Spencer-Thomas of Buquhollie v. Newell

OUTER HOUSE
LORD CLYDE
30 MARCH 1990

Heritable property — Barony title — Competing titles — Transfer of barony lands — Whether necessary to mention the barony within disposition in order to convey barony title.

Property — Heritable property — Barony title — Competing titles — Transfer of barony lands — Whether necessary to mention the barony within disposition in order to convey barony title.

Process — Title to sue — Barony title — Competing titles — Proprietors of different subjects each claiming title to barony.

At some date prior to 1549 a Barony of Freswick was erected in the parishes of Wick and Canisby in the County of Caithness. The Lands and Mains of Freswick had then become incorporated into the Barony of Balquholly. In 1644 the Lands and Barony of Balquholly were the subject of a Crown charter of resignation and novodamus, which included the Lands and Mains of Freswick. Those latter lands were separated off by a conveyance of them in 1661. The lands then passed down through the Sinclair family until their conveyance by the judicial factor on the estates of a member of that family to a limited company. Part of the lands were sold by the company in 1958 and the remainder in 1968. In 1978 the then owners of the part first sold granted a disposition of, inter alia, "the Barony of Freswick insofar as we or either of us have title thereto" in favour of a company. In 1982 that company granted a further disposition purporting to convey the barony "insofar as having right thereto". In 1986 the owner of the remainder of the lands of Freswick raised an action seeking declarator that he had the only good and undoubted title to the barony. He also sought production and reduction of those parts of the two dispositions purporting to convey the barony title. At procedure roll it was argued that the action was irrelevant in that the title for the remaining lands did not use the word "barony" in every conveyance and that when one part was separated a new erection was required to recreate the disjoined area into a barony. It was further argued that the owner of the remaining lands had no title to sue as he had to make out a lawful title before he could seek a possessory judgment.

Held, (1) that the essential feature of a barony title was the noble quality of the feudal grant; that this was not separable from the lands or in itself a subject of sasine, and that it did not require to be mentioned in order to be conveyed (p. 979A-D); (2) that it was not evident from the title deeds where the barony lands lay and in particular whether they lay within or outwith the lands owned by the pursuer and that a proof would be required (p. 981B-D); (3) that as the defenders' grant constituted a possible innovation upon the pursuer's interests as heritable proprietor of his lands as defined in his title he had a substantial interest in seeing that those rights were not invaded and that accordingly he had title to sue (p. 982F-G); and plea of no title to sue *repelled* and proof before answer *allowed*.

Opinion, that where there was a competition between parties as to which property contained the baronial lands each had a title to sue if the other claimed the title (p. 982B-C).

Observations, on the nature of barony titles (pp. 976B-977C).

Action of declarator and reduction

Ivor John Spencer-Thomas of Buquhollie raised an action against Gerald Frederick Watson Newell and others seeking (1) declarator that the pursuer had the only good and undoubted right to the Barony of Freswick; (2) production of two dispositions; and (3) partial reduction of those dispositions insofar as they purported to dispone the said barony to the defenders' predecessors in title and the defenders and whereby there was said to be a designation of the caput of the said barony.

The case came before the Lord Ordinary (Clyde) on procedure roll where the defender argued a plea to the relevancy and a plea of no title to sue.

Cases referred to

Advocate (Lord) v. *Cathcart* (1871) 9 M. 744.
Baird v. *Fortune* (1861) 4 Macq. 127.
Buchan (Earl of) v. *Duff* (1725) Mor. 16404.
Clackmanan v. *Allardes* (1630) Mor. 16399.
Duff v. *Earl of Buchan* (1725) Rob. 525.
Edinburgh United Breweries Ltd. v. *Molleson* (1894) 1 S.L.T. 602; (1894) 21 R. (H.L.) 10.
Heron v. *Syme*, 14 February 1771, F.C.
Kidston-Montgomerie of Southannan, 1951 S.L.T. (Lyon Ct.) 3.
Mather v. *Alexander*, 1926 S.L.T. 51; 1926 S.C. 139.
Montgomerie v. *Dalrymple*, 2 March 1813, F.C.
Newell, Petitioner, 1985 S.L.T. (Lyon Ct.) 26.
Smith v. *Wallace* (1869) 8 M. 204.
Wemyss v. *Lord Advocate* (1896) 4 S.L.T. 194; (1896) 24 R. 216; (1899) 7 S.L.T. 172; (1899) 2 F. (H.L.) 1.

Textbooks referred to

Bankton, *Institute*, II.iii.83-84 and 86 and IV.xvi.8.
Bell, *Dictionary* (7th ed.), p. 99.
Bell, *Lectures on Conveyancing* (3rd ed.), Vol. I, pp. 589 and 660.
Bell, *Principles*, s. 750.
Craig, *Jus Feudale*, I.x.16, I.xii.22 and III.vii.9.
Dallas, *System of Styles*, p. 579.
Erskine, *Institute*, I.iii.3, I.iv.25 and 27, II.iii.45-46 and II.vi.18.
Ferguson, *The Barony of Scotland*, p. 115.

Halliday, *Conveyancing Law and Practice*, Vol. I, para. 4-26; Vol. II, para. 22-04.
Juridical Society of Edinburgh, *Complete System of Conveyancing*, p. 376.
Menzies, *Lectures on Conveyancing* (2nd ed.), pp. 505, 515 and 519.
Rankine, *Land-ownership* (4th ed.), pp. 9 and 21.
Stair, *Institutions*, II.iii.45 and IV.li.13.

On 30 March 1990 his Lordship *repelled* the plea of no title to sue and *allowed* a proof before answer.

LORD CLYDE.—The Lands of Freswick are situated in the parishes of Wick and Canisbay in the county of Caithness. The ordnance survey map which was produced shows the area to lie beside the eastern seaboard south from John O' Groats. On the map can be seen a number of scattered homesteads and areas of agricultural land bounded on the east by the Moray Firth. In the immediate area of Freswick there are two particular properties, one now named Freswick Castle and the other Freswick Mains. Some distance to the south on a rocky outcrop extending into the sea are the remains of a castle which is named on the map as Bucholly Castle. It appears from the pleadings that this ruin has also been known as the Castle (or the Old Castle) of Freswick or Freswick Castle. This remote area is the setting for the present dispute relating to the Barony of Freswick.

In 1977 Dr and Mrs Bell who were the proprietors of Freswick Castle, formerly known as Freswick House, sold it to a company called Orbrest Ltd. In the disposition in 1978 they conveyed to Orbrest the house and the ground pertaining thereto, and also "the Barony of Freswick insofar as we or either of us may have right thereto". This addition was not something which had appeared in their own title, a disposition by the local farmer Frank Gulloch who lived at Freswick Mains. In the same year 1978 Orbrest conveyed to the first defender in the present action, Captain Newell, a circular area of ground extending to 36 sq ft "at the centre whereof is placed the principal Hearth Stone of Freswick Castle". In the same disposition it was declared that "the whole subjects hereinbefore disponed shall be hereinafter designated as the *caput* of the Barony of Freswick". In 1982 Orbrest conveyed to Captain Newell and his wife, who is the second defender in this action, the subjects at Freswick Castle which had been earlier conveyed by Dr and Mrs Bell to Orbrest excepting the 36 sq ft which had already passed to the first defender. In the deed of 1982 Orbrest also purported to convey "the Barony of Freswick insofar as having right thereto".

