Act of Parliament, that the Dean of Guild should not grant a building warrant, until provision were made to his satisfaction for the drainage of the building in a suitable and substantial manner, my impression is that such an enactment could not be enforced against the Crown unless the public department chose to apply for a building warrant. But if the enactment were expressed in such terms that its obligatory character was independent of the jurisdiction by which it might be enforced, it would then in my judgment be obligatory on the public departments.

I do not anticipate that any legal difficulty, still less injustice, will arise in consequence of the recognition of the privileges of the Crown in such matters. Because it is not to be supposed that the departments of state in expending money voted by Parliament for public buildings would refuse to recognise the duty of conforming to sanitary requirements prescribed by Acts of Parliament. On the other hand, the special requirements of the public service render it, to say the least, undesirable that the action of the administrative departments should be liable to be controlled by *ex officio* prosecutions for fine and interdict at the instance of local authorities. If it were necessary to consider the point, I should be disposed to hold that the Board of Works, or the Lord Advocate in his official capacity, would not be liable to a prosecution for a penalty. But I am content to rest my judgment on the plea of no jurisdiction, and my opinion is that the appeal for the Lord Advocate should be sustained, and that the petition in the Dean of Guild Court should be dismissed as incompetent.

LORD KINNEAR—I am of opinion with the majority of the Consulted Judges and with all your Lordships that the appellant is not subject to the jurisdiction of the Dean of Guild. As, however, a much wider exemption from the operation of the Police Acts has been pleaded on behalf of the Crown, I think it well to say, that so far as I am concerned, there is nothing in my opinion and in the judgment we have pronounced to affirm the proposition that the officials of the Crown are entitled to disregard the building restrictions which might affect the property in question if it were in the hands of a subject. The property here in question is not part of the hereditary patrimony of the Crown, but was acquired by purchase from a subject. The general rule as regards such property of the Crown is perfectly well settled, that the Crown, when it acquires a right to property from a subject, can be in no better case than its author, and so is liable to the same burdens as affected the property in its author's hands. The rule is so stated by Erskine, and it has been applied in a great number of familiar cases. I think it by no means follows from our judgment that the officers of the Crown are entitled to disregard the building restrictions which it is thought can be put in force against them, or that they may not be restrained, in the exercise of the jurisdiction to which they are undoubtedly subject, from building without having previously obtained the sanction of the proper officer to their building operations. At the same time, while I desire to guard myself in the manner I have just done, I express no definite opinion upon either of these questions. I agree with Lord M'Laren that they are not at present before us, and that they may be brought before us in a shape in which we shall be required to consider and determine them upon an argument we have not yet heard.

The Court sustained the appeal, recalled the Dean of Guild's interlocutor, and dismissed the petition.

Counsel for the Petitioner—Comrie Thomson—Shaw—Boyd. Agent—William White Millar, S.S.C.

Counsel for the Lord Advocate—D.-F. Pearson, Q.C.—Graham Murray, Q.C.—H. Johnston. Agent—Donald Beith, S.S.C.

Friday, July 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HALL MAXWELL'S TRUSTEES *v.* BOTHWELL SCHOOL BOARD.

Superior and Vassal—Feu-Contract—Irritancy ob non solutum canonem—Arrears of Feu-Duty Prior to Entry of Superior—Purging of Irritancy.

Held that a vassal in order to purge an irritancy *ob non solutum canonem* did not require to pay feu-duties which were in arrear at the time when the superior made up his title, as these were moveable estate and could only belong to the superior as the assignee or executor of his predecessor.

Opinion by Lord Rutherfurd Clark, concurred in by Lord Justice-Clerk, that the decision in *The Scottish Heritages Company, Limited* v. *North British Property Company, Limited*, January 23, 1885, 12 R. 550, should be reconsidered.

Superior and Vassal—Purging of Irritancy ob non solutum canonem—Interest on Feu-Duties in Arrear.

A feu-contract provided that interest should run on the feu-duties from the terms they became due till payment, but specified no rate of interest. *Held* that the vassal in order to purge an irritancy *ob non solutum canonem* did not require to pay interest on the feu-duties in arrear.

