

Friday, July 7.

SECOND DIVISION.

[Lord Rutherford Clark,
Ordinary.

BAILIES OF KIRKINTILLOCH *v.* MARSHALL.

*Superior and Vassal—Feu-Duty—Casualty—
Singular Successor—Burgh of Barony—Con-
veyancing (Scotland) Act 1874 (37 and 38 Vict.
c. 94), secs. 4 (subsec. 4) and 45.*

In an action of declarator by the bailies and clerk of court of a burgh of barony for behoof of the burgesses, and for payment of a casualty, where the only title from the superior which the defender produced was a charter of confirmation granted by the bailies in 1812, "as immediate lawful superiors of the lands after mentioned," in favour of the vassal last vest and seised, and bearing that the subjects confirmed were "to beholden of them and their successors in office for payment of the feu and teind duties and others specified in the original charter of the said lands," and where the pursuers produced a charter of confirmation dated in 1670 granted by the baron of the burgh as superior thereof, which contained a disposition of the burgh lands to the bailies and burgesses, and which gave power to the former to grant charters and writs by progress, and to infest and seise the proprietors within the burgh, along with certain other powers and privileges—*held*, in answer to an objection taken to the title of the pursuers, that the defender's immediate lawful superiors were the bailies for behoof of the burgh, and that the casualty was payable to them as themselves the superiors, and not merely as commissioners for the baron of the burgh.

This was an action for payment of a casualty of a year's rent in consequence of the death of the vassal last vest and seised in certain subjects in the burgh of Kirkintilloch, by the bailies and clerk of the burgh for behoof of the burgesses, against Robert Marshall, who had acquired the subjects in question in 1869, the last vassal having died in 1864.

The pursuers alleged in support of their title as superiors that the burgh of Kirkintilloch was erected in 1184 into a burgh of barony by charter granted by King William The Lion to William Cumyn, and was thereafter, in feu farm and heritage, sold and disposed by the said William Cumyn to certain inhabitants or burgesses of the said burgh, with the liberty of a free burgh of barony, with power of courts, election of bailies yearly, and other privileges, as set forth in the charter thereof.

But the earliest document on which they founded was a charter of confirmation of 1670 by William Earl of Wigtown, a successor of William Cumyn, by which, on the narrative of the aforesaid erection and of several charters, with sasines thereon, in favour of the burgh, granted by certain of the Earl's predecessors, the Earl, for the sum of 550 merks paid to him by the bailies of the burgh, confirmed to the bailies, burgesses, and corporation of the burgh all previous charters, sasines, etc. (including

those therein narrated), in favour of the burgesses, and of new granted to the bailies, burgesses, portioners, and heritors of the burgh the whole burgh lands and buildings therein more particularly described, to be holden by the bailies and their successors in office, chosen yearly by the burgesses, in feu farm of him and his successors for a yearly feu-duty of twelve merks together with services used and wont. This charter further granted to the burgesses the power of electing bailies, clerks of court, and other officers, and to the bailies so elected the right to hold courts and administer justice. The charter further gave to the bailies and to their clerks of court, as commissioners of the granter and his successors, and "as superiors of the said lands to that effect by these presents lawfully constituted," full power to receive resignations, and to infest and seise all and singular the heritable proprietors of the said burgh, or of any parts thereof, whether as heirs of their predecessors or upon resignation of their authors, or in any other ways according to the laws of the kingdom. It further confirmed to the bailies, burgesses, and community all liberties, immunities, and privileges at any time bygone granted to him and his predecessors by the king or the estates of Parliament in favour of the free burgh of his barony of Lenzie, and particularly that of holding markets. The precept of sasine in said charter directs sasine to be given in the said lands "by deliverance to the above-named bailies, burgesses, and heritors of Kirkintilloch and their foresaids, or to their certain attorneys or attorney in their names, bearers hereof," &c., with full power to the burgesses and heritors of buying and selling their several parts and portions of the said town and burgh, and of making resignations thereof in the hands of the bailies and their successors in the office of bailiary, and with liberty to the bailies of receiving the same, and of giving and granting infestments and sasines thereupon, according to the tenor of the ancient infestments of the lands of the charter. Upon this precept sasine duly followed, conform to instrument of sasine in favour of the bailies and burgesses and their successors in office in January 1671.

The pursuers further averred that long prior to and ever since the date of said charter the burgesses of said burgh had elected two bailies and a clerk of court annually, and these had been in use to grant charters, precepts, and other writs usually granted by superiors to the individual burgesses and heritable proprietors within the burgh, and on granting these to exact and receive the usual feudal casualties for the benefit of the corporation or community.

In 1812 a charter of confirmation bearing to be by the "bailies of the burgh of Kirkintilloch, and as such immediate lawful superiors of the lands and others after mentioned" (now belonging to the defender), had been granted in favour of Agnes and Jean Millar equally, the survivor of whom was the vassal last vest and seised, and on account of whose death the present claim was made against the defender as singular successor. This charter confirmed a series of titles of the subjects in question in favour of the said vassal's predecessors, and bore that the subjects were to be holden "of and under us and our successors in office, bailies of the burgh of Kirkintilloch, for payment to us, or to the treasurer of the said

burgh for the time being, of the feu and teind duties and others specified and contained in the original charter of the said lands."

