

tice, since *Todd v. Anderson* at all events, for prosecutors to produce, as matter of duty and as part of their proof, orders and regulations of the nature of those referred to in this complaint. To do so has not augmented the duties of any prosecutor, for he necessarily has the regulation in his possession before instituting a prosecution; and production thereof has doubtless been of advantage to the accused, inasmuch as some orders are not printed, and many of those which are printed are not easily obtained. I therefore think that if this course of practice had by the decision of this Court been stereotyped into a rule of procedure, it would have been a salutary rule and helpful to an accused in maintaining his defence.

I think it is only due to the Sheriff-Substitute to say that the question argued before the Lord Justice-General, Lord Skerrington, and myself would have been decided in accordance with the views which the Sheriff-Substitute has expressed in the *Stated Case*. The decision of the Sheriff-Substitute had further justification in the concession made by the Solicitor-General at the last hearing that if production in evidence of the order and regulations had been necessary, what was done by the procurator-fiscal did not amount to production in any rational sense of that term.

LORD JUSTICE-GENERAL—I agree. My opinion on this question is simple and elementary. I hold that this order and these regulations formed part of the general law of the realm, are therefore presumably known to everybody, and consequently do not require to be proved. My views are well and shortly expressed in the words Lord M'Laren used in the case of *Hutchison v. Stevenson*, 4 F. (J.) 69, 39 S.L.R. 789, which are as follows:—"The production of these regulations seems to me just like the production of an Act of Parliament in order to satisfy the Judge as to the existence of the law on the particular point. The regulations are not part of the proof of the contravention of the law, and therefore they are not documents necessary for the proof of the prosecutor's case."

The Court answered the question of law in the negative.

Counsel for the Appellant—The Solicitor-General (Morison, K.C.)—C. H. Brown. Agent—W. J. Dundas, W.S., Crown Agent.

Counsel for the Respondent—Chree, K.C.—Lippe. Agents—Macpherson & Mackay, S.S.C.

## COURT OF SESSION.

Friday, June 22.

### FIRST DIVISION.

[Lord Cullen, Ordinary.]

#### COMMERCIAL UNION ASSURANCE COMPANY, LIMITED v. WADDELL AND ANOTHER.

*Superior and Vassal—Casualties—Feu Contract—Construction—Taxed Casualty—Duplicand of Feu-Duty, Referred to Elsewhere in the Deed as a "Duplication" and a "Composition."*

The reddendo of a feu contract stipulated for a feu-duty payable at two terms in the year, Whitsunday and Martinmas, commencing the first payment at a certain date, and then provided—"And further, to pay to the [superiors] a duplicand of the said . . . feu-duty at the termination of every twenty years counting from the term of Whitsunday" 1878, and when sufficient buildings were erected to adequately secure "the cumulo feu-duty and composition" the vassals should be entitled to allocate "the cumulo feu-duty and duplication thereof" with the approval of the superiors. *Held, following Finlay v. Adam*, 1917, 54 S.L.R. 388, that the sum payable to the superior in every twentieth year was twice the amount of the feu-duty for that year in addition to the feu-duty for that year.

The Commercial Union Assurance Company, Limited, *pursuers*, brought an action against Miss Margaret Waddell and another, *defenders*, concluding, *inter alia*, for decree fixing the amount of compensation, under the Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48), payable on the redemption of casualties in respect of lands held by the defenders off the pursuers as superiors.

The defenders' title to the lands in question was a *feu contract* granted by the authors of the pursuers in favour of the authors of the defenders, dated 18th, and recorded in the General Register of Sasines for publication, and also in the Books of Council for preservation, 20th August 1880, which provided, *inter alia*—"To be holden the said ground and others by the said Andrew Waddell and William Waddell [the defenders' authors] as trustees foresaid and their foresaids of and under the said Umpherston and Company Limited [the pursuers' authors] and their successors as superiors of the same in feu farm fee and heritage forever for payment of the feu-duty and duplicands as after stipulated but always with and under the burdens conditions and provisions before specified . . . For which causes and on the other part the said Andrew Waddell and Son and Andrew Waddell and William Waddell as partners and trustees foresaid and as individuals bind and oblige themselves and their heirs

