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Ordinary, who again reported the cause, upon memorials, respecting the new production; which, with the petition and answers being this day advised, the Court adhered to their former opinion. And it was judged proper to comprise the case in this form, stating the whole of the arguments used, *hinc inde*, at once.

It may be farther observed, that, in this question, the Court adhered to the former rule respecting an incidental point, namely, that a party is not bound, in virtue of a diligence which the other had obtained, *parte inaudita*, for recovering writings at large, to produce any writings in his custody other than those specially condescended on, and wherein he that calls for production of them can show that he has an interest.

Act. *Dean of Faculty, Sol. General.* Alt. *M'Queen, Elphinston.* Reporter, *Alva.* Clerk, *Pringle.*

Fol. Dic. v. 4. *p.* 317. *Fac. Coll. No.* 66. *p.* 157.

*** This case was appealed. The House of Lords, 25th January, 1774, "ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed."

1779. *February* 3.

SIR LAURENCE DUNDAS *against* The OFFICERS of STATE, HONEYMAN of GRAEMSAY, and Others.

No. 101.
Effect of a grant from the Crown of the casualties on the entry of vassals.

The estates which antiently belonged to the Crown in Orkney and Zetland were granted by Q. Mary to Lord Robert Stewart, her natural brother. The charter conveys "totas et integras terras de Orkney," &c. *cum tota superioritate libère tenentium.*

In 1581, this grant was comfirmed by a new charter, in the same terms, and by which the subjects conveyed were erected into the Earldom of Orkney and Lordship of Zetland.

The whole of the estates having returned to the Crown by the forfeiture of Patrick Earl of Orkney, son to Robert, were annexed by an act of Parliament, in 1612.

In 1643, William Earl of Morton obtained a wadset of the earldom and lordship from the Crown, redeemable on payment of £.30,000, alledged in the grant to have been applied to his Majesty's use. The subjects are conveyed, "una cum superioritate omnium et singulorum hæreditariorum vassalorum dict. comitatus, dominii," &c. An act of Parliament followed, dissolving the earldom, &c. from the Crown, and confirming the charter. But this grant, and a subsequent wadset of the estates in favour of a trustee for the family of Morton, were both set aside by the Court of Session in an action at the instance of the Crown, and the earldom, in 1669, was of new annexed to the Crown.

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In 1707, an act passed in the Parliament of Scotland, dissolving from the Crown this earldom and lordship, together with "all *parts and pertinents*, *casualties*, jurisdictions, privileges, and others whatsoever belonging to the same," to the effect, that her Majesty may dispone to James Earl of Morton, the foresaid earldom, &c. "jurisdictions, *casualties*, and others above mentioned." This statute reserves a right of redemption to the Crown on payment of £.30,000.

In pursuance of the act, a signature was obtained from the Queen, and a charter passed, of the earldom of Orkney, &c. in favour of the Earl of Morton, in which there was a clause, disponing to the Earl, "in all time coming, her Majesty's right of the feu, and other duties, *casualties*, and services, of all and sundry the heritable vassals, and others within the said earldom, &c. with full and sole power to the said James Earl of Morton, and his foresaids, in her Majesty's place, as remaining still their immediate superior, to enter and receive the said heritable vassals who now actually hold of her Majesty and the Crown, and their heirs; and to grant charters and infeftments to whatever person or persons of the said earldom, &c. upon resignation or disposition of the said vassals, or decreet of sale, apprising, or adjudication from them, and to intromit with, uplift, and dispone, all and sundry the casualties of the said vassals already vacant, or that may happen to become vacant by single liferent, escheat, ward, non-entry, recognition, or any other manner of way whatever."

This charter was ratified in Parliament. The Earl of Morton entered into possession, and his right was rendered perpetual and irredeemable by an act in 1742, and a charter following on it.

Sir Laurence Dundas having purchased the whole estates of the Earl of Morton in Orkney and Zetland, brought an action against the Officers of State for the interest of the Crown, and against the whole landholders in these islands, concluding, *inter alia*, that he had a right under the grant 1707, as the King's commissioner, to enter the Crown-vassals, by giving them charters and precepts for infeftment.—That he likewise was entitled, as grantee of the Crown, to insist against the Crown-vassals for the feu-duties, and for the compositions due on the entry of heirs and singular successors, whether they receive their entries from him or from the Exchequer.

