Tuesday, July 15, 1874.

FIRST DIVISION.

[Lord Gifford, Ordinary.

THE EARL OF ABERDEEN *v.* THE LORD ADVOCATE.

Superior and Vassal — Crown — Non-Entry — Practice of Barons of Exchequer to Remit Duties.

Held that it is not a relevant objection to a claim by the Crown for arrears of non-entry duties, that the Barons of Exchequer were in the practice of remitting the duties in similar cases.

In this case the Right Honourable John Campbell Gordon, Earl of Aberdeen, proposed to enter with the Crown by writ of confirmation following on a disposition, dated 24th January 1872, executed by himself in favour of himself and the heirs-male of his body and the others therein mentioned of the entailed lands and barony of Haddo and others. The Crown declined to grant an entry except upon payment of the non-entry duties since the death of the last-entered vassal, and to this payment the Earl of Aberdeen objected. The last-entered vassal was the objector's grandfather George Hamilton Gordon, Earl of Aberdeen, who died in 1860. By deed of propulsion, dated 2d December 1854, he disponed in favour of his eldest son G. J. J. H. Gordon, then Lord Haddo, afterwards Earl of Aberdeen, the foresaid lands of Haddo, with the exception of the lands of Gight and Tolquhon, and the disponee was infeft in the lands propelled. G. J. J. H. Gordon, Earl of Aberdeen, died on 2d March 1864, and was succeeded by his eldest son, the objector's brother George Gordon, Earl of Aberdeen, who made up his title to the lands contained in the deed of propulsion by decree of special service as nearest and lawful heir-male of tailzie and provision in special of his father, and to the lands of Gight and Tolquhon as nearest and lawful heir-male of tailzie and provision in special to his grandfather, both deeds dated and recorded in 1864. George Gordon, Earl of Aberdeen, died on the 27th January 1870, and was succeeded by his brother, the objector, who made up his title to the lands contained in the deed of propulsion, by decree of special and general service as heir of entail and provision to his brother, recorded in Chancery 27th July, and in the General Register of Sasines 25th August 1871; but a doubt having been suggested as to the validity of his brother's service, the objector also expede a service to his father conform to decree of special and general service in his favour as heir of provision of his father, recorded as aforesaid. He also completed his title to the lands of Gight and Tolquhon as heir of tailzie and provision to his brother. The objector being then infeft in the whole of the lands in question, with the view of consolidating his title, granted in his own favour the disposition upon which the present question arose. He averred—"That prior to the passing of the Crown Charters Act (10 and 11 Vict. c. 51) in 1847 entries were obtained from the Crown either through the Director of Chancery, who granted Crown precepts, or through the Barons of Exchequer, who granted Crown charters. When the entry was obtained through the Barons of Exchequer non-entry duties were in no case charged. On the other hand, when the entry was obtained through the Director of Chancery non-entry duties from the date of the death of the last entered vassal were charged. In the present case the entry, if sought prior to the passing of the Crown Charters Act, would have been obtained through the Barons of Exchequer, and no non-entry duties would have been payable. The Presenter of Signatures now acts in place both of the Director of Chancery and of the Barons of Exchequer, but in this case he is acting in place of the Barons of Exchequer, and has no right to demand any duties which would not have been exigible if the entry had been granted by them." The objector further explained—"Prior to the passing of the Titles to Land (Scotland) Act 1858 the necessary deed would have been a charter of confirmation, and being a charter it would necessarily have been granted by the Barons of Exchequer, who alone granted charters. By the said Titles to Land (Scotland) Act, and the Titles to Land Consolidation (Scotland) Act 1868, 'writs' have been substituted in place of charters. Moreover, from the preceding statement of the state of the objector's title it is clear that if he had been entering with the Crown prior to the change of the law in 1847, he could not have entered by obtaining a precept from Chancery. It was only the heirs of parties who were entered with the Crown who could make up a title in that way. If, therefore, the objector had been obtaining this entry before 1874, he could not have been called upon to pay non-entry duties, because he would not have entered by precept from Chancery, and none of the Acts above referred to contains any provision for the payment of non-entry duties in cases in which these duties were not formerly payable."

The objections for the Earl of Aberdeen were in the following terms:—"(1) Because prior to the passing of the Crown Charters Act the objector, having regard to the state of his title, would have entered with the Crown by a charter from the Barons of Exchequer, in which case no non-entry duties were ever exacted or paid, and he is now entitled to an entry on the same terms. (2) Because in no case were non-entry duties payable to the Crown on granting a charter of confirmation, and they are not now exigible on granting a writ of confirmation, which is equivalent to and has come in place of such charter."

The Lord Advocate on behalf of the Crown pleaded—"The duties in question being due and exigible, the objector is entitled to an entry only upon payment thereof, and accordingly the objections which have been proponed ought to be repelled."

The Lord Ordinary (GIFFORD) repelled the objections.

