[3*d March*, 1843.]

GILBERT O. GARDNER, Esq., *Appellant*.

JOHN SCOTT and others, *Respondents*.

Superior and Vassal.—If, under a disposition with an alternative manner of holding, the disponee take a base infeftment,—a subsequent conveyance of the mid-superiority so created, and a confirmation thereof by the superior, will operate a mid-impediment to the vassal obtaining a charter from the superior so as to make his holding public.

Warrandice.—*Prescription.*—If lands be conveyed in warrandice of a disposition of other lands with a double manner of holding, under which the disponee takes a base infeftment,—should the mid-superior convey the mid-superiority, and the disponee of the mid-superiority obtain a charter from the superior, this will operate as an eviction of warrandice, upon which prescription will run against the original disponee of the dominium title.

Titles—*Boundary.*—A description of lands held to be demonstrative, not taxative.

ON 28th February, 1737, James Wylie disponed to Gavin Lawson, in liferent, and James Lawson, his son, in fee, "All and "haill mine, the said James Wylie's, fourth part and portion of "the lands of Shawtonhill, called Lochquarter, presently pos-"sessed by Robert Semple, with houses, biggings, yards, and "haill pertinents, lying in the parish," &c. The Lawsons were infeft upon this disposition, and their infeftment was recorded.

On 9th November, 1758, James Lawson disponed to John Hamilton, all and haill his "fourth part and portion of the lands of "Shawtonhill, called Lochquarter, as the same are now possessed "by James Thomson, with houses," &c. Hamilton was infeft

on this disposition in January, 1759, and his infeftment was recorded.

On 6th October, 1768, John Hamilton disponed to his son John, the "fourth part and portion of the lands of Shawtonhill, "called Lochquarter, with houses," &c. according to the statement of the appellant, "as the same was some time possessed by "James Thomson, and thereafter by James Russell;" but according to the statement of the respondents, "as the same was "lately possessed by James Thomson, and all in the same way "and manner as the said John Hamilton had right thereto by "disposition in his favour by James Lawson.

On 12th January, 1773, John Hamilton the younger obtained a charter of confirmation of these titles from Dame Helen Murray, the superior of the lands, declaring, that the lands were to be holden of the granter in feu-farm.

After an intermediate conveyance by John Hamilton the younger, to his brother William, and a reconveyance back to him by William, John, on 22d March, 1827, disponed to Smith, as trustee for his creditors, "all and haill the said fourth "part and portion of the lands of Shawtonhill, called Loch-"quarter." On this conveyance, Smith was infeft, and his infeftment was recorded.

On 4th December, 1828, Smith disponed the lands to the appellant, who was infeft on 6th January, 1829, and his infeftment was recorded.

On the 14th October, 1836, the appellant obtained a charter from the Duke of Hamilton, who had acquired the superiority, of "all and whole the fourth part and portion of the lands of "Shawtonhill, called Lochquarter, with the houses, &c. and "haill pertinents thereof, as possessed by Robert Semple, and "thereafter by James Thomson and James Russell, tenants "therein, and which were acquired by the deceased John "Hamilton from James Lawson, conform to disposition granted

" by the said James Lawson in his favour, dated 9th of Novem-
" ber, 1758."

This was the title of the appellant. That of the respondents was as follows: —

On 21st May, 1755, James Lawson disponed to John Scott, " all and haill these my sixteen acres of arable land, or thereby, " with mish and meadow belonging thereto, being part and por- " tion of my lands of Shawtonhill, called Lochquarter, as the " same is presently marched and meithed, occupied and pos- " sessed, by the said John Scott." And in real warrandice of this conveyance, Lawson disponed to Scott, " all and whole my " haill fourth part and portion of the lands of Shawtonhill, called " Lochquarter, some time possessed by Robert Semple." The disposition contained an obligation to infeft, *a me vel de me*, " the " one holding being without prejudice of the other," procuratory and precept, and an obligation upon the disponee, to relieve the disponer of L.3 Scots, " as a proportional part effeiring to " the said lands, of the feu-duty, teind, and other public burdens, " affecting the said lands of Lochquarter." Scott executed the precept in this disposition, by taking a base infeftment under Lawson the disponer. John Scott possessed upon this title until his death.

