Wednesday, February 21.

SECOND DIVISION.

[Lord Lee, Ordinary.

SANDEMAN *v.* STIVEN AND OTHERS.

Superior and Vassal—Sub-Vassal—Irritancy ob non solutum canonem—*Conventional Irritancy* —*Act* 1457, *c.* 71—*Act* 1597, *c.* 250.

Held that when a feu-right is irritated *ob non solutum canonem*, whether by virtue of an irritant clause in the feu-right or under the Statute 1597, c. 250, the right of a sub-vassal holding of the defaulting vassal does not fall under the forfeiture. Lord Rutherfurd Clark *dissented, being of opinion* that the irritancy being when declared at the superior's instance an annihilation of the whole estate given out by him, no part of that estate could continue thereafter to exist in the person of the sub-vassal.

Question (*per* Lord Justice-Clerk), Whether a heritable security granted by the vassal would fall by forfeiture under the Statute 1597, c. 250, unless the irritancy were purged by payment?

The Act 1457, c. 71, enacts as follows:—"*Item*, As anent few-ferme, the Lordes thinkis speidful that the King beginne and give example to the lave. And quhat prelat, barroune, or freehalder that can accord with his tennent upon setting of few-ferme of his awin land, in all or in part, our Soveraine Lord sall ratifie and approve the said assedation, sa that gif the tennandrie happenis to be in waird in the Kindis hands, the said tennent sall remaine with his few-ferme unremooved payand to the King siklike ferme, indur-ing the waird, as he did to the Lord, sa that it be set till a competent avail without prejudice to the King."

The Act 1597, c. 250, enacts as follows:—"Our Soveraine Lord and Estaites of this present Parliament haveand consideration of the greate damage and skaith quhilk his Majesty and leiges of this realme sustenis throu evill and untimious payment of the few-duties of their lands set in few-ferme, Therefore statutis and ordainis that in case it sall happen in time cumming ony vassal or fewar haldand lands in few-ferme to failzie in making of payment of his few-duty to our Soveraine Lordis Comptroller, or uther havand power of him, or to uther immediate superiour, or uthers havand power of him, be the space of twa zeires, haill and togidder, That they sall amitte and tine their said few of their said lands, conforme to the civill and common law, Siklike and in the same manner as gif ane clause irritant were specially ingrossed and insert in their saids infeftments of fewferme."

This was an action of declarator of irritancy *ob non solutum canonem*. Frank Stewart Sandeman, the pursuer, was proprietor, duly vest and seized, of part of the lands of Clepington near Dundee. The lands had been acquired from William Neish of Clepington by feu-contract between him and the pursuer and his then partner, a Mr Keiller, and had thereafter been conveyed by the pursuer and his partner to the pursuer as an individual, his title being recorded on 22d December 1875.

The pursuer by feu-contract, recorded 23d February 1876, feued part of the ground, to the extent of five acres, to William Stiven, accountant, and Henry Gibson, solicitor, Dundee, equally between them, *pro indiviso*, for an annual feu-duty of £480. The conveyance was declared to be "with the privileges and under the burdens, reservations, provisions, and declarations, so far as applicable to the said piece of ground, specified and contained in the said feu-contract betwixt" Mr Neish and the pursuer Mr Sandeman and Mr Keiller as trustees for their firm. These five acres of ground were situated in the midst of ground already or in course of being built upon, and of streets formed or in course of formation. The feu-contract contained certain stipulations as to the opening up of streets by the disponees. There was also a clause binding them to build and uphold houses on the ground feued. These conditions were to enter the register of sasines, and to be engrossed or referred to in all instruments to follow thereon, and future investitures of the feu. The entry to the subjects was at Martinmas 1875. The *tenendas* clause was as follows—"To be holden the piece of ground and others above disponed with and under the whole provisions, declarations, and obligations before specified or referred to, of and under the said Frank Stewart Sandeman and his foresaids in feu-farm, fee, and heritage for ever, for payment of the feu-duties and performance of the other prestations hereinbefore and after mentioned." After the *reddendo* clause came the following provisions—"Declaring, as it is hereby specially provided and declared, that in case at any time two years' feu-duty shall be fully resting-owing and unpaid together, then this present feu-right, and all that may follow hereon, shall, in the option of the superior, *ipso facto* become void and null, without the necessity of any declarator or process of law to that effect, and the superior shall instantly and without any warning be entitled and at liberty to remove the said disponees and their foresaids from the said piece of ground . . . . And the said disponees further bind and oblige themselves and their foresaids to build and maintain a house or range of houses of the value and description hereinbefore set forth, on the ground hereby feued, and to implement and fulfil all the other conditions, provisions, and declarations hereinbefore contained . . . . Declaring hereby, notwithstanding anything herein contained to the contrary, that the personal obligation hereby undertaken by the said disponees, and hereby incumbent on them, for payment of the feu-duty and performance of the several prestations and obligations foresaid, shall cease and come to an end so soon as a *bona fide* sale of the subjects hereby conveyed shall take place, and a notice of change of ownership of the feu be given to the superior, in terms of 'The Conveyancing (Scotland) Act 1874,' and the purchaser's infeftment has been duly registered in the appropriate register of sasines, provided that at the date of such notice there shall be erections of the description before mentioned upon the ground of the value before specified, as the same shall be ascertained in case of difference by two arbiters mutually chosen by the said first party and the said second party, or in case of the arbiters differing in opinion, by an oversman whom the arbiters may appoint."

By feu-contract recorded 26th February 1876, Stiven and Gibson sub-feued a portion of the ground, forming two lots on the feuing plan, and consisting of 22½ poles, to Alexander M'Culloch at an annual feu-duty of £22, 12s. 4d. On 24th March 1876 M'Culloch disponed this piece of ground to the Heritable Securities Investment Association (Limited), who in turn, by disposition recorded on 24th January 1877, disponed it to the defenders the Scottish Property Investment Company Building Society. The ground feued by Sandeman to Stiven and Gibson was, as narrated by them in the deeds to be immediately mentioned, in reality held by them in trust for behoof of themselves and David M'Donald, grocer and spirit merchant in Dundee, and it was arranged between these parties to divide the ground, including the superiority of the portion sub-feued to M'Culloch. Stiven and Gibson accordingly executed three separate dispositions, all recorded on 5th December 1876, whereby they, with consent of David M'Donald, disponed to each of them a portion of the subjects, and allocated thereon a proportion of the *cumulo* feu-duty. M'Culloch's feu was included in the portion of ground allocated to Gibson. By feu-contract recorded on 1st May 1877 Stiven sub-feued the portion of the ground which had been allocated to him, consisting of 32·73 poles, to the defender David Crabb for a feu-duty of £32, 14s. 7d.

The feu-duty payable to Sandeman was paid by Stiven and Gibson up to and including Martinmas 1877. Thereafter both Stiven and Gibson became bankrupt, and no further payments of feu-duty were made by them or on their behalf. The trustees on their sequestrated estates refused to take up the property. With the exception of M'Culloch's sub-feu no part of the ground had been built upon. The feu-duties having thus run in arrear for three years, Sandeman, the present pursuer, on 8th December 1880 instituted a petitory action in the Court of Session against M'Donald and the present defenders, the Scottish Property Investment Company Building Society, for payment of the sum of £1440, being six half-years' feu-duty, and payable to him as at that date under the feu-contract between him and Stiven and Gibson in respect of the subjects thereby feued. No appearance was entered in the action by M'Donald, and decree in absence was pronounced against him in terms of the conclusions of the summons on 29th December 1880. The action was defended by the present defenders, the Scottish Property Investment Company Building Society. The Court on 8th June 1881 assoilzied them from the conclusions of the action, on the ground that an over-superior had not a direct personal action for the whole *cumulo* feu-duty against a sub-vassal holding part of the feu (*supra*, vol. xviii. p. 559 and 8 R. 790).

