said to the pursuer "I will put you in prison."

That is the whole statement made by the pursuer, and the innuendo sought to be put upon it is that the defender meant "that the pursuer had been guilty of such criminal misconduct as would warrant his being apprehended on a criminal charge, and thereafter imprisoned." It appears to me that these words which were admittedly used, or something like them, will not bear the construction sought to be put upon them. I think it a most unreasonable and forced construction, because the only imputation made against the pursuer by the defender was one of incompetence and neglect of duty, which as cashier and managing clerk of the company the defender had a perfect right to make if he thought himself justified. That was the only subject of quarrel. It is no doubt ludicrous to say that because of negligence the defender had the power to put the pursuer in prison, but either from anger or from some other reason the defender seems to have had the notion that in a contract of the kind between the pursuer and the company he had the power to enforce fulfilment by imprisonment, but it is important to observe that no criminal charge was made against the pursuer. The way the innuendo puts it is that the defender meant "that the pursuer had been guilty of such criminal misconduct as would warrant his being apprehended on a criminal charge, and thereafter imprisoned." It is not suggested what kind of criminal misconduct is intended, and I think even if it were otherwise intelligible, the innuendo is not sufficiently precise. Some kind of criminal charge must be alleged. Apart from that, however, it is perfectly plain that no kind of imputation of a criminal offence could be intended. The details of the interview and misunderstanding between the parties show that the only question between them was a question of the performance or non-performance by the pursuer of his duties as clerk. I think, therefore, the case falls under the category of such cases as *Broomfield* v. *Greig*, March 10, 1868, 6 Macph. 563, 40 Scot. Jus. 568, where the Court held that an innuendo of a forced and unreasonable character could not be allowed to be put upon words not in themselves slanderous.

LORD SHAND—There are two separate grounds, I think, for refusing an issue. The words "I will put you in prison," following upon angry words previously used, satisfy me that this was a mere scolding interview. The defender was angry at the letter he had received, and charged the pursuer with being unfit for his duties, and followed that up with a threat of imprisonment. That was scolding and nothing else. If these words, however, had been spoken in all calmness, I should still have held that they would not bear the construction attempted to be put upon them. Imprisonment for debt has been abolished, but imprisonment to enforce obligations *ad factum præstandum* still remains, and the defender might have thought that he had the right to enforce this contract of service by imprisonment. If there had been any allusion to loss of money or anything of that sort, it would be different, but in the absence of anything of the sort I am of opinion that the proposed innuendo cannot be put upon the words in question.

LORD ADAM concurred.

LORD M'LAREN — I am of the same opinion. It is true that our law gives more encouragement to actions of damages for slander than the law of England, for by that law actions for verbal slander are only allowed when the words complained of impute an indictable offence, or at least one punishable by fine or imprisonment. We make no distinction between written and verbal slanders in this respect, but we have never gone so far as to hold that mere unmeaning abuse—mere vituperation—will give a right of action. We only give compensation for defamatory language, that is to say, language which conveys some definite imputation as to the character or conduct of a pursuer.

It may seem hard to the pursuer that he should have no remedy for coarse abuse levelled at him, but he always has the power to repay the person who has so attacked him in his own coin, and in such cases the right is generally taken advantage of to the fullest extent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the defences, and assoilzied the defender.

Counsel for the Pursuer—Baxter. Agent —J. H. Dixson, W.S.

Counsel for the Defender—C. S. Dickson — Salvesen. Agents — Beveridge, Sutherland, & Smith, S.S.C.

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*Thursday, January* 23.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.

## DICK LAUDER *v.* THORNTON.

*Superior and Vassal — Casualty — Duplicand of Feu-Duty on Entry of Each Heir or Singular Successor — Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4, *sub-secs.* 2 *and* 3.

An heir of entail by feu-contract granted in 1864 feued subjects for payment of feu-duties, "and doubling the said feu-duties at the entry of each heir and singular successor as the taxed casualties due upon each entry, and that over and above the feu-duty for the year in which such entry takes place." The charter forbade subinfeudation, and took heirs and singular successors of the vassal "bound to enter with the heir of entail in possession, and be infeft within three months of the date of the purchasing or succeeding," and included irritant clauses.

Various transmissions of the subjects took place between 1864 and 1887, and on each occasion the purchaser paid a duplicand of the feu-duty to the superior. A purchaser bought the subjects in 1887 and was infeft, and when sued by the superior for payment of a duplicand of the feu-duty he pleaded that the last vassal who had paid a casualty was still alive, and as the fee was full, the demand was incompetent in view of the Conveyancing Act 1874, sec. 4, sub-secs. 2 and 3, and at common law.

*Held* that the superior was entitled to payment of the casualty within three months from the date of the purchase, in view of the defender's obligation to enter within that time, and of the irritant clause which enforced his obligation.

