then this is a right which she is now entitled to exercise, although during the intervening period she has not taken advantage of it. I do not think that the circumstance that she continued to pay under the clause of relief will deprive her of the right or power of redemption if it has been conferred. It is a *res meræ facultatis.* No prescription takes it away. It is a power which may be exercised *quandocunque.* The sole question therefore is, whether there is such a power of redemption in the present case?

It is to be found, if anywhere, in that clause of the disposition which begins with the words "And in effect that the teynd sheaves and the parsonage teynds of the sds. three quarters land, with the pertinents, were disponed, alswell as the stock, to the sd. Andrew and his forsds., to make up to them the rent of fourty-two bolls victuall, and that by and attour the forsd. yearly feu-duty sua payable to his Majesty and the sd. Sir George Mackenzie in manner above expresst; and that the sume of £1200 Scots money was payd be the said Andrew to the said Sir George Mackenzie alswell for ilk chalder teynd as stock." Now, on that narrative the clause proceeds, and it is remarkable, and certainly very important, that the clause consists entirely of an obligation. And on whom is this obligation laid? It is laid on the superior, and on nobody else. No right is conferred on anyone except on the person in whose favour the obligation is conceived, and it would certainly be very peculiar if we could spell out of the clause of obligation a right or power in favour of the person who is taken bound, unless such a right is expressly conferred. The operative part of the clause is in these terms—"Therfor the said Sir George Mackenzie binds and obliges him and his forsds. to the said Andrew Ross, his spouse, and their sd. son, and his forsds., that in case the teynd sheaves of the sd. lands, with the crofts and pertinents yrof., or any part or portion of the sds. teynds, be evicted fra them be whatsoever person or persons, or yt. the samen lands and teynd be burdened and affected wt. any minister stipend in time comeing, whether present or supervenient, then and in that case, and immediately after the sd. eviction or burdening of the said lands and teynd as sd. is, to content and pay to the said Andrew Ross and his forsds. in liferent and fee rexive. the sum of £1200 money forsd. for ilk chalder that shall be sua evicted, whither of stock or teind, wt. the @rent of the sds. sumes yearly and tearmly dureing the not-payment therof after the said eviction."

As I said before, this is a clause of obligation merely, and the only obligation imposed is an obligation on the superior Sir George Mackenzie. Of course no one supposes that in the event of an augmentation of stipend becoming a burden on the estate the vassal is entitled to insist on being relieved by the superior and at the same time that the superior should pay the stipulated equivalent for each chalder. That is out of the question. The simplest rules of construction make that impossible. Therefore in one sense the two clauses of relief here are alternative. If the vassal is content to take relief by reimbursement, then the other clause cannot be enforced—he cannot insist on an annual payment. It is in the option of the vassal to take relief in the one way or the other. But as far as the superior is concerned, where is there anything to imply that he is entitled to this option? That argument just resolves itself into this, that this second clause confers upon the superior a right of redemption at the rate specified in the clause. But I am very clear that it is a right of option, not a right of redemption, and the right of option is in favour of the vassal only. The superior has no such right. The only obligation imposed on the vassal is that found in the end of the clause, which requires that when any action is brought against the vassal for evicting him from the lands or teinds he shall make intimation to the superior before litiscontestation that the superior may appear and defend.

Lord Mure and Lord Shand concurred.

Lord Deas—One observation has been made in which I entirely agree—namely, as to the hardship which may be entailed by obligations for futurity—of which we have had various forms—when no one can tell what the future may be. But it is matter of no consequence in construing the clause what its hardships are. We must take its terms and nothing else. Taking it in this way, I cannot read it as a clause of redemption, either on the one side or the other. The strength of the argument against the interlocutor is that there is an alternative giving relief, or giving it only to the extent of £1200 Scots. It was quite plain that in the natural course of things there would be augmentations; and the agreement is, that whenever there were augmentations there was to be a corresponding relief. Now, the difficulty I have had is—this being a mutual contract, how far there is not an alternative in the option of the seller—how far it is no part of the bargain between both parties that if the seller does not do the one thing he shall be entitled to do the other. But though I have much more difficulty in getting to the result at which your Lordships and the Lord Ordinary have arrived, I have no such clear opinion as to entitle me to differ.