Superior and Vassal—Irritancy ob non solutum canonem—Action of Removing under Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 32—*Purging of Irritancy—Process—Finding that Irritancy Incurred.*

A superior demanded from his vassal a certain sum as arrears of feu-duty,

and thereafter raised an action in the Sheriff Court in terms of section 32 of the Sheriff Court Act 1853, praying the Court for a decree against the vassal, ordaining him to remove himself, &c., from the ground feued, and to grant warrant to that effect to be executed at the first term of Whitsunday or Martinmas which should first occur four months after the same was issued by the Court.

The defenders lodged defences and tendered payment of and consigned in Court a sum which they averred was the full amount of the arrears of feu-duty due by them. This sum was smaller than that demanded by the pursuers.

The Court, while they found that the sum tendered and consigned by the defenders was sufficient to purge the irritancy, also pronounced a finding that at the date of the raising of the action an irritancy of the feu *ob non solutum canonem* had been incurred—*diss.* Lord Young, who was of opinion that such a finding was (1) idle and inoperative in the circumstances; and (2) incompetent, having regard to the provisions of the Act of 1853 and the terms of the prayer of the action.

By the Act of 1597, chapter 250, it is enacted "that in case it sall happen in time cumming ony vassal or fewar holdand landis in few-ferme of our Soveraine Lord or ony uther superiour immediately in few-ferme to failzie in making of payment of his few-dewty to our Soveraine Lordis Comptroller, or uther haveand power of him, or uther immediate superiour, or uther haveand power of him, be the space of twa zeires, haill and tugidder, that they sall amitte and tine their said few of their said lands conforme to the civall and common law, siklike and in the same manner as gif ane clause irritant were specially engrossed and insert in their saids infeftmentes of few-ferme."

By the Sheriff Court Act of 1853 (16 and 17 Vict. cap. 80), sec. 32, it is enacted that "whereas it is desirable that the jurisdiction of the Sheriff should be extended to questions relating to non-payment of feu-duties for real subjects of small amount, wherever in subjects not exceeding in yearly value the sum of £25, the vassal shall have run in arrear of his feu-duty for two years, it shall be competent for the superior to raise an action before the Sheriff in ordinary form, setting forth that the subject is of the value, and that the feu-duty has run in arrear as aforesaid, and concluding that the vassal should be removed from his possession, and that warrant to that effect should be granted, and thereafter the cause shall proceed in the manner herein provided in ordinary actions, and if the defendant shall fail to appear, or if it shall be proved to the Sheriff by such evidence as he may require that the subject is of the value and that the feu-duty is in arrear as aforesaid, he shall grant warrant in terms of the conclusions of the summons, which warrant shall be executed at the first term of Whitsunday or Martinmas which shall first occur four months after the same is issued by the Sheriff, and such warrant so executed shall have the effect, in relation to the said possession, of a decree of irritancy *ob solutum canonem:* Provided always . . . that it shall be competent to the vassals at any time before such warrant is executed to purge the irritancy incurred by payment of the arrears pursued for with the expenses incurred by the superior in such proceedings."

By feu-disposition dated 5th and 8th and recorded 15th October 1860, Robert Jolly as liferenter, and William Jolly as fiar, feued about half an acre of the estate of Stevenston to the kirk-session of Hamilton Free Church, and to the survivors of them, and to their successors in office, and to their assignees, on condition, *inter alia*, that the feuars should "erect and maintain in all time coming a school, teacher's house, and appurtenances thereof, for educating the children of the poor and working classes."

The feu-disposition stipulated for paymen to the superiors of "the sum of £2, 10s. sterling yearly, in name of feu-duty, at the term of Whitsunday yearly, beginning the first term's payment thereof at term of Whitsunday 1861, for the year preceding, and so forth yearly thereafter at the said term in all time coming, with one-fifth part more of the said feu-duty of liquidate penalty for each term's failure in payment thereof, and interest on the said feu-duty from the term when the same becomes due until payment."

