Thursday, November 4.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

EARL OF BREADALBANE *v.* MACDOUGALL.

Superior and Vassal—Casualty—Entry.

Held that where a vassal or his authors have recognised one as superior by taking an entry from him or his predecessors, the vassal who resists payment of a casualty on the ground that the right of superiority is in a third party, must adduce most conclusive evidence. Evidence *held* insufficient to establish such a ground of defence.

The Earl of Breadalbane raised a summons of declarator and for payment of a casualty against Alexander W. Macdougall of Soroba in Argyll, to have it found and declared that in consequence of the death of Major Duncan Macdougall, who was the vassal last vest and seized in the six merk lands of old extent of Soroba, a casualty, being one year's rent of the said lands, had become due and fell to be paid by the defender.

The pursuer alleged that he was the immediate lawful superior of the said lands under a series of titles going back for several centuries; that Major Macdougall, the last vassal, who was entered with John Earl of Breadalbane in 1821, had since died, date unknown; and that from him the present defender had derived the *dominium utile* of the said lands by a direct series of titles.

The defender denied that the Earl of Breadalbane was superior of the lands of Soroba of which he (the defender) was proprietor. He averred that the superiority of the six merk lands of Soroba belonged in last century to the Duke of Argyll; that in 1819 the superiority was conveyed to Mr Macdougall of Dunollicht or Dunolly, who entered with the Crown and was duly infeft; and that the superiority now belonged to the representatives of the said Mr Macdougall.

From the titles produced it appeared that besides Major Macdougall's entry in 1821 as above, Macdougall of Soroba had entered in 1740, and again in 1795, with the Earl of Breadalbane. It also appeared that Macdougall of Dunollicht, to whom the superiority was conveyed by the Duke of Argyll in 1819, was then proprietor of the lands of Soroba, and that the two titles since 1831 had been consolidated in the persons of his successors.

The Lord Ordinary (CURRIEHILL) found, decerned, and declared in terms of the declaratory conclusions of the summons, and ordained the defender to make payment of the amount of the casualty. His Lordship added this note—

"*Note.*—The question raised in this action is, Whether the pursuer is truly the superior of the six merk land of old extent of Soroba, described in the conclusions of the summons? The defender is undoubtedly infeft in the *dominium utile* of these lands, and is in possession thereof. The earliest titles produced by him are a disposition by Major Duncan Macdougall of Soroba, in favour of Hugh Monro of Barnaline, dated the 16th January 1824. The defender connects himself with these titles by a regular process of writs, terminating with a disposition in his own favour by George Grant Mackay, dated 9th and recorded in the register of sasines 18th May 1870. During all these years, however, no entry has ever been taken from the superior.

"Major Duncan Macdougall, in whose favour the last entry appears to have been given by the superior, by a precept of *clare constat* dated in 1821, died some time ago.

"The pursuer, the Earl of Breadalbane, maintains that he is the immediate lawful superior of the defender in the said lands, his own title being a mid-superiority, which has been held by him and his ancestors under the Dukes and Earls of Argyll ever since 1502, the pursuer himself being infeft conform to decree of special service dated 9th and recorded in Chancery 10th May, and in the general register of sasines 7th June 1871, and writ of confirmation thereon by the Duke of Argyll dated 31st July 1874. The defender maintains that there is no evidence to establish that the six merk land of old extent of Soroba possessed by him are the lands of which the Earl of Breadalbane holds the mid-superiority under the Duke of Argyll, and he has produced certain titles which he says instruct that Macdougall of Dunolly holds the six merk lands of Soroba directly under the Duke of Argyll, conform to a series of titles dating back to 1745, and that he and not the pursuer is the superior of the defender.

"It is no doubt quite true that certain subjects described as the 'six merk lands of old extent of Soroba' are in the titles both of the pursuer and of Macdougall of Dunolly, and are in both cases held of the Duke of Argyll. But at the same time there is no evidence whatever tending in the slightest degree to instruct that the six merk land of old extent of Soroba in the titles of Macdougall of Dunolly are the lands of that name which are undoubtedly possessed by the defender.