In February, 1773, James Scott, the son of John, obtained from John Hamilton the younger a precept of *clare constat*, for infefting him, as the heir of his father, in the lands conveyed to his father by Lawson's disposition of 1755, and took infeftment in virtue of the precept. He then paid Hamilton the feu-duty and other burdens stipulated in the *reddendo* of the disposition to his father, and continued to do so until the year 1828, when Hamilton became divested of the superiority under his bankruptcy.

On 14th November, 1832, James Scott disponed the sixteen

acres so held by him to Robert Thomson, who was infeft on 13th December, 1832. In the disposition to Thomson, there was an obligation to infeft by double manner of holding. On 6th March, 1833, Thomson reconveyed to James Scott in fee, and Marion, his wife, in liferent, by disposition, containing a double manner of holding. Upon this conveyance the disponees were infeft; and on 26th March, 1833, James and Marion Scott conveyed to John Scott in fee, burdened with the liferent of Marion, by disposition, containing a double manner of holding. And upon this conveyance John was infeft.

In a process of locality of the parish in which the lands in question were situated, in which a discussion arose between the appellant, on the one hand, and the common agent, James Scott, on the other, as to the stipend allocated *in cumulo* upon the lands held by the appellant and Scott, John Scott entered appearance, and in one of his pleadings, stated, that the stipend consisted of old stipend which had always been paid by the appellant and his authors, as owners of the warrandice lands, and "as "superiors of the respondent's sixteen acres."

James Scott died, and the appellant then required John Scott to take an entry with him as superior. This being refused, the appellant brought action of reduction of Scott's titles, with an alternative conclusion for declarator of non-entry in case a good title should be exhibited.

John Scott pleaded in defence, a denial that the appellant was his superior, inasmuch as the titles shewed that the lands conveyed in 1758 to Hamilton, the appellant's author, were limited to those "possessed by James Thomson," and could not include the lands conveyed to John Scott in 1755, described as "possessed by John Scott" himself. That the recognition by his, John Scott's, author of the authors of the appellant, as their superiors, had arisen from mistake, and that he was entitled,

under the assignation, to writs and evidents in his titles, to take up the procuratory of resignation in the disposition of 1755, and enter with the chief superior, the Duke of Hamilton.

The Lord Ordinary ordered cases by the parties, and thereafter, on 24th May, 1839, pronounced the following interlocutor:—"The Lord Ordinary having heard counsel in this cause, and "thereafter considered the record, cases, title-deeds produced, "and whole process, Finds, that John Smith" (Scott) "the "defender's predecessor, acquired the property now held by "him, (being sixteen acres of the lands of Lochquarter,) from "James Lawson, a predecessor of the pursuer, by disposition, "dated 21st May, 1755, containing both procuratory of resig-"nation and precept of sasine, entitling the disponee and his "successors to hold the lands either *a me, vel de me*, it being "expressly declared as usual, that the one holding should be "without prejudice to the other: Finds, that the said John "Scott having been infeft base on the said disposition, possessed "the lands till his death, without taking any other steps to com-"plete his title: Finds, that on the death of the said John Scott, "his son, James Scott, in 1773, obtained a precept of *clare con-"stat* from John Hamilton, another predecessor of the pursuers, "who had acquired the remaining part of the lands of Loch-"quarter from Lawson, and held himself out, or was understood "to be then mid-superior of Scott's said portion thereof: Finds, "that the said property originally sold to Scott has passed "through various other hands since 1773, although no other "title has been made up under the mid-superior, except by the "said precept of *clare constat:* Finds, that by the original dis-"position by Lawson to Scott, the latter and his successors are "taken bound to free and relieve the disponer of three pounds "Scots per annum, as a proportional part of the *cumulo* feu-duty "effeiring to the whole lands called Lochquarter, which portion "of feu-duty Scott and his successors paid to Lawson, Hamilton,

