required to be stated on record — that it was neither necessary nor expedient that the claims of parties should be set forth in detail, and that it was not necessary to read the portions of the record, founded on by the pursuer as excluding the claim, in so strict a way as to give them such effect, and that they were to be read in the light of those to which they were an answer. Their Lordships expressed their concurrence with the views of the Lord Ordinary upon the claims of partners to remuneration for services, and the grounds on which such must be based.

Judgment accordingly.

Counsel for the Pursuer—Mr Gifford and Mr Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for the Defender—Mr Shand and Mr MacLean. Agent—W. Mitchell, S.S.C.

Friday, Feb. 15.

FIRST DIVISION.

PET.—MACKENZIE OR BRODIE.

Judicial Factor—Parish Minister. The Court will not appoint a parish minister a judicial factor.

Process—Petition. When an estate is small, the appointment of a factor and authority to make up titles may be asked in one petition.

This petition for the appointment of a judicial factor was reported by Lord Mure (1) because the person proposed to be appointed was a parish minister; and (2) because the petition for the appointment contained also a prayer for authority to make up titles to certain heritable subjects. His Lordship stated that the Court were not in use to appoint parish ministers to such an office; and, in regard to the second point, that although an application for authority to make up titles was generally the subject of a separate application, there were cases in which it had been held competent, as the estate was small, to combine it with the application for the factor's appointment.

BIRNIE, for the petitioner, cited Kirk, 14 S. 814, and Campbell, 12 D. 913, as cases in which parish ministers had been appointed. The estate was trifling, and the minister would act without remuneration.

The Court expressed their unwillingness to multiply precedents for appointing parish ministers, and another person was accordingly suggested and appointed. In regard to the other point, they thought that in this case the appointment and the authority to make up titles might be granted under the same application.

Agents for Petitioner—G. & J. Binny, W.S.

Saturday, Feb. 16.

FIRST DIVISION.

MACKAY *v.* M'CULLOCH.

Process—Reclaiming Note—Lodging—A. S. 24th Dec. 1838. A reclaiming note against an interlocutor refusing a note of suspension must be marked as lodged by the clerk to the process within fourteen days.

This was a reclaiming note against an interlocutor pronounced in the Bill Chamber refusing a note of suspension. It had been boxed and marked as boxed within the reclaiming days, but it was not presented to the clerk of the process to be marked as lodged until after they had expired. The clerk having refused to receive it,

W. N. M'LAREN, for the reclaimer, moved the Court to allow it to be received.

MACLEAN, for the respondent, objected.

The Act of Sederunt 24th Dec. 1838, sec. 5, provides, in regard to reclaiming notes of the kind in question, that they "shall be intimated to the agent of the opposite party and clerk of the bills, and in time of session be duly marked and boxed within fourteen days from the date of the interlocutor reclaimed against."

The Court had no doubt that the marking referred to in the Act of Sederunt was the marking by the clerk to the process, and that the marking by the boxing clerk did not satisfy the provision. They therefore refused to write on the reclaiming note.

Agent for Reclaimer—J. M. Macqueen, S.S.C.

Agent for Respondent—John Ross, S.S.C.

HOUSE OF LORDS.

Monday, Feb. 11.

LORD ADVOCATE *v.* HUNT.

(In Court of Session, 3 Macp. 426.)

Property—Bounding Charter—Barony—Parts and Pertinents—Prescriptive Possession. In an action to have it declared that the ruins of the Royal Palace of Dunfermline and the ground on which they stand belong to the Crown, the defender pleaded prescriptive possession following upon a bounding charter, or otherwise upon a barony title with parts and pertinents. Held 1. (aff. Court of Session) that the ground claimed was not embraced within the boundary title; and 2. (rev. Court of Session) that although the defender had been in possession for the requisite period, it was not proved that he had possessed the subject as a part and pertinent of the barony.

This is an appeal from an interlocutor of the First Division of the Court of Session, assoilzieing the respondent from the conclusions of a summons in an action raised against him by the Lord Advocate on behalf of the Commissioners of her Majesty's Woods and Forests. Those conclusions were to the effect that it should be found and declared that Mr Hunt had no legal right or title to certain pieces of land enumerated and described in the summons, and situate in the vicinity of the Abbey of Dunfermline. The only conclusion, however, ultimately persisted in was that which related to the piece of ground on which stand the ruins of the royal palace. The abbey or monastery of Dunfermline had very extensive properties, which were partly appropriated to the Crown and partly made over to private families. The lordship of Dunfermline, which appears to have included the royal palace, was annexed to the Crown by the Act 1593, c. 189. In the year 1589, James VI., on his marriage, made a grant of the lordship to Queen Anne of Denmark, which was confirmed by Parliament by the Act 1593, c. 190. A second charter of the lordship was granted by the King in 1593, in favour of Queen Anne and the heirs lawfully procreated, or to be procreated, of the marriage between her and the King, whom failing, to the King's heirs and successors whatsomever to the Crown of Scotland; and this charter was ratified by Parliament