The feu-duty of M'Culloch's sub-feu was paid regularly to his immediate superior Gibson up to Martinmas 1878. That of Crabb had been paid to the 26th of February 1879, the date of Stiven's sequestration, and was thereafter consigned by him in bank. Crabb had erected on his feu buildings to the amount of nearly £3000, and had granted a security over the ground and buildings to certain other parties, who were also called as defenders to the present action. The feu-duty payable by Sandeman to his superior Neish was at the rate of 6s. a pole; that payable by Stiven and Gibson to Sandeman was at the rate of 12s. 6d. a pole; and that payable by Crabb to Stiven was at the rate of 20s. a pole.

On 17th January 1882 Sandeman raised the present action. He called as defenders Stiven and Gibson, and the trustees on their respective estates, M'Donald, M'Culloch, the Scottish Property Investment Company Building Society, and certain other parties, as the whole proprietors, occupants, or tenants of, or heritable creditors on, the subjects feued by him to Stiven and Gibson. He concluded for declarator that the feu-duties of these subjects from Martinmas 1877 to Martinmas 1881, amounting with interest to the sum of £2088, remained unpaid; that the defenders had thereby contravened the terms of the feu-contract, and incurred the irritancy specified therein and quoted above, and also the irritancy under the Statute 1597, c. 250, and had forfeited all right and title to the lands *ob non solutum canonem*, and that the feu-contract between himself and Stiven and Gibson had, "with all that has followed thereon, become null and void as if the same had never been granted, and that the pursuer may enter into possession of the subjects thereby conveyed, and dispose thereof at pleasure." He also concluded for decree of removing against the defenders, and each of them, from the lands.

The action was defended by the Scottish Property Investment Company Building Society and David Crabb.

The pursuer pleaded—"(1) The feu-duty and interest thereon payable in respect of said subjects, and amounting in all to the sum of £2088, having remained unpaid for the years and terms libelled, the pursuer is entitled to decree of declarator in terms of the conclusions of the summons. (2) *Separatim*, The feu-duty for the said subjects having remained unpaid for more than two years, the pursuer is entitled to decree of irritancy *ob non solutum canonem*, with expenses as concluded for. (3) The defenders who have appeared having stated no relevant defence, decree should be pronounced as concluded for."

The Scottish Property Investment Company Building Society stated that they had withheld payment to the mid-superior Gibson of the feu-duty of their sub-feu from the date of his bankruptcy. The amount of feu-duty thus in arrear was £67, 17s., of which with interest they judicially offered payment. They pleaded—"(4) The present defenders being sub-feuars of the foresaid portion of the said subjects vested in them, they are only liable for the feu-duty payable under the feu-contract thereof, and are entitled, on payment of the foresaid arrears of the said feu-duty, to absolvitor from the conclusions of the action. (5) In any event, the said Henry Gibson having, by the recording of the foresaid disposition in his favour, been entered with the superior in the portion of the subjects thereby conveyed, including therein the mid-superiority of the subjects vested in the present defenders, the latter are entitled to absolvitor on payment of the arrears of feu-duty effeiring to the portion of the said subjects thereby vested in the said Henry Gibson. (8) The action being groundless and untenable, the present defenders are entitled to absolvitor with expenses."

The defender Crabb set forth that, as above stated, he had consigned the feu-duty of his sub-feu since the date of Stiven's bankruptcy. He also averred that he had erected buildings on his sub-feu at a cost of £3000, and borrowed money thereon fom the heritable creditors who were called as defenders. He pleaded—"(3) This defender being a sub-feuar is only liable for the feu-duty payable under his feu-contract. (4) In any case this defender is only liable for the feu-duty effeiring to the portion of the said lands held by his superior, the said William Stiven. (5) This defender having regularly paid, and being still willing to pay, his feu-duty, ought to be assoilzied from the conclusions of the summons. (6) The feu-duty of said subjects having been allocated with the pursuer's consent, he is barred from insisting in this action. (7) The said lands having been feued for the express purpose of sub-feuing, the pursuer is barred from insisting in this action. (9) In any event, the present defender having erected buildings in the knowledge and with the acquiescence of the pursuer, is, in the event of irritancy, entitled to recompense for said buildings."

The Lord Ordinary, after hearing parties on the debate roll, pronounced this interlocutor— . . . "Repels also the pleas founded on the alleged division of the feu, in respect that it is not relevantly averred that the pursuer was a party to or sanctioned the alleged apportionment and allocation of the feu-duty: Finds it not disputed that the feu-duty remains unpaid for the terms specified, but that the subordinate feu rights held by the said defenders David Crabb and the Scottish Property Investment Building Society, though not sufficient to entitle them to resist the action as against the original feuars William Stiven and Henry Gibson and the trustees upon their sequestrated estates, are sufficient to entitle the said defenders to maintain their possession of those portions of said feu which are described in their feu-contracts: And finds that the pursuer is not entitled to decree against them as contraveners of the feu-contract libelled, or to maintain the present action to the effect of forfeiting their rights as sub-feuars, and of removing them from possession of their portions of the feu: Therefore assoilzies the said defenders from the conclusions of the action in so far as the same may include declarator that they have lost and forfeited all right and title to those portions of the lands included in their feu rights, or decree of removing against them therefrom, and decerns: *Quoad ultra*, finds, declares, and decerns in terms of the conclusions of the summons, under burden of the feu-contract between William Stiven and Henry Gibson and Alexander M'Culloch, dated 23d and 25th February 1876, and recorded in the General Register of Sasines 26th February same year, and of the rights of the defenders The Scottish Property Investment Building Society under the same, and under burden likewise of the feu-contract between William Stiven and David Crabb, dated 27th and 30th April, and recorded in the General Register of Sasines 1st May 1877, and of the rights of the said David Crabb under the same: Finds the said defenders entitled to the expenses of process incurred by them," &c.

"*Opinion.*—The present action of declarator of irritancy *ob non solutum canonem* is founded upon the conventional irritancy provided by the feu-contract entered into in 1876 between the pursuer and the defenders Stiven and Gibson, as well as upon the Statute 1597, and it contains conclusions for decree of removing, directed not only against the principal feuars and their trustees in bankruptcy, but also against certain sub-feuars who have built upon their feus and are willing to pay their feu-duties.

"It is defended by (1) The Scottish Property Investment Company, as in right of a sub-feu granted by Stiven and Gibson to Alexander M'Culloch, architect, Dundee, of 22 poles 18¾ yards of the 5 acres held by them; and (2) David Crabb, builder, Dundee, as a sub-feuar from the defender Stiven of 32·73 poles of said 5 acres, and which are described in his feu-contract as a part of 266·50 poles allocated to Stiven at a division of the 5 acres said to have been made by Messrs Stiven and Gibson with consent of David M'Donald. No defence is stated by the original feuars or by anyone representing the subjects as a whole.

"The fact that more than two years' feu-duty payable under the feu-contract with Stiven and Gibson remains unpaid is not disputed. The title of the pursuer appears to me to be complete. . . . .

"But it was maintained under the fourth, fifth, and sixth pleas stated in defence, firstly, that as sub-feuars of portions of land intended for building purposes the defenders are only liable in the feu-duties under their own feu-contracts, and are entitled to absolvitor from the conclusions of this action; and secondly, that in any event, as the original 5 acres had been divided into three portions by Stiven and Gibson, and each of the portioners was implicity entered with the pursuer as superior, in virtue of the Conveyancing Act 1874 (sec. 4), each of the defenders is entitled to absolvitor on payment of the arrears effeiring to the one-third share of the feu allocated to his immediate superior.

"It was also contended that the pursuer having agreed to the allocation of the *cumulo* feu-duty, was barred *personali exceptione* from insisting in this action. But I hold that there is no relevant allegation of such an agreement.

"There is another plea stated on record to the effect that the pursuer having resorted to a personal action for the arrears, and obtained decree against David M'Donald for the amount, is barred from insisting in the present action. But no argument was offered in support of this plea, and I assume that the pursuer's statement that the decree (a decree in absence) has not been extracted and is not to be followed out is accepted as sufficient. The rule that a superior cannot pursue for bygone feu-duties and also for declarator of irritancy is well settled. But an abandoned decree in absence against one of the vassals would probably not be held to exclude a declarator of irritancy. I pass by this plea, therefore, without giving any opinion upon it.

