has accepted a new vassal in his room. It is perfectly competent for the superior to stipulate for a payment in the nature of a casualty every twenty-five years, or at any other recurring period. But his remedy, if payment is withheld, is not by a declarator of non-entry, but by an action upon the charter or feu-contract, or by a declarator of irritancy, if the stipulation has been fenced by an irritancy, as is not uncommon in such cases. An action upon the charter assumes the existence of a feudal right, the conditions of which the superior desires to enforce. A declarator of non-entry proceeded on the superior's right to resume possession, because all rights flowing from him had determined, so that there was no existing vassal in the feu. That the statutory action cannot be used, any more than the old declarator of non-entry, as a method of enforcing obligations under a subsisting charter is decided in the cases of *Heriot's Hospital* v. *The Drumsheugh Baths Company* and *Dick Lauder* v. *Thornton*. The latter case is a clearer illustration of the distinction than is perhaps apparent from the report. For the superior had first brought an action in the statutory form, which was dismissed as incompetent, because on his own showing the fee was full. He then brought a second action containing an alternative conclusion for payment altogether independent of the statutory declarator, and based upon the conditions of the feu-contract. In this second action he obtained decree in terms of his alternative conclusion, and the distinction between the two remedies is explained by the Lord President in the later case of *Heriot's Hospital*. If the charters were effectual, therefore, the pursuers' remedy would not be the statutory action, but a common law action to enforce the conditions of the contract.

But, for the reasons already given, I think that in the present case such an action must have failed. It would still have been a superior's action against his vassal, and that is not the true relation between the parties. But at all events the action before us cannot be sustained, because it proceeds on the assumption that the defenders' title flows from the pursuers, and depends for its validity upon their grant, whereas in truth it depends on the Act of Parliament alone, and arises from the statutory power to take lands by compulsion from their grantee.

LORD PRESIDENT—I agree with Lord Adam and Lord Kinnear.

The Court assoilzied the defenders.

Counsel for the Pursuers—Sol.-Gen. Asher, Q.C.—M'Kechnie—Macleod. Agent—D. Forbes Dallas, S.S.C.

Counsel for the Defenders—H. Johnston—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Wednesday, March 15.

FIRST DIVISION.

HENDERSON *v.* HENDERSON AND ANOTHER.

Trust — Removal of Trustee — Judicial Factor.

A party conveyed certain house properties and other heritable subjects to A and three other trustees for behoof of B in liferent and A in fee, declaring it to be his wish that B should factor the properties, but with full power to the trustees to remove him. All the trustees accepted office, and B was appointed factor, but after a time he was removed, and the trustees, other than A, the fiar, subsequently resigned, with the result that the trust-estate came under the management of A as sole trustee. On the petition of B, the liferenter, who was dissatisfied with A's management, the Court, on the ground that the truster had never meant the trust-estate to be under the sole management of A, and that there was a conflict of interest between A and B, without removing A, *sequestrated* the estate and appointed a judicial factor.

By trust-disposition and conveyance, dated 15th and recorded 30th June 1877, James Holmes disponed certain house properties and other heritable subjects in Hamilton in favour of Robert Holmes Henderson and other three trustees, for behoof of James Henderson in liferent, and after his death for behoof of his wife Agnes Holmes Henderson in liferent, and for Robert Holmes Henderson in fee, but subject to the burden of an annuity of £100, and heritable bonds amounting to £2410. The truster declared it to be his wish that the trustees should appoint James Henderson, the liferenter, "to act as factor for the subjects hereby conveyed, with power to uplift the rents and feu-duties, and to execute all necessary repairs, but the appointment to continue only during the pleasure of the said trustees, with full power to them to remove him at any time from the office of factor."

All the trustees accepted office, and they appointed James Henderson as factor in terms of the truster's express desire, but at Whitsunday 1879 they removed him and appointed another factor. Down to 1889 the gross rental of the properties averaged about £367, but thereafter it considerably increased.

In December 1879 an agreement was concluded between Robert Holmes Henderson, the fiar, and James Henderson, the liferenter, which provided that Robert Holmes Henderson should be entitled to receive the free residue of the annual income of the subjects conveyed under the foresaid trust-disposition in place of James Henderson, and that in consideration thereof he should pay James Henderson an annuity of £52. It was also provided that James

Henderson should receive a house of not less value than £10 of annual rent.

