of opinion that the judgment of the Lord Ordinary cannot stand. I only add a word with regard to the passage in the Lord Ordinary's opinion where he supports his interpretation of the statute on the ground of public policy, for he says—"It would disorganise the administration of the Parish Council if they were obliged to be content with a preferable ranking, and to await the convenience of a trustee in sequestration before that preferable claim was made good to them." I do not suppose that this implies any reflection on the conduct of trustees in bankruptcy as a class, but means only that the collector must wait until the trustee, in following out the statutory procedure, has ingathered enough funds to satisfy his claim. Now that may be unfortunate for the collector, but after all that delay is the necessary consequence of the bankruptcy of a debtor; and the policy of the Bankruptcy Act, which we are just as much bound to regard as that of any other statute, is to prevent the bankrupt's estate from being torn in pieces by the diligence of individual creditors, and to set it apart for distribution among all the creditors according to their respective rights. In this distribution the collector has a preference which may probably be more valuable to him, as well as less prejudicial to other creditors, than the diligence by which he would set aside the trustee.

LORD PEARSON—The estates of the bankrupts were sequestrated on 12th March. The question is whether a poinding of effects belonging to the bankrupts, executed by the respondents for poor and school rates within sixty days prior to the award of sequestration, is effectual in a question with the trustee. In the ordinary case there could be no question that such diligence is ineffectual, and that the claim, however preferential in its nature, would have to be worked out in the process of sequestration. The sequestration has the effect not merely of enabling the trustee to ingather the estate, but of vesting the estate in the trustee as if he held a completed diligence. In the legal sense the whole estate is already vested in the trustee, for distribution by him to all creditors according to their preferences. And it appears to me clear that no claimant can come in to the effect of interfering with the universal and completed title of the trustee unless he can show statute for it. Now it is said the Inland Revenue Act of 1884 confers on the Parish Council the right which they now claim. If on a sound construction that statute were clear in the respondents' favour, it must, of course, receive full effect. But so far from being clear in the respondents' favour, the language of section 7, sub-section 2, appears to me on a sound construction to mean that the undoubted preference of the public body for payment of rates must be worked out in the sequestration process, and that the word "sequestration" where it occurs in the clause really refers only to the particular diligence known under that name, and does not impair the universal right and title of the trustee under sections 102 and 108 of the statute. And I think that the same remark applies also to the term "assignation" occurring in section 7 of the Inland Revenue Act. I therefore arrive at the conclusion that the respondents' claim must be worked out by ranking in the sequestration, and I may add that in my view this result will avoid serious inconvenience and loss which would result if the opposite view were to prevail.

LORD SKERRINGTON—I agree with your Lordship.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court recalled the Lord Ordinary's interlocutor except in so far as it recalled the interim interdict formerly granted; affirmed the said interlocutor in so far as it recalled said interim interdict; found that in a question with the respondents the trustee in bankruptcy was entitled to the poinded articles, and that the respondents were not entitled to the same; and found it unnecessary to dispose of the conclusion for interdict.

Counsel for Complainer (Reclaimer) — Morison, K.C. — Mair. Agent — James Ayton, S.S.C.

Counsel for Respondents — Graham Stewart, K.C. — Kemp. Agents — R. Addison Smith & Co., W.S.

Friday, July 16.

FIRST DIVISION.

[Lord Johnston, Ordinary.

INGLIS AND OTHERS *v.* WILSON.

Superior and Vassal—Entry—Non-Entry—Prohibition against Subinfeudation—Irritancy—Obligation to Enter within Three Months—Disposition by Vassal Containing Obligation to Infeft a me vel de me—Confirmation not Asked of Superior—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A feu-contract, dated in 1862, contained a prohibition against subinfeudation expressed in ordinary terms, and protected by an irritancy, whereby it was provided that any sub-feus granted in contravention thereof should be absolutely null and void. It also stipulated that each successor should be bound to enter with the superior within three months, and that if they failed to do so they should be bound to pay to the superior a duplicand of the ordinary feu-duty for each year they delayed to enter, which duplicand was declared to be an additional feu-duty and not a penalty.

In the same year—1862—on a narrative showing that the conveyance was in security of a loan, the feuars con-

veyed the subjects to an investment company by an *ex facie* absolute disposition containing an obligation to infeft *a me vel de me*, which was duly recorded, but confirmation was never asked of the superior. In 1882, the original feuar having died, his heir obtained a reconveyance of the subjects by a disposition which was duly recorded within three months of its date.

Held (1), following *Colquhoun* v. *Walker*, May 17, 1867, 5 Macph. 773, 4 S.L.R. 15, that the disposition to the investment company, having an *a me vel de me* holding, was not a contravention of the prohibition against subinfeudation; (2) that the effect of the clause of irritancy was not to render that disposition *ab initio* void but only to enable the superior to set it aside; (3) that the disposition not being set aside, the investment company became impliedly entered with the superior by virtue of the Conveyancing Act 1874; and (4) that consequently the title given to the heir by the investment company was good and no duplicands of feu-duty on the ground of non-entry were due from him.

Question, if the duplicands could in any case have been considered as an additional feu-duty and not a penalty?