The defender resisted the claim, averring that the sole superiors of his subjects were the Earls of Wigtown and their successors (now William Burns, Esq., of Cumbernauld and Kilmahew), and that the bailies by the charter of 1670 were not vested in any *dominium directum*, but were constituted merely agents or commissioners for the superior to grant certain charters by progress; and that the bailies received no power to uplift any feu-duties or casualties due to the superior, all which were by the said charter made payable to the superior or his chamberlain alone; and further, that no power was granted to the bailies to sue any declarator of non-entry, or to take any judicial proceedings to compel an entry into any feu held, as the defender's was, immediately of the superior of the burgh.

In regard to the charter of 1812 he maintained that the bailies who granted it, and who were not represented by the pursuers, were mere agents or commissioners for the superior of the burgh and of this defender's subjects; that these subjects were admittedly held blench, and that no casualty was payable or had been paid; and further, that the pursuers had no title or entry from the superior.

He averred further, that the pursuers were not properly elected and did not properly represent the burgesses of Kirkintilloch, and discharged no public functions there, and that the management of the burgh was in the hands of the magistrates and commissioners under the General Police Act. He also averred that he had never paid any feu-duty to the bailies.

The defender pleaded—" (2) No title to sue. (3) The pursuers not being superiors of the defender's subjects, the defender is entitled to absolvitor. (4) There being, by the terms of the charter of 1670, no casualty or composition exigible on a sale of the subjects now belonging to the defender, he is entitled to absolvitor."

No proof was led in the cause.

The Lord Ordinary found in terms of the declaratory conclusions of the summons, and granted leave to reclaim, adding the following opinion—" This seems to me a very clear case. The defender's lands are within the burgh territory, and the magistrates of the burgh bring this action of declarator and for payment—an action which would, prior to the Conveyancing Act of 1874, have been an action of declarator of non-entry. The title on which the defender possesses—indeed the only title which he produces—is a charter of confirmation of 1812, and I cannot read that charter as anything else than a simple confirmation of a feu-right under the burgh as superior. The *tenendas* clause is quite explicit, for it says, 'to be holden of and under us and our successors in office, bailies of the burgh of Kirkintilloch, for payment to us, or to the treasurer of the said burgh for the time being, of the feu and teind duties, and others specified and contained in the original charter of the said lands;' so that I do not think it is within the limits of possible construction to read this charter as a charter in which the lands are held of the superior of the burgh, for the very reverse is declared. If that be so, it seems to me there is an end of the cause. The sole contention of the defender is that he

held an estate of the burgh's superior, but the only title which he produces, or seeks to produce, seems to me to be necessarily conclusive against him.

"The defender says that he has never paid feu-duty. I assume that to be true; but I do not think it is material. It is perfectly possible the feu-duty was never paid, but that fact will not alter or affect the nature of the holding.

"The pursuers say that composition was paid on the entry of 1812. I do not think that I need inquire whether it was paid or not. The presumption is that it was, inasmuch as a singular successor would presumably be required to fulfil the conditions on which alone he could enforce an entry. I think, therefore, that the pursuers are entitled to prevail.

"The defender also contends that the pursuers are not infeft, but he offered little or no argument in support of that contention. According to the deed of 1812 the burgh is infeft. If it is not, the bailies are trustees, and their title is completed by the 45th section of the Act of 1874."

The defender reclaimed accordingly, and argued that as the burgesses of a burgh royal held of the Crown, so those of a burgh of barony held of the baron, and at all events such was the case here under the writs produced.

Authorities—Ersk. ii. iv. 8; i. iv. 30; *Earl of Wigtown v. Town of Kirkintilloch*, 1734, M. 7299; *Fearns of Dunse v. Hay*, 1732, M. 1824; *Home v. Young*, December 18, 1846, 9 D. 266; *Hay v. Bailies of Aberdeen*, 1634, M. 15,031; *Earl of Breadalbane v. M'Dougall*, November 4, 1880, 8 R. 42—*aff. H. of L.*, *ib.* 93; *Innes v. Gordon*, November 28, 1844, 7 D. 141.

At advising—

LOD JUSTICE-CLERK—In this question it is admitted that the defender is a singular successor, and it is not said that if he holds of the pursuers as superiors he is not liable in the casualty demanded. Whether it be or be not a hardship that they should make this demand on him now we do not need to inquire. But the plea that was apparently urged before the Lord Ordinary, and which was the sole ground of opposition to the pursuer's demand, depended on the question how far the pursuers were or were not the superiors of the defender.

The Lord Ordinary has held that he is their vassal, and as such must conform to the ordinary rules by making payment of the casualty as demanded, and the question is, whether that interlocutor is to be affirmed?