and successors whomsoever in the said subjects and others to make payment to the said Umpherston and Company Limited and their assignees of a feu-duty for the first two years from Whitsunday Eighteen hundred and seventy-eight at the rate of Ninety-fivepoundssixteenshillingsandfourpence sterling yearly and that at two terms in the year Whitsunday and Martinmas by equal portions beginning the first terms payment thereof of Forty-seven pounds eighteen shillings and twopence at the term of Martinmas Eighteen hundred and seventy-eight for the half-year immediately preceding and the like sum of Forty-seven pounds eighteen shillings and twopence at each of the terms of Whitsunday Eighteen hundred and seventy-nine Martinmas Eighteen hundred and seventy-nine and Whitsunday Eighteen hundred and eighty for the half-years immediately preceding these respective terms And thereafter and in all time coming feu-duty at the rate of One hundred and seventy-five pounds thirteen shillings and fourpence sterling yearly in name of feu-duty for the said subjects and others payable in equal portions at the said two terms in the year beginning the first terms payment of the sum of Eighty-seven pounds sixteen shillings and eightpence at the term of Martinmas Eighteen hundred and eighty for the half-year immediately preceding and the next terms payment thereof at the term of Whitsunday thereafter and so forth at the said two terms in the year in all time thereafter with one-fifth part more of each terms payment of liquidate penalty for each terms failure in the punctual payment thereof and interest at the rate of five per centum per annum of each terms payment of the said feu-duty or restricted feu-duty from the terms at which the same falls due during the not-payment thereof and further to pay to the said Umpherston and Company Limited or their assignees a duplicand of the said maximum feu-duty at the termination of every period of twenty years counting from the term of Whitsunday Eighteen hundred and seventy-eight Declaring that it shall be in the power of the said disponees or their foresaids as soon as the grounds are all built upon or sufficiently built upon to carry and adequately secure the cumulo feu-duty and composition to dispose of any part of the buildings to be erected on the pieces of ground hereby disposed and to allocate or apportion the cumulo feu-duty and duplication thereof before mentioned among the different purchasers in such shares or proportions as may be approved of by the superiors but in no case the allocation to be on buildings which will not adequately secure the feu-duty and corresponding composition and such allocation shall not be in less sums than twenty pounds and corresponding composition Declaring however that the first party shall not be bound to recognise any allocation unless there shall be sufficient buildings on the remaining or unallocated ground to adequately secure the balance of feu-duty and composition and Declaring farther that on the cumulo feu-duty being all allocated and on intima-

tion of the respective sales being given to the said superiors in terms of law they shall be bound to collect the allocated feu-duties and duplications from the individual proprietors who shall thereafter be liable only for the sums so allocated on the subjects belonging to them."