in 1612. By charter dated 15th February 1596, Queen Anne, with consent of the King, appointed Lord Urquhart, President of the Court of Session, and afterwards Earl of Dunfermline, and his heirs male, to be keepers, guardians, or constables of palace and adjacent edifices, and assigned the teinds of Masterton and Pitliver as the fee for the office. This charter, which was ratified by Parliament in 1606, recites that her Majesty had received full investiture of the whole monastery and palace adjoining, with the whole buildings, gardens, and orchards situated within the precincts of the monastery, and the object of the appointment is declared to be the preservation of the palace in sufficient repair. The charter contains a precept for infefting the keeper in his office by delivering to him the key of the palace. By another charter, dated in 1596, which was also ratified by Parliament by the Act passed in 1606, Queen Anne conferred on the Earl of Dunfermline the office of heritable bailie of the lordship and regality of Dunfermline. The heritable office of constable or keeper of the palace, and that of bailie and justiciary of the lordship and regality, were apprised or adjudged, and passed from the Earl of Dunfermline to the Earl of Tweeddale, by a decree of apprising, dated 4th May 1665, which was followed by a Crown charter, dated 12th February 1669. After the death of Queen Anne, Prince Charles (afterwards Charles I.) succeeded to the lordship of Dunfermline, and obtained a precept from Chancery as heir of his mother, under which he was infeft, conform to sasine in his favour, dated the 6th and recorded the 27th July 1619. Charles II., who succeeded his father, appears to have been the last sovereign who personally occupied the palace, having resided in it in August 1650, when he subscribed the famous "Dunfermline Proclamation," in which he professed to adhere to both covenants. From the account it is obvious that the palace and adjacent ground belong to her Majesty as crown property, unless it can be shown that they have been alienated to, or acquired by, some other person under a sufficient legal title. Mr Hunt maintains his claim on two distinct grounds. In the first place, he maintains that he holds an express title to the ground on which the palace stands and adjacent thereto, under a contract of excambion between the Marquess of Tweeddale and Arthur Forbes, dated April 1730, which conveys to the latter "all and haill that piece of ground," bounded in a certain manner. The Judges in the Court below were unanimously of opinion that the palace was not included within the boundaries mentioned. Mr Hunt, in the second place, maintains that he has acquired a good prescriptive title to the palace and grounds by possessing the same for more than forty years, as part and pertinent of the barony of Pittencrieff. A proof was led for both parties, and its effect was to establish that for a much longer period than forty years the ground upon which the ruins stand has been enclosed as part of the policy grounds of Pittencrieff House, and that access to the ruins was only to be obtained by permission of Mr Hunt or his predecessors. Parties having been fully heard, the Lord Ordinary (Mackenzie) pronounced an interlocutor finding that Mr Hunt had no legal title to the ground libelled. Mr Hunt thereupon reclaimed to the First Division of the Court, and their Lordships, on the 31st January 1865, pronounced the interlocutor appealed from, by which they find that for more than forty years preceding the date of the summons, Mr Hunt and his predecessors, in virtue of their titles by charter and sasine to the lands and barony of Pittencrieff, with parts, pendicles, and universal pertinents of the same, have possessed and enjoyed as their own exclusive property the ground libelled as part and pertinent of the said lands and barony.

Lord DEAS dissented.

The pursuer having appealed,

The ATTORNEY-GENERAL (Sir HUGH CAIRNS), ANDERSON, Q.C., and T. IVORY, argued :—It was observed by Lord Curriehill that the palace had been disannexed from the Crown, and could not therefore be Crown property. The *dominium utile* had been given to Queen Anne, but the *dominium directum* remained in the King, and when the owner of the first came into possession of the second, then the land became again crown property. The limitation in the present case was to the heirs of the marriage, with remainder to the heirs of the King whomsoever to the Crown of Scotland. The attainders of 1688 or of 1745 had the effect of extinguishing the right of the heirs of the marriage, and of causing the property to revert to the Crown. It was thus clear that unless the respondent could show that the property had been validly acquired by him, it still remained in the Crown. Crown rights required no seisin, there being no superior to grant infeftment. (Menzies' Lectures, p. 812). Now, the claim made by the respondent was founded, first, on the contract of excambion in 1730. The *onus* lay upon him to show that the palace was within the boundaries specified, which he had entirely failed to do. It was the unanimous opinion of the Judges that he had not only failed to do so, but that the palace was actually not within the boundaries. That was the only title set out on the record, and on failing to establish it the respondent's case fell to the ground. The second title set up—namely, the barony title—was not pleaded ; but, on the assumption that the respondent could set it up, then it was incumbent on him to prove possession for forty years upon a feudal title. The feudal title founded on in the record was the contract of excambion, which did not include the palace. The Pittencrieff barony title dated so far back as 1538, while in 1596 the Earl of Dunfermline was appointed constable of the palace. The title-deeds of the Marquess of Tweeddale also showed that subsequent to 1730 the palace was a landmark used to describe the boundaries or situation of different properties. It was therefore most improbable that it would be conveyed in any such indefinite manner as that "piece of ground," or, in fact, in any other way than by expressly naming it.

