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Tuesday, March 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MILLAR *v.* MARQUESS OF LANSDOWNE.

Property—Title—Competition of Titles—Crown Grant of Lands with Coals—Subsequent Crown Grant of Coals—Defect in Title—Prior Title—Prescription.

X in 1908 brought an action against Y for declarator that he had right to the coals under the lands of B. He founded on a Crown charter, dated 1647, to the lands of B with coals. Y founded on a Crown charter, dated 1663, to the coals within the lands of B. From 1647 onwards X and his authors had continuously possessed the estate. One of the links in X's title was a disposition, dated 13th November 1719, whereby the lands of B with coals were disponed to "W. D. and E. E., spouses, and to the longest liver of them two in conjunct fee and liferent for the liferent use of the said E. E., and to R. D. their eldest son, and the heirs-male to be lawfully procreat of his body, whom failzieing," to certain substitutes "in fee." In 1720 infeftment was taken upon that disposition by instrument of sasine in favour of W. D. and his wife and the longest liver of them two in conjunct fee and liferent for the wife's liferent use, and the said R. D., their eldest son, in fee. In 1789 R. D. resigned the lands for new infeftment, and obtained a Crown charter in favour of himself in liferent and his son in fee, upon which infeftment was duly taken.

Held (1) that the instrument of sasine of 1720 was defective in respect that R. D. was a substitute under the destination, and was not institute, but (2) that the said instrument of sasine and the writs between it and the Crown charter of 1789, although open to challenge at the time at the instance of anyone who had a title to raise the question, were sufficient to form a connecting link between the charter of 1789 and that of 1647, and that X's title, which was founded on the said Crown charter of 1647, was unchallengeable at the instance of Y, who founded on the Crown charter of 1663.

Property—Title—Crown Grant of Lands with Coals—Subsequent Crown Grant of Coals—Separata Tenementa—Grant a non domino—Possession.

X founded on a Crown charter, dated 1647, to the lands of B with coals. He and his authors had continuously possessed the estate since that date. Y founded on a Crown charter, dated 1663, to the coals within the lands of B. Neither Y nor his authors had ever possessed the coals.

Held that the Crown charter of 1663 was a charter *a non domino*, that the coals were not thereby created a *separatum tenementum*, and that accordingly it was not necessary for X to prove possession of the coals as a separate estate.

Dictum of the Lord President in *Cadell* v. *Allan*, March 17, 1905, 7 F. 606 (at 624), 42 S.L.R. 514, *explained.*

Property—Title—Competition of Titles—Conveyance of Lands Reserving Coal—Subsequent Conveyance without Reservation—Prescriptive Possession—Crown Grant of Coals subsequent thereto.

X's progress of title commenced with a charter granted in 1546 of the lands of L. with the coals. One of his authors obtained a charter in 1615 in which there was a reservation of coal. In 1621 a title was made up to the lands in which the reservation was omitted. Possession of the lands for the prescriptive period followed on that title. In 1663 Y's author obtained a Crown charter of resignation and novodamus to the coal in the lands of L.

Held that as forty years' possession on the title of 1621 was completed in 1661 X's author had acquired a right to the lands of L. *a cœlo usque ad centrum* before the charter was granted to Y's author in 1663.

Property—Title—Competition of Titles—Foreshore—Coal under Foreshore—Separata Tenementa—Averments of Prescriptive Possession—Proof.

X claimed the coal under the foreshore of B. He founded on a charter of 1647 to the lands of B with pertinents. The lands in fact abutted on the sea. Y founded on a charter of 1663 to the foreshore of B, and on a disposition of 1772 and instrument of sasine thereon to the coals within the foreshore of B. Both parties made averments of possession, but Y maintained that under his titles the coal belonged to him, there being no room for inquiry in respect that X's averments of possession were irrelevant, because he did not aver prescriptive possession of the foreshore prior to 1772, when there was separation of the coals and foreshore, nor possession of the coals for the past twenty years.

The Court *allowed* both parties proof of their respective averments of possession.

On 13th November 1908 R. H. Millar of Blaircastle, in the County of Fife, brought an action against the Marquess of Lansdowne for declarator "that the pursuer has the sole and exclusive right to the coals in and under the following lands of

which he is proprietor, videlicet:—(*First*) All and whole the lands of Blair and Pottisfollis (otherwise Possils), and pertinents thereof, including the foreshore *ex adverso* of the said lands; (*Second*) the town and lands of Langside, pendicles and pertinents thereof; (*Third*) All and whole that meadow called Bruce Meadow, lying between the lands of Blair and Possils on the south and lands of Langside on the north, and that acre of land called Breadie's Acre lying between the lands and meadow called Breadie's Meadow on the east, the said lands of Possils on the south and west, and the foresaid lands of Langside on the north parts, with the pertinents of the said lands; (*Fourth*) All and whole the lands of Bordie, with the pertinents of the same, including the foreshore *ex adverso* of the said lands; and (*Fifth*) All and whole the lands of Birkenhead, with the pertinents thereof, lying the whole of said lands within the Lordship of Culross, formerly in the Sheriffdom of Perth, and now in the County of Fife. . . ."

The defender pleaded—"(2) The pursuer's material averments, so far as denied by the defender, being unfounded in fact, the defender should be assoilzied. (3) The pursuer having no right by title or prescriptive possession to the coal in and under the lands and foreshore mentioned in the defender's first plea"—*i.e.*, the lands of Blair and Possils, the lands of Langside, and the foreshore *ex adverso* of the lands of Blair and Possils and the lands of Bordie—"the defender should be assoilzied from the conclusions applicable thereto. (4) The defender's title to the coal in and under the said lands and foreshore being prior to any title which the pursuer has produced and connected himself with, the defender is entitled to absolvitor. (5) The defender and his authors having possessed the coal in and under the said lands and foreshore for more than the prescriptive period in virtue of their titles, the defender should be assoilzied. (6) The coal in and under the said lands and foreshore having all along constituted a separate feudal estate vested in the defender and his authors, the defender should be assoilzied."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 24th June pronounced this interlocutor:—"Finds and declares in terms of the conclusions of the summons, except as regards the foreshore *ex adverso* of the lands of Blair and Possils first described in the summons, and the foreshore *ex adverso* of the lands of Bordie, fourth described in the summons, and decerns: Allows the parties a proof of their averments contained in the 7th and 8th articles of the condescendence and relative answers," *i.e.*, averments, &c., as to possession of the foreshore.

