I do not think, therefore, that the refusal to allow amendment entails any hardship upon the pursuer. In whatever way they set about it, they cannot convert a bad action into a good one at the expense of their adversary, but only at their own.

The Court adhered.

Counsel for the Pursuers and Reclaimers—G. Watt, K.C.—A. M. Anderson. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders—Guthrie, K.C.—M'Lennan. Agents—Auld, Stewart, & Anderson, W.S.

Friday, June 14.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MAXWELL *v.* M'FARLANE.

Superior and Vassal — Feu-Contract — Construction—Additional Feu-duty for "Ground on which Buildings shall be Erected"—Ground Accessory to Buildings.

A feu-contract provided that the vassal should pay, in addition to the feu-duty stipulated, "the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house, and a porter's lodge." A singular successor of the vassal erected a public laundry on part of the feu. *Held* (*rev.* judgment of Lord Stormonth Darling, Ordinary) that the additional feu-duty was exigible not only for the ground actually covered by the laundry buildings, but also for the ground utilised for approaches to the laundry, and certain grass slopes forming the bank of the laundry reservoir.

By feu-contract, dated 21st and 29th April 1852, the late Sir John Maxwell of Pollok feued to William Young, manufacturer, a portion of the lands of Redds, near Pollokshaws, extending in all to 12 acres, 9·98 poles. The *tenendas* and *reddendo* clauses of the said contract were in the following terms:—"To be holden of and under the said Sir John Maxwell, and his heirs and successors, in feu-farm, fee, and heritage for ever, for the yearly payment to him and them of the sum of £60, 4s. 10d. sterling of feu-duty at two terms in the year, Whitsunday and Martinmas; . . . And also the said William Young and his foresaids, paying yearly to the said Sir John Maxwell and his foresaids, besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house of Auldhousefield and a porter's lodge which the said William Young and his foresaids may erect without being liable for any of the said additional feu-duty."

In 1890 Donald M'Farlane acquired from Young a portion of the said feu, and erected thereon a public laundry, with a reservoir and bleaching-green annexed. On this being erected Sir John Maxwell Stirling Maxwell, the successor of the late Sir John Maxwell in the superiority of the lands in question, claimed the additional feu-duty, as provided by the feu-contract above quoted, not only for the ground actually covered by the laundry buildings, but also for ground utilised in the approaches to the laundry, and certain grass slopes which formed the banks of the reservoir. M'Farlane, while admitting that the additional feu-duty was exigible in respect of the ground actually covered by buildings, disputed the further claim, and accordingly Sir John Maxwell brought the present action, concluding for payment of £87, 15s. A plan was produced, on which the ground in respect of which additional feu-duty was claimed was enclosed within red lines. No claim for additional feu-duty was made for the ground used as a reservoir or as a bleaching-green.

On 11th January 1901 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor, whereby he dismissed the action.

Opinion.—"In 1852 the late Sir John Maxwell of Pollok feued about 12 acres of his estate to one Young, at a feu-duty of £5 per acre. At that time the ground consisted of a dwelling-house and park, but evidently the parties contemplated that in course of time it might come to be used for building, and so the feu-contract contained a provision for an additional feu-duty in that event. The words which give rise to the present question are, 'And also the said William Young and his foresaids paying yearly to the said Sir John Maxwell and his foresaids, besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house of Auldhousefield and a porter's lodge, which the said William Young and his foresaids may erect without being liable for any of the said additional feu-duty, which feu-duty shall begin to run from the first term of Whitsunday or Martinmas after the erection of the buildings in respect of which the same is exigible shall have been commenced, and shall be payable along with the feu-duty above stipulated, half-yearly at Whitsunday and Martinmas by equal portions, and with penalty and interest as above specified.'

"About ten years ago the defender acquired from the trustees of the original vassal a portion of these subjects, extending to about 7¾ acres. On part of the ground so acquired he has established a public laundry. The actual space covered by the buildings and outbuildings of the laundry is about 2 roods 9 poles, but the space enclosed within red lines on the plan produced is a little over an acre, the difference being accounted for by roads and grass

borders. The pursuer makes no claim to additional feu-duty in respect of other parts of the defender's ground, which contain a reservoir, bleaching-green, and pasture land; but he claims it in respect of the space enclosed within red lines on the plea that the whole of that space is, in the sense of the feu-contract, ground on which buildings have been erected, although to the extent of nearly one-half it is open to the sky. The defender, on the other hand, says that additional feu-duty is payable only for ground actually covered with buildings.