"The principal point for consideration is the effect of the sub-feus held by the two defenders. That of the Scottish Property Investment Company flows directly from the original feuars, Stiven and Gibson. That of the defender Crabb was granted by Stiven alone after the feu had been divided into three portions. As I see no reason to doubt that this division was validly

effected by the dispositions referred to on record, though the effect of it as an apportionment and allocation of the *cumulo* feu-duty may be questionable, I think that no distinction can be drawn between the two rights as regards the effect of them in a question with the granter's superior, and no distinction was drawn by the pursuer's counsel at the debate. It is not disputed by the pursuer himself that the dispositions by which the tripartite division was effected were executed and recorded as alleged. He only denies that the allocation of the feu-duty is binding upon him; and in my view this is not important in the question, What is the effect of the sub-feuars' rights as against the over-superior suing a declarator of irritancy *ob non solutum canonem*, with conclusions for removing directed against the sub-feuars?

"I am of opinion that the rights of the sub-feuars are valid and effectual as rights of property against the over-superior in this case, and that the pursuer as such over-superior is not entitled to forfeit these rights for non-payment of the *cumulo* feu-duty due and payable by the granters of them.

"The feu-right granted by the pursuer to Stiven and Gibson was one which contemplated building and did not prohibit subinfeudation. Being granted subsequently to 1874, no condition prohibiting subinfeudation could have been effectually imposed by the pursuer upon the feuars. The validity of the sub-feus, therefore, as rights of property in those portions of the feu to which they apply, is unquestionable.

"Moreover, being granted for a full and adequate avail of the lands, and at a rate exceeding the rate of feu-duty payable by the granters to the pursuer, I apprehend that the pursuer, as over-superior, is not entitled entirely to ignore them. He may be, and I think is, entitled to treat them as not excluding his right of poinding any portion of the ground for the whole *cumulo* feu-duty (*Creditors of Eyemouth*, Br. Supp. 856). But they are rights secured by law, and which the superior is bound to recognise. Had he been enforcing his claim to a composition upon the entry of a singular successor to his original feuars, he would have been bound to accept a year's sub-feu-duty, and not a year's rent, as the measure of his right (*Ross* v. *Heriot's Hospital*, June 6, 1815, 18 F.C. 392 and 2 Bligh's Reports, 709, also 2 Ross' L.C. 193). The principle of that judgment was that the right of a superior is burdened with the base rights which have been granted lawfully by his vassal. I think, therefore, that in declaring an irritancy against his vassal the pursuer in this case must recognise the rights of the defenders, and take up the rights of his original vassals under the burden of the rights held by them. As holders of proper sub-feus not requiring confirmation by the superior, they are in the same position as if the original feu-right had expressly authorised the creation of base rights, and are not liable to be dealt with by the superior as if their infeftments fell and became altogether void upon an irritancy of the original feu-right being declared. I admit that the lands as originally feued could not be burdened to the prejudice of the superior without his consent, and that by a declarator of irritancy they return to him as free as he gave them, except in so far as burdened by law or by his own consent. But I think that a feu which permits subinfeudation cannot return to him otherwise than under the burden of sub-feus which have been lawfully granted for a full avail of the land.

"The only question which remains is, whether the superior is entitled to deal with the feu as undivided, notwithstanding the recorded dispositions referred to in the statement for the Scottish Property Investment Company. My opinion is that the vassals had right to sell and dispone the feu either in whole or in separate portions. In this sense they had power to divide the feu. But I do not think that they had power to apportion the feu-duty so as to limit the pursuer's rights without his consent. The implied entry of the Act 1874 is subject to the condition that it 'shall not confer or confirm any right more extensive than those contained in the original charter.' The statute saves the rights and remedies of the superior. Could it have been maintained that, apart from the statute of 1874, the superior could have been compelled to confirm an arrangement by the vassals for apportioning and allocating the *cumulo* feu-duty? I think not. The statutes (20 Geo. II. c. 40; 10 and 11 Vict. c. 48, sec. 6; 31 and 32 Vict. c. 101, sec. 97-99) which enabled purchasers and singular successors to obtain an entry from the superior either by resignation or by confirmation, conferred no right enabling vassals to divide the feu and compel superiors to confirm the apportionment of the feu-duty; on the contrary, they contemplated that the vassal must submit to clauses of *tenendas* and *reddendo* as contained in the original charter. I am of opinion, therefore, that the pursuer is not bound to deal with this feu as divided. He was no party to the apportionment of feu-duty, and the apportionment of the feu-duty is essential to a complete division affecting the rights and remedies of the superior (*Raeburn* v. *Geddes*, 9 Macph. p. 20, *per* Lord Benholme).

"The case of *Wemyss* v. *Thomson* (14 S. 233), which was cited for the defenders, appears to me to be an authority against the contention of the defenders. For the interlocutor of Court in that case found 'that the pursuers, as superiors, were entitled to insist upon the defenders taking charters containing an obligation for payment of the whole *cumulo* feu-duty.' It gave effect to the opinion of Lord Medwyn that 'a superior cannot be compelled to divide a feu.' That this was the view understood in practice among conveyancers appears from Mr Duff's Treatise on Feudal Rights, p. 80 and pp. 205-6.

"The case of *Knight* v. *Cargill* (8 D. 991) was also cited for the defenders, but was so peculiar that little aid can be derived from it. That was a case where the superior attempted to pursue a declarator of irritancy against one of the holders of a divided feu for non-payment, not of his own feu-duty, but of feu-duties payable by another. This was held to be altogether unreasonable. But there is no such case here.

"On the whole, I think that the pursuer is entitled generally to decree, but only under the burden of the sub-feus. As, however, the sub-feuars have been compelled by the form of the summons to appear and litigate in order to maintain their rights, I think they are entitled to expenses."

The pursuer reclaimed, and argued—His vassals being two years in arrear with their feu-duty, he was entitled to irritate their feu-rights both under

the statute of 1597 and in terms of the clause of irritancy in the feu-contract. It was of the essence of the feudal system that when the vassal's feu-right was irritated everything went with it—the whole estate reverted to the superior, including all subaltern rights granted by the vassal, unless the irritancy were purged by payment. The right of a sub-vassal, flowing only from the vassal, could not stand in the way of the result the pursuer contended for The sub-vassal had no position in regard to the over-superior, who was entitled to take his feu-duty out of any part of the lands. Though the sub-vassal should tender his own part of the feu-duty, the over-superior was not bound to accept it and to recognise him. When the feu-right was irritated *ob non solutum canonem* the sub-feu was simply extinguished; it did not remain even as an encumbrance. That there was no decision to that effect arose from its having always been regarded as too clear for question. It was involved in several decisions on other points. Unless there had been an apportionment of feu-duty in the original charter, a superior was not bound to recognise any number of sub-vassals, and go to each for his portion of the feu-duty. He was not bound to accept only a part of his feu-duty from anyone, and he would, by doing so, prejudice his right to demand the whole. His right was good against the whole of the ground for the whole feu-duty, either by poinding or irritancy. From his *dominium eminens* he had a right to recover the whole lands, and he was barred only by such rights as he had himself granted.

Authorities—*Wemyss* v. *Thomson*, January 19, 1836, 14 S. 233; *Mackintosh* v. *Tytler*, May 20, 1870, 8 Macph. 772; *Magistrates of Edinburgh* v. *Horsburgh*, May 16, 1834, 12 S. 593; *Raeburn* v. *Geddes*, October 24, 1870, 9 Macph. 20 (Lord Benholme); *Hyslop* v. *Shaw*, March 13, 1863, 1 Macph. 535; *Sandeman* v. *Scottish Property Investment Building Society*, June 8, 1881, 8 R. 790; Craig, ii. 3, 34—iii. 3, 22 and 23; *Moncreiff*, 1630, M. 4185; Duff's Feudal Conveyancing, p. 80; Juridical Styles, Heritable Rights, ed. 1855, p. 30; *Ross* v. *Heriot's Hospital*, June 6, 1815, F.C., H.L. 2 Bligh, 707; *Morrison's Trustees* v. *Welsh*, May 16, 1878, 5 R. 801; Ersk. ii. 5, 79; Bell's Prin. 679, 701; *Gilmour* v. *Balfour*, January 22, 1839, 1 D. 406; *Beveridge* v. *Moffat*, June 9, 1842, 4 D. 1381; *Hope* v. *Aitken*, January 18, 1872, 10 Macph. 347; *Guthrie and M'Connachy* v. *Smith*, November 19, 1880, 8 R. 107; *Abbot of Cambuskenneth* v. *Ramsay*, 1525, M. 7179.

