AUGUST 15, 1853.

The Honourable Mrs. MARY JANE LOCKHART MACDONALD or MORETON, and others, *Appellants* and *Respondents* in Cross Appeal, *v.* SIR NORMAN MACDONALD LOCKHART of Lee and Carnwath, and others, *Respondents* and *Appellants* in Cross Appeal.

Prescription—Superior and Vassal—Title to exclude—*A barony was originally held by separate titles, the one under the Crown, and the other, consisting of certain parts and portions specially named and described as lying within the barony, under a subject superior. The investitures had been from time to time renewed by the Crown and subject superior for at least two centuries as separate tenements. In a ranking and sale at the instance of creditors using diligence against the whole barony, the estate was sold in* 1694 *as holding under the Crown, the decree of sale ordaining a Crown charter to be passed in favour of the purchaser. The purchaser executed an entail, under which he resigned the barony, as described in the decree of sale, in the hands of the Crown. The entail was followed by a Crown charter and infeftment, and the title was renewed by several successive heirs of entail, who made up no title under the subject superior. In an action of reduction improbation and declarator of non-entry at the instance of the subject superior:*

HELD (affirming judgment), *that possession of the barony on this title was fortified by the statute* 1617, *c.* 12, *and excluded the title of the subject superior, and the defender was assoilzied from the conclusions of the action, and found entitled to the expense of discussing the title to exclude, but to no other expenses.*

Expenses—*A party, insisting in a title to exclude, as well as objecting to the pursuer's title, in an action of reduction improbation and declarator of non-entry, raised a separate action of reduction and declarator for reducing and setting aside the titles founded upon as the title to sue the declarator of non-entry. The record was closed upon the summons and defences, and the action was conjoined with the original action of declarator of non-entry. The Court of Session having sustained the title to exclude, in respect the pursuer of the reduction and declarator did not then insist, repelled the reasons of reduction, and assoilzied the defenders from the conclusions of the action. On a cross appeal against the judgment, in so far as the reasons of reduction had been repelled and the expenses of discussing the objections to the pursuer's title in the original action of non-entry disallowed, the House of Lords dismissed the cross appeal, without expenses, and affirmed the judgment of the Court of Session.*[1]

These appeals originated in an action of reduction improbation and declarator of non-entry by A. M. Lockhart and others as superiors of the temple lands of Cummerland, and others in Lanarkshire, against Mrs. Lockhart and A. D. R. C. Baillie as representing Sir G. Lockhart of Carnwath, who died in 1689.

Anderson Q.C., and *Dean of Faculty* (*Inglis*), for appellants.

Sol.-Gen. (*Bethell*), and *E. S. Gordon*, for respondents.

Cur. ad. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, these were cross appeals against certain interlocutors of the Court of Session. The proceedings commenced by a summons of reduction improbation and declarator of non-entry at the instance of the appellants, against Sir Norman Macdonald Lockhart and certain other parties, as defenders, claiming right to the property, or, if not to the property, at all events to the superiority, in certain lands described in the summons as temple lands, viz., All and Whole the temple lands of Cummerland, Northflatt, Pacockland or Peacockland, and Clydesflatt, lying within the barony of Covington and sheriffdom of Lanark.

The pursuers, by their summons, after setting forth several titles of the defenders, conclude that they ought to be reduced, and that the defenders ought to be removed from the lands in question; or, if the defenders should establish any title to the property or the *dominium utile* of the said lands, then the summons concludes that the said lands ought to be declared to have been in non-entry since the death, in the year 1645, of John Lindsay, the last entered vassal thereof. That the said John Lindsay held of the predecessors of the pursuers, as his lawful superiors; and so that the pursuers were entitled to certain bygone rents, maills and duties, due to them as such superiors.

The claim thus set up by the summons was abandoned, so far as it asserted a right to the

[1] See previous reports 22 Sc. Jur. 81, 149. S. C. 26 Sc. Jur. 559.

dominium utile of the lands; so that the only question discussed was, Whether the pursuers, the now appellants, had made out a title to the superiority, which entitled them to call on the defender, Sir N. M. Lockhart, to enter with them as their vassal in respect of the lands in dispute.