"The question lies within narrow compass, and receives little aid from authority. Mr Craigie for the defender referred to cases on the meaning of 'lands built upon or used for building purposes' in section 128 of the English Lands Clauses Act (section 121 of ours). Mr Hepburn Millar for the pursuer referred to cases on the meaning of 'part of a house' in section 92 of the same Act (section 90 of ours). But I do not think that either class of cases helps one much in construing this contract. Certainly the cases as to 'part of a house' do not, because they all proceed on the principle that the word 'house' in the law of England includes all that would be carried by the devise of a house, and they go back to the definition given by Lord Coke, who says that it includes the 'buildings, curtilage, orchard, and garden,' adding that even 'six acres of land may be parcel of a house.' That, of course, goes much too far for the pursuer's case.

"It is not an unreasonable view of the contract to say that its purpose was to keep the feu-duty at a low rate so long as the ground continued to be used for a mansion-house and park, but to increase it so soon as the ground came to be used for ordinary commercial purposes. Perhaps this view receives some support from the exception in favour of an addition to the existing house and the erection of a porter's lodge. There is also something to be said for the suggestion that, once ground has been staked out for building, it would be inconvenient to inquire too curiously whether every square yard of it is covered with stone and lime. To take the whole enclosure has the merit of simplicity.

"But then comes the difficulty of knowing where to stop. One enclosure might provide for a garden of an acre in extent; another might have only a back court measuring a few square yards. Could it be said that the first of these was ground on which buildings had been erected? I think it is not too much to expect that a superior who is stipulating for an additional payment from his vassal in a certain event should define the event in unequivocal terms. If his meaning was what the pursuer suggests, a few more words would have placed it beyond doubt. Clauses of this kind do not create a restriction on the use of property, and may not therefore fall directly under the rule of construction adopted in *Russell* v. *Cowper*, 9 R. 660; but they impose a pecuniary burden, and therefore must be construed with a certain amount of strictness *contra proferentem*.

"I do not know that the argument from inconvenience goes very far. The basis of calculation provided by the contract is two shillings for every square pole, and there can be no great difficulty in arriving at the additional feu-duty for the actual space covered by a building when the measure is no larger than that. On the whole matter I incline to think that defender's construction of the contract is preferable to the pursuer's, because it is in literal accordance with the words used. And it harmonises with the view (which is a perfectly intelligible one) that the purpose of the clause was to encourage the leaving of open spaces."

The pursuer reclaimed, and argued that on a proper construction of the feu-contract the phrase, "a piece of ground on which buildings shall be erected," covered not only the ground actually roofed over, but also the ground used as accessory to buildings.

Argued for the defender—The Lord Ordinary was right. The stipulation for additional feu-duty was analogous to a restriction on the right of the feuar, and it was well established that such a restriction could not be implied, but must be expressed—*Russell* v. *Cowper*, February 24, 1882, 9 R. 660. Taking the words of the feu-contract in their literal meaning, the additional feu-duty was only exigible for land actually built upon. The provision with regard to additions to the mansion-house and the porter's lodge was in favour of this construction.

LORD PRESIDENT—The clause of the feu-contract which we have to construe in this case is certainly very peculiar, and I am not surprised there should be difference of opinion as to its meaning. The construction put upon the clause by the Lord Ordinary attributes a very narrow signification to the language used, and would have the effect of determining that the obligation to pay additional feu-duty only applies to ground actually built upon, excluding all the surrounding ground, although it might be the only access to the building, or might be absolutely necessary to its comfortable occupation and enjoyment. I have never seen a clause similar to this if the interpretation put upon it by the vassals and adopted by the Lord Ordinary is right. It is quite unusual that a clause dealing with the feuing of ground for building should deal separately with the ground actually covered by stone and lime, and the rest of the site or stance.

