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they run the hazard of subjecting their infant pupil to an universal passive title; and hence, in whichever way they acted, they might hereafter expose themselves to a challenge at the instance of their pupil when she came of age.

The *creditors maintained*, That the Countess' predecessors and her present tutors had sufficient opportunity of being fully acquainted with the extent of the debts; that all objections to the validity of these claims remained entire; and as the estate was under the management of her own factor, the value must be equally well known. Her demand was contrary to the spirit and practice of the law in similar cases: Her situation was like that of an heir, charged to enter by his predecessor's creditors; who, though he might be a minor, and unacquainted with the value of the succession, was allowed but a very short time to make his election. It was contrary to the terms of the Clan Act; by which the donator could be in no better situation with regard to the creditors than the former proprietor, who could not have protected his estate from their diligence. The payment of the debts was the condition under which she had any pretensions to the estate at all; so that, till once she made her election, she had truly neither right nor title to the subject.

The Court was clearly of opinion, that the Countess was bound to make her election;—that this case was similar to an exhibition *ad deliberandum*, where minority was no exception.

It was accordingly found, 'That, pursuant to the interlocutor of the 9th 'July 1768, the tutors of the Countess of Sutherland, in behalf of their pupil, 'must, on or before the 20th day of June next, declare her option, Whether 'she will hold the estate, and pay the creditors thereon the whole debts justly 'due to them; or, if she and her tutors will expose the said estate to sale by 'roup, for payment of the said creditors? And in case the tutors, in name of 'the Countess, shall fail to declare such option by the time before limited, find, 'That the creditors on the estate may, in their own right, without consent of 'the Countess or her tutors, bring the same to a sale, for the payment of their 'debts, as accords.'

Lord Ordinary, *Kennet*. For the Countess, *Lockhart, et alii*.
For the Creditors, *Sol. H. Dundas, Bruce*. Clerk, *Campbell*.

R. H. *Fac. Coll. No.* 84. *p.* 246.

1777. *July* 4.
JOHN M'KENZIE of Delvin, *against* SIR HECTOR M'KENZIE of Garloch.

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Particulars of the case No. 58. p. 15053.

SIR ROBERT M'KENZIE was proprietor, and Mr. M'Kenzie of Delvin superior of the lands of Kinlochar. Sir Alexander M'Kenzie, father of Sir Hector,

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had executed a strict entail of his whole lands and estate, and among these, of the lands above mentioned, and these lands had ever since the death of Sir Alexander in 1766, been in non-entry; as Sir Hector claimed to enter upon making payment only of a duplicand of the feu duty, whereas Mr. M'Kenzie the superior, insisted upon a higher composition being paid. An action of declarator of non-entry and reduction of the feu, *ob non solutum canorum*, was accordingly brought by the superior; and the following arguments were employed in support of it.

Anciently all grants of lands from superiors to vassals were effectual only during the life of the vassal or grantee. These grants were afterward extended to heirs; yet still, though the superior was under an obligation to renew the grant to the vassal's heir, the renewal of the investiture was to be purchased by a fine. And the law of Scotland remains the same to this day, only with this difference, that the superior, before he can enter to the possession of the lands, must insist in a declarator of non-entry.

This payment of a composition, or casualty of relief, came to be fixed at the rate of a year's rent of the lands.

Several diminutions of the superior's right gradually took place as commerce advanced, and for securing the rights of creditors, the superior, who formerly could not be compelled to receive any vassal other than those to whom he had consented by the investiture, was obliged by several successive statutes to receive apprizers and adjudgers, and now, by 20. Geo. II. Cap. 50. to receive any purchaser of lands whatever. By the act 1685, also establishing entails, an obligation was created upon the superior to receive heirs of entail upon their paying a reasonable composition for their entry. Yet though by that statute the sanction of public law was given to entails which before that period were no more than simple destinations, which could have no effect without the superior's consent, and which he was at liberty to accept of or not as he pleased, still the legislature was anxious to guard the rights of third parties; and it is accordingly enacted by the statute 1685, 'that nothing in this act shall prejudge his Majesty as to confiscations or other fines as the punishment of crimes; or his Majesty, *or any other lawful superior, of the casualties of superiority, which may arise to them out of the tailzied estate*; but these fines and casualties shall import no contravention of the irritant clause.' Now this clause in the statute saving the rights of superiors, would have no effect, were the defender's plea well founded; because a superior, having once accepted of a tailzie, is afterward bound to enter the after heirs of tailzie, however remote in the legal line of succession from the last proprietor, not as singular successors, but as heirs of the investiture; and as the tailzie in question contains strict clauses, *de non alienando et contrahendo debita*, and as from the series of heirs thereby called to the succession, the heir of tailzie may happen not to be the lineal heir of the last proprietor, the consequence would be, that the pursuer entering this defender upon the terms he demands, would, for 1*s.* 8*d.* for ever give up for him

No. 2. and his successors the casualty of relief due to the superior by the vassal out of these lands.