On 30th January 1908 Jane Stuart Inglis and others, 36 Heriot Row, Edinburgh, brought an action against James Wilson, 5 Merchiston Park there. In it they sought to have the defender "as proprietor of and infeft, and thereby impliedly entered in terms of the Conveyancing (Scotland) Act 1874," in certain subjects described in a feu-contract between Thomas Graham Weir, M.D., Edinburgh, and James and Robert Wilson, house carpenters, Edinburgh, dated 5th and recorded in the Books of Council and Session 14th, both days of February 1862, decerned and ordained to make payment of "(*First*) the sum of £22, 10s. sterling, being the taxed casualty payable in terms of said feu-contract on his entry, with interest thereon at the rate of 5 per centum per annum from the date of the citation to follow hereon until payment; and (*Second*) the sum of £938, 14s. 4d. sterling, being the *cumulo* amount of the duplicands payable in terms of said feu-contract in respect of his failure to enter, with interest thereon to the date hereof, together with interest on said sum of £938, 14s. 4d. sterling as aforesaid; Or otherwise it ought and should be found and declared, by decree foresaid, that in consequence of the death of Robert Wilson, who was the vassal last vest and seized in all and whole the area of ground before described, a casualty of £22, 10s. sterling, payable in terms of said feu-contract for the entry of each successor thereto, became payable to the superiors of the said lands upon the 23rd September 1882, being three months after the date of the death of the said Robert Wilson, and that the said casualty, together with a duplicand of the ordinary annual feu-duty of £22, 10s., payable half-yearly at Whitsunday and Martinmas in each year, in case of failure to enter and be infeft as provided by said feu-contract, with interest at 5 per cent. on each half-yearly payment from the time the same fell due till paid, and amounting in all as at the date hereof to £938, 14s. 4d., is still unpaid; and that the full rents, maills, and duties of the said subjects after the date of citation herein do belong to the pursuers, . . . as superiors thereof, until the said casualty, duplicand, and interest, and the expenses after mentioned, be otherwise paid."

The *feu-contract* granted by Dr Weir was in these terms:—" . . . . The said Thomas Graham Weir, in consideration of the feu-duty and other prestations after stipulated, hereby in feu farm *dispones* to and in favor of the said James Wilson and Robert Wilson, and the survivor of them, and the heir-male of the last survivor, who shall be major *sui juris* and resident within Scotland at the time, as trustees and trustee for behoof of the said firm or company of James and Robert Wilson and the present or future partners thereof, whether carried on under its present or any future firm, according to their respective rights and interests in the stock or funds of the said company, and to the assignees of the said trustees and trustee, heritably and irredeemably, but exclusive of assignees before registration hereof in the appropriate Register of Sasines, in terms of The Titles to Land (Scotland) Act 1858; and declaring that these presents shall not form a valid warrant for such registration, nor shall any instrument of sasine or notarial instrument following hereon be capable of being recorded in such register after the term of Whitsunday next, and with and under the conditions, provisions, declarations, irritancies, and reservations after mentioned, All and Whole . . . (*a building plot in Reigo Street, Edinburgh, part of the lands of Tollcross*) . . . with entry, notwithstanding the date hereof, as at the term of Whitsunday last Eighteen hundred and sixty-one; but always . . . with and under the burdens and conditions, provisions, declarations, clauses irritant and reservations following, viz.—*Providing* and declaring that . . . . it shall not be lawful to nor in the power of the said James Wilson and Robert Wilson, as trustees foresaid, or their aforesaid, at any time hereafter, to sub-feu the said area or piece of ground, or buildings erected or to be erected thereon, or any part thereof, or absolutely to sell or dispone the same, or any part thereof, so as in any case to be holden of themselves, but allenarly to be holden of and under the said Thomas Graham Weir, and his heirs and successors, superiors thereof, for payment of the *cumulo* feu-duty and performance of the prestations herein contained, and if the said James Wilson and Robert Wilson, as trustees foresaid, or their aforesaid, shall do in the contrary, then all such sub-feus, dispositions, and other deeds, and all that may and can follow thereon, shall be absolutely void and null, without declara-

tor; but without prejudice, nevertheless, to the said James Wilson and Robert Wilson, as trustees foresaid, or their aforesaid, to grant securities upon the premises, and in general to exercise any act of ownership which shall not be inconsistent with the manner of holding before prescribed; and in respect the entry of singular successors is taxed to a duplicand of the feu-duty hereinafter specified, each successor of the said James Wilson and Robert Wilson, as trustees foresaid, and their aforesaid, in the said area or piece of ground, and buildings erected or to be erected thereon, or any part thereof, shall be bound and obliged to enter with the said Thomas Graham Weir and his aforesaid, superiors of the said subjects, either by precept or writ of clare constat, or by charter or writ of confirmation, or by charter or writ of resignation, which, or the precepts in which, shall not be assignable, but all such charters, writs, or other deeds shall be recorded in the appropriate Register of Sasines by the persons in whose favour the same are granted, on their own behalf, or completed by notarial instrument or instrument of sasine following thereon in their own favour, and recorded all within three months of the date of their respectively succeeding to or purchasing the same, or otherwise acquiring right thereto, and that under pain of nullity of all such precepts, charter, writs, or other deeds, which shall not be so recorded or exhausted by notarial instrument or instrument of sasine following thereon, and recorded as aforesaid, and that notwithstanding of the authors of such successors being then in life, any law or practice to the contrary notwithstanding, the vassals, whether heirs or singular successors, always paying up the whole bygone feu-duties and others which may happen to be due at the time of their entry; and in case of failure to enter and be infeft, or have their title completed as aforesaid, they shall be bound to pay to the said Thomas Graham Weir and his aforesaid a duplicand of the ordinary annual feu-duty for the whole period during which they shall delay to enter, or have their title completed as aforesaid, and that half-yearly at the term, and with interest and penalty as herein expressed in regard to the ordinary annual feu-duty; which duplicand is hereby declared to be pactional and additional feu-duty, and nowise to be considered as penalty, and shall be a real burden affecting the said subjects in favour of the said Thomas Graham Weir and his aforesaid in like manner as the ordinary feu-duty of which it shall come in the place; and which burdens, conditions, provisions, declarations, reservations, and clauses irritant before written, are appointed to be inserted in the instrument of sasine or other notarial instrument, if any, to follow hereon, and to be inserted in all future deeds of transmission, charters, writs, precepts, decrees of special service, and adjudication and sasines, and instruments of resignation *ad remanentiam*, or other notarial instruments of or in the said subjects, or any part thereof, or validly referred to therein, in terms of law, otherwise such deeds, charters, writs, precepts, decrees, and instruments shall be void and null: *To be holden* the said area or piece of ground of and under the said Thomas Graham Weir, and his heirs and successors, in feu-farm, fee, and heritage for ever, for payment of the feu-duties and casualties after mentioned, but always with and under the burdens, conditions, provisions, declarations, and irritancies before specified: . . . For which causes and *on the other part*, the said James Wilson and Robert Wilson bind and oblige the said firm or company of James and Robert Wilson as a company, and the stock, funds, and estate thereof, and themselves as partners of that firm or company, and as trustees foresaid, and also as individuals, all jointly and severally, and their respective heirs, executors, successors, and representatives whomsoever, renouncing benefit of discussion, to make payment to the said Thomas Graham Weir, his heirs and successors, of the sum of Twenty-two pounds, ten shillings sterling yearly for the said area or piece of ground in name of feu-duty, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof as at Martinmas Eighteen hundred and sixty-one for the half-year immediately preceding, and the next term's payment thereof as at Whitsunday thereafter, and so forth half-yearly and termly at the said two terms in all time thereafter, with a fifth part more of each term's payment of liquidate penalty for each term's failure in punctual payment, and interest at the rate of five per centum per annum of each term's payment of the said feu-duty from the term of payment thereof during the not-payment of the same; and to make payment of a double of the said feu-duty at the entry of each heir and singular successor to the said subjects, and that in lieu of all entry-money or composition exigible by law for the entry of an heir or singular successor to the said subjects, or any part thereof, in all time coming; and also to make payment of a double of the said feu-duty for the whole period during which any successor of the said James Wilson and Robert Wilson as trustees foresaid and their aforesaid shall delay to take an entry or have their title completed, as before specified, beyond three months of their respectively succeeding to or purchasing, or otherwise acquiring right to the said subjects, or any part thereof, payable the said several duplications last mentioned at the terms and in the proportions, and with interest and penalty, as stipulated in the case of the ordinary feu-duty."

