1779.

COLTART
v.
MAXWELL, &c.

JOHN COLTART of Areeming, Esq. - *Appellant;*

WINIFRED MAXWELL of Nithsdale, and WILLIAM HAGGERSTON MAXWELL CONSTABLE, Esq. her Husband; JOHN MAXWELL of Terrachty, Esq. and Others, *et e contra,* } *Respondents.*

House of Lords, 29*th January* 1779.

SUPERIOR AND VASSAL—HOLDING PRESCRIPTION.—Vassals holding church lands of the Abbot as superior, before the Reformation, had obtained a charter after that event from the Crown, providing that the lands were to be held of the King as superior thereof: Held that this charter, followed by prescription, did not entitle these lands to be holden always of the Crown, or prevent a grant by the Crown of such superiority to a third party *in commendam ;* the Crown being entitled so to convey the superiority.

After the Reformation, the act 1587, called the Annexation Act, was passed, whereby lands which belonged to any abbey, convent, cloister, &c. were annexed to the Crown, to remain with it in all time coming, and all those who held their lands of the church were thenceforth to hold of the King as immediate superior. After this event, it was the practice for the Crown to give grants of these church patrimonies, thus devolving on it, to laymen *in commendam,* who were called commendatories.

The lands called Forty-nine two shilling land of *Kirkpatrick Durham,* in the Stewartry of Kirkcudbright, belonged to and made part of the patrimony of New Abbey. They were sold by the Abbot, some years before the Reformation, to Robert Maxwell, to be held under the Abbot and his successors, as superior thereof. After the Reformation, and when these estates devolved on the Crown, the abbacy was granted by the Crown *in commendam* to Mr. Robert Spottiswoode, afterwards Sir Robert Spottiswoode, son of the Archbishop of St. Andrews, who was afterwards one of the Lords of Session, under the title of Lord New Abbey. The property of the above lands of Kirkpatrick Durham was in the famiiy of Maxwell, and it was maintained that the superiority was in Sir Robert Spottiswoode.

1544.

1614.

Lord Maxwell having been tried for murder, found guilty, and executed, his estates were forfeited to the Crown in 1609, but, by charter of *novodamus,* these were restored by King James VI. to his brother, Robert Maxwell, in 1621; and in the grant they were made to hold the lands of and

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under the King, just as the Maxwells formerly held of the Abbots as superiors thereof, as coming in place of the Abbots, "virtute acti annexationis omnium terrarum temporalium "hujus regni nostri Scotiæ patrimonio nostræ coronæ."

1624. Of this date, Sir Robert Spottiswoode, upon his own resignation, obtained a grant under the Great Seal from King James VI. of the whole lands, baronies, tythes, feu-duties, *superiorities*, and other patrimonies which had belonged to the Abbey of New Abbey, and *inter alia* "totas et integras "terras et baroniam *de Kirkpatrick-Durham* cum molen-"dino terris molendinariis, multures," &c. And by special clause in the grant, the whole vassals are declared and directed to hold their lands from and under Sir Robert Spottiswoode as their superior, and in regard to which the King promises to obtain an act dissolving the estate from the general annexation act of 1587. This was done accordingly by King Charles I. in 1633. Sir Robert thereafter sold his whole estate to the King, who endowed the bishopric of Edinburgh therewith under episcopacy; and when episcopacy was abolished it again reverted back to the Crown. Whereupon King Charles, by his grant of this date, reciting that as, in the sale of the said lands by Sir Robert Spottiswoode, the price, £3000, agreed on, was never paid to Sir Robert by him, he therefore gave him the barony of New Abbey: but on this grant or signature charter or infeftment never followed, and so was not complete. Upon the Restoration, Alexander Spottiswoode, son of Sir Robert Spottiswoode, obtained a new signature from Charles II., but he having died before completing his titles, and episcopacy being again restored in 1662, the Bishop of Edinburgh got possession, and kept it till 1689, when episcopacy was finally abolished. On this event, the estate of New Abbey again reverted to the Crown. And in 1741 was again conveyed by the Crown's charter to Alexander Spottiswoode, who, of this date, disponed the feu-duties and superiorities to the appellant, Mr. Coltart, who, upon finding that the Maxwells, the vassals in the lands of Kirkpatrick Durham, still persisted, notwithstanding the above title, to hold the lands as immediate vassals of the Crown, brought the present action of declarator of non-entry and maills and duties. The question was, whether upon the face of the title, as above set forth, the lands of Kirkpatrick Durham, being a part of New Abbey, were held by the respondents (Maxwells) of the Crown or of Sir Robert Spottiswoode and his successors, as superior?

Margin dates: 1633. — Sept. 29, 1633. — 1640. — 1689. — 1690. — 1741. — 1768.

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The respondents maintained that they had never acknowledged, nor had they ever been called on to acknowledge, the grantees (Spottiswoode and Coulter) as their superiors; that by the charter in their favour in 1621, the privilege of holding these lands of the Crown was conferred upon them irrevocably, and that the titles and subsequent grants in favour of Spottiswoode was only intended to carry the feu-duties, which the respondents and their ancestors paid to them, and, in confirmation of this, he referred to two charters from the Crown in 1648 and 1741; and, finally, that even if these titles were in any way objectionable, these objections were now barred by the act 1617; and the respondent's right fortified by the positive prescription.

1648 and 1741.

