

marriage-contract estate, to make payment annually from this date to the pursuers, as trustees foresaid, of such sums as the Accountant of Court in the ordinary exercise of his office approves of as one free annual interest or produce of the said marriage-contract estate, due and payable to the said defenders Frederick John Colin Halkett and Mrs Helen Margaret Fisher or Halkett, and that at such dates as the said Accountant shall fix the amount thereof, aye and until the whole sums—principal, interest, premiums of insurance, and expenses—foresaid have been repaid to the pursuers: Find the pursuers entitled to expenses, and allow an account thereof to be given in, and remit the same to the Auditor to tax and to report: Find the defender Francis A. Bringloe entitled to retain the expenses incurred to and by him out of the capital of the trust-estate, and decern."

Counsel for Pursuers—D.-F. Balfour, Q.C.
—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defenders—Johnston—Sym.
Agent—R. Stewart, S.S.C.

Thursday, June 26, 1890.

OUTER HOUSE.

[Lord Kyllachy.

RANKINE AND OTHERS v. ROLLO AND OTHERS (ROLLO'S TRUSTEES).

*Superior and Vassal—Casualty—Entry
Taxed in Charter by Progress—Prescription.*

In a charter of resignation granted in 1843, the entry of singular successors was taxed at double the feu-duty. In the original charter the entry of singular successors was untaxed. The vassal infest and entered in 1843 having died, his trustees, who were singular successors, were called upon in 1890 to pay a year's rent as composition. They pleaded possession for the prescriptive period upon the charter of 1843. *Held* that there being disconformity between the original charter and the charter by progress, the former must rule, and that prescription did not apply, there having been no possession inconsistent with the superior's claim.

This was an action at the instance of Walter Lorne Campbell Rankine of Dudhope, in the county of Forfar, John Campbell of Kilberry, and Mrs Rose Elizabeth Maclaine, or Rankine or Maquay, his tutors, and George Robertson, W.S., Edinburgh, their factor and commissioner, against David Rollo, residing at No. 36 Montgomery Street, Edinburgh, and others, the trustees of the deceased David Rollo, writer in Dundee, to have it found and declared that in consequence of the death of David Rollo, writer in Dundee, on 30th March 1880, the vassal last vested and seised in certain

lands of which Walter Lorne Campbell Rankine was superior, a casualty of one year's rent became due on 30th March 1880 and was still unpaid, and that the rents of the lands belonged to the pursuers from the date of citation until payment. The lands were originally feued in 1792, by feu-contract dated 7th April 1792, by John Rankine of Dudhope, in favour of Alexander Donaldson, tenant at Milehouse. In that deed the casualty of relief payable at the entry of each heir was fixed at double the yearly feu-duty; but the composition payable at the entry of singular successors was untaxed. All the subsequent transmissions of the said lands were granted with and under the whole reservations, restrictions, provisions, and declarations contained, *inter alia*, in the said feu-contract, and bear expressly to be granted '*salvo jure cujuslibet*.' In none of these transmissions was there any clause of *novodamus*.

In 1841 John Cowper or Cowpar, the vassal then infest, disposed the lands in favour of David Rollo. The disposition contained the following clause—"In which lands and others above disposed I hereby bind and oblige myself and my foresaids to infest and seize the said David Rollo and his foresaids upon their own proper charges and expenses, and that by two several infestments and manners of holding, one thereof to be holden of me and my foresaids in free blench for payment of a penny Scots in name of blench farm at Whitsunday yearly upon the ground of the said lands if asked only, and freeing and relieving us of all feu-duties and other duties and services exigible out of the said lands or others by our immediate lawful superiors thereof, and the other of the said infestments to be holden from me and my foresaids of and under our said lawful superiors in the same manner that I, my predecessors and authors held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other." David Rollo was infest upon a charter of resignation by David Rankine, Esquire, of Dudhope, then the superior. The charter bore that the lands were granted in feu for payment "of the sum of £27, 4s. 1½d. sterling yearly, in name of feu-duty, by equal proportions, at the terms of Martinmas and Whitsunday respectively, and doubling the said feu-duty at the entry of each heir and singular successor . . . and these for all other burdens, exactions, demands, or secular services whatever, which can be anywise exacted or required furth of the said subjects in all time coming." The precept of sasine authorised sasine to be given in the lands, "always with and under the whole reservations, restrictions, provisions, and declarations contained in the original rights and titles of the said lands and others," and the precept ended with these words, *salvo jure cujuslibet*.