Upon the conclusions of the libel, the Court found, "That, under the grant 1707, the pursuer has no right of entering the vassals of the lands foresaid holding of the Crown; but that, in virtue of the said grant, the pursuer has a right to the feu-duties claimed; and, as to the casualties on entries of heirs, or singular succeesors, reserve to him all claim competent for the same before the Court of Exchequer, as accords."

The pursuer having carried the clause by appeal into the House of Lords, the other parts of the judgment were affirmed; but, it was ordered, "That the cause be remitted to the Court of Session in Scotland, to give judgment either upon the matter of right in controversy between the parties, with regard to the appellant's claim to the casualties on entries of heirs, or singular successors, and the nature and extent thereof, or, upon the competency of the said Court's jurisdiction to

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take cognisance of the question." Parties were accordingly ordained by the Court to be heard upon both points.

On the point of competency, the defenders objected to the jurisdiction of the Court, and

Pleaded: By the statute 6to An. C. 26. it is enacted, that "*all revenues*, debts, duties and *profits*, of what nature or kind soever, belonging to the Crown," and "all fines, issues, forfeitures, or penalties accruing to the Crown, shall be within the jurisdiction of the Court of Exchequer, and are hereby annexed to that Court."

The pursuer claims the *revenue and profits* of the Crown, arising from certain casualties, by virtue of a grant in 1707. This case, therefore, comes properly under the jurisdiction of the Court of Exchequer. Though the Court of Session were to pronounce a judgment upon it, the grant could not be made effectual without the authority of the Barons of Exchequer; and, if they were of a different opinion from this Court, it may be doubtful whether they would allow the decree to be put in execution.

Answered for the pursuer: That his claim is not founded on a mere personal grant, but upon an original charter and infeftment from the Crown, and he is now insisting in a declarator of his right under these titles to the casualties of superiority transferred by them. It was only in this Court that the action was competent, or that the objection made by the defenders to the validity of these titles could have been effectually removed.

The Court of Session had a jurisdiction exclusive of the Exchequer, previous to the Union, in all questions of this kind; A. 1661, C. 59. And this jurisdiction is reserved to it by the act 6to Ann. C. 25. establishing the present Court of Exchequer.

The Court "repelled the objections to its jurisdiction to take cognisance of the question now under debate."

On the merits of the cause, separate defences were made for the Crown and its vassals.

Pleaded for the vassals: That they are accountable in Exchequer only for the casualties of superiority on entering heirs and singular successors, and they are entitled to have the compositions for such entries settled there, according to the rules established in the case of all Crown vassals. This is the right and privilege of every vassal of the Crown; and the defenders have an obvious interest, that they shall not be obliged in place of Exchequer, to transact with the pursuer for these compositions, on the terms required by subject superiors.—But, whether the grant of the casualities in 1707, will entitle him to exact from Exchequer these dues and compositions, after they are paid into it by the Crown-vassals, is a separate consideration, in which only the Crown is concerned.

The defenders, whose rights are here in question, hold feu of the Crown; and, consequently, the *quantum* of relief due by them upon the entry of heirs, is a *duplicando* of their feu-duty.

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This is the established rule in Exchequer; and the statute 1507, C. 74, enacts, that the relief cannot be dispensed with, nor compounded in the case of feu-holdings from the Crown.—Sir George Mackenzie is of opinion, that the act imports a prohibition of gifting the relief, and that such a gift would not be effectual to prevent the vassals from accounting for it in Exchequer; *vide* Ersk. Inst. B. 2. T. 5. § 50. If the pursuer, therefore, has any title to this casualty, he can only claim it after it is paid into Exchequer.

It is a rule of long standing in Exchequer, to receive every singular successor upon paying a small fine. The compositions which now take place were settled in the reign of Queen Anne, and appear to have been originally founded in acts of Privy Council, mentioned in the statute 1578, C. 66.

They are now to be considered as established by law, and the constitutional rules by which all the vassals of the Crown are to account in Exchequer. The Crown could not, by a grant in favour of a third party, deprive the defenders of the benefit of the law in this respect, and subject them to any higher compositions whatever than Crown-vassals are liable for.

But usage, in this case, explains the intention of the grant, and shows, that parties did not understand it was meant to take from these vassals their right of transacting in Exchequer. The vassals have continued to settle and pay these compositions in Exchequer when they occurred, in the same manner after the grant as before it, and no demand was ever made on them by those in the right of this grant, until the present action.