By private Act of Parliament dated 22nd June 1825, the heirs of entail of the entailed estate of Grange were authorised to feu out the same after exposure to roup on certain conditions which were to be inserted in any original feu-charter or other feu-right granted by the heirs of entail, *inter alia*—"Declaring that it shall not be lawful to the vassals or persons severally in the rights of any such feus to sub-feu or sell all or any part of the said feus or lands, or absolutely to dispone the same, so as to be held of them or their heirs or disponees, or of any other interjected superior, but whatever part or parts of the said lands shall be so feued and disponed shall be holden immediately of and under the granter, and of the heirs of entail succeeding to the said entailed lands and estate, and of no other person or persons whatsoever, and the heirs and singular successors of the vassal or vassals or other person or persons in the right of the said feu or feus shall be bound to enter with the heir of entail in possession as aforesaid, and be infeft therein, within three months of the date of their purchasing or succeeding to the said feu or feus, or any part thereof."

The late Sir John Dick Lauder, the heir of entail then in possession of the estate, feued out lots 254 and 255 of the Grange feus to Frederick Thomas Pilkington by feu-contracts dated respectively 1864 and 1867. They incorporated the provisions of the Act of Parliament mentioned above.

By the first contract Mr Pilkington bound himself and his heirs, executors, and successors whomsoever to pay certain feu-duties, "and doubling the said feu-duties . . . at the entry of each heir and singular successor . . . as the taxed casualties due upon such entry, and that over and above the feu-duty for the year in which such entry takes place . . . viz., Declaring that it shall not be lawful to nor in the power of the said Frederick Thomas Pilkington, or the vassal or vassals, or other person or persons in the right of the said feus, or either of them, to assign this precept of sasine, or the precepts of sasine to be contained in any of the future charters of the said subjects, but that they shall in all cases be bound and obliged to take infeftment thereon, or within three months from the date of delivery thereof and of such charters at furthest; and further declaring that it shall not be lawful to the said Frederick Thomas Pilkington, or the vassals or persons severally in the rights of the said feus or either of them, to sub-feu or sell all or any part of the said feus or lands hereby disponed, or absolutely to dispone the same so as to be held of them or their heirs or disponees or of any other interjected superior, but whatever part or parts of the said lands shall be so feued and disponed, shall be holden immediately of and under the said Sir John Dick Lauder, the granter, and of the heirs of entail succeeding to the said entailed lands and estate, and of no other person or persons whatsoever, and the heirs and singular successors of the said Frederick Thomas Pilkington, or the vassal or vassals, or other person or persons, in the right of the said feus, hereby disponed, or either of them, shall be bound to enter with the heir of entail in possession as aforesaid, and be infeft therein within three months of the date of their purchasing or succeeding to the said feus or any part thereof . . . declaring also that all sales, dispositions, or other conveyances and transmissions, legal or voluntary, of the whole or any parts or portions of the said lands, upon terms in violation of or inconsistent with these conditions, declarations, and provisions, shall be *ipso facto* void and null to the disponees thereof, with all that shall follow or may follow thereon. . . . All which clauses, and the conditions, declarations, and provisions thereof, with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow hereupon, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feus or either of them, otherwise this feu-contract and such sasines, conveyances, transmissions, charters, and investitures of the said feus or either of them shall not only be void and null, but the said Sir John Dick Lauder and every other heir of entail in possession of the said entailed lands and estates, omitting to repeat the same in the subsequent charters or other investitures granted by him or them of the said feus or either of them, shall thereupon, for himself or herself only, incur an irritancy, as in a case of contravention of the said entail; and in the like manner the said vassal or vassals, or other person or persons in the right of the said feus or either of them, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses in any instrument or instruments of sasine to be taken of the said feus or either of them, or in any of the transmissions or conveyances thereof, such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals, or other person or persons in right of the said feus or either of them, shall forfeit and lose all right and title thereto, and the same shall belong to the said Sir John Dick Lauder or the heir of entail in possession as said is, in the same manner as if the said feus had never been granted."

Similar clauses were inserted in the contract of 1867.

By disposition dated 1869 Mr Pilkington disponed parts of these subjects to Lady Elizabeth Hamilton Dalrymple, who conveyed the same to Mr Samuel Raleigh, dated May 1872. Mr Raleigh acquired two other parts of the said subjects from Mr Pilkington by disposition dated 1872. These were all acquired under the provisions in the original feu-rights, and the dispositions were confirmed by the superior by charter of confirmation in 1873, which contained the following provisions—"Doubling the said feu-duty of one hundred and eighty-five pounds seventeen shillings and sixpence halfpenny sterling, being at the rate of twenty-five pounds sterling per imperial acre per annum, at the entry of each heir and singular successor to the said lands and others, hereby confirmed as the taxed casualty due upon such entry, and that over and above the feu-duty for the year in which such entry takes place."

A casualty of a duplicand of the feu-duty was paid both by Lady Dalrymple and Mr Raleigh on acquiring the feus.

Mr Raleigh died on 26th July 1882, and his trustees on 14th November 1882 paid the superior a casualty of £371, 15s. 1d. Mr Raleigh's trustees in May 1887 sold the subjects in question to Mr George Boyd Thornton under the conditions, &c., contained in the prior conveyances and feu-contracts, and Acts of Parliament, and under burden of payment of a duplicand of the feu-duty of £185, 17s. 6½d., and entry by each heir or singular successor.