William Jolly, the fiar, died on 23rd February 1861, and Robert Jolly, the liferenter, on 10th April 1865. William Jolly left a trust-disposition and settlement dated 1860-61, conveying his whole estate to testamentary trustees, who were directed, after providing for certain purposes, to convey his whole estate to his only child Miss Mary M'Neil Jolly. In 1870 William Jolly's trustees were infeft in the property, and by disposition, dated and recorded in October 1871, the sole surviving trustee conveyed to Miss Jolly the whole of her father's estate, heritable and moveable, to which he had a right as trustee. The term of entry under this deed was 31st August 1871. In October 1871 Miss Jolly married William Hall Maxwell, and by antenuptial trust-disposition and settlement dated 17th October 1871 she conveyed her whole means and estate to marriage-contract trustees. These trustees were infeft on this conveyance on 27th December 1871.

The school mentioned in the feu-disposition of 1860 was duly erected and carried on under the direction of the kirk-session of Holytown Free Church till 1874, when by assignation dated in August and September 1874 the kirk-session assigned the feu-disposition of October 1860 to the School Board of the parish of Bothwell. In the assignation there was a clause whereby the School Board agreed to free the kirk-session of all obligations incumbent on them under the feu-disposition. No price was paid for

the feu or school premises by the School Board to the kirk-session.

The feu-duty stipulated in the feu-disposition of 1860 was never paid, and payment was never asked down to October 1891, in which month the superiors of the feu, viz., Mrs Hall Maxwell's trustees, made a demand upon the School Board of Bothwell for the sum of £109, 18s. 7d., being the amount of the arrears of feu-duty and duplicand, with interest thereon from Whitsunday 1865, being the first term of Whitsunday after the death of the liferenter Robert Jolly.

Thereafter Mrs Hall Maxwell's trustees raised an action against the School Board in the Sheriff Court of Lanarkshire at Hamilton, in which they prayed the Court "to grant a decree against the above-named defenders, ordaining them to remove themselves, their servants, sub-tenants, dependants, goods and gear, furth and from their possession of" the ground feued, and "to leave the same void and redd, that the pursuers and others authorised by them may enter thereto, and possess and dispose thereof at pleasure, and to grant warrant to that effect, to be executed at the first term of Whitsunday or Martinmas which shall first occur four months after the same is issued by the Court, with expenses."

The defenders lodged defences, and made the following tender — "The defenders tender payment of the sum of £51, 10s. 4d. sterling, being the amount of feu-duty and duplicand, less income-tax, due to the pursuers for the piece of ground described in the summons from the said 19th October 1871 to the term of Martinmas last 1891, conform to statement annexed hereto, and consign the said sum in the hands of the Clerk of Court."

The pursuers pleaded—"(1) The defenders being in arrear of feu-duty for two years, the pursuers, as trustees foresaid, are entitled, in terms of said Acts, to decree as craved. (2) The tender made by the defenders in their defences is too vague and indefinite to be founded on. (3) The defenders' title expressly stipulating for payment of interest on feu-duty in arrear, the pursuers are entitled to insist on their claim for interest."

The defenders pleaded, *inter alia* — "(2) The defenders having, as soon as called upon, expressed their willingness to pay, and having tendered, the amount of the feu-duties and duplicand due of this date, as the same may be ascertained from a perusal of the pursuers' title, and thus purge the alleged irritancy, should be assoilzied. (3) The pursuers having made no claim against the defenders till the raising of the present action, and the said Mrs Mary M'Neil Jolly or Hall Maxwell having induced the defenders to believe that she, as the beneficiary under the trust, and the trustees had waived their right to said feu-duty, are not entitled to insist on payment of interest on the arrears of feu-duty."

On 25th January 1892 the Sheriff-Substitute (DAVIDSON) pronounced the following interlocutor:—"Finds (1) that the defenders are vassals of the pursuers, and that the feu-duty payable by them is more than two years in arrear, and that the defenders are therefore liable to irritancy of the feu *ob non solutum canonem;* (2) that the amount offered by defenders in their tender is not sufficient to purge the irritancy; and (3) that the amount of feu-duty payable in order to purge the irritancy is £67, 10s."

