Wednesday, January 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

TOUGH AND OTHERS *v.* MACDONALD AND OTHERS.

Superior and Vassal—Casualty—Clause of Relief—Claim of Relief for Composition by Purchaser against Seller—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 5.

An original feu-charter granted in 1874 (carrying out a contract of feu entered into prior to the commencement of the Conveyancing Act 1874) provided that the feu-duty should be doubled the first year of the entry of every heir and singular successor; that each heir or singular successor should be bound to enter and record his charter or writ within six months after the date of his succession or purchase; that all sales, dispositions, or other conveyances or transmissions, in violation of or inconsistent with the foresaid provisions, should be, in the option of the superior, null and void; that the whole conditions, provisions, &c., expressed in the charter should be verbatim engrossed, or duly referred to, in terms of law, in all the after conveyances and transmissions of the feu.

In 1879 the ground was disponed to trustees, who in 1885 paid a composition. In 1897 they granted a disposition *ex facie* absolute, but really in security, to certain other trustees, who in 1903—the superior having made no demand upon them for payment of a casualty—granted to disponees a disposition containing a clause of relief from "all feu-duties, casualties, and public burdens due from or on account of the said subjects" prior to the term of entry. All the dispositions were duly recorded. In 1904 the disponees in the last disposition paid a casualty.

In an action at the instance of the disponees in the disposition of 1903 against the granters, claiming, in respect of the clause of relief in the disposition, repayment of the amount of the casualty they had paid—*held* (1) that upon a just construction of the original feu-charter and section 5 of the Conveyancing Act of 1874 there was in the sense of that section "a taxed composition payable on each sale or transfer of the property, as well as on the occasion of the death of each vassal;" (2) that consequently under that section a casualty became due and exigible in 1900, viz., on the expiry of fifteen years from 1885, when the last casualty was paid; (3) that the casualty paid by the pursuers in 1904 was the casualty due in 1900, and that under the clause of relief they were entitled to repayment from the defenders.

Section 5 of the Conveyancing (Scotland) Act 1874 provides as follows—"Unless where it has been or shall be otherwise stipulated, corporations shall pay at the date at which the first composition would have been payable if this Act had not been passed, and every twenty-fifth year thereafter, a sum equal to what but for the passing of this Act would have been payable on entry by a singular successor; and where a composition payable on the death of the vassal shall become exigible from any trustee or body of trustees another composition shall be payable at the end of every twenty-five years, so long as the lands shall be vested in such trustee or trustees; and where by the terms of the feu rights of the lands a taxed composition is payable on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal, and a composition shall in consequence of the acquisition of the property become exigible from any corporation or from any trustee or body of trustees, another composition, unless where it has been or shall be otherwise stipulated, shall be payable at the end of every fifteen years from the date of such acquisition by such corporation or trustee or trustees so long as the lands shall be vested in such corporation or trustee or trustees, with such interest, if any, as may be stipulated for in the feu-rights during the not-payment of casualties: Provided always that in the event of such corporation or of such trustee or trustees ceasing to be proprietors of the lands after having paid a composition or compositions in terms of this section the successor of such corporation or of such trustee or trustees who shall be duly infeft in the lands at the expiration of twenty-five years where a composition is payable on the death of the vassal, or at the expiration of fifteen years where a composition is payable on the occasion of each sale or transfer as well as on the occasion of each death, from the date of the last payment of composition as aforesaid, shall then pay a composition, and the casualties for and in respect of such lands shall thereafter become due and payable at the same time and in the same manner as if such lands had never been vested in such corporation or in such trustee or trustees." . . .

The trustees under the Douglas Feuing Act (passed in 1840 for the purpose of vesting certain parts of the entailed estates of Archibald Lord Douglas of Douglas, lying in the county of Forfar, in trustees for the purpose of feuing the same), of dates 17th and 19th October 1874, granted a feu of a certain piece of ground to John Gordon. The feu-charter was recorded on 4th December 1874.