Sir Thomas Dick Lauder, as superior of the subjects, now sued Thornton for payment of the casualty of £371, 15s. 1d., as due on 17th May 1887, the date of the defender's infeftment.

He pleaded—"(1) The said casualty being due by the defender to the pursuer and unpaid, the pursuer is entitled to decree in terms of one or other of the two first alternative conclusions of the summons. (3) The defender having purchased the feu, and being bound under the feu-contract to enter with the pursuer as superior thereof within three months after the same was conveyed to him, and to pay the casualty on recording the disposition in his favour, is liable in the sum sued for to the pursuer, who is entitled to decree as concluded for."

The defender averred—"Explained that Mr Pilkington, the original vassal, is still alive, and that Mr Samuel Raleigh's trustees, from whom the defender purchased the subjects, are the last vassals infeft in the subjects, and who have paid a composition to the pursuer as for their entry. These trustees are still alive, and the fee is full. The subjects belonging to the defender consist of the whole of lot 255, and part of lot 254 of the Grange feus."

He pleaded — "(6) The feu-rights, as affected by the Statute of 1874, affording no ground for any of the actions herein pursued, the defender is entitled to absolvitor. (7) The exaction attempted by this summons of a fee or charge upon mere change of ownership, while the vassals who paid a casualty are still alive, is contrary to the Statute of 1874 and to common law, and the defender is entitled to absolvitor. (8) The present summons not being warranted by the statutes relating to feus, nor by the common law, nor by the terms of the feu-rights, the defender is entitled to absolvitor, with expenses."

The 3rd sub-section of section 4 of the Conveyancing Act 1874 provided — "Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of non-entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right for recovering, securing, and making effectual such causalties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming, but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of such entry."

On 2nd April the Lord Ordinary (KINNEAR) granted decree in terms of the petitory conclusion of the summons.

"*Opinion.*—By the terms of the contracts creating the feu-right the various parcels of land feued out are to be held for payment of certain specified feu-duties, 'and doubling the said feu-duties at the entry of each heir and singular successor to the said pieces of ground respectively, as the taxed casualties due upon such entry, and that over and above the feu-duty for the year in which such entry takes place.' The feu-contracts prohibit subfeuing, and stipulate that whatever parts of the land shall be disponed 'shall be holden immediately of and under' the granter, and the heirs of entail succeeding to him; and that heirs and singular successors of the vassal 'shall be bound to enter with the heir of entail in possession, and be infeft within three months of the date of their purchasing or succeeding.'

"All of these conditions were legal by the law in force when the contract was made, and were binding upon the vassal, and upon all persons deriving right from him. He could not relieve his disponees of the conditions on which his own right was created, and accordingly the conveyances, both to his immediate disponees and to the defender, are made subject to the conditions of the original feu-contracts, and, among others, to the condition that a sum equal to double the feu-duty shall be paid on the entry of each singular successor. The defender therefore took his title with notice of the terms on which the right was granted, and in particular of the claim which the superior now seeks to enforce.

"But for the Act of 1874 the defender could not have taken infeftment on the conveyances in his favour without the intervention of the superior. The vassal's precept would have had no validity in itself, and an infeftment taken upon it would have been a mere nullity until it had been confirmed; but the superior could not have been compelled to grant a charter of confirmation, or a charter of resignation, except upon the terms stipulated in the feu-contract. The defender therefore could not have acquired a real right without making payment of double the feu-duty to the superior. As the law stands, since the Act of 1874 he is duly infeft and entered by the registration of his conveyance. But the statute does not relieve him of the conditions, upon which alone he could have acquired a real right by the former law. By section 4, sub-section 3, the superior has right to enforce payment of any casualties or feu-duties which may be due and exigible at or prior to the date of the implied entry, 'provided that the implied entry shall not entitle any superior to demand any casualty sooner than he could by the prior law, or by the conditions of the feu-right, have required the vassal to enter, or to pay such casualty irrespective of entering.'

"The case is within this enactment, and is not affected by the proviso, because by the conditions of the feu-right the defender was bound to enter, and to make the payment demanded at or prior to the date of his entry.

"It is said that the conditions which the superior desires to enforce would have been ineffectual under the former law. But I see no reason to doubt their validity. Prior to the Act of 1874 a prohibition against subfeuing was legal, and its legality is recognised in the Consolidation Act of 1868. No purchaser therefore, could have obtained infeftment except upon the terms stipulated in the contract. The defender's counsel relied upon a passage in Duff's Conveyancing, page 216, for the purpose of shewing the inefficacy of all conditions for creating what the writer calls an artificial sort of non-entry. But the difficulty which Mr Duff points out does not arise in the present case. There might be great difficulty in enforcing such stipulations either under the former law or under the present, so long as a purchaser is content with a personal right, and does not attempt to take infeftment. The superior could not compel a new entry so long as an entered vassal remained in life, and he could not enforce the obligations of the contract against a purchaser who had not taken up the feu-right. This is the meaning of the passage cited. But Mr Duff does not suggest that the superior should have any difficulty in enforcing the conditions of the contract against a purchaser who has made himself a party to it by taking infeftment in the lands, and that is the position which the defender has assumed.

