sal consensus to the effect that the consignee must pay for the weighing and bushelling of the cargo. To this universal custom two or three exceptions have been proved. The defenders began opposition to the custom in Aberdeen, and have tried to get it altered by resisting the payment. Messrs Gripper & Son, of London, have also vainly attempted to change the custom of that port, which is to the same effect. The trade between the ports in the Baltic and Aberdeen in grain has not a very remote origin, for it began in 1864, and perhaps there is scarcely time for the formation of a custom. But then it is just as plain that this custom existed at all the other ports, such as Glasgow, Leith, London, Bristol, the Channel ports, Liverpool, Belfast, Hull, and Cork, and Aberdeen just adopted the custom that was in use at these places, and it was quietly submitted to till Grant & Company resisted. Whether the mode of payment for this work be just or expedient is a matter with which the Court has no concern. The only point now determined is that according to the universal custom, which is the law, the consignee must pay it. If he thinks it unjust he has the remedy in his own hands by making a special arrangement or contract that the shipowner shall pay all the charges of bushelling or weighing or both, but in the meantime until such special contract is presented to a court of law it must enforce the contract according to the custom.

"Wherever this custom has been broken in upon, except in the case of the defenders in Aberdeen, and Gripper & Son in London, it has been done in consequence of special arrangements made between the shipowner and the freighter. Mr Graham himself speaks to these arrangements—'On many occasions,' he says, 'we made an arrangement with the shipbroker that on his paying us a certain sum we would perform his work.' And Mr Connon speaks also to this practice—'In the cases I spoke of in recent years it was generally by special arrangement that the shipowner paid part of the measuring and bushelling. It was not by custom, simply as a matter of arrangement to save litigation and annoyance.'

"Mr Graham and the witnesses who appear for the defenders dwelt very largely upon the hardship which they would suffer were they obliged to pay for the measuring and bushelling. It is their contention that they derive no good from the bushelling. Now, this argument would not be a good argument, even although the assumption on which it is based were true, because if the custom be that the consignee must pay the expense of bushelling and weighing, then it is of no moment how small or how great may be the benefit derived by the consignee from these operations. But it is not the case of a payment without beneficial results. The consignee or the seller to him according to their bargain must pay the freight as brought out by the combined operations of weighing the gross weight and of taking the average of every 51st eight bushels. It is perfectly clear that the consignee in such circumstances has a material interest in checking the measuring done by the shipowner. Unless this measuring be exact, the consignee may be paying freight for a part of a cargo he never received, and he therefore has as much interest in checking the measurement as the shipowner has."

Counsel for the Pursuers—Jameson. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Kennedy. Agent—Wm. Officer, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

DURIE'S TRUSTEES *v.* EARL OF ELGIN AND KINCARDINE.

Superior and Vassal—Obligation to Relieve from Public Burdens—Negative Prescription.

A contract and agreement was entered into between C and D in 1764 to the effect that "the said C has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said D, his heirs and successors," of certain lands described, "to be held in feu farm and heritage of the said C, his heirs and successors, for yearly payment of £3 sterling . . . and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands . . . for the which causes, and on the other part, the said D, on the said C performing his part of the premises—that is, granting the said feu-contract in the terms above narrated, binds and obliges him, his heirs and successors, to content and pay to the said C, his heirs, executors, and successors whatsoever, the sum of £600 sterling." The deed contained a precept of sasine on which D was infeft in the said lands. This sasine was followed by a series of unchallenged infeftments confirmed by successive superiors, and by uninterrupted possession, but apparently no feu-contract was granted in pursuance of the above agreement.

In an action by vassals into whose hands the *dominium utile* of the lands had passed after a series of transmissions against a singular successor of C in the superiority, *held* that the defender was not bound to free and relieve the pursuers of ministers' stipend and other public burdens, in respect that the existing investiture of the lands made no mention of such an obligation, and that it could not be supplied from the contract of 1764, which was not a feu-contract, and merely imposed the obligation of relief as a personal obligation on C and his heirs.

Question by Lord Kinnear whether the negative prescription would apply if an obligation to free and relieve the vassal of public burdens contained in an original grant of lands was omitted from the investiture for forty years, and not actually enforced.

Res judicata—Submission—Superior and Vassal—Singular Successor.

Opinion by Lord Kinnear that an award by counsel on a submission by a superior and vassal was not binding on their singular successors.

This action was raised by the marriage-contract trustees of Dr Andrew Durie and his wife Mrs Eliza Durie against the Earl of Elgin and Kincardine to have it found and declared "that the defender, as superior of the sixty acres Scots measure of the Room of Drumtuthill, lying in the parish of Dunfermline and county of Fife, being the lands described in a contract agreement and disposition dated 5th June 1764, and registered in the Books of Council and Session 3rd October 1792, entered into between George Chalmers, merchant in Edinburgh, and William Drysdale, tenant in Drumtuthill, of the *dominium utile* of which lands the pursuers, as trustees aforesaid, are proprietors, is bound to free and relieve the said lands of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, excepting the feu-duty payable by the said lands, and also to make repetition to the pursuers of all payments they have made or may yet make in respect of such minister's stipend, schoolmaster's salary, cess, and public burdens since the term of Martinmas 1882, being the date at which the defender became superior of the said lands."