Sir ROUNDELL PALMER, Q.C., and LEE, for the respondent, argued—The purpose of the Scotch Prescription Statute of 1617, c. 12, was the quieting of titles, as was that of all statutes of limitation. That statute was to be liberally construed, insomuch that even if the original title were a bad one the forty years would remedy the defect. Evidence of forty years' possession as part and pertinent constituted a habile title. Possession had two effects—confirmation and interpretation. A man may ascribe his possession to one title or other according to the mode of dealing with it. There was not a single case in the law of Scotland in which a man having forty years' possession under such circumstances as the present had been evicted. Ross' Leading Cases, p. 338 ; Duke of Buccleuch *v.* Cumming ; Forbes *v.* Livingstone, p. 351 ; Lord Advocate *v.* Graham, p. 357 ; Countess of Moray *v.* Wemyss, p. 441 ; Earl of Fife *v.*

Cumming, p. 445. In the present case there was possession for more than forty years, and no explanation of that possession possible but that of its being as part and pertinent of the barony, and there was no competition of titles. The cases of the Duke of Montrose *v.* Mackenzie (10 D. 896) and Lord Advocate *v.* Sinclair (3 Macp., 981) showed that forty years' possession constituted a habile title where it was possible to attribute possession to some title. The authorities relied on by the appellant had no application whatever to the present case. There was nothing to preclude the respondent from setting up the barony title. His titles were habile and sufficient to enable him to maintain a prescriptive title to the subjects in dispute; and he and his predecessors, by virtue of their charters to the lands and barony of Pittencrieff, with parts and pertinents, had possessed the subjects without interruption from time immemorial, and for upwards of forty years, as parts and pertinents of the lands and barony.

The argument took place in July and August last, and judgment was given to-day.

LORD CHANCELLOR (Chelmsford)—My Lords—The learned Judges in Scotland having been divided in their opinions upon this case, it may well be supposed to be attended with some difficulty, and I have felt it necessary to consider it with very close and careful attention.

The difference between the English and th e Scotch law of prescription renders those who are principally versed in English law very liable to err in regarding the case under the influence of their English notions upon the subject. I have endeavoured to guard my judgment against the effect of this prejudice, and believe that the conclusion at which I have arrived is in strict conformity with the law of Scotland.

This suit was instituted by the Lord Advocate on behalf of the Crown, and was originally an action of reduction and declarator impeaching the respondent's title to a larger portion of ground than was afterwards the subject of dispute. In the progress of the litigation the claim was limited to having it found and declared that the defender (the respondent) "had no legal right or title to the Royal Palace of Dunfermline, or ruins thereof, or ground whereon the same is situated, and immediately adjacent thereto, lying between the walk or road on the south of the said ruins, running down to the Heugh Mills on the one side, and Monastery Street and St Catherine's Wynd of Dunfermline, or King's Highway, on the other side."

The defender's statement of facts which applied to the original claim of the Crown before its restriction to the subject just mentioned, alleged—"That the whole ground described in the summons formed part of the policy grounds of the defender, and had formed part of the policy grounds of his predecessors, proprietors of Pittencrieff, from time immemorial, at least for much more than forty years before the institution of the action. They had been possessed and enjoyed by the defender and his predecessors under the titles to the said subjects and under express title, or as parts and pertinents of the lands and barony, during that period, as their own private property, and exclusive of any possession, use, or enjoyment of any other party." By another statement the defender alleged that the portion of ground on which the ruins of the palace stood was specially described in the titles as "All and whole that piece of ground lying above the Tower Burn of Dunfermline, bounded by the burn on the south and west, the Tower Bridge and highway leading from the Tower Bridge to the Heugh Mills on the north, and the Heugh Mills Kilns on the east." And he further alleged, that he and his predecessors had, under their said titles, used, exercised, and enjoyed, in regard to the ground in question, during greatly more than forty years before the date of the action, every act of ownership of which such a subject was capable, and that all the subjects are embraced in the Crown charter granted in 1815 to the deceased James Hunt, or in the charter of confirmation and sale by the Marquess of Tweeddale which is connected with prior titles. In particular, the ground including the ruins of the palace is embraced in the Crown charter and conveyed as follows—"Totam et integram illam petiam terræ jacentem supra Towerburn de Dunfermline quæ erat disposita per Joannem Marchionem de Tweeddale dicto Arthur Forbes in permutatione et excambio pro terris de Shillinghill."

It was objected on the part of the appellant, that it was not competent to the defender to plead alternatively a forty years' possession under a special title, and a possession as part and pertinent of the barony of Pittencrieff, for thus (it was said) he would be entitled to prove his right to possession under both titles. It would be more correct to say that it enabled him to ascribe his possession to either title. And all the Judges were of opinion that this alternative mode of defending himself was unobjectionable. It may be observed that the pleas in law of the defender, which under the 11th section of the Scotch Judicature Act, 6th Geo. IV., chapter 120, are to be held as the sole ground of action or defence in point of law, state separately and distinctly and not alternatively the express conveyance by description of boundaries, and the possession as part and pertinent of the barony of Pittencrieff.

The case, however, is narrowed down to the latter ground of defence, for, according to the opinion of all the Judges, the right founded on the special title is entirely out of the question. The portion of ground mentioned in the defender's 5th statement of facts, and in his 9th statement, alleged to be embraced in the Crown Charter, and described as disponed by the Marquess of Tweeddale to Arthur Forbes in exchange for the lands of Shillinghill, was so exchanged by a contract of excambion between the parties in 1730. In this deed the ground is described as "All and haill that piece of ground lying above the Tower Burn of Dunfermline, bounded by the said burn on the south and west, the Tower Bridge and the highway leading from the Tower Bridge to the Heugh Mills on the north, and the Heugh Mills Kilns on the east." By a subsequent deed of disposition by Arthur Forbes and John Lumsden to Captain Archibald Grant, dated 30th December 1761, it appears clearly that the piece of ground so exchanged by the Marquess of Tweeddale could not have comprehended the ground on which the Palace of Dunfermline stood. This palace ground is within the lordship of Dunfermline, but in the disposition last mentioned the exchanged ground, under the same description as in the contract of excambion, is (with another piece of ground therein described) stated to be "proper part and pertinent of the lands and tenandry of Grange of Dunfermline, belonging to John, Marquess of Tweeddale." There can be no doubt that the piece of ground exchanged for Shillinghill is that which is coloured light green on the plan, and which is

separated from the ground in dispute by the road running down to the Heugh Mills.

