

effect that the trustees are entitled to hold half of the residue for behoof of the possible children of the daughter. There is one point on which a question may arise hereafter. There have been accumulations going on for the last ten years. There may be grandchildren born, and if there are they will eventually get the income. But, on the other hand, the daughter may remain unmarried till twenty-one years, when the Thellusson Act would apply and intestacy arise, and the daughter would get the income if she has no children.

LORD CRAIGHILL concurred.

The Court pronounced the following interlocutor:—

“Find, in answer to the first question, that the parties of the first part are not entitled to have now paid over to them the whole residue of the estate of the deceased Robertson Gillies; and in answer to the second question, that the parties of the second part are entitled and bound to retain, for behoof of any issue that may be born to Mary Margaret Gillies, and to be administered by them, the parties of the second part, in terms of the directions of the trust-deed and according to law, so much of the said residue as shall be equivalent to one-third part thereof, minus the legacies and annuities bequeathed by the truster and the expenses of the Special Case incurred by both parties thereto, as such expenses shall be taxed,” &c.

Counsel for Parties of First Part—R. Johnstone—Goudy. Agents—J. C. & A. Steuart, W.S.

Counsel for Parties of Second Part—Jameson—C. Johnston. Agents—Scott, Bruce, & Glover, W.S.

Thursday, February 24.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

BODDAM AND OTHERS (REID'S TRUSTEES),
AND OTHERS v. DUCHESS OF SUTHERLAND.

Superior and Vassal—Feu-Disposition—Obligation to Relieve of Stipend—Warrandice—Teinds—Right of Redemption.

A superior in 1673 disposed lands and teinds to a vassal under warrandice to relieve him of all past and present burdens affecting the same, and “yearly and termly in all time coming of all teind-duty, minister’s stipend, and annuity of teinds allenarly,” and further bound himself, his heirs and successors, “that in case the teind-sheaves of the said lands, with the crofts and pertinents thereof, or any part or portion of the said teinds, should be evicted from them (the vassals) by whatsoever person or persons, or that the same lands and teinds be burdened and affected with any minister’s stipend in time coming, whether present or

supervenient, then and in that case, and immediately after the said eviction or burdening of the said lands and teind, as said is, to content and pay to the said A and his foresaids, in liferent and fee respective, the sum of one thousand two hundred pounds money foresaid for each chaldar that should be so evicted, whether of stock or teind, with the annual-rent of the said sums yearly and termly during the not-payment thereof after the said eviction.” Various augmentations were subsequently imposed on the teinds, and the successive superiors relieved the vassals of their payments of stipend until 1877, when the then superior claimed right to redeem her annual payment by a slump sum calculated at the rate of £1200 Scots per chaldar of the evicted teind, in terms of the above clause. *Held (dub. Lord Deas)*, that she was not entitled so to redeem, the said clause importing an obligation on the superior, but no right in his favour.

By disposition dated 24th January 1673, and recorded 8th April 1679, Sir George Mackenzie of Tarbet, afterwards first Earl of Cromartie, in consideration of having received from Andrew Ross of Shandwick the sum of 4708 merks, 6s. 8d. Scots money as the real price and full value of the lands and teinds to be disposed, sold, annaized and disposed to and in favour of the said Andrew Ross and Lillias Dallas, his spouse, and longest liver of them two in liferent, and William Ross, their son, his heirs-male and assignees whatsoever, heritably and irredeemably, in fee, the said Sir George’s “three-quarters of the touen and davoeh lands of Drumgillie,” with the pertinents thereof, “together with the teinds sheaves and parsonage teyns of the said three-quarter lands, crofts and pertinents thereof included, with the stock, and not to be separate therefrom in all time coming.” The clause of tenure was as follows—“To be holden of the said Sir George Mackenzie, his heirs-male and successors, in feue and heritage for ever, for yearlie payment to them of the sume of three pounds Scots money, at two terms in the year, Whitsunday and Martinmass, be equal halves nomine feudi firme; together with three days’ service of the tenants and possessors of the saids lands with their horses and oxen ilk year in manner following, viz., one for plowing, another for casting and leading of peats, and the third for casting and leading of divets after the accustomed manner, and they desired thereto, and als. relieving the said Sir George Mackenzie and his fords. at the hands of our Sovereign Lord the King’s most excellent Majesty, and his heirs and successors, of the number and quantity of three-score twelve bolls victual, half bear half oatmeal, twelve shillings money silver mail, and six henns yearly, and that as the proportionable part efferand to the sds. three-quarter lands of the whole feu-duty payable by the said Sir George Mackenzie to his Majestie in name of feu-duty for the hail davoeh and lands of Drumgillie, beginand with the duty payable for the year and crop Jajvie threescore twelve years, at the terms used and wont, and sua furth yearlie in all time coming.” The disposer Sir George Mackenzie thereafter bound himself “to exoner, relieve, harmless and skaitless keep, the said Andrew Ross, his sd. spouse, their said son, and