James Wilson and Robert Wilson had on 28th February 1862 granted in favour of the Improved Edinburgh Property Investment Company a disposition of the building plot which was recorded in the Register of Sasines on the same date, and was in these terms:—"We, James Wilson and Robert Wilson . . . feudally vested as heritable proprietors of the area or piece of ground after mentioned under the contract of feu after specified, as trustees for behoof of the

said firm or company of James and Robert Wilson, and members or shareholders of the society or company called The Improved Edinburgh Property Investment Company after mentioned, considering that . . . the directors of said company have agreed to advance and have advanced to us on security of said subjects, out of the funds of said society or company, the sum of Nine hundred pounds sterling, being the amount or ultimate value of thirty-six shares therein held by us, for which we have granted or are to grant bond to the trustees of said company in order to enable us to complete said buildings, on the express condition that the said subjects shall be disponed by us to the trustees of said company as after written, and so that, on fulfilment of the obligations incumbent on us in respect of said advance or any future advance the said directors may think fit to make to us in respect of said property, we may ultimately again become proprietors thereof; and seeing that payment has been made to us of said advance, whereof we do hereby acknowledge the receipt, and discharge the said trustees and all concerned for ever: Therefore we do hereby dispone, assign, convey, and make over to and in favour of . . . present trustees of the foresaid Improved Edinburgh Property Investment Company . . . and to the survivors and survivor of them and their successors in office . . . in trust always for behoof of the said company, and with the powers and under the conditions specified in the said rules, and particularly with full power to sell said subjects and others after disponed, and to the assignees and disponees of the said trustees, heritably and irredeemably, All and whole . . . (*the building plot*) . . . But always with and under the burdens and conditions, provisions, declarations, clauses irritant and resolutive, contained in the feu-contract of said subjects entered into between the said Thomas Graham Weir and us . . . With entry as at the term of Martinmas Eighteen hundred and sixty-one: To be holden *a me vel de me* in trust always for behoof of said Improved Edinburgh Property Investment Company, but always with and under the burdens and conditions, provisions, declarations, clauses irritant and resolutive, before referred to: And we resign the said subjects and others for new investiture in trust always for behoof of said Improved Edinburgh Property Investment Company, but always with and under the burdens and conditions, provisions, declarations, clauses irritant and resolutive, before referred to . . ."

Robert Wilson, surviving his brother James, had died on 23rd June 1882, and by disposition dated August and recorded 22nd September of that year the Improved Edinburgh Property Investment Company had conveyed the building plot to the defender James Wilson junior who was the heir-male of his uncle Robert Wilson. [For further *narrative v.* Lord Ordinary's opinion *infra.*]

The pursuers pleaded, *inter alia*—"(1) The defender being proprietor of the said subjects, and vested in the same, is bound to implement the provisions of the contract of feu, and particularly to pay the said casualty and duplicands of feu-duty. (2) The defender being bound to enter with the superior and pay a casualty within three months of the death of the last-entered vassal, and having failed to do so, is liable in a duplicand of the feu-duty for each year since then with interest. (4) The subjects described in the summons being in non-entry in consequence of the death of the last-entered vassal, the pursuers are entitled to decree of declarator and payment as concluded for alternatively."

The defender, *inter alia*, pleaded—"(4) On a sound construction of the said feu-contract, the defender, as heir-male of the last survivor of the said partners, is not liable in a casualty to the pursuers, and should be assoilzied. (5) The defender having been duly entered with the pursuers' authors by the registration of the said disposition on 22nd September 1882, and having tendered the casualty due on such entry, with interest from the date thereof, is entitled to absolvitor. (6) On a sound construction of the said feu-contract, the clause stipulating for a duplicand feu-duty, in the event of successors failing to enter with the superior within three months of their acquiring right to the said subjects, is of the nature of a penalty, and is void."