His Lordship added the following note:—There is no objection stated in the present case to the form or terms of the Crown writ of confirmation as revised and adjusted by the Presenter of Signatures. The objections are confined to the amount of non-entry and other

duties marked thereon as payable, viz., £228, 15s. 9½d. sterling. This sum is objected to to the extent of £2082, 4s. 9½d. Scots, or £173, 10s. 5d. sterling. There is an additional objection to another £477, 10s. Scots, or £39, 15s. 10d. sterling.

"On going into detail, however, there is no objection to the calculation of duties. The objections are all, in point of principle, that the duties admitted to be rightly calculated are not in point of law due by the vassal to the Crown.

"The main objection relates to 11½ years' non-entry duties, or rather to 12 years' non-entry duties (for another half-year was added by the Presenter of Signatures) claimed by the Crown, amounting to £2082, 4s. 9½d. Scots. The Earl of Aberdeen maintains that these non-entry duties are not due by him at all, and he pleads alternatively that even if due they must be made good by a separate process against the lands or otherwise, and cannot be recovered by withholding the Crown writ of confirmation. He pleaded that he is entitled to instant entry as a singular successor on payment of the statutory composition of ten merks, and that being thus entered the Crown must adopt a new and separate process against him or against the lands for the purpose of recovering the non-entry duties, if the same are exigible at all.

"The leading question is, Are the non-entry duties really due to the Crown?

"The Lord Ordinary is of opinion that they are, and that so far the objections must be repelled.

"It was admitted in argument, and seems clear in point of fact, that the lands have been in non-entry since the death of the old Earl of Aberdeen, who died on or about 14th December 1860. It seems to follow that non-entry duties are due to the Crown till the present objector enters. It is true that, as no action of non-entry has been raised, only the retour duties, or duties calculated on the valued rent, are due, and not the full rents, for rents can only be claimed in non-entry after citation. But nothing is asked in the present case but retour duties, or the duties that became due *eo ipso* from the fact of non-entry, whether declarator of non-entry should be ever raised at all or not. It was admitted in argument that if the Crown in 1873, or even now, should raise action of declarator of non-entry it would be entitled to instant declarator that the lands had been in non-entry since 14th December 1860, and that the arrears for non-entry duties, being the very duties now claimed, were due and payable furth of the lands up to the date of citation.

"It further appears to the Lord Ordinary that as non-entry duties due before citation are *debita fundi*, and could be made good by a poinding of the ground or otherwise, and as there is no doubt as to the sufficiency of the estates, there was really no interest in anyone to discuss the question whether the claim can be made good in the present process or not. In short, the Lord Ordinary thinks that there is no defence against the Crown's claim for feu-duties.

"But certain very ingenious pleas were insisted in for the objector, who demanded that an inquiry should be made, by proof or otherwise, into the practice of the Barons of Exchequer, and he alleged that this inquiry would show that by immemorial practice in cases like the present no non-entry duties were exigible.

"The objector maintained that although in fact he was the heir of entail, yet as he claimed under a deed of propulsion he must be regarded as a singular successor, and he maintained that the Barons of Exchequer (to whom prior to the recent Act he would have applied for an entry) always granted charters to singular successors merely on payment of composition or taxed entry-duty, and never exacted non-entry duties at all. He asked for a proof of this, or at least an inquiry by a remit.

"The Lord Ordinary refused such a proof or remit, because he does not think the allegation relevant. It may very possibly be true that the Barons of Exchequer rarely exacted non-entry duties, and if so, the reason probably was that they seldom or ever had the means of knowing whether the lands were in non-entry or not. They had only to do with singular successors, and they probably never asked whether the author or disponer to such singular successor was dead or alive, but simply fixed the composition-duty as if the fee was full. In point of fact the fee would generally be full, for a singular successor, as a general rule, completes his Crown entry without waiting for the disponer's death. But the practice of the Barons of Exchequer, though it may have prejudiced the Crown's bygone rights, can never in any way affect or prejudice the Crown's present rights, its permanent rights as superior, or the general law of superior and vassal, and therefore the proposed inquiry is really immaterial.

"When an heir applied for a Crown entry, he did so, not to the Barons of Exchequer, but in Chancery, and in such cases non-entry duties were always exacted when the lands had really lain in non-entry. Nothing can turn upon the mere form in which the entry was taken, or rather upon the practice of the particular Crown officer through whom the entry was applied for. It would be absurd to hold that non-entry duties are due when the Director of Chancery prepares the charter, and not due in precisely the same circumstances when the charter is adjusted by the Barons of Exchequer. It would, if possible, be still more absurd to hold that now when the functions of both these offices are discharged by the Presenter of Signatures he is to be bound by the varying practice of his various predecessors whose functions he now discharges.