" and the pursuer, successively, down to a period recently ante-
" rior to the raising of this action, leaving them to settle for the
" same with the over-superior: Finds, under the state of the
" titles exhibited in this action, that the present defender, as a
" successor of James Scott, the original purchaser, is now en-
" titled, in virtue of the assignation of writs in the successive
" conveyances of the said property, to take up the unexecuted
" procuratory of resignation contained in the said conveyance by
" Lawson, the common author both of defender and pursuer, to
" the said James Scott; and that the pursuer is not entitled, any
" more than his author Lawson would have been entitled, to
" compel the defender to continue to hold under and take an
" entry from him, when the defender has intimated that he pre-
" fers to hold *a me* : Therefore, sustains the defences, assoilzies
" the defender, and decerns ; reserving to the pursuer to claim
" relief from the defender, as accords, of the portion of the feu-
" duty payable to the over-superior for the portion of the origi-
" nal property alienated by Lawson, to the said James Scott, in
" terms of the burden contained in the original conveyance:
" Finds the defender entitled to expenses, subject to modifica-
" tion ; and, in the meantime, allows an account of the expenses
" to be given in, and remits the same, when lodged, to the
" auditor to tax and report.

" *Note.*— Had the merits of this case depended solely on the first
" plea urged for the defender, the Lord Ordinary would have great
" doubt of it. It was pleaded that the pursuer had not a proper
" connected title to the superiority (or rather mid-superiority) of
" the defender's land, as it was said that James Lawson, the common
" author of both parties, only gave a conveyance to John Hamilton
" (subsequent to the sale to Scott) of the lands of Lochquarter, as
" then possessed by James Thomson, which it is said excluded Scott's
" portion, which was then possessed by himself. There would have
" been very great weight in this plea, had not Scott's son taken an

" entry, in 1773, from Hamilton, and paid him and his successors the
" portion of the general feu-duty for a long tract of years afterwards.
" In this view, when the whole lands of Lochquarter were conveyed
" to Hamilton, it is rather thought that the reference to Thomson's
" possession must be held as merely descriptive, and not as taxative;
" and the Lord Ordinary, after such a lapse of time, can hardly go
" into the defender's notion that the precept of *clare constat* in 1773
" was taken by Scott's son from Lawson by mistake.

" But, even assuming Lawson to have conveyed to Hamilton the
" temporary mid-superiority constituted over Scott's part of Loch-
" quarter by the base infeftment of the original disponee, and the
" precept of *clare constat* taken by his son, and that this mid-superio-
" rity has descended to the present pursuer, the question remains,
" whether, in the state of the defender's title as produced, the pur-
" suer can force the defender, and all his successors, to continue to
" enter with him? As demonstrated in the interlocutor, the defen-
" der holds a title from Lawson, the common author of both parties,
" with procuratory and precept, entitling him to a double manner of
" holding, and when the pursuer insists, in this action, that the de-
" fender (and of course all his successors *in perpetuum*) must enter
" with him, it can only be on the assumption that the defender has
" lost the option of going to the over-superior, given to his author by
" Lawson's conveyance of 1755. The Lord Ordinary, however, has
" from the first viewed that as a very startling proposition in the
" law of title, and he conceives it to be alike contrary to the clearest
" and best recognized principles of feudal law. When a party gets a
" conveyance from another, with procuratory and precept contained
" in the same deed, and when possession is taken and maintained on
" that deed, the faculty, or privilege of using the procuratory, never
" lapses by prescription or otherwise; the procuratory, while unexe-
" cuted, passes under the successive assignations of writs contained
" in each conveyance of the property; and many instances have
" occurred in practice, in which procuratories, when it was expedient
" to use them to confer a proprietary title, have been used at the
" distance of a century.

