sary that the note should have been presented for payment when the first instalment fell due, and when each instalment fell due, and that this had not been done. In my opinion this defence is bad. I think that the presentment for payment of £500 on 2nd January 1897, having been made at the place stipulated in the note, was sufficient. The law as embodied in the Act of 1882 does indeed require, sec. 87 (1), that where a note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. But it is not the law that presentment on the day of payment is a condition of the obligation either of the acceptor of a bill or the maker of a promissory-note. The contrary is made clear in the Act of 1882. The 89th section applies certain provisions of the Act relating to bills to promissory-notes, with the necessary modifications, and among these provisions is section 52. Now, taking it that this is an instrument of which presentment is required, sub-section (2) of section 52 is the part of that section applicable, and it provides that the acceptor is in that case not discharged by the omission to present for payment on the day of maturity.

In the present case I treat the question on the footing that no presentment was made for payment of any of the instalments. But then, on the expiry of the twelve months and the days of grace, the whole £500 was due, unless the want of presentment for each instalment discharged the maker of the note. Presentment having been then made at 62 Buccleuch Street, Glasgow, the condition as to place has been fulfilled. Had there been no place specified, and the first sentence of section 87 (1) therefore not been applicable, it should appear that under the second sentence the maker might have been sued without any presentment at all.

I am for adhering.

LORD ADAM concurred.

LORD M'LAREN—I should have been surprised to find in a code Act of Parliament any deviation from such a very well-established and very convenient rule as that the acceptor of a bill is liable on his obligation without the necessity of charging him by presentment. What are called the requisites of negotiation—presentment, protest, and notice of dishonour—are only necessary to preserve the holder's recourse against the drawer and endorsers, in order that each may be in a position without delay to enforce his recourse against those who are liable to him; but the acceptor is always liable in terms of his obligation for his signature without notice. If there be a condition that the bill is payable at a particular place, then, following a distinction that had been already established by decision, the Bills of Exchange Act made that condition as to place of payment applicable to the acceptor, because that is a condition of the contract. But as regards time there is no limit. I agree with your Lordship that, applying those principles to the present action, there was sufficient presentment at the prescribed place, because the holder of the bill was there and ready to receive payment in terms of his intimation to the debtor. I think that under the Act the creditor is excused from further presentment if he does all that is possible to present the bill at the place prescribed. I therefore am of opinion that the objections to the procedure for enforcing payment of this promissory-note are not well founded.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Salvesen — Gray. Agent—J. M. Glass, Solicitor.

Counsel for the Defenders—Lees—Cullen. Agent—David Dougal, W.S.

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*Friday, February* 18.

## FIRST DIVISION.

[Lord Low, Ordinary.

## FRASER *v.* LORD LOVAT.

*Prescription — Act* 1617, *c.* 12 — *Ex facie Valid Title—Reference to Former Titles —Effect of Nullity of Former Titles — Enabling Act* 1774 (14 *Geo. III. cap.* 22)— *Saving Clause Vesting Act* 1747 (20 *Geo. II. cap.* 41), *sec.* 22.

The estates of L, who was found guilty of high treason, were confiscated in 1747, in which year an Act was passed by the provisions of which estates of persons attainted were vested in the Crown, and it was provided that a register of such estates should be kept. Section 22 of the Act provided that any person having a claim to or against a forfeited estate should enter his claim before the Court of Session within six months of the entry of the estate in the register, or in default such claim should be null and void.

In 1774 an Act was passed to enable the Crown to grant the estates to S the eldest son of L. It also contained a saving clause of all rights which any person possessed in them before the passing of the Act. Following upon this Act the Crown conveyed the estates to S by charter of novodamus "as they were vested in our predecessor by the attainture of L, and as they were possessed by the said L before his attainture."

An action was raised against the present proprietor of the estates by a person claiming to be descended from an elder brother of L, whom he averred to have been the rightful owner of the estates at the time when they were forfeited.

The defender pleaded that the estates had been possessed by himself and his ancestors for more than the prescriptive period on a series of *ex facie* valid irredeemable titles, and in particular he founded on two decrees of service in favour of his father and himself, the

former expede in 1875. These contained a statement that they were granted "with and under the conditions, provisions, declarations, prohibitions, reservations, and exceptions" . . . contained in a deed of entail of 1857. This deed contained a clause in the same terms as the one quoted above, the object being merely to indicate that the estates were held subject to the provisions of an entail and not in fee-simple. It also contained, after the clause descriptive of the subjects conveyed, the words "conform to a charter of novodamus . . . dated 13th April 1774."

The pursuer maintained that in virtue of these references he was entitled to go back to the charter of 1774 to ascertain the subjects conveyed, and thence to the Act referred to in it, the saving clause of which protected his ancestors' rights against prescription. He maintained further, that the qualifications and limitations contained in the titles constituted a recorded reversion in his favour falling within the exception expressly provided by the Act 1617, c. 12.

*Held* (*aff.* the judgment of Lord Low) that it was incompetent to go outside the titles upon which the defender had possessed for the prescriptive period, and inquire into the validity of prior titles, even should they be narrated *in gremio* of those founded upon, and that although prior titles were produced which might prove to be null and void it would be incompetent to give effect to the nullity.

*Opinion* (*per* Lord Kinnear) that the alleged right on which the pursuer founded was not a "recorded reversion."

*Opinion* (*per* Lord Low) that the alleged right of the pursuer's ancestor had in any case been forfeited by his failing to enter his claim within six months, in terms of section 22 of the Vesting Act, and that the saving clause of the Act of 1774 did not apply to claims so forfeited.

