interdiction of so much of the building as transcends the red line." And accordingly the interdiction being thus granted on the application of that interdict, the same question which we have found is impossible to solve, will again recur.

It may be said, and perhaps truly said, that if that difficulty hereafter arises, it will be due entirely to either the misconduct of the present appellant, or to the inability of the present appellant to justify what he has done by proving, that it distinctly falls within the limits of the agreement; and I am compelled to accept that answer as a sufficient ground for acquiescing in the interlocutor. I trust, however, that the experience of the past will render the parties to the matter disposed to take some course consistent with reason and moderation on either side, and that they may prevent the further litigation which unquestionably is involved in granting an interdict of the description which I have mentioned, which involves an unknown quantity or at least a quantity of fact, that cannot at present be ascertained.

My Lords, with respect to acquiescence, undoubtedly the respondent had a right to assume, when the buildings were at first commenced, and during their prosecution, that they were constructed in conformity with the agreement; and we find, that when his attention was called to the fact, that the agreement had been violated, there was no delay on his part in remonstrating and protesting against what had been done. There has therefore been nothing like acquiescence which would debar him from the ordinary remedy.

My Lords, on these grounds, and at the same time regretting in some degree that we are obliged to deal with this case in a way which, if there be the same spirit of litigiousness as has hitherto prevailed, may possibly create further annoyance, I concur with your Lordships in thinking that, this interlocutor must be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Appellant's Agents, Hunter, Blair, and Cowan, W.S.; Preston Karslake, Regent Street, London. —*Respondents' Agents*, Duncan and Dewar, W.S.; Loch and Maclaurin, Westminster.

FEBRUARY 11, 1867.

HER MAJESTY'S ADVOCATE FOR THE COMMISSIONERS OF WOODS AND FORESTS, *Appellant*, *v.* JAMES HUNT, Esq. of Pittencrieff, *Respondent*.

Prescription—Possession as Part and Pertinent—Royal Palace Ruins—*H. had been in undisturbed possession of the ruins of a royal palace for forty years and upwards. He had no express title, but alleged, that he had occupied the palace as part and pertinent of his barony of P., which was near, though not contiguous. In an action of declarator to establish the right of the Crown to the palace,*

HELD (reversing judgment), *That, inasmuch as other additions made to the barony during the previous two centuries were always specifically mentioned, but the palace was not, the reasonable presumption was, that the palace was not deemed to be a part and pertinent, though possessed by the owner of the barony; therefore, there being no basis on which the possession rested, H. proved no title against the Crown.*

OPINION—*Though a royal palace may be prescribed for against the Crown, yet it could not be held to pass as part and pertinent of a barony, if it had never been previously connected with the principal subject.*[1]

This was an action of declarator at the instance of the Lord Advocate against Mr. Hunt of Pittencrieff to have it declared, that the defender had no legal right or title to the royal palace of Dunfermline, or the ruins thereof, or the ground whereon the same is situated, and that he had no right or title to certain other pieces of ground adjoining; but that such palace and other buildings belonged to the Crown, and as such fell under the management of the Commissioners of Woods and Forests.

In the course of the action, the pursuer restricted his claim to the royal palace of Dunfermline, the ruins thereof, and ground immediately adjacent thereto.

The pursuer's pleas in law were as follows:—1. The defender having no right or title to any of the subjects mentioned in the record, and, more particularly, having no express conveyance

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[1] See previous report 3 Macph. 426; 37 Sc. Jur. 213. S. C. L. R. 1 Sc. Ap. 85; 5 Macph. H. L. 1; 39 Sc. Jur. 248.