" In this view, the Lord Ordinary thought it material to ask the

" pursuer at the debate to explain what was the precise legal ground
" on which he contended that the Scotts had lost the faculty or
" option of a double holding, contained in the original conveyance.
" This question is now attempted to be answered in the pursuer's
" revised case. In one branch of his argument, he seems to contend
" that the defender's predecessor, by entering with the pursuer's
" predecessor, in 1773, had made his election, and chosen for
" ever to hold base under the mid-superior; and, in another view,
" he seems to maintain that the option of using the procuratory is
" now lost by prescription, in consequence of the elapse of sixty-six
" years since the date of the precept of *clare constat.* But the idea
" of the disponee ever having made, or of his having been obliged or
" presumed to have made, any election in this matter, to be final and
" conclusive against his use of the procuratory, is not only a new and
" unauthorized proposition in conveyancing, but seems to be contrary
" to the plainest meaning and object of the deed giving the option of
" double holdings in this and in the innumerable cases of the same
" description which occur in practice. The alternative holding was
" notoriously introduced to save the rights of parties from being
" affected by want of confirmation, till it was convenient for a disponee
" to go to the over-lord; it was a form of right by which a purchaser
" could hold under the seller and his heirs, so long as he chose, and
" then go to the over-superior when he wished to hold directly under
" him. The lower right is given without prejudice to the higher;
" and the disponee, instead of being limited to one only of the modes
" of holding, was entitled to adopt the one after the other, as suited
" his convenience.

" As little is there any room for the plea of prescription. On the
" contrary, when it is considered that the procuratory of resignation
" is a mere faculty or privilege, contained in a feudal progress, it
" would be contrary to every principle of law to hold that it could
" prescribe by any lapse of time. It would be a hazardous position,
" indeed, to maintain that any clause or right could be lost by pre-
" scription which was contained in the very deed on which a pro-
" prietor was possessing his estate.

" If, however, the procuratory of resignation be still executable by

" the defender, it seems to put an end to the present action. If the " defender be still entitled to enter with the over-superior, he cannot " be forced to enter with the pursuer. Indeed, the relative obliga- " tions between mid-superiors and sub-vassals who have a double- " holding, are peculiar; the continuance of the relation on both sides " is voluntary, and has long been so regarded in law. Accordingly, " in one well known case, where a seller had alienated an estate with " procuratory and precept, the heir of the seller was found not " obliged to make up any title to enable him to give an entry to the " purchaser's heir, who had taken a base infeftment. (See case of " Dundas, 1769, *Morr.* p. 15035.) And if the pursuer had not had " occasion to complete a title here, in respect of his right to the " other parts of Lochquarter he certainly could not have been com- " pelled to take up this mid-superiority, to give an entry to the " defender.

" The pursuer asked how the infeftment of Scott, jun. on the " precept of *clare constat* in 1773, could be extinguished on the " record, if the defender does not take the entry now required, to " which it is obvious to answer, that when the present defender " executes the procuratory of resignation, and gets a charter from " the over-superior, he can grant a precept of *clare* in his own favour, " and resign *ad remanentiam.* This, too, is obviously the best title " for the defender to expede.

" The pursuer seems mainly to rely on certain *dicta* in the opinion " of the Judges in the case of Cheyne against Thomson, in the " Second Division, in 1832, (10 *Shaw*, p. 622,) and particularly on " the opinion of Lord Cringletie, which was contrary to the rest of " the Court, as supporting his right to insist on the defender con- " tinuing his vassal. But the Lord Ordinary views the principles " laid down by the great majority of the Court, in that case, as " decidedly favourable to the defender's plea. The majority of their " Lordships considered the option given to a purchaser like Scott, " as *res meræ facultatis*, not prescribable; and they expressly laid it " down that such a faculty was not lost *non utendo.* It is true that " the heir of the party base infeft in that case never took any charter ' or precept of *clare constat* from the seller or his disponee; and

" although one of the Judges, (Lord Justice Clerk,) certainly noticed " that circumstance in his opinion, he gave no opinion what effect or " consequence would have followed from such an entry, if it had been " taken out by the purchaser, because there was no occasion to " anticipate that question, which was not then before the Court. " The Lord Ordinary thinks, that the very granting of that precept. " by one of the pursuer's predecessors, strengthened the obligation " on him to homologate and give effect to the procuratory when the " purchaser's successors chose to use it, as the precept of *clare con-* " *stat* was a recognition and homologation of the original right given " to Scott in all its points, and consequently *inter alia* of the procura- " tory of resignation therein contained.