By the contract agreement of 1764 it was contracted and agreed between George Chalmers and William Drysdale as follows—"That is to say, the said Mr George Chalmers has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said William Drysdale, his heirs and successors, of sixty acres Scots measure of the Room of Drumtuthel" —[here followed a description of the lands]— "to be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, and doubling the said feu the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled, all lying within the parish of Dunfermline and shire of Fife, and reserving the coal, freestone, limestone, and other minerals below ground, with liberty to win the same and to make pits, levels, coalhills, and roads for that purpose, upon paying damages above ground (the said William Drysdale always having liberty to win freestone and limestone for the uses of the farm allenarly), and to assign the rents from and after the term of Martinmas 1765 for crop and year 1766, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming except the said feu-duty, and to make the said publics a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said sixty acres, betwixt and Martinmas 1766 on the east, south, and west sides, with a sufficient stone dyke six quarters high, which dykes are afterwards to be upheld on their mutual expenses: For the which causes, and on the other part, the said William Drysdale, on the said Mr Chalmers performing his part of the premises—that is, granting the said feu-contract in the terms above narrated—binds and obliges him, his heirs and successors, to content and pay to the said Mr George Chalmers, his heirs, executors, and successors whatsoever, the sum of £600 stg., and that at and against the term of Martinmas 1765, with a fifth part more of penalty in case of failure, and annual rent after the said term of payment during the not-payment, and to pay yearly the sum of £3 stg. of feu at Martinmas, beginning the first year's payment at Martinmas 1766 for the crop 1766, and so forth yearly in all time coming, and to double the said feu each year at the entry of every heir and singular successor, and to grind his victuals at Meldrum's Mill, conform to the thirlage of the said lands: Attour to the effect the said William Drysdale and his foresaids may be infeft in the said 60 acres, the said Mr George Chalmers desires and requires and ilk one of you conjunctly and severally his baillies in that part, that, incontinent this his precept seen, ye pass to the ground of the said 60 acres, and there give and deliver heritable state and sasine, with real actual and corporal possession, of All and haill the said 60 acres of ground described in the manner foresaid to the said William Drysdale or his foresaids, and that by deliverance to them or their certain attorney or attorneys in their names bearers hereof, of earth and stone of the grounds of the said lands, with an handfull of grass and corn, for the said teinds and other symbolls necessary and used in the like cases, and this on noways ye leave undone, the which to do he commit to you his full power by this his precept directed to you for that effect."

In virtue of the precept of sasine contained in the said contract agreement William Drysdale was infeft in the said lands, conform to instrument of sasine recorded in the Register of Sasines for the shire of Fife on 17th May 1766, which instrument bore:—"Compeared personally William Drysdale . . . holding in his hands a contract of sale of the date underwritten, entered into betwixt Mr George Chalmers, merchant in Edinburgh, and the said William Drysdale, on the one and other parts, whereby, for the causes therein specified, the said Mr George Chalmers sold, disponed, and bound and obliged him, his heirs and successors, to grant a feu right to the said William Drysdale, his heirs and successors, of 60 acres Scots measure of the Room of Drumtuthill"—[here follows the description of the lands]—"to be held in feu farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, . . . and to free and relieve the said of all minister's stipend, schoolmaster's salary, cess, and all other publick burdens in all time coming, except the said feu, and to make the said publicks a real burden upon his other lands."

By disposition dated 15th April 1769 William Drysdale sold and disponed the 60 acres in question to Charles Durie, his heirs and successors, and in corroboration of this disposition he again sold and disponed these lands to the same party by disposition dated 8th April 1779, which contained a clause in the following terms:—"Which lands, with the teinds and others foresaid, were sold and disponed to me by the said George Chalmers by the contract of sale before mentioned, and which contains an obligation upon the said George Chalmers to free and relieve the said lands, teinds, and others foresaid, of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 sterling therein mentioned, and to make the said publick burdens a real burden

upon his other lands." Upon this disposition the said Charles Durie was infeft, conform to instrument of sasine recorded in the foresaid Register of Sasines for the shire of Fife 22nd May 1779.

By disposition dated 4th October 1792 Charles Durie disponed to Robert Scotland 40 out of the 60 acres, and upon this disposition Robert Scotland was infeft, conform to instrument of sasine recorded in the said Register of Sasines 1st December 1792.

By disposition and assignation dated 2nd September 1794 Robert Scotland conveyed the said 40 acres to Robert Russell, who was infeft therein, conform to instrument of sasine recorded in the said Register of Sasines 18th December 1807.

By charter of confirmation dated 14th May 1814 Thomas Hog of Newliston, who had acquired from George Chalmers the superiority of the said lands of Drumtuthill, ratified and confirmed in favour of Robert Russell, his heirs and assignees, the whole writs and deeds above set forth, beginning with the disposition by William Drysdale of 15th April 1769. This charter, in narrating the disposition of 1779, contained the following clause:—"Which lands, with the teinds and others foresaid, were sold and disponed to the said William Drysdale by the said George Chalmers by contract of sale entered into between them dated the 5th day of June 1764, and which contains an obligation upon the said George Chalmers to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 stg. therein mentioned, and to make the said public burdens a real burden upon his other lands, together with the obligement to infeft *a me vel de me*, procuratory of resignation, precept of sasine, and other clauses contained in the said disposition."

In 1823 Robert Russell's trustees sold and disponed the 40 acres acquired by him to Captain Robert Durie, who was infeft therein conform to instrument of sasine dated 5th April 1823. The disposition and sasine thereon referred to the contract of 1764, and recited the obligation of relief contained therein. The disposition also contained the usual clause binding the seller to relieve the purchaser of cess, minister's stipend, and other public burdens preceding the term of entry, the purchaser being bound to pay these after that term.