of said subjects, his pleas fall to be repelled. 2. Even if any part of the subjects were included in the defender's Crown titles, the same would be ineffectual and inept, as said subjects could not be alienated without the authority of an Act of Parliament. 3. If any part of said subjects were included in the defender's titles flowing from any of the lieges, said titles are further inept and ineffectual, as flowing from parties who had no right or title to grant the same. 4. The defender has no title to plead prescription, and the writings produced by him are bounding titles, and otherwise inhabile and insufficient to support the plea of prescription. 5. There are no *termini habiles* for the plea of prescription, or the acquisition of subjects as parts and pertinents in this case. The subjects in dispute are not of such a nature as can be acquired by prescription or as parts and pertinents; and so far as described in Articles 5 and 6 of the pursuer's condescendence, said subjects are completely cut off and severed from the defender's property by a deep ravine and a considerable stream of water. 6. Any possession which the defender may have had of any of the subjects not having been, either in extent or quality, sufficient to establish prescription, the defender's pleas are unfounded. 7. In any view, prescription is not pleadable against the pursuers; and the Crown cannot be prejudiced by the negligence of its officers. 8. In the whole circumstances of this case, the defender's statements and pleas are unfounded and inapplicable, and the pursuers are entitled to decree to the full extent contended for in the summons.

The pleas in law for the defender were as follows:—1. The defender having a good title to the subjects in dispute ratified by the Crown, reduction on the part of the Crown is excluded. 2. There are no relevant or sufficient grounds libelled for reducing the defender's titles. In particular there is no ground libelled for reducing the Crown charter in the defender's favour. 3. The disputed subjects, in particular the space on which the palace ruins stand, having been the subject of express conveyance by description of boundaries, and infeftment having followed, and the titles having stood unchallenged for more than the prescriptive period, and possession held thereon, the right of the defender is complete and unassailable. 4. The defender and his predecessors having from time immemorial, or at least for more than forty years and upwards, used and enjoyed, in virtue of their titles, the lands and barony of Pittencrieff, and the other lands adjacent thereto as parts and pertinents, as their exclusive property, are entitled to maintain and continue such possession; and in so far as relates to any such subjects, the conclusions of the summons are inadmissible. 5. The plea taken by pursuer, that the defender has no title to plead prescription, and that the positive prescription is not pleadable against the Crown, is wholly unsupported on principle or authority. 6. Generally, there being no good grounds for challenging the defender's right, or interfering with his possession, the defender should be assoilzied from the action.

The Lord Ordinary (Mackenzie), by his interlocutor dated 16th December 1863, found, (1.) that the defender had no express title to the palace and ground in dispute; and, (2.) that he was not entitled to plead prescription on the footing, that he and his predecessors, for more than forty years, possessed the palace and ground in dispute as a part and pertinent of the barony of Pittencrieff, or under any other legal title; and that he had no legal right or title to the palace or ruins thereof, and that the same belonged to Her Majesty and Her royal successors.

On reclaiming note, the First Division, by interlocutor dated 31st January 1865, found, that for more than forty years preceding the date of the summons in the present action the defender and his predecessors and authors, 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 said ground as a part and pertinent of the said lands and barony; therefore repel the reasons of reduction and assoilzie the defender from the haill conclusions of the action.

The pursuer now appealed from this last interlocutor.

The appellant in his *printed case* gave the following reasons for reversing the interlocutor:—1. Because the old royal palace of Dunfermline and the ground adjacent thereto, represented by the space coloured green on the plan, No. 69 of process, is not included in the piece of ground excambed by the Marquis of Tweeddale to Arthur Forbes, and was not conveyed to the proprietor of Pittencrieff by the contract of excambion, dated 30th March and 16th April 1730, and recorded 16th December 1731, nor by any other express title. 2. Because it is not relevantly stated, as a matter of fact, on the record, that the said royal palace and adjacent ground had been possessed as part and pertinent of the barony of Pittencrieff by the defender (respondent), or his predecessors; nor that they had ascribed such possession of it as they had to their barony title, with parts and pertinents; and because, in the absence of such statement, the defence founded on prescriptive possession of the said palace and ground as part and pertinent of the barony of Pittencrieff, which was only latterly insisted in by the (present) defender (respondent), was not open to him (on the record), and ought not to have been given effect to by the Court. 3. Because the Court ought not to have given effect to that defence in the face of the express averments and pleas on record, that the said palace and adjacent ground were acquired by the predecessors of the respondent by express titles, and that they have all along been possessed