Both parties in this action agree that a Barony of Freswick was erected at some time prior to 1549. That year is identified because it is in a charter of confirmation of that year that the earliest mention of the barony has been traced. There are various other references to the Barony of Freswick in deeds of the 16th and 17th centuries set out and admitted in the closed record. Furthermore it is expressly averred and admitted that the barony continues in existence. That indeed has been a matter of decision by the Lord Lyon in an application made to him by the first defender for the heraldic additaments appropriate to a barony. The Lord Lyon's decision, which is reported in *Newell, Petr.*, was that the Barony of Freswick existed but that the petitioner's application was premature since his title was a non domino and had not yet been fortified by prescription.

In 1986 the present action was raised by Ivor John Spencer-Thomas of Buquhollie who is the heritable proprietor of "the Lands and Estate of Freswick in the Parishes of Wick and Canisbay". He seeks a declarator "that the pursuer has the only good and undoubted right to all and whole the Barony of Freswick in the Parishes of Wick and Canisbay in the County of Caithness". He also seeks production of the disposition by Dr and Mrs Bell of 1978 and (after amendment of the conclusions made at the bar early in the hearing before me) of the disposition of the 36 sq ft by Orbrest and also of the disposition by Orbrest in favour of Captain Newell and his wife of 1982. He also seeks reduction of those parts of those dispositions "whereby there is pretended to be disponed the Barony of Freswick" and "whereby there is to be a designation of the subjects thereof as the *caput* of the Barony of Freswick". It was accepted that these parts were separable and no question arose in that regard. The pursuer also seeks an interdict but no particular question was raised in that connection. I should add that Dr and Mrs Bell were called as third and fourth defenders but have not entered the process. There was also a minuter who entered the process, but after negotiation of the terms of the conclusions, that minuter withdrew although his former presence is still reflected in some stray averments in the amended record. For convenience I shall use the term "the defenders" to refer to Captain and Mrs Newell.

The case came before me on procedure roll. Counsel for the defenders sought to have the action dismissed as irrelevant. Counsel for the pursuer sought decree de plano or at least a proof before answer. Parties were agreed that I should look at a number of title deeds which had been collected and, in the case of the older ones, translated. The principal submission which counsel for the defenders advanced was that the pursuer had no title or interest to sue the action and that his averments were irrelevant. At the basis of the submission was the proposition that the pursuer had no right or title to the barony. The pursuer does not claim an express recorded title to the barony. Indeed he avers that prior to 1978 there was no mention either in the Register of the Great Seal of Scotland or in the Register of Sasines of any conveyance of the Barony of Freswick. The defenders admit that averment subject to the exception of a conveyance of the Lands and Barony of Freswick to Sir George Sinclair of Clyth of 1687 which they had recently discovered. The pursuer's case is based on the fact that he is the heritable proprietor of the Lands and Estates of Freswick and he avers that those lands were erected into a

barony which still exists. In developing the argument counsel took me through the deeds which have been produced relating to the pursuer's title, and I should turn first to give a brief account of those deeds.

The earliest deed produced was a Crown charter of confirmation of 1549 by which Patrick Mowat of Balquholly conveyed the lands of Tofts Everley and the two penny lands of Auckengill lying in his Barony of Freswick to Alexander Mowat in Tofts and his heirs with reversion to Patrick Mowat and his heirs and assigns. In 1553-54 Patrick Mowat of Balquholly and Freswick conveyed the six penny lands and town of Auckengill lying within his Barony of Freswick to the Provost of the Cathedral Church of Orkney and a succession of heirs. The next deed produced was a Crown charter of appreciation of 1635 in favour of Roger Mowat, advocate. The subjects of this deed are the Lands and Barony of Balquholly in Aberdeenshire. These are defined as comprising not only a variety of particular subjects in Aberdeenshire but also "the Lands and Mains of Freswick with the castle tower and fortalice of the same the Manor Place of Burnside with the mill mill lands and multures thereof the lands of Harley and the Mill Town of Freswick with the castle tower and fortalice of the same Skirsarie Sousaquoy Tofts with the Manor Place of Tofts the lands of Everley Astrowell Blaeberriequoyes the lands of Auckengill the Mill Town of Auckengill and the lands of Stroupster". Various other rights are included and among them is the patronage of the Church of Canisbay. It appears from the deeds that all these subjects in Aberdeen and in Caithness had at some time past been "united, erected and incorporated into one whole and free Barony called the Barony of Balquholly". The subjects at Freswick are however referred to as the Lands and Mains of Freswick and not the Barony of Freswick. The word "mains" is explained by Craig (*Jus Feudale*, I.xii.22) as meaning both those lands which were held by the church for the support of the clergy (hence "manse") and the lands of a private owner kept for his own use as his private demesne (hence "mains" or "mansion").

In 1644 a Crown charter of resignation and novodamus was granted whereby the Lands and Barony of Balquholly were disponed and conveyed de novo to Roger Mowat of Drumbreck, advocate. The detailed list of the subjects comprised in the barony, including those of the Lands and Mains of Freswick, echoes the list set out in the charter of 1635. In 1661 Sir George Mowat of Bolquhollie and Magnus Mowat of Freswick conveyed to William Sinclair of Ratter, Jean Cunningham his wife and to others the Lands and Mains of Freswick. An instrument of sasine of that year is produced. The detailed description of the subjects is broadly similar to those given in the charters of 1635 and 1644. In 1661 the Lands and Barony of Balquhollie were also conveyed to the Sinclairs but that was only in special warrandice. At this stage accordingly the "Lands and Mains of Freswick" which had been earlier incorporated into the Barony of Balquhollie appear to be separated off and to come into the hands of the Sinclair family.

The next title in chronological order is a Crown charter of 1672 to Jean Cunningham and her son James Sinclair of Freswick. The signature for this charter has also been produced. The charter is one of resignation and novodamus. A description of the subjects corresponds with the description contained in the deed of 1661. The grant de novo is of the Lands and Mains of Freswick. The signature was superscribed by the King at Whitehall. It was suggested that the reason for the novodamus by the King was that the deed effected an alteration in the holding from simple ward to taxed ward.