The defenders appealed to the Sheriff (BERRY), and on 22nd December 1892 he pronounced the following interlocutor:—"Finds that the defenders are vassals of the pursuers, and that at the date of the raising of this action an irritancy of the feu, *ob non solutum canonem*, had been incurred: Finds that the defenders have tendered and have consigned in Court the sum of £51, 10s. 4d., and that that sum is sufficient to purge the irritancy: Recals the interlocutor appealed against: Decerns against the defenders for the said sum of £51, 10s. 4d.: Finds the pursuers entitled to expenses up to the date of closing the record, and the defenders to the expenses subsequent thereto: Remits the accounts of expenses to the Auditor for taxation: Authorises the Clerk of Court to pay the consigned money to the pursuers, less the defenders' expenses; and decerns.

"*Note* — . . . The feu-disposition stipulated for payment to the superiors of 'the sum of £2, 10s. sterling yearly in name of feu-duty, at the term of Whitsunday yearly, beginning the first term's payment thereof at the term of Whitsunday 1861 for the year preceding, and so forth yearly thereafter at the said term in all time coming, with one-fifth part more of the said feu-duty of liquidate penalty for each term's failure in payment thereof, and interest on the said feu-duty from the term when the same becomes due until payment.' . . .

"It is admitted that no feu-duty has ever been paid in terms of the feu-disposition. The defenders aver in explanation of this fact that the superiors voluntarily dispensed with payment, and the Sheriff-Substitute has in his note dealt with the question whether any verbal dispensation could avail the defenders. It is unnecessary for me to consider that question, as it has not been relied on by the defenders in the course of the argument before me. The position they have taken up is that while ready to pay, and tendering the amount of the feu-duties that have accrued since 1871, when the pursuer's title to the superiority was completed, they contest the right of the pursuers to claim payment from them of the arrears between 1866 and 1871, as a condition of their purging the statutory irritancy of the feu.

"The Act of 1597 under which superiors are given the stringent remedy of tinsel, provided that any vassal failing to make payment of his feu-duty by the space of two years haill and together, shall omit and tyne the feu of his lands in the same manner as if a clause irritant were specially engrossed in his infeftment. To avail himself of this statutory forfeiture, it is settled that a superior must (as the pursuers now do) proceed by a process of declarator of irritancy, and further, that the vassal is en-

titled to purge the irritancy by payment of the arrears of feu-duty at any time before extract.

"The arrears between 1866 and 1871, which alone are now in dispute, accrued to William Jolly's testamentary trustees and not to the present pursuers, whose titles of superiority date only from the latter year. At the same time, the right to any arrears existing in 1871 passed, under the general conveyance by William Jolly's testamentary trustees to Mrs Hall Maxwell, and the conveyance by her to the pursuers in that year. I do not think, however, that in an action of declarator of tinsel the pursuers are entitled, as a condition of relief from irritancy, to insist on payment of arrears which did not accrue during their tenure of the superiority, and their right to which depends on an assignation from previous superiors. I am not aware of any authority giving such an extended effect to the Act of 1597, and a penal statute ought as far as possible to be strictly construed. Further, the pursuers have this difficulty in their way, that the defenders did not become vassals in the property till 1874, and although they undertook to their predecessors to relieve them of the obligations under the feu-disposition, and are ready to pay to the pursuers the feu-duties from 1871, I am not satisfied that in this action for declarator of forfeiture they can be required as a condition of relief, to pay feu-duties which were left unpaid by previous vassals. The Act is directed against the failure on the part of a vassal 'to make payment of his feu-duty.' The feu-duties from 1871 to 1874 were not the defenders' feu-duties, but the feu-duties of their predecessors. I deal with the case exclusively as one involving a question of irritancy under the Statute of 1597. As to the rights of the parties under any other form of procedure it is not necessary to inquire. The feu-disposition of 1860 provided for payment of interest on any unpaid feu-duty from the time when it became due until payment; and the pursuers seek to include sums of interest on arrears as sums which the defenders are bound to pay in order to purge the irritancy. I do not think effect should be given to this claim. Interest on unpaid feu-duty does not form a portion of the feu-duty, but is of the nature of damages for its non-payment. A failure to pay such interest cannot in my opinion be included under the head of failure to pay feu-duty within the meaning of the Act of 1597. In the present case no rate of interest on unpaid arrears is specified in the feu-disposition, so that the claim is truly illiquid. But even had this been otherwise, I do not think that the forfeiture provided by the statute extends to anything beyond a failure in payment of proper feu-duty.