This was an action at the instance of Mr John Fraser of Lovat Lodge, 10 Harrington Street, London, against the Right Honourable Simon Joseph Lord Lovat, and the Lord Advocate, concluding for declarator— "*First*, it ought and should be found and declared, by decree of the Lords of our Council and Session, that the lands of Lovat, in the counties of Inverness and Ross, were erected into a free barony by Crown charter dated 26th March 1539, granted by our royal predecessor James V. King of Scots in favour of Hugh, fifth Lord Lovat, and the heirs-male of his body, whom failing to his nearest and lawful heirs carrying and bearing the arms, ensign, and surname of Fraser, whom failing to his heirs whomsoever; and that the said destination of the said barony of Lovat has not, since the granting of the said Crown charter, been altered or innovated upon by any person entitled under the said charter to possess the said barony, or by any person lawfully in possession thereof, and deriving his title from or through any person entitled under the said destination to possess the same, or by any person lawfully entitled to alter or innovate on the said destination, and that the said destination has all along been and remains the only ruling and lawful destination under which the said barony and lands of Lovat may be possessed; and further, it ought and should be found and declared by decree foresaid that the pursuer, as the heir-male of the said Hugh, fifth Lord Lovat, is under the said destination the person presently entitled to the said barony and lands of Lovat; and further, it ought and should be found and declared by decree foresaid that on the death of Hugh, the eleventh Lord Lovat, in or about 1696, the succession to the said barony and lands of Lovat, in virtue of the said destination, opened to Thomas Fraser of Beaufort and his heirs-male; that the said Thomas Fraser of Beaufort died in or about 1698 survived by three sons, of whom Alexander, the younger of Beaufort, was the eldest, Simon the second, and John the third; that the said Simon Fraser, commonly known as twelfth Lord Lovat, who possessed the said lands from about the year 1730 to the year 1747, had no just and lawful right and title to the said lands under the said destination, and that during the said period, and until 1776, when he died, the said Alexander Fraser, younger of Beaufort, ancestor of the pursuer, was the person entitled under the said destination to the possession and ownership of the said barony and lands; that on 19th March 1747 the said Simon Fraser, commonly called twelfth Lord Lovat, was convicted of high treason, and that by the Act 20 George II. c. 41, his estates were declared to be forfeited and vested in our royal predecessor George II., and that by the Act 25 George II. c. 41, the estates of the said Simon Fraser, commonly known as twelfth Lord Lovat, were annexed to the imperial Crown of this realm: And further, it ought and should be found and declared by decree foresaid that the estates of the said Alexander Fraser, younger of Beaufort, were not forfeited or annexed to the Crown by the said Acts or otherwise, and that the said Alexander Fraser younger of Beaufort, had full right to enter upon and possess under the said destination the said barony and lands of Lovat after as well as before the said acts of forfeiture and annexation; and that the said acts of forfeiture and annexation only forfeited and annexed to the Crown any estates which the said Simon Fraser, commonly known as twelfth Lord Lovat, did legally possess, and did not forfeit and annex to the Crown the estate in the said barony and lands of Lovat, to which the said Alexander Fraser of Beaufort was entitled, but only such interest in the said barony and lands as the said Simon, Lord Lovat, had at the date of the said Act of forfeiture: And further, it ought and should be found and declared by decree foresaid that the Crown had no right or title, in virtue of or consequent

on the said Acts of forfeiture and annexation, to retain possession or in any manner of way to dispose of the said barony and lands of Lovat, except as against the said Simon Fraser, commonly known as twelfth Lord Lovat, and his heirs; and, in particular, that the Crown had no right or title to retain, possess, or in any manner of way to dispose of the said barony and lands of Lovat, to the prejudice of the said Alexander Fraser, younger of Beaufort, or his heirs, and that *quoad* the said Alexander Fraser, younger of Beaufort, and his heirs, the Crown held and possessed the said barony and lands in trust for them: And further, it ought and should be found and declared, by decree foresaid, that by virtue of the authority granted by the Act 14 George III., cap. 22, the Crown gave, granted, and disponed unto Major-General Simon Fraser, eldest son of the said Simon, known as twelfth Lord Lovat, his heirs and assigns, all and every the lands, lordships, baronies, patronages, tithes, salmon and other fishings, and other like heritages and estates whatever, which became forfeited to our royal predecessor George II. by the attainder of the said Simon, commonly known as twelfth Lord Lovat, and which were annexed to the Imperial Crown of these realms by the said Act 25 Geo. II., in the same manner, as fully and extensively, to all intents and purposes, as the same and every part and parcel thereof was vested in our said royal predecessor George II. by the said attainder, and as the same and every part and parcel thereof were held, enjoyed, and possessed by the said Simon before the said attainder, but subject always to the proviso in the said Act 14 Geo. III., cap. 22, contained, saving to all and every person and persons, bodies politic and corporate, his, her, and their heirs, successors, executors, and administrators, other than and except the King's most excellent Majesty, his heirs and successors, all such estates, rights, titles, interests, claims, and demands of, into, and out of the said lands and premises to be granted as aforesaid, as they, every or any of them, had before the passing of the said Act, or should or might have held or enjoyed, in case the said Act had never been made: And further, it ought and should be found and declared by decree foresaid that under and by virtue of the said Acts the whole rights of the said Alexander Fraser, younger of Beaufort, and his heirs, to the said barony and lands of Lovat, were saved and preserved *in perpetuum*, and that the pursuer, as heir of the said Alexander Fraser, younger of Beaufort, is now entitled to claim the said barony and lands from the defender, the said Andrew Graham Murray, as representing us as aforesaid: Further, it ought and should be found and declared by decree foresaid that after our royal predecessor George III., in virtue of the powers conferred upon him by the said Act of Parliament 14 Geo. III., cap. 22, had given, granted, and disponed to the said General Simon Fraser the said barony and lands of Lovat, the said General Simon Fraser granted a deed of entail of the said barony and lands in favour of himself and a series of heirs, and made resignation of the said lands unto the person of the Crown, and that by Crown charter, dated 6th August 1774, the Crown granted the said lands to the said General Simon Fraser and the heirs designed by him in the said deed of entail, but subject always to the conditions, provisions, limitations, and exceptions contained, *inter alia*, in the said Act of Parliament 14 Geo. III., cap. 22: And further, it ought and should be found and declared by decree foresaid that under and by virtue of the terms of the said Crown charter, dated 6th August 1774, the whole rights of the said Alexander Fraser, younger of Beaufort, and his heirs, to the said barony and lands of Lovat, were saved and preserved *in perpetuum:* And further, it ought and should be found and declared by decree foresaid that the whole heirs of entail who became possessed of the said lands, under and by virtue of the said deed of entail, possessed the same subject to the whole conditions, provisions, limitations, and exceptions set forth in the said deed of entail and Crown charter following thereon, and more particularly under the conditions contained, *inter alia*, in the said Act of Parliament 14 Geo. III., cap. 22: Further, it ought and should be found and declared by decree foresaid that Thomas Alexander Fraser, commonly styled Baron Lovat, who was vest and seized of the said lands in 1857, as heir of entail under the said deed of entail granted by General Simon Fraser, had no right or title to possess the said lands except under the said conditions, provisions, limitations, and exceptions set forth in the said deed of entail, and more particularly under the conditions contained, *inter alia*, in the said Act of Parliament 14 Geo. III. cap. 22, and Crown charter of 1774 above mentioned; and that the said Thomas Alexander Fraser could grant no deed whereby the said lands could be freed and relieved of the said conditions, provisions, limitations and exceptions contained in the said deed of entail by General Simon Fraser, and the Crown charter following thereon, and more particularly of the conditions set forth in the said Act of Parliament 14 Geo. III. cap. 22, and that any dispositions of the said barony and lands of Lovat made by the said Thomas Alexander Fraser were so made under and subject to the conditions, provisions, limitations, and exceptions under which he acquired possession of the lands, and that the said Thomas Alexander Fraser could not confer upon himself, or any other person through him, any higher or other right to the said lands than he himself had, or was entitled to as aforesaid; and that a deed of entail granted by the said Thomas Alexander Fraser, with consent of the Honourable Simon Fraser, his eldest son, dated 4th and 18th days of August 1857, and recorded in the Books of Council and Session the 2nd day of February 1858, was granted under the conditions, provisions,