The clauses in the feu-charter with reference to the payment of composition and entry of vassals, and the irritant and resolutive clauses therein, were as follows:—"Giving therefor yearly the said John Gordon as trustee foresaid and his above written to the said Lucy Elizabeth Douglas of Douglas, Countess of Home, and the heirs succeeding to her immediate lawful superiors of the same, the sum of £266, 7s. sterling, in name of feu-duty for the piece of ground above disponed . . . beginning the half-yearly payment of £133, 3s. 6d. at

the term of Whitsunday 1890, and paying the like sum of £133, 3s. 6d. at the term of Martinmas following, and that in full of the feu-duty for that year, and so forth half-yearly and termly thereafter in all time coming, with the interest of said feu-duty at the rate of £5 per centum per annum from the respective terms of payment thereof during the not-payment . . . and doubling the said feu-duty of £266, 7s. for the said subjects the first year of the entry of every heir and singular successor after that term, and these for all other burden, exaction, demand, or secular service whatsoever which can be anyways exacted or required for the said lot or piece of ground above disponed or any part thereof . . . and the heirs and singular successors of our said disponee in the foresaid piece of ground shall be bound to enter with the said Countess of Home or her foresaids, and to record the charter or writs so to be granted within six months after the date of their purchasing or succeeding to the said feu or any part thereof . . . and it is hereby declared that all sales, dispositions, or other conveyances and transmissions, legal or voluntary, of the whole or any parts and portions of the said lot or piece of ground upon terms either in violation of or inconsistent with the conditions, declarations, and provisions herein contained, shall be, and the same are hereby declared to be, in the option of the said Countess of Home or her foresaids, absolutely null and void to the receivers with all that shall follow or may follow thereon; but declaring always that notwithstanding of the prohibitions above written it shall be lawful to our said disponee, as trustee foresaid, and his above written, to grant bonds of annual rent and dispositions in security of the premises, and to provide their wives and husbands in the liferent thereof, to be held of themselves without the necessity of their being confirmed by the said Countess of Home or the heir in possession as aforesaid; and, lastly, it is hereby provided in terms of the foresaid Act of Parliament that the whole of the above conditions, declarations, and provisions shall be verbatim engrossed or duly referred to in terms of law in all the after conveyances, transmissions, charters, precepts, or writs of clare constat, and investitures of the subjects before disponed, or any part thereof, otherwise the same shall not only be null and void, but the vassal or vassals or other person or persons in right of the said feu shall forfeit and lose all right and title thereto, and the same shall thereupon fall and belong to the said Countess of Home and her heirs and successors."

In November 1879 Henry Hoile Gordon, as heir-at-law and heir of provision in special of John Gordon, disponed the ground to John Lindsay Gordon and himself as trustees for the firm of J. & H. Gordon, manufacturers in Dundee. The disposition was recorded in the General Register of Sasines on 26th December 1879.

In November 1897 Henry Hoile Gordon, as sole remaining trustee for behoof of the firm of J. & H. Gordon, and as sole and only partner, disponed the ground to William Kid Macdonald and Frederick Fotheringham Macdonald as trustees for behoof of their firm of J. & W. Macdonald. The disposition was recorded in the General Register of Sasines on 17th November 1897. Although *ex facie* absolute it was in fact in security of a loan.

On 5th August 1903 William Kid Macdonald and Frederick Fotheringham Macdonald, as trustees for their firm, disponed the ground to Charles Tough and others, the disposition being recorded in the General Register of Sasines on 6th August 1903. The disposition contained a clause of relief from feu-duties, casualties, and public burdens in the following terms:—"We as trustees foresaid bind ourselves to free and relieve our said disponees and their foresaids of all feu-duties, casualties, and public burdens due from or on account of the said subjects prior to the respective terms of entry (Martinmas 1902 for part, August 1, 1903, for the remainder) before mentioned, the said disponees being liable for and bound to free and relieve us of the same in all time coming."

In 1885 the superior took payment of a casualty from John Lindsay Gordon and Henry Hoile Gordon, granting a receipt in the following terms:—"13th October 1905—Received . . . the sum of £133, 3s. 6d. in payment of duplicand of feu-duty exigible from the subjects within described."