"The feu-duty was payable annually at Whitsunday, and the first payment after the completion of the pursuers' title fell due at Whitsunday 1872. Including the payment for that year, there had been twenty years' feu-duty in arrear, and if a duplicand which fell due in 1879 is also included the total arrears for the period from 1871 to 1891 would amount to £52, 10s. From that there falls to be deducted income-tax, which I take from the statement annexed to the petition amounts to £1, 0s. 4d. After that deduction there is left a sum of £51, 9s. 8d., on payment of which, even if the defenders are in this action to be held responsible for the arrears between 1871 and 1874, they are entitled to be relieved from the statutory irritancy which has been incurred.

"As soon as the pursuers' title was produced the defenders tendered and consigned in Court the sum of £51, 10s. 4d., and from that date I think the defenders are entitled to expenses."

The pursuers appealed to the Court of Session, and argued—Before the defenders could purge the irritancy incurred they must pay (1) the arrears of feu-duty between 1866 and 1871. Although the pursuers during that period were not superiors of the feu, yet the case of *Scottish Heritages Company, Limited* v. *North British Property Company, Limited*, January 23, 1885, 12 R. 550, showed that they were entitled to insist on payment of the arrears of feu-duty incurred during these years. There was no doubt that under their title the defenders were liable for arrears of feu-duty. All that the pursuers required to show was that the defenders had incurred the irritancy by not paying feu-duty for two years. Thereafter it was in the discretion of the Court to allow the vassal to purge the irritancy by payment of the arrears of feu-duty. The right to purge was introduced at first as an equitable remedy, which was allowed to defenders in the discretion of the Court—Kames' Equity, i. 229; Stair, iv. 18, 3; *Stewart* v. *Wilson*, July 20, 1864, 2 Macph. 1414. The Sheriff Court Act of 1853 did not alter the nature of the right to purge. The vassal represented the feu, he was liable for arrears of feu-duty, and it was equitable that in a question with the infeft superior he should be made to pay up all the arrears of feu-duty before he was allowed to purge the irritancy incurred by him—*Marquis of Ailsa* v. *Jeffrey*, February 15, 21 D. 492, opinion of Lord Deas, p. 504. (2) Before the irritancy was purged interest on the arrears of feu-duty must be paid by the vassal. The feu-disposition expressly provided that interest was to be paid. The interest was as much part of the feu-duty as the £2, 10s. The rate of interest was not stipulated in the feu-disposition. The interest must therefore be understood to be legal interest, viz., 5 per cent.

Argued for defenders—The present was a penal action, and not an action for payment of money. The rights of parties must therefore be strictly construed, and the Court were bound to see that the pursuer was acting strictly within his rights. It was necessary for the pursuer in such an action to show that the feudal relation existed between himself and the vassal sued throughout the whole period during which the arrears of feu-duty demanded from the vassal were incurred. Both *Walker* v. *Earl of Eglinton's Tutors*, January 22, 1828, 6 S.

407, and *Knight* v. *Cargill*, July 2, 1846, 8 D. 991, supported the view that there must be concurrent relation of superior and vassal as regards all the feu-duties sought to be recovered. (2) No interest was due in the arrears of feu-duty. By common law interest did not run on feu-duties unless there was a definite contract to that effect or until after a judicial demand had been made for them. In the present case no definite rate of interest was specified in the feu-right, and, besides, the feu-duties were not paid simply because the superior waived his right to them.