By disposition and assignation dated July 31st 1819 Charles Durie disponed the remaining 20 of the 60 acres to himself in liferent, and to Captain Robert Durie in fee, and Captain Durie was thereafter duly infeft therein. This disposition also contained the usual clause binding the granter to free and relieve the disponee of feu-duties, cess, minister's stipend, and other public burdens prior to the term of entry, the disponee being bound to relieve the grantee thereof in all time coming.

After a series of transmissions the 60 acres came into the hands of the trustees of Dr Charles Durie, who in May 1845 were infeft in the whole subject, and by charter of confirmation dated 6th June 1856 John Buchan Hepburn, who had acquired right to the superiority, ratified and confirmed to these trustees all and whole the said 60 acres, and an instrument of sasine in their favour dated 21st May and recorded 20th June 1845. This charter made no mention of the obligation of relief in question, the *tenendas* and *reddendo* being in these terms:—"To be holden the said lands and others immediately of me and my foresaids, superiors thereof, in feu-farm, fee, and heritage for ever: Paying therefor yearly the sum of £3 sterling at the term of Martinmas, and doubling the said feu-duty the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled." The obligation of relief was not mentioned in any of the subsequent titles.

The *dominium utile* of the lands was thereafter transmitted in the following manner:—By disposition dated 26th March and recorded 5th April 1860, the trustees of Dr Charles Durie disponed the whole 60 acres to Robert Durie, the disponee being taken bound to free and relieve the parties of feu-duties, casualties, and public burdens due or to become due, and by writ of confirmation dated 30th April 1868 the superior confirmed the said lands to Robert Durie in so far as consistent with the charter of confirmation granted by him in 1856. On Robert Durie's death his sister Eliza Durie made up title to the said 60 acres as heir of provision in special to him, and by disposition dated 8th and recorded 12th April 1869 she conveyed the lands to the trustees under her antenuptial marriage contract (the pursuers), in whose favour the superior granted a writ of confirmation dated 9th June 1869. This writ was in the form prescribed by the titles to Land Consolidation Act 1868, and confirmed to the said trustees the disposition in their favour in so far as consistent with the charter of confirmation in 1856.

The defender, the Earl of Elgin and Kincardine, acquired the superiority of the 60 acres by purchase at Martinmas 1882. From 1856 to 1885 feu-duty was regularly paid without any deduction being made for public burdens.

The defender produced and founded on a joint memorial for Messrs D. M. & H. Black, W.S., as acting for Dr Charles Durie's trustees, and Messrs J. & W. R. Kermack, W.S., as acting for John Buchan Hepburn, Esquire, dated in 1856, in which the question whether the proprietors of the *dominium utile* of the 60 acres in question had a right to enforce against the superior the obligation of relief founded on by the pursuers, had been submitted to the decision of Mr Penney, Advocate, afterwards Lord Kinloch, and an opinion by Mr Penney that the superior was not liable.

The defender averred—In 1856, when the trustees of Dr Charles Durie were in course of obtaining an entry with the superior, they raised the question for the first time of the right of the proprietors of the *dominium utile* of the subjects in question to enforce against the superior the obligation of relief now founded on by the pursuers; and the said trustees and the said John Buchan Hepburn agreed to refer the question to the decision of Mr William Penney, Advocate. The charter of confirmation already mentioned, and which had been signed on 26th June 1856 before the reference was entered into, was delivered after Mr Penney's decision was issued, and a composition was paid by Dr Durie's trustees along with thirty-four years' arrears of feu-

duty, without any deduction in respect of public burdens or otherwise. Feu-duty was thereafter paid regularly for twenty-nine years without any deduction for public burdens.

The pursuers averred—"With reference to the explanations in the answer, it is denied that the question of the right of the vassals to enforce against the superior the obligation of relief was raised in 1856 for the first time; and it is believed and averred that it was then for the first time that the superior denied that that right was in the vassals. It is believed and averred that during the period between the granting of the original feu-right in 1764 and the date of the foresaid charter of confirmation in 1814 these superiors as regularly relieved the vassals of the public burdens in question as the vassals paid the annual feu-duty of £3 to the superiors, and that the same course was followed until the question was raised in 1856. . . . Explained that neither the present pursuers nor the defender had any knowledge of the foresaid joint memorial and opinion thereon by Mr Penney until after the pursuers had raised the present question, namely, in 1885."

The pursuers pleaded, *inter alia*—"(1) On a sound construction of the clause of relief contained in the contract agreement and disposition of 5th June 1764 the pursuers are entitled to decree of declarator in terms of the declaratory conclusion of the summons. (3) The obligation of relief in question is an inherent condition of the original feu-right of 1764, and has never been abrogated. (4) The pursuers are onerous disponees, and singular successors in the feu, and were and are entitled to rely upon the records, which disclose the existence of the obligation of relief in question. (5) The feu-right of 1764 is the writ which confers on the defender the right to the feu-duty payable under the same; and he cannot enforce payment thereof and yet refuse to perform his counterpart of the contract, including this obligation of relief of burdens. (6) The alleged reference to counsel was never intended, and was never understood to alter or discharge any condition of the original feu-right; it is not binding on the pursuers as singular successors: *Separatim*, the alleged opinion was unsound in law, and inherently unjust."

