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judicial to the community to oblige the interposed person's heirs to serve and enter, and grant procuratories for that end; who might possibly prove backward to do that, though upon the charge of others, whereby they could expect no profit. Besides the fee might come to be forfeited, through the delinquency of the trustee; and so the cure prove worse than the disease.

One of the Lords thinking that it would not be so hard upon superiors, to be thus cut off from the expectation of casualties that may or may never belong to them, as to be deprived of those that sometimes will certainly be due, as the *duplicando* of the feu duty at the entry of heirs, or what ariseth from the nature of a feu, upon the vassal's death; his Lordship proposed that those more certain casualties should take place against incorporation-vassals every 50th year, as the common period of an ordinary man's life, in the opinion of the doctors; since law determines the age of the longest liver to be 100 years, and a vassal, though he may live that long, he may die sooner. See SUPERIOR AND VASSAL.

*Fal. Dic. v. 2. p. 5. Forbes, p. 710.*

1771. January 23.

MAGISTRATES OF INVERNESS against WILLIAM DUFF, and Others.

No 17.

Mode of computing non-entry duties, and legal deductions therefrom.

THE Magistrates of Inverness having brought a declarator of non-entry against the vassals in certain lands and fishings, a question arose, Whether the defenders, who were singular successors, were liable in a year's rent, or in payment of double the feu-duty? The clause founded on by the vassals was the following in the *reddendo*; 'Nec non duplicando dictam feudi firmam primo anno introitus cujuslibet hæredis, aut assignati, &c.;' and the COURT, (Fac. Col. Februrary 2d 1769, *voce* SUPERIOR and VASSAL,) found the defenders liable in a full year's rent upon getting an entry.

This general point being settled, some others required to be adjusted—As to which, the defenders, in a reclaiming petition, *maintained*;

*1mo*, That the pursuers were not authorised to exact a full year's rent; for in the year 1739, an act of council had been passed, whereby it was ordained that no charter should be granted in favour of singular successors, 'till such time as the person entering, if he is a burghess residing within this burgh, bearing Scot, lot, &c. shall pay the half of a year's free rent of the subject; or if the person entering be not a burghess, &c. that such person shall pay before signing of his charter a full year's free rent, or three-fourths thereof, as the Magistrates shall think proper.' That the practice accordingly had fixed this composition at one half or two-thirds of the year's rent, and that they had a *jus quæsitum* to be received upon these terms.

*2da*, The defenders had been found liable by the Lord Ordinary in the full mails and duties of the subjects from the period of citation in the action, which

was erroneous; for though it might be a rule mentioned by ancient writers upon the feudal law, that these were due from that date to the superior in a general declarator of non-entry, yet that only took place where decret was afterwards obtained, and the non-entry declared by a judgment of the Court. In this case no declarator had followed, and the vassals had appeared and professed themselves willing to enter, but differed only upon the terms. Full mails and duties were never due from citation where there was any colourable excuse, (*vide infra, h. t.*;) and hence, in the present case, nothing more could be demanded than such bygone feu-duties as might be unpaid.

2<sup>to</sup>, That in fixing the *quantum* of the composition, they were entitled to deduction, 1<sup>st</sup>, Of the feu-duty payable to the superior; it being only a year's absolute produce of the vassal's estate or interest that was liable for an entry, Dict. *voce* SUPERIOR and VASSAL; 2<sup>d</sup>, Of a fifth part of the rent as the legal value of the tithes; the vassals, in the present instance, having a right to these by a progress different from that of the lands; 3<sup>d</sup>, Of the cess, upon the ground, that if the superior should carry the idea of the law into practice, and dispossess the vassal, he would in like manner be liable in public burdens.

4<sup>to</sup>, That the victual rent should be converted, not at the rate the defenders sometimes drew it from their tenants, but according to the stated conversion in that part of the country; which was the rule established in all cases, and in particular in the valuation of a bankrupt's estate previous to a judicial sale.

5<sup>to</sup>, That in computing the value of the salmon-fishings and grass, the period of seven years, which the Lord Ordinary had fixed, was too short; and that they should be taken for 20 years bygone, and fixed at a medium of that period.

The pursuers *answered*;

1<sup>mo</sup>, The act of council in 1739 was passed to prevent an abuse that had crept in, of granting an indulgence to vassals who were connected with the Magistrates; but though nothing less than a half or two-thirds of the year's rent could in any case be received, it did not from thence follow, that a full year's rent was not the rule which the Magistrates were authorised, if they should think proper, to exact it. No *jus quasitum*, therefore, was either granted or intended; it would have been an act of mal-administration to have done so; and no practice, such as the defenders maintained, had ever followed.

2<sup>do</sup>, That the pursuers had no other means to force an entry, but by taking decret of mails and duties, which was the ordinary remedy; but they had no objection that these should be restricted as the Court should think fit.

3<sup>to</sup>, With regard to the deductions claimed, 1<sup>st</sup>, Of the feu-duty; the statute 1469 positively declared, that the overlord, in accepting of the change of a vassal, should receive a year's mail as the land was set for the time. All the law authorities considered a full year's rent of the lands without any deduction, to be the standard of this casualty, and any abatement that might be given

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was merely *ex gratia*. 2d, Teinds were only a burden upon the property; and the rule had been, that vassals of subjects superior should pay a full year's rent without any deduction being specified on that account. 3d, As to the cess, the same answer applied as had been given with regard to the feu-duties.

4to, With regard to the victual; as this casualty was established to be a full year's rent of the lands as they then stood, the superior must take his chance whether the current prices were high or low. If the defenders chose to deliver the *ipsa corpora*, they would receive them; but if they rather inclined to pay the value, they could not complain, when both that and the quantity were referred to their oaths.

5to, A retrospect of seven years, as to the rent of the salmon-fishings and grass-grounds, was an indulgence, the current rent being the standard; and if the defenders were entitled to go back 20 years, they might, with the same reason, go back 40, or any period whatever.

THE COURT pronounced the following judgment: "Find there is no claim for the full mails and duties since the citation in this case; repel the defence founded on the act of council 1739, with respect to the *quantum* of the composition; but in ascertaining the extent of the year's rent, find that one-fifth part must be deducted from the rent of the lands, exclusive of the salmon-fishing, on account of tithes, in respect the pursuers are not superiors, nor have they right to the tithes: Find the cess to be no proper deduction; and that in converting the victual, the same must be rated according to the current prices of the markets in that part of the country; as to feu-duties, parties to give in mutual condescendences as to the practice; and as to the two last points (the salmon-fishings and grass), adhere. Thereafter, of consent of the pursuers, the feu-duties, in striking the composition, to be deducted from the rental."

Lord Ordinary, *Barjarg*.  
Clerk, *Campbell*.

For the Magistrates of Inverness, *Lockhart*.  
For Duff, and Others, *Cosmo Gordon*.

R. H.

*Fac. Col. No 67. p. 200.*


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S E C T. II.

Full mails not due till deplatator; unless the Superior be already in possession by ward.

No 18.  
In a declarator of non-entry, the Lords found,

1587. *March*.DRUMMOND *against* FORRESTER.

JOHN DRUMMOND having pursued one Forrester, as donatar to the King, of the non-entries of two-seventh parts of the lands of D., lying within the ba-