There is no precedent for such an application, and I do not think that we should entertain the present one. If the petitioners are not content with the statutory recal but desire decree of reduction, and conceive that there are competent grounds for such a decree, I think that they should proceed to seek it under the ordinary forms of process.

The Court refused the petition.

Counsel for the Petitioners—Sandeman, K.C. — Maclaren. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Macphail, K.C.—Henderson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Trustee in the Sequestration—E. O. Inglis. Agents—Webster, Will, & Company, W.S.

Counsel for the Scottish Amicable Life Assurance Society — Gentles. Agents — Thomson, Dickson, & Shaw, W.S.

Saturday, March 17.

COURT OF SEVEN JUDGES.

[Sheriff Court at Edinburgh.

FINLAY *v.* ADAM.

Superior and Vassal — Casualties — Feu-Charter—Construction—Taxed Casualty —"A Duplicand" of the Feu-Duty.

The reddendo clause of a feu-charter granted in 1910 stipulated for certain sums of feu-duties in respect of the feus, to be payable "at two terms in the year, Whitsunday and Martinmas, by equal portions, commencing the first payment" at a certain date. There followed a clause providing for liquidate penalty in case of failure and for interest, and then the following words—"and paying a duplicand of the said feu-duties of" so much "at the term of Whitsunday 1930, and at the same term in every nineteenth year thereafter, in lieu of casualties, with interest and penalties in case of failure." *Held* (*dis.* Lord Johnston) that the sum payable to the superior in lieu of casualties in every nineteenth year was twice the amount of the feu-duties in addition to the feu-duties for the year.

Miss Eliza Russell Bruce Adam, *pursuer*, brought an action in the Sheriff Court at Edinburgh against Thomas Finlay, builder, Leith, *defender*, concluding for decree, *inter alia*, that the defender was bound to redeem the duplicand in lieu of casualties exigible in respect of a feu held by the defender off the pursuer, and that the amount of compensation payable therefor was £69, 1s. 6d.

The *disposition* which was the defender's title to the subjects provided, *inter alia*—"To be holden the said area or piece of ground of and under me the said John Baird and my foresaids in feu-farm fee and heritage for ever: Paying therefor yearly my said disponees (*In the first place*) to my superiors the said trustees of the deceased Sir George Campbell Baronet and their successors the sums of six pounds sterling and one penny Scots for each of the said three areas or building stances and buildings thereon (*First*) before disponed and one penny Scots for the area or piece of ground (*Second*) before disponed and coloured blue on the foresaid plan, being the proportions hereby allocated upon the respective subjects before disponed of the cumulo feu-duty of Three hundred and twenty-five pounds payable by me for the whole subjects of which those before disponed form a part in terms of power granted to me in the said feu-charter in my favour dated and recorded as aforesaid: And which feu-duties are hereby further allocated and apportioned as follows, *videlicet*:—The sum of six pounds upon the ground flats of each of said three tenements and one penny Scots upon the remainder of said tenements and payable said feu-duties with relative duplications interest and penalties if incurred all at the terms and in the manner mentioned in the said feu-charter in my favour dated and recorded as aforesaid and (*In the second place*) to me and my foresaids the further sum of twenty-four pounds sterling per annum in name of feu-duty for each of the two lots of building stances facing Smithfield Street and the buildings erected thereon respectively and twenty-eight pounds upon the corner lot or building stance partly facing Smithfield Street and partly facing Wheatfield Place and the buildings erected thereon which three lots or building stances form part and portion of the area or piece of ground (*First*) hereinbefore disponed making a total feu-duty of seventy-six pounds per annum payable to me and my foresaids and that at two terms in the year Whitsunday and Martinmas by equal portions commencing the first payment of the said feu-duties at the term of Whitsunday Nineteen hundred and eleven for the half-year preceding (no payment being made for the possession to Martinmas Nineteen hundred and ten) and the next term's payment at Martinmas following and so forth half-yearly termly and proportionally thereafter in all time coming with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof and the interest of each term's payment at the rate of five pounds per centum per annum from the time the same falls due until paid and paying a duplicand of the said feu-duties of twenty-four pounds twenty-four pounds and twenty-eight pounds at the term of Whitsunday Nineteen hundred and thirty and at the same term in every nineteenth year thereafter in lieu of casualties with interest and penalties in case of failure if incurred all as provided with respect to said feu-duties."

The parties *averred*—"(Cond. 1) The pursuer is superior of the subjects before-mentioned, in terms of disposition in her favour by John Patterson, merchant, 13 Dumbiedykes Road, Edinburgh, dated 12th and recorded in the Division of the General Register of Sasines applicable to the county

of Edinburgh 15th, both days of May 1911. The defender is the proprietor of said subjects, and impliedly entered as her vassal therein in virtue of feu-charter by John Baird, solicitor, Edinburgh, in his favour, dated 17th, and recorded in the said Division of the General Register of Sasines 19th, both days of November 1910. (*Ans.* 1) Admitted. (Cond. 2) The subjects are held by the defender of and under the pursuer by the tenandas and for the reddendo specified in the said feu-charter. (*Ans.* 2) Admitted. (Cond. 4) The pursuer served on the defender on 18th May 1915 a notice of redemption of casualties in terms of section 11 of the Feudal Casualties (Scotland) Act 1914. (*Ans.* 4) Admitted, under reference to the notice. (Cond. 5) The pursuer has called on the defender to redeem the said duplicand, in terms of the Feudal Casualties (Scotland) Act 1914, as at 18th May 1915, and she believes and avers that the amount of the compensation for such redemption is £69, 1s. 6d. . . . (*Ans.* 5) Admitted that the pursuer has called on the defender to redeem the duplicand feu-duty in terms of the Feu Duties and Casualties (Scotland) Act 1914, as at 18th May 1915, and that the defender has refused to make payment of the sum of £69, 1s. 6d. claimed as compensation for such redemption. *Quoad ultra* denied, and explained that the sum claimed by the pursuer as compensation is calculated on the assumption that the stipulation in the reddendo of said feu-charter imports an obligation to pay two years' feu-duty in addition to the feu-duty of the year in which the duplicand is payable; that the defender's contention is that said stipulation imports an obligation to pay only one year's feu-duty in addition to the feu-duty of the year in which the duplicand is payable; and that the defender hereby offers to pay additional feu-duty on that footing, calculated as provided in section 9 of said Act, and to execute the necessary memorandum.

The pursuer pleaded—"1. By virtue of the title libelled, and of the provisions of the Feudal Casualties (Scotland) Act 1914, the pursuer is entitled to declarator in terms of the first conclusions of the writ."

The defender pleaded—"2. On a sound construction of the reddendo clause in said feu-charter the stipulation for payment of a duplicand of the feu-duty payable for said subjects imports an obligation by the vassal to pay only one year's feu-duty in addition to the feu-duty of the year in which the duplicand is payable."

On 26th November 1915 the Sheriff-Substitute (ORR) found "(1) That the defender is bound to redeem the duplicand in lieu of casualties incident to the pursuer's estate of superiority exigible in respect of the defender's estate of property in the subjects described in the crave of the initial writ, and that as on the 18th May 1915; (2) that the amount of the compensation payable on the redemption of the said duplicand is the sum of £69, 1s. 6d., with interest thereon at the rate of four per centum per annum from the said 18th May 1915 till paid, or until converted into an annual sum, in terms of the Feudal Casualties (Scotland) Act 1914."

Note. — "This action is brought by a superior to have it declared that the defender, her vassal, is bound to redeem the casualties incident to his feu in terms of the Feudal Casualties Act 1914, and for decree for the ascertained amount of the compensation payable on such redemption. There are certain other conclusions dealing with defender electing or not electing to convert.

"The sum claimed by pursuer as compensation is calculated on the assumption that the stipulation in the reddendo of the feu-charter imports an obligation to pay in lieu of casualties two years' feu-duty in addition to the feu-duty of the year in which the casualty is payable. The defender disputes this, maintaining that his obligation is to pay only one year's feu-duty in addition to the feu-duty of the year in which the casualty is payable. This is the only point in controversy between the parties. The feu-charter is dated in February 1910. The reddendo clause applicable to the three feus in the feu-charter contains the following provisions—[*His Lordship quoted the clause*].