No further demand was made by the superior for a casualty until 1903, when a demand was made upon Charles Tough and others, the vassals in the feu, who, after intimating to Messrs William Kid Macdonald and Frederick Fotheringham Macdonald that they would claim repetition from them under the clause of relief in their disposition, paid the amount of the casualty.

The superior's receipt was in the following terms:—"Received . . . the sum of . . . being the casualty or composition payable from the said subjects on 13th October 1900, in terms of section 5 of the Conveyancing (Scotland) Act 1874, reserving to Charles Tough and others their recourse against William Kid Macdonald and others in terms of the clause of relief." . . .

In January 1904 Charles Tough and others raised the present action against William Kid Macdonald and Frederick Fotheringham Macdonald, as trustees for behoof of the firm of J. & W. Macdonald, in which they sought declarator "that the defenders as trustees foresaid are bound to free and relieve the pursuers of the obligation to pay a casualty or composition to . . . the immediate superior of the said piece of ground, which accrued and became due and payable while the defenders, as trustees foresaid, were the entered vassals in the said piece of ground, and prior to Martinmas 1902 and 1st August 1903, the dates of the pursuers' entry thereto, and to that effect to make repetition to the pursuers of the sum of £266, 7s., being the amount of such casualty which the pursuers have paid under threat of action."

The pursuers pleaded, *inter alia*—"(1) On a sound construction of the feu-charter, receipt for casualty, and disposition by the defenders with consents in favour of the pursuers,

condescended on, and in respect of the facts set forth, the pursuers are entitled to decree of declarator and payment as concluded for, with interest and expenses."

The defenders pleaded, *inter alia*—"(3) The casualty libelled not having been due by the defenders, they are not bound to relieve the pursuers thereof."

On 8th June the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds, declares, and decerns in terms of the conclusions of the summons." . . .

Opinion.—"The pursuers in this case are persons who purchased in 1903 from the defenders certain subjects in Dundee which are held in feu from the Countess of Home. The disposition contains a clause by which the defenders undertook to relieve the pursuers of all casualties and public burdens due at or prior to the term of entry. The present action is brought to obtain implement of that obligation with respect particularly to a taxed composition claimed by the superior as having become due in 1900, and which composition the pursuers paid as proprietors of the feu. The defence, as I understand it, is that the composition in question was not due as alleged in 1900, but was, if due at all, due only in 1903, and due in respect of the pursuers' own purchase and implied entry.

"The question turns upon the construction of the 5th section of the Conveyancing Act of 1874. That section, as we know, regulates the payment of casualties by corporations and trustees under the new system of implied entries; and it is here applicable in respect that the defenders' predecessors in title were a body of trustees who in 1879 acquired the subjects and became impliedly entered with the superior, and in 1885 paid a composition in respect of that entry. The pursuers' case is that under the rules laid down by the said section the casualty which they paid in 1903 was due and exigible prior to their (the pursuers) entry having become so on the expiry of fifteen years from 1885.

"I have come to the conclusion that, having regard to the terms of the feu-right and to the just construction of the 5th section of the Act of 1874, the pursuers are right, and that there is no good answer to their demand.

"In the first place, as to the facts, I assume—what is not disputed—that the trustees, who were the defenders' authors, and who, as I have said, acquired in 1879, remained vested in the feu at all events until 1897. They probably remained vested until 1903, for although they disponed in 1897 to the defenders who were, I suppose, their agents, it seems to be conceded that this was merely a disposition in security. The exact date, however, is immaterial. What is certain is that the trustees remained vested at all events until more than fifteen years after their acquisition of the subjects in 1879, and after they had paid a casualty as they did in 1885.

"In the next place, *as to the terms of the title*. I see no room to doubt that under the original feu-right (which was, it appears, dated in 1874, but for present purposes prior to the passing of the Act) there was, in the sense of the 5th section of the Act 'a taxed composition payable on each sale or transfer of the property as well as on the occasion of the death of each vassal.' The feu-charter declares expressly that the feu-duty shall be doubled the first year of the entry of each heir or singular successor, and it further provides that each heir or singular successor shall be bound to enter and record his charter or writ within six months after the date of his succession or purchase. It also declares that all sales, dispositions, or other conveyances or transmissions, in violation of or inconsistent with the foresaid provisions, shall be, in the option of the superior, null and void; and further, that the whole conditions, provisions, &c., expressed in the feu-charter shall be *verbatim* engrossed or duly referred to, in terms of law, in all the after conveyances, transmissions, &c., of the feu.