" Similar arguments used to arise of old, when there was a doubt " whether the vassals of church lands could go to the Crown for an " entry under the clause in the acts of annexation declaring these lands " to hold of the Crown, if they had nevertheless taken a charter from " the lord of erection subsequent to the annexation. Even in that " peculiar case it required an express statute, 1661, c. 53, to prevent " the vassal from going to the Crown; but the option of using the " procuratory in such a case as the present seems to have been all " along admitted by old lawyers. In the argument in the case of " Heriot's Hospital against Hepburn, in 1714, *Morr.* p. 7988-7996-7, " this was conceded on both sides.

" These are the views on which the Lord Ordinary has decided " this case. He proposes to give the defender the greater part of his " expenses, because he not only thinks the case a clear one, even on " the defender's title, (as explained from the first in the defences,) " but because, where a feuar holding a property only of a few acres " is brought into the Supreme Court on such a question, it would be " ruin to him if he did not get his costs. But it is necessary that " that part of the expenses incurred by the defender's denial of the " pursuer's title should be deducted, as it is thought that the defender " was wrong in that plea."

A reclaiming note was presented against this interlocutor, on the 6th of December, 1839, and, on advising it, the Court pro-

nounced the following interlocutor: — "The Lords having "advised this cause, and heard counsel for the parties, adhere "to the interlocutor reclaimed against, and refuse the desire of "the reclaiming note; find additional expenses due; and remit "to the auditor to tax the account thereof, and to report."

Against these interlocutors the appeal was taken; and as the defenders in the Court below did not support the judgment of the Court below, either in printed cases, or by appearance at the bar, the appeal was heard *ex parte.*

Pemberton, and E. S. Gordon, for appellant. — I. The first question is the construction of the title-deeds, — Whether the description, in the original conveyance to the appellant's authors, is to be held to be taxative, as considered by some of the Judges below, or merely demonstrative, as held by others of the Judges. The claim of the appellant is not to the *dominium utile* of the lands, but to the mid-superiority only, and this, it is admitted, he and his authors have possessed since the year 1773 downwards. The mere mention, in the conveyance to Scott, in 1775, of his possession or occupation of the lands, cannot, therefore, have any relevancy; for a party possessing, for forty years, under a title, with parts and pertinents, cannot be affected by a title in another, who has not had possession, *Stair*, ii. 3, 73; Leven *v.* Finlay, *Mor.* 10816; Magistrates of Perth, 8 *S.* and *D.* 82; Cumming *v.* Fyfe, 8 *S.* and *D.* 326; and confessedly the mid-superiority, has not been enjoyed by any other party. A mere reference to possession will not make the description taxative; for this purpose there must be reference to specific marches and boundaries, *Stair*, ii. 3, 26; *Ersk.* ii. 6, 6; Uve *v.* Anderson, 12 *S.* and *D.* 494, where a mention of specific measurement was disregarded, and the description of boundary alone looked to, although the measurement was more clearly ascertainable than the boundaries.

[*Lord Chancellor.* — In that case the marches were very precise, I suppose?]

Yes.

[*Lord Chancellor.* — Don't say, or thereabouts?]

No.

[Then the party could not go out of the boundary because of any words?]

Exactly. — And the Court preferred the boundary to the measurement.

[*Lord Chancellor.* — The measurement, in such a case, must be construed "more or less?"

Lord Campbell. — The question is, Whether, under a title in the appellant, which might include the whole lands, words in another party's title will be admitted to limit the title of the appellant. If the title, *ex facie*, may be enough, I should, as at present advised, hold it to be enough, where the possession confirms it.]

II. But second, the respondent says, that admitting him to have held, under the appellant and his authors, as mid-superiors, since 1773, his titles give him an alternative manner of holding, and this being *res merae facultatis*, does not prescribe, and it is open to him, at any time, to revert to the procuratory in the disposition of 1775, and elect to hold of the superior lord.