Opinion.—"The coals about which there is a dispute in this action are those lying under (1) the lands of Blair and Pottisfollis (otherwise Possils), in the county of Fife. The right to the coal under the foreshore *ex adverso* of these lands is also in controversy. This will be dealt with along with the foreshore of Bordie later on.

"The title upon which the pursuer, who is proprietor of Blaircastle, claims the coal under the lands of Blair and Possils, is a Crown Charter of Novodamus, dated 11th May 1647, in favour of John Spence and Janet Kirkwood, his spouse. It is conceded by the defender the Marquess of Lansdowne that if the progress of titles connecting the pursuer with this charter is complete the title is unassailable and gives the pursuer the right he claims. The case has been argued on the footing that no distinction is to be drawn between the lands of Blair and Possils. By the dispositive clause of this charter the lands of Blair, with coals, coal-heughs, and pertinents, are conveyed, and the lands of Pottisfollis with the pertinents. The tenendas clause specifies the lands of Blair and Pottisfollis, with their pertinents, coals, and coal-heughs. The defender's title is a Crown Charter of Resignation and Novodamus under the Great Seal, dated 3rd June 1663, and sealed 1665, of the lands of Blair (which is taken to include Possils), and the coals and coal-heughs. Earlier titles are produced by each side, but it is admitted that neither can go further back in a continuous progress than the charters above mentioned. The purpose for which the pursuer referred to his earlier titles was to show that the coal then went with the lands and was not a separate estate.

"The defender's case is that there are two blots in the pursuer's progress of titles connecting him with the charter of 1647, and that if he succeeds in showing this he compels the pursuer to found on titles posterior in date to the express title to coal given him by his charter of 1663. The first blot mentioned on record is a misnomer in an instrument of sasine dated 15th February 1720. This point was not insisted in. The next is that this instrument of sasine purports to infeft Richard Dundas as institute under the disposition upon which it follows, whereas he was only a substitute, and required to serve as heir under the destination, which he failed to do, and that thus the title was not taken up. This point involves a consideration of the terms of the disposition by Sir Donald Macdonald, dated 13th November 1719, of the lands of Blair and others (including Possils). The consideration is stated to be twenty thousand merks paid by William Dundas of Airth and Elizabeth Elphinstone (Lady Airth, his spouse), for themselves and in name and behalf of their heirs after mentioned. It appears from a later deed that the money was provided entirely by the wife. The disposition is in favour of William Dundas and Elizabeth Elphinstone, 'spouses, and to the longest liver of them two, in conjunct fee and liferent for the liferent use of the said Elizabeth Elphinstone, and to Richard Dundas, their eldest son, and the heirs-male lawfully to be procreat of his body, which failzieing . . . in fee.' It may be taken that after the decision in *Forrest* v. *Forrest and Others*, 1 M. 806, this destination would import a fee in the father. This was conceded by the pursuer's counsel. It seems

certain that the disposition was not so construed in 1726, because there is in that year a disposition by William Dundas of his liferent interest in the lands of Blair and Possils in favour of Richard Dundas, his son. It is impossible to believe that this conveyance would have been granted if it had been intended by the disposition of 1719 to vest the fee in the father. The notary who expede the instrument of sasine in 1720 evidently regarded Richard as the institute. It bears to be in favour of the spouses 'and longest liver of them two, in conjunct fee and liferent for the said Elizabeth Elphinstone, her liferent use, and the said Richard Dundas, their eldest son, in fee.' The limitation of the wife's interest to a liferent was probably due to the fact that but for this the fee might have been supposed to be in her, as she provided the price of the lands. How much justification there was for the view that the fee was in Richard is to be found from an examination of the case of *Forrest*. From this it appears that Professor More in his notes to Stair took what must, subsequent to the decision in the case of *Forrest*, be considered the erroneous view, and was considered to have led subsequent text writers, and therefore presumably the profession wrong by misinterpreting the decision in the case of *Boyd* v. *Boyd*, 28th June, 1774, M. 3070. A consideration of the whole disposition in the present case shows that there are clauses which go to indicate that the fee was in Richard, *e.g.*, the power to the spouses and the longest liver to burden the lands with provisions to younger children and the declaration that the spouses are to have the full liferent. If any question had arisen between the father and son in 1726 it is difficult to suppose that the Court would not have held that the fee was in the son. Now that the years of prescription have run, as they have on the Crown Charter of Resignation of 1789, I am of opinion it is too late to take the objection. Further, there is authority for the view that the infeftment of the son along with his father is good—*Laird of Lammington*, M. 4252; *Riddels* v. *Scot*, M. 4203.

"Supposing, however, that there is a break in the progress of titles, the question arises as to the right of the defender to found upon this alleged defect in the pursuer's progress. He cannot connect with the estate which descended from 1647, and was according to his argument left *in hæreditate jacente* of William Dundas. The pursuer could take up that estate. The defender could not. The defender says that the coal was created a separate tenement by a Crown Charter of Resignation in favour of James Erskine in 1772, and that if he is right on the point now under consideration the pursuer must found on the Crown Charter of Resignation in favour of Richard Dundas and Robert Bruce Dundas, dated 6th August 1789, a title posterior in date to his charter of 1663. The fallacy here appears to me to be this. If the coal was given out by the charter of 1647, as *ex hypothesi* of the defender's argument it was, the subsequent grant in 1663 must have been *a non domino*. The coal could not be made a separate tenement because some-one not the owner granted a conveyance of it. I am of opinion that the defender has no right to found on this alleged flaw.