By interlocutors of 23rd July and 22nd October 1908 the Lord Ordinary (JOHNSTON) repelled the pleas for the defender; found that, by the feu-contract of 1862 founded on, subinfeudation was strictly prohibited, and the prohibition fenced with an irritancy; found that the defender derived his title through parties to whom the subjects had been conveyed in breach of said prohibition, and that therefore he held on a title which the superiors were not bound to recognise; found that the subjects fell into non-entry on the death of Robert Wilson, the last survivor of the original vassals, and granted decree in terms of the alternative conclusions of the summons.

Opinion.—"The pursuers, the Misses Inglis, represent, by due progress of titles, the late Dr Graham Weir, who was the superior of certain ground at Tollcross.

"In 1862 Dr Graham Weir feued out a portion of these lands in Reigo Street to James Wilson and Robert Wilson for behoof of their firm of James & Robert Wilson, house carpenters, Edinburgh.

[*His Lordship narrated terms of the feu-contract, v. sup.*].

"It is evident that this feu-contract contains provisions of a very exceptional and onerous character so far as the vassal is concerned, and, emanating as it did from the office of the late Dr Mowbray, the assumption that it was drawn with remarkable skill is not belied.

"The history of the feu has been this. The above feu-contract was dated 3rd and 5th February 1862, and it was registered 'on behalf of James Wilson and Robert Wilson, house carpenters in Edinburgh, and the survivor of them, as trustees or trustee for behoof of the firm or company

of James and Robert Wilson, house carpenters in Edinburgh, and the present or future partners thereof,' on 28th February 1862. On the same day James Wilson and Robert Wilson, as trustees for behoof of their said firm, having received an advance of £900 from the Improved Edinburgh Property Investment Society, being an enrolled Benefit Building Society, conveyed the subjects to the society by disposition *ex facie* absolute, though bearing *in gremio* that it was in security merely; and this disposition, which bore a tenendas clause *a me vel de me*, 'but always with and under the burdens and conditions, provisions, declarations, clauses irritant and resolutive,' of the granters' own title, a procuratory of resignation in the short form, and clause of registration, was registered on behalf of the company also of the same date — 28th February 1862.

"When this transaction was in course of preparation, Dr Mowbray wrote to the agents for the Property Investment Society on 20th February 1862—'If your clients prefer taking their security in the form of an absolute conveyance, I do not think that my clients will call on them to enter under the provision to that effect contained in the feu right, but I cannot sanction any deviation from the condition as to the manner of holding, and if your clients consider it necessary for their security to have a confirmation by the superior, they must take it on the usual terms.'

"No confirmation was asked, and no further reference was made to the superiors, who are not charged with any knowledge of or concern with the security title which was taken as above explained. The firm of James and Robert Wilson paid the feu-duty till the death, on 23rd June 1882, of Robert Wilson, predeceased by his brother James. The heir-male of the said Robert Wilson, the last survivor, was the defender James Wilson junior, the son and also heir-male of the said James Wilson. He had been assumed a partner by his uncle Robert of the firm of J. & R. Wilson, and continued and continues to carry on the business under that name, but he has since his uncle's death been the sole partner of the firm. The debt to the Property Investment Society having been paid off, the society, with the consent of the widow and children of the said James Wilson for their interest under the will of the said Robert Wilson, conveyed the subjects to the said James Wilson junior by disposition recorded 22nd September 1882. I understand that the property was treated as a partnership asset, and that James Wilson junior was assumed to be entitled to one-half in his own right, and to acquire his uncle Robert's half on paying out his representatives the sum at his credit in the partnership. And the dispositive clause bore to dispone 'to and in favour of the said James Wilson junior, his heirs and assignees whomsoever, heritably and irredeemably,' without any reference to the so-called firm of J. & R. Wilson, which was quite consistent with the position James Wilson junior held as sole partner of the business. The manner of holding was implied by virtue of the Titles Act 1868, section 6.

"No intimation was given of this transfer of the property in 1882, and the feu-duties continued to be paid regularly, and to be acknowledged by the factors of the superiors as received 'from Messrs J. & R. Wilson.'

"The Misses Inglis, as superiors, having learned of the transmission which took place in 1882, have now demanded payment of the taxed casualty of £22, 10s. due by the said James Wilson junior, together with the duplicands payable in terms of the title yearly since Martinmas 1882, in respect of his alleged failure to enter. For these sums, being £22, 10s. of casualty and £938, 14s. 4d. of duplicands and interest, the Misses Inglis now sue the said James Wilson junior in the present action. Allowance is made in the calculation of the sum sued for for the feu-duties actually paid.

"To this action various pleas in defence are proponed. I think I may put aside the first three without remark, and also the seventh, which is founded on personal bar, by reason of acceptance of feu-duties. There is nothing to indicate that any change took place in the tender and acceptance of feu-duties after the recording of the defender's disposition, which could bring to the knowledge of the superior that any change in the ownership had taken place. The feu-duties were tendered and accepted, as they had been all along, as from the old firm of J. & R. Wilson.