Argued for the Scottish Heritable Property Investment Building Society, whose argument was adopted by the defender Crabb—There was no authority to be found in any case or writer in the law of Scotland for the broad contention of the pursuer. The superior who feued for building purposes made the sub-feus as much a burden on the right given out by him as if they had been specified in the feu-contract. To seize the houses of the sub-vassals for the vassal's feu-duty would thus be a breach of contract. Hardships and inequity in a high degree attended the pursuer's demand. If the sub-vassal had no standing with the over-superior, his feu might be irritated behind his back, he knowing nothing of the state of matters between the mid and over-superiors. The sub-feu was an estate. The superior's estate consisted only of the feu-duty. The irritancy was no part of his estate. Irritancy *ob non solutum canonem* was, as a casualty, in marked distinction to ward or recognition, which forfeited the whole estate from the nature of the avail. The difficulty in making up a title on the part of the defenders was only apparent, for the irritating of the mid-superior's right was equivalent to resignation by the latter of his right in the hands of the over-superior *ad remanentiam* with procuratory, and puts the defenders at once in his place as vassals of the over-superior. The operation of the irritancy was similar to that of liferent escheat, which annihilated the mid-estate and joined the sub-vassal on at once to the over-superior. The penal and resolutive conditions in the charter by Sandeman could not be pleaded against an onerous purchaser. The principle of the decision in the case of *The Edinburgh Roperie and Sailcloth Co.*, v. *Magistrates of Edinburgh*, July 10, 1877, 4 R. 1032, was in point. The case of the *Abbot of Cambuskenneth* applied to kirk lands before the Reformation, and was therefore under the canon law.

Authorities—Menzies' Lect., p. 819; Stair, ii. 4, 5, and 15; 1693, c. 13; *Ross* v. *Heriot's Hospital* (*supra cit.*); *Anderson* v. *Marshall*, Nov. 30, 1824, 3 S. 334; *Campbell* v. *Westena*, June 28, 1832, 10 S. 734; Stair, ii. 4, 23, 51, ii. 4, 66, ii. 5, 26; Erskine, ii. 5, 42: *Johnston* v. *M. of Annandale*, 1759, M. 4356; *D. of Hamilton & E. of Selkirk* v. *Douglas*, 1762, M. 4358; 1 Bankton, 621; *Wemyss* v. *Thomson* (*supra cit.*); *Knight* v. *Cargill*, July 2, 1846, 8 D. 991.

At advising—

Lord Justice-Clerk—The main question raised in this case, and that to which my opinion will be confined, is, whether when a feu is irritated *ob non solutum canonem*, whether under the statute 1597 or by virtue of an irritant clause in the feu-right the right of a sub-vassal holding of the defaulting vassal falls under the forfeiture? I agree without difficulty in the view which the Lord Ordinary has taken of this, as well as of the other questions raised; but as the result contended for by the pursuer on the point I have mentioned would, if sanctioned, be of very wide and very mischievous operation, I shall consider it with some care.

The question arises out of a building feu granted by Sandeman to Gibson and Stiven of five acres of land in the neighbourhood of Dundee. The subject is described as bounded on all sides by streets or projected streets delineated on a building plan, and in regard to the maintenance, repair, and use of these streets the feu-contract contains special stipulations laid on the vassal. The object in view was the erection of urban tenements; and in accordance with ordinary usage, as the superior must well have known, the feuars contemplated feuing off the separate stances in detail. Sandeman himself held under a building feu from Neish, his superior, and Neish in like manner had a similar right from his authors. Each of these successive feuars undertook an increased feu-duty. Accordingly Gibson and Stiven granted a sub-feu, to be held only of themselves, of one of the stances to Crabb, one of the defenders, whose case I shall take as an example. Crabb

erected buildings on this ground, which he alleges cost £3000. Gibson and Stiven, his superiors, having failed for two years to pay their feu-duty to their superior Sandeman, he has obtained decree of irritancy against them; and he now wishes a decree of removing against Crabb, their sub-vassal, who has admittedly fulfilled all the conditions of his own right.

There are two conditions on the surface of this action which, had we no other guides for our judgment, I should have been inclined to have held conclusive. The first is the undeniable consent of the superior. He not only did not prohibit sub-feuing, but he intended that this building ground should be sub-feued, and the grant was made with no other object. It seems to be a mere abuse of legal terms to hold that the superior did not consent to his vassal using the property in the way and for the purpose for which it was granted.

Moreover, it seems to be conceded that there is not a single example in the books of such a demand as this being successful—indeed, none of its being made. The research of counsel has failed to produce a solitary instance of the exercise of such a power as the pursuer here asserts. We may well assume that the absence of precedent implies the absence of right in such a matter.

In this aspect the question may be called a new one; but it is, in fact, the shadow or echo of a controversy which is as old as the feudal customs themselves, and which universal consent has silently but conclusively settled in accordance with sound feudal principle as well as with manifest justice. The history of it among ourselves has some judicial, and indeed political, interest attaching to it, and a short review of it will show that our earlier legislation was more enlightened and liberal on this subject than some of the alterations which afterwards for a time qualified it. One of these was the Act 1597, on which this action proceeds. Its terms are as follows—[*reads*].

The provision of this statute thus engrafted on the feudal customs in use among us formed no part of the feudal system. It was imported, as the terms of the statute imply, from the emphyteusis of the Roman law. But a proper subfeu is a right essentially different from the emphyteusis of the civilians, as Lord Stair points out (ii. 3, 34), and was inalienable, and conferred no power to grant a perpetual right to another. The feudalists for the most part reject this irritancy entirely, as our own customs did until the end of the sixteenth century (Voet, In Dig. 38, 116). His words are:—"Quod si vassallus annuam præstationem domino directo feudi nomine præstare debeat, eamque toto triennio haud solverit, feudum non amittet, licet ita emphyteuta suos excidat emphyteusios jure; cum causa illa nuspiam feudali jure sufficiens declarata inveniatur." I should conclude at all events that the practical effect of this provision must depend eminently on custom, and that as it has been in force for 300 years without an attempt to apply it in the way contended for by the pursuer, we may safely conclude that no such result was embraced by it.

At the utmost, however, this forfeiture can have no wider effect than if it proceeded on a proper feudal delinquency, and it was in regard to such cases that the controversy to which I have alluded was in former times maintained, one school of jurists insisting that the forfeiture of a vassal extinguished all subaltern rights, according to the brocard "*soluto jure dantis, solvitur etiam jus accipientis*," and the other holding that the land returned to the superior only as the delinquent vassal held it himself, *cum omni onere reali*. The jurists of the Continent were much at variance on this subject. I have only been able to consult the authorities I had at hand, but I find that Pothier discusses at length the rival principles, and states that the opinion of Dumoulin, who held that the superior could only take the subject of the feu under its real burdens, had been permanently adopted as the law of France (Traité des Fiefs, i. 3, 3). I gather from a sentence in the treatise of Voet (In Dig. 38, 18), which I formerly quoted, that in the law of Holland the superior only took the land on the vassal's forfeiture, subject to such burdens as the vassal might legally impose.

In our own system there are traces of both principles having at different periods had influence on text-writers and decisions, but there is no instance of a sub-vassal holding feu of a subject-superior, himself holding feu, being included in the forfeiture of the mid-superior on any ground whatever. The only analogies, therefore, which are to be found relate to ward-holdings and to forfeiture for treason; and if we trace the law on these subjects from its commencement we shall find the present question practically and conclusively solved.