Pleaded for the Crown: From the terms of the grant 1707, it appears that the right of uplifting these casualties was considered merely as an appendage of the power conferred upon the grantee to enter the Crown-vassals. But as it has been finally determined, that the clause conferring this power is null and void, the right to the casualties following upon it falls of course.

These casualties of superiority are inseparable from the right of superiority, because they are occasioned by the very act of receiving the vassal. If they were disunited, no compulsitor would exist to make them effectual; for a person who is not in the right of superiority has no title to insist in a declarator of non-entry. These casualties have always been considered as dependent on the right of superiority. The lords of erection, whose grants contain church-lands which had been feued out before the Reformation, are entitled to the feu-duties of the vassals, even if they should choose to hold of the Crown; A. 1633, C. 14. and 1661, C. 53. But, in that case, the lord of erection has no claim to the casualities. They must be paid into Exchequer, and remain there as part of the Crown-revenues.

By the act 1587, C. 70. it is ordained, "That his Majesty's casualties shall not be given away in great as of the casualties of a hail country together." In the present case, therefore, the grant by the Crown of these casualties was prohibited by statute, as well as illegal at common law.

The grant cannot be supported as authorised by the act of dissolution, or any other statute. That act did not empower the Crown to dispose of the casualties

exigible from the Crown-vassals in Orkney and Zetland. It mentions casualties in general terms, as among the parts and pertinents of the earldom and lordship; but the casualties in question were no part nor pertinent of either; nor had the grantees of this earldom ever any right to them. The clause in the original charters, "*cum tota superioritate libere tenentium*," was altogether void, as the right of superiority disposed of was inseparable from the Crown, and could not be transferred. Consequently the disponees could derive no right to the casualties of superiority from this grant of the right of superiority, which was itself null.

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The act of Parliament confirming the grant being a private act, the right of the Crown-vassals was saved to them by the act *salvo jure cujuslibet*, passed in the same session:—And, in the act 1744, there is a clause reserving the rights of third parties.

Answered for the pursuer: It does not affect the present question, that the pursuer has failed in supporting the grant 1707, so far as it conferred a power of giving entries to the vassals of the Crown.—This part of the grant was considered as unconstitutional and illegal.—But it has been already established by a final judgment, that the feu-duties payable by the vassals of the Crown in Orkney and Zetland are carried by this grant. As it is effectual to convey the fixed profits of superiority, no solid reason can be given why it should not have the same legal effect in conveying the contingent profits arising from the casualties.

The difficulties stated by the defenders, as to making effectual a gift of these casualties, are merely imaginary. They may be separated from the superiority without any inconvenience; the gift of them carries with it an implied mandate to insist in a declarator of non-entry, by which the benefit of the right can only be obtained.

There are no words in the statute 1587, C. 74. prohibiting the Crown to grant the casualty of relief. The act is merely an injunction on the Sheriff not to take compositions, and to account in Exchequer.

Neither was the statute 1587, C. 70. any bar to the grant. This act seems to have been little regarded from the first. Sir George M'Kenzie considers it as solely relative to gifts of single escheat; and, even as to these, mentions an instance where the Court had repelled an objection founded on it. Many considerable gifts of escheat were made after this act, without challenge.—Consequently, it must be considered as obsolete.

The Crown, therefore, without aid of statute, may dispose of its casualties as well as its feu-duties. But, in this case, the Crown was authorised, by the previous act of Parliament, to grant the whole earldom, &c. "with all its parts, pertinents, and casualties." These words of the act apply to the casualties in question, which, from the first erection of this earldom, have been part and pertinent of it. The grant to the right of superiority, in the original charters, implied a grant to the profits thence arising. Though it has been found, that the right of superiority itself could not be validly conveyed by the Crown, yet, as the profits

No. 101. thereof were disposable by the Crown, the grant was effectual to convey them, whether feu-duties or casualties. These profits are therefore part of the earldom and lordship, and considered as such in the act of dissolution.