"The defender's fourth plea is based on the contention that no casualty was due so long as the subjects were held by the disponees or the survivor, or the heir-male of the last survivor, as trustees or trustee for the firm. There is some justification for this contention in the terms in which the obligation to enter within three months is imposed by the feu-contract on successors. It is applicable to each successor 'of the said James Wilson and Robert Wilson, as trustees foresaid, and their foresaid.' Now, 'their foresaid' may be intended to mean the survivor or the heir-male of the survivor only. If so, then, impliedly, neither the survivor nor his heir-male is intended to be included in the term 'successor,' who is regarded as a person 'succeeding to or purchasing' the subjects 'or otherwise acquiring right thereto.' But it is even then doubtful whether the heir of the last survivor of James and Robert Wilson taking up the trusteeship is not brought in by the terms of the reddendo. I do not, however, think it necessary to canvass this question, because I do not think that James Wilson junior did make up a trust title as heir-male of the last survivor of the trustees. The title of the trustees was burdened by an infeftment in security, of which confirmation was not asked. But it came to an end by the reconveyance, with consents, to James Wilson junior. I assume he might have served heir to his uncle and passed over the security infeftment. But it did not suit him to do so.

He was left sole partner, and the firm was only carried on in name. He had right to one-half of the property himself, and he was acquiring the other half, and what he made up accordingly was not a trust title but a personal title. In these circumstances I do not think that he can plead that, as heir-male of the last survivor of the original partners, he is exempt from casualty.

"It was represented that, strictly speaking, the title made up was no title at all, in this respect—subinfeudation was prohibited and fenced with an irritancy. The Property Investment Society made up a subaltern title and never confirmed. It was therefore bad, and could not be a valid link in the progress. Consequently a conveyance by the society to James Wilson junior was inept, and did not connect him with the original grant.

"I regret to say that I think there is much force in this view. The Property Investment Society chose, though warned against doing so, to rely upon a *de me* holding which was prohibited, and the prohibition fenced with an irritancy. The superiors were not bound to recognise it if they knew of it, which there is nothing to indicate, and not only did nothing to recognise it, but pointedly intimated that, to validate their security if they chose to take it in form of an *ex facie* absolute disposition, the society must take out confirmation on the usual terms, and that confirmation never was obtained unless by force of the 4th section of the 1874 Act when it passed. But this section could not have this effect, as the society could hardly be said to be 'duly infeft,' and as, moreover, it expressly provided 'That nothing herein contained shall be held to validate any subfeu in cases where subinfeudation has been effectually prohibited.' But giving the argument all the effect which the defender can claim for it, I do not think that it aids him. If the title of the building society was bad in a question with the superior, as personally I think it was, that does not make the title of the defender good. On the contrary, it makes his title bad, and leaves the property *in hæreditate jacente* of the late Robert Wilson. The subjects have therefore been in non-entry since his death, the defender has not entered in terms of the feu-contract, and he is consequently liable, whether as heir or singular successor, in a duplicand of the feu-duty in respect of his entry, and in double the normal feu-duty for all the years that he has stood out. But if, on the other hand, the title of the building society was good, the defender's failure to complete his title according to the conditions of the feu-contract would have left him in the same position, excluding for the present, as this plea does, from consideration the effect of the Conveyancing Act of 1874. In any view, therefore, the defender's fourth plea falls to be repelled.

"I think it convenient to pass now to the defender's sixth plea, which is to the effect that the stipulation for a duplicand feu-duty in the event of failure to enter within three months is of the nature of penalty, and is void. I do not understand how it should be void. I presume what is meant is that it can only be enforced subject to the equitable power of the Court to restrict it. In fact I understand that what is intended to be raised is the well-known question of penalty or liquidate damages. Now I quite recognise that the provision is a compulsitor on entry, and may therefore be said in a sense to be *in pœnam*, yet I cannot find that it is a mere penalty capable of restriction. It has been well settled that the use of the word 'penalty' or of 'liquidate damages' is not conclusive one way or the other, and that the reality of the party's intention will override the expression. But here I think that the expression goes with the intention. We are dealing with a contract which on the one hand is of very common occurrence, but which, on the other hand, stands out distinguished by its peculiar incidence from ordinary contracts. The contract between superior and vassal with regard to the feuing of land stands very much by itself. Now here, what the superior says is—I will feu you my lands for a feu-duty of £22, 10s. If your successor enters with me or my successor within three months of a transmission of the feu, the feu-duty shall continue £22, 10s. per annum, but if he fails to enter within the three months, the feu-duty shall be doubled, and the duplicand shall, during the period of his remaining unentered, come in place of the ordinary feu-duty. During the period in question the duplicand becomes the reddendo of the feu-right, and during that period there is no other reddendo. It is difficult, therefore, to treat it as a restrictable penalty. I do not proceed upon the declaration that it is to be pactional and nowise to be considered as a penalty, but on the fact that it is pactional and additional feu-duty, and is made a real burden affecting the subjects. This, if a penalty, it could not be, because a restrictable penalty is not a definite sum, and therefore cannot be made a real burden. I was referred to the cases of *Elphinstone*, 13 R. (H.L.) 98, 23 S.L.R. 870, and of the *Clydebank Engineering and Shipbuilding Company*, 7 Fr. (H.L.) 77, 42 S.L.R. 74, and I think that the above conclusion is in accordance with the views of the learned Lords who gave judgment in these cases.

"I shall therefore repel the defender's sixth plea.

"There remains for consideration his fifth plea, founded upon the 4th section of the Conveyancing Act of 1874. He says that, having been duly entered by registration of his disposition on 22nd September 1882, he is only due a casualty on such entry, and, as it has not been paid, admits that it must carry interest from the date of the entry—at least, so I read his plea. In passing, I may say that I do understand this admission, for I see no foundation for it in the feu-contract. But the essential question is, what in the present case is the effect of the implied entry introduced by the Conveyancing Act 1874? After the best consideration which I can give to the case,

I have come to the conclusion that this depends in the present case upon the true effect, in a question with the superior, of the title which the defender has made up. If that title is good against the superior, I think that the implied entry enables the defender to elude the provisions of the feu-contract on which the superior bases his demand. But if that title is bad, then the defender has no implied entry with which to shield himself from the superior's claim.