Subinfeudation grants to be held feu of a subject-superior for a competent *reddendo* have from the earliest times been favoured by our feudal customs, on the principle that such grants were beneficial for the cultivation of the land, and increased the value of the over-superior's security for his feu-duty. The right of the sub-vassal has always been considered not as a burden on the principal vassal's right, but as a separate feudal estate. Mr Bell lays this down in his Principles (788), and the doctrine was very clearly and learnedly examined in the well-known case of *Cockburn Ross* v. *Heriot's Hospital*, to which I shall afterwards advert. Excepting in the case of ward-holdings, all vassals have from the earliest times in our law had the right of subinfeudation, unless prohibited by their own charters (Stair, ii. 3, 35). In ward-holdings the case was different, the obligation to military service being supposed to exclude alienation or delegation, and if a ward-vassal sub-feued his holding he was in danger of forfeiting his right under the feudal casualty of recognition. The policy, therefore, of our rulers during the 15th and 16th centuries was to enable and encourage ward-vassals to sub-feu their lands for a just avail, and the legislation to that end has an important bearing on this subject. Nisbet of Dirleton, in an instructive chapter on Forfeiture contained in his "Doubts," has this passage—"By the Acts of Parliament, King James II. and King James IV., anent the setting of fews, and by custom ever since, the setting of fews was so speedful and necessar in order to the policy of the kingdom that vassals are not only allowed but invited to set their lands in few, which is in effect a general confirmation of all fews; so that the fewers should not be in hazard either by the waird or non-entry, or by any deed or

delict of the superiour, but should be lyable only to pay their few-duties to those who should have right upon occasion of the same."

Dirleton's legal authority is undoubted, although, like Craig, he leant to favour Court and prerogative. This was written in the reign of James VII., and it will be observed (1) that he attributes to subsequent custom the same effects and operation as those produced by the statutes he mentions while they were in force; and (2) that he combines in the same category all causes of forfeiture whether strictly feudal or not.

The two statutes referred to were of inestimable value to Scotland. The first of them, which is very short, deserves to be quoted at length. It is dated 1457, c. 71, and is in the following terms—[*reads*]. The statute of James IV. in 1503, c. 91, is in terms precisely similar, excepting that it is limited to the life of the King.

These two statutes although they did not please the King or the Crown lawyers in succeeding reigns, yet remained in substantial force for nearly two centuries. The reason of this jealousy on the part of the Crown plainly was that if these Acts operated as a general confirmation of subinfeudations, they necessarily limited the Crown's interest on the forfeiture or confiscation of the vassal, and protected the sub-vassal from its operation. Notwithstanding an attempt in 1606 to limit its effect, the Act of 1457 remained in practical operation until it was repealed by Charles I. in the Parliament of 1633. Then commenced the main conflict to which I have alluded. The repealing statute was itself repealed in 1641, and sundry other statutes were passed during the troubles for the protection of subvassals. These in their turn were repealed in 1681, and for the first time the principle of *resoluto jure dantis resolvitur jus accipientis* became a question of State policy. It culminated in utter and exemplary failure; but I pause for a moment to advert to some cautious but weighty remarks by Lord Stair on this head, published after he had ceased to be President of the Court, and at the commencement of the reign of James VII.

Craig, although he writes with reserve, seems to lean to the widest application of the maxim. Stair, however, treats his speculations with scant respect. He says (ii., 11, 31) that Craig has treated learnedly of feudal delinquencies in other nations, and of what would be held with us; but that "he adduceth little what had been sustained." Lord Stair goes on to say that such feudal customs are always local, and are defined by the usages of the community; and that although Craig does not go the length of Continental feudalists, yet, he says, "if we went the length which Craig goes there would be few unquarrelable rights of superiority or property in the kingdom."

In a subsequent section of the same title he resumes this subject, and states for solution a question which bears on that which we have in hand. He says (34)—"It hath been much and long debated, and is not yet decided . . . whether recognition can only be incurred by the deeds of the immediate vassal." He says he will not anticipate what he calls "the public determination of this question;" but adds "There hath not yet appeared any case by which a donator, by his gift and presentation being infeft in the fee of the King's sub-vassal forfeited, has excluded those who had real rights from the forfeited person before the treasonable fact."

Notwithstanding the hesitation of this indication of opinion, the source of which it is not difficult to surmise, Stair ultimately deals with the question directly (iii. 3, 31). The whole section is very material, but too long to encumber this opinion with; but his result is this, "And therefore when any person is forfeited that is not the King's immediate vassal, his estate, both property and superiority, falls to the King, but with the burden of all real rights constituted by the vassal."

This view was recognised in one or two reported cases decided during as well as after Lord Stair's presidency of the Court to which he here refers. Thus in the case of *The Marquis of Huntly* v. *the Laird of Cairnborrow*, in 1674, M. 4170, the report bears that the Lords found that "forfeiture of those who are not the King's immediate vassals confiscates their ward-holdings as a penal statute, but with the burden of all subaltern rights and deeds of the forfeited person." The same was laid down in the case of *Campbell of Silvercraigs* in 1684 (M. 4176), where it was found that ward lands being feued out before the year 1633 by the King's vassal for a competent avail conform to Act of Parliament, the Act of Parliament was equivalent to a confirmation, and ought to defend the sub-vassal against the forfeiture of the immediate superior, as well as against ward and recognition. And in *Lauderdale's* case the vassal was obliged to prove that the lands were feued for a competent avail, and not the superior or donator that it was incompetent—Fol. Dic., vol. i., p. 295; Harcarse (Forfeiture), No. 494, 136. Again, in the case of the *Marquis of Huntly* v. *Grant* in 1677 (M. 4689). the Court expressed in their judgment the general doctrine which was afterwards laid down by Dumoulin and Pothier. The report bears that "though forfeiture be penal, introduced by statute a custom whereby treason is punished by the loss of life, lands, and goods, yet thereby the King gets no more than the forfeited person had, in the same way as in liferent escheat the fee comes to the superior *cum suis oneribus realibus*, and all infeftments, annual-rents, and tacks constituted by the vassal anterior to the rebellion are valid." The Court did not apply that doctrine in the case in hand, because the subaltern right, though held of a ward vassal, was not held feu but blench, which adds significancy to their finding.

But in 1682, when Lord Stair was in exile, and the civil troubles at their height, in the case of General Dalzell against the wife of Mure of Caldwell, the Court is reported to have found "That there was no difference as to the case of a subvassal, whether the King's immediate or mediate vassal was forfeited, and that in both cases the right of all sub-vassals fell under the forfeiture" (M. 4693). Probably there were similar cases which were not reported; and had this doctrine, never so unreservedly announced before, remained law, the question would have been determined. But in six years came the Revolution; and in the Declaration of Right of the Scottish Estates one of the grievances in respect of which they declared that James VII. had forfeited the Crown was this very matter of the rights of sub-vassals; and in 1690 (cap. 33) was

passed an Act which recites the evil to be remedied in very incisive and emphatic language—"Forasmuch as amongst other grievances represented to their Majesties when the Crown was tendered to them, forfeitures in prejudice of vassals, creditors, or heirs of entail, were condescended on as a great grievance, and that it is just that every man suffer for his own fault, and not the innocent with or for the guilty, and that such rights as are not in a man's power to alienate by consent should not confiscate by his crime;" and on this preamble it proceeds to enact "that the subaltern real rights holden of them by their vassals, whether in fee or liferent, and by whatsoever manner of holding, shall no way be prejudged by the forfeiture of the superior, but shall remain with the vassal in the same way and manner as if their rights had been confirmed under the Great Seal before committing of the crime for which the superior was forfeited."

This is language not to be gainsaid. It implied that the legal forms under which such things were done were not only prohibited for the future, but were contrary to law, and an offence to the nation in the past. Sir James Stuart, in answering one of Dirleton's Doubts on this very head, says (p. 71) that the statute has made so great a difference on this subject that it has now become a topic of mere juridical speculation, of no further utility. With the statute the controversy as regards all practical purposes came to an end, and sub-vassals have never since been disturbed by the maxim *soluto jure dantis, solvitur jus accipientis* until this action was brought.