The Court adhered.

Counsel for Pursuers (Respondents)—Guthrie Smith—Blair. Agents—Philip, Laing, & Co., S.S.C.

Counsel for Defender (Reclaimer)—Mackintosh—Dundas. Agents—Mackenzie & Black, W.S.

Friday, February 25.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

DUCHESS OF SUTHERLAND *v.* BODDAM AND OTHERS (REID'S TRUSTEES), AND OTHERS.

Thirlage— Commuted Multures —Abbreviate-Decree—39 Geo. III. c. 55, *secs.* 1 *and* 4—*Registration.*

An action for payment of commuted multures was founded on an abbreviate-decree of commutation of thirlage, to which it was objected (1) that it had not been registered within sixty days in terms of section 1 of 39 George III. c. 55; and (2) that the respondent, in the petition on which it proceeded,

was at no time proprietor of the thirled lands, and that the real owner, his wife, had been made no party to the proceedings. *Held* (1) that having been registered about six months after the verdict was pronounced, and having remained on record for a period greatly over three years unchallenged, it was, in virtue of section 4 of said Act, unchallengeable to all time—the provision in section 1 begin merely directory and with no sanction of nullity attached; and (2) that the second objection could not be pleaded *ope exceptionis* in this action, but would have to be proved separately in a reduction.

The Duchess of Sutherland, Countess of Cromartie, was heiress of entail infeft in, *inter alia*, All and Whole the corn-mills of Miltown of New Tarbet, with the mill lands thereto belonging, and the whole parts, pendicles, and pertinents of said mills lying in the parish of Kilmuir Easter, county of Cromarty, and of All and Whole the astricted multures, suckens, and sequells of the said mills used, and among others the multures, suckens, sequells, and services of the lands and estate of Drumgillie, which formed part of the estate of Shandwick. She sued the proprietors of the estate of Shandwick, viz., the trustees of the late Captain Reid, and the trustees of the late Mr Ross Duncan, for payment of £80, 14s. 3d., or such other sum as might be ascertained to be the equivalent of the commuted multures payable from the said lands of Drumgillie for crops in years 1877, 1878, and 1879, according to the conversion in terms of the abbreviate-decree of commutation condescended on, or otherwise for payment of the money equivalent of the amounts of barley and meal fixed by long custom as the equivalent of the amounts of grain and money contained in the said decrees. The said abbreviate-decree of commutation, which was dated 1st September 1800, and recorded 17th March 1804, followed upon a petition presented to the Sheriff of Ross and Cromarty under the Act 39 George III. c. 55 ("An Act for encouraging the improvement of land, subject to the servitude of thirlage, in that part of Great Britain called Scotland"), by the Hon. Mrs Mackenzie of Cromarty, the pursuer's predecessor in the property of the mills and mill lands above set forth, against John Cockburn Ross, Esquire of Shandwick, to have the thirlage of the lands of Drumgillie commuted to the payment of a fixed annual amount of victual in view of thirlage services, conform to and in terms of the said Act of Parliament. The abbreviate-decree bore the verdict of the jury following on said petition, and fixing the fair and just annual payment to be substituted for the petitioner's right of thirlage over said lands. The pursuer averred that until 1878, for crop and year 1877, the value of the said commuted thirlages, as converted (grain and money) by long custom, was regularly paid, but the defenders had since then suspended payment, and the present action had been rendered necessary. The defenders denied the practice of payment, and averred on a preliminary defence that the abbreviate-decree had not been recorded in terms of the statute; that the estate of Shandwick, including the lands of Drumgillie, having been held under an entail, no obligation to pay commuted multures could be made to affect the said lands or succeeding proprietors otherwise than in terms of the statute; that the proceedings and abbreviate founded on instructed no obligation against the defenders; and further, that at the date of said petition Mrs Jane Cockburn Ross was heiress of entail in possession of the lands of Shandwick, that she was no party to the proceedings referred to, and that her husband John Cockburn Ross, the respondent in the petition, was at no time proprietor of said lands.