"The feu-charter having been granted subsequent to 1874 is subject to section 23 of the Conveyancing Act of 1874 abolishing relief and composition as formerly exigible. A payment 'in lieu of casualties' is stipulated for, to be made at regular intervals. The question raised is a pure question of construction—what did the parties mean by that stipulation? The clause is so framed as to deal first and exhaustively with the feu-duty for each lot, the amount of it, the terms at which it is to be payable, penalty in case of failure, and interest on sums overdue. There the clause ends so far as feu-duty is concerned, and then the deed goes on to stipulate for an additional payment, introduced by the words 'And paying.' This additional payment is to be 'a duplicand' of the three feu-duties of £24, £24, and £28; it is to be payable at Whitsunday 1930 and at Whitsunday in every nineteenth year thereafter in lieu of casualties; then interest and penalties are provided for in case of failure, 'all as provided with respect to said feu-duties.' It is to be noted that this extra or additional payment in lieu of casualties is to be made at a different term from the feu-duty. The latter is to be paid at two terms in the year, Whitsunday and Martinmas; this additional payment is to be paid in whole at the term of Whitsunday 1930 and at the same term in every nineteenth year thereafter. The impression produced on me by the structure and provisions of this clause is that the payment in lieu of casualties is a separate payment altogether from the feu-duty, and that it is meant to be paid in addition to, or in other words over and above, the feu-duty.

"Where the sole question is the construction of the language of a particular deed other cases construing different deeds cannot be authorities, however helpful as illustrations. But I am confirmed in the view expressed above by the case of *Governors of George Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C., 875, 49 S.L.R. 561, where

the structure and language of the corresponding clauses in the deed bear a close resemblance to those of the present deed, and where the Court construed the clause in the same sense. The only difference calling for notice is that in *Lawrie's Trustees* the language used was 'As also paying . . . a double of the said respective feu-duties . . . in name of composition.' The expression 'As also paying' I regard as synonymous with 'and paying' in the present deed—*Alexander's Trustees* v. *Muir*, January 31, 1903, 5 F. 406, see Lord Moncreiff at p. 415, 40 S.L.R. 316. 'In name of composition' conveys the same idea as 'in lieu of casualties.' Again 'a double' is just 'a duplicand,' the phrase used here—*Earl of Zetland* v. *Carron Company*, June 30, 1841, 3 D. 1124. I read the expression 'a duplicand of the said feu-duties' as meaning a sum equivalent to double, or twice as much as, the said feu-duties. As matter of construction therefore I come to the conclusion that the vassal is to pay in lieu of casualties a sum equivalent to double the annual feu-duty over and above the feu-duty which falls to be paid at the particular term when the casualty falls due. The defender relied upon the case of *Alexander's Trustees*, but when the language in that deed is examined it is found to differ materially from the present. The annual feu-duty there was to be £248, 18s. 2d., and the vassal was to pay at the term of Whitsunday 1824 the sum of £497, 16s. 4d., being the double of the said yearly feu-duty, and also to pay every nineteenth year the said sum of £497, 16s. 4d., 'being the double of the said yearly feu-duty' . . . 'doubling the said yearly feu-duty every nineteenth year.' In respect of these payments 'the agreed and fixed consideration hereby accepted of in lieu of all compositions,' the superior bound himself to enter vassals without demanding or being entitled to exact any composition whatever.

"In short there was to be a doubling of the feu-duty every nineteenth year, the amount being expressed in money, and in respect of that doubling the lands were to remain free of composition. I shall accordingly find in terms of pursuer's first crave, and also of the third crave, inasmuch as defender's agent intimated at the bar that defender intended to convert."

The defender appealed to the Sheriff (MACONOCHIE), who dismissed the appeal.

Note.—"The question in this case is whether the reddendo of the feu charter (which is dated in 1910) imposed on the defender, as maintained by the pursuer, an obligation to pay at Whitsunday in every nineteen years (the first payment falling to be paid at Whitsunday 1930) a sum amounting to two years' feu-duty in addition to the feu-duty of that half-year, or whether, as maintained by the defender, he is only bound to pay every nineteen years a sum amounting to one year's feu-duty in addition to the feu-duty of the half-year due at that term. In my opinion the pursuer must prevail, on the authority of the case of *Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561. In the present case the reddendo of the feu-charter provides that the vassals shall pay to the superior annual feu-duties on three parcels of ground of fixed amount, viz., £24, £24, and £28, making a total feu-duty of £76 per annum, payable by equal portions at Whitsunday and Martinmas in each year, 'and paying a duplicand of the said feu-duties of £24, £24, and £28 at the term of Whitsunday 1930, and at the same term on every nineteenth year thereafter in lieu of casualties, with interest and penalties in case of failure if incurred, all as provided with respect to said feu-duties.' The present case deals only with the £28 feu. The feu contract in the *Heriot's Trust* case provided for payment by the vassals of an annual feu-duty of stated amount for each lot conveyed, payable by equal portions at Whitsunday and Martinmas in each year, 'as also paying to the said Governors of George Heriot's Trust and their foresaids a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years, viz.—. . .' The decision in that case was that the vassals had contracted to pay in name of composition a sum equivalent to double the amount of the annual feu-duty over and above the half-year's feu-duty due at the term at which the composition fell to be paid. It seems to me that so far as the question of what fell to be paid in the year when the additional sum fell due is concerned the provisions of the two feu contracts are indistinguishable. In both cases the feu-duties are dealt with exhaustively before the additional payments are dealt with, the amount of the feu-duties is definitely fixed, the terms of payment of the feu-duties are different from the terms of payment of the sum 'in lieu of casualties' as here, or 'in name of composition' as in the *Heriot's Trust* case, and as both contracts were entered into after the Conveyancing Act of 1874 it was impossible to have casualties or compositions in the old sense. So far the two cases are identical, but in arriving at the meaning of the parties it is necessary, if a decided case is to be held to rule any other case, to see that the Court is dealing with words which are identical in meaning. Now beyond the fact that in *Heriot's Trust* case the words are 'in name of composition' and in this case are 'in lieu of casualties'—a fact which I think is of no importance—there are only two words or sets of words which differ in any way. The first is that the clause in the *Heriot's Trust* case which deals with the additional payment is ushered in by the words 'as also paying to' the superior, while here the corresponding words are 'and paying.' It appears to me that those two phrases mean precisely the same thing and have the same effect; but if authority is required for that view it may be found in the cases of the *Earl of Zetland* v. *Carron Company*, 3 D. 1124 (where the words were, as here, 'and paying'); *Cheyne* v. *Phillips*, 5 S.L.T. 27; and the *Heriot's Trust* case, in all of which cases the phrases were treated as being synonymous. The only other distinction is that here the payment is to be a 'duplicand' of the feu-duty, while in the *Heriot's Trust*

case the words are "a double of" the feu-duty. Again, it seems to me that according to the ordinary use of language the phrases are synonymous, but in the *Earl of Zetland's* case the Lord Justice-Clerk distinctly says—'I am unable to see any ground . . . for saying that "duplicand" is anything but double of the feu-duty;' and Lord Moncreiff adds —'Must not payment of a duplicand be payment of double of the feu-duty?' and the same view runs through the other cases to which I have referred.

"On these grounds I hold that the case is precisely ruled by the decision in the *Heriot's Trust* case, and if that be so, there is no necessity for me to consider the earlier case of *Alexander's Trustees* v. *Muir*, 1903, 5 F. 406, 40 S.L.R. 316, which, however, I may point out is specially considered by Lord President Dunedin in the *Heriot's Hospital* case, and distinguished from the case which his Lordship was then dealing with."

The defender appealed, and the case was sent to a Court of Seven Judges.