limitations, and exceptions under which the said Thomas Alexander Fraser acquired possession of the said barony and lands of Lovat, and that no heir of entail in possession of the said barony and lands of Lovat, under and by virtue of the said deed of entail by the said Thomas Alexander Fraser, could hold or possess the said barony and lands except under the conditions, provisions, limitations, and exceptions under which the said Thomas Alexander Fraser possessed them himself as aforesaid, and that all heirs of entail in possession of the said lands under the said deed of entail, granted by the said Thomas Alexander Fraser, held and possessed the said lands under the conditions, provisions, limitations, and exceptions contained in the said deed of entail granted by General Simon Fraser, and the Crown charter following thereon, and under the conditions, provisions, limitations, and exceptions contained in the said Act 14 Geo. III. cap. 22: And further, it ought and should be found and declared by decree foresaid that the defender Simon Fraser, Baron Lovat, holds and possesses the said barony and lands of Lovat under and subject to the conditions, provisions, limitations, and exceptions contained in the Crown charter granted to the said General Simon Fraser in 1774, and under the conditions set forth in the said Act of Parliament 14 Geo. III. cap. 22, and that he is bound and obliged to divest himself of the barony and lands of Lovat upon the pursuer making good his right, title, and claim thereto, reserved to him by the said Act of Parliament 14 Geo. III. cap. 22. . . . his heirs and successors conform to the writs libelled: *Secondly* and *separatim*, it ought and should be found and declared, by decree foresaid, that the barony and lands of Lovat are an appanage of the title of Baron Lovat in the Peerage of Scotland, and that the said barony and lands can only be held by the persons legally entitled to the dignity, title, and honour of Baron Lovat in the Peerage of Scotland."

The pursuer averred that he was descended from Alexander, the elder brother of Simon twelfth Lord Lovat, who had fled to Wales after the battle of Killiecrankie. His averments with regard to his claim to the Lovat estates are fully set out in the conclusions of the summons quoted above, and the sections of the Acts and Crown charter referred to therein are quoted in the opinion of the Lord Ordinary.

The pursuer pleaded—"(1) (*c*) That the Crown, represented by the defender Andrew Graham Murray, having taken possession of the said barony and lands of Lovat merely in the absence of the rightful owner, Alexander Fraser of Beaufort, and without any title so to do as against him, or in trust for the said Alexander Fraser of Beaufort, ancestor of the pursuer, is now bound to restore the said barony and lands to the pursuer, who is at present entitled thereto. (*d*) That the defender Lord Lovat holds the said lands subject always to eviction by any person having a prior claim thereto, and whose rights were saved by the said Statute 14 Geo. III. cap. 22. (*e*) That the pursuer's claim and right to the said lands have been preserved by the said statute, and can now been enforced. (2) The defender Lord Lovat and his predecessors having since 1774 held the said lands and barony, subject to a recorded reversion, the said defender is now bound to hand over the said lands and barony to the pursuer, who is in right of the said reversion."

The defender, the Lord Advocate, pleaded —"(2) The action as directed against this defender is irrelevant."

The defender Lord Lovat denied all the pursuer's material allegations both of fact and with reference to title, and averred that he and his ancestors had possessed the lands continuously and without interruption, save during the period of forfeiture, from the year 1738 to the present time, upon certain specified titles and infeftments. The defender himself held upon a decree of special and general service in his favour as heir of entail to his father dated 1887, while his father's title was a decree of special service dated 1875.

Both these decrees bore to be granted, "but always with and under the conditions, provisions, declarations, prohibitions, reservations, and exceptions and clause authorising registration in the Register of Tailzies, contained in a deed of entail granted by the said Thomas Alexander, Baron Lovat, with consent of the said Simon, Baron Lovat, therein named and designed the Honourable Simon Fraser, his eldest son, dated the 4th and 18th days of August 1867."

The deed of entail of 1857 contained the statement that it was granted, "but always with and under the conditions, provisions, declarations, prohibitions, reservations, and exceptions, and real burdens and clause of registration in the Register of Entails underwritten."

It also contained in the clause descriptive of the lands conveyed the following sentence:—"*Primo*"—[*Here follows a description of the lands, lordship, and barony of Lovat*]—"Conform to a charter of novodamus under the Great Seal in favour of the deceased Lieutenant-General Simon Fraser, dated the 13th day of April 1774, by which charter the lands and others foresaid are erected and incorporated into one free barony,"

The defender pleaded—(5) *Esto* that the said Alexander Fraser of Beaufort was alive and entitled to the said estates in the year 1747, his right thereto and the right of all persons claiming through him were extinguished by section 22 of the Act 20 Geo. II. cap. 41. (6) The defender is entitled to absolvitor in respect of his titles and the possession of the said estates, had thereon by himself and his predecessors for more than the prescriptive period.

The Lord Ordinary (Low) on 16th November 1897 pronounced the following interlocutor:—"Sustains the sixth plea-in-law stated for the defender Lord Lovat, and assoilzies him from the conclusions of the summons, and decerns: Sustains the second

plea-in-law for the defender the Lord Advocate, and dismisses the action *quoad* him, and decerns: Finds the said defenders entitled to expenses," &c.

*Opinion.*—"It appears to me to be clear that the title of the defender Lord Lovat is protected against challenge by the positive prescription, unless the pursuer's argument is well-founded, that since 1774 Lord Lovat and his predecessors have held the estates subject to a statutory provision saving the rights of any person who at that date had a claim to the estates, which provision prevented prescription running against those in right of such claim.

"I shall state briefly the grounds upon which the pursuer's contention is rested.

"In 1745 the Lovat estates were possessed by Simon Fraser, the twelfth Lord Lovat. He was implicated in the rebellion of that year, and his estates were forfeited and he himself executed in 1747. In 1774 an Act of Parliament (14 George III. cap. 22) was passed 'to enable his Majesty to grant unto Major-General Simon Fraser the lands and estate of the late Simon Lord Lovat upon certain terms and conditions.'

"Major-General Fraser was the eldest son of Simon Lord Lovat, and the Act proceeded upon the narrative that ever since he was capable of acting for himself he had testified his loyalty, and had done good service in the army. It was accordingly enacted that 'it shall and may be lawful to his Majesty, his heirs and successors, to give, grant, and dispone unto the said Major-General Simon Fraser, his heirs and assigns, all and every the lands,' &c., 'which became forfeited to his said late Majesty by the attainder of the said Simon, late Lord Lovat, and which were annexed to the Imperial Crown of these realms.'

"The Act concludes with the saving clause upon which the pursuer founds, and which is in these terms:—'Saving to all, and every person and persons, bodies politick and corporate, his, her, and their heirs, successors, executors and administrators (other than and except the King's most excellent Majesty, his heirs and successors) all such estates, rights, titles, interests, claims and demands of, into, and out of, the lands and premises to be granted aforesaid, as they, every or any of them, had before the passing of this Act, or should or might have held or enjoyed in case this Act had never been made.'

"In pursuance of the Act a Crown charter of novodamus, dated 13th April 1774, was granted to General Fraser. By it the King disponed, 'prædilecto Simoni Fraser ejusq. hæredibus et assignatis quibuscunq. hæredifarie et irredimabiliter, absq. ullo regressu, reversione, seu redemptione qualicunque,' the lands, lordships, and so forth, which became forfeited to the Crown by the attainder of the said Simon Lord Lovat, and specially and without prejudice to the said generality, the lands and Barony of Lovat and other lands which were particularly described. There was no saving clause such as that in the Act of Parliament incorporated in the charter, but the Act was referred to in the narrative of the charter.

