

1777. ROBERT BRUCE E. M'LEOD of Cadboll and } *Appellants* ;
 Guardians, - - - - - }
 M'LEOD, &c. MUNRO ROSS of Pitcalny, and MISS JEAN ROSS, *Respondents* ;
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 ROSS &c. CAPT. JOHN LOCKHART ROSS of Balnagowan, *Appellant* ;
 MUNRO ROSS of Pitcalny, and MISS J. ROSS, *Respondents*.

House of Lords, 5th May 1777.

FEU-DUTY—SUPERIOR AND VASSAL.—A charter bound the vassal to deliver thirty bolls of corn yearly, or, in his option, 6s. 8d. Scots for each boll, as conversion money. The subsequent investitures omitted the option of the conversion money. Held the superior not entitled to claim the *ipsa corpora* of the victual, but the conversion money only.

Easter and Wester Drums of Fearn, belonged anciently to the family of Ross of Balnagowan, and were held by them under the Commendator of the Abbey of Fearn, as superior thereof, and afterwards under the Crown, as coming in place of the church, for payment of 30 bolls of corn yearly.

1592. George Ross of Balnagowan sold Wester Drum of Fearn in 1592, to Walter Ross of Morenzie, upon which occasion he resigned the said lands into the hands of the superior, the Commendator, and, of same date, obtained a charter of resignation, containing the following reddendo, expressing the feu-duty payable by the vassal: “ Triginta bollas victu-
 “ alium firmæ (corn rent) vel pro qualibet bolla insoluta
 “ summam sex solidorum octo denariorum usualæ monetæ
 “ regni extenden. ad summam decem librarum usualis monetæ
 “ prefate *et id in optione solventium*, ad duos anni terminos,”
 &c. Upon this charter Walter Ross was infeft; and, on 14th March thereafter, obtained a charter from the Crown, rati-
 fying and confirming the charter granted by the Commendator, and expressing the feu-duty as thirty bolls of corn, or 6s. 8d. Scots for each boll, in the option of the vassal.

1600. Thereafter the Crown gave a grant of the Abbey of Fearn to Sir Patrick Murray, who, wishing to reduce the above conveyance, instituted proceedings for that purpose. These ended in a charter passed under the Great Seal, dated in 1600, and proceeding on the resignation of Ross of Morenzie, and also of Sir Patrick Murray, with consent of Ross of Balnagowan, wherein the feu-duty, mentioned as payable to the superior, was thirty bolls of corn, payable “ secundum
 “ formam et tenorem antiqui infeofamenti eorundem.” This

charter was in favour of Munro Ross, the purchaser from Ross of Morenzie; and under it the vassals had paid for many years the 30 bolls of corn yearly.

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In the meantime, the property of Wester Drums of Fearn had gone successively into different hands by purchase, and finally into the hands of James M'Culloch, for the payment of whose creditors it was made the subject of a ranking and sale; and after being sold, and the creditors paid, there remained a surplus to be divided among the respondents, as heirs of the family. This reversion was made to depend on the validity of a claim, lodged in the ranking by the appellant, M'Leod of Cadboll, who claimed, as in right of the feu-duties from 1697 to 1717, the *ipsa corpora* of the thirty bolls of corn yearly. The respondents disputed his right to claim the *ipsa corpora* of the corn rent, and maintained that the vassal was entitled to avail himself of the option of the conversion thereof, at 6s. 8d. Scots per boll.

The result would have been, that if this claim was sustained, M'Leod was entitled to £800, being nineteen years feu-duty, at thirty bolls of corn yearly; but, if only entitled to the conversion money of 6s. 8d. Scots money, his claim only amounted to £12. 10s.

M'Leod's title to the feu-duties was founded upon conveyances of adjudications for debt as follows:—George Ross of Balnagowan had purchased from Sir Patrick Murray his right to the Lordship of Wester Fearn of Drum, granted to him by the Crown, and by which he claimed right to the feu-duties of these lands. The right to these feu-duties was wadsetted by David Ross of Balnagowan in 1673, to Sir John Urquhart, and this wadset, by adjudication led against Sir John Urquhart, came afterwards to belong to M'Leod, who raised an action of mails and duties against M'Culloch, the proprietor of Wester Drum, and obtained decree for payment of 30 bolls of corn yearly, for crops 1697, 1698, and 1699, at £12 Scots per boll, and for payment of the like duties in all time coming.