The defender, Sir N. M. Lockhart, rested his defence on two grounds—*First,* That the pursuers did not make out a valid title to the alleged superiority. *Secondly,* If that title was made out, then he relied on a good title to exclude, by virtue of the titles under which he and his predecessors had, for more than forty years, possessed and enjoyed all the lands lying within the barony of Covington. In support of the first head of defence Sir N. M. Lockhart brought a cross action of reduction and declarator against the pursuers in the original action, to which I shall advert more particularly hereafter.

The pursuers in the original action make out, as they contend, their title to the superiority as follows:—At the time of the reformation, the lands in Scotland, which in very remote times had belonged to the Knights Templars, and which had afterwards passed to the order of St. John of Jerusalem, became vested in the Crown. These lands were very extensive, and were scattered over many different counties, being generally designated as "temple lands." Queen Mary, by a charter dated the 24th Jan. 1563, granted to Sir James Sandilands, the last preceptor or head of the order of St. John of Jerusalem, various baronies and lands mentioned in the charter, and also the temple lands throughout the whole kingdom; and she erected all the baronies and lands, so granted, into a barony, to be called the barony of Torpichen. In the year 1599, the immediate successor of Sir James Sandilands sold the temple lands, which thus constituted part of the barony of Torpichen, to two persons of the names of Tennant and Williamson. Tennant soon afterwards sold his share to Williamson, who thus became sole purchaser. In 1606 an act of parliament was passed confirming this transaction; and by a charter of resignation, dated the 23rd Feb. 1609, James VI., pursuant to the act of parliament, granted all these temple lands to Williamson and his heirs, and erected the same into a barony or tenement called the tenantry of the temple lands. The temple lands were soon afterwards purchased by Lord Binning, afterwards Earl of Haddington, and were duly conveyed to him and his heirs by a charter of resignation, dated the 16th Oct. 1614. By this charter these lands were erected into a new barony called the barony of Drem, to be holden of the Crown in blenchfirm, on payment of an annual rent of one penny if demanded. Infeftment having been duly taken on this charter, an act of parliament passed in 1617, c. 45, confirming the transaction. The barony of Drem continued in the family of the Earl of Haddington from the time when they thus acquired it, until the sixth year of the reign of George I.; an act of parliament was then passed vesting it in trustees for sale. Those trustees sold the barony to John Hamilton, who duly feudalized his title; and after divers mesne conveyances, the barony, with certain exceptions not material to the present question, was, in the year 1810, sold and disponed to Mr. Robert Hill, W. S. Mr. Hill was duly infeft, and he moreover completed a title to the barony by a process of adjudication in implement, the decree in which bears date 4th March 1814. He afterwards, in 1817, sold and conveyed to Laurence Hill, (under whom the pursuers derive title,) *inter alia,* the temple lands of Cummerland, Northflatt, Pacock or Peacockland, and Clydesflatt, in the barony of Covington, described as being parts and portions of the barony of Drem. It is not necessary to state the pursuers' title, or alleged title, to the superiority of these lands more in detail.

Several links in the chain of progress of the title to these temple lands are questioned by the respondents; but for the present, the title of the pursuers to the superiority of these lands may be taken as good, if at the time of the sale to Laurence Hill they formed part of the barony of Drem, subject, of course, to the other question, Whether the defenders had not acquired by prescription a title to exclude?

In order to shew that the lands in question formed part of the barony of Drem, *i. e.*, that they were holden of that barony, the pursuers relied on the following facts:—They shewed that, from a very remote date, *i. e.*, from the middle of the 15th century, the family of Lindsay held of the Crown the barony of Covington. This they shewed by means of special retours on the deaths of successive owners, and, in some cases, by instruments of seisin duly made up and completed, pursuant to precepts from Chancery for that purpose, issued on the retours. The last title shewn to have been thus made up by any member of the family of Lindsay, was in the year 1646. On 3rd Sept. in that year, Sir William Lindsay was served heir of his brother, John, who, as I have already stated, died in 1645; and it was found that the said John had died last vest and seised in All and Whole the lands and barony of Covington. A precept was, on the retour of this service, issued from Chancery, on which infeftment was duly taken by Sir William Lindsay on 7th Oct. 1646.