"General Fraser took infeftment on the charter conform to instrument of sasine dated 30th September and recorded in the Register of Sasines 1st November 1774, and the lands in which he was thus infeft have (so far as they have not been alienated) descended by a regular series of titles to the present Lord Lovat.

"The pursuer's case is based upon the averment that Simon, twelfth Lord Lovat, had no right to the estates. Hugh, the eleventh Lord Lovat, died in 1696 without male issue, and Thomas of Beaufort was his heir-male and as such was entitled to the estates. Thomas, however, made up no title to the estates, and died in 1698. He was survived by three sons, Alexander, Simon, and John. Simon obtained possession of the estates and was infeft therein about 1730 on, as the pursuer alleges, the false and fraudulent representation that he was the eldest son of Thomas of Beaufort. The pursuer avers that Simon was not the eldest surviving son of Thomas, but that his elder brother Alexander, who had fled to Wales after the battle of Killiecrankie in 1689, lived until 1776 and left lawful issue. The pursuer claims to be the heir-male of Alexander, and through him of Thomas of Beaufort and of the eleventh Lord Lovat.

"The pursuer's argument is that under the Acts of Parliament dealing with the estates of persons attainted for complicity in the rebellion of 1745, there was only forfeited to the Crown such rights as the traitor truly had, and that Simon, twelfth Lord Lovat, not having right to the estates, they were not vested in or annexed to the Crown. It was to provide for such a case, *inter alia*, that the saving clause was inserted in the Act authorising the estates to be conveyed to Major-General Fraser.

"I think that it is the case that estates were forfeited subject to all lawful burdens and claims, because the Act made careful provision for the ascertainment and payment of debts and burdens, and for the trial of any claims to a forfeited estate, and I shall assume, in the meantime, that the saving clause founded on was intended to reserve the right of any person having a claim to or against the estates authorised to be granted to General Fraser.

"But I do not think that that aids the pursuer, because the defender, Lord Lovat, has produced a good prescriptive title. Thus in 1875 the noble defender's father, Simon Baron Lovat, succeeded to the estates and made up his title by decree of special service dated 25th September, and recorded in the General Register of Sasines 21st October 1875, as nearest and lawful heir of tailzie and provision in special to his deceased father, who was found to be last vest and seised in the estates.

"In like manner, when Simon, Lord Lovat, died in 1887, the noble defender obtained decree of special service as nearest and lawful heir of tailzie and provision to him, which was duly recorded.

"It seems to me that these two infeftments constitute a perfectly good prescriptive title, and that it is incompetent to go

behind them and inquire into the origin and previous history of the title.

"Even if the infeftments since 1875 were not sufficient, it would only be necessary to go further back to get a prescriptive title. Take, for example, the charter of 1774, which, as I have said, was an absolute grant of the lands to Major-General Fraser and his heirs and assignees whomsoever. Forty years' possession upon that charter and the infeftments following thereon plainly constitute a prescriptive title.

"In order to get the better of the prescriptive title the pursuer would require to shew that the meaning and effect of the saving clause in the Act of 1774 was that so long as the estates descended to heirs the operation of the positive prescription was suspended as regarded any claims which could have been made to the estates in 1774, or in other words, that to that extent the Act of 1617, c. 12, was repealed. It seems to me to be impossible to put any such construction on the clause. Further, I think that this case is ruled by the Cromarty case—*Glassford* v. *Mackenzie*, 7 S. 423—in which practically the same question was raised.

"That is sufficient for the decision of the case, but I think that it is right to express my opinion that the pursuer's argument proceeded upon a misapprehension of the meaning and effect of the saving clause in the Act of 1774. By that clause the rights which any person had in regard to the lands before the passing of the Act, or would have had if the Act had not been passed, were saved. Now, it seems to me that an examination of the Vesting and Annexing Acts shews that at the time of the passing of the Act of 1774 Alexander Fraser (who the pursuer says was then alive) could not have claimed the estates upon the ground upon which the pursuer now claims them.

"The Vesting Act (20 George II. c. 41) was passed in 1747, and by it the whole estates, heritable and moveable, belonging to persons attainted, or who should be attainted, of high treason, between the 24th June 1745 and 24th June 1748, were vested in the Crown. The carrying out of the Act was entrusted to the Barons of Exchequer, who were given large powers for the discovery of means or estate which might be concealed.

"In order that any person having an interest in a forfeited estate might make good any claims which they had, it was provided that the Barons of Exchequer should cause a register to be kept in which the names of all persons attainted should be entered, and also all their means and estate.

"It was also provided by section 22 that any person having a claim to or against a forfeited estate should enter his claim before the Court of Session within three months of the entry of the estate in the Register if the estate was personal, and within six months if it was real, and it was declared that a claim which was not so made should be 'null and void to all intents and purposes whatsoever,' and that the estate should be 'freed, acquitted, and discharged of and from the same.'

"The pursuer argued that the declaration of nullity of a claim which was not made within the prescribed time only applied to claims in respect of debts affecting the estate, and not to claims to the estate itself. I do not think that argument is tenable. In the first place, it is declared by section 19 that all estates 'to which no claim shall be entered within the time and in the manner hereinafter prescribed, shall be deemed and taken against all persons, and to all intents and purposes to be vested in His Majesty in virtue of this Act.' In the second place, the 22nd section is followed by provisions of the procedure to be adopted by the Court of Session in adjudicating upon claims. It is then provided (sec. 25) that if a claim held to be just and lawful should contain a demand of a sum of money affecting the estate, the Barons of Exchequer should issue debentures or certificates upon which the Receiver-General should pay the sum found due. Further, it was enacted (section 27) 'that where the said claim shall contain a demand of any honours, castles, manors, lands, tenements . . . or other real estate whatsoever, and shall be adjudged, determined, or decreed as aforesaid to be just and lawful, then and in that case the said Court of Session are hereby authorised to order the Sheriff or Sheriffs . . . to cause possession to be delivered to such claimant or claimants.'

"The annexing Act (25 Geo. II. cap. 41) was passed in 1752. It annexes inalienably to the Crown from and after the 25th December 1752 the estates which became forfeited by the attainder of, *inter alia*, Simon late Lord Lovat.

"There was a saving clause by which it was provided that nothing in the Act should extend 'to take away any right, title, or benefit whatsoever which any person or persons are, shall, or may be entitled to in virtue of any claim or claims that have been or shall be duly entered in the Court of Session in Scotland pursuant to the aforesaid Act (the vesting Act), or in virtue of any decree or decrees that hath been or shall be made upon such claims."

"The explanation of the reference in that clause to claims which may be made in the future appears to me to be that means and estate belonging to the attainted persons named might still be discovered, when such estate would fall to be entered in the Register, and claims could then be made to it within three or six months thereafter as the case might be.