At advising—

LORD YOUNG—The feu in question (of half an acre of ground) was granted in 1860 to the kirk-session of the Free Church at Holytown for the purpose of building a school and teacher's house. In 1874 the ground with the house and school on it were conveyed by this kirk-session to the School Board of Holytown, who then became and have since continued to be the vassals. The feu-duty (£2, 10s.) has never been paid, and payment was never asked till October 1891, when the pursuers made a demand upon the defenders (the School Board) for the whole arrears—not indeed from the commencement, but from 1866, *i.e.*, for 25 years. No reason was given for the past forbearance or the suddenness of the demand, and the defenders say that when they were inquiring into the matter that they might determine what was their obligation and proper course, this action was raised within a few days of the demand. As the result of the inquiries and consideration on the part of the defenders they appear to have been advised—1st, that they had no good answer to the demand as regards the duties since 1874, when they became the vassals in the feu, and 2nd, that although their liability for any duties prior to 1874 might be questionable, it would be prudent to concede their liability from 1871, when the pursuers first became superiors in the feu. They accordingly tendered payment of the duties from 1871 downwards and defended the action on the footing of that tender. The pursuers declined the tender and insisted on the action proceeding on the ground that they were in addition entitled to, 1st, the feu-duties from 1866 to 1871, amounting to the sum of £12, 10s., and 2nd, to interest on the whole dues from 1866 to 1891, amounting to the sum of £43, 16s. 4d. The defenders thereupon lodged a formal minute of tender of the sum of £51, 10s. 4d. which they paid into Court and which I assume—for it was not disputed—is the full amount of the feu-duties from 1871 to the date of the action.

The dispute between the parties was thus limited to these two questions—1st, Are the defenders liable in interest and bound to pay it in order to avoid decree of removing? and 2nd, are they liable for and bound to pay the feu-duties from 1866 to 1871 in order to avoid such decree?

The Sheriff has decided both these questions against the pursuers. His judgment on the first was acquiesced in, and the demand for interest abandoned in the argument before us. We have therefore only to consider his judgment on the second, and I am of opinion that it is sound.

The action, which is brought under section 32 of the Sheriff Court Act 1853, prays for "a decree against the above-named defenders, ordaining them to remove themselves" from the ground feued, &c., and "to grant warrant to that effect to be executed at the first term of Whitsunday or Martinmas which shall first occur four months after the same is issued by the Court." There is nothing else in the prayer, nor could be under the statute. Thus the only judgment possible in the action is one granting or refusing the decreew-arrant of removing prayed for. Now, the statute under which alone such action as this is competent allows it "when the vassal shall have run in arrear of his feu-duty for two years," and enacts that if it shall be proved to the satisfaction of the Sheriff "that the feu-duty is in arrear as aforesaid, he shall grant warrant in terms of the conclusions of the summons, which warrant shall be executed at the first term of Whitsunday or Martinmas four months after the same is issued."

Now, with respect to the duties from 1866 to 1871, I agree with the Sheriff in holding that these were not duties of the defenders of which they were or could be in arrear to the pursuers, for during that period neither were the defenders vassals nor the pursuers superiors in the feu. With respect to the duties from 1871 to 1891, I also agree with the Sheriff in holding that the defenders were not in arrear of these after the tender and payment thereof into Court. The pursuers ought to have taken the payment tendered, and the money being in the hands of the Clerk of Court and at their command, and the only reason assigned by them for declining it being bad, I think they must be dealt with as if they had taken payment. The Sheriff was therefore right, in my opinion, in holding that the defenders are not in arrear of their feu-duty, and so in refusing warrant of removing. I have already pointed out that in this statutory action, and under the prayer of the petition, which is in terms of the statute, he could do nothing but grant or refuse such warrant. He has, I think, formally erred in decerning for the amount consigned. But the error is immaterial and harmless for the decerniture could only operate as an order on the clerk to pay the money in his hands to the pursuers whenever they are pleased to take it.

Had the action been a declarator of irritancy *ob non solutum canonem*, I should have thought it clear that no irritancy was or could be incurred by the defenders because of feu-duties unpaid prior to 1866. But admitting this the pursuers' counsel contended that an irritancy having been incurred by the defenders because of the arrears into which they themselves ran after 1874 when they were the vassals, the Court in the matter of allowing them