his forsd., of feu-duties, teynds, tack-dutys, minister's stipends, cess, taxations, annuities, excise money, and other private and publick imposts of whatsoever nature, due and payable furth of the lands, teynds, and others hereby disposed, wt. the pertinents, at the hands of those having, claiming, or pretending to have interest therto in any sort, and that of all moneys, crofts, years, and tearms preceeding the feast and tearm of Whitsunday last bypast Jajvie threescore twelve years and cropt revixe after assigned, and yearly and tearmly in all time comeing of all teynd-duty, minister's stipends, and annuity of teynds allenarly, and to make the acquitances and discharges therof furthcomeing to them at all occasions necessar when necessarlie they shall have to do therwith, wherin if the sd. Sir George Mackenzie and his forsd. failzie, and that the said Andrew Ross and his forsd. be distressed for and forced to pay any of the sds. dutys throw the want of the saids discharges, then and in that case he binds and obliges him to reimburse the said Andrew, his said spouse, their sd. son, and his forsd. therin, cum omni damna." The immediately ensuing clause was as follows— "And in effect that the teynd-sheaves and the parsonage teynds of the sds. three-quarters land, with the pertinents, were disposed alswell as the stock to the sd. Andrew and his forsd., to make up to them the rent of forty-two bolles victuall, and that by and attour the forsd. yearly feu-duty sua payable to his Majesty and the sd. Sir George Mackenzie in manner above expresst; and that the sune of £1200 Scots money was payd be the said Andrew to the said Sir George Mackenzie alswe for ilk chalder teynd as stock: Therfor the said Sir George Mackenzie binds and obliges him and his forsd. to the said Andrew Ross, his spouse, and their sd. son, and his forsd., that in case the teynd-sheaves of the sd. lands, with the crofts and pertinents prof., or any part or portion of the sds. teynds, be evicted fra them be whatsoever person or persons, or yt. the samen lands and teynd be burdened and affected wt. any minister stipend in time comeing, whether present or supervenient, then and in that case, and immediately after the sd. eviction or burdening of the said lands and teynd as sd. is, to content and pay to the said Andrew Ross and his forsd. in liferent and fee revixe the sum of £1200 money forsd. for ilk chalder that shall be sua evicted, whither of stock or teind, wt. the @rent of the sds. sumes yearly and tearmly dureing the not-payment therof after the said eviction: And it is hereby declared and specialie provided, that in case any action shall happen to be commenced and persued against the sd. Andrew Ross and his forsd. for evicting of the saids lands and teynds or any part therof frae them, or burdening of the sds. teynds as said is at any time hereafter, that then and in yt. case they make due and lawful intimation of any such actions when moved or persued befor litiscontestation be made in the cause to the sd. Sir George Mackenzie and his forsaids personallie, or at the mannon place of Milntoun, in presence of a nottar and witnesses as effeirs, to the effect he and his forsaids may compear and defend them in liferent and fee revixe against all such persuits."

In the first known process of locality after the date of the said disposition, viz., that which ter-

minated in 1720, the Court found that by the terms of the said disposition the Earl of Cromartie was bound to relieve the said three-quarters lands of Drumgillie of any part of the minister's stipend allocated thereon, and ordained the proportion of stipend allocated thereon to be localled on his lands within the parish. In the next locality, which terminated in 1809, the Lord Ordinary reserved to Mrs Jane Ross of Shandwick, then proprietrix of Drumgillie, and her husband, their claim of relief against the Earl of Cromartie for any part of the augmentation allocated on the said lands. In 1816 the lands of Drumgillie were valued, and the stock and teind of the said three-quarters were valued at £196, 3s., the teind being £39, 4s. 7½d. In the next locality, which terminated in 1855, a large augmentation was laid on the said lands, under reservation of relief against Mr Hay Mackenzie of Cromartie. In the last rectified locality of the said parish, modified 11th December 1876, the sum allocated on the said three-quarter lands was £39, 4s. 7½d.