"It is no hardship to him that he should be required to pay the sum sued for, because it is merely a part of the price which by the terms of his title he had undertaken to pay. It must be assumed that his liability to the superior was taken into account in fixing the remaining part of the price which he pays to his immediate author.

"The defender's contention is in effect that he is entitled to hold the superior's land without paying the price, which he is taken bound to pay by the title which embodies his contract with the persons from whom he purchased, and the contract which through them he has made with the superior. The ground on which he claims to have obtained this advantage is that by reason of certain technical difficulties the superior has no remedy. But in so far as it concludes for payment, the action appears to me to be as correct in form as it is well founded in substance. I do not think it can be maintained as a statutory action in lieu of a declarator of non-entry, because that is available only where the lands would have been in non-entry but for the Act. But the defender by his own act has obtained an entry subject to the conditions of the feu-contract. It cannot be maintained that the entry so obtained discharges the pursuer's claim for the price, on payment of which alone the defender was entitled to procure it. And it follows that the pursuer has a good action to enforce such payment."

The defenders reclaimed, and argued—1. The rights of the pursuer prior to the Conveyancing Act of 1874 fell to be first considered. The original feu-charter contained no obligation to pay a casualty apart from an entry. A casualty could only be demanded on the death of the last entered vassal. The obligation to enter in three months was only for the purpose of compelling obedience to the stipulation against subinfeudation. Such a stipulation did not entitle a superior to compel an entry—*Morris* v. *Brisbane*, February 21, 1877, 4 R. 515. The only difference between that case and this was that here the vassal was bound to enter in three months. Such a condition could not have been enforced by an action *ad factum præstandum*, or by a reduction, but only by declarator of irritancy—*Colquhoun* v. *Walker*, May 17, 1867, 5 Macph. 773. It would have been otherwise if the defender had been entered *ad omnia*, but the stipulation was only intended to carry out the prohibition against subinfeudation. The duplicand of the feu-duty on entry was only the ordinary provision taxing an entry, and did not imply payment at any other time or earlier than by the common law under which on the death of a predecessor his heir or successor was bound to enter. The law was unfavourable to creating a status of artificial non-entry—Duff's Feudal Conveyancing, 216; Bell's Conveyancing, 621. 2. With regard to the pursuer's rights under the Act of 1874, assuming that before 1874 the superior could not have compelled an entry, and that therefore the superior could not have irritated the feu before the date of the Act of 1874, the question was whether the 4th section of that Act made any difference? The two clauses of irritancy in the charter

applied (1) to deeds and transmissions; (2) omissions to insert clauses in such deeds or transmissions both in violation of or inconsistent with the conditions of the charter. The first clause most nearly applied to this case, but the pursuer did not allege that the sale to the defender involved the irritancy. It concerned rather the superior as heir of entail, and related only to the consequences of subinfeudation. In the second clause the words "any of the conditions, declarations, and provisions above specified" could not cover all the conditions of the feu-contract, for if so the first irritancy clause would be superfluous. The conditions referred to were those immediately preceding and relating to the omission to insert clauses. No words in either clause were appropriate to bring an irritancy against anyone who had done nothing. The principal change in the relation of superior and vassal made by the 1874 Act was to make infeftment equal to entry by confirmation. Sub-section 3 of the 4th section saved the rights of both superior and vassal. *Morrison's Trustees* v. *Webster*, May 16, 1878, 5 R. 800, did not apply. There the special terms of the feu-contract made the compositions *debita fundi* recoverable by poinding the ground irrespective of entry. By the 1874 Act such clauses of irritancy were now of no effect. The superior could enforce his feu-contract only "in so far as the same may not have ceased to be operative in consequence of the provisions of the Act." It was only indirectly by exposing the title to risk that the irritancy could formerly cause an entry to be taken. The Act removed this risk and gave so much to the vassal. Under the Act only such a clause as in *Morrison's Trustees* would warrant such an action independent of any entry being taken.

Argued for the respondent—1. As to his rights before 1874. Formerly a superior was never bound to give an entry, and therefore the question could not arise whether a singular successor was bound to give an entry. But if the vassal failed to obey the provisions against subinfeudation and as to entry in three months the superior would have irritated the feu. The provision against subinfeudation had been obeyed—the holding being *a me*—and the charter expressly declared that a purchaser from Pilkington should enter in three months—*Colquhoun's* case, 5 Macph. 773, only decided that the superior's remedy was incompetent in the special circumstances. Here the obligation to enter was a condition of the right, and could have been enforced as *debitum fundi*—*Morrison's Trustees* v. *Webster*, May 16, 1878, 5 R. 800; *Stewart* v. *Gibson's Trustees*, December 10, 1880, 8 R. 270. 2. Under the 1874 Act—The defender forgot that he was entered by the 4th section, (3) and (4). The superior had right to the sum sued for at entry. In *Moir's* case there was a clause forbidding subinfeudation, but none compelling entry within a certain time.