"The next alleged defect is this. It is stated that 'the superiority and property of the said lands were split by James Baird and Margaret Anderson taking infeftment by instrument of sasine dated 20th, and recorded in the General Register of Sasines 24th January 1702, on a disposition in their favour dated 3rd January 1702 by John Corss, who was then base infeft in the lands and unentered, and by their subsequently expeding an instrument of resignation on the procuratory contained in a prior disposition, dated 14th May 1683, by John Spens, in favour of his son John Spens, obtaining a charter of resignation thereon and expeding an instrument of sasine, dated 1st February and recorded in the General Register of Sasines 8th March 1703, on the precept of sasine contained in the said charter of resignation.'

"This is the typical case of a split, the result being that James Baird held the property and superiority under separate titles. In 1705 he granted a conveyance in favour of Francis Stuart. This was a conveyance of what undoubtedly belonged to James Baird, and the warrandice would cover any right vested in him. The defect is one purely of conveyancing. If the property was conveyed the split is immaterial, because the disponer was in possession of the lands. At that date there had not, even on the defender's argument, been any separation of lands and minerals. The title given to Francis Stuart was sufficient to carry the coal. If the superiority is held to have been conveyed, then prescriptive possession has fortified the title, and no one is claiming through James Baird. The observations already made as to the position of the defender in objecting to the pursuer's title apply here also.

"I am accordingly of opinion that the pursuer is entitled to found on the charter of 1647, and that under it he is entitled to decree as regards the lands of Blair and Possils.

"(2) The town and lands of Langside. The title under which the defender claims these coals is the charter of 1663 already referred to.

"The early titles in the pursuer's progress, commencing with a charter in 1546 by the Commendator and Convent of Culross, include coals and coal-heughs in the tenendas clause. On 22nd May 1615 Sir George Bruce of Carnock obtained a charter from John Erskine of Sauchy of the lands of Langside, with coals, coal-heughs, and pertinents. On 11th October of the same year, by a charter of alienation following on a contract of sale, Sir George Bruce conveyed to John Sands of Overtoun and Katherine Bennet, his spouse, the town and lands of Langside, with pertinents, but neither in the dispositive nor in the tenendas clause is there any mention of coals. No doubt the conveyance of the lands is

sufficient by itself to carry everything *a cœlo usque ad centrum*, and would in the absence of reservation carry the coal. There is, however, a clause of reservation expressed in the following terms (as translated)—'Provided, however, that this present alienation and disposition of the said lands of Langside, with their pertinents, shall not prejudice or be a prejudice to me and my heirs of any anterior right and title which I have to the coals within the bounds of the said lands of Langside, with the passages and others pertaining to the coal-pits, paying the damage of the lands.' The defender says this is a good reservation of the coal. The pursuer says it is not intelligible. In my opinion the defender is right. I think the anterior right and title referred to is the charter from John Erskine of 1615. It is significant that though that grant specifies coals and coalheughs, no mention is made in the dispositive clause of the charter of alienation of these or in the tenendas. The intention of Sir George Bruce plainly was to keep and work these coals himself. The last words of the clause above quoted, 'paying the damage of the lands,' show this. The reservation appears (I was informed) in the sasine following on the charter.

"I do not lose sight of the point referred to by the defender's counsel that they have reason to believe, if the intervening links could be produced, the defender could connect with this reserved right. This, however, was introduced more in order to strengthen the equity of the defender's claim than as affecting the legal question. The reservation, however, disappears in the sasine of 1621 in favour of John Sands, son and heir of the late John Sands of Overtoun, and the lands have been possessed on titles unaffected by the reservation ever since. The title of 1621 seems to me good as without any prescriptive possession as against the defender's title of 1663. If the defender could have connected with the right to coal which Sir George Bruce reserved in 1615, the case would have been different. The observations of the Lord President in *Allan* v. *Cadell*, 7 F. 606, would have applied. The pursuer would then have had to prove prescriptive possession, and that not of the lands, but of the coal, because the coal having been made a separate tenement the adverse possession would have had to be of that separate estate. The defender, however, cannot so connect.

"The pursuer's title to the lands, which is sufficient to carry the coal, is earlier in date than the title the defender founds on. There is no separation of the title to coal from the title to lands prior in date to the pursuer's sasine of 1621. The defender does not relevantly aver possession, because the possession averred is outwith the period of prescription. It appears to me the pursuer's express title must prevail, as the defender's later title has not been converted into a good one by possession. Even assuming the pursuer required to show prescriptive possession were necessary on the sasine of 1621, this was complete by 1661—which is before 1663, the earliest title of the defender. Possession of the lands in this case would be enough. That would include the coal, which had not then been made a separate tenement.

"The pursuer is, in my opinion, entitled to decree as regards the lands of Langside, in terms of the second conclusion.

"(3) Bruce Meadow and Breadie's Acre. This is admitted.

"(4) The lands of Bordie. This is admitted. The foreshore is in dispute, and is dealt with afterwards.

"(5) The lands of Birkenhead. This is admitted.