Argued for the defender — Whatever a duplicand meant it always included the feu-duty for the year in which it was payable, and was not in addition to that feu-duty unless it was clearly expressed in the deed that the duplicand was to be payable in addition to the feu-duty for the year. Duplicand was the equivalent of *duplicando* in the Latin feu-charter. The English word was first found in *Earl of Mansfield* v. *Gray*, 1829, 7 S. 642, and thereafter the English form seemed to have been in general use. That duplicand included the feu-duty for the year was shown by Erskine, Inst., ii, 5, 49; *Magistrates of Inverness* v. *Duff*, 1769, M. 15,059, where the word *duplicando* was held to include the feu-duty for the year and to sopite any other claim for feu-duty; *Mackenzie* v. *Mackenzie*, 1777, M. 15,053, and App., *voce* Superior and Vassal, No. 2. Duplicand was used as equivalent to relief—*Musselburgh Magistrates* v. *Brown*, 1804, M. 15,038, at p. 15,040; *Earl of Mansfield's* case (*cit.*), at p. 643. In the *Earl of Zetland* v. *Carron Company*, 1841, 3 D. 1124, there was an express stipulation that the duplicand was to be over and above the feu-duty for the year. Without that stipulation the decision would have been that the duplicand included the feu-duty for the year —*per* Lord Jeffrey (Ordinary) at p. 1127; *Buchanan's Trustees* v. *Pagan*, 1868, 7 Macph. 1, *per* Lord Ormidale (Ordinary) at p. 2, and Lord President Inglis at p. 3, who stated that the heir paid a duplicand on entry, *i.e.*, the feu-duty for the year plus its replica, 6 S.L.R. 1. Similar dicta were emitted in the *Magistrates of Inverkeithing* v. *Ross*, 1874, 2 R. 48, *per* Lord President Inglis at p. 52, Lord Ardmillan at p. 59 and p. 63, 12 S.L.R. 21; *Magistrates of Dundee* v. *Duncan*, 1883, 11 R. 145, *per* Lord Rutherfurd Clark at p. 148, 21 S.L.R. 107. In *Cheyne* v. *Phillips*, 1897, 5 S.L.T. 27, there were express words showing the duplicand was in addition to feu-duty. In *Alexander's Trustees* v. *Muir*, 1903, 5 F. 406, 40 S.L.R. 316, the vassal was bound to pay the feu-duty "as also" the double of the feu-duty, and it was held that the words "as also" were not equivalent to "in addition to," and that being so the double of the feu-duty meant the feu-duty plus its replica, and the *Earl of Zetland's* case was distinguished as the duplicand was expressly stated to be in addition to the feu-duty. *Inglis* v. *Wilson*, 1909 S.C. 1393, *per* Lord Johnston (Ordinary) at p. 1398, and Lord Kinnear at p. 1404, was to a similar effect, 46 S.L.R. 979. *Governors of George Heriot's Trust* v. *Lawrie's Trustees*, 1912, S.C. 875, 49 S.L.R. 561, was distinguished, for the words were "a double of the feu-duty," which had not a fixed meaning like duplicand. *The Commercial Union Assurance Company, Limited* v. *Waddell*, 1916, 2 S.L.T. 163, was distinguished, for the words were "and further to pay" a duplicand. In *Murray* v. *Bruce*, 1917, 1 S.L.T. 20, it was held *per* Lord Hunter that "a duplication" of a ground annual was ambiguous and must be construed against the creditor, and held to mean a replica of and not twice the ground annual. The same principle should be applied here. *The Church of Scotland* v. *Watson*, 1904, 7 F. 395, 42 S.L.R. 299, was referred to. Further, the word duplicand was a technical term with a fixed meaning, and was equivalent to relief—Bell's Prins., section 716; Duff on Deeds (1838 ed.), p. 84; Menzies, Conveyancing, p. 522; Bell's Lectures, p. 635; Wood's Lectures, p. 145; The Juridical Styles (1st ed.), p. 161, did not refer to duplicand; "doubling" was the word used. The Juridical Styles (1907 ed.), vol. i, pp. 2 and 16, and the Scots Styles, vol. iv, pp. 373 and 414, were referred to. In the present case there was no indication in the deed that the duplicand was to be in addition to the feu-duty. When it was intended to stipulate for an additional payment the deed used the word "further." The fact that the duplicand was in lieu of casualties was of little force, for no casualties were possible at the date of execution. It was immaterial that the feu-duty was payable half yearly and the duplicand yearly, for the feu-duty like the duplicand was a payment for the year. The repetition of the penalties clause was in favour of the defender, for it showed that the duplicand was not in lieu of the casualties which existed before 1874 because interest could not run upon them. The pursuer was only entitled to the feu-duty for the year plus a replica thereof under the clause in question.

Argued by the pursuer (respondent)—It was clear from the deed that the duplicand did not include the feu-duty. The duplicand was in lieu of casualties, and since 1874 casualties in the modern sense had to be separately and expressly stipulated for apart from the stipulation for feu-duty. Consequently a payment stipulated for in lieu of casualties had nothing to do with feu-duty, and could not be held to include it unless that was expressed in the deed. Further, the feu-duty was distinguished from the duplicand, for the periods of payment were different. The case of the *Governors of George Heriot's Trust* (*cit.*) was not distinguishable from the present. Further, "duplicand" meant twice the feu-duty—Stair, ii, 4, 27; *Inverness Magistrates* (*cit.*),

also reported in 2 Ross's Leading Cases, 190; *Heriot's Trustees* v. *Paton's Trustees*, 1912 S.C. 1123, *per* Lord President Dunedin at p. 1130, 49 S.L.R. 852. In Ross's Lectures on Conveyancing (2nd ed.), p. 160, there was no reference to the taxing of relief, which was the effect of the meaning ascribed by the defender to "duplicand." In the *Earl of Zetland's* case Lord Jeffrey (*loc. cit.*) held that a duplicand was twice the feu-duty. In the case of the *Magistrates of Dundee* (*cit.*) the same opinion was expressed; so also in the *Church of Scotland* v. *Watson* (*cit.*). In *Inglis* v. *Watson* (*cit.*) the duplicand was held to be twice the feu-duty in circumstances in which no feu-duty was payable; so also in the *Magistrates of Dundee* v. *Duncan* (*cit.*), and *Alexander's Trustees* v. *Muir* (*cit.*). Ersk., Inst. (*cit.*) referred to the casualty of relief and to cases in which there was no such clause as the present. Bell's Prins. (*cit.*) and Menzies, Conveyancing (*cit.*) both were dealing with relief and explaining its amount. The pursuer was entitled to the feu-duty plus twice the feu-duty under the present clause.

At advising—

LORD PRESIDENT—In this action the vassal undertook to pay for his grant a feu-duty of £28, payable at two terms in the year —Whitsunday and Martinmas—in equal portions in all time coming. The feu-duty clause is complete and self-contained. It is followed by a clause, equally complete and self-contained, round which the controversy centres, which runs as follows—"And paying a duplicand of the said" feu-duty of £28 "at the term of Whitsunday 1930 and at the same term in every 19th year thereafter in lieu of casualties, with interest and penalties in case of failure if incurred as provided with respect to said" feu-duty.

Now if these words which I have read are to be interpreted apart from authority, I think there can be little hesitation as to their true interpretation, despite the use of the technical term "duplicand." They mean that as every 19th year comes round, the vassal at Whitsunday will be liable to make payment of twice the amount of the feu-duty and, in addition, the equal half of the feu-duty of the year which he is liable to pay at that term. But it was argued to us on behalf of the vassal that the term "duplicand" is technical and has a well ascertained and definite meaning, and that according to the law of Scotland although it means no doubt double the feu-duty yet it carries with it the implication that the ordinary feu-duty of the year is included. The very same argument was addressed to us which was advanced on behalf of the vassal in the well-known case of the *Earl of Zetland* v. *Carron Co.*, 1841, 3 D. 1124, which runs thus—"That the expression in the reddendo clause as to payment of a duplicand was an adaptation to the particular circumstances of the case of the ordinary clause regarding the casualty of relief due to the superior, the word 'duplicand' being borrowed from the common style of clauses applicable to the relief payable upon an entry; that a duplication of the feu-duty, or a clause *de duplicando feudi-firmarum*, was a technical and established expression for a well-known casualty in feu-holdings, and that the meaning of that expression was equally well fixed, and the casualty so designated imported merely the payment of one year's feu-duty as a casualty over and above another year's feu-duty as the ordinary reddendo of the lands."

On that argument Lord Jeffrey made the comment (at p. 1125) that "the defender's construction would be clear enough if the words of the charter had been merely 'paying a duplicand of the said feu-duty at the end of every twenty-five years.'" His Lordship's opinion I think is sound and unassailable, but everything depends upon the stress laid upon the word "merely." As applied to the feu-disposition then before the Court its application is obvious. If we eliminate the important words upon which the judgment of the Court there turned, then the words of the clause of the feu-disposition would run thus—"For the yearly payment . . . of the sum of £95 of feu-duty, at the term of Martinmas yearly, beginning the first year's payment thereof at Martinmas 1815 for the year preceding, and so forth yearly thereafter, and paying a duplicand of the said feu-duty at the end of every 25 years." Now that is the clause read as Lord Jeffrey contemplated it would be read in the expression of opinion to which I have just referred. It is plainly very different from the clause in the charter before us, where we find the feu-duty clause and the duplicand clause separate and distinct each from the other, from which I draw the inference that every nineteen years the double payment requires to be made—ordinary feu-duty at the two usual terms of the year, and twice the amount of the ordinary feu-duty at the term of Whitsunday.

As Lord Moncreiff observed in the case of *Alexander's Trustees* v. *Muir*, (1903) 5 F. 406, at p. 416, "There was no doubt of the meaning of the word 'duplicand'; it meant double the feu-duty. The only question was whether, used in the connection in which it appeared, it did or did not include the feu-duty for the year." He was there commenting on the opinion of Lord Jeffrey in the case of the *Earl of Zetland* v. *Carron Co.* Now in the connection in which it appears in the case before us I have no doubt that it does not include the feu-duty for the year. The clause is identical with the clause in the case of *Governors of George Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C. 875, in which the word, however, was "double." But there is no difficulty with "double" and "duplicand"—they are interchangeable terms, as all the Judges said in the *Earl of Zetland's* case and as Lord Moncreiff agrees.