At advising—

LORD PRESIDENT—In 1825 the late Sir John Dick Lauder, as heir of entail of the estate of Grange, obtained an Act of Parliament to enable him to feu a portion of the estate, and the feu-contract, which is the foundation of the defender's title, was granted under the authority of that Act. It refers in general terms to the conditions, declarations, and provisions, contained in the Act of Parliament, all of which are binding upon the parties to the feu-contract. The subjects in question having been exposed for sale by public roup, were purchased by Mr Pilkington, and accordingly by the feu-contract which followed upon the sale, Sir John Dick Lauder conveyed to Mr Pilkington and his heirs and assignees whomsoever in feu-farm, certain pieces of ground, "always with and under the conditions, declarations, provisions, and others contained in the said articles of roup. . . . And also with and under the conditions, declarations, and provisions contained in the said Act of Parliament." It was provided that the lands should be holden "by the said Frederick Thomas Pilkington and his foresaids immediately of and under the said John Dick Lauder and the heirs of entail succeeding to the said entailed lands and estate respectively in feu-farm, fee, and heritage for ever." And on the other hand Mr Pilkington bound and obliged himself, and his heirs, executors, and successors whomsoever to make payment to Sir John and his foresaids of certain feu-duties therein specified, and "doubling the said feu-duties, . . . at the entry of each heir and singular successor to the said pieces of ground respectively, as the taxed casualties due upon such entry, and that over and above the feu-duty for the year in which such entry takes place." The feu-contract also contains a very express declaration to the following effect, viz.—"Declaring that it shall not be lawful to nor in the power of the said Frederick Thomas Pilkington, or the vassal or vassals, or other person or persons in the right of the said feus, or either of them, to assign this precept of sasine, or the precepts of sasine to be contained in any of the future charters of the said subjects, but that they shall in all cases be bound and obliged to take infeftment thereon within three months from the date of delivery thereof and of such charters at furthest: and further declaring, that it shall not be lawful to the said Frederick Thomas Pilkington, or the vassals or persons severally in the rights of the said feus, or either of them, to sub-feu or sell all or any part of the said feus or lands hereby disponed, or absolutely to dispone the same so as to be held of them or their heirs or disponees or of any other interjected superior, but whatever part or parts of the said lands shall be so feued and disponed, shall be holden immediately of and under the said Sir John Dick Lauder, the granter, and of the heirs of entail succeeding to the said entailed lands and estate, and of no other person or persons whatsoever, and the heirs and singular successors of the said Frederick Thomas Pilkington, or the vassal or vassals, or other person or persons, in the right of the said feus, hereby disponed, or either of

them, shall be bound to enter with the heir of entail in possession as aforesaid, and be infeft therein within three months of the date of their purchasing or succeeding to the said feus or any part thereof."

So far the provisions of the feu-contract are very clear and distinct. There is a prohibition against everything of the nature of subinfeudation, and there is an obligation in the usual terms imposed upon the feuar, his heirs, executors, and successors, to pay the feu-duty as it becomes due, and also to pay a duplicand at the entry of each heir and singular successor. Looking to the nature of these obligations, it is very clear that every successor in the feu—that is, everyone who becomes a vassal of the superior—is under a personal obligation to pay the feu-duty and a duplicand of it to the same effect as the original feuar. The words of obligation, "binds and obliges himself, and his heirs, executors, and successors whomsoever," have a perfectly fixed signification in law. They mean that the original vassal binds himself to make the payment, and that after his death he binds his heirs and executors to make payment of the arrears of the feu-duty. He also binds his successors in the feu, whoever they may be, to pay the feu-duties and casualties as they become due. The present owner of the feu is therefore under a personal obligation to pay the feu-duty and a duplicand of it whenever it arises. That an occasion on which the superior may claim payment of a duplicand of the feu-duty has arisen, I have no doubt, because the purchaser is an entered vassal. Apart from everything else, he is an entered vassal by virtue of the Conveyancing Act of 1874. To the effect of that statute in another respect I shall advert immediately. But to begin with, it is clear that the present defender is liable to pay not only all the termly feu-duties which are stipulated for, but also a duplicand of the feu-duty on the occasion of his entry.

It must be kept in view that the obligation to pay a duplicand of the feu-duty is not by any means confined to the occasion of the fee being vacant. The fee might be full, but the present defender being an entered vassal would be bound nevertheless to pay a duplicand whether the fee was full or not. This is very clear upon the face of the deed and in the existing circumstances.

