercises the right.

My Lords,—Upon this question, as I have stated to your Lordships, great difference of opinion existed in the Court below; and I believe I may venture to state, that there is no subject of greater importance in the law of Scotland than the subject of a title by prescription: it is that upon which many of their titles depend; and therefore it is of the utmost importance that your Lordships should, before you venture to decide on such a question, have all the information you can from the legal authorities of the country. Upon this case I regret again, as I have had to repeat more than once, that in a case of so much importance in point of value and principle, when great difference of opinion existed in one Division of the Court, I cannot but regret that they did not avail themselves of obtaining the opinions of the

other Division; because, if the differences of opinion still existed, you would have the advantage of knowing what the collective opinion of the sages of the law of Scotland was upon the point, which is a point of such infinite importance as affecting the law of prescription there.

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My Lords,—In this case I think, that this should be considered not merely as to the value of the property, (which is very large I understand from the argument at your Lordships' Bar), but where the questions of law are of such importance, I humbly submit to your Lordships in this case, that your Lordships should send it back to have the opinion of all the Judges upon the application of the principles of law to this case; and although there has been the unanimous opinion of the Court as to the charter of 1716, I should propose that that question, as well as the other, should be reconsidered. If the Judges of the other Division concur with the Judges of the Second Division, that there is no doubt that that charter gave a title to found a prescription, you will have their collected opinion: but, even supposing they are of that opinion, then comes the important question, whether the acts of possession have been proved; and if it was of a more recent date, and an inquiry by issue could be obtained, I should recommend it to the Court to direct an issue; but I feel a difficulty as to an issue on account of those old witnesses who were examined many years back; their evidence may be lost; and as the Court have acted upon this evidence, which is not very long, I have not detained your Lordships by going through it, wishing that it should be further considered, and not wishing to express any opinion that can or ought in any manner to affect the judgment of the Court below; but the evidence is not very voluminous, and therefore it will be very easily read and understood by those learned persons, to whom I propose that this cause should be remitted. It appears to me that the question under the charter of 1716 is still open, and the inference may be drawn one way or the other; I will not say to which side it ought to be drawn. It seems to be the opinion of Lord Newton and Lord Craigie that that was a sufficient title, and the Court have concurred in that view of the case; and therefore I should propose to remit this cause to the Court of Session, in order that we may have the benefit of the united and collected opinions of the Judges of both Divisions on the question.

Before I conclude, I should humbly suggest to your Lordships that it should be communicated to the Court below, that in this interlocutor no distinction is made between Whiterig and Parkhall lands. It may be that the Court considered that the acts of possession, whether under distinct rights or not, were sufficient to carry coals under the whole land. As to Whiterig, there is only one act of enjoyment proved, but no distinction is made between the lands of Whiterig and the other lands; but, as I collect the opinion of the Court, it was this, that having sufficiently proved acts of possession of Tappuck or Tappuckstone, which formed part of Parkhall land, that that gave Mr Livingstone a right to coal under the whole of the lands comprized in

June 29. 1825. the charter of 1716. It may be important that the Court of Session should have an opportunity of considering, whether they mean to draw any distinction between the one set of lands and the other. I would propose to remit this for the Court to consider, whether the respondent has produced a sufficient title on which prescription can be founded; and whether the acts of possession and taking the coal in Tappuck or Tappuckstone, and Whiterig, respectively, in proof in the cause, are sufficient to establish a title by prescription in the respondent to the coals under the lands of Nicolton, Weetshot, Hillside, Gilmeadowland, and Parkhall, and under the lands of Whiterig, or any of them; and it is farther ordered, that the Court to which this remit is made do require the opinion of the Judges of the other Division upon the matters and questions of law in this cause in writing, which the Judges of the other Division are to give, and communicate the same; and after so reviewing the interlocutors complained of, the said Court do decern in this cause as may be just. In reviewing their interlocutors, if, in their judgment, they think any distinction can properly be made, that question will be quite open to them; and when the matter comes before your Lordships again, we shall know the opinion of all the Judges of the Court of Scotland as to prescription to coal under land, the surface of which belongs to another person, and whether that right of coal was lost by positive prescription or enjoyment. I propose to your Lordships to remit the cause with the directions I have stated.

J. CHALMER—J. RICHARDSON,—Solicitors.

No. 57. LIEUTENANT-GENERAL MONCREIFF, Appellant and Respondent.

PATRICK GEORGE SKENE, Esq. Respondent and Appellant.

Relief—Heir and Executor—Clause—Legacy.—1. A party having executed an entail of an estate in favour of a certain series of heirs, declaring that the heirs should be bound 'to pay and perform all debts payable and prestable by me or my ancestors, 'and every other claim and demand to which the said lands and others, or any part 'thereof, are now, or may happen by law to be subjected or made liable;' and also, unico contextu, a general disposition of the estates of which he should die possessed in favour of the same heirs, under a declaration, that 'the real and 'personal estate hereby conveyed is and shall be burdened with the payment of all my just and lawful debts;' and the succession to the entailed and unentailed properties having afterwards gone to different parties;—Held, in a question between them, (reversing the judgment of the Court of Session), That the two estates were liable in relief pro rata of a debt constituted by the granter over them both. And, 2. A legacy having been left by the granter of the above deeds, payable by one of the heirs and his representatives, in case of his succeeding to the estates; and he not having succeeded, and his representative having only got a part of the succession, while the other part went to the legatee;—Held, (reversing the judgment of the Court of Session), That the legacy was not exigible.