If this be so, the case of *Heriot's Hospital* is directly in point. Its authority was not challenged, and therefore I think the superior is entitled to have her decree.

LORD JUSTICE-CLERK—In my opinion the Sheriffs have arrived at a sound conclusion. In the *Earl of Zetland's* case, 1841, 3 D. 1124, the Court interpreted the term "duplicand" as meaning two years' feu-duties.

That interpretation, I assume, has been acted on by the profession since then. In the case of *Heriot's Trust*, 1912 S.C. 875, 49 S.L.R. 561, the Court adopted the view that "duplicand" was in this connection synonymous with "double" of the feu-duty. In the feu-charter in the present case certain sums are stipulated to be paid "in name of feu-duty" half-yearly, and then a further stipulation is made for payment of "a duplicand of the said feu-duties" at the term of Whitsunday "in every nineteenth year thereafter in lieu of casualties." In my opinion it follows from the above cases that this latter payment, which is payable in whole at one term, viz., Whitsunday, and is not for feu-duties but for casualties, requires a payment in every nineteenth year of two feu-duties over and above the feu-duty for the year.

LORD DUNDAS—I think this appeal must fail. The appellant's counsel did not, in my judgment, succeed in showing that the language of the clause under consideration differs in any material respect favourable to his client from that which was construed in the recent case of *Heriot's Trust*, 1912 S.C. 875, 49 S.L.R. 561. That case was in my opinion rightly decided. If this view be correct it affords a sufficient ground for the decision of the case before us.

I am not sure whether any question of general application is here raised for consideration or determination. Each case of the kind must be decided upon a construction of the particular language used. If the parties have clearly in mind what it is exactly that they wish to stipulate for I cannot think that there should be any difficulty in expressing their intention so as to leave no room for doubt, without employing words or phrases of doubtful significance or having recourse to style books. Perhaps the simplest method would be to express the sum to be paid definitely in figures without reference to the amount of the feu-duty. The word "duplicand" has sometimes, no doubt, been used as equivalent to a duplicate or double of, or as a sum equal to, the year's feu-duty. But it is plain that if a duplicand be stipulated for the sum to be paid when it becomes due, including the feu-duty, cannot be less (though it may be more) than twice the amount of the yearly feu-duty. That was laid down in *Zetland* v. *Carron Company*, 1841, 3 D. 1124. When therefore, as in that case, the duplicand was to be payable "over and above the feu-duty of the year in which it fell due," it was held that a sum equal to three times the amount of the feu-duty had to be paid. I think we must construe a similar intention when we find it provided, as here, that "a duplicand of the said feu-duties" is to be paid at the term of Whitsunday—the annual feu-duty being payable at Whitsunday and Martinmas in each year—"in lieu of casualties," and with interest and penalties in case of failure "all as provided with respect to" the feu-duty. The duplicand, though expressed with reference to the feu-duty, seems clearly to be something separate from and independent of it, and must, in my judgment, be held as intended to be an additional sum equal in amount to twice the annual feu-duty.

I desire to add that since writing the above I have had an opportunity of reading the opinion about to be delivered by my brother Lord Cullen, and that I concur in it.

LORD MACKENZIE—I think the present case is one governed by the decision in the *Heriot Trust* case, 1912 S.C. 875, 49 S.L.R. 561. I also have had an opportunity of reading the opinion about to be delivered by my brother Lord Cullen, in which I entirely agree.

LORD SKERRINGTON concurred.

LORD CULLEN—Two questions are raised by the argument for the appellant in this case.

The first is whether a "duplicand" of a feu-duty means the amount of two years' feu-duties or the amount of one only. This question, as it appears to me, is authoritatively answered by the decision in the case of *Earl of Zetland* v. *Carron Company* (1841), 3 D. 1124. Two questions were raised in that case, as here. One was whether the word "duplicand" taxing the entry of both heirs and singular successors meant the amount of two years' feu-duty or only the amount of one. The other was whether, *esto* the duplicand meant the amount of two years' feu-duty, the duplicand as stipulated for in the deed there under construction was intended to include the ordinary annual feu-duty for the year in which it fell due or to be additional thereto. Both the Lord Ordinary and the Judges of the Inner House were of opinion that a "duplicand" meant the amount of two years' feu-duty. The stress of the vassals' contention in the Outer House was laid on the view that the "duplicand" included, *quoad* one-half of it, the ordinary annual feu-duty for the year. They contended, according to the statement in the Lord Ordinary's opinion, that the superior's claim for the amount of two years' feu-duty under the name of duplicand in addition to the amount of the ordinary annual feu-duty for the year was novel and unprecedented and a startling innovation. The Lord Ordinary took the course of allowing an inquiry into conveyancing practice, the result of which was to show that there was in his view a prevalent practice of long standing on the part of superiors, where the entry both of heirs and of singular successors was taxed at a periodically recurring payment, to fix that payment at the amount of two years' feu-duty over and above the ordinary annual feu-duty for the year. The words "over and above the feu-duty of the year" occurred in the feu-disposition there in question; and accordingly the Lord Ordinary, viewing the word "duplicand" as meaning the amount of two years' feu-duty, held that in the year when the duplicand fell due the vassal was bound to pay an amount equal to three years' feu-duty, one-third thereof representing the ordinary annual feu-duty for the year and the other two-thirds representing the "duplicand." His decision was affirmed. It is difficult to

see how the conditions of the question left room for much argument to the effect that the "duplicand," whatever its amount, was inclusive of the feu-duty of the year in question, seeing that the feu-disposition declared it to be payable over and above the feu-duty for that year. And when the case came before the Inner House it would seem from the reported opinions that the vassals there argued, mainly at least, that a "duplicand" of a feu-duty meant an amount equal only to the feu-duty and not to twice the amount thereof. The reported opinions of the Lord Justice-Clerk and Lord Moncreiff are brief, but they are not ambiguous. The Lord Justice-Clerk said—"I am unable to find any ground for differing from the Lord Ordinary, or for saying that 'duplicand' is anything but double of the feu-duty." Lord Moncreiff said—"There is no room for doubt. We are in a question of common law and of contract. Must not payment of a 'duplicand' be payment of a double of the feu-duty? If we wanted a translation of the word the clearest is in the charters of the Drumsheugh grounds by Messrs Walker and Melville—two years' feu-duty and then something beyond the year's feu-duty."

This definite decision on the meaning of the word "duplicand" was pronounced seventy-five years ago. So far as the authorities cited to us went the decision has never been the subject of challenge or adverse criticism; and presumably it has regulated the practice of conveyancers since its date in cases where the word "duplicand" has continued to be used in the reddendo of feu-rights. I am therefore of opinion that we should follow it.

While the meaning of the word "duplicand" as laid down in the *Zetland* case has never been challenged, there is a recent case—*Governors of George Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561, which I may refer to.

In that case a question was raised as to the meaning of a "double" of a feu-duty. Just as here in the case of a "duplicand," the opposing contentions were (1) that a "double" meant the amount of two feu-duties, and (2) that it meant the amount of one feu-duty. It was held to mean the amount of two feu-duties. This decision was, *inter alia*, in accordance with the use of the word "double" by Erskine in the passage, ii, 5, 49, of his Institutes, where, referring to the "double" paid by an heir on entry, he explains that the "double" is not to be regarded as all paid for the heir's entry, but that one-half of it represents the ordinary feu-duty for the year. The decision in the case cited is not a direct authority on the meaning of the word "duplicand" as contrasted with the word "double." But as the word "double" and the word "duplicand" have a common historical origin in feudal practice I regard the decision as going to corroborate the decision in the *Zetland* case. And I confess that I see no reason to doubt it in itself.

The second question in the case is whether on a due construction of the terms of the feu-charter here in question the "duplicand" stipulated to be paid each nineteenth year—assuming the word "duplicand" to denominate an amount equal to two years' feu-duties—is intended to include the ordinary annual feu-duties of the year in which it falls due or to be additional thereto. This question of construction does not seem to me to be attended with difficulty. The duplicand is, I think, clearly stipulated for as a payment in each nineteenth year additional to the ordinary annual feu-duties of that year.

The reddendo of the feu-charter begins with a complete scheme of payment of the annual feu-duties. The amounts thereof are defined. They are to be paid in the first year, and in every year thereafter in all time coming without exception, in two half-yearly and termly portions, one-half at the Whitsunday term and one-half at the Martinmas term in each year, with a provision for interest and penalties in the case of failure of punctual payment.

Having finished with the scheme of payment of the annual feu-duties, the reddendo proceeds—with the introductory words "And paying"—to stipulate for a duplicand of the said feu-duties to be paid in each nineteenth year "in lieu of casualties." And the duplicand is to be paid in whole at the Whitsunday term of the year in which it falls due.