The Act 39 Geo. III. c. 55, proceeds on the following preamble:—"Whereas it is found by experience that the servitude of thirlage and right of mill services incident thereto in that part of Great Britain called Scotland are very unfavourable to the general improvement of the country, by checking the industry of the occupiers of the ground, and by occasioning troublesome and expensive litigation, and that it is highly expedient that it should be allowed to persons subject to such servitude to compensate or to commute the same by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions thereto incident or pertaining, and in some cases to make an entire and complete purchase of the same for a fair and adequate price." . . . .
It is provided (section 1), after the procedure before the Sheriff and jury has been set forth, that an abbreviate of the verdict and determination of the jury "shall be registered by any of the parties in the General Register of Sasines at Edinburgh, or the Particular Register of the said county or stewartry, within sixty days after the pronouncing of such verdict or determination." Section 4 provides that "After the expiry of three years from the registration of the verdict of the jury, the said verdict and the proceedings had relative thereto shall not be reduced, set aside, reviewed, altered, or amended by the Court of Session or any other judicatory for any neglect of the provisions herein contained, or for any informality or error, or for any other reason or pretext whatever; and if any party shall pursue any process of reduction of the verdict of the jury, or other process for setting the same aside, or for altering or amending the same in the Court of Session, and shall fail in such pursuit or process, such party prosecuting as aforesaid shall be liable to the other party or parties in full costs of suit."

The defenders pleaded—"(1) The abbreviate founded on not having been recorded in terms of the Statute 39 Geo. III. cap. 55, is ineffectual to instruct the pursuer's claim. (2) The proceedings founded on by the pursuer as ascertaining the amount of commuted multures, not having been carried out in terms of the said statute, *et separatim*, not having been directed against the proprietor of the lands mentioned, are insufficient to instruct the present claim against the defenders."

The Lord Ordinary (CURRIEHILL) found "that the decree of commutation mentioned in the summons is binding upon the pursuer and defenders, and that the defenders are bound, in accordance with the provisions thereof, to pay to the pursuer the sum concluded for, with interest."

His Lordship added the following note:—"This is an action at the instance of the Duchess of Sutherland, Countess of Cromartie, against the proprietors of the estate of Shandwick for payment of the sum of £80, 14s. 3d., being

the equivalent in money value, according to the fiars prices, of three years' payment of certain quantities of grain and meal in name of services for upholding the mill and mill-lade of Miltown, and for dry multures, in pursuance of a decree of commutation obtained at the instance of the pursuer's predecessor against the defenders' predecessors, dated 1st September 1803, an abbreviate whereof was recorded in the register of sasines on 17th March 1804. At the date of the decree the estate was held under a deed of entail dated 5th May 1790, but on the death of the last proprietor in 1872 without issue the succession opened to the heirs and assignees whomsoever of the entailer, in which capacity the late Andrew Gildart Reid and John Ross Duncan succeeded to the estate as heirs-portioners, and their respective interests are now represented by the two sets of defenders. The main defence is that the decree of commutation is ineffectual in respect of alleged non-compliance with the provisions of the Statute 39 Geo. III. cap. 55, by which such commutation was authorised.

"The first and principal objection is that the abbreviate of the decree prepared in terms of the statute was not recorded within sixty days of the date of the decree or verdict of the jury, and that the same is therefore ineffectual to instruct the pursuer's claim. By section 1 of the statute it is enacted, that after the amount of commutation is ascertained by the verdict of a jury in the manner prescribed, an abbreviate of the decree or verdict 'shall be registered by any of the parties in the General Register of Sasines at Edinburgh, or the Particular Register for said county or stewartry, within sixty days after the pronouncing of such verdict or determination.' Now, it is quite true that the abbreviate of the decree in question was not recorded within sixty days of its date, but it was recorded in the proper register about six months after its date.

"The defenders maintain that the direction to record within sixty days is imperative, and that failure to comply with that direction is fatal to the decree.