Looking at the actual words of the clause which we have to construe, viz., "piece of ground on which buildings are erected," one would be inclined to regard the words as meaning the site of the building in its ordinary acceptation, including besides the ground actually covered by stone and lime such additional ground as is necessary for access or for the admission of light and air or the like—in short, whatever may be necessary for the reasonable use and enjoyment of the building.

Another test for the construction of the clause is supplied by considering what would pass under a lease, demise, or bequest of the house, and I apprehend that there can be no doubt that in these cases such accessories as I have mentioned would be included.

The question then comes to be whether adopting the interpretation suggested, the ground in respect of which pursuer claims the additional feu-duty falls within the clause. It includes the approach roads, as to which it appears to me that there can be no doubt, and a grass slope which practically forms a side of the reservoir in connection with the laundry. Even if it had been only ornamental, I should have been inclined to hold that the grass slope was a proper accessory of the buildings, but it appears to me to be so more clearly when it is seen to form the bank which protects the buildings from the water in the reservoir. If therefore the principle of construction which I have indicated is reasonable—as I think it is—this is in my opinion a strong case for applying it. The construction adopted by the Lord Ordinary would exclude what might be just as essential to the use and enjoyment of the building as the ground upon which it actually rests.

I therefore think that the judgment of the Lord Ordinary should be recalled, and that the pursuer should obtain decree in terms of the conclusion of the summons.

LORD ADAM concurred.

LORD M'LAREN—The question raised by this reclaiming-note depends on the true construction of the stipulation for additional feu-duty, whereby it is provided that the defender shall pay "the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected." The defender says that the meaning of this provision is that the additional feu-duty is payable only for ground covered by buildings, and the Lord Ordinary, after some discussion of the question of construction, sums up his opinion as follows:—"The basis of calculation provided by the contract is two shillings for every square pole, and there can be no great difficulty in arriving at the additional feu-duty for the actual space covered by a building when the measure is no larger than that. On the whole matter I incline to think that the defender's construction of the contract is preferable to the pursuer's, because it is in literal accordance with the words used." Now, I notice that the Lord Ordinary, while pointing out the difficulties which would result from the application of the principle of construction for which the pursuer contends, has not gone so fully into the difficulties which arise out of the defender's construction, and I think the argument for the defender showed the great difficulty he had in bringing his position within the compass of an exact definition. I agree that we must not ascribe too wide a meaning to the clause, but I think that the Lord Ordinary in his judgment, and the defender in his argument, have carried the principle of economical construction a little too far, because the argument comes to this, that no additional feu-duty is to be paid except for so much of the building as is covered by a roof. It is easy to see that this definition of the phrase "piece of ground on which buildings shall be erected" breaks down when it is applied to buildings in general, whether for commercial or residential purposes. Take, for example, the case of a factory chimney, which might possibly cover more than a pole of ground, the defender's contention would make it necessary for him to affirm that the additional feu-duty would not have to be paid for the ground occupied by the chimney. A similar case would be that of a quadrangle, or what is called a "well," for the admission of light and air, or even the recesses between projecting gables in a country house. I think it is impossible so to measure the ground for the purposes of feu-duty as to exclude such spaces. Now, when I put the question, why are such spaces to be included, the answer must be that they are physically so related to the house as to be incapable of separate occupation. But if that is the principle, it would cover the ground which is in dispute here, which consists of an approach and a walk surrounding the main building of the average width of 7 or 8 feet, with the addition of a sloping grass bank, which is really the retaining-wall of the reservoir. It is not suggested that these small pieces of ground could be used in any other way. On the other hand, I desire to guard myself against being supposed to hold that a garden or a lawn, which though connected with a house or building were yet capable of separate occupation, would be liable to additional feu-duty on the ground that they were land on which a building was erected. There might be cases where there might be more than two views to be considered—cases where part of the land in controversy might be liable to additional feu-duty and part not, but in this case I understand that there are only the two views, that no intermediate construction is possible, and I agree with your Lordships that the judgment of the Lord Ordinary should be recalled and the pursuer found entitled to decree in terms of his conclusions.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defender in terms of the conclusions of summons.

Counsel for the Pursuer and Reclaimer—Guthrie, K.C.—J. H. Millar. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defender and Respondent—Salvesen, K.C.—Craigie. Agents—George Inglis & Orr, S.S.C.