The statute 1685 contains no enactment compelling a superior to receive, and enter an heir under a strict entail. From the practice, however, which has prevailed since that statute, the superior is considered as bound to receive such heirs. But if practice alone be held sufficient to bind the superior to receive such heir, practice must equally subject the heir to pay such composition as has usually been paid in similar cases. And the superior by practice has always been understood in such case, to be entitled to at least a year's rent of the lands. Frequently a great deal more has been given.

To compel a superior to acknowledge a tailzie without getting any recompence for so doing, would indeed be manifest injustice. It would be depriving the superior of his undoubted property without his consent, or without giving him value for it. It would be contrary to an established rule in law and material justice,—*Id quod nostrum est, sine facto nostro ad allium transferri non potest.* The right of superiority and the casualties thereto belonging, are as much the estate of the superior, as the *dominium utile* or right of property is the estate of the vassal, and cannot therefore be taken from him without his consent, without value, or without his committing any crime to forfeit his just right.

The right of the superior cannot be prejudiced merely by the act and deed of the vassal without the superior's own consent and concurrence; and upon this account, it is laid down by our lawyers, that a superior cannot be obliged to receive for his vassal a body corporate, Craig, Lib. 1. Dieg. 15. § 16. Stair, B. 2. Tit. 3. § 41. There are two decisions indeed, Master of the Church and Bridge work of Aberdeen against Masters of the King's College, 11th December 1712, No. 42. p. 15034. and University of Glasgow against Hamilton of Dalziel, 24 July 1713, No. 16. p. 9296. in both which cases the Court of Session found, that the superior was obliged to receive a body corporate as a vassal. But the last of these decisions was reversed upon appeal; and Lord Bankton accordingly, B. 3. Tit. 2. § 90. and Mr. Erskine, B. 2. Tit. 12. § 27. lay down the same doctrine on this point with our old lawyers.

Yet in sundry particulars it is more prejudicial to the superior to accept of an entail than to receive a body corporate. Corporations may sell their estates, or their creditors may attach them for debts. But when a superior once acknowledges an entail, containing strict, prohibitive, irritant, and resolutive clauses, his casualty is gone for ever: For by the entail the property is absolutely locked up, and singular successors excluded.

A case was mentioned, recently determined by the Court, Aitchieson of Rochsolloch against Hopkirk and others, No. 69. p. 15060. in which the superior's right to a composition was sustained upon the practice, though the claim was not so favourable as in the present case.

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The defender had admitted, that as soon as the succession under the tailzie should open to any of the heirs of entail, who were not likewise heirs of line to the former proprietor, the pursuer would then be well founded in demanding a composition of a year's rent from such heir of tailzie, and he might, it was said, throw in a clause in the charter saving his right to such claim, while the defender in the mean time was entitled to an entry under the entail, as being lineal successor, without payment of any such composition. But such saving clause, the pursuer contended, would be of no avail to him, for by once acknowledging the entail, his right of claiming compositions from after heirs is for ever barred. So the Court found in the case of Lockhart of Carnwath against Sir Archibald Denham, 10 July 1760, No. 56. p. 15047. In that case Mr. Lockhart the superior had inserted in the charter he gave to the first heir of entail, a most express reservation to the effect above mentioned. Yet upon the succession opening to Sir Archibald, who was not heir of line to the person last vested in the lands, and upon the superior's insisting for the composition as expressly reserved to him by the charter, Sir Archibald successfully pleaded, that the superior having once acknowledged the tailzie, could not afterwards demand a composition from any succeeding heir, and that the clause inserted in the charter to the former heir could not bind *him*, who in no shape represented the former heir, otherwise than as heir of entail. If a reservation therefore so express and strong as that contained in the charter granted to Mr. Lockhart, could not save the superior's right, it cannot be expected that the pursuer in the present case, is to pass from what he is entitled to demand by law, upon any such condition.

On the part of Sir Hector, it was argued, that every feu-holding has certain known casualties and prestations arising from it, and these must be *precisely* fixed either by the feudal charter itself, or by those established rules of law founded in the nature of the right itself, which take place in all other holdings of the same kind. But in the present demand made by Mr. M'Kenzie, there is nothing *precise*. It is a vague claim for a composition, of which it is left to the Court to settle the amount. Such a claim is adverse to the nature of a feudal holding, and demonstrates of itself the unsoundness of the pursuer's claim.

One of two things is unavoidable. The defender must either be an heir or a singular successor. No third case has ever been known. There is no medium betwixt entering as an heir and entering as a singular successor. If the defender be regarded as the latter, the consequence is plain, that he is liable in a year's rent; if an heir of the original vassal, he can be liable in nothing more than the duplicand of the feu-duty. In this last situation he plainly is; and being *alioqui successurus* by the investiture, no law obliges him to pay a composition for entering with the superior, because his predecessor has laid him under the fetters of an entail. He acquires nothing by the entail, and would

No. 2. wish to be rid of it, and the pursuer should be very welcome to a year's rent, could he affect this desirable purpose.