Having thus shewn the title of the Lindsays to the barony of Covington, the pursuers next proceeded to establish, that during these remote times, the same family held the lands now in dispute as a separate tenement, and that they so held them, not under the Crown as part of the barony of Covington, but under the house of St. John of Jerusalem, as their superior. And for this purpose they relied, *first,* on an inquest, dated 9th March 1466 (on what occasion taken does

not appear), by which the jurors found "quod terre de Comerland Clidisflat, Pacockbank et Northflat, sunt terre templarie sancti Johannis de Torfechyng et tenentur in capite de magistro et fratribus Jerosolimitanis domus de Torfiching." Then the pursuers produced several ancient precepts of *clare constat* and other instruments, by which it appeared, that before the temple lands had come to the Crown on the reformation, successive members of the family of Lindsay were admitted by the superiors of the house of St. John of Jerusalem, as vassals to that house, in respect of lands described as temple lands of Cummerland, Clydesflatt, Pacockland, and Northflatt, and as lying within the barony of Covington. And in like manner they shewed, that after the grant by the Crown of the temple lands, and the erection of them into the barony of Drem in 1614, the lands described as the temple lands of Cummerland, Northflatt, Pacockland, and Clydesflatt, and as being locally situated within the barony of Covington, were treated as not constituting part of that barony, but as forming part of the barony of Drem. For this they relied, amongst other similar documents, on an inquisition taken 4th Nov. 1623, by which it was found that John Lindsay died seised of the lands and barony of Covington, and also of the temple lands of Cummerland, Northflatt, Pacockland, and Clydesflatt, lying in the barony of Covington, and that George Lindsay, his son, was his heir. And in this inquisition the barony of Covington is stated to be of the annual value of £40 Scots, according to what is called the old valuation, and of £120 Scots, according to the new valuation, and to be holden of the Crown by the service of attending three Courts at Lanark. And the temple lands are stated to be of the annual value of £5 Scots, according to the old, and £20 Scots, according to the new valuation, and to be holden of Lord Melrose and Binning, meaning, no doubt, the Earl of Haddington, by payment of 4*s*. Scots annually if demanded. Many of the old documents confirm, with more or less of distinctness, this representation as to the value, and the different tenures of the barony and the temple lands.

George Lindsay, thus served heir of his father, does not appear to have been infeft in the temple lands, but on the 2nd Jan. 1643, George being then dead, seisin of the temple lands of Cummerland, Northflatt, Peacockland, and Clydesflatt, was duly granted by the then Earl of Haddington, who was the owner of the barony of Drem, to John, son of George, as being the grandson and heir of John, the father of George. This John, who was thus infeft in 1643, died soon afterwards without issue, viz., in 1645, as has been already mentioned. He was the elder brother of William (Sir William), who, as I have already stated, was infeft in the barony of Covington on the 7th of October 1646, on the death of his elder brother, John.

The appellants then contend, that it is thus manifest that, in 1646, Sir William Lindsay stood infeft as a vassal of the Crown for the barony of Covington; that he had a right to claim as heir in apparency the temple lands in question lying within, but not forming part of, that barony, and so that his possession of those lands must be referred to his right as heir of his late brother, an entered vassal of the Lords of the barony of Drem, and not to his possession of the barony of Covington.

The barony of Drem, so far as it relates to the superiority of these lands, having (as the appellants contend) passed to them, they instituted the original action in this case for the purpose of having a declarator of their right, and of compelling the defender, Sir N. M. Lockhart, to enter as their vassal, and to pay the arrears of feu duties.

The defender, Sir N. M. Lockhart, disputed the title of the appellants to the alleged superiority, but even if that were made out, still he contended that he had a good title to exclude, by virtue of an adverse possession founded on title, viz., a charter from the Crown followed by infeftment, with enjoyment of above a century, and he made out his case thus:—Sir William Lindsay, who was infeft in the barony of Covington in 1646, as heir of his deceased brother, John, appears to have fallen into pecuniary difficulties, and to have incumbered his property by means of heritable bonds or other securities, which led to the institution of legal proceedings; and, eventually, in an action of sale, raised by certain creditors of Sir William after his death, against John Lindsay, his son and heir, pursuant to a decree of sale, dated 15th Feb. 1694, the barony of Covington was put up to public auction, and was purchased by George Lockhart of Carnwath, the son of Sir George Lockhart, the President of the Court of Session, who died in the year 1689, and who held heritable securities on the property in question. George Lockhart, the purchaser under the decree in 1694, before completing his title to the barony by procuring infeftment, pursuant to the decree of sale, with the concurrence of George Lockhart, his eldest son, executed a deed of entail, dated 31st Oct. 1721 (which was afterwards duly recorded). By that deed George Lockhart, the purchaser in 1694, and George, his son, bound themselves to surrender, among other property, the barony of Covington into the hands of the Crown, to the intent that the same might be regranted to George, the son, and the heirs-male of his body. Resignation was accordingly made, and a Crown charter, dated 29th Nov. 1721, and registered on 17th Jan. 1722, was duly obtained, granting to George, the son, and the heirs male of his body (*inter alia*), the barony of Covington. On this charter infeftment was taken, and the instrument of sasine was duly recorded.

