1770. *February* 1. DUKE of BUCCLEUCH *against* The OFFICERS of STATE.

No 56.
The right of superiority of lands, held by an erroneous tenure, being found to be established by prescription in the crown; the right to the feu-duties found to be vested in like manner in the crown; and the vassal accountable for a retrospective period of 40 years.

THE lands of Ewisdale, in 1619, belonged to Sir John Kerr, and were held ward of the King. In 1620, Walter Earl of Buccleuch made a purchase of this lordship from Sir John Kerr; and a contract of sale was entered into, containing an obligation upon Sir John to infeft the Earl *a me et de me*, procuratory of resignation, precept of sasine, &c. and ascertaining the infeftment *de me* to be for payment of the yearly feu-duty of 160 merks, in name of feu-farm; and of the same date with the contract Sir John granted a feu-charter to the Earl, upon which he was infeft. This feu-duty appears to have been merely nominal, the contract containing the following provisions, *1mo*, That the not payment of the feu-duty for two or more years running together unpaid, should be no cause of nullity or reduction of the said infeftment. *2do*, Sir John became bound to dispone to the Earl, &c. all nonentry duties or other casualties, and to re-invest the heirs and singular successors *gratis*. *3tio*, Sir John granted to the Earl a perpetual discharge of the said feu-duty of 160 merks.

The Earl having thus completed his base right, he and his successors continued to hold this lordship of Ewisdale upon the same titles down to the year 1664.

In the year 1663, Countess Anne, the heiress in the estate of Buccleuch, was married to the Duke of Monmouth. In the procuratory of resignation in the contract of marriage, this lordship is included alongst with the rest of the estate; and thereon, upon 3d October 1664, a charter under the Great Seal, containing a *novodamus*, was expede of the Countess' whole estate, comprehending *inter alia* the Lordship of Ewisdale. This charter contains no express change of the holding of these lands from ward to feu; but the reddendo clause is conceived in the following words: 'Reddendo pro prædict. terris et 'dominio de Ewisdale, jacen. &c. de nobis et successoribus nostris, aliisve jus 'haben. pro tempore, summum unius centum et sexaginta mercarum monetæ 'Scotæ, &c." This Lady, when Dutchess of Buccleuch, in 1689 expede another charter of the estate upon her own resignation, in which the reddendo clause as to the lordship of Ewisdale was conceived in the same words; which were also used in all the subsequent investitures of the estate till 1742, when the late Earl of Dalkeith expede a charter, wherein the words '*Aliisve jus 'haben. pro tempore*' were omitted; as they also were in the present Duke's special service in 1751, as heir to his father.

No demand had ever been made of the above feu-duty of 160 merks by the Officers of the Crown, nor had it ever been entered in the property rolls in Exchequer till the years 1760, when the barons made an order that the Duke should be charged with the said feu-duties for 40 years back, and in time coming.

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In this situation the Duke brought an action of declarator against the Officers of State; concluding to have it found, "That these lands, by their original tenure, were holden ward of the Crown; that the feu-duty of 160 merks had been engrossed for the first time by mistake in the Crown charter of the earldom of Buccleuch and lordship of Ewisdale, *anno* 1664, and which, by the same error, had been continued in the subsequent title-deeds, in place of the ancient tenure by ward and relief; that in virtue of the act 20th Geo. II. he was entitled to hold said lordship of Ewisdale blench of the Crown; and, at any rate, that the said feu-duty of 160 merks was not exigible by, or payable to, the Crown, either for bygones or in time coming, but did of right belong to him the pursuer."

The question having been reported upon informations, the radical argument maintained upon the part of the Crown was, the plea of prescription; seeing the lordship of Ewisdale had held feu of the Crown, not for 40 years only, but for near a century. And the Court pronounced the following interlocutor, which was afterwards adhered to, "Find that the pursuer is not entitled to demand a charter from the Crown of the lordship of Ewisdale holding blench; and remit to the Lord Ordinary to proceed accordingly; and also to hear parties farther with respect to the feu-duties of said lands; and to do as he shall see just." See No 20. p. 10711.