The next deed I should mention is a signature of a Crown charter of adjudication of 1687 together with a relative sasine to Sir George Sinclair of Clyth. The subjects of the charter include "the Lands and Barronie of Freswick". The detail of those lands includes some of the particular places detailed in the charter of 1672 but is not quite the same as the earlier details. Some 10 years later there was executed a sasine of 1697 in favour of David Sinclair as heir to his brother James Sinclair. The deed relates to the Mains of Freswick and lists the particular lands set out in the charter of 1672. There then follows a sasine of 1720 in favour of William Sinclair. The subjects are described as "the sixpence and three farthing land of Cuckingill and Miln therof milnland & nultures & sequells of the same being a part of the Barony of Freswick", and also all and whole "the Remanent of the said Lands and Barony of Freswick", and also "the Lands of Cambster Raester and Mursay and the Lands of Greenland".

In 1727 a Crown charter of resignation was granted to William Sinclair of Freswick and his heirs male with a further destination over to a variety of persons, "at all times bearing the arms of the House of Freswick and taking the designation of Freswick". The subjects conveyed were the Lands and Mains of Freswick with a list of detailed subjects and rights which seems to be the same as those listed in the charter of 1672. The charter of 1727 requires sasine to be taken at the Manor Place of Burnside or at some other place and that by delivery of earth and stone only. Two further charters of resignation have been produced of 1784 and 1789, the former to "Captain Robert Sinclair now of Freswick" and the latter to Robert Sinclair of Freswick. The subjects described in the 1784 charter are the Lands and Mains of Freswick with the details, subject to some minor differences, the same as those set out in the charter of 1727 and the sasine of 1697, as well as a number of other lands. Provision is made for a single sasine by earth and stone only at the Manor Place of Freswick or any other part of the lands. The charter of 1789 closely echoes the terms of that of 1784 but adds a detailed reference to a disposition and tailzie which does not appear in the charter of 1784. It may be that it was that omission which was the reason for the granting of the deed of 1789. Thereafter it seems that the entail operated until 1896 when a deed of disentail was executed and the subjects passed under a trust disposition and settlement of Admiral Sir Edwyn Sinclair Alexander Sinclair of Freswick. After his death a judicial factor was appointed on his estates

and in 1948 that judicial factor disponed the estates of Freswick to Freswick Estates Co. Ltd. The description of the lands there conveyed closely follows the description of the lands set out in the charter of 1727. In 1958 that company disponed the farm of Freswick Mains to Frank Gulloch who appears to have been the tenant farmer of those lands, and in 1975, as I have already indicated, Gulloch disponed Freswick House, then known as Freswick Castle, to Dr and Mrs Bell through whom it passed to the defenders. In the meantime in 1968 Freswick Estates Co. Ltd. disponed the residue of Freswick Estate and other lands to the pursuer.

Before going further I should say something about the nature of a barony in Scots law. A barony is an estate of land created by a direct grant from the Crown. The original grant is said to have "erected" the lands into a libera baronia, a free-hold barony (Bell's *Principles*, s. 750). The right can be conferred only by the Crown and cannot be transmitted by the baron to be held base of himself (Bell's *Dictionary* (7th ed.), p. 99; Bankton's *Institute*, II.iii.86). In feudal classification a barony falls into the class of noble as opposed to ignoble feus. That classification is discussed by Craig (*Jus Feudale*, I.x.16) and Bankton (II.iii.83). In Scotland the distinction was recognised between the greater barons and the lesser barons, the former acquiring such titles as Duke or Earl. It was at the earliest a territorial dignity as distinct from the later personal peerage. Thus when one was divested of an estate the title of honour ceased (Bankton, II.iii.84). In the feudal system, however, whether the dignity was that of a baron or of the greater dignity of an earldom, the feudal effects were the same (Erskine's *Institute*, II.iii.46). As Stair put it (*Institutions*, II.iii.45): "Erection is, when lands are not only united in one tenement, but are erected into the dignity of a barony; which comprehendeth lordship, earldom, &c. all which are but more noble titles of a barony, having the like feudal effects". The grant of barony carried with it the right to sit in Parliament, but as the number of lesser barons increased, steps were taken from 1427 onwards to restrict attendance to a selected number of them (Erskine's *Institute*, I.iii.3). The grant in liberam baroniam also carried a civil and criminal jurisdiction (Erskine's *Institute*, I.iv.25). But Erskine also states that while such an erection or confirmation is necessary to constitute a baron "in the strict law sense of the word", all who hold lands immediately of the Crown to a certain yearly extent are barons in respect of the title to elect or be elected into Parliament (*Institute*, I.iv.25).

One effect of the constitution of lands as a barony was that all the subjects or rights of which it consisted were incorporated together as a unum quid. The whole was united into one feudal tenement (Bell's *Lectures on Conveyancing* (3rd ed.), Vol. I, p. 660). The union was one not only of all the tracts of lands contained within the lands of the barony whether adjacent to each other or discontiguous, but of all the rights connected with the barony. Thus in the case of barony lands a single sasine on one part of the barony sufficed to carry both the whole lands and all the rights. Separate sasines were not required in respect of different parcels of land even although they were not contiguous. One symbol sufficed to carry all the rights for which otherwise each of the appropriate special symbols was required. A bare charter of union which gave the former privilege did not enable the latter to be achieved without a special dispensation. Thus the erection of lands into a barony conferred a higher degree of right than a charter of union (Erskine's *Institute*, II.iii.46). The quality of union may be transferred by the holder of lands to a sub-vassal. In *Heron* v. *Syme*, the clause of union and dispensation extended the privilege not only to the grantee but to his heirs and assignees and it was held that the privilege could be enjoyed by one to whom parts only of the feu had been transferred. So on the alienation of part of a barony estate the purchaser might enjoy the privilege of union in respect of the alienated land. Barony was thus a nomen universitatis (Erskine's *Institute*, II.vi.18). As a consequence possession of part was regarded as possession of the whole and the conveyance of the barony without enumeration of all its lands or parts and pertinents was sufficient to carry all the entirety of what was comprehended within it. Thus a barony title is a sufficient title to found a claim to rights not specifically granted but established by possession. A survey of the legal effects was given by Lord President Inglis in *Lord Advocate* v. *Cathcart* at p. 749.