"On the other hand, from an inventory of the defender's titles it appears (1) that Major Duncan Macdougall of Soroba, who granted the conveyance to Hugh Monro in 1824, had himself been infeft in the lands now held by the defender, conform to precept of *clare constat* by the Earl of Breadalbane in favour of him as heir of Patrick Macdougall, his father, dated 28th August 1821, and sasine thereon dated 26th September and recorded in the general register of sasines 9th October 1821; and (2) that this precept of *clare constat* and infeftment were merely the latest of a long series of successive precepts and sasines granted by the Earls of Breadalbane, and going back at all events to 1740.

"All this appears from the inventory of the defender's own titles and productions; in the absence of contrary proof it would probably be sufficient to establish the subsistence of the feudal relation of superior and vassal between the Earls of Breadalbane and the defender's predecessor Major Duncan Macdougall. The defender, however, though directed to lead in the proof, maintained that he was not bound to do more than exhibit his titles for the prescriptive period; that, in particular, he was not bound to produce the title of Major Duncan Macdougall and his predecessors, and that in point of fact these had been missing for many years. It is unnecessary to decide whether or not, in the face of the inventory of his own titles, the defender is entitled to take up such a position and throw upon the pursuer the *onus* of proving the existence of these prior titles, because the pursuer has

produced from the register of sasines official extracts of the three sasines of 1821, 1795, and 1740 in favour of Major Duncan Macdougall and his immediate ancestors, all proceeding upon precepts of *clare constat* from the pursuer's ancestors, the precepts being engrossed at length in the sasines. Such extracts, by the Act 1617, cap. 16, 'make as great faith as the principals, except in case of improbation.' No case of improbation is alleged, and as the extracts now produced establish beyond all doubt the identity of the lands now belonging to the defender with those which Major Duncan Macdougall and his ancestors held of and under the pursuer's predecessors the Earls of Breadalbane as their superiors, the defender cannot successfully dispute that his lands of Soroba are held of the pursuer's superior. I need hardly add that the non-production of the precepts of *clare constat*, on which the sasines bear to proceed, is of no moment, as by the Act 1617, cap. 12, 'anent prescriptions,' such sasines standing together for forty years are sufficient as a prescriptive title without production of their warrants.

"Before concluding, I should observe that the defender objected to the pursuer's title on the ground that when the lands (or mid-superiority) were originally granted by the Earl of Argyll to the pursuer's predecessor Duncan Campbell of Glenurquhay, in 1502, the destination was to the heirs-male of his body, whom failing to the granter and his heirs, whereas the present pursuer is said not to be the heir-male of Duncan Campbell. No proof was offered of that alleged fact; but such proof would have been clearly irrelevant, seeing that the destination was altered in the charter of resignation, dated 29th April 1786, by the Duke of Argyll to John fourth Earl of Breadalbane and a series of heirs of taillie, the pursuer being now served and infeft in that character.

"On the whole, therefore, I have no difficulty in holding that the pursuer is superior of the six merk land of old extent of Soroba belonging to the defender, and described in the summons, and that he is now entitled to the casualty of a year's rent from the defender as singular successor of Major Duncan Macdougall, the last entered vassal.

"As to the amount of the casualty there is no dispute, the parties being agreed that after making the usual deductions it shall be taken to be the sum mentioned in the conclusions of the summons as amended, viz. £284, 13s."

The defender reclaimed, and argued—The casualty was not due to Lord Breadalbane, the titles disclosing that Macdougall of Dunollicht was the superior of the lands of Soroba.

The respondent replied—The defender's predecessor having entered at least once with the Earl of Breadalbane, and a casualty having become due to the Earl on the death of Major Macdougall, the defender must pay it, unless he could prove that Lord Breadalbane was not superior of the lands in question. He had failed to do so. His own titles showed that both property and superiority of the lands of Soroba were consolidated in the person of Macdougall of Dunollicht; the obvious inference was therefore that his lands of Soroba were not the same as those described in the summons, of which Lord Breadalbane was superior.