The pursuers averred—" (Cond. 4) By minute of allocation by [one of the pursuers' authors] with consent of the defenders, and by the defenders with [his] consent . . . dated 13th and recorded in the said Division of the General Register of Sasines 19th November 1895, copy of which is produced herewith, an allocation of part of the feu-duty and casualty payable under said feu-contract was effected. Upon the four several areas of ground described in the summons, of which the pursuers are superiors as aforesaid, portions of the foresaid cumulo feu-duty and relative duplicand were by said minute allocated in the sixth, seventh, eighth, and ninth places respectively. The feu-duties so allocated on the said four several areas of ground are £13, £13, £10, and £15 respectively, amounting together to £51. The said respective feu-duties are allocated in each case 'with a corresponding proportion of the duplication of said feu-duty payable every twenty years.' (Cond. 6) The casualty payable at Whitsunday 1918 is in each case a double of the feu-duty over and above the feu-duty for the year. The sums set forth in the summons as representing compensation for redemption of the said respective casualties are £44, 6s. 5d., £44, 6s. 5d., £34, 1s. 11d., and £51, 2s. 10d., and the corresponding annual sums payable on conversion of the said sums of compensation into annual payments as set forth in the summons are £1, 15s. 6d., £1, 15s. 6d., £1, 7s. 3d., and £2, 0s. 10d., being 4 per cent. on the corresponding sums of compensation for redemption in terms of section 9 of the said Act. With reference to the statement in answer the pursuers are prepared to admit that in the event of the casualties payable at Whitsunday 1918 being held to be a double of the feu-duty over and above the feu-duty for the year, the sums which represent compensation for redemption of the said respective casualties are £43, 13s. 2d., £43, 13s. 2d., £33, 11s. 8d., and £50, 7s. 6d., and that the corresponding annual sums payable on conversion of the said sums of compensation into annual payments in terms of the said Act are £1, 14s. 10d., £1, 14s. 10d., £1, 0s. 7d., and £2, 0s. 4d., and further that in the event of the casualties payable at Whitsunday 1918 being held to be a sum equal to one year's feu-duty only the sums representing compensation for redemption of the said respective casualties are £21, 16s. 7d., £21, 16s. 7d., £16, 15s. 10d., and £25, 3s. 9d., and the corresponding annual sums payable on conversion of the said sums of compensation into annual payments in terms of the said Act are 17s. 5d., 17s. 5d., 13s. 6d., and £1, 0s. 2d. The receipt referred to in the answer is referred to for its terms. The statements in the answer with respect to the meaning of the parties to the feu-contract, the construction of the terms thereof, the acquiescence of the pur-

suers' authors, and the interpretation of 'duplicand' are denied."

The defenders averred—" (Ans. 6) Denied. Explained and averred that on a sound construction of the said feu contract and minute of allocation the casualty payable at Whitsunday 1918 is in each case a sum equal to one year's feu-duty only over and above the year's feu-duty. Explained further that that was the meaning of the parties to the said feu contract as expressed therein, and the casualties payable at Whitsunday 1898 were calculated on that basis and the sum of £51 (less income tax) was demanded and accepted by the superiors in payment of the duplicands exigible respectively from the said areas of ground. The receipt therefor is produced herewith. The pursuers' authors acquiesced with the defenders in construing the terms of the said feu contract to mean that only a year's feu-duty could be claimed as a casualty and the pursuers are not now entitled to put a different construction on the said feu-contract. Further, said construction was in conformity with the invariable practice of the legal profession in Scotland in regard to similar words in the reddendo clauses of feu contracts. Scots conveyancers have always interpreted 'a duplicand' to mean one year's feu-duty in addition to the annual feu-duty. The sums representing compensation for redemption of the said respective casualties under the Feudal Casualties (Scotland) Act 1914 are accordingly £21, 16s. 7d., £21, 16s. 7d., £16, 15s. 10d., and £25, 3s. 9d., respectively. The defenders have already intimated to the pursuers' agents that they elect to convert the compensation into annual sums and they are prepared to execute the necessary memoranda constituting the following sums, viz., 17s. 5d., 17s. 5d., 13s. 6d., and £1, 0s. 2d. additional feu-duties over the several areas of ground respectively."

The receipt for the duplicand of feu-duties payable at Whitsunday 1898 was as follows:—

"52 Hanover Street,  
Edinburgh 10 Sept. 1898.

"Received from Misses M. & E. Waddell, No. 6 Hartington Place, Edinburgh, the sum of (£51) Fifty-one pounds stg. less tax, being duplicand of feu-duties of £13, £13, £10 & £15 over subjects at Pilrig payable at Whitsunday 1898 to the Farmers Land Owners & Mercantile Insurance Coy. Ltd. (now The Scottish County & Mercantile Insurance Coy. Ltd.) [authors of the pursuers].

Id.

Feu-duty	£51	0	
Less tax	1	14	10
	£49	6	Sept. 1898.
			"Connell & Campbell."

The defenders pleaded—"2. On a sound construction of the feu contract the casualty payable at Whitsunday 1918 for each of the said areas of ground being in each case a sum equivalent to one year's feu-duty over and above the year's feu-duty, and the defenders being willing to convert the redemption compensation under and in terms of the said Act on that basis, should be assilized from the conclusions of the

action with expenses. 3. The measure of the defenders' obligation under the said clause in the said feu contract having been fixed by (a) the construction put thereon by the pursuers' authors and the defenders in 1898, and (b) by the meaning attached to the words 'a duplicand' and 'a duplication' by Scots conveyancers and Scots conveyancing practice, the pursuers are barred from insisting on decree as craved."