"(7) The foreshore *ex adverso* Blair and Possils and Bordie. It is denied that Bordie, which the pursuer holds under a title granted by the Abbey of Culross in 1546, has a foreshore, and it will have to be proved that it has. The pursuer founds on the charter of 1647 as regards the foreshore of Blair and Possils, and what I have already said in regard to the lands of Blair and Possils as to the progress of titles applies to the foreshore also. Subject to that, the position of Blair, Possils, and Bordie is the same. They are said to abut on the sea. There is no sea boundary. The pursuer asks a proof of the averments in cond. 7 and 8. The defender admits he is entitled to a proof of the averments in cond. 8, as regards working the coal, but denies that a right to coal under the foreshore can be established by proving the averments in cond. 7, which relate to acts of possession of the surface only. The fallacy in this argument appears to me to be based on a misreading of what was decided in *Cadell's* case. In the present case the earliest express grant to the coal under the foreshore is in 1772 (there was an express grant of the foreshore in the charter of 1663), long after the charter of 1647, which is a habile title on which possession of the foreshore may follow. If the foreshore has been possessed by the pursuer for the prescriptive period on that title of 1647, then the grant being *a cœlo ad centrum* the whole estate will be carried. It would be different if a separate estate in coal had been created by a prior express grant; this is the point in *Cadell's* case; the right so created could only be defeated by adverse possession of the same estate, viz., coal, not by possession of another estate, viz. the surface. Where, however, the express grant of the coal is not before but after a grant of the lands in terms which may include the foreshore, without reservation of the coal, there is nothing to prevent the prior grantee establishing by possession of the lands his right to the coal also.

"Both parties are here competing for the coal under the foreshore, and in my opinion the only course is to allow a proof of the possession averred in cond. 7 and 8 and relative answers."

The defender reclaimed, and argued—(*Lands of Blair*)—Under the disposition of 1719 the fee was in William Dundas. The disposition gave no warrant for the infeftment of Richard Dundas in fee—*Forrest* v.

Forrest, 1863, 1 Macph. 806, *per* Lord Justice-Clerk Inglis at 810, explaining *Boyd* v. *Boyd*, 1774, M. 3070, and disapproving More's notes to Stair, p. clxxvi; *Livingstone* v. *Lord Napier*, 1757, M. 15,409; *Wilson* v. *Glen*, December 14, 1819, F.C., 3 Ross, L.C. 716; *Chancellor* v. *Mosman*, July 19, 1872, 10 Macph. 995, 9 S.L.R. 646. They were therefore able to show what the understanding of the profession was on this matter in the 18th Century. The Lord Ordinary was in error in holding that *Forrest* v. *Forrest* (*sup. cit.*) settled for the first time that such a destination would import a fee in the father. At the same time it was irrelevant to consider what was the understanding of the profession on this matter in 1719. The document was tendered for judicial construction now. The construction of a destination was not a question of intention. A heritable destination of this type had always been treated as involving perfectly definite results. The actings of the parties were irrelevant. Richard Dundas was a substitute, and would therefore have required to serve in special to his father—*Ballantyne* v. *Ballantyne*, 1734, 1 Elchies *voce* Deathbed; *Livingstone* v. *Lord Napier* (*sup. cit.*); *Wilson* v. *Glen* (*sup. cit.*). Bankton, ii, 3, 116, and *Lammington* v. *Moor*, 1675, M. 4252, were inconsistent with the later authorities. Richard Dundas never having served, the estate, both land and minerals, still remained *in hæreditate jacente* of William Dundas, though in 1874 a personal right vested in William Dundas' heir to have himself served heir. The instrument of sasine was inept so far as it gave the fee to Richard Dundas, as the effect of it was to give sasine simultaneously to two persons. The chain of the pursuer's title was thus broken, so that he could not found on the title of 1647. He had to start afresh in 1789 with a Crown Charter of Confirmation. But that was a younger title than the defender's charter of 1663 to the coals. The pursuer had possessed the surface for the prescriptive period, but the defender was entitled to the coals unless the pursuer could show that he had had prescriptive possession thereof, because in 1719, when prescription must begin to run, the pursuer had to prescribe against the defender's title of 1663, which was an express title to the coal as a separate subject. In order to prescribe a right to the coals the pursuer must possess the coals and not merely the surface—*Cadell* v. *Allan*, March 17, 1905, 7 F. 606, 42 S.L.R. 514; *Forbes* v. *Livingstone*, November 29, 1827, 6 S. 167. It was not the law that the coals and the surface could be separate tenements only when it was shown that they had been separated by the act of a person who was *dominus* of both. It was enough that there were two competing titles, one of which was a title to the coals as a separate subject. It was not necessary to show how the separation was brought about. Moreover, the defender was founding on a Crown Charter, and the Crown could always give a charter which was good unless another party could produce an earlier Crown Charter—*Cadell* v. *Allan* (*sup. cit.*), Lord President at p. 624. (*Langside*)—The coals were reserved in the charter of 1615. It was true that the reservation did not appear in the title of 1621. But there had been a separation of the coals and surface in 1615. When there was separation there were two separate estates in law, and possession referable to one estate could not be referred to another —*Cadell* v. *Allan* (*sup. cit*). The pursuer's possession of the surface for forty years after 1621 was therefore not enough to oust the defender, who got an express Crown grant to the coals in 1663. It was necessary for the pursuer to prove prescriptive possession of the minerals. He had not even averred that. (*Blair Foreshore*)—The pursuer had no express title to the foreshore, though the title of 1647 was habile to operate prescription. In 1663 the defender's author got an express title to the foreshore. In 1772 the coals and the surface became separate tenements, and after that date possession of the surface would not give a prescriptive right to the coals. The defender's title was only sixteen years after the pursuer's, and therefore came into being long before prescription could have followed on the pursuer's title of 1647. The pursuer's averments of possession were irrelevant. The only things that would avail him would be possession of the foreshore for the prescriptive period prior to 1772, when the separation of the tenements took place, or possession of the coals for the prescriptive period, *i.e.*, the last twenty years. All that he was attempting to prove was the usual use of the foreshore for the past twenty years. (*Bordie Foreshore*)—Bordie did not abut on the sea, and the pursuer had no title habile to operate prescription. In any event, the same argument applied to Bordie foreshore as to the foreshore of Blair.