"I confess I do not see what difficulty there can be either as to the construction of these provisions or even as to their enforcement. On the latter point some difficulties, which I am not sure that I quite appreciate, appear to have been suggested in the cases of *Dick Lauder* v. *Thornton*, 17 R. 320, and *Hamilton* v. *Chassels*, 4 F. 494. But apart from the consideration that those difficulties could hardly, as far as I see, arise here, I apprehend that the question of enforcement is not here *hujus loci*. The point, I apprehend, here simply is, whether on the just construction of this feu-right a taxed composition was payable upon each transmission of the feu.

"Then, such being the terms of the title, what does the 5th section of the 1874 Act enact with respect to the pecuniary consequences of the statutory implied entry in the case of corporations and trustees? What in particular does it enact in the case (which is the case here) where, the feu-right providing for a casualty on every transmission, and not merely on the death of a vassal, the feu is acquired by trustees and those trustees duly pay the composition due for their entry, and remain for fifteen years thereafter vested in the subjects?

"As I read the 5th section, it is quite express to the effect that another composition becomes payable on the expiry of the first period of fifteen years, and so on, upon the expiry of every subsequent period of fifteen years while the trustees remain vested. In other words, the effect here of the 5th section is just what the pursuers contend, viz., that a second composition became here payable to the superior in the year 1900. I may note in passing that there can be no doubt that the second composition here—the composition of 1900—was a composition due '*in terms of the 5th section*.'

"It results, therefore, that a casualty was due at the date of the pursuers' purchase, a casualty of which, if exacted and paid, they are entitled to be relieved by the defenders.

"It remains, however, to consider whether this casualty was exacted from and paid by the pursuers, or whether, on the other

hand, there is ground for the suggestion that what the pursuers in fact paid was really a further and different casualty due by themselves in respect of their own purchase.

"Here again, however, it seems to me that the terms of section 5 are express and conclusive. For what does the section say with respect to the case (being the case here) where a corporation or body of trustees pay a casualty under the section and then become divested before another casualty falls due. The words are—'Provided always that in the event of such corporation or of such trustee or trustees ceasing to be proprietors of the lands after having paid a composition or compositions in terms of this section, the successors of such corporation or of such trustee or trustees who shall be duly infeft in the lands at the expiration of twenty-five years where a composition is payable on the death of the vassal, or at the expiration of fifteen years where a composition is payable on the occasion of each sale or transfer as well as on the occasion of each death, from the date of the last payment of composition as aforesaid, shall then pay a composition, and the casualties for and in respect of such lands shall thereafter become due and payable at the same time and in the same manner as if such lands had never been vested in such corporation or in such trustee or trustees.' It does not appear to me that there is any doubt as to the meaning of these words. What they mean just is that the payment of a casualty by a corporation or by trustees—a payment under the 5th section—enfranchises the subject for the full statutory period in favour both of themselves and their succeesors. So far, therefore, from the pursuers being liable to pay a casualty on their own account in 1903, they were not liable in any casualty, at all events until 1915. There might conceivably have been a different question if the divestiture in the pursuers' favour had taken place between 1885 and 1900, and before the second casualty (the casualty of 1900) became due and payable. It might conceivably have been argued that the first casualty (that paid in 1885) was not a casualty paid in terms of the 5th section. But it is unnecessary to determine any question of that sort here, for there can be no doubt that the second casualty—the casualty due in 1900 and paid in 1903—the casualty here in question—was a casualty paid and payable in terms of the 5th section.

"On the whole matter, therefore, I think the pursuers are entitled to judgment in terms of their summons."

