

No. 16.

GOVERNORS of HERIOT'S HOSPITAL, Appellants.
Lushington—Simpson.

MAJOR M'DONALD, Respondent.—*Murray—Brown.*

Superior and Vassal—Clause—Consuetude.—Where a vassal was bound, in a feu-contract, to relieve the superior, and the lands, houses, teinds, and feu-duties, of and from all multures which could be claimed furth thereof, 'and that for all other 'burden, exaction, question, demand, or secular service, which can anyways be 'exacted or demanded' for the same; and the feu-duty was equivalent to the rent of the lands; and the superior, from the date of the contract, (a period more than 40 years), paid the minister's stipend;—Found, (affirming the judgment of the Court of Session), that the superior could not throw the burden of stipend upon the vassal.

Process.—A charter not produced or founded on in the Court below, not permitted to be referred to in the House of Lords.

April 7. 1830.

1ST DIVISION.
Lord Medwyn.

ABOUT the middle of the 17th century the Governors of Heriot's Hospital acquired the lands of Broughton, lying in the immediate vicinity of the town of Edinburgh. Thereafter, they granted various feus of small portions of these lands to different individuals, averaging a feu-duty of four bolls an acre; and for some also a money price. This price was alleged to be equal to the agricultural rent of the land. Six of these feus were acquired from the respective vassals by Alexander M'Donald, who was succeeded by his son, Major M'Donald. These six feus had been conveyed in six different feu-rights; but Major M'Donald, in completing his titles, included all the feus in one charter, which, however, contained a verbatim transcript of the reddendo clause of all the feus. After specification of the amount of the feu-duty, a clause (slightly varying in expression) was inserted, by which the vassal was bound to free and relieve 'the said 'Hospital, and Governors thereof, the said house, and the whole 'of the foresaid lands above-mentioned and dispoed, and feu- 'duties payable for the same, of and from all multures which 'can be claimed forth of the said lands, teinds, and others above- 'mentioned, as payable to any mill to which the same may have 'been astricted; and that for all other burden, exaction, ques- 'tion, demand, or secular service, which can anyways be exact- 'ed or demanded for the house, lands, teinds, and others above- 'mentioned.' In one of the feu-contracts, (1771), the clause was, 'and also freeing and relieving us, and our successors in office, of 'and from payment of cess, ministers' stipends, and all other 'public burdens payable forth of the same, from and after the 25th 'day of March next; and sicklike freeing and relieving us and

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' our successors in office, and the foresaid lands, teinds, and feu-
 ' duties payable for the same, of and from all multures which can
 ' be claimed, &c.; and these for all other burden, exaction, ques-
 ' tion, demand, or secular service, which can anyways be exacted
 ' or required for the lands above disposed.' None of the feuars
 were ever called upon by the Governors of the Hospital to pay any
 part of the stipend of the clergyman of the parish; but an augmen-
 tation having been granted, a portion of the augmentation was, in
 a process of locality, about 1824, imposed upon Major M'Donald.
 He objected to this burden. But the Lord Ordinary found, ' as
 ' to the claim of relief made by the vassals in those lands (Brough-
 ' ton), and the proprietor of Powderhall (Major M'Donald),
 ' that there is no clause in the feu-rights in favour of their prede-
 ' cessors, binding the Hospital to relieve their vassals of the burden
 ' of payment of the teinds of the lands;—on the contrary, in some
 ' of the feu-rights this burden is expressly imposed on the vas-
 ' sal: That there is no evidence of the allegation, that the feu-
 ' duties payable under the different feu-rights were held by the
 ' parties to be the full value of the lands, both stock and teind;
 ' and the clause in several of the feu-rights, that the feu-duty is to
 ' be for all other burden, exaction, question, demand, or secular
 ' service, which can in anyways be exacted or required for the
 ' lands and teinds above-mentioned, imports only that the supe-
 ' rior can demand nothing beyond the stipulated feu-duty, but
 ' does not import that the vassals are not to be liable for the teinds
 ' of their lands, which were payable to the ministers of St Cuth-
 ' berts and the Crown's donee, the professor of public law: That
 ' the circumstance of the Hospital having, ever since the date of
 ' the feu-rights till the present interim locality, paid the teinds
 ' of the objector's lands, is rather to be ascribed to negligence on
 ' the part of the managers of the Hospital, than to be held suffi-
 ' cient proof that this was the understanding of the parties at the
 ' time of obtaining the various feu-rights; and that it was an im-
 ' plied condition in the grants, that the vassals were to be relieved
 ' of this burden by the superior, as the same practice was observed
 ' as well in regard to those feu-rights where the burden of the
 ' stipend is expressly laid on the vassal, as in those where there
 ' is no such clause. Therefore so far repelled those objections.'