David Rollo died on 30th March 1880 leaving a trust-disposition and settlement conveying his whole estate to the defenders.

The defenders were infest on 18th June 1880.

The pursuers pleaded—“(2) A casualty of one year's rent of the subjects and others mentioned in the summons having become due by the defenders upon the death of the said David Rollo, the previous vassal, the pursuers are entitled to decree as concluded for. (3) The pursuers are entitled to draw the full rents, maills, and duties of the lands libelled from and after the date of the defenders' citation.”

The defenders pleaded—“(1) The composition for the entry of singular successors to the said lands being taxed at a duplicand feu-duty, the pursuers are only entitled to decree for payment of £27, 4s. 1½d., and are liable to the defenders, who tendered that sum before the action was raised, in expenses. (2) *Separatim*, the pursuers' predecessor having, by the said charter of resignation of 1843, contracted with the defender's predecessor for the taxation of the entry of single successors at a duplicand feu-duty, and the same being thereby taxed accordingly, the pursuers are only entitled to decree as aforesaid. (3) The defenders and their authors having possessed the said lands for more than forty years upon the writs produced by the defenders, commencing with the said charter of 1843, they have thereby a valid prescriptive title to the lands, and the pursuers are barred from claiming more than a duplicand feu-duty.”

The Lord Ordinary (KYLACHY) pronounced the following interlocutor—“Finds and declares conform to the declaratory conclusions of the summons, and decerns: *Quoad ultra* continues the cause: Finds the pursuers entitled to expenses hitherto incurred by them, and remits the account thereof when lodged to the Auditor to tax and report: Further, on the motion of the defender, grants leave to reclaim against this interlocutor.

“*Opinion.*—The question in this case is whether the defenders, who hold certain lands in feu from the pursuers as proprietors of the estate of Dudhope, are liable in a year's rent as composition, or have their entry taxed at double of the feu-duty. There is no doubt that in the original charter dated in 1792 the entry of singular successors is untaxed, but the defenders contend that they are entitled to the privilege which they claim, in respect that in the latest charter by progress, viz., the charter of resignation dated in 1843 granted in favour of their author, words are introduced whereby the taxation previously existing in the case of heirs was extended to singular successors.

“There is no averment of any transaction between the superior and vassal to which the alteration in question can be referred. Neither is it alleged that there has since been any usage of payment on the lower or taxed scale. Indeed, there has been no entry to raise the question since the entry of the pursuers' author under the charter of resignation in question, but what was paid for that entry seems to have been a commuted sum of £5, the receipt for which bears that it was ‘accepted in full of com-

position due for the within charter.’

“In these circumstances the pursuers contend that the case falls within the well-known rule that where there is disconformity between the original charter and any subsequent charter by progress the former rules, and in short that without a *novodamus* a charter by progress is not as a rule effectual to vary the original terms of the grant. They found on the usual authorities for this proposition, and in particular on *Ersk. ii. 3, 20*; *Craig, ii. 12, 9*; *Bell's Lec. 2, 737*; *Graham, 4 D. 482*; *Duff's Feudal Conveyancing, 229*; *Hutton v. Macfarlane, 2 Macph. 79*; *Boyd v. Bruce, 11 Macph. 243*; *Munro, 3 Ross' Leading Cases, 373*.

“The defenders do not dispute the application of those authorities, but they seem to consider that they have obtained the privilege of a taxed entry by prescription. In other words, they appear to contend that as they have possessed the subjects of the feu for more than forty years on a charter and sasine expressing a taxed entry, it is not competent now to inquire into the terms of their previous titles.

“I am of opinion that the pursuers are right, and that there is no room for the plea of prescription. I am not sure that I understand the application of the positive prescription to such a case. The right sought to be prescribed is not, it will be observed, a right of property, but immunity from a burden on property. It is therefore, I should suppose, the negative prescription and not the positive which must be appealed to.

“But without entering into any refinements as to the distinction between the two prescriptions, it appears to be enough to exclude any plea of prescription, that from 1843 till now there has been no opportunity to the superior of demanding any composition either on the one scale or the other. In other words, there has been no possession significant of the right claimed by the defenders, or inconsistent with the claim of the pursuers.

“I shall therefore decern in terms of the declaratory conclusion of the summons, and of course with expenses.”

Counsel for the Pursuers—Guthrie.
Agents—Pearson, Robertson, & Finlay,
W.S.

Counsel for the Defenders—Law. Agent
—John Rhind, S.S.C.