"It appears to me, however, that the pursuer is entitled to rely upon section 4, which provides that 'After the expiry of three years from the registration of the verdict of the jury, the said verdict and the proceedings had relative thereto shall not be reduced, set aside, reviewed, altered, or amended by the Court of Session, or any other judicatory, for any neglect of the provisions herein contained, or for any informality or error, or for any other reason or pretext whatever.' This section must be read in connection with section 5, which enacts that after the verdict—not, be it observed, after registration of the verdict, but after the verdict—'the servitude and thirlage, and all services, prestations, and restrictions pertaining or any way incident thereto, so valued by the said jury, shall cease to be exigible from or binding upon either or any of the parties; but in lieu thereof the said proprietor or proprietors, occupier or occupiers, of the thirled lands or tenement shall be bound and obliged to pay, and the proprietor of the mill to which the said lands or tenements are thirled shall be bound and obliged to receive, annually at the mill where the multures under the former servitude of thirlage was in use to be paid, or at some other convenient place to be fixed by the jury, such quantity or amount of corn or grain of such kind or sorts, kinds or sorts, as the said jury shall in manner aforesaid determine to be a just compensation or equivalent to such right of thirlage.' And by section 7 the payment of the commutation is to be made at Candlemas yearly, the first payment to be made at the first term of Candlemas after the date of the verdict, which term might arise long before the expiry of the sixty days prescribed for the registration of an abbreviate.

"Now, reading all these clauses together, I think it is clear the decree or verdict was to take effect, and was to operate, as a commutation of the thirlage and services from its date, irrespective altogether of the registration of the abbreviate. But unless and until the abbreviate was recorded, the decree was to remain open to challenge or review on any competent ground. The object of the Legislature in prescribing the registration of an abbreviate, and in directing the registration to take place within sixty days, was not only to provide for the publication of the commutation in the public records of the country, but to induce the parties to make the publication without delay, and thereby secure the finality of the decree at the earliest possible period, *i.e.*, after the lapse of three years from the registration. Until the registration was made, the decree, whether acted on by the parties or not, might be challenged, in a reduction or otherwise, not only on the merits, but on the grounds of failure to comply with the statutory forms, and the right of challenge would probably subsist until extinguished by prescription or barred by homologation. But so soon as the abbreviate is recorded, the statutory period of limitation (three years) begins to run, and on its expiration the decree is to become absolutely unchallengeable on any pretext whatever.

"In these circumstances the direction to record the abbreviate within sixty days appears to me to be not imperative, not only because there is no penalty attached to failure to comply with that provision, but because the provision is just one of those statutory provisions, failure to comply with which is expressly declared to be ineffectual as a ground of challenge after three years from the date of registration. It is important to observe that in the case of sasines and inhibitions, where registration within sixty days and forty days respectively is by statute made matter of express enactment, the penalty of nullity is attached to failure to comply with the direction, whereas in the case of adjudication where an abbreviate is by statute directed to be recorded within sixty days, failure to comply with that direction does not create a nullity, but has merely the effect of postponing the adjudication of which an abbreviate is not timeously recorded, to an adjudication which, although subsequent in date, has been timeously recorded.

"It is further objected to the decreee that John Cockburn Ross, upon whom the petition for commutation was served, as being then the proprietor of Shandwick, was not truly proprietor. To this objection two answers are made—(1) That as the decree bears that he was the proprietor of the lands, and that he appeared and took part in the proceedings as proprietor, such an objection cannot be entertained without a

reduction of the decree; and (2) because the 4th section of the statute is a complete answer to a challenge of the decree on this or any other ground. I am of opinion that these answers are well founded.

"In conclusion, on this branch of the case, I have only to observe that this is a highly remedial statute, and is to be interpreted liberally, and not in the judaical manner contended for by the defender. It was passed, not for the purpose of imposing a burden upon lands, but of substituting a moderate fixed annual payment for a burden uncertain in amount, and oppressive in the mode of exaction; and I think it would be absurd to hold that it was intended that the whole benefit of the lengthened and laborious inquiry directed by the statute was to be entirely lost if the parties, from any cause however innocent, should allow even one hour more than the sixty days to elapse without recording the abbreviate."