On 28th June 1916 the Lord Ordinary (CULLEN) found "that on a sound construction of the feu contract mentioned on record, the defenders, as vassals in the subjects described in the summons, are bound to pay to the superiors every twentieth year from the term of Whitsunday 1898 an amount equal to twice the annual feu-duty over and above the feu-duty for the year: Further, finds there are no averments relevant to support the third plea-in-law for the defenders, and repels the same."

Opinion.—"By the reddendo of the feu contract here in question the vassals are taken bound (1) to pay annually to the superiors a feu-duty of £17s. 3s. 4d., and that in equal portions at the terms of Whitsunday and Martinmas in each year, with interest and penalty in case of non-punctual payment, and (2) 'further to pay' to the superiors 'a duplicand' of the feu-duty at the termination of every period of twenty years counting from the term of Whitsunday 1878. Further on in the deed the duplicand is spoken of as 'a duplication,' and it is several times referred to under the name of 'composition.'

"The question raised in this action is whether the said stipulation for a 'duplicand' contained in the reddendo means that in every twentieth year counting from Whitsunday 1878 the vassal is to pay twice the amount of the annual feu-duty or only the amount of one year's feu-duty over and above the annual feu-duty for the particular year in which the duplicand falls due.

"What is to be 'further' paid every twentieth year is, in the reddendo, named a 'duplicand' of the feu-duty. That a 'duplicand' of a feu-duty equals twice the amount of the feu-duty is a proposition which I think I am bound to affirm in view of the case of *Earl of Zetland v. Carron Company*, 1841, 3 D. 1124. In the present feu contract the duplicand is, subsequent to the reddendo clause, spoken of as a 'duplication.' 'Duplication' means doubling, and it does not seem to me that the use of this word alters the meaning of the leading word 'duplicand' used in the reddendo.

"The defenders, however, say that, *esto* the duplicand payable every twentieth year is equal to twice the amount of the annual feu-duty, it includes the annual feu-duty for the year in which the duplicand falls due. They point out that the duplicand is not in express terms declared to be payable 'over and above' the feu-duty for the year in question. But the words 'over and above' the feu-duty for the particular year are not *voces signatae*. And apart from other considerations I do not see how the defenders' construction of the feu contract can be accepted seeing that the ordinary

annual feu-duty is in the twentieth year, as in every other year, payable one half at Whitsunday and one half at Martinmas, while the 'duplicand' is payable in one sum at the Whitsunday when it falls due.

"I am unable to distinguish the present case in any material respect from the recent case of *Heriot's Trust v. Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561. In the latter case the feu contract, after providing for an annual feu-duty payable by equal portions at Whitsunday and Martinmas in each year, imposed this further obligation on the vassal—'as also paying to' the superior 'a double of the said respective feu-duties before mentioned in name of composition at the expiry of every twenty-two years,' &c. The words 'a double' were held to denominate an amount equal to twice the amount of the ordinary annual feu-duty, and thus to mean the same as 'a duplicand' according to the view of the latter word adopted in *Earl of Zetland v. Carron Company* above cited. And that the 'double' did not include the ordinary annual feu-duty for the year in which it fell due was deduced from these considerations—(1) that after providing for payment of the ordinary feu-duty in each year the feu contract said 'as also paying' the 'double' each twenty-second year, thus indicating that the stipulation for the double was for something different from and additional to the ordinary feu-duty for the particular year; (2) that the double was stipulated for 'in name of composition,' thus being given a special character; and (3) that while the ordinary annual feu-duty was made payable in equal portions at the terms of Whitsunday and Martinmas in each year, the double was payable in one sum at the Whitsunday of the year in which it fell due. All these considerations are, essentially, represented in the present case. In the first place, while the feu contract here does not use the words 'as also paying' it uses the equivalent words 'and further to pay.' In the second place, while it does not in the reddendo say that the duplicand is to be paid 'in name of composition,' it speaks of the duplicand further on as 'composition.' In the third place, the duplicand here is, as in the case of *Heriot's Trust v. Lawrie's Trustees*, payable wholly at the Whitsunday of the year in which it falls due, while the ordinary feu-duty for the year is, as in that case, payable one half at said term and one half at the term of Martinmas thereafter.