Major M'Donald having reclaimed, the Court, 12th February
 1828, found, ' From the terms of the feu-contract, and in respect
 ' of the uniform practice of the Hospital having paid all along the
 ' stipend of the lands of Powderhall, that there is sufficient evi-
 ' dence of the understanding of the parties to that effect; and

April 7. 1830. 'therefore they so far altered the interlocutor of Lord Medwyn, 'reclaimed against, as to find that the Hospital is bound to relieve Major M'Donald of the stipend payable from his lands 'of Powderhall, excepting the two acres and eleven perches of 'land contained in the feu-contract of 1771.'*

The Governors of Heriot's Hospital appealed.

Appellants.—It is a general rule that teinds are debita fructuum; and are payable by the proprietors of the ground producing the fruits, and who reap and enjoy the fruits. But a feuar is a proprietor: the superior only retains the dominium directum. There is neither authority nor principle for maintaining, (even if the fact were true, which it is not); that where the feu-duty is equal to the full annual value of the lands, the superior who draws the feu-duty must be subjected to payment of the tithes. Neither is there any thing in the terms of the different feu-rights to warrant the judgment of the Court of Session. They are in the ordinary style of such instruments, and do not contain any clause declaring that the stipend shall be payable by the superior.

Lord Wynford.—I perceive, in the appendix to the respondent's Case, a very important clause, described to be an excerpt from 'Charter by the Governors of Heriot's Hospital,' dated 20th June 1720. How has that charter got into the Case? It is very material. If it applies to the whole question, it puts the matter very much at rest.†

Lushington (for the appellants).—It never was produced in the Court below. It is neither referred to nor founded upon by Judge nor Counsel. If it relates to the respondent's lands, it settles the question in his favour; if not to his lands, then it affords us a powerful argument, by shewing that when stipend was to be relieved against, there was an express clause for the purpose.

Lord Wynford.—We must either send this case back, that the import and effect of this charter may be determined, or we must consider this case without taking the charter into our view at all. As there are no traces of it having been relied upon in the Court below, we shall adopt the latter course.

* Shaw and Dunlop's Teind Cases, p. 156.

† This clause was as follows:—'Nos et successores nostri tenebimur et obligamur 'tenoreque præsentium nos nostrosque antedict. astringimus et obligamus dict. magistrum Georgium Gordon ejusque antedict. ab omnibus censibus stipendiis decimis aliisque publicis oneribus imposit. seu imponend. super dictas acras terræ cum pertinen. 'præscript. tam pro præterito quam pro futuro liberare et relevare.'

Lushington.—It is of no avail to the respondent to resort to the alleged usage. Usage may in some matters be permitted to explain a doubt, but not to controul written documents, where the meaning is clear, and the intention of parties manifest; particularly, it would be unjust, to permit the vassals to obtain an advantage never contemplated, in a question with an Institution whose managers are varying. In truth, the payments of stipend by the Hospital were made from mere want of attention. April 7. 1830.