Thus in the first place the duplicand is given by the terms of the feu-charter a distinctive character differentiating it from the ordinary annual feu-duties. It is expressly denominated as a payment "in lieu of casualties." Prior to the date of the feu-charter the Conveyancing Act of 1874 had abolished casualties in the sense of former feudal practice *quoad* feus granted after it came into effect. By section 23, however, it had, *inter alia*, provided that it should be lawful in the case of such subsequent feus to stipulate "for payment of a casualty in the form of a periodical fixed sum or quantity," &c. The reddendo of the feu-charter under consideration follows that provision. The duplicand in each nineteenth year in whole and part is stipulated for distinctively as a payment "in lieu of casualties." There is, therefore, no room for saying that one-half of the duplicand is to be paid in the essentially different character of the ordinary annual feu-duties of the year. In the next place the duplicand is payable wholly at the Whitsunday of the year in which it falls due, whereas the annual feu-duties for that year, as in every other year, are payable one-half at Whitsunday and one-half at Martinmas. This marks a further difference between the duplicand and the annual feu-duties. If the appellant's argument were sound then the payment of the annual feu-duties in each nineteenth year would, differing from all other years, fall to be made wholly at Whitsunday. This would directly contradict the terms of the antecedent and unqualified scheme of payment of the annual feu-duties.

It may be noticed that the reddendo of the feu-charter in its concluding part stipulates separately for interest and penal-

ties in respect of non-punctual payment of the duplicand, "all as provided with respect to said feu-duties," thus keeping up the difference in character already drawn between the duplicand and the feu-duties.

For the reasons above stated I am of opinion that the judgment under appeal should be affirmed.

The LORD PRESIDENT intimated that LORD JOHNSTON dissented, and his Lordship subsequently issued the following opinion:—The question which this case raises is the not unfamiliar one of what meaning and effect is to be given to the word "duplicand" when used in a feu-charter or contract in taxing relief and composition, or from 1874 to 1915 in fixing the consideration which could still be stipulated for by the superior in lieu thereof.

When the case was heard before the First Division of the Court the judgment in *Zetland* v. *Carron Company*, 1841, 3 D. 1124, appeared at first sight to rule it, but when that case came to be examined it was thought by some of their Lordships that, as reported, it was not altogether a satisfactory authority, and that having regard to the importance and urgency of having a clear decision upon the point raised to guide practitioners in carrying out the multiplicity of transactions which have to be settled, and settled immediately, under the recent Feudal Casualties Act 1914, the case was one on which it was proper to take the judgment of a larger bench. In these circumstances I conceive that we are not merely concerned with the question whether the present case is governed by that of the *Earl of Zetland*, but that the decision in the latter case is open to reconsideration.

I regard this case as now raising before the Court three questions—(1) What is it that was decided by the Second Division in the case of the *Earl of Zetland?* (2) Was it well decided? and (3) Even if the judgment cannot be supported has it established a practice, or rather I should say fixed a technical meaning upon the word "duplicand" in the art of conveyancing which ought not now to be gone back upon?

I do not ignore the fact that some of your Lordships seem more inclined to rest your judgment upon the recent case of the *Heriot Trust*, 1912 S.C. 875, 49 S.L.R. 561, and I shall deal with that case, to which I was myself a party, subsequently. But notwithstanding, I am satisfied that any judgment in the present case must have its foundation in the view which may be taken of the decision of that of the *Earl of Zetland*.

I should like to advert to one or two preliminary points which I think it is desirable to notice in approaching the present question. In the first place I agree that in all these cases it is, as was said by Lord Dunedin in the *Heriot Trust* case, at p. 877, "a pure question of construction of what the parties meant." But that question of construction must be determined on a consideration of the words they used, and one or more of these words may have a technical signification. I think that this consideration was neglected by the learned Judges who decided the *Earl of Zetland's* case, and who themselves, though speaking somewhat loosely, are now said to have stamped a technical sense on the word "duplicand." In the second place, while I cordially agree with Lord Dundas that each case of this kind must be decided upon a construction of the particular language used, I do not think that he is right in saying that it is doubtful whether any question of general application is here raised. I think that there is a general question, namely, as I have said, Has the term "duplicand" a technical and therefore certain meaning? But I quite accept that either if it has not a technical meaning or if it is clear that it was not used in such, the case would then fall to be determined on its own specialties. I may add that I heartily concur in Lord Dundas's criticism on the conveyancing which will leave important questions such as the present to depend on the interpretation of doubtful terms instead of taking the trouble to state clearly what is meant. A better example of the conveyancing, which leaves nothing for subsequent dispute, and that which paves the way—one is almost tempted to say intentionally—for it, could not be found than by a comparison between the clauses for providing a payment in lieu of casualties adopted by the over-superior and by the mid-superior respectively in regard to these very subjects. It is the mid-superior's deed which has created the whole trouble. And in the last place, not merely because the superior is *in petitorio*, but because the stipulation in question is a last remnant of a feudal exaction which militated against the free commerce in land, it is, I think, incumbent on the superior to establish clearly the claim he makes. The presumption is for freedom, and any point of doubt must be given in favour of the vassal.

I shall now refer to the clauses in the present title as shortly as I can. The trustees of Sir George Campbell of Succoth (after the passing of the Conveyancing Act of 1874) feued out to John Baird, solicitor, a portion of certain lands on the outskirts of Edinburgh for a reddendo of £325, with contingent augmentations in name of feu-duty, payable half-yearly at Whitsunday and Martinmas beginning at Martinmas 1897 for the half-year preceding, "and doubling the said feu-duty, augmentable as aforesaid—that is, paying one year's feu-duty in addition to the feu-duty of the year—at the term of Whitsunday 1922, and in each nineteenth year thereafter, but for such nineteenth year only, and that as a payment in lieu of all casualties."

Baird, in whose right the pursuer Miss Eliza Adam now is, in 1910 subfeued to the defender Thomas Finlay part of the above-mentioned subjects for payment to the over-superior of an allocated share of the over feu-duty, and to himself of further sums of £24, £24, and £28 respectively, for the three stances which made up the sub-feu, the sub-feu-duties to be payable as in the principal feu-charter at two terms in the year, Whitsunday and Martinmas, by equal portions commencing with Whitsunday 1911.

And then the reddendo clause proceeds "and paying a duplicand of the said feu-duties of £24, £24, and £28 at the term of Whitsunday 1930, and at the same term in every nineteenth year thereafter, in lieu of casualties, with interest and penalties in case of failure if incurred, all as provided with respect to said feu-duties." It may save confusion if I at once say that although it is not in express terms provided that this further payment of a duplicand is to be over and above the feu-duties for the year, a provision upon which great weight has been put in the decision of some previous cases, the clause in question makes that as abundantly clear to be the intention of the clause as if it were expressed in terms. I have never been able to understand the reasoning which has put such weight on this provision when made, because if a payment is to be made as a taxed casualty, or as in lieu of casualties, it necessarily must be over and above the feu-duty of the year, and if, as here, it is in terms to be made "and" or "as well as," or "in addition to," the feu-duty of the year, it is in the same position. The question still remains, what is meant to be the amount of that payment? Just as here, the normal feu-duty for the year having been stipulated, and there being no question as to what they meant when writing after 1874 by "in lieu of casualties," the payment of a duplicand is not in lieu of feu-duty and casualties, but simply in lieu of casualties, and the true and sole question is, what did the parties mean when they wrote the word "a 'duplicand' of the said feu-duties." If the term "duplicand" means, and can only mean, "twice the amount of," then there can be no doubt that the additional payment stipulated in the present case every nineteenth year is a sum equal to twice the feu-duties, and that therefore in that year the equivalent of three feu-duties has to be paid. If, on the other hand, the term "duplicand" means, unless a contrary intention is made clear, nothing but a double in the Scots sense of the feu-duty, then the additional payment is the amount of once the feu-duty only, and therefore in every nineteenth year the equivalent of two feu-duties only is exigible. I am, as I have said, totally unable to find anything in the expression of the fact that the payment is over and above the feu-duty for the year, which can aid, still less lead to the conclusion that the extra payment stipulated is to be twice and not once merely the amount of the feu-duty.