The defenders reclaimed, and argued—They were not bound to relieve the pursuers, as the casualty paid by the latter was not a casualty covered by the clause of relief, being, if due at all, due in respect of the pursuers' own entry. The reclaimers were never anything but security holders; the superior had therefore no good claim against them for a casualty. Accordingly the casualty paid by the pursuers in 1903 could not have been a casualty due by the reclaimers, and accordingly there could be no question of relief. But further, there was no casualty due in 1900. Upon a proper construction of section 5 of the Conveyancing Act of 1874, a casualty became due in 1879 upon the implied entry of John Lindsay Gordon and Henry Hoile Gordon. The casualty paid in 1885 was the casualty due in 1879. Another casualty (assuming they were payable every fifteen and not every twenty-five years) accordingly became due in 1894; that casualty was never demanded by the superior, who accordingly lost his right to it—*Fisher's Executrix* v. *Fisher's Trustees*, December 8, 1903, 6 F. 196, 41 S.L.R. 126; *Governors of Heriot's Trust* v. *Caledonian Insurance Company*, February 20, 1904, 6 F. 442, 41 S.L.R. 313; *Motherwell* v. *Manwell*, March 6, 1903, 5 F. 619, 40 S.L.R. 429. The next casualty, accordingly, was not due till 1909, fifteen years after 1894, so that at the date of the disposition by the defenders to the pursuers there was no casualty due. Further, however, looking to the terms of the feu-charter and section 5 of the Act of 1874, the casualties fell under the twenty-five and not under the fifteen years period, so that no casualty was due at the date of the pursuers' entry—*Governors of Heriot's Trust* v. *Drumsheugh Baths Company*, June 13, 1890, 17 R. 937; 27 S.L.R. 751; *Dick Lauder* v. *Thornton*, January 23, 1890, 17 R. 320, 27 S.L.R. 455; *Hamilton* v. *Chassels*, January 30, 1902, 4 F. 494,39 S.L.R. 337.

Argued for the respondents—What the respondents were entitled to under their disposition was the subject free of burdens in the shape of casualties. Under section 5 of the Act of 1874, the fifteen and not the twenty-five years period applied, and a casualty became due in 1900, fifteen years after 1885. Supposing, however, that the reclaimers were right in their contention that the casualty fell due in 1894, the fifteen years counting from 1879, it was immaterial, for that casualty had never been paid and was still owing when the pursuers made their payment in 1903. The fact that the superior may not have demanded it did not affect the clause of relief, which was unqualified—*Farquharson* v. *Caledonian Railway Company*, November 21, 1899, 2 F. 141, 37 S.L.R. 94; *Straiton Estate Company, Limited* v. *Stephen*, 8 R. 299, 18 S.L.R. 187. There was a casualty "due from or on account of the subjects," and the pursuers were accordingly entitled to relief; the fact that the defenders were only security holders had no bearing upon the present question, which was one between disponer and disponee under a clause of relief, and not a question between superior and vassal.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether the defenders are bound to make good to the pursuers the amount of a casualty which they were compelled to pay to the superior — they having no defence against the superior's demand, —having therefore submitted to it. The subjects had been conveyed to them by the defenders in 1903, when they were

infeft and entered with the superior under an *ex facie* absolute disposition. The pursuers found upon a clause of relief contained in the disposition granted to them, by which the disponers undertook to "free and relieve our said disponees and their foresaids of all feu-duties, casualties, and other burdens due from or on account of the said subjects prior to the respective terms of entry before mentioned."

I think it to be beyond doubt that a casualty had become due on 5th October 1900, under the 5th section of the Conveyancing Act of 1874, the fifteen years prescribed by that clause as the term for a new casualty in the case of subjects held in trust having passed since the last payment in 1885, and this was three years before the pursuers' term of entry. The defenders being at the time in possession and entered, the sole question is whether the clause of relief quoted does not bind them notwithstanding the defence they set up that they were only security holders. I cannot hold otherwise than that it does. They undertook as if they were absolute proprietors to give the relief, and in a question with the pursuers I am of opinion with the Lord Ordinary that they have no defence. I am unable to see that the defenders can obtain any ground of law for their defence from the case of *Motherwell* which was quoted at the debate. They cannot, as I think, found as against the pursuers upon the fact that the superior had not made any demand for the casualty of composition before they granted the disposition. If the casualty was due and exigible, as it certainly was, then it is such a casualty against which relief is guaranteed. It is difficult to see what benefit the clause of relief would confer if it did not apply here. For if the superior had demanded the casualty the defenders would have had to pay it, in which case a clause of relief to their disponees would have been unnecessary. It was due, and therefore the pursuers could not resist the superior's demand. It was paid, and the demand of relief was in my opinion unanswerable.