Respondent.—The Hospital received the full value of the lands, which necessarily implied relief from the burden of stipend. If the Governors of the Hospital receive the whole returns, they cannot object to pay the burden to which the fruits of the subject feued is liable. There is a great similarity between tacks of land and feus; yet it is well known, that unless there be a stipulation to the contrary, the landlord pays the stipend. In point of fact, the respondent pays his proportion in the feu-duty exacted from him; but the appellants wish him to pay that twice. If the superiors had any intention of throwing this burden on the vassals, that would have been expressed in all, as it was expressed in one of the feu-charters. But the best interpretation of the intention of parties is to be found in the conduct of the Hospital. Although repeated opportunities occurred, in the allocation of augmentations to the minister of the parish, for distributing the burden, and of course for placing it on the respondent, had such been the original contemplation of parties, the Hospital uniformly assumed that liability. Usage is good evidence in this case, and leaves no doubt what was the real meaning and understanding of all parties.

LORD WYNFORD.—(After stating the facts of the case, and the proceedings in the Court of Session, proceeded as follows:—)

If we are only to look at the documentary evidence, I think that the Governors of Heriot's Hospital are bound to pay the minister's stipend, and not the feuars. If the evidence of usage was admissible to explain the written instruments, the usage proved in this cause shows, that the construction put on the instruments is the true construction. It is not, however, necessary to decide the question, whether the evidence of usage was admissible or not. But old instruments may be expounded by contemporaneous and continued usage. There can be no means of getting at the meaning of old instruments so satisfactorily, as that of seeing how the parties acted under them at the time they were made, and have since continued to act. Now, from the year 1763 down to this time, the trustees have borne the burden of the minister's stipend, and at those times when the stipend was raised they took upon them the increased charge on their estate.

April 7. 1830. It has been said in argument at your Lordships' bar, that this usage has grown up from the trustees not having attended to the interests of the Hospital. But when I consider the respectability of the trustees, and the high estimation in which this charity has been held, I should rather suspect the trustees of want of attention to their own private interests than of neglecting their duty in the execution of such a trust. My Lords, the trustees, by their agreement with the feuars reserved so large a rent for the property, that I am not surprised that they obliged themselves to bear the burden of the minister's stipend. The rent reserved amounted to about one-third of the value of the produce of the land ;—any one who is acquainted with rents will perceive, that this is a rent that no tenant could pay unless exempted from the burdens incidental to the holding of the land.

Although I think that the judgment of the Court below was right, yet the Provost and Corporation of Edinburgh, acting as trustees, might think themselves obliged to have the opinion of this House. They must pay, however, at least a part of the expense that they have put the respondent to by their appeal; and I therefore move your Lordships that this appeal be dismissed, with L.50 costs.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutor complained of be affirmed, with L.50 costs.'

Appellants' Authorities.—2. Ersk. 3. 10. ; 2. Ersk. 10. 42. Bruce Carstairs, Jan. 23. 1773, (2333.) Colquhoun, Jan. 23. 1798, (Synop. No. 3. Sup. and Vassal). Plenderleath, Jan. 31. 1800, (16,639.) Stewart, July 1. 1806, (Synop. 762.) 2. Connell on Teinds, 479. Hamilton, June 13. 1823, (2. S. & D. 403.) Mill, Feb. 7. 1794, (13,081.)

Respondent's Authorities.—2. Stair, 3. 34. ; 2. Bank. 3. 35. ; 2. Ross, Lect. 474. ; Bell on Leases, p. 184. Feuars of Kinross, Dec. 6. 1693, (13,071.) Town of Edinburgh, Feb. 25. 1696, (4188.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—
Solicitors.

No. 17.

ROBERT BARCLAY ALLARDICE, and JOHN BOSWELL,
Appellants.—*Spankie—Brown.*

JOHN ROBERTSON, Respondent.—*Lushington—Dundas.*

Reparation—Jurisdiction.—1. Held, (affirming the judgment of the Court of Session), that a Justice of Peace is not protected against an action of damages for a verbal slander, averred to have been made maliciously in delivering judgment against a party under trial before him; but, 2. held, (reversing the judgment), that the malice is not to be inferred from the words used, but must be proved.

Process.—Competent for the House of Lords, on an appeal against a judgment of the Court of Session disallowing an exception, to take the whole cause into consideration.