"Assuming that the title which he made up in 1882 is good, then by the 2nd subsection of the 4th section of the Act, he was impliedly entered of the date of recording his disposition. But in introducing this implied entry there were anxious provisions made in favour both of vassal and superior. The object of the section was to get rid of the charter by progress. Accordingly section 4 (3) provided that the implied entry, which was to obviate its necessity, should not prejudice the vassal by entitling the superior to demand any casualty sooner than he could prior to the Act have required the vassal to enter. And it also provided that it should not prejudice the right of the superior to any casualties, feu-duties, or arrears of feu-duties which might be due at or prior to the date of such entry, and then—1*st*. That 'all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutem canonem*,' shall continue to be available to such superior in time coming; and 2*nd*. That 'all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise,' shall continue to be available to such superior in time coming.

"I cannot regard the conditions of the feu-right on which the present question turns as a right or remedy competent to the superior for recovering, securing, and making effectual his casualties. That it may have that indirect effect does not, I think, bring it within the natural meaning of the terms above used.

"Again, while it is certainly an obligation and condition in the feu-right prestable to or exigible by the superior, yet from its very essence it ceases to be operative in consequence of the implied entry provided by the Act.

"If, then, the defender's title was one which the superior was bound to recognise, I think that the implied entry effected by the statute would be a complete answer to the pursuer's claim. But then, as I have already stated, I do not think that the title made up by the defender in 1882 was valid in a question with the superior. If that be so, the subjects have been in non-entry since the death of Robert Wilson on 23rd June 1882, and the superiors are entitled to recover. But I am not sure that the alternative conclusion of the summons exactly fits the circumstances, as to which I shall continue the case to hear parties."

The defender reclaimed, and argued—The conveyance to the investment company was not of necessity a contravention of the prohibition, for the disposition contained an obligation to infeft *a me vel de me*, and the superior could waive any objection and subsequently confirm—Bell's Lectures, p. 620. Such conveyances were not meant to create sub-feus, but to be confirmed by the superior at a subsequent date—*Colquhoun* v. *Walker*, May 17, 1867, 5 Macph. 773, 4 S.L.R. 15. *Esto* that until that date arrived the superior could object to the title, he had not done so here, and his agent by his letter of 20th February 1862—[*quoted by the Lord Ordinary, vide opinion supra*]—had virtually waived any objection to the company's title. In any event, the conveyance to the company was not absolute but in security, and therefore there was no sub-feu, merely a burden on the existing right. Accordingly there being no subinfeudation the company had a good title, and it therefore followed that the defender's title was also good, and he was impliedly entered on getting infeftment, for the date of his disposition was subsequent to 1874. No sum was due therefore in respect of the alleged non-entry. With regard to the casualty of £22, 10s. sued for, the defender, without admitting liability, now tendered payment thereof.

Argued for respondents—The Lord Ordinary was right. Each successor in the feu, whether heir or singular successor, had to complete his title within three months. This the investment company had not done, and their title therefore was bad. The prohibition against subinfeudation was fenced with an irritancy, and where that was so a conveyance with a double manner of holding was bad. *Esto* that the conveyance to the company was a security title, that did not aid the defender, for in that case the company could give him no better title than their own. Neither did the Act of 1874 help him, for that Act did not validate any sub-feu in cases where subinfeudation had been effectually prohibited. Reference was made to *Church of Scotland* v. *Watson*, December 24, 1904, 7 F. 395, at pp. 406 and 409, 42 S.L.R. 299, and *Fife Coal Company, Limited* v. *Bernard's Trustees*, 1907 S.C. 494, at pp. 503-4, 44 S.L.R. 236.

At advising—

LORD KINNEAR—This is an action at the instance of the superiors of a piece of ground in Edinburgh against the defender, who, as they aver, "is duly infeft" in the ground. The superiors' demand is for payment of a casualty and of a sum of £938, 14s. 4d. as a penalty—for in my opinion it is a penalty and nothing else—for holding out unentered since 23rd September 1882. Throughout that period the defender has been infeft and the superiors have been drawing the feu-duties. The claim is based on highly technical grounds, and the penalty demanded is certainly a very large sum in proportion to the extent of the ground. The Lord Ordinary has expressed

regret that he is compelled to give effect to the pursuers' demand; but I agree with his Lordship that rights of this kind must be determined according to the settled rules of law, however hardly these may bear upon either party to a particular case. The only question that we have to consider, therefore, is whether the pursuers have established valid grounds in law to support their demand.

The feu-right in question was constituted by a feu-contract in 1862 by which the late Dr Graham Weir disponed the subjects to "James Wilson and Robert Wilson and the survivor of them, and the heir-male of the last survivor," as trustees for a firm of which James and Robert Wilson were partners. That appears to me to be a grant in perfectly clear terms, but as some confusion was introduced into the argument through a misconception as to its true construction I think it is desirable to consider its effect before going further. The Lord Ordinary has, I think, attached too much importance to the reference to the trust under which the subjects were to be held. As regards beneficial interest, the mention of the trust involves very important consequences, but it has no feudal effect whatsoever. The grantees on taking infeftment are entered as individuals, and so long as they remain his vassals the superior is no more concerned with their liabilities as trustees than with any other personal liability they may have undertaken to creditors who are strangers to the feu. The mention of the trust may enable the beneficiaries the more readily to vindicate the property if need be, but it does not put them into the position of vassals; and unless and until someone beneficially interested has acquired a title to displace the entered vassal and take up the feu in his room, the superior has nothing to do with the trust. The feu-contract therefore is simply a *de presenti* grant to James and Robert Wilson and the survivor with a simple destination to the heir of the longest liver.