The defenders reclaimed, and argued—The abbreviate-decree founded by the pursuer was invalid—(1) The Act 39 Geo. III. c. 55, directed the registration of the verdict within sixty days after it was pronounced. This had admittedly not been done here. The direction was an imperative one, and the provisions of section 4 would not remedy the defect, for the "registration" there alluded to was a registration of the verdict in terms of section 1. Instruments of sasine and inhibitions, if not recorded within sixty and forty days respectively, incurred the penalty of nullity—see Acts 1581, c. 119; 1617, c. 16; *Young* v. *Leith*, 11th March 1847, 9 D. 932. (2) The respondent who was called, and who answered the petition on which the abbreviate proceeded, was at no time owner of the lands. His wife, who was proprietrix, was no party to the proceedings. The decree could not therefore be founded on, and the defenders denied the practice of payment since 1803. The pursuer's claim in this action therefore fell to the ground.

The pursuer replied—(1) The admitted defect of non-registration within sixty days was just one of those provided for by the remedial words of section 4. That section, read along with secs. 5 and 7, showed that the verdict was to take effect and operate at once, irrespective of its registration, but until it had been recorded and remained three years on the register it was to be open to challenge on any competent ground. The provision as to registration in section 1 was a directory one, to which no sanction of nullity was attached. This distinguished it from the other Acts cited by way of analogy by the defenders—see also Act 1661, c. 31 (apprisings), and 1669, c. 3 (instruments of resignation). (2) It was not admitted that John C. Ross was not proprietor of the lands. The defenders would have to prove this, and that in a reduction, and not *ope exceptionis* in this action. If a reduction were brought, it would be challenged *in limine* as incompetent under section 4. That section was an answer to both the objections raised. The statute was a highly remedial one, and should be liberally construed.

At advising—

Lord President—This is an action for the recovery of a sum of £80, 14s. 3d., which is the equivalent for three years of certain quantities of grain payable from the estate of Shandwick to the Duchess of Sutherland in respect of a decree of commutation obtained by a predecessor of the Duchess in 1804. The first objection taken to this decree of commutation is, that it was not recorded in terms of the statute within sixty days from its date, and I understand that this objection is pleaded to two effects. It is in the first place said that the failure to record within the sixty days makes the decree null to all effects; and secondly, even supposing that its effect does not go so far as this, it is said that it, at all events, deprives the party holding the decree from obtaining the benefit of the 4th section of the Act which authorises the commutation.

Now, the first question consequently comes to be, what is the effect of failure to record the decree within sixty days? Is it a provision which is imperative, and with an implied sanction of nullity, though not an express sanction, for no such sanction is expressed? Now, in the first place, I have to observe that this is a remedial statute in the highest degree. It is intended to put an end to a highly disadvantageous relation between the owners of the barony and of the lands thirled. We are therefore bound to give it a liberal interpretation in favour of the object proposed to be obtained by the statute. The words of the statute are, that an abbreviate of the decree or verdict "shall be registered by any of the parties in the General Register of Sasines at Edinburgh, or the Particular Register for the said county or stewartry, within sixty days after the pronouncing of such verdict or determination;" and there the provision stops. It is not said that the verdict shall be so recorded under pain of nullity, nor are there any equivalent expressions. In these circumstances I am not prepared to hold that the provision is imperative; I think it is merely directory. In such a statute I think that unless nullity be expressed, it will not be assumed to have been intended. This impression is confirmed by the other clauses referred to by the Lord Ordinary, to which I need not refer to in detail. But the defenders contend further that if the party fails to record the decree within sixty days he cannot avail himself of the provisions of the 4th section of the statute. I am not prepared to affirm that view either, because I think the words of the 4th section are inconsistent with it. That section provides—[*reads ut supra*]. Now, the condition upon which the verdict or proceedings is protected against all subsequent challenge is that three years shall have expired from the registration of the verdict. It is not said that the three years are to be counted from registration sixty days after the date of the verdict. It is not even said after the verdict "has been recorded as aforesaid," referring to the preceding requirement regarding the sixty days. The words are a great deal more general—"after the expiry of three years from registration of the verdict by the jury." Now, if I am right in holding that a verdict may be recorded after the lapse of the sixty days, and be a good registration, then these words are sufficient to cover any verdict that may be recorded although after the lapse of the sixty days. So that upon this first ground on which the defender relies I have no hesitation in agreeing with the judgment of the Lord Ordinary.