[*Lord Brougham.* — Do you contend that the vassal must elect once for all?]

No. He may elect, *toties quoties*, so long as there is no mid-impediment. In this case there are several objections to the vassal so doing: — 1. It is assumed by the Lord Ordinary, that the respondents have a right to the procuratory; but they have not averred on the record, or produced evidence to shew that their titles contain any assignation of writs, so as to carry the procuratory of resignation in the disposition of 1755. 2. Even

if the respondent's title do contain assignation of writs, this would not vest in them the right which the original disponee, John Scott, had to take up the mid-superiority, previously existing in Lawson. When John Scott died, his son, James Scott, did not expede a general service, which could alone have carried to him this personal right, but he entered by precept of *clare constat*, which had not any efficacy to transmit such a right. The personal right, therefore, in John Scott, to take up the procuratory in the disposition of 1755, is still *in hæreditate jacente* of him. Moreover, if the right to the procuratory were in the respondents, it has never been exercised so as to make a title to the mid-superiority, but it is only when their title has assumed this form that it could be an answer to this action. 3. The infeftment taken by Scott upon the disposition by Lawson in 1755, was a base infeftment, until confirmed by the superior, which it never was. A right of mid-superiority, then, was vested in Lawson, and was in him, was carried by his disposition to Hamilton, in 1758, and was fully established in the person of Hamilton by the charter of confirmation in 1773. This charter, and the infeftment upon it, opposed a mid-impediment to Scott establishing, in his person, the right to the mid-superiority, by executing the procuratory in the disposition of 1755. 4. Whether the title to the mid-superiority thus vested in Hamilton, was or not liable to objection originally, it is now fortified beyond challenge by possession for more than forty years. It is admitted, by some of the Judges in the Court below, that the charter of confirmation in 1773 operated a mid-impediment; but they deny effect to the prescriptive possession, because of the conveyance of lands in warrandice, by the disposition 1755, holding that there was no eviction until this action was raised. But, 1*st*, There is nothing on record, or in evidence, to shew that the respondents are in right of the warrandice lands, without which they cannot have any right to found on the conveyance as barring prescrip-

tion, Hamilton *v.* Montgomerie, 12 *S.* and *D.* 353, otherwise successors in the warrandice lands could not have any knowledge from the record of the liability to which they are subject. 2*d*, If the charter of 1773 operated as mid-impediment, it did so as an eviction, and the right to recur to the conveyance in warrandice then emerged. It is a manifest contradiction to hold that these could be cut off by a mid-impediment created in 1773, but that no eviction of the right warranted occurred till 1836, the date of bringing this action. Possession, in virtue of an inconsistent right, is eviction, Burnet *v.* Johnston, *Mor.* 16586; Hepburn *v.* Buccleugh, *Mor.* 16617.

[*Lord Chancellor.* — If Scott, in 1774, had wished to avail himself of the warrandice, how could he have accomplished it?]

By compelling Hamilton by action to resign in the hands of the superior in favour of himself.

[*Lord Chancellor.* — Was the warrandice argued at the bar in the Court below?]

It was not raised before the Lord Ordinary at all; but a hint was thrown out in the course of the argument before the Court, but counsel did not come prepared to argue it.

LORD CHANCELLOR. — James Lawson was proprietor of a fourth part of the lands of Shawtonhill, called Lochquarter; and in the year 1755, he disposed a part thereof to John Scott, by this description, — "all and haill those my sixteen acres of land, or "thereby, being part of my lands of Shawtonhill, called Loch-"quarter, as the same is presently marched and meitted, "occupied and possessed, by the said John Scott."

The disposition contained an obligation to infeft by a double manner of holding, *a me vel de me*, in the common form, a procuratory of resignation, and precept of seisin; and an engagement to relieve the granter of the sum of L.3 Scots of feu-duty, as the proportional part of the *cumulo* feu-duty effeiring

to these lands. Scott took infeftment on the precept in this disposition.