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The matter here rested, until the question was again raised by General Ross of Balnagowan, in the present action, and continued by his son, Captain Lockhart Ross, the appellant, who brought a reduction and declarator, to have it found that M'Culloch, Miss Ross, and others, possessors of these lands of Wester Drum, should be ordained to hold these lands of him as superior lord thereof, and ordained to pay to him the *ipsa corpora* of the thirty bolls of corn, as the feu-duty payable therefor. The respondents stated their defence, founded on

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Captain Ross's claim to the *ipsa corpora* of these bolls was rejected, of this date, and as to M'Leod's claim, the Lord Ordinary, of this date, " Found that M'Leod of Cad-boll is not entitled to claim the *ipsa corpora* of the thirty bolls of victual, as the reddendo or feu-duty for the lands in question, but, that Miss Jean Ross is entitled to pay the conversion money." And, on reclaiming notes, the Court, by two separate unanimous judgments, adhered, and sustained the option of the vassal to pay the conversion money of 6s. 8d. Scots per boll.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—It was not in the power of the Commendator of the Abbey of Fearn to discharge the actual delivery of the thirty bolls of corn, in his grant to Walter Ross in 1592, because, by the act 1585, such grants were declared null, as a stripping of the Abbey of its lawful revenue, by introducing a conversion money at a low rate. And, accordingly, this grant, with its conversion, was soon thereafter questioned by Sir Patrick Murray, the Crown's grantee, and the option given to the vassal abolished by the new charter and investiture to Munro in 1600, the reddendo of which only mentions thirty bolls of victual, without any conversion, thus differing from the charter in 1592. This last charter was the title of Munro's possession of Wester Drums, and has remained the radical title in his successors ever since. Upon this title possession has followed, in as much, as the vassals had, subsequent to its date, paid to Balnagowan's wadsetters from 1660 to 1689 the *ipsa corpora* of the thirty bolls of corn yearly. Indeed, the disproportion between this and the conversion money of 6s. 8d. Scots by the former title, is so apparent as to convince the vassals of the right to exact such, and to make them at once deliver the thirty bolls corn. Besides, this possession is fortified by the decree obtained in the action of mails and duties in 1707 for these very feu-duties, and the respondent's plea is now barred by that decree. And, even supposing this decree was not a sufficient *res judicata*, still the proceedings in the action must be of importance in point of evidence. But the respondent imagines he gets over all these objections, as well as the charter 1600, by stating, that the clause "*secundum tenorem, antiqui infeofamenti*" referred to the feu-duty as payable by the former charter of 1592, but the word *antiquum* cannot surely apply to a charter granted only *eight*

years before; and, accordingly, this clause must be construed to apply to a period anterior to that date, and when nothing but thirty bolls of corn were deliverable as the feu-duty.

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Pleaded by the Respondent.—From the evidence afforded by the whole progress of titles, it clearly appears that the feu-duty payable by the vassal of Wester Drums of Fearn was thirty bolls of corn, or 6s. 8d. Scots, as the conversion money in room of each boll, in the option of the vassal. The vassal, therefore, had this option conferred upon him by the oldest title produced in this process, namely, the contract of sale of Wester Drums by Balnagowan to Walter Ross, and charter following thereon in 1592. The sale by Walter Ross to Munro, and new charter or novodamus following thereon in 1600, does not derogate from the former charter in the least, because, although in this later charter, the option of conversion is not expressed, yet it was clearly implied under the words “*secundem tenorem antiqui infeofamenti eorundem*,” and, accordingly, there is no pretence for supposing that there was a departure from the original redendo, and as little reason for the allegations, that the option in that charter (1592) was a dilapidation of the benefice prohibited by the charter 1585. The possession alleged after the charter 1600, in so far as the vassals delivered the *ipsa corpora* of the thirty bolls of corn, cannot deprive the proprietor of Wester Drum of his right. The receipts referred to can only prove that the vassal, at that time, chose the option of delivering thirty bolls, in place of paying the conversion money; but this still left the option open to be exercised otherwise, by him or any other subsequent vassal. It could not be lost *non utendo*, or a contrary possession as *res meræ facultatis nunquam prescribuntur*. And the decree of mails and duties in 1707 could not affect the right, because it passed in absence of the defender, then an infant, and so could form no *res judicata* or bar to the option now insisted in.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors be affirmed.

For Appellants, *Henry Dundas, Alex. Wight.*

For Respondents, *E. Thurlow, Dav. Rae.*

Note.—This case imperfectly noticed in Brown's Supp., “Tait,” vol. v. p. 615.