The other objection is that the party who was called, and who appeared as owner of the estate,

was not in fact the owner of the estate. But this is denied by the pursuer, and if any effect is to be given to the argument, it can only be after an inquiry into the fact whether in 1804 John Cockburn Ross was or was not owner of the estate of Shandwick—that is, heir of entail in possession of the estate. Now in regard to this, I am very clearly of opinion that it is not a matter which can competently be tried in this action. It is quite out of the question to maintain such a plea *ope exceptionis*. It can only be raised in a reduction of the decree of commutation, because that decree must first be taken out of the way. It was a decree obtained, not in absence, but after a defender had been called and had appeared, in a petition under the statute. Suppose that such a reduction is raised, then I think that the reasons of reduction must be very carefully libelled to set aside a decree after the lapse of so many years since 1804. And there would arise on behalf of the defender in such an action very formidable pleas of which no notice has been given at present—which indeed could hardly be competently referred to in this action. I need not go further than to mention the plea of the negative prescription. In short, the question whether the true owner was called or not is not before us for determination. We have no materials at present to determine either on the one side or on the other.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court repelled the defences, and decerned in terms of the conclusions of the summons.

Counsel for Pursuer (Respondent)—Mackintosh—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Blair. Agents—Philip, Laing, & Co., S.S.C.

HOUSE OF LORDS.

Friday, February 11.

(Before Lord Chancellor (Selborne), Lords Blackburn and Watson.)

MACKENZIE *v.* BRITISH LINEN COMPANY BANK.

(*Ante*, June 4, 1879, vol. 17, p. 619, and 7 R. 836.)

Forgery—Bill—Assent to Forged Signature.

Held, upon a proof (*rev.* judgment of the Court of Session) that a person whose signature had been appended by another to a bill had not authorised or assented to that signature.

Forgery—Adoption—Bill—Mere Silence will not Infer Adoption.

Held (*rev.* judgment of the Court of Session) that continued silence on the part of a person whose signature to a bill has been forged, after repeated intimations have been made to him by the bank which has discounted the bill that it has fallen due, will not render him liable for the contents of the bill, unless the position of the bank is thereby prejudiced.

This case was decided in the Court of Session on June 4, 1879, and is reported *ante*, vol. 17, p. 619, and 7 R. p. 836.

The action was brought into Court by Mackenzie in order to have a charge given to him by the British Linen Company Bank suspended; the First Division of the Court of Session (*diss.* Lord Shand) recalled the interlocutor of the Lord Ordinary, and found the charge orderly proceeded; against this interlocutor Mackenzie appealed. The facts out of which the case arose, and the various documents referred to, will be found in the previous report.

At delivering judgment—

Lord Chancellor—My Lords, in this case there are two questions—the first, whether the appellant authorised or assented to the signature of his name as drawer and indorser of the bill of exchange of the 14th April 1879? the second, whether, if he did not, he has nevertheless so acted as to be estopped from denying his liability on that bill in a question between himself and the respondents, the British Linen Company?

If the first of these questions ought to be answered in the appellant's favour, I am clearly of opinion that the circumstances of this case can raise no estoppel against him. He has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken—nothing from which the respondents or a court of justice could reasonably infer that he "adopted" or admitted his liability upon this bill.

The merits of the respondents appear to me to be extremely small. They took from John Fraser the first bill for £76 on the 7th February 1879, with the signatures of the appellant and John Macdonald, without any knowledge of these parties or of their handwriting, and without any inquiry whatever. The bill was not one which had been previously in circulation; it was offered by John Fraser to the bank to obtain a loan of money for his own benefit for the purpose of paying for a grocery business which he was then taking up in Inverness. John Fraser had not been their customer before; they knew nothing of him except that he had been in the employment of a respectable merchant who was one of their customers. When this bill became due on Saturday the 12th April 1879, they caused notice to be given to the appellant, and also to Macdonald, both of whom resided and were in employments at some little distance from Inverness. But on the following Monday, before any reply had been or could reasonably have been expected to be received to these notices they gave up this bill to John Fraser in exchange for £6 cash and for another bill which when produced to Mr Williamson was signed in blank with the same names, and was filled up by John Fraser in Mr Williamson's presence for £70, being the bill now in question. It is impossible for the respondents to contend that any conduct or silence