The present action was raised by the trustees of the late Captain Reid and the trustees of the late Mr John Ross Duncan, as heritable proprietors *pro indiviso* of the estate of Shandwick, of which the said lands of Drumgillie formed part, against the Duchess of Sutherland as superior of said lands, for the repayment of the amount of stipend paid by the pursuers for the said three-quarter lands for crops and years 1876, 1877, 1878, and 1879.

The pursuers averred—"Since the granting of the said disposition by the said George Mackenzie, Earl of Cromartie, the said George Mackenzie and his successors, including the defender the Duchess of Sutherland, have all along till 1877 (for crop and year 1876) admitted their obligation to relieve the proprietors of the said three-quarter lands of Drumgillie, now called Shandwick, from the payment of stipend for or in respect of the said lands, and have either themselves made payment of the stipend to the minister of the parish, or repaid the amount thereof to the proprietors of the said lands; but since 1877 the defender has failed to make payment of the stipend due in respect of the said lands to the minister of the parish, and the same, as ascertained and settled by the said rectified scheme of locality, has been paid to the minister by the pursuers. The several sums paid by the pursuers to the minister of the parish as stipend for the said lands are the sums specified in the conclusions of the summons, and the same are now due and resting-owing by the defenders to the pursuers; but the defenders have refused, or at least delay, to make payment thereof, whereby the present action has been rendered necessary."

The defender denied that she represented the disposer Sir George Mackenzie, but explained that for the purposes of the present action she did not intend to dispute her obligation to carry out, or the pursuers' right to enforce, the terms of the said disposition. She admitted that from 1809 onwards she and her predecessors had relieved the proprietors of the said three-quarter lands from payment of stipend. In 1877, for crop and year 1876, however, such payment was refused, and the defender stated her desire and intention to redeem the obligation of relief under the clause of said disposition having regard thereto, and tendered the pursuers £187, 10s. in

full of all liability under said obligation for the future. That sum was calculated to be the equivalent of the annual value of victual, half bear half oatmeal, on the average fiars prices for years 1871-77—represented by the said sum of £39, 4s. 7½d.—calculated said redemption at the rate of £1200 Scots per chalder. This offer the pursuers refused.

The defender pleaded—“(1) The defender having offered and being willing to redeem the obligation of relief founded on in the manner prescribed by the said disposition, is entitled to absolvitor with expenses.”

The Lord Ordinary (CURRIEHILL) decerned against the defender in terms of the conclusions of the summons.

His Lordship added this note—“The object of this action is to enforce against the defender, the Countess of Cromartie and Duchess of Sutherland, an obligation undertaken by her ancestor Sir George Mackenzie, in 1673, to relieve the pursuers' predecessor Andrew Ross of Shandwick, and his successors, of all stipend and burdens on teinds affecting, or that might be made to affect, the lands of Drumgillie, then conveyed by Sir George to the said Andrew Ross. The obligations of relief are set forth at length in the record, and need not be here repeated. The defender admits the validity and subsistence of the obligation, but maintains that by its terms she is entitled to redeem the obligation by paying the pursuers at the rate of £1200 Scots for each chalder evicted or burdened with stipend. The defender maintains that the option of redemption is vested in her. The pursuers maintain that the obligation of relief is twofold—(1) A general obligation to relieve the purchaser of all stipend; (2) an obligation, in the event of and immediately after eviction of teinds or land or imposition of stipend, to repay a corresponding portion of the price at the rate specified in the clause of relief. It appears to me that according to the sound construction of the deed the option lay with the purchaser and his successors, and not with the seller. The deed has been so interpreted by all concerned ever since the teinds began to be burdened with augmentation in 1720, although during the greater part of that time it would have been greatly to the advantage of the defender and her predecessors to have asserted and vindicated their alleged option. On the whole, I have little difficulty in adopting the pursuers' construction of the deed.”