It is thus shown that the only title upon which the respondent can found himself is the possession of the ground, upon which the ruins of the palace stand, for forty years, as part and pertinent of the barony of Pittencrieff. Of the possession of the ground for more than the requisite number of years there is no doubt; and the only question is whether the respondent can show a habile title to which that possession can be lawfully ascribed.

The statute respecting prescription of heritable rights passed in the Parliament of 1617, chapter 12, "statutes and declares that whosoever his Majesty's lieges their predecessors and authors have brooked heretofore, or shall happen to brook in time coming, 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 their superiors and authors, their heirs and successors, nor by any other person pretending right to the same by virtue of prior infeftments, public or private, nor upon no other ground, reason, or argument competent of law except for falsehood, providing they be able to show and produce a charter of the said lands and others foresaid granted to them or their predecessors by their said superiors and authors preceding the entry of the said forty years' possession, with the instrument of sasine following thereupon, or where there is no charter extant that they show and produce instruments of sasine one or more continued and standing together for the said space of forty years, either proceeding upon retours or on precepts of *clare constat.*"

I have stated the statute thus fully in order to show with more clearness what is the possession which is meant to be protected. It is a possession which must begin with a title, and in the words of the statute, must continue "for the space of forty years continually and together, following and ensuing the date of the infeftments." The title under which the possession commenced may have been an infirm and invalid one, but if the party can show that he has possessed the subject of the infeftment for forty years, he is safe from all future interruption, so the subject claimed need not be expressly mentioned in the charter, but may be comprehended within the terms "parts and pertinents." But in such a case it will not be sufficient to prove that the alleged pertinent has been occupied with the principal subject; it must be occupied as belonging to such subject, for, when the statute says that the parties must be "able to show and produce a charter of such lands and others foresaid granted to them," it seems clear that something more is necessary to be proved than a joint possession of the principal subject of the charter with that which is alleged to be part of or pertinent to it.

Some objections were made on the part of the appellant to the possibility of the ground in dispute being part and pertinent of the barony of Pittencrieff.

It was said, in the first place, that the discontiguity of it from the barony rendered it incapable of becoming pertinent. As far as I understand the map, the ground in dispute in no part touches the barony of Pittencrieff, unless Mr Hunt's garden is part of the barony. If it is not, but only a continuation of Tower Hill, which is certainly no part of the barony, then the ground is separated from the barony of Pittencrieff by the long strip of ground, coloured light green, which has been shown to be the excambed lands. Now, I quite agree that, whether the intermediate land which separates a piece of ground from a barony, of which it is claimed to be part and pertinent, belongs to a different owner, or to the same owner, a different title is quite immaterial. But it is clear from the text writers, and also upon the authority of decided cases, that discontiguity is no objection to a subject becoming part and pertinent, even where it is included in the titles of another party. Of course, in such cases the *prima facie* presumption will be against the claim, but it will be overcome by sufficient evidence.

Another objection urged by the appellant was that the subject claimed by the respondent is a royal palace, which cannot be prescribed for against the Crown. It is denied, on the part of the respondent, that it ever was a royal palace. But it appears to me that the view of the appellant is the more correct one.

The lordship of Dunfermline, in which the palace and ground adjacent was included, belonged originally to the monastery of Dunfermline, and was annexed to the Crown on the dissolution of that monastery in 1593. The lordship was afterwards granted by King James to his Queen, Anne of Denmark, and the heirs of the marriage, whom failing, to the King's heirs and successors in the Crown of Scotland. Charles I., when Prince of Wales, was infeft as heir of the marriage; but, when he came to the throne, it must have been considered that the *dominium utile* of the lordship became consolidated with the superiority belonging to the Crown, for thenceforth it appears to have been regarded as Crown property. Perhaps the best proof of this is, that, after the Revolution, King William and Queen Mary, with consent of Parliament, granted a tack of the lordship and regality of Dunfermline; and in the dispositive clause, after the general words, there is added, "which may pertain or are known to pertain to their Majesties, or to their royal grandfather, as lord of the said regality and lordship of Dunfermling, by any manner of way, or which did ever at any time by gone, pertain to their Majesties' dearest grandmother, as lady of Dunfermling, or to King James VI. of blessed memory, by any Acts of Parliament or otherwise howsoever or to the abbots' convent, and monastery thereof of old." But assuming that the ground in dispute was *inter regalia*, it does not appear to me that this would be any conclusive objection to the respondent's prescriptive claim, although it might render proof of it much more difficult. It was quite competent to the Crown expressly to have annexed the piece of ground on which the palace stood to the barony of Pittencrieff upon its creation, but I very much doubt whether property of the Crown could pass under the general words of "parts and pertinents" to a principal subject with which it had never been previously connected. But waiving the consideration of this point, and assuming the right of the respondent to prescribe against the Crown, and considering the respondent's title to the barony of Pittencrieff as the only habile title upon which his

claim can be founded, I proceed to examine the different charters and instruments relating to that barony, so far as they bear upon the question of the ground in dispute being part and pertinent of it.