under these express titles. 4. Because, in claiming to have acquired, by possession for the prescriptive period, under a grant of a barony with a clause of parts and pertinents, a subject confessedly not originally included in the grant, the *onus* is on the claimant to prove beyond question, that he or his predecessors and authors ascribed their possession to that title, and that such subject has been possessed by them for the prescriptive period as part and pertinent of the barony. 5. Because there is no proof, that the respondent or his predecessors ever ascribed their possession of the said palace and adjacent ground to their barony title, with parts and pertinents. 6. Because there is no proof, that the defender (respondent) or his predecessors or authors possessed the said palace and adjacent ground for the prescriptive period, as part and pertinent of the barony of Pittencrieff. 7. Because, the said palace of Dunfermline being described in the defender's (respondent's) titles down to his latest Crown charter, dated 1st June, and registered and sealed 3d July 1816, as one of the boundaries of a portion of his property, the Court, in respect of this fact, especially when taken in conjunction with the other facts of the case, ought to have found, that the defender (respondent) had not acquired the said palace and adjoining ground (by prescriptive possession).

The respondent in his *printed case* gave the following reasons for affirming the interlocutor:—1. For more than forty years preceding the date of the summons the respondent and his predecessors and authors, 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 in question as part and pertinent of the said lands and barony. 2. The claim of the appellant and the objections alleged against the respondent's title are excluded by the Prescription Act, 1617, c. 12.

The *Attorney General* (Cairns), *Anderson* Q.C., and *T. Ivory*, for the appellant.—It is obvious, that the title to this palace and ruin must consist either in an express title or in prescriptive possession of the same as a part and pertinent of some other property. 1. As to express title, the only foundation of it is the excambion of 1730. But the site of the palace cannot be reasonably held to be included in the description there given. Therefore, that ground of title cannot be relied upon. 2. The respondent says, that though there be no express title, yet a barony title with a clause of parts and pertinents, and followed by use for forty years as part and pertinent of the lands, will suffice. But this has not been alleged clearly in the record, and it is stated alternatively, which is not competent; and even if it had been sufficiently stated, yet there is no clear evidence of possession of this palace as a part and pertinent. A royal palace is, moreover, not a competent subject of prescription. But even if it is, still it is not enough to prove mere possession, unless it is also clear, that such possession has been as part and pertinent of the principal subject—Ersk. iii. 7, 4; Stair, ii. 3, 73; Menzies on Conveyancing, 549; M. 9636; *Young* v. *Carmichael*, M. 9636; *C. Moray* v. *Wennyss*, M. 9636. The possession must be not only available, but be actually ascribed to the particular title—*Earl of Stair* v. *King*, 5 Bell, Ap. 82; *Scott* v. *Ramsay*, 5 S. 367. Here the alleged pertinent is discontiguous, and therefore the difficulty of connecting the principal and pertinent is all the greater. If it be doubtful to which of two titles possession must be ascribed, then this possession *in dubio* cannot be taken as prescriptive possession—*Maule* v. *Maule*, 4 Mar. 1829, F. C.; Napier on Prescription, 260, 274-7.

Sir R. Palmer Q.C., and *Lee*, for the respondent.—It is not disputed, that the respondent has possessed the palace for forty years, but it is said, that he did not possess it as a part and pertinent of the barony. But there is nothing to shew, that the possession was necessarily referable to any other title; and it is reasonable in such a case to assume, that at some more remote date the titles were connected so as to account for the possession that has followed—*Lord Advocate* v. *Sinclair*, 3 Macph. 994. The subjects that may be included as part and pertinent of a barony are very comprehensive, as, for example, a King's castle—Stair, ii. 3, 60-66; *Mackenzie* v. *Mackenzie*, 6 Paton, Ap. 376; and a mill—*Rose* v. *Ramsay*, M. 9645. And the subject occupied as part and pertinent need not be contiguous—M. 9629, 9636, 9638. The case of *Earl of Stair* v. *King*, when examined, is not adverse to the respondent, for in that case it was admitted, that the lands had been acquired by the predecessor of the entailer as a distinct tenement, and had so continued to be held. But in this case there is no such evidence; and according to the rule laid down by Lord Moncreiff, in *E. Stair* v. *King*, 6 D. 860, the possession is to be ascribed to the title which is most favourable to the party possessing—*Duke of Montrose* v. *Macintyre*, 10 D. 896.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, the learned Judges in Scotland having been divided in their opinion 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 the 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 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 mill 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 Marquis 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: "Totam et integram illam partem 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 12th section of the Scotch Judicature Act, 6 Geo. IV. c. 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 Marquis 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 frae the Tower bridge to the Heugh mills on the north and the Heugh mill 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 Marquis 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, Marquis 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 shewn, 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 shew a *habile* title, to which that possession can be lawfully ascribed.