The defender reclaimed, and argued—On a sound construction of the disposition she was entitled, in terms of the special clause following the general one of warrandice, to redeem the annual demand for relief by a slump payment, calculated in the manner therein proposed, and cancelling, to the extent of the valued teind, the original bargain. The special clause was to be read with the general one as qualifying it, and limiting the possible liability of the disponent and his successors. The bargain was a carefully framed one, and was probably considered likely to be fair for both parties thereafter, as it was at the time, though the change in value of grain had rendered it *de facto* otherwise. It amounted to a contract of insurance or taxation of the general warrandice, the special clause limiting the disponent's possible indemnification in case of eviction. The option of redemption was presum-

ably with the debtor in this obligation, the disponent, and the fact of his not having exercised it in time past could not alter the question of construction of the clause.

Replied for the pursuers—The clause in question imported only an obligation, and no right or privilege to the disponent. The option of receiving repayment in the manner specified lay with the purchaser and his successors. If the seller ever had an option, he had lost it by non-use. The deed should be construed in the light of the subsequent actings of parties.

At advising—

LORD PRESIDENT—I entirely agree with the judgment of the Lord Ordinary. I do not think that the disposition on which the question turns will bear any other construction than that which he has given.

The lands disposed were conveyed “together with the teinds sheaves and parsonage teynds of the saids three quarter lands, crofts and pertinents thereof included, with the stock, and not to be separate therefrae in all time coming;” the meaning and effect of this clause of course being, not that Sir George Mackenzie could give a right to the teinds *cum decimis inclusis*, or anything equivalent to that, but only to show that the lands and teinds were given out to the vassal together, and that the duty was a *cumulo* duty for the lands and teinds. Now, undoubtedly it was the intention of parties that the superior should relieve the vassal not only of all past burdens, but as regards certain burdens in all time coming. This is very clearly expressed in the disposition. The superior is to relieve the vassal “yearly and tearmly in all time coming of all teynd duty, ministers' stipends, and annuity of teynds, allenarly.” With regard to these and the burdens set forth in the preceding part of the disposition, the superior is taken bound “to make the acquittances and discharges thereof forthcoming to them at all occasions necessary when necessarlie they shall have to do therewith, wher-in if the sd. Sir George Mackenzie and his fords. failzie, and that the said Andrew Ross and his fords. be distressed for and forced to pay any of the sds. duties throw the want of saids discharges, then and in that case he binds and obliges him to reimburse the said Andrew, his said spouse, their sd. son, and his fords. therin *cum omni damna*.”

Now, nothing can be clearer and more complete than the obligation there undertaken by the superior. That it is an unfair arrangement is nothing to the point. Indeed, I may say that it is one of the most foolish kinds of agreement that a man can enter upon, because by it he binds himself and his successors to make indefinite payments, the amount of which he cannot foresee. But these agreements have been given effect to in previous cases, and I see no reason for denying effect to such obligations. Nor do I understand that the Duchess of Sutherland disputes this. She admits that the burden has been laid upon her effectually, and that it has been discharged by her and her predecessors ever since the execution of the disposition. But what she says is this—that under a subsequent clause of the disposition she has had conferred upon her the power of redeeming the obligation of relief upon payment of a certain sum. If that is so,

then this is a right which she is now entitled to exercise, although during the intervening period she has not taken advantage of it. I do not think that the circumstance that she continued to pay under the clause of relief will deprive her of the right or power of redemption if it has been conferred. It is a *res meræ facultatis*. No prescription takes it away. It is a power which may be exercised *quandocunque*. The sole question therefore is, whether there is such a power of redemption in the present case?