But it has been maintained that as the defender has been entered *vi statuti*, therefore all the qualifications which have been created by the statute, and apply to the case of a vassal impliedly entered, must be observed. In the first place the statute provides that an implied entry "shall not entitle any superior to demand a casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering." It is said that if this question had arisen under the old law, and not under the Act of Parliament, an entry could not have been brought about by any means at the disposal of the superior. According to the Dean of Faculty's argument, a man could not have been compelled to become a vassal. In one sense this is true. It is true that the superior could not have brought an action to have a man ordained to become a vassal as a fact to be performed. The method which the superior took under the old law when a vassal declined to enter was to bring a declarator of non-entry, but he could only do this when there was no vassal, because a casualty was not payable so long as the fee was full.

But in the present case the matter stands on a different footing. According to the terms of the feu-contract, any person in right of the feu is bound to enter within three months from the date of delivery; and if he does not do so, he violates one of the provisions of the feu-contract by which he is personally bound. The defender asks, How is the obligation that he shall enter with the superior within the three months to be enforced? The answer is, by a proceeding analogous to the declarator of non-entry under the old law, but applicable to the new circumstances. It is not necessary that the fee shall be vacant in order that the obligation may be enforced. The fee may be full. The proceeding by which it may be enforced is, as I have said, perfectly analogous to that which would have taken place under the old law, and it is provided by the feu-contract itself; it is a proceeding by way of a declarator of irritancy of the feu if the vassal should fail to enter. This is a conventional irritancy, and in this respect perhaps it differs from the mode of enforcing an entry under the old law. But a declarator of non-entry was in reality nothing more than a means of enforcing an irritancy. That was the spirit and purpose of a declarator of non-entry; it was a means of forcing a vassal to enter by threatening him with the consequences if he failed to do so.

Under the feu-contract in the present case the superior can bring a declarator of irritancy if the defender refuses to enter. The provision in regard to that matter is as follows—"All which clauses, and the conditions, declarations, and provisions thereof, with this present clause or provision repecting the same, shall be repeated in the instrument or instruments of sasines to follow hereupon, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feus or either of them shall not only be void and null, but the said Sir John Dick Lauder and every other heir of entail in possession of the said entailed lands and estates, omitting to repeat the same in the subsequent charters or other investitures granted by him or them of the said feus or either of them, shall thereupon, for himself or herself only, incur an irritancy, as in a case of contravention of the said entail." That is an irritancy directed against the superior as heir of entail. And then follows this further provision—"And in the like manner the said vassal or vassals, or other person or persons in the right of the said feus or either of them, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses

in any instrument or instruments of sasine to be taken of the said feus or either of them, or in any of the transmissions or conveyances thereof, such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals, or other person or persons in right of the said feus or either of them, shall forfeit and lose all title thereto, and the same shall belong to the said Sir John Dick Lauder or the heir of entail in possession as said is, in the same manner as if the said feus had never been granted." That is the manner in which, if the Conveyancing Act of 1874 had not passed, the superior would have compelled the defender to enter. He would have brought a declarator of irritancy, and would have concluded for decree that the titles under which the feu was held were bad, and that the person contravening the provisions of the feu-contract had lost all right to the feu; and that action having been brought, the purchaser or the person succeeding to the feu would have been bound to enter or to forfeit his right to it.

That is enough for the settlement of this case. It shows that this is not an attempt on the part of the superior to get payment of a casualty sooner than he could have done so by the law prior to the Act of 1874, because under the feu-contract itself a casualty would have become exigible three months after the succession of a new vassal or a purchase by a singular successor, just the same as upon the death of the last vassal.

I am therefore of opinion that the Lord Ordinary has come to a sound conclusion.

LORD SHAND—The superior's demand for payment of a duplicand of the feu-duty in the present case has been met by a defence which arises upon certain words in the 3rd sub-section of section 4 of the Conveyancing Act of 1874, which your Lordship has read. It is said by the defender that although he cannot dispute that he has obtained an entry by taking infeftment upon his conveyance, no casualty is due, and he proceeds upon the rule of the ordinary case in maintaining that so long as his author is alive none can be charged. He maintained that although the entry is to have effect in other respects, the superior is not entitled to payment of a casualty sooner than he would have done prior to 1874. In other words it is maintained that so long as the fee is full, irrespective of his entry, the superior cannot claim a casualty. The reply which is made is, conceding that in the ordinary case the right to a casualty would not have opened to the superior until the death of the last entered vassal, yet there are stipulations in the feu-contract to which the defender is a party, entitling the pursuer to obtain decree for a specific sum from anyone who has obtained an entry irrespective of the fact that the last entered vassal is still alive. It is argued that by the conditions of the feu-right the superior could have required the defender to pay a duplicand of the feu-duty within three months of the date of his purchase, irrespective of his being entered.

I have come to the conclusion that the superior is right. The original feu-contracts of the subjects in question—the conditions of which are inserted in the subsequent transmissions of the feu—contain, in the first place, a prohibition against subinfeudation. In the second place, they contain an obligation upon anyone taking a conveyance of the feu to enter with the superior within three months of the date of his purchase. And, in the third place, it is provided that the purchaser shall also be infeft within three months.