"Following the cases of *Earl of Zetland v. Carron Company*, and *Heriot's Trust v. Lawrie's Trustees* above cited, I am of opinion that I must sustain the pursuers' view as to the construction of the feu contract here under consideration.

"The defenders plead, *separatim*, that the pursuers are barred from maintaining their present construction of the feu contract by reason of the fact that in 1898 when the duplicand first fell due they accepted the amount of one year's feu-duty for the year. I am unable, however, to see why this fact should bind them *quoad* subsequent payments."

The defenders reclaimed, and argued—The defenders were only bound in 1918 to pay twice the feu-duty, *i.e.*, the feu-duty plus its facsimile as casualty. The mere use of the words duplicand, duplication, or double did not *per se* entitle the superior to thrice the feu-duty, specific words such as "over and above" showing the duplicand was to be in addition to the feu-duty were required—*Earl of Zetland v. Carron Company*, 1841, 3 D. 1124. Here there were no such words of addition; the words "and further" were words of style introducing a new provision and did not bear that meaning. But if there were words of addition, the special meaning of duplicand could not be pled, for here the parties had used duplicand as equivalent to duplication, which meant not twice the feu-duty but its facsimile—*Murray v. Bruce*, 1917, 1 S.L.T. 20, *per* Lord Hunter; *Stair*, ii, 4, 27. Thus the parties had themselves interpreted "duplicand" in the feu contract. That that was the intention of the parties was also shown by the minute of allocation and the fact that the superior had been content to accept this facsimile of the feu-duty as the casualty—*Magistrates of Dundee v. Duncan*, 1883, 11 R. 145, *per* Lord Young at p. 148, 21 S.L.R. 107. Further, the duplicand, duplication, or composition was not stated to be in lieu of casualties. The case was distinguished from *Finlay v. Adam*, 1917, 54 S.L.R. 388; *Governors of George Heriot's Trust v. Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561.

Argued for the pursuers (respondents) The present case was not distinguishable from *Finlay's* case (*cit.*) and *Lawrie's* case (*cit.*). The allocation and the receipt were irrelevant; they might well be the result of a misunderstanding which could now be rectified. The use of "duplication" was immaterial, for it only occurred in a subsidiary clause, while "duplicand" was used in the principal clause. Here the payment was in lieu of composition, it was called a duplicand, interest was not payable on arrears, and the duplicand was payable at one and not two terms in the year, which showed the extra payment was treated separately from the feu-duty, and those were decisive considerations—*Lawrie's* case (*cit.*).

At advising—

LORD PRESIDENT—In common with the Lord Ordinary I am quite unable to distinguish this case from the case of the *Earl of Zetland v. Carron Company*, 3 D. 1124, and the case of *The Governors of George Heriot's Trust v. Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561. Both these decisions were carefully reconsidered and their authority affirmed by a Court of Seven Judges in the case of *Finlay v. Adam*, 54 S.L.R. 388. That decision I consider to be directly in point here, but it was pronounced after the Lord Ordinary's interlocutor in the present case. There is no peculiarity in the contract before us which would serve to distinguish it from those authorities I have just mentioned, for the expressions "duplication" and "composition" and "duplicand" which are found in this feu contract are

obviously used interchangeably; the one is synonymous with the other in every instance where the expressions are used.

I am for adhering to the interlocutor of the Lord Ordinary.