Argued for pursuer (respondent)—(*Blair*) —In construing a destination to husband and wife in conjunct fee and liferent the question of intention had to be considered. Here it was certain from what the parties did that they intended that Richard Dundas should be fiar. If the question had been canvassed in Court at the date of the disposition, there could be little doubt that the fee would have been held to be in the son—Erskine, iii, 8, 35, 36; *Paterson* v. *Balfour*, 1780, M. 4212; *Miles* v. *Calman*, February 12, 1857, 19 D. 408; *Boyd* v. *Boyd* (*sup. cit.*); *Forrest* v. *Forrest* (*sup. cit.*), *per* Lord Benholme (in this case the Court was dealing with moveable and not heritable estate); More's Notes to Stair, p. clxxvi; Bell's Lectures, p. 833. If Richard Dundas were fiar, then there was no defect whatever in the title. Further, there was authority for the view that the infeftment of the son along with his father was good—*Laird of Lammington* v. *Moor* (*sup. cit.*); *Riddels* v. *Scot*, 1747, M. 4203. Even although there was this defect in the pursuer's progress of titles, the defender could not found upon it. It was alleged that the estate had never been taken out of the *hæreditas jacens* of William Dundas. If so the only person who could take it out

was William Dundas' heir. The defect had been cured by prescription on the charter of 1779. The surface and the coals had not been made *separata tenementa* by the charter of 1663. The Crown had parted with the land and coals in 1647, and the charter of 1663 was therefore *a non domino*. There never was severance of coals and surface by anyone who had right to do so. It was no doubt true that if the coals and surface had been made into separate tenements by some one who was *dominus* of both the pursuer could not have prescribed a right to the coals merely by possessing the surface—*Forbes* v. *Livingston* (*sup. cit.*); *Cadell* v. *Allan* (*sup. cit.*). If the Crown divested itself of an estate, it could not make a subsequent grant of it any more than a subject could. The Lord President did not say in *Cadell* v. *Allan* (*sup. cit.*) that the Crown could give grants of what it had already given away. He was referring to the eminent estate in land which, according to feudal theory, was in the Crown, and entitled it to deal again with lands which were in nobody's hands. The defender must show an absolute gap in the titles that connected the pursuer with the Crown charter of 1647. Unless the estate had reverted to the Crown subsequent to that date the Crown could not make a grant of it or any part of it. It was not enough for the defender to be able to point to a defective unit in the progress of titles. (*Langside*)—There was no reservation of the coals in the charter of 1615. But even if there were, the reservation had dropped out of the pursuer's title of 1621. Prescriptive possession for forty years followed on that title. The pursuer's author had thus acquired right to the coals before the date of the defender's charter in 1663. (*Blair Foreshore*)—The pursuer's charter of 1647 was one upon which a right to the foreshore might be acquired by possession. It was averred that it had been so acquired. The granting of the defender's charter in 1663 was not an act of possession on the part of the Crown which would interrupt prescription. The pursuer's possession of the surface for the past twenty years was conclusive in that it explained the title of 1647 as including the foreshore. If that were so, the charter of 1663 proceeded *a non domino*, and the coals were not thereby made a separate tenement. Accordingly possession of the surface of the foreshore enabled the pursuer to prescribe a right to the coals. In any event, the pursuer averred that he had possession for the prescriptive period. (*Bordie Foreshore*)—The pursuer averred that Bordie abutted on the sea. If that were so he had a title habile to operate prescription. The argument applicable to the foreshore of Blair applied to the foreshore of Bordie.

At advising—

Lord Low—The questions in dispute in this case relate to the right to the coal in certain lands in the county of Fife and in the foreshore *ex adverso* of these lands, which are situated upon the Firth of Forth.

There are, in the first place, the lands of Blair and Possil. In regard to the coal in these lands the pursuer founds upon a Crown charter of confirmation and novodamus dated 11th May 1647. By that charter the pursuer's predecessors are given right to the lands of Blair with "coals, coal heughs, and pertinents of the same," and to the lands of "Potispoillis with the pertinents." In the tenendas clause the subjects are described as the lands of Blair and Potispoillis "with coal, coal heughs, ... and their lawful pertinents whatsoever, as well not named as named, as well under the earth as above the earth."

The defender, on the other hand, founds upon a Crown charter of resignation and novodamus dated 3rd June 1663, of "All and sundry the coals and coal heughs within the bounds and ground of the lands of '(*inter alia*)' Blair." There is no mention of the lands of Possils in this charter, but it is conceded that it is impossible to distinguish between Blair and Possils.

It is also conceded by the defender that if the pursuer is able to connect himself by an unimpeachable series of titles with the charter of 1647, his right to the coal in the lands of Blair would be established, but the defender's case is that certain steps in the progress of the titles upon which the pursuer relies are essentially defective, and that although these defects may ultimately have been cured, that did not take place until long after the charter of 1663, which must therefore be regarded as the prior title.

The main alleged blot in the pursuer's title occurred in 1720, when an instrument of sasine was expede in favour of one Richard Dundas in fee, for which it is contended that there was no warrant. The circumstances were these—By disposition dated 13th November 1719 Sir Donald MacDonald disponed the lands of Blair, with coal and coal heughs, to "William Dundas and Elizabeth Elphinstoun, spouses, and to the longest liver of them two in conjunct fee and liferent for the liferent use of the said Elizabeth Elphinstoun, and to Richard Dundas their eldest son, and the heirsmale to be lawfully procreat of his body, whom failzieing" to certain other substitutes "in fee." In January 1720 infeftment was taken upon that disposition by instrument of sasine in favour of William Dundas and his wife and the longest liver of them two in conjunct fee and liferent for the wife's liferent use, and the said Richard Dundas their eldest son in fee.

The defender's contention is that under the destination in the disposition William Dundas, the father, was the fiar, and that Richard Dundas, was only a substitute; that accordingly there was no warrant for infefting Richard in the fee; and that the result was that the estate remained *in hæreditate jacente* of William Dundas.