The defender pleaded, *inter alia*—"(2) The question raised in the present action having been raised and decided in the submission set forth on record, it is *res judicata* that the pursuers have no such right of relief as is now claimed by them. (3) On a sound construction of the titles of parties and their authors, and by prescriptive practice and possession, the pursuers have no right to the relief claimed. (4) The contract of 1764 merely set forth an agreement as to the clauses and obligations which the feu-charter when granted should contain, and the contract itself contained no obligation of relief, but in any view the obligation of relief from public burdens was, and was intended to be, personal, and not transmissible against singular successors in the superiority of the feu; and *separatim*, the said obligation, assuming it to have been granted, not having been validly transmitted against the defender, or in favour of the pursuers, the defender is entitled to absolvitor. (5) The obligation of relief alleged by the pursuers never having been validly constituted a real burden on the superiority of the lands in question, the defender is entitled to absolvitor, with expenses. (7) Assuming the agreement of 1764 to have contained a valid obligation of relief, it has been extinguished by the negative prescription."

On 31st December 1888 the Lord Ordinary (KINNEAR) assoilzied the defender from the conclusions of the summons, and decerned.

"*Opinion.*—The question is, whether the pursuers as proprietors of the *dominium utile* of certain lands in the county of Fife, are entitled to be relieved by the defender as their immediate superior, of 'all minister's stipend, schoolmaster's salary, cess, and other public burdens,' now and in all time coming. The latest renewals of the investiture prior to the Act of 1874 were effected by a charter of confirmation in 1856, and by writs of confirmation in 1868 and 1869; and these instruments express no obligation of the kind now sought to be enforced. But the pursuers maintain that no mere omission in charters by progress can alter the terms of the investiture, and that the question must therefore be determined by the conditions of the original grant. As a general proposition, this is perfectly correct. But the peculiarity of the present case is, that the instrument upon which the pursuers found is not a grant of the lands, but a mere personal contract to make such a grant on the performance of a certain condition. And the defender maintains that, as a singular successor, he is in no way bound by the obligations contained in the personal contracts of a remote author.

"The contract in question was entered into in 1764 between George Chalmers, then proprietor of the *plenum dominium*, and William Drysdale. It contains no *de presenti* conveyance. But it sets forth that Chalmers, 'has sold and disponed, and binds and obliges himself, his heirs and successors, to grant a feu-right to the said William Drysdale' of sixty acres of the Room of Drumtuthill, which are specifically described 'to be held in feu-farm and heritage of the said George Chalmers, his heirs and successors, for yearly payment of £3 sterling;' . . . 'and to assign the rents from and after the term of Martinmas 1765 for crop and year 1766, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said sixty acres betwixt and Martinmas 1766, on the east, south, and west sides, with a sufficient stone dyke six quarters high, which dykes are afterwards to be upheld on their mutual expenses: For the which causes and on the other part the said William Drysdale, on the said Mr Chalmers performing his part of the premises'—that is, granting the 'said feu-contract in the terms above narrated—binds and obliges him' to pay to Chalmers the sum of £600 at and against the term of Martinmas 1765. That this is not a feu-contract but an obligation to execute and deliver such a contract in return for a payment of money to be made at a future term, is perfectly clear. But although it is not a conveyance, it contained a precept of sasine; and the pursuers found upon an instrument of sasine following upon the precept, dated and recorded in May 1766, by which

they maintain that William Drysdale was duly infeft in the lands, upon the conditions expressed in the contract of sale. If this sasine had stood alone, it could not, in my judgment, have been upheld as a valid infeftment. There is authority for holding that at an earlier period, a precept alone, *secundum chartam conficiendam*, might have been sustained as a valid title if followed by possession, even if no charter had afterwards been made out. But even if this had been still a recognised method of infeftment in 1766, the sasine would be invalid because the stipulations of the contract in which the precept is contained exclude the possibility of its being used as a warrant for present infeftment. A contract to grant a charter in consideration of a payment of money at a certain future date could not be of itself a warrant of infeftment, notwithstanding that it contained a precept. It gives no absolute right to obtain infeftment. To acquire such a right it was necessary for the feuar to satisfy the condition of the contract by paying £600 at Martinmas, 1765; and when he had made payment, it was further necessary, in order to establish the right and complete the title, that he should either obtain a charter or feu-contract, or adjudge in implement.

"The defective character of this first sasine, however, is of no importance to the validity of the pursuers' title, because it has been followed by a series of unchallenged infeftments confirmed by successive superiors, and by uninterrupted possession. By a charter of confirmation in 1814, Thomas Hog of Newliston, who had acquired the *dominium directum* from Chalmers, confirmed four successive dispositions of forty of the original sixty acres, and the instruments of sasine following thereupon. The remaining twenty acres, after a series of transmissions, came into the same hands as the forty. In May 1845 the trustees of Dr Charles Durie were infeft in the whole subject; and by charter of confirmation on the 6th of June 1856, John Buchan Hepburn, who had then acquired right to the *dominium directum*, confirmed to these trustees all and whole the said sixty acres and the instrument of sasine in their favour. Subsequent infeftments were confirmed by writs of confirmation in 1868 and 1869. There can be no doubt, therefore, of the validity of the pursuers' title, or of the feudal relation between them and the defender, who is a singular successor of Mr Buchan Hepburn.

"It is a different question whether by virtue of their admitted title they are in a position to enforce the obligation of relief. This obligation is recited in the writs confirmed in 1814, and also in the charter of confirmation. But it is not mentioned in the charter of 1856, in the instrument thereby confirmed, or in any of the subsequent titles. The defender maintains that he is not bound, not merely because the obligation itself is collateral and extrinsic to the feu-right, but because the contract in which it is contained is altogether personal, so that none of its obligations can be held to affect singular successors in the superiority. The answer is that the feudal relation being in fact established, its terms, *hinc inde*, must be determined by the only right to which it can be traced, which is the contract of 1764. It is said that there is nothing but the contract to fix the feu-duty, and that the superior who enforces its obligations against the vassal must also accept the corresponding obligations in the vassal's favour. On the other hand, it is said that the superior does not require to go further back than the instrument of sasine and the charter of 1856 in order to ascertain the conditions of the infeftment then confirmed. It is true that this is only a charter by progress, and its terms are therefore liable to be corrected by the original grant. But if no original grant can be produced there is no authority for controlling the infeftments upon which the vassal has possessed for the period of prescription by reference to previous transmissions of the *dominium utile*.