Since the essence of a barony is that it is held immediately of the Crown, any transfer had to be by a conveyance a me. The Crown charter could be either a confirmation or resignation. But, although the baron could convey the privilege of union to a sub-vassal, he could not divest himself of the barony by any grant in which he reserved to himself the superiority of the lands (Erskine's *Institute*, II.iii.46). Where part of a barony estate is sold off, the position as stated by Bankton (*Institute*, II.iii.86) is as follows: "A disjunction of any part of the lands from the barony, by an alienation, to hold the parts disponed of the Crown, does not prejudice the right of barony as to the remainder; because the privilege of barony belongs to the whole: hence, what is retained is still a barony, but the parts disponed have not the privilege without a new erection: however, they are independent of the barony, which is restricted to what remains still with the baron". But where a baron subfeued part of the lands he was understood to communicate to the purchaser a certain degree of jurisdiction over the part of the barony which he had sold to him (Erskine's *Institute*, I.iv.27). The extent of that jurisdiction might be clarified by the terms of the vassal's infeftment, as for example infeftment cum curiis or cum curiis et bloodwitis. But the jurisdiction so granted was cumulative with that of the baron who was still bound under the grant which the Crown had made to him of the whole lands to do justice to all within that territory (Erskine's *Institute*, I.iv.27). It is also open to the holder of a barony when alienating a part of the lands to convey to the purchaser rights which form part of the barony lands such as the right to collect

seaweed from the barony lands, but without that it may be difficult for the purchaser to establish a right to accessory privileges (*Baird* v. *Fortune*). So far as the part of the barony which is retained on a division is concerned, it is the better view that the union remains intact (Erskine's *Institute*, II.iii.45). The parts which remain as barony lands continue united as one sasine. In the case of *Montgomerie* v. *Dalrymple* Lord Meadowbank observed: "A barony remains a barony to all intents and purposes, so far as the lands are not sold off. Those lands are no longer part of the barony; but the barony remains, with all its effects, so far as not alienated." The matter of separation and possible reunion were raised in the case of *Wemyss* v. *Lord Advocate*. There three baronies had been united by the Crown into a single barony. In 1662 on the restoration of episcopacy the superiority of one of them reverted to the Archbishop of St Andrews and although on the Revolution the superiority again passed to the Crown, it was held in the absence of a re-erection of the three into one barony, the one remained a separate barony from the others. The importance of that for the case was that rights to coal ex adverso the lands of that separate barony could not be claimed on the strength of the possession of coal ex adverso the lands of one of the others. Once the one barony had been disjoined from the other two, it remained disunited.

The first conclusion of the action, as I have already mentioned, is for a declarator that the pursuer has the only good right to all and whole the Barony of Freswick. It is from that declarator that the other conclusions must follow. But it is important to bear in mind what is meant by "all and whole the Barony of Freswick". The word "barony" is, as Bell in his *Dictionary* records, used both in reference to the territory over which the rights of barony extend and to signify the right itself. The rights of jurisdiction can no longer be exercised. The particular ancillary rights, including the property rights such as foreshore rights, fishings or rights of peat cutting are still of importance, but the right to use the name and hold a dignity is also currently regarded as important and valuable. It is averred and admitted in the closed record that the action "relates to entitlement to a barony in the Baronage of Scotland erected over certain lands in Caithness". But this case is properly not about a matter of peerage. It is not a claim merely for a rank or dignity and it is not with that particular aspect that this action is concerned. This is a claim to heritable subjects described as all and whole the Barony of Freswick in the parishes of Wick and Canisbay in the county of Caithness. I do not understand that I am dealing with any "incorporeal entity" such as the Lord Lyon was concerned with in the defenders' application in 1985. The present action is not one for considerations of the law of the peerage but a matter of land law and a claim to property in land. It is thus properly a matter for this court. The peculiarity of the case is that parties are not at one as to what the physical extent of the barony lands are. The declarator thus does not truly strike at the point in issue. There is no doubt as to the physical extent of the lands comprised in the pursuer's present title. There is no doubt as to the physical extent of the lands known now as Freswick Castle which are owned by the defenders. What the pursuer is seeking to have declared is that the barony lands comprise or are comprised in the lands which he owns.

The pursuer avers that he is the heritable proprietor of all and whole the Lands and Estate of Freswick subject to certain exceptions. He then avers that before 1549 the Lands and Estate of Freswick were erected into a barony. He then avers, as I have already mentioned, that prior to 1978 there was no mention either in the Register of the Great Seal of Scotland or in the Register of Sasines of any conveyance of the Barony of Freswick, but he refers to certain records where mention is made of the Barony of Freswick and he avers that the barony remains in existence. He then avers: "as above narrated the pursuer is heritable proprietor of said Lands and Estate of Freswick". He does not hold the lands through any intervening superior. In the circumstances he seeks declarator in terms of the first conclusion.

The main thrust of the defenders' attack on the relevancy of the pursuer's case was based on the absence of any mention of the barony as being the subjects conveyed in the series of charters on which the pursuer bases his title. This raises the question whether it is necessary in the conveyance of barony lands to make an express use of the word "barony". It was common ground that the word had to be used in the original charter which erected the lands into a barony. The parties were sharply divided on the question whether it is necessary to use the word in the subsequent conveyances. The pursuer holds his title as he avers immediately of the Crown. That is necessary for a barony feu but by itself is not determinative of the question whether the feu is of that character.

The defenders sought to found on the style books to show that the word "barony" is always used. Counsel referred to Dallas' *System of Styles* published between 1666 and 1668 at p. 579, to the *Complete System of Conveyancing* published by the Juridical Society of Edinburgh in 1855 (p. 376), and to Ferguson's *The Barony of Scotland*, p. 115. But these examples appear all to relate to the erection of a barony and support the proposition that in the original charter or a charter effecting a re-grant and re-erection of a barony the word should be used. But it was not doubted that in an original grant the word should be used in order to erect the lands into the dignity of a barony. The question remains whether, once the lands have been so erected, the word "barony" must always be used in later conveyances.

There is the authority of Craig for the proposition that a mere inclusion in a Crown charter of lands of the right of pit and gallows does not necessarily make the grantee a baron, for a baronial rank "depends on the conferment on the lands of the privileges of barony" (*Jus Feudale*, III.vii.9). Craig also states (I.xii.23) that the mere grant of lands confers no rank "unless the grant

manifests an intention to confer it". But in both these passages the references appear to be to the erection of a barony, not to its transference after creation. On the other hand, Craig states (I.xii.23) that where the prince makes a grant of lands which have rank attached to them he ennobles the grantee even though no express conferment of noble rank be made, and he indicates (ibid.) that rank may attach to any lands held in Crown grant after several generations, at least if the holder has not required to engage in manual labour or resort to some form of trade (I.x.16). No authority was put before me to show that once erected the dignity of the baronial quality requires to be made manifest in the charters of progress. So far as the researches of counsel had gone it appeared that the point is not one on which any direct ruling or guidance is available.

It might be thought that the resignation of lands to the Crown and the re-grant by the Crown to the purchaser should be seen as a fresh grant requiring a recreation of the nobility of the feu on each occasion. But a resignation ad favorem does not appear to have been regarded as affecting a true resumption of the whole estate in all respects by the superior, who in the present case is the Crown. The writs which have been founded upon are not original grants but are all merely writs by progress. The charters of resignation are in favorem and do not intend to be entirely new grants by the Crown. The purpose of the novodamus is to make an alteration in the terms of the feudal grant, but the deed is still merely one by progress. A distinction in relation to Crown charters was noticed by counsel for the defenders in his observation that the signatures in the case of a grant of barony or an alteration in the grant required to be superscribed by the King in person while signatures relating to other charters were dealt with by the exchequer. But that distinction does not seem to me to innovate upon the status of any of the charters produced as still being merely charters by progress. Any theory of a surrender and re-grant implied in the process of a charter of resignation does not seem to me to lead to the conclusion that necessarily the word "barony" must be mentioned in the conveyance.