It is true that at the Union the English law of attainder was extended to Scotland, and substantially superseded these provisions; but, unless I am misinformed, the results to sub-vassals' and real rights constituted before the forfeiture remain unchanged.

I have given this short summary of the progress (or rather the alternation) of juridical opinion not so much to show that all controversy on this head was concluded in 1690, although substantially it was so, for it never revived, but to exhibit the basis on which the unbroken practice has proceeded since that time. Usage is the best interpreter of laws; and when we find that even so lately as at the commencement of last century great lawyers like Stair and Dirleton doubted, to say the least of it, on the feudal principle, and couple these weighty authorities with the fact that no sub-vassal's right has been forfeited by his immediate superior's act or neglect since that time, it is too late, I think, to make a new precedent in so retrograde a direction.

The most important case which has occurred in recent times in regard to such questions is that of *Cockburn Ross* v. *Heriot's Hospital*, June 1815, F.C., to which I have already referred; and I am glad to find in the opinion of two such feudalists as Lord Glenlee and Lord Meadowbank signal confirmation of some of the views I have already expressed. Lord Glenlee in that case said—"It appears to me that previously to the passing of the Act 1606, to which I have already referred, it was understood by our lawyers of those days, or I should rather say that after the passing of the Act 1606 it was understood that before that Act was passed, the claim of the subject-superior for non-entry, by whatever tenure his vassal held, whether by ward, feu, or blench, was burdened by the base rights which had been granted by the vassal, whether consented to by the superior or not." And Lord Meadowbank, in answer to Lord Bannatyne's view that vassals had no power to subfeu by the feudal law, warmly repudiated that doctrine. He said—"There is nothing in the whole history of them (subinfeudations) which demonstrates that there ever was a period when this question was ever considered in the light in which it is now viewed by his Lordship. Custom everywhere overruled any strict notion regarding them that otherwise might have been deduced from the feudal grants of benefices bestowed by great proprietors for military service. It was held that property conveyed to vassals for an adequate value was too sacred not to overrule the right of the superior, and it modified it so far as to sanction sub-feus." The last sentence indicates the germ of true policy which lies at the root of this matter, and it entirely confirms the view which I have ventured to enforce. He goes on to say that by the laws of France and Spain it never was supposed that the vassal's right was inalienable or subinfeudation prohibited.

I have dealt solely with proper feu-rights, holding of a subject superior directly and for a competent avail. These alone were the subject of the authorities and *dicta* which I have quoted, and further than this it is not necessary that I should go. The case of an heritable security is not within this category; and although Mr Bell in his Principles does state that such a security would fall by a forfeiture under the Statute 1597, unless the irritancy be purged by payment, the case he refers to is very slender authority for so wide a proposition. It relates entirely to the right of an heritable creditor to purge an irritancy incurred under the statute. But I desire to reserve my opinion on that matter.

It may be objected that the analogy of forfeiture for treason is imperfect, inasmuch as its effect is to carry the *dominium* to the Crown *jure coronæ* and not as superior, and so indeed Stair suggests. But he also says (iii. 3, 28)—"Forfeiture is the great confiscation, comprehending all other penal confiscations." It may be that the crime against the state absorbs the purely feudal delinquency, yet that treason is also the greatest of feudal delinquencies is equally true, and one would think that its effect on rights granted by the traitor should not be less than that of the confiscations which it includes. In principle there can be no legitimate cavil on this head. Erskine's *dicta* on this head seem to add nothing to the controversy. He seems to limit the effect of such irritancies on sub-vassals to those casualties which are implied in the nature of a feudal grant, such as non-entry (ii. 5, 79); and now that recognition is abolished, non-entry is the only casualty which preserves that character, and not being necessarily a delinquency, might not be affected by the views I have suggested. He says that liferent escheat is different in its operation, because it does not arise out of the feudal character of the grant. I do not stop to analyse his views, because an irritancy under the statute 1579 does not arise out of the feudal relation, but is engrafted on it by statute from the civil and canon law, and by many is

considered to be in its nature repugnant to it.

I only add that I do not think that if the views I have stated are sound, the conventional irritancy will affect the result. That, no doubt, is inherent in the contract, and affects the lands in the hands of a singular successor, but it will not in my opinion affect the interest of a sub-vassal whose right was perfected before the irritancy was incurred. The irritancy on principle can only reach those who are liable to pay the feu-duty in respect of which it attaches, and as it has been conclusively decided between these parties that the defenders are not personally liable for the feu-duty, I do not see how it can affect them.

Lord Young—I entirely concur in the judgment which has just been delivered, to which I have listened with great attention, and I may say from which I have derived much instruction. I have hardly anything to add. I only wish to say that the Court would certainly find a way of frustrating any device of a vassal, by means of a sub-feu, to trick or cheat his superior out of his feu-duty, or any of the remedies which the law gives him therefor. The present case presents no feature of that kind. On the contrary, I am of opinion, with your Lordship, that the sub-feu with which we are here dealing must be taken to have been granted with the consent of the over-superior, because I think it was in accordance with his intention, indeed in pursuance and furtherance of the building speculation in which he was engaged, and we take that, not from any extrinsic evidence, but from the title-deeds before us. For the title-deeds have exhibited to us, as the true nature and character of the case, that the pursuer, who is called the over-superior, although he is himself a sub-vassal, engaged in a building speculation, buying for that purpose a few acres of building land in the immediate neighbourhood of Dundee. He has that ground laid out for building purposes in accordance with plans which have been prepared, all with the same object in view, and he feus part of the ground to a builder, intending that that builder shall erect houses, or shall sub-feu to customers who will erect houses on the building stances. That was the way in which this speculation, disclosed on the face of the documents before us, was to be worked out to a successful issue. And what the pursuer proposes here is that the customer who bought the feu to erect buildings on it, shall forfeit his right to the house which he has erected there at great expense, because he is not prepared to pay the feu-duty of the whole of the building stances which remain unfeued. I think it would be a reproach to our law at the present day if it afforded any countenance to such an attempt. It would be extravagantly dishonest, if it were not sought to be carried out in pursuance of what was represented, and I suppose believed, to be the condition of our law. There is dishonesty in the thing itself, although I daresay depriving people of their property, if it is allowed by the law of the land, does not merit, certainly does not go by, that name. But it would be a misfortune, and I think a reproach to the state of our law at the present day, if a man of a speculative turn of mind, who buys land with a view to a building speculation in the neighbourhood of a town, should forfeit the property of others, or if those who were induced to take building stances to build under such circumstances as are presented to us here should lose theirs; and if it were necessary for the decision of the case I should be quite prepared to hold that the sub-vassal here holds under a sub-feu granted with the superior's consent, in pursuance and in furtherance of his own project as disclosed to us upon the face of the title-deeds on which the case is based.

Lord Craighill—I concur in thinking that the interlocutor of the Lord Ordinary ought to be affirmed. This conclusion appears to me to be called for by the justice, and to be on all points consistent with the law, of the case. My reasons for this view are those explained by the Lord Ordinary and by your Lordship in the chair. I adopt every word of your opinion, for which, in common with Lord Young, I feel, as the profession will feel, under great obligation to your Lordship. I would add, however, that all the reasons assigned do not appear to me necessary for the decision of this case, there being one consideration which seems to me to be decisive. Subinfeudation has from the first been a part of the feudal system in Scotland, and the reason of this is not far to seek. In the first place, it was not alienation, and therefore did not infer recognition. In the second place, it was not a burden on the right held by the vassal granting the sub-feu. (Bell's Prin., par. 788.) That remains what it was, the estate created by the sub-feu being distinct and independent. This, then, was the state of things when the Act 1597, c. 250, was passed, and the Act is to be construed with reference to this situation. There it is set forth that there were feus held of the Crown, others held of the vassal of the Crown, and others held of subaltern vassals—held of vassals still further removed from the Crown. The only feu, however, as I read the Act, which was to be affected, was that feu held of the immediate superior to whom the feu-duties in arrear were due. And this Act has never received another interpretation. There is no doubt here a conventional irritancy, but the pursuer's case is not in consequence stronger than it would have been had it been rested on the statute alone, for the thing that is to be irritated is his feu-right—in other words, the feu-right in the charter given out by the pursuer.