"Then there followed the Act of 1774, and it seems to me that the saving clause in that Act had just the same scope as the saving clause in the annexing Act, and that while it would save all claims to means or estate which might afterwards be discovered, or claims which were not finally settled, it did not save a claim to estate previously discovered and registered which had not been lodged within the time prescribed by the vesting Act,

"The pursuer's counsel pointed out that he denied that the Lovat estates had been

duly entered in the Register. The defenders aver that the estates were registered, and that no claim was made to them, and the pursuer denies that averment. But that, in my opinion, is not sufficient. The presumption is that the provisions of the vesting Act were carried out, especially in regard to so important an estate as that of Lovat, and if the pursuer desired to maintain that Alexander of Beaufort never had an opportunity to make his claim because the estates were not registered, he was bound to make a specific averment to that effect.

"The pursuer not only claims the estate on the grounds which I have considered, but the summons contains a separate conclusion for declarator, 'that the barony and lands of Lovat are an appanage of the title of Baron Lovat in the peerage of Scotland, and that the said barony and lands can only be held by the persons legally entitled' to that peerage; and further, that it should be declared 'that on its being found by a competent tribunal that the pursuer as the heir-male of the said Hugh, fifth Lord Lovat, is entitled to the peerage, the pursuer as Baron Lovat is entitled to own and possess the said barony and lands of Lovat.'

"The pursuer avers that the title of Baron Lovat was not created by patent, but that the pursuer's ancestors who held that title sat as Lords of Parliament in the Scottish Parliament, and that the lands and barony of Lovat were bestowed upon them by the Crown as an appanage of their title.

"Now, the original charter of the lands (upon which the pursuer founds) was a Crown charter of resignation, dated 26th March 1539, in favour Hugh, fifth Lord Lovat, whereby the lands then possessed by him were erected into the barony of Lovat. By the dispositive clause the lands were disponed to Hugh, Lord Lovat, and the heirs-male of his body, whom failing, to his nearest and lawful heirs-male whomsoever. The lands, therefore, have since 1539 been held under an ordinary feudal title, and there is no room for holding them to be a mere appanage to the title, assuming that such a state of matters is known to the law of Scotland.

"But further, in 1884 the pursuer claimed the peerage of Lovat, and the finding of the Committee of Privileges and of the House of Lords was, that 'John Fraser has no right to the title, dignity, and honours claimed in his petition.' That finding appears to me to be destructive of a claim founded upon the assumption that the pursuer is Lord Lovat.

"In so far as the action is directed against Lord Lovat, I shall sustain the sixth plea-in-law stated for him, and grant decree of absolvitor. As regards the Lord Advocate, I do not think that any relative case is stated for calling the Crown as a party, and I shall therefore sustain the second plea-in-law for the Lord Advocate, and dismiss the action so far as he is concerned."

The pursuer reclaimed and argued—(1) *On Prescription*—No doubt by the ordinary law of prescription, possession upon an *ex facie* valid irredeemable title for 20 years would preclude inquiry further back than that period. That rule applied where there was nothing in the titles to suggest any qualification, and the effect was that there could be no extrinsic ground of attack—*Munro* v. *Munro*, May 19, 1812, 16 F.C. 568. Here, however, there was a course of references back from the 20 years' titles and intrinsic of them, and accordingly the reclaimer was entitled to scrutinise the older titles. If by reference in the new, and by direct expression in the old titles, he could prove that these subjects were not included in the titles, then he would simply be going outside the titles to ascertain the extent of the subjects and not the nature of the right, and it was only the latter and not the former investigation that was barred by prescription. There was in the decrees of service a distinct qualification of the respondent's title, the right being said to be "under the conditions, provisions, &c.," contained in the deed of entail of 1857. The effect of that reference was the same as if all these conditions had been inserted in the decrees. But on turning to the deed of entail there was found — besides the clause containing the conditions of entail, a reference to the charter of novodamus of 1774—the words "conform to," not being merely for local description, but being equivalent to a condition. It was said that the defender had no need to produce the old charters, and that it was enough for him to produce these decrees of service. But however that might be, as he had chosen to found a further defence upon the old charters the pursuer was entitled to look at them. On turning to the charter of 1774, the question naturally arose "Did the lands dealt with by the Acts actually belong to Simon?" and if they did not, the Acts never applied at all. Accordingly, it was impossible to sustain a plea of prescription when the titles contained such qualifications as did these. (2) The Act of 1774, which enabled the Crown to grant the lands forfeited by Lord Lovat to General Fraser, contained a saving clause intended to apply to just such cases as this, and if it could be shown that Simon had not been the owner of the lands forfeited, and that the Crown had taken by mistake the lands belonging to Alexander, the result would be that the lands had been held in trust for the true owner, to whose heirs they must accordingly be restored. Accordingly, so long as the estates descended to the disponee of the Crown, and had not gone to onerous disponees, the operation of positive prescription was suspended. It was not unreasonable to hold that for the purposes of this Special Act the Act of 1617 was suspended. At the date of the passing of the last named Act there already existed an Act dealing with forfeitures for treason, so it might very well be that it was not intended to apply to such cases at all. There were circumstances in the case of *Glassford* v. *Mackenzie*, February 17, 1829, 7 S. 423, which was

said to rule this case, and was certainly somewhat analogous, which differentiated it. There were analagous cases showing that prescription would not apply to property held in trust for another—*Magistrates of Aberdeen* v. *University of Aberdeen*, March 23, 1877, 4 R. (H. of L.) 48; see also *Heritable Reversionary Company* v. *Millar*, August 9, 1892, 9 R. (H. of L.) 43; *Fleeming* v. *Howden*, July 16, 1868, 6 M. (H. of L.) 113. Moreover the Crown grant contained a limitation as to its own rights, for it did not merely contain a specific conveyance of certain lands, as in the case of the *Duke of Buccleugh*, cited by the respondent, but limited the grant to what was possessed by Simon, and accordingly it was quite competent to go outside the grant and ascertain what it had the power to grant, just as in a bounding charter — *Orr* v. *Mitchell*, March 20, 1893, 20 R. (H. of L.) 27; *Mackintosh* v. *Abinger*, July 12, 1877, 4 R. 1069. (3) It was said that Alexander himself had forfeited his right under section 22 of the Vesting Act, because he had not put forward a claim within six months, but the penalty in that clause applied only to claims in respect of debts, and not to claims to the estate itself. Penal statutes must always be construed strictly. The words in the clause describing the class of persons having a claim to estates seized on behalf of the Crown were taken from the Act 5 George I. cap. 22, but the corresponding words of penalty were not incorporated. It was not equitable to read in the penalty by implication as applying to both classes of claimants, for that would be equivalent to shortening the prescriptive period, in which a claimant would lose his right to an estate, to six months. This distinction was quite reasonable, since the creditor claimed through the attainted person, while the claimant to the estate had no connection with the treason, and it might be expected that the effects of the forfeiture would not be extended beyond the attainted person — *Lord Advocate* v. *Gordon*, 1751, 1 Pat. App. 508; *Earl of Perth* v. *Willoughby de Eresby's Trustees*, March 9, 1875, 2 R. 538 (at 565), December 13, 1877, 5 R. (H. of L.) 26. But on the facts it was not the case that the Lovat estates had ever been entered on the register, and so the section did not apply. (4) There was here a registered reversion in the sense of the Act 1617, cap. 12, which was accordingly saved from prescription. The references to the qualifications and limitations contained in the Crown grant, which appeared in the registered titles did amount to such a reservation, the essence of it being that there was an obligation on the person having the apparent ownership of property to restore it to the true owner. Such a reversion was saved both from negative and positive prescription—Bell's Pr. sec. 2008; Erskine, iii, 7, 10.