An argument was addressed to us for the purpose of showing that the limit of twenty-five years under the 5th section of the Conveyancing Act of 1874 applied to this case. I confess I am quite unable to understand how it could, and I do not find in the Lord Ordinary's note anything to suggest that such an argument was raised before him.

As regards the suggestion that what the pursuers paid was not the casualty due and exigible before the time of their obtaining their disposition, but a casualty due by them in respect of their own purchase, I adopt in its entirety what is said by the Lord Ordinary, and which it is unnecessary to repeat.

I would move the Court to affirm the judgment reclaimed against.

Lord Young concurred.

Lord Moncreiff—I am of opinion that the Lord Ordinary's judgment should be affirmed and that on the simple ground which he adopts. The defenders, when they conveyed the subjects to the pursuers in 1903, were infeft and entered with the superior under a disposition *ex facie* absolute. The disposition which they granted in favour of the pursuers contained the following clause of relief—"And we as trustees foresaid" (that is, as trustees for the firm of J. & W. Macdonald) "bind ourselves to free and relieve our said disponees and their foresaids of all feu-duties, casualties, and public burdens due from or on account of the said subjects prior to the respective terms of entry before mentioned."

Now in point of fact, before the terms of entry of the pursuers, and while the defenders were in possession of the subjects and entered with the superior, a casualty—that is, a composition—became due and payable "from or on account of the said subjects" on 13th October 1900, in terms of section 5 of the Conveyancing (Scotland) Act 1874.

The defenders plead that they were only security holders and that therefore the superior had no good claim against them. But assuming that this defence would be relevant in other circumstances, this is not a question between superior and vassal; it is a question between disponer and disponee under a clause of relief. And whether the defenders were merely security holders or not they were *ex facie* absolute proprietors and took upon themselves the obligations of absolute proprietors in granting the obligation to relieve their disponees of all casualties which were due and exigible at the date of the disposition.

Again, founding on the case of *Motherwell and Others*, they plead that as the superior did not demand the composition from them before they disponed the subjects to the pursuers, no casualty was due at that date from them or their authors, and but for the clause of relief there might have been room for argument on this contention. But as I have pointed out, the clause of relief is unqualified; there was a casualty "due from or on account of the subjects;" and the necessary consequence of the defenders not having paid that casualty which they were bound to pay was that the pursuers had no answer to the superior's demand and were obliged to pay it themselves and fall back on the clause of relief.

I confess I am unable to understand the grounds on which the defenders maintain that the twenty-five years' limit mentioned in the 5th section of the 1874 Act (which is confined to the case of a casualty becoming due on the death of a vassal) applies. The original feu-charter in favour of John Gordon provided that the feu-duty should be doubled the first year of the entry of every heir or singular successor. John Gordon apparently died before 1879, because in that year his heir, Henry Hoile Gordon, granted a disposition in favour of John Lindsay Gordon and himself as trustees for their firm of J. & H. Gordon, and on that disposition they were duly infeft and impliedly entered with the superior as they were bound under the feu-charter in favour of John Gordon. Being so entered they became subject to the provisions of the 5th section of the Act of 1874, and as trustees and singular successors they were liable in a composition, which they paid on 13th October 1885. By

payment of that composition they (to use the Lord Ordinary's felicitous expression) enfranchised the trust for fifteen years, which expired on 13th October 1900. Whether they retained the subjects or alienated them, a second composition became then due and payable. Before the expiry of that period Henry Hoile Gordon, as sole remaining trustee for behoof of the firm, conveyed the subjects in 1897 to the defenders, who were duly infeft and entered with the superior. In October 1900, while the defenders were still in possession and undivested another composition fell due in terms of the statute, fifteen years having expired from the date of the last payment of composition. Three years later the defenders conveyed the subjects to the pursuers, with the clause of relief which I have mentioned.

