No. 10. Sir MICHAEL SHAW STEWART, Bart. and Others, Commissioners of Major-General Sir THOMAS BRISBANE, K. C. B. and JOHN SCOTT, Ship-builder, Appellants.—*Solicitor-General Hope—Bosanquet.*

JOHN LEAD, Tenant in Chappelton, Respondent.—*Solicitor-General Wetherell—Murray—Keay.*

Tack—Clause.—In a lease of an arable farm, situated near a small town, the landlord having reserved right to feu the whole or any parts or portion thereof, allowing recompense in proportion to the rent payable for the whole; and having feued part of the farm, by a feu-disposition, for a principal sum, with a reddendo of one shilling; and an action of removing having been brought against the tenant; and the Lord Ordinary having decerned in the removing; but the Court having ordered a condescendence as to the practice of feuing lands on the estate, and thereafter assoilzied the tenant;—The House of Lords reversed the judgments of the Court ordering the condescendence and assoilzieing the tenant, and affirmed that of the Lord Ordinary decerning in the removing.

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2D DIVISION.
Lord Pitmilly.

THE commissioners on the Brisbane estate advertised for sale, by private bargain, five enclosures, containing 33 acres 3 roods and 38 falls, or thereby, being part of the estate of Chappelton, situated upon the rising ground behind the town of Largs, with a commanding view of the sea and islands in the Frith of Clyde, peculiarly favourable for a villa, and capable of being highly ornamented, the ground to be 'sold in either one, two, or four 'lots.' Scott thereafter feued these lots from the commissioners, paying down L.5500, and an annual duty of 1s. The feu-disposition proceeded on a 'minute of sale' entered into by the parties, and bore that the commissioners 'have sold and in feu-'farm disponed, as we do hereby sell, alienate, and in feu-farm 'and heritage let, demit, and dispone,' &c.

At this time these lands were held in lease by John Lead, whose father had, in 1806, obtained a lease of the farm of Chappelton, of which they formed a part, from General Brisbane's father, for fifteen years, at three guineas per acre, the term of removal being Martinmas as to the arable land, and Whitsunday as to the houses and grass. But the lease contained this reservation, 'Reserving always to the said Thomas 'Brisbane and his heirs, at any time during the currency of this 'tack, full power and liberty, not only to quarry limestone and 'other stones, and to bore and search for coals, and to work the 'same, or any minerals or metals within any part of the said

'lands, and to plant what parts thereof they may think proper, March 25. 1825
'and to make roads through any part of the same; but also to
'feu the whole, or any parts or portion thereof—the said Thomas
'Brisbane, or his foresaids, always allowing recompense for the
'grounds so worked, planted, or feued, in proportion to the
'rent payable for the whole.' Acting on this clause, the commissioners intimated to the tenant to remove at Martinmas 1815 as to the arable land, and Whitsunday thereafter as to the houses and grass. Lead, in return, intimated to the commissioners, that he intended to hold possession of the farm until the expiry of his lease, (1821). Thereupon the commissioners presented a summary petition to the Sheriff of Ayrshire, praying that Lead might be ordained to cede and give up the possession of the five enclosures of the said farm of Chappelton feued to the said John Scott, at the term of Martinmas 1815 as to the arable land, and at Whitsunday following as to the pasture grass; and in the event of failing to remove at these terms, concluding for damages, violent profits, and expenses.

The Sheriff-substitute found, 'that by the said tack the petitioners' constituent reserved full power and liberty not only to 'quarry limestones, &c. but to feu the whole, or any part or 'portion of the lands thereby set: finds it averred by the petitioners, and not refused by the respondent, that they have 'lately feued to the other petitioner, Mr Scott, five enclosures 'of the farm of Chappelton, situated on the east side of the road 'leading from Largs to Brisbane, and on the south side leading to 'Burnside, consisting of about 34 acres; therefore finds, agreeable 'to the covenant of parties, that the respondent must cede and 'give up said possession as craved by the petitioners: finds, that 'the respondent must be allowed recompense for the ground so 'feued in proportion to the rent payable for the whole and improvements made thereon;' and for that purpose appointed inspectors to report thereon.

The case being taken by advocation to the Court of Session, the Lord Ordinary ordered production of the feu-right and disposition to the subjects, with infeftment following, and quoad ultra sisted procedure until the pursuers brought a process of declarator; which action having been raised and conjoined, his Lordship, on the 28th February 1816, pronounced this judgment:—'Repels the reasons of advocation, and remits the cause 'simpliciter to the Sheriff of Ayrshire; and in the action of declarator and removing, repels the defences, and decerns in 'terms of the libel, with this declaration, that the defender's

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'claim to a recompense for ceding possession of the lands feued, 'and all questions concerning the amount or rate of said recom- 'pense, and the grounds on which it is to be fixed and ascertain- 'ed, are reserved, and will be discussed in the process before the 'Sheriff.' To this judgment he adhered on the 23d May 1817. Lead then petitioned, and the Court, on the 15th January 1818, before answer, appointed the pursuers 'to give in a special con- 'descendence, in terms of the Act of Sederunt, of the facts which 'they aver and offer to prove as to the practice of granting feus 'of part of the estate of Brisbane, previous to the date of the 'lease in question, and since that period;' and on the 3d July 1818 they recalled the Lord Ordinary's interlocutor, and appointed a new condescendence in terms of the former order to be given in. Thereafter, on the 5th February 1820, their Lordships, on advising the condescendence, with answers, and 'the 'whole circumstances of the case, altered the interlocutor com- 'plained of; and in the process of advocation advocated the 'cause, sustained the defences, assoilzied the defenders, and de- 'cerned.' In consequence of an equality of voices as to the question of expenses, the case was superseded till the 11th, when their Lordships found expenses due. To these judgments their Lordships adhered on the 27th February 1821, and on the 24th November they decerned for L.209. 14s. 7d. of expenses.