Now I agree with the Lord Ordinary to

this extent, that I think it is hardly doubtful that the parties intended that William Dundas as well as his wife should only be a liferenter, and that the fee should be in Richard Dundas. In my view, however, they failed to give effect to that intention. I do not think it is possible to read the destination in the disposition as limiting William Dundas's interest to a liferent and giving the immediate fee to Richard. I think that William was the fiar and Richard only a substitute, and that therefore the criticisms of the defender upon the sasine of 1720 are well founded. What happened after that sasine was taken was this:—In 1726 William Dundas disponed his life interest in the estate to Richard Dundas. That disposition obviously proceeded upon the assumption that Richard Dundas was infeft in the fee of the estate, and was intended to disburden the fee of his father's liferent. Passing over a Crown charter of confirmation which Richard Dundas obtained in 1730, and which does not seem to have any bearing on the present question, we come to the year 1789, when Richard Dundas resigned the lands for new infeftment and obtained a Crown charter of resignation in favour of himself in liferent and his son Robert Bruce Dundas in fee, upon which infeftment was duly taken. The subsequent progress of titles is not in any way impugned, and it is admitted that the pursuer has validly connected himself with the charter of 1789. The defender, however, contends that from the date of the sasine of 1720 until the charter of 1789 the pursuer's predecessors had no title to the estate at all, and that a gap was thereby made in their title which cannot be bridged over, and which makes it impossible for the pursuer to connect himself with the charter of 1647. The result, the defender argues, is that the earliest title upon which the pursuer can found is the charter of 1789; and that accordingly the charter of 1663 conveying the coal in Blair to the defender's authors is the prior title and must prevail.

Now, in the first place, it is to be observed that it was not until long after the charter of 1663 that the defective sasine upon which the defender founds was expede. When the charter of 1663 was granted the pursuer's predecessors held the estate disponed by the charter of 1647 upon unimpeachable titles, and were in possession of the estate. The charter of 1663 therefore at the time carried nothing whatever to the grantees, and neither they nor their successors ever possessed the coal which the charter purported to dispone. If they had possessed the coal a very different position of matters would have arisen. But they never had any possession, while on the contrary there has been continuous and uninterrupted possession of the whole estate by the pursuer and his authors from 1647 until the present day. Further, so far as appears from the progress set forth in the joint minute, the only persons who had the right to take the estate out of the *hæreditas* of William Dundas were the actual possessors of the estate, namely, Richard Dundas, and after him his son Robert Bruce Dundas, and if they had become aware of the defect in the title they could have made up a valid title. Finally, the old defect in the title has long ago been cured, and the pursuer's right cannot now be challenged by anyone unless it be by the defender.

The defender's case rests entirely upon the fact that the charter of 1663 was a Crown charter. If it had proceeded from a subject superior it is admitted that it would have been worthless unless it had been followed by possession for the prescriptive period. But it was argued that it cannot be pleaded against the Crown that the grant proceeded *a non domino*, and a *dictum* of the present Lord President in *Cadell* v. *Allan*, 7 F. 606, was quoted to the effect that "there is always enough left in the Crown to give a good title." Now I do not read that *dictum* as being more than a short way of stating what was the fundamental principle of the feudal system, namely, that all lands either belonged to the sovereign or were held of him as superior. Therefore the Crown was the source from which all feudal rights flowed, and a Crown grant—coming directly from the source—could not be said to proceed *a non domino*, at all events to the same extent and effect as that in which the plea is maintainable against a subject superior.

The argument which the defender founded upon that doctrine was that the charter of 1663, although it gave the grantee no claim to the coal at the time, put him in a position to take advantage of any blot which might thereafter arise in the pursuer's title, and that such a blot arose when Richard Dundas came to possess the estate upon the inept sasine. Now in a question of this kind I do not think that a defective title—one, I mean, which is badly made up according to the rules of feudal conveyancing and which is therefore open to challenge—is the same thing as no title at all. If after 1663 the estate had become what one might call a derelict estate, that is to say, if there had been a hiatus in the pursuer's title, a period during which there was no title at all, and no connecting link of any sort between the writs on the one side of the gap and those on the other, the case presented by the defender would have been very much stronger. But that is not the case which actually occurred. There is no actual hiatus in the pursuer's title, but, on the contrary, there is a continuous and uninterrupted progress of titles from 1647 down to the present day, and I do not think that the fact that a scrutiny of the writs shows that for a time the title was badly made up justifies the wiping out of the defective writs altogether so as to put matters in the same position as if for the period during which there was a defect in the title there had been no title at all. That is especially the case where, as here, there was no interruption in the possession of the estate, and where, so far as appears, the possessors were in right of the estate, so that they and no one else could have made up a valid title if they had become

aware of the defect. It therefore seems to me that the sasine of 1720 and the writs between that date and the charter of 1789, although defective and open to challenge at the time by anyone who had a title to raise the question, are sufficient to form a connecting link between the charter of 1789 and that of 1647, because, taking the titles as they stand, there can be no doubt that the estate which the pursuer now holds is that which was granted by the Crown charter of 1647, and that from that date the pursuer's authors have continuously and uninterruptedly had right to and possessed the estate.