Lord Rutherfurd Clark—I am unable to concur in the decision at which your Lordships have arrived, as I conceive it to be contrary to principle and to authority.

This is an action to declare the tinsel of feu-right *ob non solutum canonem*. It is competent to a superior only, and the purpose of it is to irritate the feu-right.

In this case the feu right was given out on the express condition that "in case at any time two years' feu-duty shall be fully resting-owing and unpaid together, then the said feu-right, and *all that may follow thereon*, shall, in the option of the superior, *ipso facto* become null and void." I accentuate these words, "all that may follow thereon" not because they add anything to the nullity that is stipulated for, but because they express the consequence of that nullity. Anything that could follow on the feu-right, that is to say,

anything that depended on it, is annulled along with the feu-right itself.

This condition entered the register of sasines and became a real condition of the feu-right; but it is made by statute a condition of every feu; for it is declared by the Act 1597, c. 250, that if the vassals shall allow the feu-duty to be in arrear for two years "they shall amit and tyne their said feu of their said lands conform to the civil and canon law, sic like and in the same manner as gif an clause irritant were specially engrossed and insert in their said infeftments of feu ferme." The lieges, therefore, who transacted with the vassals and acquired any rights under them knew of the conditions of their tenure, both from the record and through the public law. They knew that the feu-right might be irritated if the feu-duty fell into arrear.

There can, I think, be no doubt that the clause of irritancy is effectual at common law. The statute was intended to extend the irrritancy to all feu-rights, so that all should be held on the same tenure as if they contained a conventional irritancy—Stair, ii. 3, 51.

By this action the pursuer seeks to enforce this irritancy, conventional and statutory. His right to do so is unquestioned, and therefore he is, in my opinion, entitled to the decree of declarator which he asks, viz., that the "feu-contract libelled has, with all that has followed upon it, become null and void." This is nothing more than the expression of the irritancy which was stipulated and which has been incurred. It is certain that the pursuer is entitled to annul the feu-right; nor, as I understand, is it questioned that he is entitled to decree in the words which I have quoted. But it is said that although the feu-right is annulled the sub-feus which the vassal had granted during the existence of the feu remain in force. This is the question which we have to decide, and it seems to be solved by what has been already said, for there can be no doubt that the sub-feu depends on the feu-right, and that it "followed thereon."

The purpose of the irritancy was to enable the superior to obtain the more easily the payment of feu-duty. This is not expressed in the feu-contract itself, but it appears on the face of the Act, which proceeds on the recital of "the great damage and skaith whilk his Majesty and lieges of the realme sustains through evil and untimeous payments of the feu-duties of their lands set in feu-ferme." Anyone having interest can purge the irritancy by payment of the feu-duties in arrear, and in this way he can protect his own right; but the question is whether he can enjoy any right following from the vassal whose feu-right has been annulled? The sub-feus are held from the vassal and from a part of the estate which was originally given over by the superior. The case of the defenders, therefore, is that the irritancy does not annul the entire feu-right, but only such part of it as remains in the beneficial enjoyment of the vassal at the date of the decree.

It is here, in my opinion, that the fallacy of the defenders' argument becomes obvious. They maintain that the right of the vassal—that is to say, such right as exists in him when the irritancy is incurred—is forfeited. This is not the language of the express condition nor of the statute. It is not his right that is forfeited, but the feu-right itself that is irritated. The words of the irritant clause are that the "feu-right shall be null and void." The statute declares that the vassals shall "tyne and amit their feus as if a clause irritant"—that is, a clause declaring the feu-right to be null and void—had been inserted. If there be any difference, which I think there is not, the express condition must prevail, and there is no ambiguity about its meaning.

The sub-vassals necessarily hold of the vassal. They derive right through him, or, as I have said, their right is something which has followed on the feu. The estate which they possess is nothing more than a part of the estate given over by the superior to him, or as it is sometimes expressed, a burden on his estate; but the irritancy declared by the superior being an annihilation of the feu-right—that is, of the whole estate given out by him—I cannot see how any part of the estate which is thus annihilated can continue to exist in the persons of the sub-vassals. The maxim applies, *resoluto jure dantis, resolvitur jus accipientis.* If we are to give effect to the express words of the conventional irritancy, this consequence must follow, for the irritancy is not confined to the feu-right, which might, though I think it ought not to, be construed as limited to the estate as it stood in the person of the vassal when the irritancy was incurred. It is expressly extended to all that should follow on the feu, which includes, if any words can include them, the sub-feus which might have been granted by the vassal.

Nor is equity, if such a consideration is admissible in a purely legal question, wholly on the side of the defenders. They took their sub-feus in the knowledge that their author's right was liable to be annulled both under the condition of the feu and by statute law; but they are claiming to enjoy a benefit under it when the condition of its continued existence is not fulfilled. They can preserve their right by paying the feu-duty and then purging the irritancy; but they refuse to follow this course, and seek to retain their sub-feus while the superior is not receiving the feu-duty payable to him.

In this connection the question occurs, Of whom, after the declarator of irritancy, can the sub-vassals hold? They cannot hold of their author, for his right has been annulled. The only suggestion is that they are to hold of the pursuer, and that the declarator has the same effect as if the vassal had resigned into the hands of the pursuer *ad remanentiam.* To my mind it would be a very singular result to identify a declarator of irritancy with a resignation; but the defenders mistake altogether the meaning of a resignation. It is a re-conveyance to the superior of the feu, subject to the burdens upon it. He need not accept it unless he pleases; but if he accepts it he takes it under the existing burdens, or, in other words, subject to the sub-feus. It follows from this that he accepts the sub-feuars as his vassals, and by the absorption of the feu into his superiority, subject to the sub-feus, they do become his vassals, and hold of him as they held of their original superior; but all this is effected by his consent only. He cannot be forced to accept the reconveyance, or to receive the sub-vassals as his vassals.

If this idea were followed out, the sub-vassals would not benefit by it. For if they could be received as vassals at all, they could only be so received on the footing of paying the full feu-duty

due by the original vassal. This may be illustrated in two ways. There are cases in which a vassal may bring a tinsel of the superiority, and enter permanently with the overlord. But in this case he is liable for the feu-duties payable by his original superior—see the Act 10 and 11 Vict. c. 48, and Menzies (3d ed.), 822. This is no doubt provided by statute, but it is the only case of which I am aware in which a sub-vassal can come to hold of the overlord without consent of the overlord, and in conformity with what I believe to be feudal principle he can only take the place of the mid-superior by assuming his obligations.

Again, to use the analogy of ward-holding, the full fee returned to the superior by recognition, and all subaltern rights were extinguished. But if they have been confirmed by him, the sub-vassals retained their subaltern rights, but were subject to all the obligations of the original grant. Ross says (p. 253)—"If the lands did open to the prime or first superior by a forfeiture of that kind, which went under the name of "recognition," then the rear vassal who had got his right so confirmed was in virtue thereof brought forward and substituted in the delinquent's place. The new vassal sometimes gained nothing but a step by this, which often proved a substantial loss; for although the confirmation saved the absolute forfeiture of the land, yet still, when thus advanced in his former superior's place, it behoved him to perform all the conditions of the original grant." I see no reason for thinking that when a feu has been irritated the sub-vassal could retain his sub-feu on more advantageous terms.

There is not much direct authority on this question; but all of it, so far as I can judge, is in favour of the pursuer.

In his Elucidations, art. 11, Lord Kames says—"The superior's right to the land is in its nature unlimited, extending over the whole. The vassal's right on the contrary, is in its nature limited, being in effect a burden on the superiority. Accordingly, when the vassal's right is by any means annihilated, the superior's property, like air formerly compressed, expands itself over the whole, and becomes unlimited, precisely as before the vassal's right existed. The vassal's right, on the contrary, being originally limited, would not turn more extensive by extinction of the superior's property, if such a thing could be."