I cannot assent to either of two views which have been suggested—first, that the survivor of James and Robert Wilson is to be considered as the successor of the first predeceaser; and secondly, that the heir of the longest liver is a direct disponee. Both of those views are inadmissible. It is well settled that the effect of a destination in these terms is that the immediate grantees are joint fiars, that on the death of one the survivor takes the whole, and that on his death his heir is entitled to take up the succession as heir of the investiture.

The next question is as to the effect of certain conditions contained in the feu-contract. The first of these is a prohibition of sub-feuing, which is expressed in ordinary terms and is protected by an irritancy, whereby it is provided that "if the said James Wilson and Robert Wilson, as trustees foresaid, or their aforesaid, shall do in the contrary, then all such sub-feus, dispositions, or other deeds, and all that may and can follow thereon, shall be absolutely void and null without declarator." The second condition, which the pursuers bring into combination with the first, is that each successor of James and Robert Wilson and their aforesaid in the ground shall be bound and obliged to enter with the superior either by precept or writ of *clare constat*, or by charter or writ of confirmation, or by charter or writ of resignation, and that all such charters, writs, or other deeds shall be recorded or completed by notarial instrument or instrument of sasine following thereon and recorded all within three months of their respectively succeeding to or purchasing the same, and that under pain of nullity of all such deeds not so recorded; and it is provided that in case of failure to enter they shall be bound to pay to the superior a duplicand of the ordinary feu-duty for the whole period during which they shall delay to enter, and the duplicand is declared to be additional feu-duty and not a penalty. Now the circumstances in which the question as to the effect of these conditions arises are that the immediate disponees conveyed the subjects to trustees for a company called the Improved Edinburgh Property Investment Company. That disposition contained an obligation to infeft by a double manner of holding, and according to the Titles Act of 1858, which was then in force, that implied an indefinite precept. Accordingly it was open to the disponees to enter by taking infeftment and obtaining confirmation from the superior afterwards. The original disponees, James and Robert Wilson, continued in possession of the subjects till 1882, when the last survivor died. After the death of the last survivor the present defender, who is the son of James and the heir of Robert Wilson, obtained from the trustees of the Improved Edinburgh Property Investment Company a reconveyance of the subjects by a disposition dated 22nd September 1882. If that was a good title, then the defender has satisfied the condition of the feu-contract requiring entry with the superior within three months, but the Lord Ordinary has found that it is bad on the ground that the disposition to the trustees for the company and the title made up by them were null, and that the 1874 Act could not therefore have the effect of entering it with the superior. This being so, the disposition by the trustees for the company to the defender was also necessarily bad, because he could have no higher title than his authors. The Lord Ordinary has proceeded on this view, and has found that the defender holds on a title which is inept and which has not been validated by the confirmation implied by the Act of 1874.

The first question then which we have to consider is whether the disposition to the trustees for the Property Investment Company is struck at by the prohibition of sub-feuing contained in the feu-contract. The disposition is a somewhat singular deed. So far as the dispositive clause goes, it is a disposition *ex facie* absolute, but it sets forth as the cause of the grant a transaction for a loan by the

grantors, and a condition that the grantors on repayment of the loan may again become proprietors of the subjects, and on that narrative it proceeds to dispone the subjects heritably and irredeemably, to be holden *a me vel de me* in trust for the company. I think that difficult questions might have been raised as to that deed if it had been necessary to determine whether it had the legal effect of a disposition *ex facie* absolute qualified by a back bond or other extrinsic writing; but these questions do not affect the feudal investiture, and it is with that alone that we are concerned in this case. This is a conveyance of subjects heritably and irredeemably, subject no doubt to a personal obligation expressed in the deed under which the grantees must reinvest the grantor—but nevertheless a conveyance of the *dominium* and not merely of a burden on the *dominium*. Such a conveyance cannot be less feudally effective than an absolute conveyance qualified by a back bond which has been recorded in the Register of Sasines; and if we accept the law laid down by the majority of the judges in *Gardyne* v. *The Royal Bank*, 13 D. 912, 15 D. (A.L.) 45, 1 Macq. 358, and, so far, without dissent from the minority, it is a good title of property on which the grantees may be duly infeft under the superior so as to enable them to grant a valid and effective warrant for the infeftment of a disponee. No exception was taken by the superior except on the ground that the disposition was struck at by the clause prohibiting subinfeudation, and if this is not so, it is not suggested that the deed is otherwise bad.

Mr Chree argued that the prohibition struck at a disposition with a double manner of holding as well as at a disposition with a base holding only. There is authority both for and against that proposition in the books of writers on conveyancing; but the question is now settled by the decision in *Colquhoun* v. *Walker*, May 17, 1867, 5 Macph. 773, in which it was held that a disposition containing an obligation to infeft by two manners of holding was not a contravention of such a clause. In that case the Lord President, after explaining how the form of conveyance with an obligation to infeft by two manners of holding came into use, observed—"It is not a form of conveyance in the ordinary case, intended to create a permanent base right, but only to complete a title that shall place the disponee in the shoes of the disponer." Lord Curriehill concurred with the Lord President, and added that the action was based on a mistaken view of the legal nature and effect of an obligation to infeft with a double manner of holding and an indefinite precept of sasine. That decision is conclusive, and I cannot therefore agree with the Lord Ordinary's view that the disposition is struck at by the prohibition.