The barony of Covington has, ever since the creation of this entail, been held and enjoyed by

the persons entitled as heirs male of the body of George Lockhart, the son, and the original defender, Sir N. M. Lockhart, was undoubtedly such male heir. Nothing having ever been done to destroy the entail, the only question is, Whether the lands in dispute were included in the instruments by which the entail was created? For if they were, enjoyment having ever since gone in conformity with the provisions in the deed creating the entail, and the charter expede thereon, for a period now far beyond forty years, (indeed above 120 years,) there is a clear title by prescription.

The appellants say there is nothing to shew that the deed of entail included the temple lands. They are not mentioned by name, and nothing which could include these lands is comprised in the deed creating the entail, unless they are comprised in the general description of the barony of Covington.

That barony is there described as comprehending, *inter alia*, lands designated as the lands of Cummerland; but there is no mention of the lands of Northflatt, Pacockland, and Clydesflatt, and even the lands described as the lands of Cummerland are not stated to be temple lands, and might therefore be other lands properly forming part of the barony of Covington, and not the temple lands known by the same name of Cummerland; for which argument, indeed, some of the earlier documents do afford a foundation. The appellants therefore say, there is nothing to prove, as to the temple lands, any title on which to found the prescription. That there has been enjoyment for above a century and a half is not disputed, but mere possession, not originally resting on title, is worthless; and the argument of the appellants is, that the deed of 1721 creating the entail, and the Crown charter granted thereon in 1722, relating exclusively to the barony of Covington, and not to the temple lands, do not form a title on which the subsequent enjoyment of the temple lands can attach; and so they say that the respondents have nothing on which to rely beyond mere naked possession; that this works no prejudice to the superior, who has a right to treat the lands as having been all along in non-entry, which, it is admitted, so long as the feudal relation subsists, does not prevent the superior from asserting his rights against the vassal after any lapse of time.

As a general proposition, the appellants are undoubtedly right in saying, that mere lapse of time gives no title to the vassal against the superior, when he calls on him to enter and perform his other duties arising out of the feudal relation. But the question here is, Whether there is any such feudal relation between the appellants, as claiming under the Lords of the barony of Drem, and the respondent, as the owner of all the lands locally situate within, and, in that sense, forming part of, the barony of Covington?

What was contended on behalf of Sir N. M. Lockhart, was not merely that he and his ancestors had been in the enjoyment of all the lands locally situate within the barony of Covington, at least since the creation of the entail in 1721, including (if it does include) the temple lands in dispute, but that he and they have held all the lands of which they have so been in possession, as being part and parcel of the barony of Covington which his ancestors held, and which he still holds of the Crown, and if that be so, there is no doubt of the doctrine of prescription being applicable.

Suppose, for instance, that the deed of 1721, and the Crown Charter which followed on it in 1722, had described these temple lands by name, as included in and forming part of the barony of Covington, it would then clearly be a case within the express words of the statute of 1617. The successive owners in tail would then have bruiked these temple lands by virtue of an heritable infeftment made to them by the Crown for the space of forty years and upwards.

In such a case no other person could possibly set up any adverse title to the lands or to the superiority. Does it make any difference that the lands are not specifically described by name? I think it makes no difference in principle. However minute the description of lands may be in a deed conveying them, it must still be in all cases necessary to identify the lands themselves with the description of them, and this can only be done by ascertaining on the spot what particular lands have been known under the written description. Where the written description is very precise and detailed, this may, for the most part, be done easily. Where it is more vague and general, there is often great difficulty. Still the question is in all cases the same in principle—What lands have been generally known under the written description? for it is to these lands that the titles must apply.