About three years afterwards, namely, in 1758, Lawson disponed to John Hamilton, "all and haill his fourth part of the lands "of Shawtonhill, called Lochquarter," as the same were then possessed by James Thomson. Hamilton was infeft in 1759. The present action was brought by Gardner, in whom Hamilton's estate had become vested, against John Scott, the grandson of the original disponee of the sixteen acres, to compel an entry from him, as singular successor, and payment of the usual composition of a year's rent.

The first question in this case is, whether the mid-superiority of the sixteen acres passed to Hamilton under the above disposition to him from Lawson? I agree with the Lord Ordinary, that if the question had arisen recently after the disposition, and there had been no collateral circumstances to shew what was included in it, and to what it extended, it might have been difficult to say that the mid-superiority of the sixteen acres passed by this conveyance. But in 1773, James Scott, the only party interested in disputing Hamilton's title, was infeft on a precept of *clare constat* from Hamilton, and thereby acknowledged his title to the superiority, paying him the feu-duty of L.3, the proportion stipulated in the original disposition to John Scott; and this payment has been continued down to the commencement of the present suit, a period of more than sixty years.

A farther acknowledgment of the right took place in 1824, in a process of locality then depending, in which it was contended by John Scott, the son of James, and the then owner of the sixteen acres, that Gardner, whose title was deduced from Hamilton, was the superior of the sixteen acres held by Scott. This formal acknowledgment of the title for so many years by the proprietors of the sixteen acres, compels me to read the

words "all and haill his lands, &c. as the same were then "possessed by James Thomson," as merely descriptive or demonstrative, (a sense which I think they will bear,) and not as taxative, or defining precisely the limits of the disposition.

If this be so, the next question is as to the effect of the confirmation of Hamilton's title by the over-lord. It is not disputed, that under a disposition to hold *a me vel de me*, the disponee may, at any time, elect to hold of the superior, and apply for a confirmation of his title. This right is *meræ facultatis*, and is not barred by time. But in a case like the present, where the mid-superiority is disponed to another, and the disponee is infeft by the over-lord, a *medium impedimentum* is created, which must be removed, by reduction or otherwise, before this right can be exercised; and if this state of things be acquiesced in, and the party do not vindicate his right, he may be barred by prescription. The acquiescence in this case has been for a period more than sufficient for that purpose, and there is therefore, I think, subject to the next question, an end of the claim.

The remaining question relates to the effect of the warrandice. The disposition by Lawson to Scott conveyed "all and haill "his fourth part of the lands of Shawtonhill, &c. in real war-"randice of the sixteen acres." It is argued, that this warrandice is still in force, and that, as the pursuer is in possession of the warrandice lands, he cannot enforce his present claim against the defenders, because, if successful, he would be bound to indemnify the parties by reason of the warrandice; and that to prevent this circuity, the law interposes in the first instance. The question, therefore, is, whether the warrandice be still in force? or whether this also is barred by prescription? This depends upon the point whether there has been any eviction in this case, and if so, at what time; for by the statute of 1617, the period of prescription runs from eviction. Some of the learned Judges

in the Court of Session were of opinion, that the eviction in this case could not be considered as having commenced until the institution of the present suit.

But if, by the disposition of the mid-superiority to Hamilton, and the infeftment under that disposition, Scott was prevented from obtaining confirmation of his title, in the usual course, by the over-lord, I consider this to have been an eviction, and that the prescription would run from that period. It follows, therefore, that there is nothing to prevent the pursuer succeeding in his present suit. I recommend your Lordships, therefore, to reverse the judgment of the Court of Session.