The case of the *Earl of Zetland* arose under a feu-disposition of 1814 granted by Lord Dundas to the Carron Company, which was an early joint stock company likely to have a long period of life, and in the then rudimentary condition of joint stock company law, also likely to experience difficulty in relation to holding heritable property. Accordingly, in addition to the obligation for a yearly feu-duty there was added to the reddendo clause "and paying a duplicand of the said feu-duty at the end of every twenty-five years, upon payment of which duplicand, over and above the feu-duty of the year in which it falls due," Lord Dundas and his foresaids should be obliged to enter the said Carron Company or their disponees as vassals in the said piece of ground. It was held that this clause imported an obligation to pay a sum equal to twice the year's feu-duty in addition to the year's feu-duty itself, in every twenty-fifth year. I have said that the decision does not appear to be altogether satisfactory. But it may be the report which is at fault. I may add, however, that nothing is gained by referring to the Faculty Collection for the year, where the report is still less satisfactory. From which I am led to think that the reporter in Dunlop has probably made the best he could in the circumstances of the decision. I think I can see some reason for his difficulty in the course of procedure which was adopted. The Carron Company maintained in defence what has been maintained here, viz., that the expression in the reddendo clause as to payment of a duplicand was an adaptation to the particular circumstances of the ordinary clause regarding the casualty of relief due to the superior; that "a clause *de duplicando feudifirmarum* was a technical and established expression for a well-known casualty in feu-holdings; and that the meaning of that expression was equally well fixed and the casualty so designated imported merely the payment of one year's feu-duty as a casualty over and above another year's feu-duty as the ordinary reddendo of the lands." That defence was one which I respectfully think deserved more careful consideration than it apparently received, for it is really not dealt with either in the Outer or the Inner House. I think myself that it bears to be determined on the common law of feus. But I cannot say that an inquiry into the practice in the case of reddendo clauses similar to that in question might not have aided in the determination of the question which was there, just as here, what was the meaning of the word "duplicand," and what was to be implied from its use? Accordingly I am not prepared to say that that exception could have been taken to the Lord Ordinary's allowing an inquiry to be made as to the practice in the case of reddendo clauses in feu-charters similar to that in question. But under this allowance by the Lord Ordinary an inquiry appears to have been instituted into the practice in the case of clauses so absolutely dissimilar to that in question that it is impossible to see how anything but miscarriage could have resulted were reliance placed upon the result of the inquiry. It is impossible to say that reliance was not so placed. Certainly the reporter seems to have thought so, for he states, as if it was important to the judgment, that from the inquiry it appeared that in a variety of instances similar words had been used, and that in them three years' feu-duty had been paid when the demand arose. When, however, the table of instances given is examined, they are found to be absurdly dissimilar and so phrased that in not one of them is the word "duplicand" used. The practice of six different large estates, all, except the Earl of Zet-

land's own Grangemouth estate, and possibly one other with the *locus* of which I am not acquainted, being in the immediate neighbourhood of what was then Edinburgh. The expressions used are, in Lord Zetland's own case, "doubling" the said feu-duty at the entry of every heir and singular successor, upon payment of which over and above the feu-duty of the year of entry the superior is to be bound to enter, &c. On St Leonards estate, on the lands of Orchardfield, and on the Broughton property, words are used almost identical in terms with the above and absolutely identical in meaning and effect; on Lord Moray's lands of Drumsheugh the payment of two years' feu-duty over and above the feu-duty of the year of entry is required; and on Sir Patrick Walker's estate of Coates, in some cases paying the double of the feu-duty at the entry over and above the feu-duty of the year of entry, and in other cases trebling the feu-duty at the entry is the expression used. How these instances could have any bearing upon the question before the Court it is difficult to see. To take them as in any way fixing the meaning of the term "duplicand" would be entirely to beg the question. But there is good reason for thinking that they were considered and did influence the Court—for instance, Lord Moncreiff says, with reference to the word "duplicand"—"If we wanted a translation of the word, the clearest is in the charters of the Drumsheugh grounds by Messrs Walker and Melville—'two years' feu-duty' and then something beyond the feu-duty." This would seem to show unmistakeably that his Lordship had not gone further in the consideration of the case than merely to scan the table of instances supplied to the Court and assume that they contained the equivalents of the word "duplicand." The Lord Ordinary, on the other hand, uses it for a different purpose, viz., to counter a contention which he states was put forward by the defenders, viz., that the claim of the pursuer was something quite novel and unprecedented and an extraordinary departure from all feudal usage, and therefore that if the words were at all capable of construction they should be so interpreted as to avoid so startling an innovation. They proved, his Lordship said, that what the defenders would represent as an unheard of innovation was then quite familiar in practice.

But at the same time the Lord Ordinary does not directly deal with the reporter's view of the defender's contention. He may be said to sustain it and then to go on to avoid it. He would, as I understand his opinion, have sustained it but for the addition of the words "over and above the feu-duty of the year in which it falls due"—to which emphatic words his Lordship thinks the defender's construction would give no effect whatever. Giving, he adds, to these last-quoted words a plain and obvious meaning, his Lordship sees no difficulty in the case. "For it is plainly of no consequence whatever in a question as to their construction to observe or to recite authority to show that where there is nothing more in a charter than a simple and unqualified stipulation for a duplicand, or double of the feu-duty, on the entry of an heir, it is only one of those yearly duties that should be considered as the relief. There cannot well be any doubt, it is supposed, or dispute as to this." Now here his Lordship states the understanding of the legal profession, as I think it can be shown to have stood prior to the decision in the *Earl of Zetland's* case, and to have interpreted the term "duplicand" as prior to that case it had been understood. But when his Lordship reasons himself out of this interpretation and adopts that of twice the amount of the feu-duty, so as to make the duties due on the occasion in question thrice and not twice the feu-duty of the year, because of the addition of the phrase "over and above the feu-duty for the year," I must respectfully say that I fail to understand why the expression "over and above" should make this difference. These words are just as apposite if the duplicand or double is one additional feu-duty as if it is two additional feu-duties. But they do not end in determining whether it is one or two additional feu-duties that is payable, In the Inner House the case was treated very lightly. The Lord Justice-Clerk (Boyle) merely says that he is unable to find any ground for saying that "duplicand" is anything but double of the feu-duty. And Lord Moncreiff simply asks the question, Must not payment of a duplicand be payment of the double of the feu-duty? and then, as I have already said, accepts the form adopted in the charters of the Drumsheugh estate as an accurate translation of the word. Their Lordships do not deal with the question as if there was any necessity to look at anything outside the four walls of the case with which they were dealing. Having regard to the way in which it was presented to them and to the mode in which they dealt with it, if the report be accurate and complete, as I find no reason to doubt, the decision does not appear to be a satisfactory one on which to base the adoption of a fixed judicial interpretation to be attached for the future to a word of style in conveyancing.

In estimating the weight and effect of this judgment I think that it is necessary to do what the Court avoided, viz., to look to what had preceded its date. Relief on the entry of an heir had its foundation in the common law of feus. Thus Erskine says, ii, 5, 48—"Where relief is specially expressed in a holding by feu-farm the words *uti mos est in feudifermis* are commonly subjoined, which plainly import that the casualty would have been due though it had not been expressed." In the case of singular successors an entry could only be obtained with the assistance of the Acts of 1469, cap. 32, 1669, cap. 39, &c., by indirect methods prior to the Act 20 Geo. II, cap. 50, passed in 1746-47, by which an entry was made the direct right of every singular successor on condition of paying, not relief, but what was termed composition. Whereas relief had by custom come to be measured by the amount of the feu-duty, and so to be a double of the feu-duty, so composition had

come first by similar custom, afterwards by statute, to be taken as a year's rent as the lands stood set for the time—Erskine, ii, 7, 7. But by the eighteenth century a change had gradually come over the relation between superiors and vassals. Land had become more and more an article of commerce, the right to a year's rent on entering a singular successor, which in itself was but a reflection of the old feudal exactions, became gradually recognised to be an obstruction to the commerce in land, and it became first the exception and then rather the rule to tax the consideration for an entry both on succession and on *inter vivos* transmission, and this particularly in cases where the feudal grant was made for building or analogous purposes. This taxation was the origin of the clause which raises the question in this case, and in it, I think, is to be found the proper interpretation of the word "duplicand" as used, prior at any rate to the *Earl of Zetland's* case in relation to such taxation. I do not go back to the earlier writers, but commencing with Stair—though writing as early as 1681—he had no call to deal expressly with the present subject, he has, at ii, 4, 27, two short passages which may be quoted. In fees where the reddendo is not military service but some other payment or performance, he says "that the reddendo is doubled the first year after the death of the vassal the one half whereof is the relief," necessarily implying that the other half is the ordinary duty for the year. And again, "the duplication of the feu-duty is due at the entry of every heir and that without an express clause in the reddendo by the feudal custom, which is generally acknowledged; and even when the duplication is expressed it doth ordinarily bear *secundum consuetudinem feudorum*." This again gives to duplication the same meaning and effect as doubling used in the first passage, and both passages accord with the interpretation of "duplicand" contended for by the appellant. Erskine, whose work was composed, though not published, prior to his death in 1768, at ii, 5, 48, speaks of "a special provision in the charter for doubling the feu-duty at the entry of every heir," and of also the sovereign in his precepts to his sheriffs for infefting heirs in a feu-farm fee uniformly requiring them "to take security of the heir for the payment of the double feu-duty as the relief," and then in ii, 5, 49, he makes clear what he means by "double feu-duty." It is, he says, "agreed by all lawyers that the relief in blench and feu-holdings, at least where the charter expresses that casualty is estimated to the double of the blench or feu-duties. But this is not to be so understood as if double of the reddendo were paid properly in name of relief, for one year's reddendo goes to the superior as the constant yearly feu-duty payable out of the lands, it is the other only that is paid as an acknowledgment to him for relieving the feu out of his hands." Now neither Stair nor Erskine made reference to the entry of a singular successor, for it was probably only after the date at which Erskine was writing that taxation of composition as well as relief began to be commonly part of the bargain between the superior and the vassal, at least in feus for building purposes. But it sprang out of the common practice of taxation in the case of relief instead of relying on the common law of feus, and naturally adopted the form previously used in relation to that practice. There is no reason for saying that when the terms double, doubling, duplication, duplicand, were adopted from the taxation of relief, and applied in the taxation of relief and composition, they were used in any other sense than in the practice from which they were borrowed, and as explained by Stair and Erskine.