"The question thus raised would be one of considerable difficulty if the pursuers' construction of the contract were clear, and if the possession had been all along in accordance with that construction. But I think the construction by no means clear, and there is nothing to show that the obligation ever became operative even against Mr Chalmers.

"When an obligation of this kind has been embodied in a feu-contract or feu-charter it will in general be read as a condition of the grant, and therefore available against singular successors in the superiority. But it may bear a very different construction when it is found only in a personal contract to grant a feu, because there may be stipulations in such a contract which are not intended to enter the charter as permanent conditions of the grant. In the agreement in question there are a variety of conditions, some of which are purely personal. By the obligation immediately following that in question the superior is taken bound to enclose the subjects with a sufficient stone dyke, which is certainly personal; and a very material part of the stipulation in dispute is purely personal also, because the granter binds himself to make the public burdens a real burden upon his other lands, that is, upon lands of which the property remains in him. There is thus a personal obligation in the superior and his heirs to relieve the feuar, and to make the right of relief a real burden on their property lands, and no similar obligation to make it a burden on the superiority as such. As a question of construction, therefore, it appears to be at least very doubtful whether the condition was intended to affect singular successors in the superiority. It is not one of the essential conditions of a feu-right, and it could not be embodied in a feudal grant as a permanent condition of the right, because an essential part of the stipulation, if it were expressed in such a grant, would be altogether inapposite and ineffectual.

"But if the construction be even doubtful it appears to me to be conclusive in favour of the defender, that no grant has in fact been executed in terms of the contract. The feu-contract is to be given in return for a payment of money, and there is nothing to show that the payment was ever made. The proper evidence that the condition had been performed upon which, according to the argument, the proprietors of the superiority were to become bound to relieve the *dominium utile* of public burdens would be the production of a charter or feu-contract. If no such right were granted the inference is that the condition was not performed. It is true that the successors of the feuar are in possession. But they have possessed under a title which in its

inception was ineffectual to bind the superior. Their right in the lands has now come to rest upon titles which are perfectly valid, but which do not import the obligation in question.

"It is a very material consideration that the successive proprietors of the *dominium utile* have made no claim for relief, at all events since 1856. The defender avers that no such claim has been ever made since 1764; and although the pursuers allege that they 'believe and aver' the contrary, there is no evidence in process to show that the alleged obligation has ever been enforced. The inference from the titles is that no payment of relief can have been demanded from the superior for more than forty years. The result is that there is nothing to show that the obligation ever came into force by performance of the condition on which it became prestable. The available evidence tends to show the contrary.

"I am therefore of opinion, upon the construction and legal effect of the titles, that the defender is not liable in the relief claimed. In this view it is unnecessary to consider the plea of prescription, which cannot be disposed of until the fact of non-payment for forty years has been more conclusively ascertained. But assuming non-payment to be proved, I am not satisfied that the defender's plea of prescription is excluded by any of the previous decisions. In *Hope* v. *Hope* it was held by Lord Benholme that the superiority title had been relieved of a similar burden by its omission from the investiture for forty years. His Lordship's judgment was reversed by the First Division, but upon the ground that the condition as expressed in the original grant had in fact received effect. It was not decided that the negative prescription would be inapplicable if the condition had neither been expressed in renewals of the investiture nor actually enforced.

"The defender's plea that the question is precluded by an award upon a submission to Mr Penney in 1856 is not in my opinion well founded. Mr Penney's opinion was probably binding upon the parties who submitted the question to him. But it cannot affect singular successors. Their rights must be determined by the titles."

The pursuers reclaimed, and argued—The deed of 1764 followed by sasine constituted a valid feudal right in the persons of the pursuers. A precept for immediate infeftment followed by sasine was sufficient to give a valid title—Stair, ii. 3, 14, and ii. 11, 2; Ersk. ii. 3, 19; *King* v. *Chalmers*, November 15, 1682, 1 Ross' Leading Cases, 18; Bell's Lectures on Conveyancing, pp. 576, 578, and 647. It was a question whether words of *de presenti* conveyance were necessary to pass property in lands where there were words of conveyance *de preterito*. In all cases where *de presenti* words had been held necessary, the question had been whether words *de futuro* were sufficient. The deed of 1764 contained executive clauses as well as all essential conditions of the grant. There was no novelty in distinguishing one of a batch of obligations from others, and holding that it was to run with the lands, and that the others were personal. When an obligation was of a continuing character as here, there was no reason why it should not transmit against singular successors. This obligation was a counterpart of the obligations undertaken by the vassal. The charter of 1814 barred the superior from maintaining that the feu-duty was due except upon the conditions of relief contracted for. Being a charter by progress it could not alter the conditions of the title, and it was therefore necessary to go back to the deed of 1764—*Harvie* v. *Stewart*, &c., November 17, 1870, 9 Macph. 129; *Duke of Montrose* v. *Stewart*, February 15, 1860, 22 D. 755, March 27, 1863, 1 Macph. (H. of L.) 25, and 4 Macq. 499; *Stewart* v. *M'Callum*, February 14, 1868, 6 Macph. 382, February 17, 1870, 8 Macph. (H. of L.) 1; *Hope* v. *Hope*, February 20, 1864, 2 Macph. 670; *Dunbar's Trustees* v. *British Fisheries Society*, July 12, 1878, 5 R. (H. of L.) 221. The obligation had not been extinguished by the negative prescription. In 1856 there were thirty-four years' arrears of feu-duty. The moment the feu-duty was exacted the counter claim was made, and the matter referred to Mr Penney. Thereafter feu-duty was paid for twenty-nine years without deduction, but for some of that time under the award by a person bound thereby, and since 1885, when the pursuers became aware of the existence of the clause of relief, it had been paid under protest. The pursuers were not bound by the submission—*Fraser* v. *Lord Lovat*, July 29, 1850, 7 Bell's App. 171.