Argued for respondent—It was a sufficient answer to the claim of the reclaimer to produce the decrees of service in favour of the respondent and his father, and state that there has been possession on these titles for twenty years. They certainly constituted an "*ex facie* valid irredeemable title" in the words of section 34 of the Conveyancing Act 1874, and there was no occasion or right to go behind them. The case of *Munro* v. *Munro*, *supra*, was directly in point. Even if the prior titles had been narrated *in gremio* of the titles founded on, inquiry as to their validity was excluded. Even if the respondent, going beyond what was required of him, produced old titles, they could do him no harm, though they were proved to be null and void, since the purpose of prescription was to remedy bad and not good titles—*Scott* v. *Bruce Stewart*, 1779, M. 13,519, Ross's Leading Cases, iii, 334; *Duke of Buccleugh* v. *Cunnynghame*, 1826, Ross's Leading Cases, iii. 338; *Lord Advocate* v. *Graham*, December 10, 1844, 7 D. 183; *Forbes* v. *Livingston*, 1822, 1 S. 282, 1825, 1 W. & S. 687, 1827, 6 S. 167. As to the reference contained in these decrees to the deed of entail of 1857, if that deed were looked at it was perfectly clear that the conditions, prohibitions, &c. referred to were nothing more or less than the conditions, &c. of an entail, the sole effect being to make the respondent an heir of entail in possession instead of a proprietor in fee-simple. But even if the reference enabled the reclaimer to go back and trace the history of the former title, and show that it had its origin in a grant of forfeited lands, he was expressly precluded from this very thing by the prescription upon which the respondent founded. And accordingly, assuming that there was the nullity which the reclaimer wished to establish, it would be of no avail to him. 2. But if the pursuer was entitled to look at the charter of 1774, he had no case upon the merits. It was true that it did contain a reference to the Act, but it was merely for the purpose of showing that that Act had been passed to enable the Crown to give out what the previous Act had annexed to the Crown. The words used in describing the grant were merely ordinary dispositive words, and were not intended to create any qualification. But even going back to the Act of 1774, the saving clause did no more than the saving clause in the annexing Act; it did not save a claim to estate previously discovered and registered, which had not been lodged within the time prescribed by section 22 of the vesting Act. The penalty for failure to lodge such a claim applied to claims in respect of the estate as well as to claims for debts affecting it, and accordingly if Alexander ever had any rights he lost them by failing to come forward. The point was absolutely settled by the case of *Glassford* v. *Mackenzie*, which was precisely analogous. 3. As to the saving of a "recorded reversion," in point of fact the pursuer did not allege any reversionary right at all, but maintained that he had a right of property. Nor would it avail him against the prescription founded upon even if he had such a right—*Monro* v. *Monro*, *supra*; *Scott* v. *Bruce Stewart*, *supra*.

At advising—

LORD PRESIDENT—The defender Lord Lovat, and his father before him, have for

the prescriptive period possessed the lands now in dispute in virtue of recorded decrees of special service. This being so, it is settled law that all question is excluded as to the defender's title except such as is raised by the terms of the decrees on which he founds. The pursuer's counsel, admitting this, have rested their case on certain words in the decrees, which they say set forth a qualification of the defender's title and therefore lay it open to their challenge. The words in the decree in favour of the defender so founded on are these—"but always with and under the conditions, provisions, declarations, prohibitions, reservations, and exceptions and clause authorising registration in the Register of Tailzies contained in a deed of entail" of 1857. Now, of course, we are entitled to look at the entail of 1857 for the purpose which is thus set forth in the decree; and it is equally certain that we are entitled to look at it for no other purpose. What that purpose is must be determined by the ordinary methods of construing and comparing legal instruments. In the present instance, when the deed of entail of 1857 is looked at there can be no doubt whatever that the conditions, provisions, declarations, prohibitions, reservations, and exceptions, and clause authorising registration referred to in the decree, are the things specified in the entail in those identical words, in the appendix. From this it appears that the qualification of Lord Lovat's title imported from the entail into the decree is this and nothing more—that he is not a fee-simple proprietor but an entailed proprietor.

The contention of the pursuer is that the referring words in the decree legitimately carry us to the following words in the entail—"conform to a charter of novodamus under the Great Seal in favour of the deceased Lieutenant-General Simon Fraser, dated the 13th day of April 1774," and that this entitles us to examine whether the title thus named did not flow *a non domino*. Upon this it must be observed, in the first place, that the words "conform," and so on, in the entail, can by no licence of language be called a condition, provision, declaration, prohibition, reservation, exception, or clause authorising registration, and least of all when the words of reference are exactly and punctually satisfied by applying them to another part of the entail. But in order to measure the boldness of the pursuer's argument, and its absolute contrariety to the principles of the law of prescription, it is necessary to state in a sentence or two what is the nature of his claim and the ground of his attack on Lord Lovat's title. Lord Lovat's title, says the pursuer. is rested on the grant by the Crown to General Fraser in 1774, and the Crown's right at that date was based on the theory that the lands had come back to the Crown as being part of the estate of Simon twelfth Lord Lovat, which was forfeited to the Crown on the attainder of that nobleman. This, says the pursuer, was a mistake, the lands not having belonged to Simon but to his elder brother, from whom the pursuer descends. But (the pursuer goes on) in the statute which authorised the Crown to bestow the lands on General Fraser there is a salvo of the rights of others, and the subsequent titles are qualified by their dependence on this statute. The result is that in substance the Lord Lovat who made the entail in 1857 had only whatever right the Lord Lovat of 1747 had, and no more. I am conscious that in a highly condensed statement like this I am not fully presenting the pursuer's argument on what may be called the merits of his theory, but I am at present only concerned with its general quality, and in what I have said this is sufficiently indicated. The elaborate deduction of the pursuer's argument does not make the conclusion he arrives at other than this, that the deed of entail of 1857 proceeded *a non habente potestatem*.

Now, the defender's answer to this attack is rested on a compact body of authority which it is impossible to dislodge. It is enough for the defender to say that he and his father have possessed for the prescriptive period in virtue of their infeftments. All inquiry into the validity of the prior title is excluded, even although the prior title is narrated *in gremio* of the titles on which possession is pleaded. It is not necessary for the defender to produce his charter, but if the charter, being produced, were found to be good for nothing and null and void, this would be of no consequence, and would not deprive the defender of his prescriptive title. The positive prescription operates by excluding all inquiry beyond the prescriptive period into the previous titles and rights to the lands, so that it is not competent to inquire, and consequently cannot be known legally, whether lands possessed for forty years on good *ex facie* titles were ever forfeited or not.