We were informed by Mr Chree, the learned counsel for the appellant, that the earliest instance found in the reports of such an extension of the clause was in *Magistrates of Inverness* v. *Duff*, 1769, M. 15,059, where the reddendo clause ran—"reddendo inde annuatim prefatus . . . heredes sui et assignati antidicti nobis nostrisque successoribus summam . . . ad duos anni terminos, necnon duplicando dictam feudifirmam primo anno introitu cujuslibet hæredis aut assignati ad dictas terras aliaque præscripta, prout usus est feudifirmæ duplicatæ pro omni alio onere," &c. The report is only valuable as giving this form of clause which clearly links on with the prior practice referred to by Stair and Erskine. For the contest on the merits of the case was whether the clause really covered singular successors or was to be restricted to the narrower class of assignees before infeftment. The judicial mind of the day found it possible to give it the narrower interpretation. It is in this report that the curious expression "the duplicando of the feu-duty" is first found. The next case is that of *MacKenzie*, 1777, M. 15,053, but more fully reported in M. *voce* Superior and Vassal, App. No. 2. The plea in this case was between Sir Hector MacKenzie of Gairloch, who was heir under the former investiture and claimed an entry under a strict entail by his predecessor "upon making payment only of a duplicand of the feu-duty," while the superior insisted upon treating him as a singular successor. Again we are not concerned with the merits of the cause, but the judgment of the Court was in these terms:—"Finds that Mr MacKenzie, the superior, is obliged to enter the defender, who in this case is the heir in the former investiture, in terms of the tailzie upon receiving a duplicando of the feu-duty, and not entitled to demand from him a year's rent or other composition for said investiture," reserving his rights should an heir not of the prior investiture subsequently present himself. Here we have the adoption by the Court of the word "duplicando" (afterwards shortened into duplicand) as a comprehensive term, to express the result of the provision so commonly inserted in feu rights, but implied at common law, where not expressed. And there can be no question, that as so used by the Court it had the same meaning of "a double" in the sense of an additional, and not of "double" in the sense of a multiple, as explained by

Erskine in the passage above quoted. In the case of *The Magistrates of Musselburgh* v. *Brown*, 1804, M. 15,038, again the expression "the heir of a vassal is entitled to be entered as such on payment of the duplicando," by which is clearly meant as above a "double" of, is used on the bench, but the decision, important as it is on the merits, does not otherwise touch the present question. In the case of the *Earl of Mansfield* v. *Gray*, 1829, 7 S. 642, there is found an example of taxation unquestionably applicable expressly to singular successors. It was a feu much of the same nature as that in *Lord Zetland's* case, though earlier in date. The feu was by Lord Mansfield's predecessor in 1794, of ground for an iron foundry granted to an early joint stock company. The feu-contract contained a taxation of casualties on two alternatives, viz., first, paying to the superior at "Martinmas 1818 and every twenty-fifth year thereafter *the double of the foresaid feu-duty in lieu and place of*" [the italics are mine] "the composition for entry of heirs or the entry of singular successors in the share or shares" of any of the partners in the said feu, while it remains with the company as such; and, second, paying to him a taxed composition of £500 on sale by the company. The question involved was whether a certain transmission was covered by the first or fell under the second alternative. As the Court held the latter to be the case, no question could arise as to the meaning of the term "the double" of the foresaid feu-duty. But I think it is clear on all hands that it was accepted as having, although applicable to singular successors as well as heirs, no other meaning than that of the old clause to which I have referred, or of its condensation in the term duplicando or duplicand. Thus Lord Glenlee speaks of the first clause stipulating for a duplicand every twenty-five years; while Lord Pitmilly says, I have no doubt on the first point, that the lands are in non-entry, and therefore "there is only one question, what are these people to pay?—whether under the clause regarding one set of singular successors they are to pay double the feu at the end of every twenty-five years, or under that regarding the other set to pay £500." Duff on Feudal Conveyancing, writing in 1838, p. 84, touches very briefly on the point under the rubric "Relief or Duplicand of feu-duty." The reddendo, he says, "of feu-charters usually bears that the feu-duty shall be doubled at the entry of each heir and sometimes by special agreement at the entry of each singular successor (purchaser or other disponee not the heir of line) or that a fixed sum should be paid by one or both at the end of a certain period without regard to the situation of the fee and that this payment should be in lieu of all other burden, exaction," &c. There can, I think, be no doubt that in saying the feu-duty shall be doubled he used that term in the same sense and with the same effect as it was used in the precedents to which I have already referred.

While then there is no case prior to that of the *Earl of Zetland* in which the meaning of the word "duplicand," in a clause such as that which we are considering, was at issue, I think it is clear that the understanding of the profession in its continued use prior to that case was consistent with the genesis of the clause. It is impossible, I think, in the face of the references which I have ventured to give, to hold that the case of the *Earl of Zetland* was really a considered judgment on the meaning, as a general question, of the term "duplicand," or other than one pronounced on the *ad captandum* view which suggested itself to the Court on the case as it was presented to them. Personally I consider the judgment to have been unsound, for I cannot accept, in view of the conveyancing history to which I have adverted, the mere *ipse dixit* of the Lord Justice-Clerk that there was no ground for saying that "duplicand" is anything but "double" in the sense of twice the amount of the feu-duty. With all respect to his Lordship, I think, on the mere face of the expression there is very substantial ground for doubting whether the term "duplicand," taken even by itself and apart from any consideration derived from the history of its use, is any more necessarily the same as "double," in the sense of multiple by two, than multiplicand is the same as multiple. I think it was said in the course of the discussion that duplicand was a barbarous word. I should venture to say that to interpret "duplicand" as equivalent to "twice the amount of" was rather a barbarous use of a word. It appears to me that duplicand in its proper sense exactly fits the situation in which it is here used; that duplicand is the thing to be doubled, the feu-duty; that when doubled it is the feudal payment for the year in question—twice the feu-duty, made up of the feu-duty for the year and its duplicand or double, the conventional surrogatum for the relief and composition. For I do not think it is inappropriate to remind your Lordships that "double" "a double," "the double" in Scots parlance, and particularly in that of lawyers, even so recently as the last century, meant not twice the thing or sum referred to, but its duplicate, copy, or replica. Such I think is the meaning of its analogue "duplicand" where used in the case of the *Earl of Zetland* and in the present.

I know that the Sheriffs in their judgments in this case have founded an argument on the fact that the feu-duty is payable at two terms in the year and the duplicand at one only, and their view has found acceptance both in the *Heriot Trust* case, and I think with some of your Lordships. The argument is such a narrow one that did the judgment require its support I should be rather inclined to suspect the judgment. A feu-duty is always the feu-duty for the year. It is always stipulated to be paid annually at so much a year, as here, £24, &c., sterling per annum. Its being made payable in half-yearly portions makes it none the less a yearly payment. I respectfully say that its duplicand is the duplicand of the yearly feu-duty none the less that it is made payable at one term and not, like

the feu-duty itself spread over two terms in the year. The latter fact has no more effect in interpreting the term "duplicand" to mean twice the amount of, than to mean only once the amount of, the feu-duty.

From these considerations I am led to the conclusion on the first two of the questions to which at the outset I adverted:—First, that the judgment in *Lord Zetland's* case does not fix as a matter of general technical interpretation the meaning of the term "duplicand," but that the two judges whose opinions are recorded express an emphatic opinion that duplicand can mean nothing but double, meaning thereby twice, the feu-duty. Second, that this opinion if intended to apply generally was without justification, and that if the judgment is read as founded upon it it cannot be supported.