Taking this principle as our guide, I confess it seems to me to admit of no doubt that the lands now in dispute form part of those comprised in the deed of entail of 1721, under the description of "All and Haill the lands and barony of Covington." That deed, which bears date 31st Oct. 1721, and which was duly recorded in the Register of Tailzies on 28th Nov. 1722, was executed by George Lockhart, the purchaser under the judicial sale in 1694, and by George Lockhart, his eldest son. It is to this effect:—"Be it known to all men by thir presents, me, George Lockhart of Carnwath, heritable proprietor of the lands, baronage, jurisdictions, and others underwritten, with the pertinents, with the special advice and consent of George Lockhart, my eldest lawful son, and I, the said George Lockhart, younger, for myself, and with the special advice and consent of my said father, and we both with one consent and assent, for the

well and standing of our family, and the better preservation of our lands and estate after mentioned, with our own posterity, and the other heirs of tailzie underwritten in manner after specified, wit ye us to be bound and obliged, likeas we, by these presents, bind and oblige us and our heirs, als well male, tailzie, conquess and provision, as heirs general and of line, and successors whatsomever, renouncing the benefit of discussing our said heirs in order or priority, to make due and lawful resignation of our lands and estate after mentioned, in the hands of our immediate lawful superiors thereof, in favours, and for new infeftment of the samen, to be made, given, and granted to me, the said George Lockhart, younger, and to the heirs male of my body; which failing, to our other heirs male, and of tailzie, and successors after mentioned (always with and under the express reservations, conditions, provisions, faculties, restrictions, limitations, and irritancies after specified, allenarly, and no otherwise)." Then, "for that effect," he appointed certain procurators "to resign, surrender, &c., likeas we, &c., resign, surrender, simpliciter upgive, overgive, and deliver, all and sundry the lands, baronies," and so on. Then there is a description of a great many properties, and, amongst others, "All and Haill the lands and barony of Covington, comprehending the lands after specified, the lands and mains of Covingtoun, with tower," and so on; and, "All and Haill the lands of Hillhead and lands of Cummerland;" "All and Haill the lands of Meadowflatt," and so on; and all "writs, rights, titles and securities of the foresaid lands," and so on; and specially but prejudice of the foresaid generality, ane decreet of sale before the Lords of Council and Session of the lands and barony of Covingtoun, comprehending as above, in favours of me, the said George Lockhart, elder."

This deed of entail was followed by a Crown charter proceeding on it, dated 29th Nov. 1721, and registered 5th Jan. 1722. It is in these terms:—"Georgius dei gratia, &c. Dedisse concessisse et disposuisise et hac presenti carta confirmasse &c. Dilecto nostro Georgio Lockhart," and so on, describing him "Omnes et singulas terras, baronias, regalitates, tenendrias, molendina, silvas, piscationes decimas, patronatus, aliaque subscripta cum pertinentibus, viz.," and so on. Then a great many properties are described, and, amongst others, "Et præterea totas et integras terras et baroniam de Covingtoun comprehendentem terras postea spect., viz. Terras et dominicales terras de Covingtoun cum turre fortalicio," and so on; "Quæ quidem terræ et baroniæ de Covingtoun comprehendentes particulares terras," and so on; "perprius ad quondam Dominum Gulielmum Lindsay de Covingtoun et Joannem Lindsay ejus legitimum filium natu maximum et hæredem apparentem illosque creditores hereditarie pertinuerunt per illos de nobis et prædecessoribus nostris regiis tent. Et per dictum Georgium Lockhart seniorem apud publicam auctionem, lie roup, coram Dominis consilii et sessionis secundum decretum venditionis per illos in ejus favorem datum et pronunciatum" on the 15th day of February 1694, and so on. "Tenendum et habendum omnes et singulas terras baronias, molendina, multuras, silvas," and so on; "Georgio Lockhart juniori ejus que dictis heredibus masculis," and so on.

From these instruments it is plain, that, so far as relates to Covington, what was comprised in the entail was that which had been purchased at the judicial sale in 1694. The title then acquired by George Lockhart, the purchaser, had not been feudalized by him up to the time of the creation of the entail; and in the charter to which I have just referred, the lands and barony of Covington are stated to have formerly belonged to Sir William Lindsay and his son and heir apparent, and their creditors, and to have been sold under a decree of the Court of Session to George Lockhart in 1694.