On this agreement being concluded, the trustees under the trust-disposition and conveyance, other than Robert Holmes Henderson, resigned.

The agreement continued in force until 1884, when Robert Holmes Henderson requested his father to release him from it, and to accept the free residue of the rents of the subjects conveyed by the trust-disposition in place of the fixed annual payment provided for in the agreement. To this James Henderson agreed, and on his suggestion James Mackie was appointed to factor the property. Mackie continued to act in this capacity down to the date of the proceedings now to be mentioned.

In January 1893 James Henderson presented a petition, in which he craved the Court to sequestrate the estate, remove Robert Holmes Henderson from the office of trustee, and appoint a judicial factor.

The petitioner charged Robert Holmes Henderson with mismanagement and breach of trust. He stated that the properties were being managed in the interests of the fiar and to his prejudice, and averred that in several instances subjects had been let at a low rental on condition that the tenants should execute improvements which would ultimately increase the value of the estate.

Robert Holmes Henderson and his mother Mrs Agnes Henderson lodged answers objecting to the petition being granted. They denied that there was any substance in the charges made by the petitioner.

Argued for the petitioner—The truster had never contemplated that the fiar should manage the property as sole trustee. There was clearly such a conflict between the interests of the petitioner and respondent as justified the Court in appointing a neutral party to manage the estate—*Fleming* v. *Craig*, May 30, 1863, 1 Macph. 850; *Thomson* v. *Dalrymple, &c.*, January 11, 1865, 3 Macph. 336.

Argued for the respondents—The factor who managed the properties was appointed on the suggestion of the petitioner. The charges made by the petitioner against the fiar's conduct as trustee were of the most shadowy description. There was no such conflict of interest as to call for the interference of the Court, and the mere fact that a trustee had a personal interest conflicting with his duty as trustee was not a ground for taking the administration of the trust-estate out of his hands—*Birnie* v. *Christie*, December 16, 1891, 19 R. 334, *per* Lord M'Laren, 338.

At advising—

Lord President—We are not called upon to pronounce on the validity of any of the charges which are here made of maladministration on the part of this sole acting trustee on this estate. A great many of those charges raise questions of opinion, and in anything I say or propose we should do, I do not indicate any censure at all upon the acting trustee. But we find that this trust has got entirely out of gear owing to the joint action of the present petitioner and the present trustee.

The truster contemplated that there should be four trustees, and the fiar was one of them; he also contemplated that the liferenter should factor the estate; the subject of the repairs to be executed was before the mind of the truster, and he was content that the management of the estate and the repairs should, *prima facie* at all events, be in the hands of the liferenter. Unfortunately, however, this scheme of administration was not adhered to. The liferenter and the fiar come to an agreement by which the liferenter practically gave up his interest in the trust, and in place of that interest took an annual payment, accepting his son as the creditor of that obligation. Upon that footing the other trustees who had been nominated by the truster, and who had accepted office, cleared out of the trust, there being no necessity, in the contingency that had arisen, for an impartial administration, inasmuch as there was between the father and son the relation of debtor and creditor for the future. But that agreement, which was probably *ultra vires* of the trustees—I say so having regard especially to the interest of the lady who was contingent liferentrix of the estate—has also gone by the board. But it has gone by the board without the management which was part of that arrangement also going by the board; so that now, contrary to the expectation of the truster, the fiar is in the sole administration of the estate.

Now, that is a state of matters which, I think, requires a remedy, looking particularly to the fact that there is great discontent on the part of the liferenter with the management of the estate which has supervened. As I have said, I do not pronounce upon whether the petitioner is right in the various points of criticism and censure which he makes as against the trustee, but he has said enough to show that upon those delicate questions of the adjustment of the interests of the liferenter and fiar there is reason for an impartial administration beginning now. It was not contemplated by the truster that such a state of things should arise. He appointed a body of impartial trustees to act along with the fiar in the administration of the trust, in the first place, for the interests of the liferenter. Therefore, as I have said, I think this is a case in which we should, without removing the trustee, sequestrate the estate and appoint a factor. In the event of the death of the liferenter survived by his widow, who would then be the liferentrix of the estate, a new chapter would be opened, and it would then be competent to the parties to come to the Court and ask for the recal of the sequestration, or there might be an assumption of new trustees. At present it is a case for the exercise of the jurisdiction of the Court, by which we do not remove the trustee but merely appoint a judicial factor.