to purge might, and in equity to the pursuers ought, to take account of the duties prior to 1866, and make the payment of these as well as of the arrears because of which the irritancy was incurred a condition of permission to purge. I would not, I think, have found any difficulty in rejecting this argument if urged in a declarator of irritancy. For the rule undoubtedly is to allow an irritancy or penal forfeiture to be avoided by payment before judgment of the debt by the non-payment of which the party had become exposed to it. But it is, I think, not only unnecessary but incompetent in this action to decide anything about the equities of allowing purgation and prescribing conditions at the common law. The action before us is, as I have pointed out, a statutory action in which the only conclusion competent is that a vassal who "shall have run in arrear of his feu-duty for two years" . . . "should be removed from his possession, and that warrant to that effect should be granted." By the express words of the Act the warrant is to be granted only if it shall be proved "that the feu-duty is in arrear as aforesaid." Now, here the warrant has been properly refused on the ground that it is not—the whole feu-duties that ever were due by the defenders to the pursuers being tendered, and on their refusal because of the larger claim which has been rejected as unfounded, paid into Court. This excludes the consideration of any question connected with purging an irritancy, and the exclusion is made the more distinct by the language of the only two passages in the Act in which irritancy and purging are mentioned. The first is in the enactment that a warrant of removing under the Act shall be executed at the first term of Whitsunday or Martinmas four months after the same is issued, "and such warrant so executed shall have the effect in relation to the said possession of a decree of irritancy *ob non solutum canonem*." The second is in the enactment that it shall be competent "at any time before such warrant is executed to purge the irritancy incurred by payment of the arrears pursued for, with expenses."

I have already stated the circumstances in which this action was brought, and cannot avoid characterising the pursuers' proceedings as hasty and harsh. No excuse or explanation was given to us, and in answer to a question put from the bench the pursuers' counsel very candidly stated that he was unable to give any. The defenders are a public body with a statutory power of taxation, and the pursuers had no reason to doubt their willingness or their ability to pay whatever it should appear that they truly owed. Without any undue delay they tendered and consigned all that they did owe, while the defenders demanded more than double what was due to them, and insisted on what they termed an "equitable" enforcement of their demand by a penal action.

I am of opinion that the action ought to be dismissed, and with expenses, the clerk being authorised to make payment to the pursuers of the money consigned in his hands. I am not prepared to say that an irritancy was ever incurred by the defenders, and am clearly of opinion, first, that a finding that it had would be idle and inoperative; and second, that having regard to the provisions of the Act under which the action is brought, and the terms of the prayer, such finding is incompetent.

LORD RUTHERFURD CLARK—In March 1871 the pursuers were infeft in the superiority of the piece of ground mentioned in the summons. They were at the same time assigned into such feu-duties as were in arrear from 1866 inclusive. There was no express assignation, but it was not and could not be disputed that they are in right of these feu-duties.

The defenders made up their title as vassals in 1874, and they have since been in possession of the feu. They undertook to relieve their predecessors, who were the original vassals, of all claims for bygone feu-duties.

The defenders paid no feu-duty. It is admitted that the feu-duties are in arrear since 1866, and that the defenders are liable in the payment of them—their liability is direct for the feu-duties which became due after their entry. They are liable in relief only for the duties before that date. But the burden of payment rests entirely on them.

An irritancy of the feu has been incurred. In consequence the pursuers are entitled to a decree of removing which is equivalent to a decree of tinsel of the feu unless the defenders shall purge the irritancy. So far there is no room for dispute, and as the defenders are willing to purge the irritancy we have only to settle what payments they are bound to make. They offered to pay all arrears since the pursuers made up their title as superiors. The pursuers claim in addition the arrears since 1866 inclusive.

The right to sue a declarator of tinsel of the feu is given to the superior alone, and as a consequence it must I think be founded on the failure to pay the feu-duties which accrued due after he became superior. For arrears of feu-duties prior to that date are not carried by a transmission of the superiority either by conveyance or by succession. They are moveable estate, and can only belong to the superior as the assignee or executor of his predecessor. No assignee or executor of a superior can sue a declarator of tinsel of the feu.

The law allows the vassal to purge the irritancy, or, in other words, to undo a default of which the superior as such complains. According to the natural meaning of the phrase, it cannot include feu-duties which did not create or go to the creation of the irritancy on which the superior sues. It cannot therefore include those feu-duties which were in arrear at the time when the superior made up his title as superior. It is true that the right to purge is an equitable remedy, and that it might only be allowed on more onerous terms. There is no reason in equity why

the defaulting vassal should not be required to pay all the feu-duties for which he or his feu are liable. But in the absence of authority I do not think that we can go so far.