The defender and respondent argued—The obligation of relief was not binding on the defender. There was no mention of it in the recent charters. In order to modify the existing feudal relations the pursuer was bound to show a very clear title. The contract of 1764 could in no way be held the foundation of a valid feudal title. It was titled and recorded "contract and agreement," and it contained no words of *de presenti* conveyance. The infeftment following upon it was a bad infeftment. Even on its terms, however, the obligation to relieve was clearly intended to be only a personal obligation on the superior, and was not intended to be binding on his singular successors. It was not the counterpart of the *reddendo* at all, another remedy being provided by the superior binding himself to make these burdens real burdens on his other lands; the inference was that the obligation had nothing to do with the lands in question. All that was done by Chalmers in the agreement of 1764 was to engage to grant a feu right in certain terms. There was nothing in the disposition of 1779 or the charter of 1814 to impose the burden of stipends, &c., on the superior if that had not been done by the deed of 1764. The subsequent charters of 1856, 1868, and 1869 contained no mention of this obligation of relief, and the obligation had been extinguished by the negative prescription, there having been no deduction from the feu-duty for sixty-three years. The question had also been settled by the submission to Mr Penney, and was *res judicata*—Stair, iv. 40, 16; Bell on Arbitration (2nd ed.), p. 262; *Rutherfurd* v. *Nisbett's Trustees*, November 27, 1832, 11 S. 123; *Earl of Leven and Melville* v. *Cartwright*, June 12, 1861, 23 D. 1038.

At advising—

Lord President—This action is brought by the marriage-contract trustees of Dr Andrew Durie and his wife, who are the proprietors of the *dominium utile* of 60 acres of the Room of Drumtuthill lying in the parish of Dumfermline

and county of Fife, against the superior in the lands, to have it found and declared that the superior is "bound to free and relieve the said lands of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, excepting the feu-duty payable by the said lands, and also to make repetition to the pursuers of all payments they have made or may yet make in respect of such minister's stipend, schoolmaster's salary, cess, and public burdens since the term of Martinmas 1882, being the date at which the defender became superior of the said lands."

The existing investiture of the lands is a writ of confirmation by John Buchan Hepburn dated 7th June 1869, in which under the form prescribed by the Conveyancing Act of 1868, he enters the marriage-contract trustees in place of the last vassals with this qualification, "only in so far as consistent with the charter of confirmation granted by me as superior foresaid in favour of Henry Black, solicitor in Edinburgh, 'and others' dated the 20th day of June 1856."

Now, this writ of confirmation really contains nothing but what I have read, except a formal statement of who are the parties entered, and those in whose place they are entered. It contains no *tenendas* and *reddendo*, as they are not necessary clauses under the Act of 1868, and therefore a reference back to the charter of 1856 is necessary to complete the terms of entry under this writ of confirmation. It must, in short, be taken that the charter of 1856 together with this writ of confirmation constitute the existing investiture of the lands. Now, the charter of 1856 was granted by John Buchan Hepburn, the then superior of the lands, and he confirms to the disponees in the deed of settlement of the late Dr Durie the 60 acres in question, and an instrument of sasine in the lands dated 1st May 1845. The *tenendas* and *reddendo* clauses are thus expressed:—"To be holden the said lands and others immediately of me and my foresaids, superiors thereof, in feu-farm, fee, and heritage for ever; paying therefor yearly the sum of £3 sterling at the term of Martinmas, and doubling the said feu-duty the first year at the entry of every heir and singular successor and being thirled to Meldrum's Mill, conform as the said lands are thirled," and so forth.

Now, the conditions of the tenure are therefore clearly expressed in the charter of 1856, and there are none except the manner of holding, the feu-duty, and the servitude. The obligation to relieve of minister's stipend, &c., is therefore not in the existing investiture of the lands, but of course if that obligation occurs in the original constitution of the holding, it would be quite competent for the vassal to go back to it and say that he is not barred from insisting in the conditions of the original right because they are omitted in the charter of confirmation.

But, then, is there an original feu right in existence, and if so, what is it? This inquiry does not involve the consideration whether the vassal has a good feudal title, because he is possessing under a charter from the superior, and has been so possessing for more than the prescriptive period. The title to the feu is therefore unimpeachable. The vassal, however, says he has got the deed which is really the constitution of the original feu right, and that it contains the obligations sought to be enforced.