I rather think,—although it is not perhaps necessary to determine anything on this point—that the vassal has complied with the obligations of the feu-contract in reference to the manner of holding and to subinfeudation. The conveyance under which the subjects were disponed to him contains nothing relating to the manner of holding, and in these circumstances it appears to me that the provisions of the 6th section of the Titles to Land Consolidation Act of 1868 apply. That section enacts that "where no manner of holding is expressed, the conveyance shall be held to imply that the lands are to be holden in the same manner as if the conveyance contained a clause expressing the manner of holding to be *a me vel de me* where the titles of the land contain no prohibition against subinfeudation or against an alternative holding." But the section proceeds, "and as if the conveyance contained a clause expressing the manner of holding to be *a me*, where the titles contain such prohibitions, or either of them." So that this conveyance must be taken on the footing that there is an implied condition that the holding is an *a me* holding only. There has also been a compliance with the obligation that the vassal shall take infeftment within three months of his purchase.

In my opinion, the superior could have obliged his vassal to enter within three months of his purchase. There is an obligation in the feu-contract to that effect, which is fortified by an irritancy. If it had not been so fortified, I think there might have been a great deal in the contention which has been maintained for the defender. A great part of the argument which was addressed to us was directed to the point whether the clause of irritancy did or did not cover the obligation to enter? I have come to the conclusion that it does cover it. It was submitted for the defender that the first clause of irritancy—"declaring that all sales, dispositions, or other conveyances and transmissions, legal or voluntary, of the whole or any parts or portions of the said lands, upon terms in violation of or inconsistent with these conditions, declarations, and provisions, shall be *ipso facto* void and null to the disponees thereof"—exhausted the irritancy so far as the conditions of the deed which preceded it. It is further contended that the subsequent clause of irritancy is limited to the case of an omission to insert in all deeds of transmission of the feu the whole of the conditions which it is provided are to be essential

to the validity of the contract. I am of opinion that that reasoning cannot prevail. The second clause of irritancy is the more sweeping of the two, and it has been inserted in order to supply any deficiency in the first. Its intention and effect was to create a forfeiture of the vassal's rights, and to throw the property back upon the superior. I was for a time impressed with a difficulty which occurred to me in reading the latter part of that clause, viz.—"such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals or other person or persons in right of the said feus or either of them shall forfeit and lose all right and title thereto," and was inclined to the view that the irritancy was confined to a failure to insert the clauses of the contract in the transmission of the feu. But I have come to be of opinion that the irritancy must be read back to the expression in the opening part of the clause, and, so read, the result is that the vassal would forfeit his right if a declarator of irritancy were brought against him upon his failure to enter with the superior within three months from his purchase. Accordingly, I think the superior was in a position before the Act of 1874 to bring a declarator of non-entry if the vassal failed to enter within three months, and therefore that the case is fairly within the provision of the 3rd subsection of section 4 of the Act of 1874, as prior to the passing of that Act the superior might have required the defender to pay the casualty. That being so, I think the Lord Ordinary is right in the conclusion at which he has arrived.

Lord Adam—The only clause in the feu-contract about the construction of which there has been any dispute is the second clause of irritancy—"Such vassal or vassals . . . shall forfeit and lose all right and title thereto, and the same shall belong to the said Sir John Dick Lauder or the heir of entail in possession . . . in the same manner as if the said feus had never been granted," and the dispute is whether it refers to a contravention of the whole conditions of the feu-contract, or whether it is limited to the immediately preceding clause, that is, the omission to insert the clauses of the contract in all sasines, conveyances, and transmissions of the feu. I cannot say that I have any doubt that the first is the proper construction. I think the clause refers us back to find out who "such vassal or vassals" are, and that takes us back to the beginning of the clause—"And in the like manner the said vassal or vassals, or other person or persons in the right of the said feus or either of them, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses in any instrument or instruments of sasine to be taken of the said feus or either of them, or in any of the transmissions or conveyances thereof." I therefore think the reference is clear that it is to the contravention of any of the conditions of the feu, as well as to the omission to insert the clauses in any future instrument that the irritancy refers, and I have no doubt that that is the proper construction.

What then are the conditions and obligations of the feu which are here in question, and which are binding upon the feuar? The heirs and singular successors of the original guarantee are taken bound to enter with the heir of entail in possession, and to be infeft within three months of the date of their purchase or succession. There is, accordingly, a clear obligation upon the vassal or upon any disponee or successor of the vassal, even before he takes infeftment, to enter with the superior within three months. There is no doubt that the defender in the present case has acquired right to the feu. He is in right of it in virtue of a disposition dated 9th May, and upon which infeftment was taken on the 17th May 1887. It is clear upon the construction of the clause that the defender was bound to enter with the superior within three months from May 1887, and I think the effect of the clause of irritancy to which I have referred is that he was not only bound to enter, but that he could have been compelled to enter in this sense, that if he failed to do so he would lose all right to the feu. That is the defender's position under the law as it stood prior to 1874.