Counsel for the defenders pointed to the principle that, as is clear from Bankton (III.ii.86) and the case of *Montgomerie* v. *Dalrymple*, a disjunction of part of a barony does not prejudice the lands which remain with the seller, but a new erection is required to recreate the disjoined area into a barony. The case of *Clackmanan* v. *Allardes* provides an illustration. But a separation of part of barony lands would immediately give rise to problems relating to the multiplication of baronial rights and privileges and so the principle is a necessary and practical one in that context. That problem does not arise where the whole barony lands are transferred. Counsel also referred to Bankton (IV.xvi.8) enlarging on the same point but adding the qualification that the retained lands would still have to be of sufficient size for the jurisdiction still to be exercised and sufficient for a qualification to vote on parliamentary elections. These rights could be lost if the remaining residue was too small. But the fact that the nobility may be lost in such circumstances does not mean that it terminates on a transmission unless express mention is made of it.

Counsel for the defenders sought to found on the statement which many writers on barony titles make to the effect that a barony is a nomen universitatis. It is the name which comprehends the totality of the rights. Bell (*Lectures on Conveyancing* (Vol. I), p. 589) states: "The conveyance of the 'barony', generally, will comprehend every component part, whether specified or not". The use of the quotation marks around the word "barony" indicates, as counsel for the defenders submitted, the use of that word in the deed of conveyance. I do not however infer from that that the use of the name is an essential for the conveyance of a barony. To describe it as a nomen universitatis does not mean that it cannot exist unless the designation is found expressly in the charters of progress. The name may carry all the rights and privileges but that does not mean that the dignity cannot be transferred without express use of the name. Nor will the name necessarily effect the acquisition of all possible rights. The detailed substance of the rights may still have to be resolved by reference to possession. It appears at least in practice that the specification of the component parts has been included. To continue the quotation from Professor Bell: "Hitherto, it has not been usual to dispone simply 'the barony'. Baronies are created by charters of union and erection from the Crown, which, as well as the subsequent titles, almost invariably contain some specification of the component parts; and the rule of practice, when the whole barony was to be disponed, has been to adhere to the description contained in the existing titles. The proprietor was in possession upon those titles; the disponee was to take his place; and nothing could more clearly indicate that purpose, or more effectively carry it out, than to take from him a disposition of what was in his titles, and neither more nor less." In practice no doubt the jurisdiction rested upon his being infeft cum curiis.

Counsel for the defenders founded upon the principle that the dispositive clause is the ruling clause. Nothing can be conveyed unless it is mentioned in the dispositive clause. Reference was made in this connection to Menzies' *Lectures on Conveyancing* (2nd ed.), p. 505 [3rd ed., p. 537] and Professor Halliday's recent *Conveyancing Law and Practice*, Vol. I, para. 4-26 and Vol. II, para. 22-04. The principle is of course entirely sound and I should not wish in any way to diminish the importance of the description of the subjects conveyed in the dispositive clause as being in principle determinative of those subjects. Nor do I feel that "the barony" can be regarded as passing as a part or pertinent of the lands, as one of the "external accessories" to quote Professor Menzies (op. cit., p. 515 [3rd ed., p. 546]). He also states (p. 519 [3rd ed., p. 548]) that whatever does not fall under the description of parts and pertinents must

be mentioned in the dispositive clause in order to its being conveyed. It may be that the rights of a barony could be seen as pertinents of the lands, but the same could equally be said of rights annexed to an ignoble feu. Indeed it is clear that the Crown can grant a right of union and the dispensation for a single form of sasine to any vassal, and I have already referred to Craig's observation (*Jus Feudale*, III.vii.9) that even a grant of the right of pit and gallows does not necessarily make the grantee a baron. It seems to me that the essential feature of a barony title is the noble quality of the feudal grant. It is not the extent of ground or the nature or substance of the rights granted which is critical but the quality of the holding. This does not seem to me to be something which is separable from the lands or which requires to be mentioned in order to be conveyed. An analogy was sought to be drawn in the course of the debate with a superiority, but that is a distinct estate. Analogy was also sought to be made with a right of union and it may be noticed that Professor Bell (*Lectures on Conveyancing* (Vol. I), p. 660) states that a union and dispensation when granted by the Crown "became a quality inherent in the lands, and passed with them, though not specially assigned". So far as I have seen the quality of barony is not in itself a subject of sasine. It is on the contrary a quality inherent in the lands giving the proprietor a territorial rank and dignity. It also at an early period gave rights in relation to Parliament. A barony is, as I have already defined it, an area of land and that area of land must be described in some way in the dispositive clause. But the quality which makes it baronial is something inherent in the original feudal grant and I see no reason why that has to be specified expressly in every subsequent step in the progress of title. Bankton (II.iii.84) says that nobility "followed the Property of the Estate to which it was annexed". In my view it can do that without the need for particular reference in the dispositive clause.

In making his petition to the Lyon Court, the first defender led the evidence of an expert who had researched the Barony of Freswick. In light of his evidence the Lord Lyon held that a barony had been created and it appears to have been a territorial dignity which he recognised, although later in his opinion he refers to "an incorporeal entity such as a barony". The lands to which the evidence was directed for the existence of the barony appear to have been those comprised in the 16th and 17th century titles to which I have referred. Note was made in particular of the subjects at Ouckingill which can (subject to variation in spelling) be identified in the confirmation of 1553-54, the adjudication of 1687 and also in a private document of the Sinclairs of Freswick indicating that Ouckengill was comprised within the Lands and Barony of Freswick. The defenders' case before the Lord Lyon for the existence of the barony appears to have been substantially based on the titles on which the pursuer now relies. The omission of the word "barony" does not seem to have been regarded as fatal to the case either by the petitioner or the Lord Lyon and a variety of material was used as evidence of the existence of the barony.

If I am in right in holding that the word "barony" is not an essential for the transfer of barony lands so that the lands retain in the hands of the purchaser the quality of barony lands, the question still remains whether the barony lands are to be found in those now held by the pursuer. The matter was approached as one of construction of the pursuer's titles. Counsel for the defenders pointed to the contrasting language in some of the deeds where some lands were expressly referred to as barony lands while the lands now owned by the pursuer were simply referred to as the Lands and Mains of Freswick. Thus, for example in the charter of 1672 the conveyance made "as for the principal" is of the "Lands and Mains of Freswick" and by contrast in special warrandice the "Lands and Barony of Balquoholly". This argument is obviously one of considerable strength. While I have taken the view that the omission of the word "barony" is not fatal to the pursuer, the omission in the description of the lands in the pursuer's titles provides a strong reason for questioning whether his lands have that quality. On the other hand, there are reasons for holding that the feu may have a noble character. Reference to the Barony of Freswick after 1672 may fit with the lands held by the pursuer. Indeed the first defender himself founded on those earlier titles and other adminicles to establish the existence of the barony in the Lyon Court.