The nature of the holding being thus finally settled, the right to the feu-duties, as well for time bypast as for time to come, came to be discussed: When it was

Pleaded by the Duke of Buccleugh pursuer; Though the holding was fixed by the positive prescription, the feu-duties stood in a very different situation. As to them, there was no complete title in favour of the Crown; and it was admitted there had been no possession. The argument used by the defenders, that the Crown, as superior of these lands, must of necessary consequence be enlitled to the feu-duty, was erroneous; the feu-duty was by no means necessarily attendant upon the feu-right, or inseparable from it; it might, either by the conception of the charter itself, or other relative deed, be conveyed or made payable to any third person, or it might be discharged or renounced. The connection between superior and vassal would not thereby be dissolved, as it nevertheless stood firm *quoad* all the other casualties or obligations betwixt them, although one of them was loosed. Of this, a well known instance occurred in the superiorities of church lands erected into temporal lordships, which were resumed by the Crown, reserving to the Lords of Erection, the feu-duties payable by the church vassals, till the same should be redeemed; which power of redemption was now discharged, and from which it has happened, that though most of the church vassals have expede charters from the Crown for payment of a feu-duty, yet the Lords of Erection continue to have rtght to, and to exact these feu-duties as formerly.

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There being nothing, therefore, incongruous in supposing a superiority without a feu-duty, payable at least to the superior, the Crown in the present instance never had, *de jure*, acquired any right or title to the feu-duties in question. A gross error had been fallen into in expeding the charter in 1664, upon the occasion of Countess Anne's marriage with the Duke Monmouth; the lordship of Ewisdale then held base, and in feu of Sir John Kerr and his heirs; the procuratory in Kerr's disposition in 1620 never had been executed; and therefore the procuratory of resignation in the marriage-contract in 1663 neither did, nor could give authority for resigning this lordship into the hands of the Crown; and as the procuratory was the warrant of the charter; so, where a charter went beyond its warrant, it was good for nothing.

This reasoning was peculiarly applicable to the feu-duties; no right whatever could be given to them; they were the property either of Sir John Kerr and his heirs, or of those in Sir John's right; and as they had from the first been discharged and non-existing, they never could be acquired by the Crown. Niether in fact had they been acquired by the Crown in the charter 1664, founded on as the title; for in the *reddendo* clause they were made payable *aliisve jus habentibus*; which plainly imported some other party as having right thereto, viz. Sir John Kerr and those in his right, and not the Crown; as in the event that the crown had the right, the obligation would have been simple and absolute.

As the title the Crown founded on had therefore been erroneously obtained, and was even from the first inadequate; so the pursuer's and his predecessors' retainment and possession of these feu-duties, had been acquiesced in for near a century. There never had been any possession of these duties by the Crown, they had not even been noticed as part of the Crown revenue; there was therefore no foundation for the doctrine of prescription; and as the error had at length been discovered, there was no reason why it should not now be rectified, and justice done.

The Officers of State, on the part of the Crown, *pleaded*; That on the same principle the Court had pronounced the judgment as to the nature of the holding, must the pursuer be liable in payment of the feu-duty stipulated in the charter to the Crown, the uncontroverted superior of the lands. The doctrine of prescription was equally applicable to both rights. The feu-duty was an essential requisite in a feu-holding; it could not exist without it, as the very relation of a superior and vassal supposed the existence of *reddendo* payable by the one to the other. Were it otherwise, the estate in the present instance would stand upon the extraordinary and anomalous footing of there being a feu-holding, a feudal superior, and a feudal vassal, but not the vestage of a *reddendo* payable by the one to the other. The case of church lands, or such other cases where the superior, either by enactment of law, or particular agreement, had assigned away his right to the feu-duty, did not apply; for in these

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A charter granted by a superior, and accepted of by the vassal, might very properly be considered as a mutual contract, binding at least upon the contracting parties and their representatives; and though it should appear that no proper titles had been made up, neither the one nor the other would be allowed to contravene their own act and deed. Though there had been some irregularity therefore in granting the charter in 1664, yet as the vassal had then accepted of it, it was incompetent, especially *post tantum temporis*, to stir this objection. This was agreeable to the doctrine of the positive prescription introduced by statute 1617, which, for quieting possession, presumed, that the charter upon which the possession was commenced had been expede upon proper warrants, and in consequence of titles properly established.