On that narrative I do not see any escape from the conclusion that under the clause of relief the defenders were bound to relieve the pursuers of the second composition.

If the second composition had been paid on 13th October 1900, when it should have been paid, the pursuers would not have been called upon to pay a casualty until 1915. But owing to the defenders' refusal to pay the casualty the pursuers had to pay it to the superior, in a question with whom they had no answer.

I confess that I share the difficulty which the Lord Ordinary has felt in seeing how the cases of *Dick Lauder* v. *Thornton*, 17 R. 320, and *Hamilton* v. *Chassels*, 4 F. 494, can assist the defenders; and I still less appreciate the grounds of the defenders' contention that the twenty-five years' limit and not the fifteen years' limit applies to the case.

In what I have said I do not think I have gone back in any way on what was decided in the cases of *Motherwell*, 5 F. 619, and *Heriot's Hospital Trustees* v. *Caledonian Insurance Company*, 6 F. 646, which were cases between superior and vassal, and which raised no question on a clause of relief. In the latter case, although it did not raise the same question, I had occasion very carefully to consider the terms and meaning of the 5th section of the statute.

On the other hand, I think the cases of *Straiton*, 8 R. 299, and *Farquharson* v. *Caledonian Railway Company*, 2 F. 141, assist the pursuers. I am accordingly prepared to dispose of the case as the Lord Ordinary has done and on the same grounds.

As this is sufficient for the decision of the case I have not found it necessary to examine more particularly the conditions of the original feu-charter in favour of John Gordon, upon the terms of which I think a separate and independent argument could be successfully rested by the pursuers.

The Court adhered.

Counsel for the Defenders and Reclaimers—C. K. Mackenzie, K.C.—Macphail. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Pursuers and Respondents—Craigie—MacLennan. Agents—Miller & Murray, S.S.C.

Thursday, January 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

REID & LAIDLAW, LIMITED *v.* REID.

Company—Liquidation under Supervision of the Court—Powers of Liquidator—Agreement by Liquidator to Compromise Claim subject to Sanction of Court—Subsequent Objection by Creditors—Locus pœnitentiæ till Sanction Obtained.

In an action at the instance of the liquidator of a company, which was being wound up under the supervision of the Court, for payment of a debt alleged to be due by the company, the defender pleaded that the liquidator was barred from insisting on the action in respect that he had concluded a compromise with the defender and had failed to apply to the Court for sanction of the compromise. The defender founded on (1) an offer by the liquidator to accept a certain sum in full of the claim, subject to the approval of the Court being obtained and to an accurate statement of his affairs being made by the defender, and (2) an acceptance of that offer by the defender, followed by the delivery by the defender of a statement of his affairs to which the liquidator took no objection for a period of seven weeks. It appeared that subsequently an objection to the compromise was intimated on behalf of certain creditors to the liquidator, who thereupon refused to proceed with the compromise and to apply to the Court to sanction it.

Held that, pending the sanction of the Court being obtained to the compromise, there was *locus pœnitentiæ*, and accordingly that the liquidator, in view of the objection taken by the creditors, was entitled (1) to refuse to present a note to the Court for the approval of the compromise, and (2) to prosecute the action.

On 1st July 1904 Reid & Laidlaw, Limited, wholesale ironmongers, Edinburgh, and William Robertson, liquidator of the said company, raised the present action against John Reid, formerly one of the directors and secretary of the said company, concluding for payment to the pursuer William Robertson, as liquidator of the said company, of the sum of £1106, 17s. 2d.

Reid & Laidlaw, Limited, resolved on voluntary liquidation on 19th February 1903, and thereafter on 6th March 1903 the First Division appointed the winding-up to be continued under the supervision of the Court.

The pursuers averred that the liquidator had frequently called upon the defender to make payment of the sum sued for, but that he refused to do so.

The defender admitted that the liquidator had called upon defender to pay the sum sued for, but explained that the liquidator negotiated with the defender for a settlement of the claim, and that in full knowledge of the circumstances the liquidator agreed to accept £100 in full from the defen-