Counsel for the defenders reinforced the submission on the absence of the word "barony" by further reference to certain of the deeds. He recognised the separation of the Lands and Mains of Freswick from the Barony of Balquoholly in 1661 but he stressed that at that stage there was no grant de novo of a Barony of Freswick. Any baronial quality which the lands might have had before or during the merger with the Barony of Balquoholly would have flown off on the separation and no new grant was made. Counsel for the pursuer on the other hand argued that this was simply a matter of assumption and was not established. In 1672 when the Crown grant was made de novo to Jean Cunningham, again there was no erection of the lands into a barony. Counsel for the defenders suggested that the barony lands were by that time elsewhere. He sought in his opening submission to found on the sasine of 1687 with a view to supporting his argument that the barony lands had left the mainstream of the pursuer's title. The instrument of sasine follows on a Crown charter of adjudication in favour of Sir George Sinclair of Clyth, and the subjects are described as the Lands and Barony of Freswick. A signature relating to this conveyance has also been produced. The names of the places specified in the deed relating to the Lands and Barony of Freswick appear to be the same as some of those listed in the deed of 1661. For example "Oukingill" may be the same as Auckengill in the 1672 charter. Counsel suggested it might be a large area and the deeds may not relate to the same lands, but it is to be noted that "Oukingill" is used in the signature of

1687 where "Auckengill" appears in the relative sasine of that year. Counsel for the defenders suggested that it might be at this stage that the barony moved away from the main line of the progress of titles on which the pursuer was founding his claim to the barony. Counsel for the pursuer, however, submitted that the deed of 1687 was effecting a heritable security, a wadset. There was nothing to show that the subjects did not revert to the branch of the family which previously owned them and indeed by 1727 it seemed that that branch had recovered the title. Counsel suggested that between 1678 and 1719 the Sinclair family were in severe financial embarrassment requiring them to wadset their lands. The sasine of 1720 and the charter of 1727 showed the return of the lands to the family of the Sinclairs of Freswick and what they held were the whole Lands of Freswick. Since the barony is agreed to exist it must be included in the whole lands. Counsel for the defenders then adopted a somewhat different line of argument by pointing out that Stair had observed (*Institutions*, IV.li.13): "it is a great inconvenience, that creditors may adjudge what they please to insert, and thereby lay the foundation of a plea against parties not concerned". The sasine of 1687 on this approach, so far from showing the Barony of Freswick separate from the mainstream of the pursuer's title, is simply not to be trusted. Similarly the sasine of 1720 may be suspect, although the reference to "the remanent of the said Lands and Barony of Freswick" might suggest that part of the barony lands had been separated off. Counsel also suggested that the date of the deed of 1697 might be significant in relation to the expiry of the 10 year period of the legal after 1687. Furthermore, he submitted that the security said to be required in the sasine of 1697 was in respect of money owed to the King in respect of certain reliefs and not to Sir George Sinclair and that the sum required in security was more than the amount due for those reliefs, leaving a question whether there was security for some other lands involved.

The argument at this stage begins to move into the realm of fact and away from a matter of construction of the deeds. The argument drifted into matters of history in order to explain the significance of certain of the deeds or even to suggest what may have happened to the barony lands. Consideration of the deeds of 1687, 1697, 1720 and 1727 leads readily to some consideration of the fortunes of the family of the Sinclairs of Freswick. But more particularly, in seeking to affirm the relevancy of his own case, counsel for the pursuer eventually came to depend upon matters of fact as well as law. The pursuer's argument for the immediate upholding of his title was based essentially on his ability to derive his title to the land from the titles of 1661 and those following thereon. He argued that the barony land must be within that progress. When part was disponed to Gulloch it would cease to be barony land. What remained was what had passed to him. Looking to the vast extent of the lands over which his title extended it was a reasonable assumption that the barony was attached to that very substantial area of land. He was not able to say precisely which the original barony lands were and the matter was left as one of reasonable assumption that it was or included the lands which he now owns. But he recognised that this might be required to be proved. Counsel for the defender on the other hand submitted that the language and description used in relation to the Lands and Mains of Freswick suggested that it was a diminutive estate. He suggested that it may have fallen among heirs portioners. The argument seemed to me to be straying into realms of fact on which a proof would be necessary. The assumption on which counsel for the pursuer's position was proceeding was the size of the pursuer's lands, although there are no averments of their extent or how that relates to the defenders' holding. Superficially from the map and the title plans it may well be much larger, but the actual extent and any significance of its size must be matter of fact. Correspondingly the submission by counsel for the defenders raises critically the factual problem of identifying the lands to which the barony attaches. He submitted that the incorporation of the Lands of Freswick into the Barony of Balquholly did not extinguish the Barony of Freswick. That is to say that there were lands in Caithness which remained intact still possessing the baronial quality. When the Lands of Freswick were disunited from the Barony of Balquholly in 1661 they ceased to have any baronial quality and in 1672 were not erected into a barony. Even if William Sinclair of Ratter to whom the Lands of Freswick were conveyed in 1661 owned the Barony of Freswick, that, on the principle in the case of *Lord Advocate* v. *Wemyss*, which I have already cited, would not effect an incorporation of the lands into that barony. Thus the Lands and Mains of Freswick, the lands owned by the pursuer, are not part of the Barony of Freswick.

The admitted existence of the barony involves the existence of baronial lands. The defenders aver that they do not know where they are. It is not impossible that they are within the pursuer's lands notwithstanding the contrary indications in such titles as have been produced. On the other hand, counsel for the defenders did suggest some places where the barony lands might lie. He mentioned Cambster, Raester, Mursay and Greenland which are named in the sasine of 1720. Again the location of these places may be of significance and the matter becomes further involved in questions of fact.

There is another consideration which adds to the complexity. It is averred by the defenders and admitted by the pursuer that the pursuer claims to be infeft in a feudal Barony of Buquhollie in Caithness. It is also admitted that he represented to the Lord Lyon that he was so infeft and that he founded on the disposition of 1968 by Freswick Estates Co. Ltd. to himself. But that is the deed by which he asserts that he has the sole right to the Barony of Freswick. There is, as I mentioned earlier, a Bucholly Castle noted on the ordnance survey map not far from Freswick. The titles now produced suggest that at least in the 17th century the Barony of Balquhollie was in Aberdeenshire

not in Caithness, and it is not immediately easy to see how the disposition of 1968 relates to that barony. Of course no formal challenge is made in this action to the pursuer's claim to the Barony of Buquhollie, but insofar as he is seeking to trace his claim to each of the two baronies through the same disposition of 1968 it may be necessary for him to establish as matter of fact what the areas of ground are which relate to each of the two baronies. If the whole lands which he owns consist of the Barony of Buquhollie then they cannot also comprise the Barony of Freswick.