It is quite clear that the palace did not originally belong to the barony of Pittencrieff. When the original charter was granted in 1538, it was within the lordship of Dunfermline, which was part of the possessions of the monastery of Dunfermline. This in itself would furnish no objection to the respondent's claim, because it has been held that an infeftment in lands, with parts and pertinents, is a sufficient title for a prescription by possession, although the property was expressly included in the title of another person. The only effect is that we must look to some period subsequent to the creation of the barony for the origin of the alleged relation to it of the piece of ground in question. But, on referring to this later period, it will be found that the palace was dealt with by various charters long after the date of the creation of the barony, and that, in all the subsequent charters dealing with the barony, when annexations to it were made, they were always specifically mentioned. For instance, in a charter of 1675 in favour of Alexander Clerk, the Crown grants and dispones "All and whole the lands and barony of Pittencrieff, with the addition of the fourth part of the lands of Newlands and five acres of land called New-raw-Croft, now created, annexed, and incorporated into one entire and free barony, now and in all future time to be called the barony of Pittencrieff."

In the next charter of 1687, there is the same description of the barony as in the former one, but, in addition, the serjeant lands or marsh lands of Pittencrieff are stated to be parts and pertinents of the lands and barony of Pittencrieff, and this description is repeated in a charter of confirmation of 1690. We hear nothing of any other addition to the barony of Pittencrieff until after the contract of excambion in 1730, when the Marquess of Tweeddale exchanged with Arthur Forbes the piece of ground upon which the respondent's special title is founded in his pleadings. This piece of ground never became part of the barony, but is named in subsequent charters as distinct and separate from it.

In the disposition from Forbes and Lumsden to Captain Archibald Grant in 1761, which was followed by the Crown charter of confirmation of 1762, we have the whole of Pittencrieff, with all the additions described, consisting of the lands and barony of Pittencrieff, serjeant lands and the marsh lands of Pittencrieff, the fourth part of Newlands, five acres of Newrawcroft, forty-five falls of land and the Friars Inns of Inverkeithing, all which lands above enumerated (it is stated) are all proper parts and pertinents of, and were all united, annexed, and incorporated into one free and entire barony called the barony of Pittencrieff; and then follow, with the introduction of "as also," lands and grounds occupied with the barony but not belonging to it, consisting of the piece of ground excambed by the Marquess of Tweeddale to Arthur Forbes, of a piece of ground called the Tower Hill, described as lying near the Palace of Dunfermline, of a farm and lands of Middle Baldridge, commonly called Mounthooly, and of the part of the mason lands of Middle Baldridge.

It is unnecessary to pursue these descriptions through the subsequent charters, as they are uniformly adopted down to the last of them, the Crown charter of resignation in favour of James Hunt in 1816. The remark to be drawn from them is, that it is scarcely possible to believe that the palace and ground ever were made part and pertinent of the barony of Pittencrieff, because, not only each addition to the barony is expressly mentioned, but these lands which were acquired from time to time, and were never annexed to the barony, are always described as being separate from it; and it is inconceivable that no mention should have been made of such an important subject as the palace for some time continued to be, having become a part and pertinent of the barony. More especially does this seem remarkable, as in some of the charters it is considered of importance enough to be descriptive of a boundary "juxta palatium de Dunfermline."

But then it is argued by the respondents that there having been originally a render of a red rose for the barony of Pittencrieff in the later charters, when all the additions had been made to the barony, and the several other subjects were occupied with it, the whole together were united in the single reddendum of a red rose. I confess that I do not see the importance of this, unless it can be assumed (which is the question to be decided), that the palace had in some way become part and pertinent of the barony.

A close examination of the charters leads me to the conclusion that they have a negative and excluding force with respect to the palace being part and pertinent of the barony. And the case of Scott *v.* Ramsay (Feb. 15, 1827, 5 S. 367) seems to me to be a strong authority in favour of the appellant. There the piece of glebe land in dispute was entirely surrounded by the defender's barony of Gogar, and had been possessed with the barony, and no doubt as part of it, for upwards of seventy years. But it appearing that although a former owner of the barony had agreed with the Presbytery of Edinburgh to purchase this glebe, at an annual feu-duty of £4, and the owners of the barony had possessed the glebe, and paid the feu-duty for the long period mentioned, yet, as it appeared there was no infefment made of the glebe, there was no habile title to which the possession could be ascribed, and the pursuer prevailed.

So in this case the respondent is unable to show a charter of the ground in dispute, or to prove that it was ever held as part and pertinent of the barony of Pittencrieff, and therefore he fails to defend himself against the claim of the Crown.

I confess that I have arrived at this conclusion with great reluctance, as the moral right of the respondent to retain possession of this piece of ground, which is probably of no value, and which has been an ornament to his property for so many years, presses strongly in his favour. But, being bound to disregard every other consideration except what the law dictates, I am compelled to come to the conclusion that the interlocutor appealed from must be reversed. But I submit to your Lordships, that the Crown having originally made a claim beyond what in the result it appears to have been entitled to, there ought to be no costs on either side.

LORD CRANWORTH—My Lords,—It must be taken as a fact admitted or established in proof, that the defender and his predecessors in title had, before the raising of the action in 1854, been for more than forty years in the undisturbed possession of the land in dispute. The only question, therefore, is, whether he can show a valid title by which that possession can be supported?