These propositions are laid down in so many words in the cases of *Munro*, *Buccleuch*, and *Livingston*, and the sentence from *Livingston* has a strikingly direct application to the present case. The recorded decrees of special service and the possession of the defender Lord Lovat and his father preclude us from listening to the story of the pursuer's pedigree. Accordingly, prepared as I am to sustain the plea of prescription, no other pleas require to be considered. I say this not for the purpose of throwing the smallest doubt on the strength of the defender's position in other respects, or on the soundness of the Lord Ordinary's views on the other branches of the case.

I am for adhering.

LORD KINNEAR—I am entirely of the same opinion. The defender and his immediate predecessors have been in undisputed possession of the lands in question under titles that are *ex facie* adequate since 1774. The pursuer alleges that these titles were founded upon a Crown grant which was really a nullity in respect that it proceeded upon the erroneous assumption that the lands conveyed by it belonged to Simon Lord Lovat, and were forfeited to the

Crown by reason of his treason, whereas in point of fact, according to the pursuer, they belonged to an elder brother Alexander Fraser, whom he alleges to have been then in life and to have been really in right to the property. Therefore he undertakes to show that he is the descendant and representative of this Alexander Fraser, and has a preferable right to the descendants of Simon the twelfth Lord Lovat. The defender denies all the material allegations both of fact and with reference to title upon which this case is presented; but he pleads in the first place that in virtue of his prescriptive possession he is entitled to exclude all inquiry into the pursuer's averments. I agree with your Lordships that that plea is well founded. I think it a very clear case, because every point that can be raised for the pursuer appears to me to be determined by a series of authorities which cannot now be called in question. I quite agree with the Lord Ordinary that it is not necessary for the defender to go further back than the decree of special service in favour of his father, which was recorded in the Register of Sasines in 1875. He effectually connects his own title with that of his late father by the decree of special and general service in his own favour, which was recorded in the Register of Sasines in 1887. It is not disputed that the late Lord Lovat and his son the defender were duly infeft by virtue of these recorded decrees, or that they have peaceably possessed the lands in question upon these titles since 1875. There can be no question that these recorded decrees of special service are sufficient to satisfy the requirements of the Act of 1617, chap. 12, as modified by the 34th section of the Conveyancing Act of 1874. It was perfectly well settled before the latter Act was passed, on the construction of the earlier statute, that the title of an heir was instructed sufficiently for the purpose of prescription by the production of an instrument of sasine or instruments of sasine standing together for forty years, either proceeding upon retours or upon precepts of clare constat, and that it was not necessary to go beyond the sasine and to produce its warrant, or even to instruct the existence of a retour or precept of clare constat otherwise than by the tenor of the sasine itself. Under our present system of conveyancing that condition of the statute of 1617 cannot be literally satisfied, because there have been no retours since the practice of issuing brieves from Chancery was abolished, and it is no longer customary or necessary to expede instruments of sasine, but the registration of the decree of special service has now the same effect as an instrument of sasine on a retour under the former law; and under the Act of 1874 "any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate register of sasines shall be sufficient foundation for prescription, and possession following upon such recorded title for the space of twenty years continually and together, and that peaceably, for all the purposes of the Act 1617, chap. 12," is held to be equivalent to possession for forty years by virtue of heritable infeftment for which charters and instruments of sasine or other titles are produced. There can therefore be no doubt that the defender has produced a sufficient title to satisfy the statutes. Since he and his father have enjoyed possession under that title for more than twenty years it follows that his right is impregnable on any ground of challenge that is not founded upon some intrinsic nullity or forgery. Now, the only ground of challenge is that a remote ancestor, with whose right that of the defender may be connected by a long progress of titles, acquired the land under a Crown charter of novodamus in 1774, which the Crown at that date had no power to grant. But that is the very objection which it is the object and effect of the statutes to exclude. It is that the granter of a charter one hundred years earlier in date than the title on which prescriptive possession begins had no right or power to make the grant. But possession for the prescriptive period excludes all inquiry into the origin and history of the titles produced, and therefore it is irrelevant to say that if that history were investigated it would be found that the title was ultimately traceable to an invalid grant, or to a granter who had no right. "I hold," says Lord Moncreiff in *The Lord Advocate* v. *Graham*, "that it is the purpose of prescription to exclude all inquiry as to whether titles, habile in their form, on which prescriptive possession has followed, were in their original nature and constitution good or bad, and especially the inquiry whether the author from whom they have proceeded had power to grant them or not. When prescription has run there is an absolute presumption that they are good." It is said that the decree of special service upon which the defender and his father were infeft in terms refer to a certain deed of entail, and that when that deed is examined it will be found that the right is traceable to the charter of novodamus to which I have referred, and that that again proceeded upon the treason and forfeiture of Simon, twelfth Lord Lovat. The sole purpose of the reference to the deed of entail is, as your Lordship pointed out, to make up the title of the heirs in possession under the conditions and restrictions of that deed. They were bound to make up their title in that way, and not otherwise, because I presume if they had not done so they would have incurred an irritancy. But the only effect is to burden their title with conditions of tailzie; it does not qualify their right in any other way whatever. Therefore the reference to the deed of entail will do nothing more for the pursuer than enable him to do what the statute expressly excludes, that is, to trace the history of the prior title, and to show that it had its origin in a grant of forfeited lands. What is the legal consequence of that process of historical investigation? It may be that but for the Statute of 1617 there might have been an argument against the validity of the charter of novodamus, and therefore