What we have to decide, therefore, is—whether the lands in question were comprised in the judicial sale? Now, for the purpose of coming to a correct conclusion on that point, we must look to the terms of the decree of sale. From an extract of that decree, it appears "that the said persewars are just and lawful creditors to the said umquhill Sir William Lindsay, and to John Lindsay, now of Covingtoun, his eldest lawful son, as representing him and his legal rights, affecting the said lands and barronie of Covingtoun, with the pertinents, as is above mentioned; and that the said umquhill Sir William Lindsay was nottoreously bankrupt, and his creditors are in the possession of his estate, by a factor appointed to them by the Lords of Sessione. Therefore, they said it was most just that, according to the Act of Parliament, a sale should be made of those lands." "The Lords of Council and Sessione aforesaid, sell, adjudge, and dispone to and in favour of the said George Lockhart of Carnworth, his aires and assigneys, heritably and irredeemably," the particular lands above and under written. Then a description is given of the lands. Then it appears that this was disputed by the parties who claimed against the creditors in fact, but that the Court overruled it, and finally ordained charters to be expede under the Great Seal, in favour of the said George Lockhart, *in communi forma*.

It appears, therefore, that what was sold to George Lockhart was the lands and barony of Covington, comprehending, *inter alia*, the lands of Cummerland, as to all of which the decree ordains charters to be expede in favour of the said George Lockhart under the Great Seal. Certainly, therefore, what was sold to George Lockhart was the barony of Covington, and nothing else. If at that time the Lindsays held any lands locally situate within, but not forming part of the barony, (any lands holden of the Earls of Haddington, for example,) those lands were not

comprised in the sale. It is the common case of both the now litigant parties, that ever since that sale, George Lockhart, the son of Sir George Lockhart, and those claiming under him, have been in possession of the barony of Covington, including all lands locally situate therein, including therefore the lands now in dispute. Either, then, they must have then taken, and have since held possession of these lands, as constituting part of the barony, or they must have entered on, and held them as trespassers—as mere wrong doers. In such circumstances I think it impossible not to be satisfied that the former is the correct conclusion—that the whole of the lands of which George Lockhart, or his guardians, took possession in 1694, were then treated as being included in, and forming part of the lands and barony of Covington, and were then understood and meant to be included under the general description of the barony of Covington. Upon any other hypothesis the purchasers were guilty of a great wrong towards the Lindsays. They had against them a good right to whatever lands formed part of the barony of Covington. They had no right to any lands not forming part of the barony.

On these grounds I have satisfied myself, that whatever might have been the true rights of the parties prior to the judicial sale, yet that, after that time, the barony was always treated as comprising all lands locally situate within it, and therefore comprising the lands in question, and so that the deed of 1721, and the Crown charter proceeding thereon, together with the numerous subsequent charters on the deaths of successive tenants in tail, must all be read as if they had by name included the lands now in dispute.

This fully establishes the respondent's title to exclude by virtue of the statute of 1617. That statute enacts, that whoever shall have possessed, "by themselves, their tenants, and others having their rights, their lands, baronies, annual rents, 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 interruption 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 lands and heritages foresaid, by His Majesty or others," &c., "provided they be able to shew and produce a charter of the said lands and others aforesaid granted to them, or their predecessors, by their said superiors and authors, preceding the entry of the said forty years' possession," &c.

The respondent, and those under whom he claims, have certainly possessed the lands in question for the space of forty years and upwards. Can they produce a charter of the said lands granted to them or their predecessors preceding the entry of the forty years' possession, with the instrument of sasine following theron? Undoubtedly they can, if these lands were included in the general description of *totas et integras terras et baroniam de Covington.* For the reasons which I have already stated, I am of opinion that they certainly were so included, and therefore that the statute clearly applies to this case.

It must not be supposed that in coming to this conclusion, I in any respect question the doctrine so strongly pressed in argument by the appellants, namely, that the feudal relation is never lost or destroyed by mere *nonuser.* "A vassal," says Mr. Erskine, "cannot prescribe an immunity from the feu duties, services, and casualties of superiority due to his overlord, though he should not have made payment of them for forty years; and, consequently, the superior's right to these cannot be lost by his silence or neglecting to exact them; for the right of feu duties and of feudal casualties being inherent in and essential to the superiority itself, or *dominium directum,* is accounted a right of lands which does not suffer the negative prescription, except in favour of one who can plead the positive. This the vassal cannot do who has no title of prescription in him, his only title being a charter from the superior, which, in place of being a ground of the positive prescription, directly excludes it." And the passage which follows well illustrates the doctrine. In the case of *Ferguson* v. *Gracie,* (Napier on Prescr. 186,) it was said, "Possession by a vassal, whether the vassal be entered or only in apparency, is as much possession for the superior of his rights, as possession by a tenant is civil possession for the landlord; and hence a vassal cannot prescribe an immunity from the feu duties, services, and casualties of superiority due to his overlord, though he should not have made payment of them for forty years." So in this case, if the respondent had nothing to rely on but a title under Sir William Lindsay, if the respondent's ancestor who purchased these lands had not obtained a charter from the Crown, followed by infeftment, with a description of the subject matter of the charter, *i.e.,* of the lands granted, sufficient to include, and which, I am satisfied, was meant and supposed to include, the lands now in dispute, then the principle laid down by Mr. Erskine would have been applicable. But there is no foundation for the doctrine, where the possession is founded on a title resting on a charter and infeftment inconsistent with the feudal relation insisted on.