Professor Bell (Principles, sec. 701) says—"The annulling of the vassal's right is not necessarily attended with nullity of securities granted by the vassal; but unless the holders of such securities come forward to purge the irritancy the superior will be entitled to the lands free of the burden."

There is no decision of the Court on the question. But the decision in the case which Professor Bell quotes in support of his *dictum (Drummond*, M. 7235) recognised it to the full. There the superior had brought an action of tinsel of the feu *ob non solutum canonem*. The only defenders who appeared were heritable creditors. They did not maintain that the decree of declarator would not annihilate their rights. All they asked was to be allowed to purge the irritancy by payment of the feu-duties. The pursuers maintained that the irritancy was not purgeable, as it was a conventional irritancy contained in the body of the writ. There is here no decision but a very strong recognition of the right contended for by the pursuer, and modern cases can be cited where the same course was taken—See *Hinshelwood*, 8 R. 108, note.

An heritable creditor is nothing, so far as his real right is concerned, but a sub-feuar. He no doubt holds under a disposition *a me vel de me*. But in practice he never enters with the superior, for that would involve the payment of a composition. So that in these cases the lender, or, what is the same thing, the sub-feuar, could find no other way of preserving his heritable security or his sub-feu except by purging the irritancy which had been incurred by his author.

It is very likely that there are no cases in which an irritancy has been declared, because it has been found to be the interest of the lender's sub-vassals to purge it. But I believe that up to the present time the power of the superior to declare an irritancy has been regarded as an effectual means of recovering the feu-duty, and that feu-duties have often been recovered by the necessity of paying them in order to avoid the irritancy.

The Lord Ordinary seems to think that some support is obtained for the defenders from the fact that in estimating the composition payable on entry the rent is taken as the sub-feu-duty when the lands have been sub-feued. But I cannot see that that rule has any bearing on the present case. Here we are dealing with an irritancy of the feu-right and the consequences of it. There the Court had to consider what was payable for an entry on the assumption that all rights remained in full force. On that assumption they had to determine what within the meaning of the statute, which gave a singular successor a right to require an entry, was a year's rent of the lands, which is the amount of composition payable for such an entry. I see nothing in common between the two cases.

Nor is it to my mind material that it appears from the feu-contract that the pursuer contemplated that the lands were to be sub-feued, and thereby consented to it. Subinfeudation is a right which the vassal possesses independently of the consent of the superior, and whenever a feu is given off it must be known to the superior that subinfeudation may take place. But any power or consent to sub-feu is given subject to the conventional and statutory irritancy—to both as I think—certainly to the former, which is a condition of the feu-right, and which cannot be abrogated by any consent or power implied from the terms of the feu-contract. It is possible that the irritancy of the sub-feu might be avoided if the superior had confirmed it, because when he does, the right of the sub-vassal does not depend solely on the original feu-right, but in part on the confirmation.

The value of such a confirmation may be seen in a case mentioned by Dirlton (*voce* Forfaulture, p. 74) under the classical name of Sempronia. She held of the Earls of Argyll, and the Earls of the Archbishop of St Andrews, "who did confirm the subaltern rights granted by the Earls." On the forfeiture of the Earl of Argyll the question came to be, whether the subaltern rights fell under the forfeiture? It was solved in the negative, and the chief reason was that they were saved

by the confirmation, for it was said that the subaltern right "doth not only depend upon Argyll's right so that it falleth with it, but hath another right whereupon it doth subsist, viz., the Bishop's own right and the confirmation granted by the Bishop." See also Ersk. ii. 5, 44, where, with reference to the casualty of non-entry, he says—"A superior who himself confirms a base infeftment granted by his immediate vassal is thereby understood to renounce the benefit arising from such non-entry, and must be contented upon that vassal's death to demand, as in his right, from the sub-vassal, the yearly duties and whatever else might have been demanded from him by his immediate superior had he been alive." So Stair, ii. 3, 28—"Confirmation of a right not bearing to be holden of a superior but of a vassal makes it not a public infeftment, nor takes away the superior's ordinary casualties, as ward, etc., but only recognition and forfeiture." So much for the value of the confirmation by a superior of a sub-feu. It shows very conclusively that some rights otherwise competent to the superior may be excluded by confirmation but by nothing else.

I may examine before I conclude some cases of forfeiture which may present analogous considerations, as, for instance, forfeiture for treason, although I do not think that they have any very direct bearing on the case with which we have to deal. For it is to be observed that we are here dealing with an undoubted irritancy of the feu-right; while in the case of treason the true question was whether the forfeiture was personal to the traitor, so that there was no irritancy, or whether it operated as an irritancy, and therefore affected third parties. It was on this consideration that it was debated whether the forfeiture of the vassal was limited to his own estate as it stood at the date of the treason, or was to be extended to the subaltern rights granted by him. This question is put and resolved by Dirlton (*voce* Forfaulture, p. 71)—"If a sub-vassal to a vassal holding of the King be forefaulted for treason, will subaltern rights granted by him fall under forefaulture? Seeing it is pretended that such forefaultures belong to the King, not as superior but *jure coronæ*, and as Prince, *et noxa caput sequitur;* and the King has no prejudice, having a vassal. Yet I think that these rights should fall, *quia resoluto jure dantis, resolvitur jus accipientis;* and if the sub-vassal should forefault his lands by recognition, his vassal's rights would forefault."

Again, another case was presented where the forfeiture was incurred by a mid-superior who had himself granted subaltern rights. The forfeiture operated in favour of the Crown, and the question was whether it merely operated as an escheat or assignation of the traitor's estate as it stood in his person, or extended to the rights which he had granted to be held of himself. The difficulty was, the Crown was not the superior, and could claim no right as such. This was the only defence which could be stated for the subaltern rights. Stair disposes of it thus (iii. 3, 31): —"When any person is forfeited that is not the King's immediate vassal, his estate, both property and superiority, falls to the King, but with the burden of all real rights constituted by the vassal; yet forfeiture of the King's immediate ward-vassal proceedeth upon crimes which infer recognition, and therefore returns his ward-lands to the King, as they came from the King, free of all burden." But this very question came before the Court in 1682 in the case of *Caldwell*, M. 4690, the last, I think, which deals with feudal forfeiture. It was decided contrary to Stair's opinion, and, besides, it illustrates also the value of a confirmation of a sub-feu. Harcorse gives the following short, and I think accurate note of it—"Found that there was no difference as to the case of a sub-vassal whether the King's immediate or mediate vassal was forfeited, and that in both cases the right of all sub-vassals fell under the forfeiture; and that what moved some of the Lords in this particular case was, that the lady's right was not confirmed by Eglinton, her immediate superior, the time of the forfeiture, though she was confirmed the time of the debate."

The same decision had been pronounced at an earlier date (1610) in the case of *Campbell*, M. 4685, that by the forfeiture of a sub-vassal, not only his own right, but all rights flowing from him, are carried in favour of the donator of the Crown. The only exception that seems to have been made was in favour of tenants, and more from commiseration than on principle; for though in the case of *Home*, M. 4684, it was held that tacks clad with possession were valid against forfeiture, Balfour makes this observation on the case—"All landis and tenandries haldin in chief of ony man that is forfaltit, and not lauchfullie confirmit be the King, cumis in his Hienes's handis be ressoun of forfalture." The decision was, however, repeated in the case of *Dalziel*, 1674, M. 4685, but upon the ground that they were temporary rights, and granted for a fair rent, and not to the detriment of the superior.

In this state of the law it was not until the Act 1690, chap. 33, was passed that vassals and heritable creditors were protected against forfeiture of their superior and author, and since that time cases of that class seem to have disappeared from our books. But no statute has been passed to protect sub-feuars against the irritancy incurred *ob non solutum canonem*. Nor was any needed, for while the irritancy was intended and required to protect the interests of the superior, the vassal, and those holding under him, could secure their own by purging it. Of course no one could purge the forfeiture incurred by treason.

I do not enter into the other question which has been raised. It is technical only, and has no importance beyond the present action.

The Court adhered to the Lord Ordinary's interlocutor.

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