**LORD JOHNSTON**—The terms used in this feu contract, which after the undertaking to pay a feu-duty of blank pounds sterling “yearly, and that at two terms in the year, Whitsunday and Martinmas, in equal proportions, beginning the first term’s payment thereof” at the term of Martinmas 1878 for the half year immediately preceding, and the like sum at the term of Whitsunday 1879, &c., in name of feu-duty in all time coming, are “and further to pay . . . a duplicand” of the said feu-duty at the termination of every period of twenty years counting from the term of Whitsunday 1878.

These terms are in my opinion even more favourable to the views which I entertain and ventured to express in the case of *Finlay v. Adam* than the terms of the clause in question in that case, and I cannot even now convince myself that the application of the judgment pronounced in that case to the present is in accordance with the intention of the parties to the original feu contract. It is certainly an index not to be ignored, that when the first duplicand under this feu contract fell due the then superiors, represented by a firm of lawyers, entertained the same view of the meaning of “a duplicand” which I respectfully still entertain, and accordingly claimed no more than one additional feu-duty payable at the end of the first twenty years, which was duly paid. They must now be held to have been mistaken. But the mistake, as I must now assume it to have been, of a firm of lawyers of the last generation, is a somewhat strange concomitant of the practice which in the case of *Finlay v. Adam* the main ground of judgment of the Court assumed to have followed on the earlier case of the *Earl of Zeland*.

But in the case of *Finlay v. Adam* this Court, with the aid in consultation of three Judges of the Second Division, have decided that the term “a duplicand” has the fixed technical meaning of *twice the amount of*, in feudal conveyancing, and that judgment is binding on this Court. The judgment which your Lordship proposes follows therefore, I think, as a matter of course.

**LORD SKERRINGTON**—In every case of this kind the first question which has to be determined is whether the obligation to pay a duplicand is intended to mean a duplicand which shall include the feu-duty for the year, or whether the duplicand is to be paid over and above the feu-duty for the year. It was conceded by the defenders’ counsel that the language used in this feu contract was susceptible only of one construction, namely, that the duplicand was not to include the feu-duty for the year but was to be something over and above and exclusive of it. It was further conceded, in view of the authorities, that the word “duplicand” *prima facie* means two feu-duties. But of course any word, however technical, may be shown from the context to bear

some other meaning, and it was maintained that in the present case it sufficiently appeared that “duplicand” ought to be construed as meaning only a single feu-duty, because in a later clause of the feu contract it was spoken of as a “duplication.”

Now it seemed to be assumed that the word “duplication” has a clear and definite meaning in the English language inconsistent with the primary and technical meaning of the word “duplicand.” If that contention had been made out it would have been necessary for us to determine which meaning represented the true intention of the parties as expressed in this feu contract. That question, however, does not arise, because the word “duplication,” so far as I know, is not inconsistent with the word “duplicand” as that word has been construed by our Courts. “Duplication” is generally used as meaning the process of doubling, but it may equally be used to mean the result of doubling. If one substitutes the word “double” for the word “duplication” the position of the defenders is not in any way improved. Indeed I rather think that, according to the decision in the case of *Heriot’s Trust*, “double” has been held to mean the same as “duplicand.” But upon the most favourable view of the defenders it can only be regarded as a word of ambiguous meaning, which may be taken either as meaning a “replica,” or, on the other hand, as meaning that the original thing is repeated twice over. Accordingly I am clear that the defenders’ argument, which was based entirely upon the use of the word “duplication,” breaks down, and that in view of the prior authorities there must be paid three times the feu-duty, once in name of feu-duty and twice in name of duplicand.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for the Pursuers (Respondents)—Chree, K.C.—Greenhill. Agents—W. & J. Burness, W.S.

Counsel for the Defenders (Reclaimers)—The Lord Advocate (Clyde, K.C.)—R. Macgregor Mitchell. Agents—J. Miller Thomson & Co., W.S.

Tuesday, June 26.

## SECOND DIVISION

[Lord Ormidale, Ordinary.

TURNBULL’S TRUSTEES v. LORD  
ADVOCATE.

*Succession—Trust—Uncertainty—“Public, Benevolent, or Charitable Purposes” in a Particular Locality.*

A testator by her trust-disposition and settlement directed her trustees to apply the residue of her estate to “such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood . . . as they in their discretion shall think