The only question now is, what does the Conveyancing Act of 1874 say? for I think there is no dispute that the defender must pay unless he is exempted by the provisions of the 4th section of that Act. I do not think that there is anything in these provisions which would prevent his being liable. The words of the 3rd subsection of that section which are founded on are—"Provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu right have required the vassal to enter or to pay such casualty irrespective of his entering." Assuming that the irritancy does not apply to the case, could this vassal have been "required" to enter under the old law? I express no opinion upon that point, but I shall only say that I do not think it is clear that the word "required" in that subsection necessarily means "compelled." If there is a clear obligation in a feu-contract upon a vassal to enter, even although not forfeited by an irritancy, that possibly might be sufficient.

The question is, whether in the present case a casualty is being asked sooner than the vassal could have been required to enter under the old law. But under the old law he could have been required to enter within three months from the date of his purchase. It was not till many more months had passed that the present action was brought. Upon that ground I am of opinion that the Lord Ordinary's interlocutor is right.

But there is one sentence in the Lord Ordinary's note with which I cannot altogether concur. His Lordship says "the case is within this enactment, and is not affected by the proviso, because by the conditions of the feu-right the defender was bound to enter and to make the payment

demanded at or prior to the date of his entry." I do not think the Lord Ordinary has observed that the obligation to enter was not prestable under the feu-contract until three months after the date of the contract, and therefore, that as the vassal's implied entry took effect as at the date of the sasine following on the contract, the superior could not have demanded a casualty at the date of the implied entry, which would have been three months earlier than he could have demanded it under the old law.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—Asher, Q.C.—Murray. Agents—Scott & Glover, W.S.

Counsel for the Defender—D.-F. Balfour, Q.C.—R. V. Campbell. Agents—Wylie & Robertson, S.S.C.

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# HOUSE OF LORDS.

*Friday, March 7.*

(Before the Lord Chancellor (Halsbury), and Lords Watson, Bramwell, Herschell and Morris.)

## TANCRED, ARROL, & COMPANY *v.* THE STEEL COMPANY OF SCOTLAND.

(*Ante*, vol. xxv. p. 178, and 15 R. 215.)

*Arbitration—Reference to Arbiter Unnamed—Reference to Person Holding Office for Time Being—Delectus Personæ.*

The arbitration clause in a contract for the construction of a bridge provided that any question that might arise as to the meaning and intent of the contract should be settled, in the case of difference, by the engineer for the time being of one of the parties.

*Held* (*aff.* the judgment of the First Division) that the reference was invalid, there being no appointment of a referee inferring a *delectus personæ* on the part of the contracting parties.

*Custom—Usage of Trade—Contract—Proof Inadmissible where Language not Technical.*

A contract was entered into by which manufacturers of steel offered to supply the contractors, who were constructing a bridge, with "the whole of the steel required by" them for the bridge at prices which were stated and subject to certain terms and conditions, *inter alia*, "The estimated quantity of the steel we understand to be 30,000 tons more or less." The offer was accepted by the contractors, who repeated this estimate in their letter of acceptance. In an action at the instance of the manufacturers to compel the contractors to take from the pursuers the whole of the steel required for the construction of the bridge, the defenders averred that by the custom and practice of the iron and steel trade the contract was to be regarded only as a contract for the estimated quantity with a certain margin for variation.

*Held* (*aff.* the judgment of the First Division) that evidence of the alleged custom or usage of trade was inadmissible, as the words of the contract were unambiguous.

This case is reported *ante*, vol. xxv. p. 178, and 15 R. 215.

The defenders appealed.

The respondents were not called upon.

At delivering judgment—

LORD CHANCELLOR—My Lords, when once the questions sought to be raised by this appeal were sufficiently clearly before your Lordships, I do not believe that any of your Lordships entertained any doubt that this judgment must be affirmed.

The first question raised was as to the competency of the Courts to entertain this action at all, upon the ground that the parties had themselves selected their tribunal, and that it was not competent to the Courts to entertain the question which had been debated between them. That depended upon a question of Scottish law with reference to arbitration. My Lords, I doubt whether anything is gained in the elucidation of that question by considering the differences that may exist between the Scottish and English laws upon the subject of arbitration. This was a Scottish contract, and this litigation must be determined by the law of Scotland, and certainly for ninety-one years it has been recognised as part of the law of Scotland, constantly acted upon and recognised and affirmed in this House, that in order to have the effect which the appellants insist upon in this case the parties to an agreement for an arbitration must have selected an individual person. The question which first arises here is whether within that rule the parties have agreed upon a particular person. I do not understand the rule in Scotland to make any point as to the mode in which that person should be described. If an existing dispute was referred to a person not described by his Christian name and surname, but described by the name of his office, I do not understand that there is any decision of the Courts in Scotland which would not make that an effectual agreement so as to bar the Courts from exercising jurisdiction when pleaded by one of the parties as against the right of the other to appeal to those Courts. Feeling of course the pressure of the observation that arises upon that, the Attorney General sought to establish here that the engineer for the time being was Sir John Fowler, and that inasmuch as the dispute had arisen during the time that Sir John Fowler was the engineer, therefore each of the elements which he impliedly admitted were necessary in order to constitute an effectual bar in the Scottish Courts was established by those circumstances. But the fallacy of