"The Lord Ordinary holds that the general law regulating the rights of superior and vassal, and the Crown rights as superior, cannot be affected by the past practice—it may be the bad practice—of Crown officials whose duties have been superseded. The Lord Ordinary applies the general law of superior and vassal to the present case, and he has no difficulty in holding that the bygone non-entry duties (admittedly rightly calculated) are due to the Crown, ...

"There only remains the objector's contention, that although due, these various duties cannot be recovered by retaining the Crown writ. The Lord Ordinary thinks this plea also ill founded.

"As already mentioned, there is really no interest to maintain such a plea, for as the duties are *debita fundi*, they could easily be declared

and recovered by diligence, and it would be unreasonable to remit the parties to a new process when the question can easily be determined now and here.

"But on its merits the plea is untenable. A superior is always entitled to retain a charter till bygone feu-duties or non-entry duties are paid. The vassal cannot claim the charter while he refuses to implement the vassal's obligations. The superior is not bound to receive a vassal who refuses to implement the conditions of the feu. The charter, if delivered without payment of bygones, might be pleaded on as implying their discharge. It might create a difficulty in the recovery of the bygone non-entry duties, for if the fee was once filled a declarator of non-entry could hardly be brought. But however this may be, it seems both law and equity that a superior should not be compelled to do his part as superior unless the vassal at the same time fulfil the obligations incumbent upon the vassal or upon the feu."

The objector reclaimed.

At advising—

Lord President—A sort of mist hung over this case during the discussion, but it rather seems to me to be unattended with any great difficulty.

This is a case of blench-holding of the Crown, which was substituted in place of ward-holding, and there cannot be the least doubt that these lands so held fall into non-entry by the Statute 20 George II. cap. 50; there are certain retour duties payable by the heir, and if the heir refuses, the Crown has the strongest remedy of a declarator of non-entry. In the summons of non-entry there is a statement of the heir's refusal, and a conclusion for declarator that the lands are in non-entry, and also a conclusion for the retour duties till the date of citation, and for the whole rents after the date of citation, and then there is a warrant to messengers-at-arms to destrain for these retour duties. In that way these duties are recoverable. But if the heir comes forward like a dutiful vassal and offers to take entry, the lands having been in non-entry for several years, the retour duties for these years are just as payable as if there had been a decree in a declarator of non-entry, and I can see no objection to the Crown insisting on payment of them.

Now, the noble Lord who is here an objector is an heir, and certain of his lands have been in non-entry for sometime. I see no difficulty and I have heard nothing that makes it impossible, for the Crown to insist upon payment of the retour duties as the price of giving an entry, and if the heir will not pay them then they can fall back upon a declarator of non-entry. The practice of the Barons of Exchequer under previous statutes has no bearing on the question before us. The simple question is, Are these retour duties payable, and can the Crown enforce their payment? These points I have already disposed of. We must adhere to the Lord Ordinary's interlocutor.

Lord Deas—I am of the same opinion.

I have no doubt at all that Lord Aberdeen is in the position of an heir, and is liable for these duties in some shape or another.

I have just as little doubt that if the Crown had brought an action of declarator of non-entry they could have got decree in that action, which, though not a special personal decree, is of the nature of a process of poinding the ground, and the decree would have made them preferable to any other creditors. The only answer to the Crown's demand for payment of these duties, which it appears are fixed by 20 George II. in such cases to one per cent. of the valued rent, is that Lord Aberdeen is applying for an entry and is willing to enter. The Crown of course will enter him if he would only pay the retour duties, and they say if you will not pay them we will not enter you till we get our decree of declarator of non-entry.

The point is very simple, and the whole argument on the part of Lord Aberdeen was just a tissue of plausibilities.

Lord Ardmillan—I have no doubt on this case. The objector's contentions are out of the question.

Beyond all doubt these lands have been in non-entry for about eleven years—that the next heir is liable for non-entry duties is equally true, and the deed of propulsion, although it makes him a disponee, cannot relieve him of his liability as heir.

The question is thus a very simple one. The objector has made use of a great deal of subtlety, but still we cannot take the view suggested by him.

The Court adhered.

Counsel for Objector—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Lord Advocate — Ivory. Agent—Donald Beith, W.S.

HOUSE OF LORDS.

Tuesday, July 12.

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

PATERSON AND OTHERS *v.* MAGISTRATES OF ST ANDREWS AND OTHERS.

(*Ante*, vol. xvii. p. 225, 7 R. 712.)

Burgh—Administration of Common Good by Magistrates—Road.

Held (*aff.* judgment of Court of Session) that the magistrates of a burgh who held certain ground for the recreation of the public were within their rights of administration in constructing a macadamised road for public use over a part of that ground, it being proved that the road did not interfere with such forms of public recreation as were in use to be practised thereon; but that it was not within the power of the magistrates to alienate the *solum* of the said road, or to suffer the commissioners of police or any other body to acquire rights of administration over it, and judgment of Court of Session altered so as to ensure this condition.