Authority—*Innes* v. *Gordon*, Nov. 20, 1844, 7 D. 141.

At advising—

Lord President—I think this is a very clear case. The pursuer alleges that he is the superior of certain lands, and the defender denies his title. In such cases the first thing is always to look at the titles of the defender in order to see what was his last entry and with whom. That is clear in the present case. The defender bought the lands in 1870, and got them from George Grant Mackay, who was joint-purchaser with James Steele in 1866, when the estates were brought to sale by a bondholder. Before that, Hugh Munro, a disponee of Major Duncan Macdougall of Soroba, was infeft in the estates in 1824. Major Macdougall had duly entered, and the superior with whom he entered was a predecessor of the pursuer—for by precept of *clare constat*, dated 28th August 1821, he was acknowledged to be the vassal of John Earl of Breadalbane, and was infeft in the same year. Therefore the last entry was taken with the pursuer or his predecessor as superior. There has been no entry since, but that is not difficult to account for. We do not know how long Major Macdougall lived; he may have lived on for a long time after 1824, and so long as he did so the fee was full, the purchaser holding of him till he was entered with the superior. That being so, we cannot tell when Lord Breadalbane first had an opportunity of demanding a new entry; and therefore it must not be taken for granted that there is anything extraordinary or improbable in the view that this estate may have been in non-entry for a long time before this action was raised.

The important fact is, that the last entry was with a Breadalbane, and the present defender is a singular successor of the person who took that entry. That is conclusive of the case on the authority of *Innes* v. *Gordon*, unless the defender can conclusively show that the title of superiority is not in Lord Breadalbane but in someone else.

Now, the present Lord Breadalbane is the successor by a regular series of the Lord Breadalbane of 1821, so that the series of titles on both sides, both those of the superiority and of the *dominium utile* are complete, and are connected together in 1821, and I think that is an end of the case, unless the defender can show that the 1821 entry was a mistake and ought not to have been taken at all.

But if we go back we find not one but several entries. There was one in 1740, another in 1794, and this one in 1821; so that thereby the defender's task is rendered the more difficult, for he must show that all these entries proceeded on a mistake, because the superiority belonged to someone else. How does he attempt to do this? He does not go beyond 1740, when Alexander Macdougall of Soroba took entry with John Lord Glenorchy with concurrence of Lord Breadalbane, his father. He begins later with a charter granted by the Duke of Argyll to Macdougall of Dunollicht in 1745. Now, it is very odd if Lord Breadalbane in 1740 were giving one entry to this subject, and the Duke of Argyll was giving Macdougall of Dunollicht in 1745 an entry to the superiority the right of which had been already exercised by

Lord Breadalbane for five years before. But passing over that, the state of titles produced by the defender shows that in 1819 Macdougall of Dunollicht, being owner of the *dominium utile* of "the six merk land of Soroba," got a conveyance to the superiority from the Duke of Argyll, and on that was entered as a Crown vassal in 1819, and then, having both these rights in his person, another Macdougall in 1831 consolidated the property and superiority, and his successor is now infeft as a Crown vassal in the superiority and *dominium utile* as consolidated in 1831. He holds the property of his estate, whatever it be, directly as a Crown vassal. But how that could put him in the position of being the superior of the defender I cannot see. He has a substantial estate of *dominium utile* held directly of the Crown; but in the estate we are dealing with under this summons there has been a mid-superiority reaching from 1740 to the present day, or at least to 1821. Is it possible that these two estates can be the same? A puzzle no doubt arises from the use of the same name; but it is possible, if not common, that there should be two such estates, and it is the only way of explaining the puzzle which the defender has created. But this is not the way to get over the title of a pursuer to claim a casualty, and I am clearly for adhering to the Lord Ordinary's interlocutor.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Asher—Low. Agents—Davidson & Syme, W.S.