against the validity of the rights flowing from it; but then the answer may be stated again in Lord Moncreiff's words—"If the statute has any meaning in its preamble and in the enactment following it, the very purpose of it was to raise an absolute presumption of error, falsehood, forgery, or some other fatal nullity against all the averments and all the muniments founded on in support of them, for showing that the titles by which possession has been held were derived from some person who had no power to constitute them." Therefore the whole process of historical investigation founded upon this reference in the decrees of special service is perfectly futile, because when the facts have been ascertained, assuming them to be in favour of the pursuer's case, any inference which might otherwise have been drawn from them against the validity of the defender's title is absolutely prohibited. It appears to me, therefore, that it can make no difference that it is by the aid of the very title upon which the prescriptive title is founded that the history of the previous title may be examined with the view of discovering some antecedent nullity, because when that has been done, and the supposed nullity has been discovered, it is of no effect against prescriptive possession upon a title *ex facie* valid. But that is a matter of express decision, because both in the case of *The Duke of Buccleugh* v. *Cunnynghame* and in *Forbes* v. *Livingston*, it was held that any inquiry into prior titles was excluded, even where the prior titles were narrated *in gremio* of the title on which prescription was pleaded. In *Forbes* v. *Livingston* the objection was that the charter which was the foundation of the prescription had been granted by the Barons of Exchequer contrary to the Act of 1816, which is known as the Clan Act; and this was shown very distinctly by the terms of the clause in the charter itself, which contained an express reference to the power under which the grant appeared to be conferred. Nevertheless it was held that, although the charter would have been null on the ground of error if challenged in due time, that was not a relative ground of objection to the prescriptive title, upon the well-established principle that possession for the statutory period excludes all inquiry into the earlier title. Then in the *Duke of Buccleugh* v. *Cunnynghame* the charter upon which prescription followed bore that it had been granted by virtue of the Act of Annexation, and the Act of Annexation expressly excluded from the Crown right the subjects so granted, but nevertheless the prescriptive possession which had followed upon that grant was held to be perfectly effectual. The pursuer's counsel raised two points which they treated as separate points, as if they raised a new question which had not been directly decided by the previous authorities. I refer to these points for the purpose of showing that they have not been overlooked. But they appear to me to raise exactly the same question, and to depend precisely on the same considerations to which I have already referred. The first point was that the pursuer had right by virtue of a saving clause which is contained in the statute enabling the Crown to grant the charter of novodamus from which it is said the defender's right originally came, the Act enabling the Crown to convey the lands forfeited by Lord Lovat's treason, to Major-General Simon Fraser. It contained the clause—"Saving to all and every person or persons, bodies politick and corporate, his, her, and their heirs, successors, executors, and administrators (other than the King's Most Excellent Majesty, his heirs and successors) all such estates, right, titles, interests, claims, and demands of, into, and out of the lands and premises to be granted aforesaid, as they, every, or any of them had before the passing of this Act, or should or might have held or enjoyed in case this Act had never been made." Now, the use the pursuer desires to make of that saving clause is to show that the Enabling Act and the charter following on it, taken together, were ineffectual to disturb or destroy the right, if it be assumed to have existed, that is said to have vested in Alexander Fraser in 1774, but that is only a reason for saying that the grant of 1774 to the defender's ancestors proceeded from a granter who had no power to make it. Now, it is of no consequence what the reason for making that allegation is. It is excluded by the statute. We are not to inquire into the validity of that grant, or to examine its history for the purpose of seeing upon what authority it came to be granted. It might be a very good point against the defender if he were founding or required to found upon the Enabling Act and the charter that followed upon it. It saves the rights of all persons having a contrary interest as to such rights as they had before the passing of the Act, or such as they might have had or enjoyed if the Act had not been passed. But then the defender does not found upon the Act, nor does he found upon the charter of novodamus which followed upon it. He founds upon the infeftment in the beginning of 1875, and upon the prescriptive possession which has followed since, and it is impossible to meet that case by a saving clause against the effect of a statute upon which the defender does not require to rest his case. But then it is said that the saving clause keeps alive the right of Alexander Fraser, or in other words, that it repeals the Act of 1617 in so far as regards this kind of right. But then it is to be observed that what is saved by this clause, as reserved to persons having contrary interests, is such rights as they have had before. It confers no new right upon anybody, but it leaves them exactly in the same position as if the Enabling Act had not been passed. But then what is the right that it is alleged was vested in the pursuer's ancestors? It was the right to land subject to all the rules and conditions of the law of Scotland, and one of these conditions was that such right might be lost irretrievably by contrary possession following *ex facie* absolute titles through

the operation of the Statute of 1617. Therefore, giving the pursuer's ancestor the full benefit of the saving clause, he is still left to the law of prescription established by the Act of 1617. It therefore appears to me that there is nothing in the saving clause which raises any separate or different point from that which is decided over and over again in the series of cases to which I have referred. The other point said to be separate was that the estate in this case is what is called an appanage, whatever that may mean, of the barony of Lovat, and could not be effectually alienated. The particular kind of right which the pursuer bases upon that allegation has not, I confess, been made clear to my mind, but assuming—and I think it a very difficult assumption to make—that there is a limitation of the kind suggested by the argument known to the law of Scotland, which should render an estate inalienable, that is only another reason for saying that the earlier grants prior to the constitution of the defender's title were not well constituted in respect of their proceeding from persons who had no power to make them. That is just the old question again, and the answer as before is the Act of 1617. There was one other point which I desire not to pass over in silence, because we had so full and able an argument for the pursuer, that it is due to the learned counsel to say that one has considered it, and that is, that the pursuer has the benefit of the saving clause in the Statute of 1617 itself which protects recorded reversions from extinction—that is, reversions recorded in the Register of Sasines. But the answer appears to me to be very clear that the pursuer does not allege any reversionary right whatever. He does not maintain that the defender holds a redeemable title, and that he is the party in right of the reversion. On the contrary, he challenges what is plainly an irredeemable right on the ground that the granters had no power to constitute it. Therefore I think it is quite hopeless to bring the pursuer's case within the saving clause of the statute of 1617. On the whole matter I entirely concur with your Lordship in thinking that the Lord Ordinary's interlocutor must be adhered to.

LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—Balfour, Q.C. —Kennedy—F. Cooper. Agents—Forbes, Dallas, & Co., S.S.C.

Counsel for the Defender the Lord Advocate—C. Johnston. Agent—Thomas Carmichael, S.S.C.

Counsel for the Defender Lord Lovat—Asher, Q.C. — Macphail. Agents — Tods, Murray, & Jamieson, W.S.

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*Tuesday, January 4.*

## OUTER HOUSE.

[Lord Stormonth Darling.

## LORD ADVOCATE *v.* SAWERS.

(Sequel of *Lord Advocate* v. *Sawers*, Dec. 3, 1897, *ante*, p. 190.)

*Revenue—Process—Exchequer Prosecution —Proof or Jury Trial — Court of Exchequer (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 56), *sec.* 6.

Under the provisions of section 6 of the Court of Exchequer (Scotland) Act 1856 the facts in an Exchequer prosecution may be ascertained either by jury trial or by a proof before the Lord Ordinary.

The circumstances of the case are stated in the previous report, *ante*, p. 190. The present case raised the question whether an inquiry into the facts stated by the defender in support of his plea of not guilty should be by jury trial before a jury or by a proof before the Lord Ordinary.

By section 6 of the Court of Exchequer (Scotland) Act 1856 (after a provision as to the form of lodging an information) it is provided as follows:—"If the said defender shall appear and shall not admit as aforesaid, the Lord Ordinary shall appoint a day for hearing the parties upon such information, where this shall appear to him to be necessary, or shall appoint a day for trying the matters put in issue by such information, without any adjustment of separate issue or issues, or shall take such other course as to him may seem proper, and when a day shall be so appointed for trial, a common or special jury (when a special jury shall be applied for and granted) shall be summoned and empanelled, as in any ordinary jury cause before the Court of Session, to be tried by a Lord Ordinary in the Outer House . . . and the verdict of the jury may be in one or other of the forms in Schedule C, hereunto annexed, or in such other form as may be applicable to the case . . . and on such verdict being given the Lord Ordinary presiding at the trial shall pronounce decree in conformity therewith, and as may be just and according to law."

The pursuer and respondent moved for a proof, and argued — Questions raised in Revenue cases had always, so far as the records of the Inland Revenue Office showed, been decided by a proof. That course had been taken in *Crookshank* v. *Lord Advocate*, July 19, 1888, 15 R. 995.

Argued for the defender and reclaimer—Section 6 of the Court of Exchequer Act 1856 limited the ascertainment of facts in a case like this to trial by jury. The whole terms of the section showed this, and contrary practice, when the question was not raised, could not abrogate the terms of a statute. In *Lord Advocate* v. *Thomson*, February 23, 1897, 24 R. 543, Lord M'Laren intimated an opinion that trial by jury was necessary.