Lord Adam—I agree with your Lordship.

From anything I have heard I should not have been prepared to remove the trustee as having been guilty of any breach of trust such as to call for that proceeding. But we cannot shut our eyes to the facts which have supervened. The fiar is sole trustee, while the petitioner is the liferenter, and for the time the sole beneficiary. We must have regard to the nature of the estate. It consists apparently of a considerable amount of property of different kinds in the town of Hamilton, some of it not of the best class, but all of it yielding a certain rental. It is quite obvious that questions must arise from week to week or even from day to day as to the amount to be spent on the upkeep and repair of such property, and these questions of what is or what is not proper expenditure must arise as between the liferenter and fiar. Therefore I agree with your Lordship that we should appoint a factor without removing the trustee.

As your Lordship has pointed out, we are not interfering with a trust in which everything has gone on as the truster contemplated. The truster obviously thought that it would be administered, in the first place at all events, for the benefit of the liferenter, and it was not at all in his view that it should be administered solely by the fiar as sole trustee. The fact is that the liferenter was, in the contemplation of the truster, to be the factor. The truster also, as was right, appointed the fiar, who had an interest in the estate, one of the trustees, but only one of several, for he conjoined three others with him. But what has since taken place has led to the result that the fiar has been left in the sole management and control of the trust-estate, and has thus been put in a position of conflict with the liferenter. Now that, as we have seen, there have been and may be constant disputes as to what is or what is not proper expenditure, I agree with your Lordship that it is for the advantage of the estate that the present course of management should be put an end to and a judicial factor appointed.

LORD M'LAREN—When the ownership of property is such that one individual has usufruct for life, and another has the fee or reversion, the kind of management which the law prescribes is one which entitles the liferenter to administer the estate during his life for his own benefit, he being at the same time under obligation to keep the subject in repair as a matter of duty to the fiar. In this case, by arrangement between the limited owner and the fiar, this state of matters is reversed, the fiar is administrator of the estate for the benefit of the liferenter. But the trust was not put into its present position with a view to the existing character of the interests arising under it, but under an arrangement by which the petitioner was to draw a fixed annuity out of the trust-estate. Now, there are no ulterior interests to be protected by this trust, nor is the circumstance that the trust has been put under the management of the son a consequence of any change on the beneficial interests of the two parties to it. It is purely a trust for administration, leaving the essential rights of the parties untouched. In such circumstances I agree with your Lordships that the trust ought to be continued only so long as the administration is satisfactory to the parties concerned. I do not think that we have any precedent directly in point, because this is a very unusual arrangement that a liferenter should put the management of property into the hands of the fiar. But we have precedents which are applicable in principle, and particularly in the case of marriage-contract trusts, where it is quite settled that the spouses may revoke the appointment of trustees and appoint new trustees in whom they have confidence. Now, in this case the liferenter was so far committed to the principle of neutral management that he could not very well be allowed to take the estate into his own hands, and all that we can do is to put the estate under neutral control.

LORD KINNEAR concurred.

The Court sequestrated the estate, and appointed John M. Macleod, C.A., Glasgow, as judicial factor.

Counsel for the Petitioner—Strachan—Crabb Watt. Agent—James Gibson, S.S.C.

Counsel for the Respondents—W. Campbell. Agents—Bruce & Kerr, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

JOHNSTON AND ANOTHER *v.* SAWERS-MITCHELL.

Burgh—Dean of Guild—Building Restrictions—Building Plan—Jus quæsitum tertio—Acquiescence—Servitude—"Vents."

A superior feued three building areas in a proposed street to two persons "according to a ground plan and elevations of the said street and intended buildings prepared by Patrick Wilson." The feuars, among other restrictions and conditions, were forbidden either to build on the plots of ground in front of the areas, or to build on the back ground buildings with fireplaces or vents. All these prohibitions and conditions were appointed to be engrossed in the sasine and in all renovations of the feu-right. This appointment was duly observed.

The feuars bound themselves to build houses on the areas conform to Wilson's plan, and agreed that all operations should be conducted under inspection of Wilson. There was no direction that these obligations should enter the sasine, and accordingly they did not appear either in the sasine or in subsequent titles.

Houses were built on the areas feued,