Lord Campbell. — My Lords, I heard this case along with my noble and learned friend, and I entirely concur in the view of the case, which he has explained in such a very lucid and convincing manner. My Lords, I never entertained any doubt upon the first question, namely, as to the title of the pursuer. One of the learned Judges below says, that the two conveyances, the conveyance to Scott, and the conveyance to Hamilton, are exactly of the same sort, and that the words in both of them must be consid red demonstrative, not taxative, and that the same rule would apply to both. My Lords, there is no distinction between them, because, as regards the conveyance by Lawson to Scott, the subject matter of the conveyance is expressly confined to the sixteen acres in the possession of Scott; there are no words which would carry the grant beyond that portion of the land. But then, when you come to the conveyance to Hamilton, it is "all and haill" so and so in the possession of Thomson. The possession there may well be demonstrative, and there are words which would carry the whole, namely, the mid-superiority of the sixteen acres, as well as the residue of the lands. It seems to me, therefore, that at all events, it is quite clear, that this might be the foundation of a prescriptive right. Your Lordships are aware, that by the law of Scotland, unless there be a written

grant, adverse possession will not give a title; but if there be a grant which, upon the face of it, might carry the lands, then possession for a certain length of time is a sufficient evidence of title against all the world. Therefore, upon that point, I have never entertained the smallest doubt.

With respect to the effect of the deed of 1773, and Hamilton taking infeftment of the whole, and Scott, the son of the grantee, completing his title under Hamilton, it seems to me, that it was a consummated transaction at that time. If Hamilton was not entitled to the mid-superiority, and if the warrandice was to be resorted to, there was at that time an eviction, because, at that time, Hamilton takes a title to the whole, including the sixteen acres, from the superior under the Crown. Then, that was an eviction, and at that time Scott might have put his warrandice in force. But instead of doing that, what does he do? He completes his title to the sixteen acres under Hamilton, undertaking to pay him the L.3 a year, as the proportion of feu-duty in respect of the sixteen acres, and they have gone on for about sixty years paying the L.3. My Lords, after that, it seems to me, that it is utterly impossible to put that warrandice in force. The warrandice would have run in *sæculâ sæculorum*; there would have been no statutory limitation or prescription, whereby such a claim would be defeated.

Under these circumstances, it seems to me, that the pursuer was clearly entitled to treat the defender as his vassal, and to call upon him to enter under him, the pursuer, as his superior. Unfortunately, the respondent did not appear at the bar, which made us more cautious in considering the case, particularly as there was a great division of opinion among the Judges, and we felt ourselves under the necessity of reversing their interlocutor; but after having given the most anxious consideration to it, I consider, that the opinion expressed by my noble and learned friend is entirely in accordance with feudal principles well

established in the law of Scotland. I entirely concur in the view which Lord Fullerton takes of the case, in his most masterly judgment; and, under these circumstances, I have no hesitation whatever in concurring in the opinion expressed by my noble and learned friend.

Lord Brougham.—My Lords, in this case I entirely agree with my noble and learned friends who have addressed your Lordships. There was one small part of the argument which I did not hear. I, however, considered the case at the time, and have had some communication on the subject with the learned persons in question, and I entirely agree in the view taken by Lord Fullerton, and also in what my noble and learned friend has just said, as to the very satisfactory nature of his very masterly judgment. I entirely agree in the reasons given by my noble and learned friend on the woolsack. There was considerable difference of opinion in the Court below. I entertain no doubt that Lord Fullerton was right, and that the Court below came to a wrong decision, and that the judgment, therefore, must be reversed.

Mr Anderson.—My Lord, with regard to the costs, the Court of Session gave costs against us.

Lord Brougham.—You must have your costs below. We are giving the judgment they ought to have given. We not only reverse the judgment saddling your party with costs, but give you the costs.

Lord Chancellor.—The question is, what order ought to have been made below?

Lord Brougham.—Just so. We make the order which the Court below ought to have made.

Lord Campbell.—The Court below ought to have given costs.

Mr Anderson.—Your Lordships will decern in terms of the libel, and find the pursuer entitled to his costs.

GARDNER *v.* SCOTT. — 3d March, 1843.

Lord Brougham. — The costs below.

Ordered and Adjudged, that the interlocutors complained of in the appeal be reversed. And it is farther ordered, that the defender, in the action in the Court of Session, (respondent here,) do pay or cause to be paid to the pursuer in such action, (appellant here,) the costs of the proceedings incurred by the said pursuer in the said Court of Session; and it is also farther ordered, that the cause be remitted back to the Court of Session, in Scotland, to do therein as shall be just and consistent with this judgment.