This writing is dated in 1764, and is certainly a very singular document. I might almost say that it is a sort of bargain or contract such as has never been seen before in the history of conveyancing in this country, and it therefore requires precise consideration. It sets out that "Mr George Chalmers has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said William Drysdale, his heirs and successors, of sixty acres Scots measure of the Room of Drumtuthill, "being no doubt the sixty acres of which the pursuers are in possession." The words are "has sold and disponed," which words in the ordinary forms of our conveyancing writs mean that he "has already agreed to sell and dispone," but they are not followed by the words "and hereby sells and dispones;" the words following are, "and binds and obliges him, his heirs and successors, to grant a feu right." He has not therefore granted a feu right, but he comes under a personal obligation to grant one. The lands are next described, and the deed then proceeds thus—"To be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, and doubling the said feu for the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled, all lying within the parish of Dunfermline and shire of Fife, and reserving the coal, freestone, limestone, and other minerals below ground, with liberty to win the same and to make pits, levels, coalbills, and roads for that purpose, upon paying damages above ground (the said William Drysdale always having liberty to win freestone and limestone for the uses of the farm allenarly), and to assign the rents from and after the term of Martinmas 1765 for crop and for year 1766."

Now, all these provisions are governed by the original words "binds and obliges him, his heirs, and successors," and then comes the particular obligation in question, "and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said 60 acres" . . . "for the which causes, and on the other part," on Mr Chalmers granting a feu-contract as expressed, he, the other party, "binds and obliges him, his heirs and successors, to content and pay to the said Mr George Chalmers, his heirs, executors, and successors whatsoever, the sum of £600 sterling, and that at and against the term of Martinmas 1765."

Now, all this therefore stands upon the obligation of the granter, and there is nothing but a personal contract between the parties. Of course if a feu right followed upon it, and contained all these clauses, and Mr Drysdale paid the £600, and received delivery of the feu right, he would then have become vassal in the lands, and the obligations *hinc inde* would have been binding on both parties. But we are bound to assume that no feu right was ever granted, because we are shown none, and that the sum of £600 was never

paid. In short, this deed remains exactly what it was from the beginning, a personal obligation on the one hand and the other.

There is superadded to this deed a precept of sasine in the simplest and purest form, and on that infeftment was taken. It is not easy to see with what view a precept of sasine was added to this singular deed, but certainly mere infeftment on an unqualified precept could never convert the contract in question into a valid feu right—could not feudalise the personal obligation in the instrument.

That being so, it appears to me that what the vassal here refers to for the purpose of correcting the terms of the existing investiture is not a feu right at all, but contains only a personal obligation, and not even a personal obligation to free and relieve from minister's stipend, &c., but only to insert in the feu-contract an obligation to that effect. That is not an obligation binding on the singular successors of Chalmers, who granted the obligation. The progress and history also of the case is certainly against the supposition that this was ever considered to be a condition of the right of property of William Drysdale or a condition of the superior's drawing the feu-duty, because there was never any demand, so far as can be seen, from 1764 down to the present time, that this obligation should be fulfilled.

There was something attempted to be made of the charter of 1814, and it is quite necessary to refer to it to remove any confusion that may seem to arise from its terms. It confirms a disposition dated 18th April 1769 granted by William Drysdale, the supposed feuar in the instrument of 1764, in favour of Charles Durie of Craigluscar, and also another by the same party and in favour of the same party dated 8th April 1779, and then after setting out the lands the charter proceeds thus—"Which lands, with the teinds and others foresaid, were sold and disponed to the said William Drysdale by the said George Chalmers by contract of sale entered into between them dated the 5th day of June 1764, and which contains an obligation upon the said George Chalmers to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 stg. therein mentioned, and to make the said public burdens a real burden upon his other lands, together with the obligement to infeft *a me vel de me*, procuratory of resignation, precept of sasine, and other clauses contained in the said disposition."

Now, it appears pretty clear that the conveyancer who drew this charter had never seen the deed of 1764, because he has misdescribed it from beginning to end. In the first place, he calls it a contract of sale, which it is not. Then he says it contains an obligation on George Chalmers, but not upon "his heirs and successors," to free and relieve from burdens, and when he rightly says that the deed contained an obligation to make the public burdens a real burden upon the other lands of the granter, he proceeds, "with the obligement to infeft *a me vel de me*, procuratory of resignation" (and who ever heard of a procuratory of resignation in a feu right?), "precept of sasine, and other clauses contained in the said disposition." That is plainly a bungled title, whatever else might be said of it, and as I said before, it is perfectly clear that the conveyancer had not seen or had misunderstood the nature of the deed of 1764. It is not a contract of sale, it is not a disposition, it contains no obligation to infeft, and no procuratory of resignation. But still further, the obligation of relief is not binding on singular successors, taking the words of the charter, because it is only an obligation upon the said George Chalmers, and no one else — a personal obligation upon George Chalmers—and an obligation to make the public burdens a burden on his other lands. There is not a word of making it a condition of the feu right, or a condition of the superior's being entitled to demand his feu-duty.

Therefore, while the deed of 1814 introduced a certain amount of confusion into the argument, it shows how completely the deed of 1764 has been misunderstood throughout, and it also shows by making reference to no other contract or deed, being a contract of feu, that no feu-contract ever followed upon it.

I have therefore come to the same conclusion as the Lord Ordinary, that there is no obligation of relief such as is here sought to be established.

Lord Mure—I agree in the result arrived at by the Lord Ordinary.

We were referred to the case of the *Duke of Montrose* to the effect that an obligation of relief transmitted to and was enforceable by a singular successor of the vassal against the superior, and did not require express assignation by the vassal to his heirs and disponees. But that decision proceeded on the ground that the original feu right granted by the Duke of Montrose created an obligation in favour of the vassal, his heirs and successors, to relieve them of these burdens, and that that obligation was contained in the feu-contract itself, and constituted by infeftment following upon it; the basis of the judgment being that there was privity of contract between the superior and vassal to the effect that the latter was to be free and relieved of these burdens in all time coming, and the obligation was held to be feudalised against the superior in the lands because it was part of the constitution of the feu right.