The blunder said to have been fallen into in expeding the charter 1664, was not really such as it had been represented. In order to have completed Countess Anne's right to this lordship, and to have rendered her the immediate vassal of the crown holding feu, in the strict feudal form, a multiplicity of legal operations were necessary. There must have been charges to enter against the heirs of Sir John Kerr, and an adjudication in implement of the contract 1620; a Crown charter and infeftment upon adjudication; a new resignation by Countess Anne to entitle the Crown to change the holding; a charter and infeftment making that change; a special service and infeftment to carry the subaltern feu-holding; and, lastly, a resignation *ad remanentiam* to extinguish that base right. To avoid the perplexity of these operations, it might very naturally have occurred, that there could be no impropriety in allowing the Countess to resign this lordship with the rest of the estate, and thereon to expede a charter, making the *reddendo* to be the former feu-duty of 160 merks; which charter, containing a *novodamus*, and passing on a signmanual, was in every respect effectual as an original grant, and a valid alteration of the holding from ward to feu.

The interpretation given to the words in the *reddendo*, "aliisve jus habentibus pro tempore," as applicable to Sir John Kerr, &c. was unnatural and unauthorised. If that interpretation was admitted, there would have been a *reddendo* payable to a person nowise connected with the superior, and claiming under a title perfectly distinct, which was repugnant to the nature of a feudal contract. The true and natural import was, that the feu-duty was payable to the king, or to such other persons as should afterwards acquire right from the Crown by assignation or otherwise; and in a variety of charters which contained these words, it was unquestioned that the radical right vested in the superior, though the particular profits, on account of being divised either by grant or operation of law, might not accrue.

The title in favour of the Crown therefore being complete, the possession was equally strong and established; for though the Crown had not uplifted the feu-

duties, it had acted as superior in renovation of the various investitures that have taken place since the 1664; each of which was an act of possession, and rendered the plea of prescription in favour of the Crown as strong as if the practice had been regularly to uplift the feu-duties. No. 56.

The Court pronounced different judgments; the terms of which sufficiently indicate the grounds of the Judges' opinions.

Upon advising the informations, the LORDS "find, That the pursuer is liable in payment to the Crown, superior of the lordship of Ewisdale, of 160 merks Scots yearly, as the feu duty thereof, as to time to come; and that he is bound to account in Exchequer for the same; and assoilzie the Officers of State from the conclusions of the pursuer's declarator as to bygones of the said feu-duty."

Upon advising a petition for the Duke of Buccleugh with answers for the Officers of State, the following interlocutor, by a majority of seven to five, was pronounced:

"In respect, it appears, that the barony of Ewisdale did originally hold feu of Sir John Kerr for payment of the same feu-duty of 160 merks, which is expressed in the charter 1664, granted by the Crown; and that in the *reddendo* of said charter, the feu-duty is made payable to the Crown 'aliisve jus habentibus,' which supposed that the right thereof might be in another; and in respect that the Crown has never been in possession of said feu-duty, neither was it entered in any of the Crown's rentals, but that the same was for ever discharged by Sir John Kerr in the year 1621; therefore, sustain the said discharge as sufficient to free the petitioner from payment of the feu-duties claimed, both in time past and in time to come."

But upon advising a reclaiming petition for the officers of state, with answers for the Duke, they returned to the interlocutor of 1st August 1769; and found, "That the yearly feu-duty of 160 merks Scots, in the investiture of the lordship of Ewisdale, is exigible by the Crown, both with regard to bygones for 40 years, and in time to come; and that the respondent is bound to account in Exchequer for the same." This judgment was carried only by the President's casting vote. And upon advising a reclaiming petition and answers, the Court, on the 8th June thereafter, adhered.

Lord Ordinary, *Auchinleck*.
For the Duke of Buccleugh, *A. Lockhart, J. Dalrymple, & Ilay Campbell*,
For Officers of State, *Lord Advocate Montgomery, Sol. H. Dundas, & R. Blair*.

R. H. *Fac. Col. No 17. p. 36.*