There remains to ascertain whether there is anything in the cases which have occurred since the *Earl of Zetland's* showing that that case has been treated as having established a fixed technical meaning for the term "duplicand" which has been relied upon by conveyancers, and as having given it a new and fixed acceptation as a word of style.

I am not aware of any case on the subject occurring between that of *Lord Zetland* and the passing of the Conveyancing Act 1874. That Act (section 23), while it did not interfere with existing feudal contracts except in giving the right to redeem casualties on terms, abolished legal casualties for the future, and prohibited the stipulation for any equivalent which was not fixed in its date of recurrence and in its amount. Of the cases subsequent to its date some of them relate to feu-contracts of earlier date, others to those of later and which therefore complied with its provisions. But as all such cases depend not on the application of the common law but on the construction of conventional terms, I do not think that the passing of the 1874 Act calls for any discrimination.

The first case to which I must refer—*The Heriot's Trust* v. *Lawrie's Trustees*—though not the earliest in date, was founded upon by the respondent—and I think some of your Lordships were inclined so to accept it—as though it had been decided on the rule of the *Earl of Zetland's* case. But the term "duplicand" was not used in the feu-contract, which like the present gave out several separate feus and was dated after 1874. It stipulated for a substantial feu-duty "as also paying" to the Governors "a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years from the following terms, *videlicet.*" The contest certainly was, just as in *Lord Zetland's* case, whether the term "a double" meant "twice the amount of" or merely once the amount of the feu-duty. I ventured to express a doubt as to the soundness of the judgment of the Court, for I considered the natural meaning of the term "a double" in the collocation in which the words occurred to be a ditto or replica of and to import, as it referred to money, a sum which was the same as and not twice as much as the feu-duty. I have reconsidered the case in the light of the much more exhaustive discussion which the present has had, and I am only confirmed in the doubt which I there expressed. I am the more so confirmed by a study of the authorities, to which in particular the learned Judge who then presided in this Court referred. I agree with him, as I have said, that the question was one of construction of what the parties meant. If the parties used words in a technical sense which have a technical meaning, that technical meaning must be given to them. If they did not, then the terms which they did use have to be construed. "Duplicand" may be regarded as a technical word; "a double" is a popular or vernacular expression. It carries its own meaning on the face of it, and personally I am quite unable, finding it in a Scottish document, to read out of it twice the amount of instead of a ditto or repetition of something to which it is referable, and therefore once the amount of. Referring to the cases which he was going to examine, his Lordship says that in all of them the question was the same, viz., whether thrice or twice the feu-duty was payable. That is perfectly true, but while the question so regarded was the same it rose on provisions essentially differently expressed. I have dealt already with the *Earl of Zetland's* case, and agree with his Lordship that one of the Judges concerned thought the words "over and above" to be conclusive of it. But suppose they were so held by the Lord Ordinary—and I do not think that they should have been—that would not give the word "a double" a special meaning in a case where, as in the *Heriot Trust* case, they do not occur. The Lord Ordinary's deduction from them is to me not intelligible, and they are in no way referred to by the judges in the Inner House. Unless the chain of reasoning be "a double" means a "duplicand," and a "duplicand" has been interpreted to mean "twice the amount of," therefore "a double" must also mean "twice the amount of," I cannot understand how the case of the *Heriot Trust* is ruled by that of *Lord Zetland.* But I do not find that the decision in the *Heriot Trust* is rested upon the interpretation of "duplicand" in that of *Lord Zetland,* but upon a construction of its own terms. To hold it ruled by *Lord Zetland's* case is very much the same as saying that that case was, as was probably the case, ruled by the examples contained in the table laid before the Court—that is to say, ruled not *similibus* but *dissimilibus.*

In *Alexander's Trustees* v. *Muir*, 1903, 5 F. 406, 40 S.L.R. 316, also referred to by Lord Dunedin, the feu-disposition, which was an old one, stipulated for a large money feu-duty, and also for payment to the superior at the term of Whitsunday 1824 of a sum expressed again in money, "being the double of the said yearly feu-duty which will then be due for the said whole subjects," and for payment of the same amount every nineteenth year from 1824, doubling the said yearly feu-duty every nineteenth year counting from Whitsunday 1824, but that only for each nineteenth year as the same comes round. This very special stipulation provides, I think, its own interpretation in the last line

which I have quoted, and the case therefore can be no authority of general application. The decision naturally was that the double payment, the amount of which was specified, and nothing more, was exigible in each nineteenth year, but that cannot help to interpret either the term "a double," or the term "a duplicand" occurring in any other case. It was rather, I think, relied on by the respondent for a remark of Lord-Justice Clerk (Macdonald) which may be held as re-echoing the expression of his predecessor in the *Earl of Zetland's* case. All that can be deduced from *Alexander's* case is that the Court there held that doubling meant literally doubling, but in the collocation in which it was used, that the double feu-duty was substitutional for and not cumulative with the feu-duty of the year.

Besides the *Heriot Trust* case, and the above cases referred to in it, there was also quoted to us the following:—*The Magistrates of Dundee*, 1883, 11 R. 145, 21 S.L.R. 107, in which the expression in the feu-disposition (dated prior to 1874) was "shall be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year." The question at issue was not what was meant by duplication, but what did the sum stipulated under that expression, whatever was its amount, cover. Dissenting Lord Rutherfurd Clark, the Court held that it covered all casualties, and not merely relief. It has therefore no bearing upon the present case. There was next the *Church of Scotland* v. *Watson*, 1905, 7 F. 395, 42 S.L.R. 299, which is in the same position. The title, also of old date, included a clause "doubling the feu-duty at the entry of each heir and singular successor." But the question was not what was the meaning and effect of the term "doubling," but whether the conventional provision in which it occurred made the payment exigible on a transmission to a singular successor so long as the last-entered vassal was still alive. Again in *Inglis* v. *Wilson*, 1909 S.C. 1393, 46 S.L.R. 979, the title was couched in very special terms with the object of preventing subinfeudation. It was dated in 1862, and taxed the entry of singular successors at a "duplicand" of the feu-duty, and in respect of that taxation obliged each singular successor to enter at once on the transmission to him, and failing his so entering, stipulated for "a duplicand" of the feu-duty for each year that he laid out unentered. The question on which the case turned was not what was meant by "duplicand" in this provision, but whether or not there had been an implied entry which avoided the superior's claim which was for duplicands over a long series of years. The Court held that there had been such implied entry, and therefore there was no cause for determining the meaning of the term "duplicand" in the clause of the feu-contract founded on.

I think that that exhausts the cases adduced by counsel, excepting that of *Murray*, 1917, 1 S.L.T. 20, where Lord Hunter in the Outer House had to deal with the expression "a duplication" in a contract of ground annual. From his Lordship's opinion I can only gather that he would have had the same difficulty that I had in following the interpretation by the First Division of the term "a double" in the *Heriot Trust* case.

So far, then, as precedents have been adduced, there is no ground for saying that the decision in the *Earl of Zetland* v. *Carron Company* has stamped on the expression "duplicand" a technical meaning, which it must now receive, whenever it occurs in the reddendo clause of a charter or feu-contract.

If so, then I find nothing to prevent our giving it here the meaning which it originally had, and which I think is its natural and proper meaning, and the one which the parties to the feu-contract intended it should receive.

The Court adhered.

Counsel for the Pursuer (Respondent)—Christie, K.C.—Gentles. Agents—J. & J. Jack, W.S.

Counsel for the Defender (Appellant)—Chree, K.C. — D. M. Wilson. Agents — Miller, Mathieson, & Miller, S.S.C.

Tuesday, March 6.

SECOND DIVISION.

[Lord Anderson, Ordinary.

M'ALLESTER *v.* GLASGOW CORPORATION.

Reparation—Negligence—Motor Car—Street—Collision between Tramway Car and Motor Car—Duty of Chauffeur in Emerging from Side Street into Main Road—Contributory Negligence.

A tramway car proceeding along a main road collided with a motor car which, having emerged from a side street, was attempting to cross the car rails diagonally in front of the approaching tramway car in order to reach its own proper side of the road. The driver of the motor car on emerging from the side street saw the tramway car approaching and thought he had time to cross in front of it, but turning on the slant as he did he lost sight of the tramway car.

Held (*dis.* Lord Anderson) that the accident was due to the contributory negligence of the pursuer, and the verdict in his favour *set aside*.

Robert M'Allester, motor driver, Glasgow, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for payment of the sum of £550 as damages for personal injuries resulting from a collision between a motor taxi-cab driven by himself and one of the defenders' tramway cars.

The defenders *pleaded*, *inter alia* — "3. Any injuries sustained by the pursuer having been caused or materially contributed to by the fault of the pursuer, the defenders should be assoilzied."

The *facts* appearing from the evidence so