If the terms of a dispositive clause are clear and unambiguous then unquestionably one is bound by the terms of that clause. But the present case does not seem to me to be of that kind. The writs produced in the progress of the titles include at least in 1687 and 1720 indications that the quality of the lands which appear to be lands now owned by him was that of a barony. It is admitted that a barony exists but it is not evident from the title deeds precisely where the barony lands lie and in particular whether they lie within or without the lands now owned by the pursuer. The pursuer avers that the Lands and Estate of Freswick as conveyed to him (ignoring the exceptions of the area separated from it) were erected into a barony before 1549. It is for him to prove that that was the extent of the barony land and that it is to that land that such evidence as there may be of the continued existence of a barony after 1672 relates. I am unable to resolve these matters from the deeds produced by themselves. The terms of the pursuer's own immediate title are such as require explanation with the help of extrinsic evidence. In these somewhat peculiar circumstances I consider that the proper course is to put the matter to proof so that the pursuer can attempt to establish that the lands of which he is the proprietor are barony lands. I would only add, as was observed during the debate, that if titles are to be proved, it is the sasine which vouches the infeftment, and not the charter, which only grants the right.

Counsel for the pursuer challenged the relevancy of the averments of the defenders, but the argument to some extent at least overlaps with the submissions which were made to affirm the pursuer's title. Counsel argued that the defenders' title must relate to their holding of Freswick House and that title was derived from the common author of both the pursuer and the defenders. The baronial quality had remained with the pursuer's land and accordingly there was no basis for the defenders' title. The defenders' position, however, was that the barony is not within the lands from which the pursuer derives his title. Indeed the dispositions to and by Orbrest make a distinction in the conveyance between Freswick House on the one hand and the barony on the other. Counsel for the pursuer then submitted that there was no land outside the lands contained in the sasine of 1661 to which the barony could attach. He pointed out that the defenders do not in their defences specify where these barony lands are and he argued that it is not sufficient to produce the a non domino title and seek thereby to overcome the pursuer's title which could be shown to link back to the time when the barony was agreed to have existed. The barony must have passed to Freswick Estates and would not have been conveyed to Gulloch in 1958: accordingly it remained with Freswick Estates Co. Ltd. and passed from them to the pursuer. In this connection reference was again made to the relative extent of the pursuer's landholding and the likelihood of the larger area retaining the barony. The disposition to Gulloch was the conveyance of a farm to a tenant farmer. It was not likely that the barony would have attached to that, and one could presume that the major tract of land from which over the years small parcels had been conveyed away was the area where the barony was still to be found. The inference in any event would be that the barony remained with the disponer.

The defenders' title is confessedly a title a non domino. But it is not disputed that if the lands covered by such a title have been erected into a barony and are held by someone immediately of the Crown with no superior intervening, then the holder of those lands would hold them with the quality of a barony, although he would require the fortification of prescriptive possession to complete his title. Here again it seems to me that the issue depends upon the identification of the lands of the barony. The attack made on the defenders' pleadings was on the basis that the pursuer's title was to be preferred as being the more likely to include the barony. The defenders' reply that the barony lands are outwith the pursuer's lands seems to me to involve a matter of fact which has to be resolved by inquiry.

As I mentioned at the outset, the defenders challenged not only the relevancy of the pursuer's case but also his title to sue. To a significant extent the issue of title to sue was bound up with the attack on relevancy and for that reason I have dealt with the matter of relevancy first. But I turn now to the matter of title to sue which, although it should logically be considered first, is more conveniently dealt with at this stage. On the defenders' argument, if the pursuer had no right to the barony then he had no title to sue the action. If the pursuer had a clear right to the Barony of Freswick he would have a clear title and interest to sue one who challenged that right. Insofar as his title to sue rests on his right to the barony and that right is one to be resolved after proof, so also decision on the question of his title to sue the action should be deferred so that both issues could be resolved together. On this approach the issue raised in the first conclusion of the summons resolves the issue of title to sue.

Counsel for the defenders developed his argument by submitting that one squatter could not be ejected by another squatter. He referred to Rankine on *Land-ownership* (pp. 9 and 21) to vouch his submission that the pursuer must show a lawful title to the barony as the foundation for a possessory judgment. He referred to the case of *Duff* v. *Earl of Buchan*, where the House of Lords ordered that the defender should not be obliged in an action of reduction in probation to produce his

titles until the pursuer had made out his title on which he founded his action. The report does not give the reasons for the decision but the successful appellant's argument emphasised the pragmatic reasons for discovering the validity of the pursuer's title before embarking on a lengthy and expensive litigation and disturbing a long period of quiet possession in circumstances where the pursuer's title was open to a serious question. Indeed in January of the same year the Court of Session had held ((1725) Mor. 16404) that a sasine taken by the pursuer was null. Counsel also referred to *Edinburgh United Breweries* v. *Molleson*, *Smith* v. *Wallace* and *Mather* v. *Alexander*. Counsel submitted that the defenders had a recorded title to the barony. In these circumstances the pursuer was required to establish what was prima facie at least a competing title, a real right to the barony, feudal or personal. The pursuer had failed to do so in the present case.

A further formulation of the issue appeared at an early stage of the debate although it later faded from view. If the barony lands lie within the lands formerly held by the common author of the parties so that there is a competition between them as to which property contains the barony lands, it seems to me that each would have a title and interest to sue if one was to claim the title. In such a case the pursuer would not merely have a jus actionis as was the situation in *Smith* v. *Wallace*, a case on which the defenders founded, but a title and interest which could not be rejected at least without inquiry. As can be seen in the case of *Mather* v. *Alexander*, a prima facie title is not open to challenge by one who cannot found on any competing title. If in the present case there were two competing titles each derived from a common author and one was claiming that he has the true title on which the barony may be claimed, it seems to me that he would have title to sue an action against the other. However, as I have said, by the end of the debate the possibility of a situation of competition had faded from view and this approach to the question of title to sue does not now arise.

