

1796. February 3.

The EARL of CASSILLIS *against* The COMMON AGENT of the CREDITORS of  
HUGH ROSS.

## No 57.

The effect of a latent transaction, of an old date, relieving the vassal from payment of the feu-duty, found not to be lost by prescription, although the feu-duty appeared in all the investitures, there being no evidence of its ever having been paid.

THE Earl of Cassillis held the lands of Nether Skeldon and Airds ward of the Crown; and, in 1613, a contract was entered into between him and John Crawford, by which the former disposed these lands to the latter for 12,000 merks, to be held feu on payment of 52 merks Scots yearly; but in order to relieve the vassal of the feu-duty, the Earl obliged himself to grant him an infestment of annualrent out of other lands to an equal amount, the annualrent and feu-duty to be held as mutually discharging each other, except when the lands should fall in ward to the Crown, during which period, it was declared, that the feu-duty should be paid to the donatar, and the annualrent should cease.

In 1614, the Earl granted a feu-charter of the lands, bearing to be in implement of the contract. It declared the feu-duty to be 52 merks Scots, *si petatur tantum*; but it took no notice of the discharge of it by means of the annualrent, nor was infestment of annualrent ever granted.

In all the subsequent titles down to 1747, (which were granted both to heirs and singular successors,) the duties payable by the vassal were declared to be the same as in former investitures, without specifying their amount, and still no mention was made of the annualrent.

In 1678, a declarator of non-entry was obtained by the superior.

In 1747, the vassal accepted a precept of *clare constat* from the superior, in which the 52 merks of yearly feu-duty were declared payable, without any reference to former titles.

The father of Hugh Ross of Kerse afterwards purchased these lands, and was succeeded in them by Hugh his son. Neither of them renewed the investiture.

In 1787, when Hugh Ross's affairs were embarrassed, the Earl of Cassillis obtained a decree of reduction and certification against him for neglecting to pay the feu-duty. No feu-duty, however, was paid by him, nor was there any evidence of its having ever been paid from 1613 downwards.

These lands were sold by Hugh Ross's Creditors, warranted free of feu-duty. But the Earl of Cassillis, who represents the original disponent, refused to enter the purchaser, unless on a payment of the feu-duty from 1747 downwards; and his allowing a clause to be inserted in the charter, declaring the Earl's right to the feu-duty, in the same general terms as in the precept 1747.

His Lordship accordingly raised a suspension, in which he stated, that it had been the practice of his family, instead of annually exacting payment of their feu-duties, to content themselves with receiving all arrears each time the investitures were renewed; that the feu-duties of the lands in question would no

doubt be paid in the same manner, though, from the books kept by the agent of the family having been destroyed by fire, direct evidence of the fact could not now be obtained; but he contended, that the titles to these lands, subsequent to the date of the contract, established both the practice of paying feu-duties, and the right to exact them.

*Pleaded.* The contract 1613, which is very anomalous in its nature, seems to have been immediately departed from. Not only no infeftment of annualrent was ever granted in consequence of it, but the charter executed the very next year, while it expressly stipulated the feu-duty of 52 merks, took no notice of the annualrent which was to discharge it. The subsequent titles by which the vassal was taken bound to pay the feu-duty exigible by former investitures, cannot therefore apply to the contract 1613, upon which no possession or infeftment followed; and it is altogether improbable that these titles would have been so expressed, unless the superior, on the one hand, had considered himself entitled to exact, and been accustomed to receive the stipulated *reddendo*, and the vassals, on the other hand, been sensible that they had no right of exemption from payment of it. Since, therefore, the lands in question have been possessed for above 180 years, upon an investiture which entitled the suspender's predecessors to demand a feu-duty, and which they no doubt did at each time the investiture was renewed, while, during this long period, the discharge contained in the contract 1613 has continued latent, the right of the suspender is established by the positive, and that of the charger lost by the negative prescription. Indeed, though no feu-duty had been paid, the investitures under which an estate has been held for 40 years, fix unalterably the rights of superior and vassal, even although, by mistake, they should contain a discrepancy from the prior titles; 5th August 1768, Duke of Buccleuch against the Officers of State, No 20. p. 10711. Decision in 1770 between the same parties, No 56. p. 10751.

*Answered.* The contract 1613 was fair and reasonable. John Crawford gave a full price for the lands; and it was therefore intended that he should pay no feu-duty to the Earl of Cassillis; but, though Crown vassals were at its date entitled to grant feus, 1457, c. 71.; 1503, c. 90. and 91.; Erskine, b. 2. tit. 5. § 7. they could not do so to the prejudice of the superior, and it was therefore necessary that the feu-duty should be kept up, in case the lands should at any time fall in ward to the Crown, which was the reason for its being so provided by the contract. The infeftment of annualrent was meant merely in security of the discharge of the feu-duty, to make it a real burden on the lands, and good against singular successors in the superiority.

Such being the object of the contract, it is incumbent on the suspender to establish, that the right of exemption has been passed from by the vassal. In this, however, he has failed; he has produced no evidence of the feu-duty having been paid, and, in fact, none has been paid since the date of the contract. The charter 1614 expressly bears to be granted in implement of the contract, and must therefore apply equally to every part of it; and as the subsequent

No 57.

titles, down to 1747, all refer to the charter 1614, they are therefore just as much qualified by the contract as if it had been narrated in them. The object of the precept of *clare constat* in 1747, was merely to give the right to the heir *tantum et tale*, as it had been enjoyed by his predecessor; and it is admitted no feu-duties have been paid since its date, which both shows the understanding of parties at granting the precept, and strengthens the presumption, that no prior feu-duties had ever been exacted. In these circumstances, there can be no room either for the positive or negative prescription.

THE LORD ORDINARY, "in respect that by the original feu-contract in 1613; the yearly annualrent of 52 merks thereby stipulated, and the like sum of feu-duty, are declared to extinguish each other; and in respect there is no evidence that one farthing of the feu-duty from the date of the contract downwards, was ever paid; found, That the non-payment of feu-duty is equivalent to possession upon the annualrent-right, and therefore prescription, positive or negative, does not strike against the contract, but that it is binding on the parties and their heirs at this day: And in respect it is averred by the charger, that the suspender represents John Earl of Cassillis, the party to the contract, and that the suspender has pointed out no other title upon which he holds the estate than that of heir, found the letters orderly proceeded."

Upon advising a reclaiming petition, with answers, the LORDS, upon the grounds stated by the respondent, unanimously adhered.

Lord Ordinary, *Justice-Clerk.* For the Suspenders, *D. Cathcart.* Alt. *A. Campbell, junior.*  
Clerk, *Homs.*

D. D.

*Fac. Col. No 199. p. 477.*

## S E C T. IX.

## Teinds.

1665. November 24.

BISHOP of the ISLES *against* The FISHERS of GREENOCK.

No 58.  
In a process for the teind of fish, it was found relevant, that the defenders had been in immemorial possession in the

THE Bishop of the Isles, as being presented by his Majesty to the bishoprick of the Isles, and whole teinds, rents, and emoluments thereof, and as thereby having right to the great teind of all fish taken in and about the isles of Scotland, pursues the fishers of Greenock for the teind of cod and ling taken by them about the isles of Arran, Bute, and Ilsey; but insists only for those taken between Arran and Ilsey or Bute, and not between these and the shore, and