The pursuer, having right to these casualties, is entitled to insist, that, before the Crown-vassals apply to Exchequer for their charters and precepts, they must settle the composition with him; and he is not obliged to accept of the small compositions demanded in Exchequer. There is not any legal tie on the Crown to continue the benignity they show their vassals in this respect; and it is only as authorised by Privy-Seal warrants that the Barons have power to accept of such compositions.—But as the Crown was divested of the casualties of superiority in this case by the grant 1707, a Privy-Seal warrant could not afterwards affect the right of the grantee, or oblige him to accept of any thing less than the legal composition of a year's rent from these vassals. They had no *jus quæsitum* from the mere act of favour given by a Privy-Seal warrant, which, if there had been no grant of the casualties, could only be effectual until recalled, and fell of course on the demise of the Sovereign.

If the grant gives a right to uplift these casualties, that right cannot be lost *non utendo.* A particular composition will prescribe, if not demanded within the years of prescription; but the neglecting to exact such compositions, for any length of time, does not annul the general right of the Crown, conferred on the grantee, to demand its casualties whenever they open anew.

The Court pronounced the following judgment: "The Lords having considered the memorials, &c. and having also considered the acts of dissolution of the earldom of Orkney in the years 1707 and 1742, with the charters issued from Exchequer in pursuance of these acts; and particularly that clause in said charter, by which the pursuer claims the sole power of entering and receiving the heritable vassals of the Crown in Orkney and Zetland, and of intromitting with, uplifting, and disposing of all and sundry the casualties of the vassals vacant, or which shall happen to vack in all time coming; and having also considered the possession which has been uniformly held and enjoyed, as well by the King's Majesty and his vassals, as by all the Earls of Morton and the pursuer, since the date of these charters to this time; find, That as the first part of this clause, granting the power of entering the King's vassals, has been declared void and null by judgment of this Court, affirmed in the House of Peers, so the after part of the clause, granting the casualties attendant upon, and consequential of, the entry of these vassals, is also void and null, and that the clause in both branches is illegal and unconstitutional, as well with respect to the rights of the Sovereign, his heirs and successors, as with respect to the rights of the heritable vassals of the Crown: And find, that the above clause was not warranted by the words, nor by the meaning and intendment of the act of dissolution 1707, nor of the act 1742: And find, that the charter 1707, though ratified in the Parliament of Scotland, yet, being a private act, the just rights of the King's vassals were saved and reserved to them and their heirs, by the act *salvo jure cujuslibet*, passed in the same session of Par-

liament; and, in like manner, that the same rights of the King's vassals were saved and reserved to them by the saving clause in the act of Parliament 1742: And find, that this interlocutor applies, and shall extend to all the defenders who are entitled to hold of the Crown, as explained by the former interlocutors in this cause: And, upon these grounds, the Lords sustain their defences, and assoilzie them from the conclusions of the pursuer's declarator."

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Act. *Rae*, *Wight.* Alt. Advocate, *J. Campbell.* Clerk, *Orme.*

O. *Fol. Dic. v.* 4. *p.* 317. *Fac. Coll. No.* 64. *p.* 116.

*** This judgment was affirmed upon appeal.

SECT. XXIV.

Rights competent to the Superior.—Ward-holding.

1756. *January* 13.
ALEXANDER HAMILTON of Pencaitland, Esq. Supplicant.

No. 102.
A superior who has a considerable feu-duty payable to him out of his vassal's lands, may interpose to prevent these lands from being deteriorated by the fodder being carried off the land.

Hamilton of Pencaitland disponed the lands of Udstone to Thomas Borland, his heirs and assignees, to be held in feu-farm of the disponer for payment of a high feu-duty, being the same with the former rent of the lands.

Jn July, 1754, Borland became bankrupt; his creditors poinded and carried off his whole moveable effects, and, amongst others, his corns growing upon the lands of Udstone; but none of the creditors adjudged, or entered to possess the lands.

In February, 1755, Mr. Hamilton, the superior, to whom Borland was debtor, both for by-gone feu-duties and for other sums, applied by petition to the Sheriff of Lanark, setting forth, That Thomas Borland was unable to stock or labour the lands; and therefore craving, that warrant might be granted for letting them by roup to one or more persons, and to ordain the rent to be applied for payment of the feu-duties, in the first place, and that the remainder, if any was, might be lodged with the Clerk of Court for behoof of the creditors. The Sheriff granted warrant to the Clerk of Court to let the lands by roup; and it was one of the articles of roup, that the fodder should be consumed upon the ground; but, upon the day of the roup, some of the creditors represented to the Sheriff, that the lands would let much higher if they were let in small parcels, and the tenants allowed to carry off the fodder: The Sheriff thereupon granted warrant for letting