The pursuer has, however, a further ground for claiming title to sue. It is accepted that there are barony lands but the precise location of them has not been identified. It may be that they fall wholly within the Lands and Estate of Freswick disponed to the pursuer or wholly within the subjects of Freswick Castle disponed to the defenders. It may fall outwith those specific areas. It may not lie exclusively within any of those areas. The precise extent of the subjects conveyed to the defenders described as "The Barony of Freswick" remains uncertain. Counsel for the pursuer suggested that it might be an attempt to impose a superiority which extended over lands of his own. Alternatively it may be a fief over the whole barony lands and those may be lands to which the pursuer has title in whole or in part. Whatever the precise effect of the grant to the defenders may be, it appears to constitute a possible innovation upon the pursuer's interests, if not a threat to his rights. His interest here is not necessarily tied to the baronial quality of any of his lands but to his own concern to preserve the rights which he undoubtedly has as the heritable proprietor of the lands defined in his own title. He has a substantial interest in seeing that his proprietary rights are not invaded by claims by the defenders for rights over them. The relationship between these two landholders in these circumstances is in my view of a legal quality sufficient to constitute a title to sue and that is fortified by the pursuer's evident interest in the matters at issue in the action.

Accordingly while in the other respects the matter of title to sue could be left over to a proof, I take the view that the pursuer has in any event a title and interest here and I shall repel the defenders' plea in relation to that matter.

Some areas of the pleadings and some of the argument during the debate was related to the principal messuage or, to use what is the heraldic term, the caput of a barony. As was pointed out, its practical significance was to identify the place at which a single sasine under the privilege of union could be taken, or the place of the baron's court. I was referred to the case of *Kidston-Montgomerie* in this connection, which was concerned with an alteration in the precise site of the caput. The matter arises in connection with the conveyance by Orbrest to the first defender in 1978 of the circular area of land and the principal hearth stone of Freswick Castle which was designated as the caput of the Barony of Freswick. Counsel for the defenders however accepted that that was inept to carry the barony. There was also some argument relating to the defenders' averment where they aver that the pursuer was no longer the proprietor of the Manor Place of Burnside which was the principal messuage or caput of the Lands and Estate of Freswick. However, it was not maintained that a baron could designate a particular place ownership of which would carry the barony, and neither side sought to argue that ownership of principal messuage or indeed of a hearth stone carried ownership of a barony. There was a corresponding argument related to the opening sentence of cond. 5 where the pursuer makes an alternative claim based on his ownership of the principal place of the barony, the Castle of Freswick. However, the attack made by counsel for the defenders was based on a misunderstanding of these pleadings. The pursuer is not seeking to claim that the barony is, as counsel for the defenders understood, in some way attracted back to the castle despite having been separated from it, but is simply arguing that if there are two people holding right to the barony then the one who holds the principal place should be preferred. Counsel for the defenders accepted that his attack had been based on a misunderstanding of the pleadings. He also accepted, following the authority of Bankton to which I have already referred, that if the charter of 1672 was a barony title then there was no room for competition between the parties because the conveyance to Gulloch would not have retained the barony quality over the lands so conveyed. Accordingly this area of dispute is no longer alive. I should add that there are some averments in the defences suggesting that

the lands and the barony are separate tenements but that line of approach is not now pursued. There are also in ans. 1 averments by the defenders relating to a plea of personal bar, but that was not a matter which was developed in the debate.

The curious feature about this case to my mind is that both parties accept that a Barony of Freswick was created and that it does still exist. The pursuer claims that it is over his lands. The defenders deny that but do not identify the lands which they believe are comprised in it. The question in the present case is whether the pursuer's title includes or comprises the barony. For the reasons which I have explained I do not consider that the pursuer's claim can properly be disposed of as a matter of relevancy and simply by reference to the deeds produced. It is eventually a matter of fact. I shall accordingly allow a proof before answer upon the whole case. I shall however repel the defenders' first plea in law at this stage as I am satisfied that whether or not the pursuer can claim title to the barony, he has the title and interest to raise the matter in this action.

Counsel for Pursuer, J. W. McNeill; Solicitors, Shepherd & Wedderburn, W.S. — Counsel for Defenders, Agnew of Lochnaw; Solicitors, Aitken Nairn, W.S.

C. N. M.

William E. Selkin Ltd. v. Proven Products Ltd.

VACATION COURT
LORD CULLEN
2 APRIL 1991

Patent — Infringement — Construction of specification — Claims — Obviousness — Novelty — Similar apparatus — Interim interdict — Weight to be given to existence of patent — Balance of convenience — Protection of long established business against newly formed business.

Interdict — Interim interdict — Patent — Similar apparatus — Balance of convenience — Weight to be given to prospects of success of challenge of patent — Protection of long established company against newly formed company — Possibility that award of damages not adequate compensation.

A company manufactured, as assignees of letters patent dated 8 October 1973, a portable cleaning apparatus called the "Wash-Matik International". The apparatus was built in accordance with the patent specification. Another company started to sell apparatus under the name of the "Wash-Kit". The Wash-Kit had been sold only since February 1991. Interim interdict had been granted on 8 February 1991 against the manufacturers of the Wash-Kit on averments of infringement of the patent.

The sellers of the Wash-Kit argued that there was doubt as to whether the patent was valid in that there was doubt as to whether the claimed invention was new or involved an inventive step. They further argued that there was no prima facie case of infringement in the light of the relevant claims under the patent. It was further argued that the sellers of the Wash-Kit were entitled to a licence upon such terms as might be settled by the comptroller. It was submitted for the manufacturers of the Wash-Matik International that the patent should be regarded as valid until determined otherwise, that the invention was novel, and that the Wash-Kit infringed the patent in a variety of ways. It was explained that the manufacturers of the Wash-Kit had not undertaken to take a licence to which, in any event, they had no absolute right.

On the balance of convenience, it was submitted by the manufacturers of the Wash-Matik that they had been manufacturing and marketing it since about 1973, that they had a well-established business with a large sales turnover and considerable goodwill and that it would be difficult to compensate for any loss by an award of damages. The distributors of the Wash-Kit submitted that they had the opportunity of applying for a licence as of right and that damages would therefore be limited.

Held, (1) that the patent was to be regarded as valid (p. 985I); (2) that there was a prima facie case that the patent had been infringed in that (a) an arguable case had been made out that a certain distinguishing feature was identical on each apparatus, and (b) the Wash-Kit was substantially as described in the drawings which accompanied the specification of the Wash-Matik International (p. 985J-K); (3) that the balance of convenience favoured the existing company (p. 986F-I); and motion for recall *refused.*

Action of interdict

William E. Selkin Ltd. raised an action against Proven Products Ltd. seeking to interdict the defenders from infringing certain letters patent.

On 8 February 1991 the Lord Ordinary (Cullen) *granted* interim interdict on the pursuers' ex parte application.

The case came before the vacation judge (Lord Cullen) on 27 March 1991 on the defenders' motion for recall of the interim interdict.

Statutory provisions

The Patents Act 1949 provided:

"35.—(1) At any time after the sealing of a patent the patentee may apply to the comptroller for the patent to be endorsed with the words 'licences of right'; and where such an application is made, the comptroller shall notify the application to any person entered on the register as entitled to an interest in the patent, and if satisfied, after giving any such person an opportunity to be heard, that the patentee is not precluded by contract from granting licences under the patent, cause the patent to be endorsed accordingly.