The case he makes is, that his possession is founded either on an exchange made in 1730 by

Arthur Forbes, one of his predecessors, with the then Marquess of Tweeddale, whereby the Marquess disponed the land in question to Forbes, in exchange for a piece of land called Shillinghill, or else that it is part and pertinent of the barony of Pittencrieff, to which it is not disputed that the defender has a good and valid feudal title. The Lord Ordinary was of opinion that the defender failed to show any title by either of these modes, and that the title of the Crown must prevail. The Lord President and two of the Judges of the Inner House were of a different opinion; they agreed with the Lord Ordinary that the land in question did not form part of that which Arthur Forbes received from the Marquess of Tweeddale by way of exchange, but they thought that the defender and his predecessors had held the land in question for more than forty years as part and pertinent of the barony of Pittencrieff. Lord Deas, the fourth Judge, differed from the rest of the Court, and was of opinion with the Lord Ordinary that the defender had failed to show any title to the land in dispute, either under the exchange, or as being part and pertinent of the barony.

In pursuance of the opinion of the three Judges, an interlocutor was pronounced, bearing date the 31st January 1865, whereby the defender was assoilzied from the conclusions of the action, and the pursuer was found liable in expenses. Against this interlocutor there was an appeal to your Lordships, which was heard at the end of the last session, and the same now stands for judgment.

With respect to the claim of title under the exchange it is unnecessary to say much. The Judges were unanimous in their opinions against the defender. Indeed, the matter does not admit of doubt. The land in dispute certainly comprises the site of the ancient royal palace of Dunfermline, now in ruins. Whatever doubt there may be as to the exact extent of the land conveyed by way of exchange in 1730, one thing is certain; it certainly was part or pertinent of the lands or tenandry of the Grange of Dunfermline. This appears from the disposition of the 30th of December 1761, by which Arthur Forbes disponed to Archibald Grant, as well the barony of Pittencrieff, as also the lands received by him in exchange in 1730, and again from the disposition by Archibald Grant in favour of George Chalmers, of the same barony and lands on the 26th of August 1765. In both these deeds of disposition, which form part of the defender's titles the land, received in exchange is expressly stated to be part and pertinent of the lands and tenandry of the Grange of Dunfermline. Now, the Marquess of Tweeddale derived his title to the Grange of Dunfermline under a decreet of sale in 1665. In that decreet, all the subjects constituting the lands and tenandry of the Grange of Dunfermline are minutely enumerated, and the office of constable of the palace is expressly stated to form part of the tenandry. This is inconsistent with the hypothesis that the tenandry included the palace itself, which moreover is not mentioned among the items which constituted the tenandry. This seems to me so distinctly to show that the land now in dispute, which must be taken as comprising the palace with its pertinents, could not have formed part of what was conveyed by way of exchange in 1730, that I do not think it necessary to dwell further upon this part of the case.

It was not the title relied on at your Lordships' bar, any more than in the Court below; and I therefore proceed to consider the other title put forward—namely, that this piece of land, the site in fact of the ancient palace, has for more than forty years been held and enjoyed by the defender and his predecessors, as part and pertinent of the barony of Pittencrieff.

That barony was created by James V. in 1538, in favour of Patrick Wemyss, and at that time it certainly did not comprehend the Palace of Dunfermline, for, long after that time, the palace formed part of the lordship of Dunfermline, which was granted by King James VI., and confirmed by Parliament to Anne of Denmark and the heirs of her body by the King. That the palace formed part of this lordship is plain from the fact that Queen Anne, reciting her title to the palace as part of the royalty of Dunfermline, by charter, under her hand and seal, dated the 15th of February 1596, and confirmed by Parliament, granted the office of guardian or constable of the palace to Lord Urquhart, afterwards Earl of Tweeddale, and the heirs male of his body. This office continued to exist and to belong to the Earls of Tweeddale, and, by a royal charter of the 14th of February 1669, was made part of the tenandry of the Grange of Dunfermline, then granted and confirmed to the then Earl, his heirs, and assigns. The office is described in the charter as the hereditary office "Constabulario et custodi Palatii nostri de Dunfermling." From which it is plain that the palace was not then part or pertinent of the barony of Pittencrieff—it still was a royal palace.

The question is, therefore, reduced to this—Has the defender shown that which ought to satisfy your Lordships that between the years 1669 and 1803, which is the date of the charter under which he claims title, this piece of land, on which are the ruins of the palace, has ceased to be the property of the Crown, and has become part and pertinent of the barony of Pittencrieff?

The parole evidence satisfies me that for forty years and upwards before the bringing of this action, the respondent and his predecessors in title had been in the undisturbed possession of the piece of ground in dispute, and had made it a part of the policy grounds of Pittencrieff. This seems to be clearly established. I am further satisfied that, at all events, up to the close of the last century or thereabouts, there existed a road, a very bad road, but still a road, running from the Tower Bridge to the Heugh Mills, between the ruins of the palace and the Tower Burn, as indicated by the brown line on Mr Wylie's plan, but, beyond these two facts, the parole evidence throws no light on subject.