The Statute respecting prescription of heritable rights passed in the Parliament of 1617, c. 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, annualrents, and other rentages 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 state of their said infeftments, and that peaceably without any lawful interruption made to them thereon during the said space of forty years, that such persons 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 superiours and authors, their heirs and successors, nor by any other person pretending rights to the same by virtue of prior infeftments public or private, nor upon no other ground, reason, or competent of law except for the falsehood, provided they be able to shew 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 shew and produce instruments of sasine, one or more, continued and standing together for the said space of forty years either proceeding upon retour or on precept of *clare constat*."

I have stated the Statute thus fully in order to shew 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 shew, 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; it must be occupied as belonging to such subject. For when the Statute says, that the parties must be able to shew and produce a charter of such lands and others aforesaid 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, and 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 shewn 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 under a different title, is quite immaterial. But it is clear from 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 *primâ 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 grounds adjacent were 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 legality and lordship of Dunfermline by any manner of way, or which did ever at any time bygone, pertain to their Majesties dearest grandmother, as Lady of Dunfermline, 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 claims, 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 and 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 Newrawcroft, 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 serjount 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 the 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, serjount lands, and the marsh lands of Pittencrieff, the fourth part of Newlands, 5 acres of Newrawcroft, 45 falls of lands, 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," the 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 was made part and pertinent of the barony of Pittencrieff, because not only each addition to the barony is expressly mentioned, but those lands which are 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 *Scot* v. *Ramsay* (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 was 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 infeftment 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 shew 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 in the Court below.

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 shew 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 shew 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 shew 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 pursuers were 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 tenantry of the Grange of Dunfermline. This appears from the disposition of the 30th 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 shew, 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 on 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 the Fifth in 1538 in favour of Patrick Wemys, 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 the Sixth,

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 the royal charter of the 14th February 1669 was made part of the tenandry of the Grange of Dunfermline, then granted to the then Earl, his heirs and assigns. The office is described in the charter as the hereditary office—constabularia et custodia palatii nostri apud 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 shewn, 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 the 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 shew a proper feudal title on which his possession has rested. Now, here I think the respondent has failed to shew 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 shewing title to a barony with parts and pertinents as by shewing a bounding title including expressly and by name the lands in question, but then the person relying on such a title must shew, 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 shew, 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 shewing 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 palace 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 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 beneficial use that which all other persons seemed to have abandoned. The arguments 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 shewn, that the palace in question, at the date of the Crown charter of 15th September 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 shew, that the latter, like the exchanged land, forms no part of the barony.

But there are circumstances connected with the case, which makes 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 shew, that more land is included in it than was comprised in the preceding charters,—nothing to shew, 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 insist on such a title to shew, 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 shewn 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, shall 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 1667 the palace was not part or pertinent of the barony of Pittencrieff, for King Charles II., in a charter dated the 14th February 1669, granted and confirmed to the Marquis 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 shew, 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 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 in the Court below.

Mr. Anderson.—My Lords, with regard to the expenses, 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 friend's opinion, it is, that there should be no expenses in the Court below, and I entirely agree with him in that.

Mr. Anderson.—The expenses paid to be repaid.

LORD CHANCELLOR.—Yes.

Interlocutor appealed from reversed.

For Appellant's Agents, Horace Watson.—*For Respondent's Agents*, Grahame and Wardlaw.