There is no other question before us. But it has been said that the defenders have made a too liberal admission, and that they are not bound to pay more than the feu-duties which became due after their entry as vassals. I need not discuss this point, but I may say that as at present advised I do not think that their admission has gone beyond their legal obligation.

The pursuers claim interest on the feu-duties in arrear. It is true that the feu contract provides that interest shall run on the feu-duties, but no rate is specified. I am therefore of opinion that the claim cannot be allowed. Interest is not due *ex lege*.

The case of *The Scottish Heritages Company* was cited to us and much dwelt upon. I have not found it necessary to examine it. But I entertain great doubts of the soundness of the decision, and I think that it ought to be reconsidered.

With regard to the findings to be pronounced, I am of opinion that as the irritancy has necessarily been incurred by the feu-duty being in arrear for two years, the Court must find that an irritancy *ob non solutum canonem* has been incurred before they find that the sum consigned by the defenders is sufficient to purge the irritancy.

LORD TRAYNER—For my part I entertain no doubt that the pursuers have incurred an irritancy of their feu, and that we should so find. Unless there be a finding to that effect we cannot proceed to consider the other question—the real question in this case—on what terms the irritancy can be purged. The title of the petitioners as superiors of the feu in question is dated in 1871. The defenders did not become vassals until 1874. In these circumstances a question might be raised whether, in order to purge the irritancy which has been incurred, the defendants can be called on to do more than pay the feu-duties effeiring to the period of their tenure. But that question does not require to be decided here, as the defenders have offered and are willing to pay all the feu-duties which have become due since the present superiors' title was completed. I am of opinion that nothing more can be demanded of the defenders than what they have offered, in an action like the present. The defenders may be liable to the pursuers under some obligation granted by them, for arrears of feu-duty which fell due during the lifetime of the last superior, or to relieve someone else of liability therefor, which is practically the same thing—but the pursuers cannot insist in the present action in order to the purging of the irritancy, upon payment of more than the feu-duties due to them as superiors—that is, of the feu-duties which have become exigible since their title was completed.

I agree with the Sheriff that the pursuers cannot here insist on payment of interest or arrears of feu-duty for the reasons he has stated.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Rutherfurd Clark.

The Court pronounced the following interlocutor—

"Recal the interlocutor appealed against: Find that the defenders are vassals of the pursuers, and that at the date of the raising of this action an irritancy of the feu *ob non solutum canonem* had been incurred: Find that the defenders have tendered and have consigned in Court the sum of £51, 10s. 4d., and that that sum is sufficient to purge the irritancy: Find the pursuers entitled to expenses up to the date of closing the record in the Sheriff Court, and find the pursuers liable in expenses from that date in the Sheriff Court and in this Court: Remit the account of expenses to the Auditor to tax and report: Authorise the Sheriff-Clerk of Lanarkshire to pay the consigned money to the pursuers: *Quoad ultra*, dismiss the action and decern."

Counsel for the Pursuers—H. Johnston—Craigie. Agent—R. J. Gibson, S.S.C.

Counsel for the Defenders—Dundas—Salvesen. Agents—Simpson & Marwick, W.S.

HIGH COURT OF JUSTICIARY.

Monday, July 17.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Wellwood.)

STRACHAN *v.* WATSON.

Justiciary Cases—Procedure—Proof—Omission to Note Documentary Evidence—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. c.* 53), *secs.* 16 *and* 34.

Section 16 of the Summary Procedure (Scotland) Act 1864 provides, *inter alia* —"The record shall set forth . . . the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

Held that the failure to note two documents, which appeared from a report by the Sheriff-Substitute to have been made elements of evidence in a summary case, was a matter of substance, and vitiated the whole proceedings.

This was a bill of suspension for David Strachan, farmer, Brackenhill, Hamilton, against John Watson, proprietor of the lands of Neilsland, Hamilton, craving suspension of a sentence pronounced by the Sheriff-Substitute at Hamilton under a complaint at the respondent's instance, charging the complainer with having trespassed on the lands of Neilsland in pursuit of game, "particularly in and upon the