The title under which the last vassal held is, as I think, conclusive of this dispute. It was granted in 1812, and is a charter of confirmation by the bailies in favour of Agnes and Jean Miller, and it proceeds—"We, bailies of the burgh of Kirkintilloch, and as such immediate lawful superiors of the lands and others after mentioned," and so on. This charter of confirmation by the bailies forms the title from the superior on which infeftment was taken and the property has since been held, and I do not well see how it can be disputed by a singular successor of a vassal so entered that the bailies are his lawful superiors, or how a demand for a casualty at the instance of the successors in office of the granters of that charter can be resisted by the singular successor of that vassal. It is said, however, that the

bailies, though they actually granted the charter in these terms, were not really superiors of the vassals whose title they professed to confirm, but that the overlord, the Earl of Wigtown, is the true superior, and consequently that the corporation, and the bailies as representing the corporation, are not entitled to exact the casualty which they here demand, and that this is shown by the titles on which they themselves hold their lands. I doubt if that can be relevantly pleaded in answer to a demand by the person in right of the superiority under the only title which the defender produces. If I am right in this view, I do not think it is necessary to go far into the antiquarian and perhaps more interesting inquiry as to the position of the superior of the burgh of barony as contrasted with the corporation of the burgh. It is contended that the position of the bailies is that only of commissioners of the superior, and that the pursuers have not, and never had, any right except as commissioners. This is said to be the effect of a charter of confirmation and novodamus granted by the then Earl of Wigtown in 1670. I have gone carefully into that charter, and I think that the view of the defender is founded on a misconception. The charter consists of four separate provisions. There seems to have been an ancient charter from the Crown, going as far back as the time of William the Lion, and that Kirkintilloch was possessed of the privileges of a burgh of barony before the charter of 1670. That charter sets out with the narrative of these former grants, and that it was the intention of the granter to confirm and enlarge the rights thereby conferred. It then proceeds, in consideration of the sum of 550 merks paid to him by the bailies on behalf of the burgesses (which shows that it was an onerous transaction on the part of the superior), first to confirm the old rights and titles of the burgesses. The second part is a disposition and alienation from the superior to the burgesses of the whole lands in question. These are the words—"Moreover, witt ye us, the said William Earl of Wigtowne, Lord Superior foresaid, for the said sum of money, and for divers other good onerous causes and considerations well and truly made, done, and performed to us and our honourable predecessors by the said burgesses, heritors, incorporations, and community of said burgh, with which we hold us as well contented, and renounce all objections to the contrary, *de novo* to have given, granted, alienated, and in feu-farm heritably for ever demitted, and by this our present charter confirmed, and also by the tenor of these presents to give, grant, alienate, and in feu-farm heritably for ever demit, and by this our present charter confirm, to the said James Findlay and John Ginding, bailies of the said burgh," &c. This is an alienation to the bailies and the burgh of the land in question. The third part is a re-grant of the privileges of the burgh, including the important one of market. The fourth part is a reservation of certain lands in Kirkintilloch. Then there is a stipulation for a feu-duty to be paid to the superior:—"Paying thence yearly, the said bailies, burgesses, and heritors of Kirkintilloch, or their heirs and successors above written, to us, our heirs and successors, or to our chamberlains in our name, the sum of twelve merks usual money of this kingdom of Scotland, as the yearly rent and feu-duty for the foresaid lands."

Now, the effect of all that is that the burgh as represented by the bailies became the superior of the burgesses as vassals. I do not go into all the clauses; it is enough to indicate the general effect of this charter. From that time the burgh was to pay a feu-duty to the superior of the burgh, and, on the other hand, it was entitled to superior's rights as against the burgesses. It is clear that the bailies do not merely represent the superior, but that the burgh has been given the rights of superior. No doubt if the matter had not been so ancient, and if we could have had access to the original writs, of which the charter of 1670 is a confirmation, the result might have been different, but, on the other hand, I have a strong impression that if the matter could be further looked into the result would rather be to confirm than to set aside the conclusion to which I have felt myself obliged to come.

LORDS YOUNG, CRAIGHILL, and RUTHERFORD
CLARK concurred.

The Lords adhered.

Counsel for Pursuers (Respondents)—Robertson—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender (Reclaimer)—R. V. Campbell. Agents—Maitland & Lyon, W.S.

HOUSE OF LORDS.

Monday, July 10.

(Before Lord Chancellor Selborne, Lords
Blackburn and Watson.)

ROYAL BANK OF SCOTLAND *v.* COMMERCIAL
BANK OF SCOTLAND AND OTHERS.

(*Ante*, p. 97, and 8 R. 805.)

*Bills—Bankruptcy—Lien—Pledge—Bankruptcy
of both Drawer and Acceptor while Bills in
Circle—Right of Holders.*

The drawer and the acceptor of a bill of exchange both fell bankrupt, the acceptor holding certain goods of the drawer in security of his acceptance. *Held* (*aff. judgment of the Court of Session*) that by the laws and practice of Scotland the holder of the bill must rank for the full amount of the bill on both estates to the effect of obtaining payment in full, but that the acceptor's trustee was entitled to indemnity out of the proceeds of the goods, which had, in the meantime been sold, for all payments made by him to the billholder.

This case was decided on June 15, 1881, by the First Division of the Court of Session, and the circumstances of the bankruptcies in which it took rise will be found reported *ante*, p. 97, and 8 R. 805.

The bank which held the bills appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an appeal in an action of multiplepounding arising