Further, I think that it is clear that if the defender can now claim the coal on the ground that for a certain period the pursuer's title was bad, he could have done so during that period. It seems to me, however, that he could not have done so, because, so far as appears, the persons in possession of the estate during the period when the title was defective were in a position to cure the defect by taking the estate out of the *hæreditas jacens* of William Dundas. Suppose that when William Dundas died, the defender had claimed the coal from Richard Dundas, the latter could at once have put the title right by serving as heir of provision to his father, and it seems to me to be out of the question to suggest that he would not have been allowed an opportunity to do so, but that the Court would at once have given decree finding that the coal belonged to the defender. But if that view be sound, how can the defender be in a better position now when the pursuer has possessed the estate for greatly more than the prescriptive period upon what is admittedly a sufficient title, namely, the charter of 1789? The defender's answer is that the pursuer has only possessed the surface, and that that possession does not avail him, because by the charter of 1663 the coal was made a *separatum tenementum* of which the pursuer has never had possession. That argument assumes that the pursuer cannot go further back than the charter of 1789. Even upon that assumption, however, I am of opinion that the argument is not well founded. I do not think that the coal was made a *separatum tenementum* by the charter of 1663. In order to make the surface and the subjacent minerals separate estates they must be separated by a person who is owner of the whole estate, both surface and minerals. For example, he may dispone the lands reserving the minerals, or he may dispone the surface to one person and the minerals to another. The defender endeavours to make a case of that kind by reverting to the doctrine which I have already mentioned, of the power of the Crown to give a good title. He argued that the Crown could have given a good title to the whole estate, and that having made a grant of the coal only, the Crown must be regarded as having retained the surface and created a separate estate in the coal. Whatever may be the value of that argument theoretically, it does not square with the fact. There is the evidence of the public records to show what the fact was, namely, that in 1647 the Crown had given out the whole estate of Blair—lands and coal—and that in 1663 the grantee of 1647 was in possession of the estate under unimpeachable titles. What really happened in 1663, therefore, was that the defender obtained from the Crown (for what it was worth) a grant of part of an estate which the Crown had already given out and in which the grantee was duly infeft. In these circumstances no separate estate in the coal was in my opinion created to the effect of rendering it necessary for the pursuer in order that he might have right to the coal, to work it, and so possess it as a separate estate. The charter of 1789 disponed the whole estate without reservation or exception, and the possession which has been had upon that charter has in my opinion rendered the pursuer's right unchallengeable by the defender as by everyone else. Suppose that the charter of 1663, instead of conveying only the coal, had conveyed the whole estate in the precise terms of the charter of 1647, the defender would have obtained exactly the same right to the whole estate as he now claims to the coal; but it is plain that if the grant had in fact been to the whole estate, the possession which the pursuer has had on the charter of 1789 would have entirely excluded the defender. It would be very strange if the fact that the defender obtained a grant to only part of the estate should give him a better right than if the grant had been to the whole estate. It seems to me that to sustain the defender's contention would be inconsistent with the security to land rights which possession for the prescriptive period upon a sufficient title affords.

There is another alleged blot in the pursuer's title to Blair which is founded on in the record and is dealt with by the Lord Ordinary. It appears that early in the eighteenth century the *dominium utile* and the mid-superiority of the estate came to be held upon separate titles, and that the subsequent transmissions of the estate were upon the superiority title alone. I am not sure if that circumstance is now founded upon, because I think that I am right in saying that senior counsel did not mention the point. But however that may be, I am clearly of opinion with the Lord Ordinary that the objection is not well founded, because possession for the prescriptive period upon the superiority title had the effect of extinguishing the base right.

I am therefore of opinion that the defender has failed to establish his claim to the coal in Blair and Possils.

The next question relates to the coal in the lands of Langside. Here again the defender founds upon the charter of 1663, which disponed all and whole the coal and coal-heughs in Langside. The pursuer's title, on the other hand, commences with a charter by the Commendator of the Abbey of Culross, granted in 1546, of the lands of Langside with the coals and coal-heughs, The alleged defect in the pur-

suer's title, upon which the defender founds, arises upon the terms of a charter of the town and lands of Langside granted in 1615 by Sir George Bruce of Carnock in favour of John Sands of Overtoun and Katherine Barnett, his spouse. The charter contains a clause in the following terms—"Provided, however, that this present alienation and disposition of the said lands of Langside, with their pertinents, shall not prejudice or be a prejudice to me or my heirs of any anterior right and title which I have to the coals within the bounds of the said lands of Langside with the passages and others pertaining to the coal-pits, paying the damage of the lands."

The first question is whether that is an effectual reservation of the coal in the town and lands of Langside? The language used is not very clear, but I cannot read it as meaning anything else. So far, therefore, I am with the defender. In my opinion, however, he cannot take any benefit from the reservation, and for this simple reason. In 1621 a title was made up to the lands of Langside in which the reservation was omitted, and it is plain that forty years' possession upon that title was sufficient to wipe out the reservation altogether, and give the possessor a right to the lands *a cœlo usque ad centrum*. But forty years' possession was completed in 1661, and therefore when the defender's charter was granted in 1663 the pursuer's predecessor had an absolute right to the lands of Langside, including the coal.

There remains the question as to the right to the coal in the foreshore of Blair, and also in the foreshore of certain lands called Bordie.

As regards the foreshore of Blair, the title upon which the pursuer relies is the charter of 1647. That charter contains no express grant of the foreshore, nor is there a sea boundary, but the lands are in fact situated upon the sea, and they are conveyed with pertinents. The charter, therefore, is one upon which a right to the foreshore might be acquired by possession.

The defender, on the other hand, founds upon an express grant of the foreshore and of the coal under the foreshore. The charter of 1663 includes "all and whole the lands within the shore of the sea" *ex adverso* of Blair, and by a charter dated in 1772 there were disponed "the coals, great and small, within the bounds of the town and lands of . . . . Blair . . . . and within the seashore as well within the sea as without the same, opposite the said town and lands."

The defender contends that in these circumstances the foreshore, with the coal, belongs to him, and that there is no room for inquiry. The argument was to the following effect:—It is not averred that the pursuer possessed the foreshore between 1647 and 1663, and even if he had done so it would not have availed him, because the period was less than forty years. No doubt possession of the foreshore for forty years might have interpreted the charter of 1647 as including the foreshore, but unless and until such possession was had the charter did not include the foreshore, and there was nothing to prevent the grant of foreshore in 1663 being effectual. Indeed, that grant proved that the foreshore had not been given out in 1647.