It is to be found, if anywhere, in that clause of the disposition which begins with the words "And in effect that the teynd sheaves and the parsonage teynds of the sds. three quarters land, with the pertinents, were disposed, als well as the stock, to the sd. Andrew and his forsd., to make up to them the rent of forty-two bolls victuall, and that by and attour the forsd. yearly feu-duty sua payable to his Majesty and the sd. Sir George Mackenzie in manner above expresst; and that the sume of £1200 Scots money was payd be the said Andrew to the said Sir George Mackenzie als well for ilk chalder teynd as stock." Now, on that narrative the clause proceeds, and it is remarkable, and certainly very important, that the clause consists entirely of an obligation. And on whom is this obligation laid? It is laid on the superior, and on nobody else. No right is conferred on anyone except on the person in whose favour the obligation is conceived, and it would certainly be very peculiar if we could spell out of the clause of obligation a right or power in favour of the person who is taken bound, unless such a right is expressly conferred. The operative part of the clause is in these terms—"Therfor the said Sir George Mackenzie binds and obliges him and his forsd. to the said Andrew Ross, his spouse, and their sd. son, and his forsd., that in case the teynd sheaves of the sd. lands, with the crofts and pertinents prof., or any part or portion of the sds. teynds, be evicted fra them be whatsoever person or persons, or yt. the samen lands and teynd be burdened and affected wt. any minister stipend in time comeing, whether present or supervenient, then and in that case, and immediately after the sd. eviction or burdening of the said lands and teynd as sd. is, to content and pay to the said Andrew Ross and his forsd. in liferent and fee revive. the sum of £1200 money forsd. for ilk chalder that shall be sua evicted, whither of stock or teind, wt. the @rent of the sds. sumes yearly and tearmly dureing the not-payment therof after the said eviction."

As I said before, this is a clause of obligation merely, and the only obligation imposed is an obligation on the superior Sir George Mackenzie. Of course no one supposes that in the event of an augmentation of stipend becoming a burden on the estate the vassal is entitled to insist on being relieved by the superior and at the same time that the superior should pay the stipulated equivalent for each chalder. That is out of the question. The simplest rules of construction make that impossible. Therefore in one sense the two clauses of relief here are alternative. If the vassal is content to take relief by reimbursement, then the other clause cannot be enforced—he cannot insist on an annual payment. It is in the option of the vassal to take relief in the one way or the other. But as far as the superior is concerned, where is there anything to imply that he

is entitled to this option? That argument just resolves itself into this, that this second clause confers upon the superior a right of redemption at the rate specified in the clause. But I am very clear that it is a right of option, not a right of redemption, and the right of option is in favour of the vassal only. The superior has no such right. The only obligation imposed on the vassal is that found in the end of the clause, which requires that when any action is brought against the vassal for evicting him from the lands or teinds he shall make intimation to the superior before litiscontestation that the superior may appear and defend.

LORD MURE and LORD SHAND concurred.

LORD DEAS—One observation has been made in which I entirely agree—namely, as to the hardship which may be entailed by obligations for futurity—of which we have had various forms—when no one can tell what the future may be. But it is matter of no consequence in construing the clause what its hardships are. We must take its terms and nothing else. Taking it in this way, I cannot read it as a clause of redemption, either on the one side or the other. The strength of the argument against the interlocutor is that there is an alternative giving relief, or giving it only to the extent of £1200 Scots. It was quite plain that in the natural course of things there would be augmentations; and the agreement is, that whenever there were augmentations there was to be a corresponding relief. Now, the difficulty I have had is—this being a mutual contract, how far there is not an alternative in the option of the seller—how far it is no part of the bargain between both parties that if the seller does not do the one thing he shall be entitled to do the other. But though I have much more difficulty in getting to the result at which your Lordships and the Lord Ordinary have arrived, I have no such clear opinion as to entitle me to differ.

The Court adhered.

Counsel for Pursuers (Respondents)—Guthrie Smith—Blair. Agents—Philip, Laing, & Co., S.S.C.

Counsel for Defender (Reclaimer)—Mackintosh—Dundas. Agents—Mackenzie & Black, W.S.

Friday, February 25.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

DUCHESS OF SUTHERLAND v. BODDAM AND OTHERS (REID'S TRUSTEES), AND OTHERS.

Thirlage—Commutated Multures—Abbreviate-Decree—39 Geo. III. c. 55, secs. 1 and 4—Registration.

An action for payment of commuted multures was founded on an abbreviate-decree of commutation of thirlage, to which it was objected (1) that it had not been registered within sixty days in terms of section 1 of 39 George III. c. 55; and (2) that the respondent, in the petition on which it proceeded,