The statute 1685, expressly allows all his Majesty's subjects to tailzie their lands. This necessarily implies that the superior must enter the heirs of tailzie, otherwise he holds a negative against the Legislature.

The reserving clause in the above mentioned statute, does not admit of the construction put upon it by the pursuer. That act indeed does not diminish or take away any of the feudal prestations arising out of the feu-contract; but it does not at the same time add any perquisites or casualties to the superior, which he had not before. The act, therefore, could never mean, that upon entering the heir of the former investiture, whether with or without a tailzie, the superior should have any thing more than the common legal duties upon such entry.

The acts of Parliament obliging the superior to receive adjudgers and purchasers of bankrupt estates, only oblige him to do so upon receiving a year's rent. But the act 1685 says no such thing, which it ought to have done had the Legislature intended to give the superior any such casualty.

The superior was very early obliged to enter the heir of the vassal, and in most feudal holdings entitled to a certain casualty of relief for receiving him. But neither before nor after the act 1685, was he entitled to a year's rent, and that act has left matters upon the same footing as formerly, the superior being entitled to the common casualty of relief, which in the present case is a duplicand of the feu-duty.

The pursuer's argument scarcely goes so far as to maintain, that in a tailzie, which contained no clauses against selling or contracting debt, the superior would be entitled to demand any composition; for his argument chiefly rests upon the circumstance, that the casualty is for ever lost, by the vassal being tied up from selling the land, or disponing to singular successor. But the more the vassal's hands are tied up from disposing of his feu, the nearer does it approach to the ancient constitution of feus in general, which were scarcely a subject of commerce. The pursuer is accordingly here complaining of the very thing, for which superiors of old insisted, viz. that the vassal should not be at liberty to introduce a stranger into the feu. And the very foundation therefore of his argument is unfeudal.

The Court seemed very much inclined to get complete information concerning the *practice*; but the practice was discovered to be various.

Some of the Judges appeared to be not at all satisfied with the decision in the case of Denham. It was observed, that though the law will not grant the demand for present payment, yet the superior is entitled to retain his right *tanquam optimum maximum*, and therefore not bound to grant a charter, conceived in such terms as would entitle a stranger to enter without paying a composition. The superior has an evident interest here. Were he to sell his superiority, it would not bring so high a price, were the superior to be understood

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as not entitled to draw any composition from a stranger. It was therefore moved, that a reservation to this purpose should be inserted in the interlocutor. And the judgment of the Court was accordingly (4th July 1777,) pronounced in the following terms: 'Find that Mr. M'Kenzie, the superior, is 'obliged to enter the defender, who in this case is the heir of the former investiture, in terms of the tailzie, upon receiving a duplicando of the free duty, and 'is not entitled to demand from him a year's rent, or other composition for 'said entry; reserving to the superior and his successors in the superiority any 'claim which he or they may have to a year's rent, or other composition, on 'the entry of any future heir of tailzie, not an heir of the investiture prior to the 'tailzie; and reserving to the said heirs all defences against the same, as accords.'

Lord Reporter, *Justice-Clerk.* Act. *Elphinstone* Alt. *Ilay Campbell,*

Kirkpatrick, Clerk.

J. W.

1801. *June* 16.

JOHN SYME, the Trustee for the CREDITORS of JOHN RANALDSON, *against* SIR WILLIAM ERSKINE, and Others.

No. 3.
The institute under an entail, who was likewise heir of line, wishing to make up titles in the latter character, obtained from the person he believed to be superior, a precept of *clare constat*, upon which he was infeft, and conveyed the lands to his creditors. After the death of the granter of the precept, it

ANDREW RANALDSON executed a strict entail of the lands of Blairhall, Langleys, and Wester-broom. He had purchased the two latter from Dr. Erskine, to be held of the disponer for 2*s*. 6*d*. feu-duty.

His son John Ranaldson, the institute, on his father's death, recorded the entail, and made up titles to Blairhall in terms of it. He possessed the other lands for some time in apparency, but having got into embarrassed circumstances, he executed a trust for behoof of his creditors, and wished to convey the lands held in apparency to them.

With this view, his agent John Syme, Writer to the Signet, who was likewise his trustee and chief creditor, applied to the agent of Dr. Erskine for a precept of *clare constat* in favour of John Ranaldson, as heir of line of his father, but was informed that the Doctor had sold the superiority to Sir William Erskine. Mr. Syme then wrote to David Forbes, Sir William Erskine's agent, requesting that a precept of *clare constat* might immediately be prepared.

Mr. Forbes made out the draught of the precept with his own hand, (28th September 1789;) it was duly executed by Sir William Erskine (22d October 1789;) and after some correspondence between Messrs. Forbes and Syme,