The pursuers appealed.

Appellant.—The interlocutors of the Sheriff and of the Lord Ordinary proceeded on a just view of the contract of lease. The power there reserved to feu the whole, or any parts or portions, is unqualified and unlimited, either in regard to the extent of ground to be feued, or to the species of feu-rights to be granted, or their terms and conditions. There is no stipulation that the feus are to be merely building feus, or that the consideration for them is to be entirely an annual sum equivalent to the rent. On the contrary, the landlord was entitled to feu for what purpose he chose, and either to take a large annual payment, or a principal sum and a nominal feu-duty. With these matters the tenant had no concern. It is sufficient that the appellants entered into a feu-contract. The inquiry ordered respecting the practice of granting feus of parts of the estate of Brisbane previous to the date of the lease in question, and since that period, was utterly incompetent. It is contrary to the established rules of law, and a most dangerous precedent, to allow extrinsic evidence, even of the most unsuspicious character, to shake the security of a right fixed by

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a regular instrument, or to controul a written contract by a limitation not to be discovered in any part of the deed itself. The tenant could not have been permitted to prove by testimony what the Court has seen proper to let in. Even if the extrinsic evidence had been competent, the mode or extent of dealing with others cannot afford any secure grounds for interfering with the parties in this particular case. Still, such as it is, it is in favour of the appellant. The practice has been general on the estate to feu; and in particular, this mode of disposing of the property was eligible in respect of the proximity of the town of Largs. Tenants holding under leases containing the same clause with that in question, acquiesced in being removed from 1600 acres purchased by Mr Scott, and held by him in feu for a small feu-duty. The respondent has referred to an entail of the estate of Brisbane executed in 1792, and which, he maintains, proves that only small feus were in contemplation of the entailer who granted the Chappelton lease. But it is impossible to allow the tenant to rest on such grounds; and even if he did, the entail having been granted under heavy debts, the restriction to small feus, supposing such a restriction existed, could only relate to the management of the estate after these debts are paid off, which could be effectually done by transactions of the very kind the respondent has challenged, and merely could have relation to the preservation of the pleasure-grounds from encroachment.

Respondent.—The contract in question is a bona fide contract, and must be construed according to the intention of the parties at the time, and the ordinary meaning of the words. It never was contemplated that the lease could be set aside, in whole or in part, by a sale. 'To feu,' as the parties used the phrase, meant to give off small portions of land for building. This event a tenant could estimate—as he could a reservation to plant; but a sale does not admit of calculation. There is a particular clause when that is intended, and would of course have been introduced if such an occurrence were in view. The whole conduct of the contracting parties proves, that 'to feu' merely related to building grants. In the entail which the lessor had executed some years before, and rescinded in 1801, the feus are limited to that description. Acting on this principle, extensive offices have been erected on the land, and the tenant has expended large sums on its improvement. To be deprived of his whole farm, as the construction of the appellant implies, would not admit of compensation, under much broader words than contained in the compensation clause in the lease. It would be

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unjust to allow the tenant to be affected by what is in substance a sale, merely because the deed conveying away receives the name of a feu-disposition, and there is an annual though illusory reddendo. Besides, although a building-feu may, a sale, in whatever form it may be effected, does not necessarily imply a removing of the tenant. The appellants offered to establish that there was such a practice of granting feus on the Brisbane estate as must have prepared the tenant for the event which has happened. In this offer the appellants failed. The practice merely proved to be what was the common practice in other parts of Scotland, and of course must receive a like interpretation as there is given. Besides, the lease is now expired, and the respondent has removed.

The House of Lords ordered and adjudged, 'that the said interlocutors of the Lords of Session in Scotland, of the 15th January and 3d July 1818, the 5th and 11th February 1820, and the 27th February and 24th November 1821, complained of, be reversed. And it is further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 23d May 1817, so far as complained of, be affirmed. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be consistent with this judgment, and as shall be just.'

Appellants' Authorities.—Graham against Rutherford, February 1809, (not reported); Hunter against Craig, 1812, (not reported).

Respondent's Authorities.—Wellwood, 1777, (not reported); Whitton against Duncan, 13th May 1795, (Bell).

J. RICHARDSON—BUTT,—Solicitors.

No. 11. JOHN WILLIAM HENRY, EARL of STAIR, Appellant.

JOHN EARL of STAIR'S Trustees, Respondents.

Trust—Clause.—A party having conveyed to trustees his whole funds, interest and proceeds thereof, to be vested in lands, which were to be annexed to his entailed estate, and bequeathed legacies, of which one was not payable for six months after his death; and his heir of tailzie having claimed the interest of the funds from and after the day on which the truster died;—Held, (affirming the judgment of the Court of Session), That he was not entitled to the interest from that period.

March 29. 1825.

1ST DIVISION. Lord Alloway.

ON the 1st of June 1821, John Earl of Stair died without heirs of his body, having made an entail of his estates in Scotland,