It is with great reluctance that I have come to a conclusion different from that at which the Court below have arrived; but the law of Scotland requires, in order to establish a title by prescription, not only that the party insisting on it should prove possession for the required period (forty years), but also that he should show a proper feudal title on which his possession has rested. Now, here, I think, the respondent has failed to show any such title. I do not doubt the correctness of the doctrine that possession of land for the required period may found a title by prescription, as well by showing title to a barony with parts and pertinents, as by showing a bounding title including expressly and by name the lands in question; but, then, the person relying on such a title must show not only that he has possessed the lands in question for the required period; but, further, that he has held them as part and pertinent of the barony. The description "part and

pertinent" of the barony is but a compendious mode of describing what might have been described by setting out the boundaries, and when it has been ascertained that these words have been used in a charter to designate particular lands, the legal consequences will be the same as if the lands had been described by metes and bounds.

It is obvious, from these considerations, that the question in all such cases as that now before us is, whether the enjoyment relied on has been an enjoyment founded on the land being part and pertinent of the barony, or on some other title, or on no title whatever. The onus of proof is on the person setting up the title. It is for him to show that he has been holding that which is in dispute as being part and parcel of the barony, and it is plain that whether he succeeds in showing this must depend on all the circumstances of the case. No general rule can be laid down as to what is or is not sufficient to establish such a case by evidence. Now, here the only facts relied on are—first, that the place in dispute has for more than forty years been enclosed with and treated as part of the policy of Pittencrieff; and second, that unless it has been held as part and pertinent of the barony, it has been held without any title at all.

The last point may be disposed of at once. If to suppose that the place in question had been held without any title at all, merely by usurpation, could be treated as a *reductio ad absurdum*, there would be great force in the argument. But, so far from this being the case, it appears to me, as it did to Lord Deas, to be extremely natural that when Lord Tweeddale had disposed of all that was valuable in what he had acquired by the apprising, he would not be disposed to pay any regard to the duty imposed on him of keeping the palace in repair, and so it naturally became a ruin. It had long ceased to be, in fact, a royal residence, and nothing could be more probable than that a neighbouring proprietor on whose lands the ruins abutted should try to include them in his policy, treating them almost as derelict property. I see nothing in this improbable, or indeed very blameworthy. I can readily understand that the owners of Pittencrieff might suppose that if, even without any title, they enclosed these ruins, and made walks and plantations about them, admitting, as they seem to have done, all respectable persons to enjoy the recreation of walking in the grounds, they were only putting to a beneficial use that which all other persons seemed to have abandoned. The argument, therefore, derived from the improbability of possession having been held without title, seems to me to fall to the ground.

It remains, then, to be considered whether the respondent has shown that the place in question, at the date of the Crown charter of 15th Sept. 1803, was held and enjoyed as being part and pertinent of the barony of Pittencrieff. It may be assumed that it formed part of the policy of Pittencrieff, but that is consistent with its not forming part of the barony. The piece of land obtained in 1730, by way of exchange from the Earl of Tweeddale, forms part of the policy, but it certainly forms no part of the barony. And the fact that this exchanged land, which is no part of the barony, lies between the barony and the place in dispute, is strong, though not conclusive, to show that the latter, like the exchanged land, forms no part of the barony.

But there are circumstances connected with the case which make it highly improbable that the place in dispute can be included among the parts and pertinents of the barony. When a piece of land, not originally part of a barony, is included in a new charter as part of the barony, and is there described by metes and bounds, the Crown, in granting the new charter, can be in no doubt as to what is granted and of what the barony is thus made to consist. But where there is nothing on the face of the charter to show that more land is included in it than was comprised in the preceding charters, nothing to show that more was meant to pass under the words "parts and pertinents" than had been previously included under those words, it must be incumbent on the party who insists on such a title to show that the Crown intended, under these general words, to include the additional land, or, at all events, that the additional land had come to be generally known and treated as part and pertinent of the barony. Otherwise, the Crown might be granting that which it did not intend to grant, and which, from the language used, would not appear to be granted.

This observation applies with peculiar force to a case like the present, where the Crown had itself the *dominium utile*, as well as the *dominium directum* of the land in question.

It can hardly be inferred without proof that the Crown intended under the words "parts and pertinents of the barony of Pittencrieff" to include its own lands not shown to have ever been known or reputed as being part and pertinent of the barony, still less can such an intention be inferred when the subject-matter includes a royal palace, or the ruins of a royal palace. It is highly improbable that the Crown, if it intended to part with such a possession, should effect its object otherwise than by an express description of the object it meant to alienate.

But there are observations leading to the same result, and deducible *ex facie* of the charters themselves. It is certain, as I have already had occasion to remark, that in 1669 the palace was not part or pertinent of the barony of Pittencrieff, for King Charles II., in a charter dated the 14th of February 1669, granted and confirmed to the Marquess of Tweeddale *inter alia* the hereditary office of constable of *Our* Palace of Dunfermline.

Among the titles in proof, are three charters of grant and confirmation of the barony of Pittencrieff, dated respectively in the years 1675, 1687, and 1690, and in all of them certain lands are enumerated not originally part of the barony, but which are expressly stated to have become united with and part of the barony. No charter appears between 1690 and 1762, but in that latter year there was a charter of resignation and confirmation of the barony in favour of Archibald Grant, in which all the lands expressly referred to in the three former charters are enumerated, and are stated to be parts and pertinents of and to have been incorporated into the barony. The same description is retained in the subsequent charters, and in that of 1803, on which the respondent must rely, several other parcels are enumerated as having become parts and pertinents of the barony, but there is no mention of the piece of land in question.