In the present case the existing investiture contains no obligations of this description, and we are thrown back to the original title of the pursuer to see whether any such obligation was in the deed then granted. Now, we have not been referred to any deed of the nature of a feu-contract which contains any such obligation on the part of the superior. We have been referred to a contract containing an obligation by Chalmers to grant a feu right, but it appears never to have been granted, probably because it was only to be granted on payment of £600, and the fact that there never was a feu-contract granted leads to the opinion that the £600 was never paid, and that the obligation of relief was never attempted to be enforced against the superior. No such obligation was ever made part of a feu-contract. The charter of 1814 cannot be said to be of that nature. Therefore nothing more in this case can be pleaded against the superior than that the original contract granted by Chalmers laid a personal obligation on him, his heirs and successors, to free and relieve the vassal of stipend and other public burdens. Accordingly, it has never

been attempted to enforce that obligation by legal proceedings since 1764, though the obligation by its terms is to relieve of public burdens in all time coming.

I therefore concur with your Lordship.

Lord Shand—I am not prepared to say that I have found this case altogether free from difficulty, but after giving it full consideration I have come without difficulty to be of the same opinion as your Lordships. If the document of 1764 had been a feu-contract containing clauses to the effect that the subjects were conveyed on condition of payment of feu-duty, and with an obligation to relieve of public burdens, I should have had no doubt, after the decision to which we have been referred, that it would have been held that the obligation of relief was the counterpart of the obligation to pay feu-duty, but the case falls far short of that. The only case presented on behalf of the vassal is that he can show from a series of titles that the parties accepted this deed as a feu-contract, and looking to the terms of the deed it would require a very clear statement of obligation in the later deeds to operate the result argued for by the pursuers. There is nothing in any deed to which we have been referred which does so operate. It is quite plain that when the document in question was originally granted, it was not intended to be a feu-contract regulating the rights of parties. No doubt the person who desired to have the lands desired to have infeftment and got it, but there was no direct disposition of the lands, and when the obligations were inserted, and, among others, one of relief from public burdens, they were all subject to this undertaking to pay £600. Now, whether that sum was paid or not, as a matter of fact we do not know, but it may fairly be assumed that if it had been paid a feu-contract would have been granted. If it was not paid, what were the terms on which the parties allowed this deed to become the permanent title? If a feu-contract had been prepared the seller might have decided to insert the clause of relief, but he might not, and so, taking the document as we have it, unless it is made clear by a subsequent title that the superior treated this contract as a feu right, not merely as to the title of the vassal, but also as to the obligations *inter se* of the parties, the pursuers cannot succeed.

Now, we have been referred to the charter of 1814. The conveyancer who drew that deed seems to have had very imperfect knowledge of the contract of 1764, but it is to be observed that in narrating the obligation in question he does not treat it as anything but a personal obligation by Chalmers. There is no indication that he looked on it as an obligation on the heirs and successors of Chalmers in the superiority, and one might argue from that that it was probably ultimately arranged that it was not to affect persons taking the title of superior in time coming. That is not a reference which favours the view of the pursuers that the superior is liable to that obligation. The later charters also make no reference back to the conditions of the original deed.

Now, I do not think when a condition contained in an extraordinary deed of this sort is omitted in the subsequent charters we can go back to the original deed to supply it. I say so for the reason that we have no feu-charter here, and in accepting this deed as the title the parties accepted it with the character it had, but I am not prepared to say that they imported all the conditions contained in it into the title, or that they intended to do so.

I am therefore of opinion that the Lord Ordinary has reached a right conclusion.

Lord Adam—I have no doubt at all that it is lawful to go back to the original investiture to correct an alleged omission in a charter by progress, but I am not aware that it is lawful to correct an alleged omission by reference to anything but the original investiture. It is new to me that it is possible to correct an omission in one charter by progress by reference to another, and if an attempt were made to control a later charter by progress by an earlier, I should say there was no authority for it. I should rather be inclined to say that the later charter by progress must rule or correct the earlier. The insuperable difficulty in the defender's case is that they cannot produce the original grant. They produce a deed called a contract, but it is a mere personal contract. We do not know whether a feu-contract was ever granted, or, if it was, on what terms or conditions it was granted. Therefore the only means of supplying the alleged omission in the charter by progress is awanting, and consequently I think it must be ruled by the later documents.

The Court adhered.

Counsel for the Pursuers—Sir C. Pearson—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defender—Gloag—Jamieson. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, July 12.

FIRST DIVISION.

MUIR AND OTHERS (MUIR'S TRUSTEES) *v.* MUIR.

Sucession—Legacy—Accretion—Residue—Unascertained Class.

A testator directed his trustees to hold the residue of his estate for behoof of and equally among the issue of his only child, to accumulate the interest, and to pay the shares of accumulated principal and interest to sons on their attaining twenty-five years, and on the daughters attaining that age or being married, to hold their shares for them in liferent for their liferent alimentary use allenarly, and their respective children in fee. He provided that if a grandson died before the period of payment without issue his share should accresce to the survivors, but there was no similar provision with regard to the granddaughters' shares. A granddaughter survived the testator, but died before the period of payment without leaving issue. *Held* that the share set free by her death went to form part of the undivided residue of the testator's estate.

William Muir of Inistrynich, Argyllshire, died on