This really ends the case, but an argument was addressed to us founded on the effect of the clause of irritancy which it is right that I should notice. In *Colquhoun* v. *Walker* the prohibition was not protected by an irritancy. But this difference cannot affect the construction of the clause prohibiting subinfeudation, although in regard to the efficacy of the prohibition it may be very material. According to the Lord Ordinary the irritancy made the infeftment *ab initio* null and void. In this view the infeftment could never be confirmed because a nullity cannot be ratified; whereas if the effect of the irritancy was only to enable the superior to set aside the infeftment if he chose, then it would be for him to consider whether he ought not rather to confirm it, and so give effect to his own right to exclude sub-feus by entering the disponee with himself. The objection to the title depends on a condition in favour of the superior which he was entitled to waive if he thought fit. Apart from authority it seems to me clear enough that if the disponees had gone to the superior with this disposition containing an indefinite precept it would have been open to the superior to grant a writ of confirmation if he thought fit, and *Colquhoun* v. *Walker* decides that he could have been compelled to do so. The importance of this lies in the fact that, on the pursuers' own showing, the disponees never intended to take up a right which might be challenged by the superior, for the trustees of the company put the disposition before the agent of the superior, who replied that he had no objection to the form of the title. The letter from the superior's agent was in these terms:—[*His Lordship read the letter of 20th February* 1862, *v. Lord Ordinary's opinion*]. That letter appears to me to be an intimation to the agents of the disponees that the superior does not challenge the validity of the disposition, but that if the disponees desire to make themselves safe by making up a feudal title they must do so under the superior, and on the terms stipulated for the entry of singular successors. What was done was that the disposition was recorded, and the disponees thus obtained an infeftment which was open to confirmation, and which they were entitled to expect that the superior when called upon would confirm. Matters remained in this position till the Act of 1874 came into force, and entered them with the superior to the same effect as if they had obtained a writ of confirmation. They had not as a matter of fact had their infeftment confirmed, but it was not therefore null; and it is evident that the superior was aware of their right, and I cannot doubt that if they had gone to the superior and asked for a writ of confirmation they would have got it. It follows, therefore, that by virtue of the 1874 Act they were entered and they were accordingly in a position to grant a valid disposition to the defender. On obtaining that disposition the defender was duly infeft and entered, and in this way the condition as to the time within which the vassal must enter with the superior was satisfied.

In the meantime the superior had always a vassal in the feu, and a vassal who performed all the stipulations of the contract.

The Lord Ordinary says that the defender might have made up his title as heir to his uncle Robert Wilson, the longest liver of the original disponees. As, however, the rights both of the heir and disponee were combined in the person of the defender, it was for him to consider in what manner he should complete his title, and we are not called on to inquire whether he has taken the best method, or to decide what the result would have been had the rights of heir and disponee been vested in different persons. There was one point raised by the Lord Ordinary and discussed in the argument before us, to which I advert only for the purpose of saying that in other circumstances a difficult question might have arisen. The Lord Ordinary holds that the heir is liable for a double feu-duty for all the years during which in his Lordship's opinion he was unentered; and he considers that the stipulation in the feu-contract for this duplicand is for additional feu-duty and not a penalty. His Lordship observes that during the period of non-entry the duplicand becomes the reddendo of the feu-right. Now I am very much disposed to accept the Lord Ordinary's suggestion that we are not lightly to assume that the original feu-contract is a blundered piece of conveyancing, but when one comes to consider the terms of the clause regarding the successor's failure to enter, I am not sure but that it presents an example of the justice of Mr Duff's criticism of all attempts of this kind to provide for what he calls artificial non-entries. It provides—[*His Lordship read the clause*]. Now feu-duties are due only under the contract, and no liability to pay them can attach to anybody who has not taken up the contract by entering with the superior. On the other hand, if there is an entered vassal, then the lands cannot be in non-entry. The notion that any payment exacted on the ground of non-entry can be part of the reddendo exigible from an entered vassal is a legal impossibility; and therefore if the clause is effectual it is only as imposing an additional fine in respect of failure to enter. How far this would affect the present defender we need not consider or decide.

The remaining question is what judgment should be pronounced. The defender tenders the sum of £22, 10s., and therefore as regards that sum no question arises. In regard to the sum of £938, 14s. 4d. also sued for, the defender must be assoilzied from the conclusions of the summons.

The LORD PRESIDENT and LORD GUTHRIE concurred.

LORD M'LAREN and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutors of 23rd July and 22nd October 1908, decerned against the defender for the sum of £22, 10s. and interest thereon at the rate of five per cent. from 22nd September 1882, and *quoad ultra* assoilzied the defender from the conclusions of the summons.

Counsel for Pursuers (Respondents)—Cooper, K.C.—Chree. Agents—Henry & Scott, W.S.

Counsel for Defender (Reclaimer)—Hunter, K.C.—Sandeman. Agents—Thomas White & Park, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Inverness.

NATIONAL TELEPHONE COMPANY, LIMITED *v.* SMITH.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, sec.* 17—*Redemption of Weekly Payment—Lump Sum—"Where the Incapacity is Permanent."*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I, sec. 17, enacts—"Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act. . . ."

A workman sustained injuries in the course of his employment whereby he lost his arm. By memorandum of agreement duly recorded his employers agreed to make him a weekly payment of 16s. from the date of the accident during the period of his incapacity. After the weekly payment had been made for six months, they applied to the Sheriff-Substitute, as arbiter, to have it redeemed by payment of a lump sum in terms of section 17 of the First Schedule of the Workmen's Compensation Act 1906. The Sheriff-Substitute, without inquiry as to the workman's capacity for work, fixed the amount of the lump sum as calculated from the weekly payment, on the footing of permanent incapacity under the first branch of the section.

On a stated case, *held* (*diss.* Lord Low) that the arbiter was right.

In an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), made by the National Telephone Company, Limited, for the purpose of redeeming by payment of a lump sum the weekly compensation paid by them to William Smith, residing at 76 Eastgate, Inverness, the Sheriff-Substitute (GRANT) at Inverness, without having any inquiry into Smith's capacity, awarded him £622, 14s.,