Looking, then, to these documents, I feel compelled very reluctantly to say that the respondent has not satisfied me of what he was bound to show—namely, that he has any charter of the land in question so as to enable him to insist on a title by prescription. I regret that this should be so. I should have been glad to have found any principle on which I could have said that this long possession had created a right, but I am unable to do so consistently with what I understand

to be the law of Scotland, and I therefore concur with my noble and learned friend in advising your Lordships to reverse the interlocutor complained of, and to declare that the pursuer is entitled to a decreet in the terms of the summons, so far as relates to the piece of land on which the ruins stand. But, as the claim originally went much beyond that to which it is now confined, I think there should be no expenses on either side.

Mr ANDERSON—My Lords,—With regard to the expenses of the Crown paid to the respondent, the expenses in the Court below, there will be the usual order for repayment.

LORD CHANCELLOR—As I understand my noble and learned friends' opinion, it is, that there should be no expenses on either side, and I entirely agree with him in that. I rather inaccurately stated that there should be no costs of appeal, but I meant what my noble and learned friend has expressed.

Mr ANDERSON—The expenses paid to be repaid.

Interlocutor appealed from reversed, with declaration.

Agents for Appellant—Andrew Murray, W.S., and Horace Watson, Westminster.

Agents for Respondents—Hamilton & Kinnear, W.S., and Grahames & Wardlaw, Westminster.

COURT OF SESSION.

Saturday, Feb. 16.

FIRST DIVISION.

PETITION—MILES AND SPOUSE.

Lands Clauses Consolidation Act—Railway—Consigned Money—Authority to uplift—Competency—Sufficiency of Title. Property having been taken compulsorily by a railway company, and a sum consigned under sec. 84 of the Lands Clauses Consolidation Act, 1845, the sellers applied for authority to uplift the money. The company opposed on the grounds, (1) that the application was incompetent; and (2) that the title offered was bad. Competency sustained, and held that as the title offered was a good title to the beneficial right to the subjects which the company might, if necessary, complete feudally by adjudication, the sellers were entitled to get up the consigned money.

This was an application for authority to uplift certain consigned money. The petitioners were proprietors of certain heritable subjects in Couper Street, Leith. On 24th October 1865, they received notice from the North British Railway Company that they required to purchase under Acts of Parliament obtained by them a portion of the said subjects, and demanding from them the particulars of their interest therein, and the claims made by them in respect thereof, and giving them notice that the company was willing to treat for the purchase of the subjects and as to the compensation to be made.

On 23d November 1865, the petitioners sent in a claim in which they set forth that they were owners of the subjects, called upon the company to take the whole of the subjects, and claimed £270 as compensation.

On 20th January 1866, the company, with the view of entering upon the subjects in virtue of the Lands Clauses Consolidation Act, consigned in bank the sum of £270, being the amount claimed, and tendered a bond. The deposit receipt bore, in terms of the act, that the consignation was made "subject to the control and disposition of the Court of Session."

The petitioners thereafter agreed with the company to accept £250 as compensation, and the titles were sent to their agents with a view to a conveyance being prepared. The petitioners offered, in implement of their statutory obligation to grant a title, to give the company an assignation by the trustees of the Scottish Property Investment Company (who held an *ex facie* absolute assignation of the personal right and title of the petitioners in security of advances) of their personal right and title, and to become consenting parties thereto. This the railway company refused to accept, in consequence of certain alleged defects in the prior titles.

The petitioners thereupon presented this application for authority to uplift £250 of the consigned fund, they, at the same time, giving the company the assignation which they had tendered. They founded on sections 84 and 85 of the Lands Clauses Consolidation Act.

The railway company lodged answers, in which they stated that the application was, by reason of the terms of section 86 of the Lands Clauses Act, incompetent. A bond had been tendered by them previous to their entry to the lands, which was by the act equivalent to granting a bond, and there was no condition of that bond which had not been fulfilled by them. They were willing to settle the price on their objections to the title being removed.

Their objections to the title were—"1. That no prescriptive title had been produced to the respondents. 2. That the petitioners are not infeft. 3. That the petitioners have only a right to a *pro indiviso* half of the subjects, in respect that the subjects had been at one time held under a disposition and sasine in favour of the then deacon and boxmaster of the barbers of Leith, *nominatim*, and their successors in office, for the use and behoof of the said incorporation, and that the subjects have never been taken out of the *haereditas jacens* of one of these persons, but still to the extent of one *pro indiviso* half thereof remain with his heirs. Mr Johnston, the deacon to whom the title was so taken, died without conveying his right and interest in the subjects; and in 1817 the then deacon, together with the old boxmaster, who still survived, pretended to dispone the subjects to the petitioners' authors. 4. An important part of the petitioners' subjects was and is omitted in the charter of resignation in their favour. This objection the petitioners proposed and did attempt to remedy by getting the omitted portion of the description put on the margin of the charter, and signed after the objection was taken, in order that it might pass as if signed of the proper date of the deed, as is shown by the respondents' agents' letter of 30th April 1866, and the charter of resignation as it now stands, which the petitioners have produced. The charter is No. 19 of process."

The Lord Ordinary (Mure) pronounced an interlocutor, in which he repelled the objection to the competency, and found, with reference to the annexed note, that the respondents are not bound to accept the title offered by the petitioners until the objection taken to the charter of resignation No. 19 of process is removed. The following is his Lordship's

"*Note.*—The object of the present application is to obtain an order on the City of Glasgow Bank for payment of a sum of money deposited by the