I have not forgotten the argument pressed by the appellants, that whatever might be the case as to preceding owners, still that as to Sir N. M. Lockhart, he could have no title to exclude, because in making up his title in 1833, on the death of his elder brother, the lands in dispute were excepted out of the Crown charter and infeftment thereon. I do not think it necessary to pronounce any opinion as to whether there was in truth any such exception as would exclude the

lands in question; because even if there was, the only effect of it would be, that as to the particular lands, Sir N. M. Lockhart had not, as between himself and the Crown, completed his title. It could not make him a vassal of the appellants as to lands in respect of which those whom he succeeded had been previously vassals of the Crown.

The result, therefore, is, that there was no ground whatever for this action, and I certainly concur with the judgment of the Court below, pronounced by their final interlocutor of 19th Feb. 1851, whereby they sustain the defender's title to exclude, and assoilzie the defender from the conclusions of non-entry.

It is to be observed that the appeal was directed not only against this final interlocutor, but also against an interlocutor of the 22nd January 1850, and several subsequent interlocutors following thereon, as to all of which, however, the appeal must be dismissed.

The pursuers insisted, in the progress of the cause below, that the disputed lands, *i.e.*, the lands of Cummerland, Pacockland, Northflatt, and Clydesflatt, were parcel of the lands locally within, but not forming part of, the barony of Covington. The defender, on the contrary, contended that there were lands within, and forming part of the barony called Cummerland, but that there were no lands known by the names of Northflatt, Pacockland, or Clydesflatt.

The Court below was desirous to have this cleared up, and accordingly pronounced the interlocutor of 22nd Jan. 1850:—"The Lords, considering that the defender, in support of the title to exclude produced by him, has averred that there is in the barony of Covington only one tenement or parcel of land, known by the name of the lands of Cummerland, which he and his predecessors have possessed as one tenement under that name, in virtue of their infeftments as vassals of the Crown, and that there are no distinct lands in the said barony known by the separate names of Northflatt, Pacock or Peacockland, and Clydesflatt, and that such lands, if any such there are, are only portions of the said lands of Cummerland, and have always been so known and possessed; and in respect that the pursuers aver that there are distinct lands or tenements situate within the barony of Covington, which are temple lands, different from the lands of Cummerland held by the defender, Sir N. M. Lockhart, directly under the Crown, and to which their declarator of non-entry applies,—before answer, allow the parties a proof *hinc inde* of their respective averments on this matter of fact; appoint the defender to lead his proof of his said averment, that in the barony of Covington there is no tenement or parcel of lands to which the name of Cummerland may be applied, or having such name, except the lands which he has possessed under his infeftment as Crown vassal."

I am by no means of opinion, that if the pursuers could have made out that there were such lands, that alone would have established their case; but it might have been a circumstance in their favour, and, with other evidence, might have entitled them to what they asked.

The practice of instituting inquiries like this, and going into evidence before answer, is not, I think, at all a convenient practice, or one to be encouraged. It must often lead to useless expense and delay, as I think it has done here. Still it seems to be a course often followed, and I do not discover any trace of objection to such a course pressed at the time by the pursuers. On the contrary, the defenders thought themselves to some extent aggrieved by having the burden of proving a negative cast on them.

I do not think, therefore, that your Lordships, dismissing the appeal in the result on the merits, ought now to allow the appellants to raise any question whether the inquiry, directed for the purpose of enabling the litigant parties to go into evidence on a matter which, on both sides, was treated as being of some importance, was, or was not, strictly necessary. I therefore think that the original appeal has failed in all points.