It was not until several interlocutors of the Lord Ordinary and Court, deciding that the respondents held of Spottiswoode as superior, (which are the subject of the cross appeal), that the Court decided, of this date, that the defenders (respondents) were entitled to hold their lands of the Crown: And, on reclaiming petition, the Court pronounced this special interlocutor; " Find that the charter and infeftment " 1621, founded on by the respondents, was a null grant, as " being contrary to the act of annexation; and that the act " of dissolution 1633 was not applicable to, nor could support the said charter and infeftment. Find, that by virtue " of the charter 1624, and act of dissolution 1633, Sir Robert " Spottiswoode was entitled to the superiority of all lands " formerly held of the Abbacy of New Abbey; and that by " the after conveyance by him to the Crown, and the subsequent erection by the Crown of the bishopric of Edinburgh, the superiority of the lands formerly held of the " Abbacy of New Abbey, were legally vested in the Bishop " of Edinburgh and his successors. Find the act 1690, declaring the superiorities which pertained to the bishops, " to belong to the Crown, ought not to be extended to the " superiorities of New Abbey, in respect that by the declaration of the parliament 1695, it is declared that the act " 1662, restoring bishops, did not prejudice the heirs of the " said Sir Robert Spottiswoode; and therefore find, that " the petitioner, as in right of the charter 1741, granted to " John Spottiswoode, the heir of Sir Robert, has just right " and title to the superiorities of the lands libelled; and " find, the possession held by the bishops of Edinburgh of " the feu-duties payable to them out of the said lands, during the subsistence of episcopacy, and by the factors appointed by the Crown, for uplifting the bishop's rents,

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" since the year 1690, when episcopacy was abolished, is
" sufficient to bar the respondents' plea of prescription, and
" repel the said defence of prescription accordingly. Finds
" the lands libelled are in non-entry; *but in respect of the*
" *circumstances of this case, and the doubts thence arising*
" *touching the superiority of the lands in question, find the*
" *petitioners only entitled to the retour duties of the lands*
" *preceding the date of this interlocutor;* but find him en-
" titled to the full maills and duties from this date, ay and
" until the respondents be lawfully entered and received by
" the petitioner as his vassals therein, and decern and de-
" clare accordingly."

The appellant brought an appeal against that part of the interlocutor which finds them entitled only to the maills and duties of the lands in question subsequent to the date of the interlocutor, and not from citation. And the respondents brought a cross appeal against the rest.

Pleaded for the Appellant.—By the charter 1624 the superiorities of these lands were conveyed in express words by the Crown on Sir Robert Spottiswoode, who thereafter became the undoubted superior thereof. The act 1633, dissolving these lands from the annexation act of 1587, confirmed this right, and entirely divested the Crown. The same question had been tried by him with his vassal Burnet, when the House of Lords gave effect to it, and the question ought therefore to be held as *res judicata.* This being fixed, and the Court of Session not denying his right, he ought to be restored to the full effect, so as to have right to the maills and duties from the date of citation in the present action.

Pleaded for the Respondents.—The respondents are endeavouring to maintain themselves in the state which they and their predecessors have enjoyed for more than 150 years, during which time they were never called on by the appellant's predecessors for an entry, or in an action of maills and duties, and their right is therefore absolutely secured to them by act 1617, conferring an unchallengeable prescriptive title. This right has for its basis, a conveyance of the property of these lands, by the Abbot of New Abbey prior to the Reformation; and a charter subsequent to that event, whereby the Crown, in whom the superiority of these church-lands then vested, conveyed that lands of new, to be held irrevocably of the Crown, by charter 1621, and which was confirmed by two subsequent charters, upon which prescriptive possession has run, whereas all that the appellant ac-

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quired by his rights was a right to the feu-duties merely, and not to the superiority of the lands of Kirkpatrick. The rule that the vassal who refuses to enter forfeits to the superior the full rents of the lands from the date of citation is subject to exceptions, according to the discretion of the Court; and the circumstances of the present case, at least, giving rise to so much reasonable doubt, if not to absolute certainty, in favour of the respondents, entitle it to an exception from that general rule, as they have never been contumacious, or wilfully refused to enter.

After hearing counsel, LORD MANSFIELD moved to affirm without assigning reasons. It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Henry Dundas, Ar. Macdonald, Andrew Crosbie.*

For Respondents, *Al. Wedderburn, Ilay Campell, Gilb. Elliot.*

Not reported in Court of Session. A point of form in the case is noticed in Brown's Suppl. "Tait," p. 460.

JOHN SHAW STEWART, Esq. - - - *Appellant.*
The MAGISTRATES and COUNCIL of Greenock, *Respondents.*

House of Lords, 2d *March* 1779.

CHURCHYARD—GROUND TAKEN FOR DO.—PARTIES TO SUIT—SUPERIOR AND VASSAL.—Held in the Court of Session, that by law, the ground to be chosen for erecting a new churchyard, is a burden upon the heritors of the parish; and the ground contiguous or adjoining to the old churchyard is to be set off, reserving to the heritor relief for the value against the other heritors, unless otherwise agreed on. Where action had proceeded and had been discussed on the merits, without objection to certain parties being called, appeal was taken to the House of Lords, where the objection was taken for the first time. Interlocutors in consequence reversed, without prejudice to call additional parties, or bring a new action. Question: whether a superior is bound to grant a feu-charter to a kirk-session, of ground for churchyard.

The ground on which the town of Greenock is built, belonged in property or superiority, to the appellant's ancestor, Sir John Shaw, then of Greenock. The town, which was then inconsiderable in size, and the adjoining country, formed one parish, having one church and churchyard. But the rapid increase of the population, from the shipping commercial traffic of the place, so extended the town that in 1741 it was necessary to subdivide the parish, and build