Counsel for Defender (Reclaimer)—Trayner—Lorimer. Agents—H. & H. Tod, W.S.

Friday, November 5.

FIRST DIVISION.

[Bill Chamber.

CITY OF GLASGOW BANK LIQUIDATION—(*ANDERSON'S CASE*)—ANDERSON *v.* THE LIQUIDATORS.

Public Company—Companies Act 1862, *sec.* 121—*Contributory—Suspension of Charge against Defaulting Contributory without Caution or Consignation.*

A holder of bank stock was placed upon the list of contributories, and being unable to meet a call made upon him, arranged the terms of a compromise with the liquidators, to which authority was interponed by the Court, and in virtue thereof a discharge duly executed. Before the said discharge was delivered, however, the liquidators discovered that the contributory had not disclosed the fact that at the time when the compromise was effected he had already engaged to recommence business as partner in a new firm, to which he had with the assistance of friends made certain advances, and considering his explanation unsatisfactory they refused to deliver the discharge, and took decree against him as a defaulting contributory for the amount of his calls under the 121st section of the Companies Act. *Held*, on a suspension of the charge following on that decree, that the circumstances of the case warranted the Court in passing the note of suspension without caution or consignation.

This was a reclaiming note presented on behalf of the liquidators of the City of Glasgow Bank against the interlocutor of the Lord Ordinary on the Bills (LEE) in a note of suspension for James Anderson, farmer, Sandyhills, Shettlestone, of a decree obtained by them in this Court against him in absence as a defaulting contributory. Anderson's mother held stock in the City of Glasgow Bank, which at her death was transferred to her children, who all held it at the date of the stoppage of the bank on 2d October 1878. The share which fell to Anderson amounted to £257, and on this a call of £500 per £100 of stock was made on 13th November 1878, which he paid. On or about 8th April 1879 the liquidators made a further call to the amount of £5782, 10s., payable on 22d April of the same year. As Anderson was unable to pay this second call, he entered into negotiations with the liquidators for a compromise, and made the usual declaration and answered the usual queries required in such cases. The liquidators ultimately agreed to take, as in full of their whole claim, £1300 of paid cash, and to grant Anderson the usual discharge. Anderson accordingly raised money by bill and otherwise, and paid the said £1300 on 5th March 1880. Shortly thereafter application was made to the Court by the liquidators to interpone authority to this arrangement, which was done on 19th March 1880. In virtue thereof the discharge was duly executed by Anderson on 12th April 1880, and by the liquidators shortly afterwards. But after the sanction of the Court had been obtained to the proposed compromise, the liquidators discovered that at the time when he was negotiating the said compromise with them he was a partner in the firm of John R. Rennie & Company, tube manufacturers, Wallace Street, Tradeston, Glasgow, and had concealed that fact from them. On making this discovery the liquidators at once directed that the discharge should not be delivered, and that inquiries should be made as to his connection with said firm; the result of which inquiries was to show that Anderson had entered into partnership with John R. Rennie as tube manufacturers, by contract of partnership dated 2d July 1879, by which he agreed to contribute £1500 to the capital of said firm. The liquidators employed Mr John M'Lean, accountant, Glasgow, to examine the books of the firm, and from a report furnished by him it appeared that Anderson had, on 31st December 1879, a sum of £698, 3s. at his credit in said firm, which he had paid by instalments, the first on 29th August 1879, and the last on 31st December 1879. The liquidators after receiving Mr M'Lean's report called upon Anderson for an explanation, and on 4th May 1880 he furnished them with a statement in which he explained that the sum standing at his credit in said firm was made up of loans from various friends, together with a sum of £200 received by him from the fund established for the relief of contributories to the bank, and averred that he had made a full and fair surrender of his means and estate. The liquidators not being satisfied with this statement, called upon Anderson to account to them for the sum at his credit in said firm, and on his refusal to do so they took decree