I recognise the force of that argument, but I am not sure that if after 1663 the pursuer possessed the foreshore for the prescriptive period, the defender standing by and taking no objection, the former would not thereby establish his title to the foreshore to the exclusion of the defender. It was argued, however, that the express grant of the coal in the foreshore to the defender in 1772 rendered that coal a separate estate, and that therefore it was necessary for the pursuer to prove possession of the coal as well as of the surface of the foreshore. It seems to me that there was no creation of a separate estate in the coal of the foreshore of Blair any more than there was of the coal in the lands, and as at present advised I think that if the pursuer has had exclusive possession of the surface of the foreshore for the requisite period, that would give him right also to the subjacent coal. I do not, however, think that it is desirable to decide anything in regard to the coal under the foreshore of Blair at this stage, because both parties aver that they have actually possessed that coal, and it seems to me that the proper course is in the first place to ascertain what the facts are.

There is also a question as to the right to the coal in the foreshore of certain lands called Bordie. It is admitted that the coal in these lands belongs to the pursuer, but the defender claims the coal in the foreshore. The question upon the titles is very similar to that in regard to the foreshore of Blair, but it is unnecessary to go into that at present, because the defender avers that the lands of Bordie do not extend to the seashore, and that accordingly there is no foreshore of these lands. If that should be established, there would be an end of the question, and accordingly I think that in regard to the foreshore of Bordie also a proof must be allowed.

LORD ARDWALL—I have had an opportunity of perusing the opinion just delivered by Lord Low as well as going carefully over the various points therein dealt with in consultation, and I concur entirely in that opinion.

I desire, however, to reserve my opinion as to whether the defective sasine of 1720 might not in the circumstances be held to have been validated by prescription apart from the Crown charter of 1789. I am, content, however, to rest the decision of the case on the prescription that has run on the charter and sasine of 1789 as explained in Lord Low's opinion.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Low and have nothing to add.

LORD DUNDAS was absent.

The Court adhered.

Counsel for Pursuer—Blackburn, K.C.—Chree. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defender—Clyde, K.C.—Fleming, K.C. — Macmillan. Agents—Dundas & Wilson, C.S.

HOUSE OF LORDS.

Wednesday, April 6.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, and Lord Shaw of Dunfermline.)

GLASGOW NAVIGATION COMPANY, LIMITED *v.* IRON ORE COMPANY, LIMITED.

(*Ante* July 20, 1909, 46 S.L.R. 908, and 1909 S.C. 1414.)

Process—Hypothetical Case—Competency—Appeal to House of Lords—Waiver by Parties of Clause in Contract upon which Action Raised.

Prior to raising an action to recover a certain sum as demurrage the solicitors for the parties, the shipowners and the charterers, agreed that a clause in the charter-party—"It is agreed that all liability of the charterers shall cease as soon as the cargo is shipped, notwithstanding that it may have been sold at a price to cover cost, freight, and insurance, in consideration of the vessel having a lien upon same for all unpaid freight, dead freight, and demurrage which she is hereby bound to exercise"—should be waived. The action proceeded on this footing, and was appealed to the House of Lords.

Their Lordships, on the ground that parties had concurred in asking for an order upon the footing that they were bound by a contract different from the contract by which they were actually bound, *dismissed* the action with expenses to neither party.

This case is reported *ante ut supra.*

The pursuers, the Glasgow Navigation Company, Limited, appealed to the House of Lords.

Their Lordships drew attention to the cessor clause in the charter-party quoted *supra* in rubric, which the parties, as appeared from the correspondence, had agreed to waive if the action was brought in the Sheriff Court, and asked for an explanation of such waiver.

Counsel for the pursuers (Mr BAILHACHE) stated—Before the action was begun the shipowner for whom I appear was not in a position to know who was liable for this demurrage. The bill of lading was sent, as your Lordships will see by the letter from Messrs Kinghorn & Company, who were the agents of the defenders in this case, the charterers, to Messrs Hamilton & Son, who were the agents both for the ship and for the Dalmellington Company, but we did not know whether the bill of lading had been endorsed over to or handed over to the Dalmellington Company, so that the Dalmellington Company took delivery under the bill of lading and were the holders of the bill of lading. Whether that was the position or not depended entirely upon the contract for the sale of this ore. At that time we were not in a position to call for the contract of course. We could not ask for the contract until this litigation began and we got discovery. Under those circumstances we communicated with the charterers and said—"There is a cessor clause in your charter-party. We do not know whether you are the owners of the cargo and the holders of the bill of lading, or whether the Dalmellington Company are the holders of the bill of lading. Will you undertake the obligations for demurrage although there is a cessor clause in the charter-party?" The charterers at once said they would, and attached the condition to it that the proceedings should take place in Scotland. Now when we came to see the contract (and it is necessary I should refer your Lordships to it) we found there was nothing at all in this waiver point, that the charterers remained liable because the contract is for delivery "free on rail Ayr." Under a contract for delivery "free on rail Ayr," the charterer who undertakes delivery does not pass the bill of lading to the receiver, the Dalmellington Company, and if we had known the facts it would not have been necessary for us to have approached the charterers in this case at all, because although there is a cessor clause in the charter-party, yet by reason of their being at the time of delivery the holders of the bill of lading, they became liable *qua* holders of the bill of lading.

LORD CHANCELLOR—Very well. Now where is the bill of lading? It was never given in evidence in the case at all.

Mr BAILHACHE—No, it was not.

LORD CHANCELLOR—Why not?

Mr BAILHACHE—I cannot tell your Lordship why it was not. I was not in the case in Scotland.

LORD CHANCELLOR—Was there only one copy of the bill of lading?

Mr BAILHACHE—There was only one copy.

LORD CHANCELLOR — What happened to it?

Mr BAILHACHE—We have it here.

LORD CHANCELLOR—Why was it not put in in process?

Mr BAILHACHE—The bill of lading, as your Lordship sees by the letter to which I have referred, was sent first of all to Messrs Hamilton & Son. Then the bill of lading came into the hands of the defenders' solicitors, and was sent at some time to us to inspect, and we still have it.

LORD CHANCELLOR—Why did not you put it in in process?

Mr BAILHACHE—In view of the arrangement that had been come to with the charterers, it was not necessary to refer to the bill of lading, because the charterers