It remains, therefore, only to consider the cross appeal. I have already stated that Sir N. M. Lockhart, the defender in the original action, in support of that part of his defence in which he impeached the pursuer's title, brought a cross action of reduction against the original pursuers, thereby seeking to reduce the titles on which the original pursuers relied as establishing their superiority to the lands in question. This cross action was, by consent, conjoined with the original action;—the object of the cross action being to meet a possible objection, that the defender could not, in the original action, dispute the pursuers' right to sue, without, by a proceeding of his own, reducing the titles on which that right was alleged to be founded.

As the Court decided in favour of the original defender, Sir N. M. Lockhart, on the ground of his having established a valid title to exclude, he, or rather his representatives, (for he died pending the proceedings,) did not proceed to establish the right to reduce insisted on in the cross action. And we find, therefore, that in the final interlocutor of 19th Feb. 1851, the Court decreed as follows:—"And farther, in respect the pursuers of said reduction do not now insist in the reasons of reduction of the title called for, and sought to be reduced against the defenders, repel the reasons of reduction, assoilzie the defenders, and decern." And on the subject of expenses, the Court, though it decreed absolutely in favour of the original defender, yet gave to him, or his representatives, only so much of the expenses as had been incurred in making out the title to exclude, and not the expenses incurred in impeaching, or attempting to impeach, the pursuers' title to insist.

Against these portions of the interlocutor the respondents, the representatives of Sir Norman Macdonald Lockhart, have appealed—that is, as to so much of the interlocutor as repels the reasons of reduction, on the ground that the validity of these reasons had never been discussed, —it having become unnecessary to go into that part of the case, in consequence of the Court sustaining the defender's title to exclude, founded on the possession, for above forty years, under the Crown charter of 1722,—and as to so much of the interlocutor as relates to the expenses, on the ground that the Court ought to have given to the respondents the whole of their expenses, and not that portion only of them which related to one branch of their defence.

With respect to the first point, I concur with the respondents in their argument, that it was wrong to come to a decision adverse to that part of the defence which it had become unnecessary to consider. The correct course would have been either to go into and decide on both heads of defence, or else to declare that, as the defenders had established their title to exclude, the Court had not thought it necessary to consider the other branch of the defence, and so had come to no decision as to the pursuers' title to insist. And I cannot say that the respondents did wrong in appealing against this part of the decree; for if this House had not concurred with the Court of Session on the right to exclude, founded on prescription, it might, perhaps, have been important to the respondents to have a separate appeal against this part of the interlocutor. But with regard to so much of the interlocutor complained of as relates to the expenses, the case is different. I cannot concur with the cross appellants in their view of the case. Sir Norman Macdonald Lockhart insisted on two separate defences. He made out one of them only,—the other was never finally disposed of. And I cannot, therefore, say that the Court did wrong in giving to him, or to his representatives, so much only of the expenses as were attributable to that head of defence which alone was established. In strictness, the interlocutor ought to be varied in so far as it repels the defender's reasons of reduction. But as this error, so far as it is an error, has in the result become wholly immaterial, and as I am not prepared to disturb the interlocutor so far as relates to the expenses, the more convenient course will be, to affirm the interlocutor generally, dismissing the original appeal with, and the cross appeal without, costs; and that is the course which I recommend your Lordships to adopt.

The *judgment* of the House of Lords was in the following terms: It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the said original appeal be, and is hereby, dismissed this House; and that the said interlocutors of the 22nd of January, the 25th of June, the 6th of December, and the 6th (signed 7th) of December 1850, and the 18th (signed 21st), and the 19th (signed 20th) of February 1851, so far as complained of in the said original appeal, be, and the same are hereby, affirmed: And it is further ordered, that the appellants in the said original appeal do pay, or cause to be paid, to the said respondents therein, the costs incurred by them in respect of the said original appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, that unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby, remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary: And it is further ordered and adjudged, that the said cross appeal be, and is hereby, dismissed this House, and that the said interlocutor of the 19th (signed 20th) of February 1851, so far as complained of in the said cross appeal, be, and the same is hereby, affirmed.

Dodds and Greig, Solicitors, London; and John Whithehead, S.S.C., *Agents for Appellants.*— Richardson, Loch and MacLaurin, Solicitors, London; and Bell and M'Lean, W.S., *Agents for Respondents.*