

'working-days' or 'running-days.' The former stipulation excludes Sundays and custom-house holidays. Under the latter the days are reckoned like the days in a bill of exchange. Where the expression is general—"days,"—the legal construction is for running-days; but if usage should settle it otherwise, it rules the construction." That doctrine is taken from an opinion of Lord Eldon, to which Mr Bell refers. On that point I concur with Lord Shand and with the opinions referred to by him in the case of *Thiess v. Byers*; that is quite a distinct rule.

Then comes the question—Has there been proof of a local custom? We have no intimation on record that that question is to be raised, but putting that aside, I think that parties should have stipulated, being in full knowledge of the peculiar nature of this port, that surf-days should not be reckoned as working-days. In the absence of any such stipulation I think they are not entitled to found on this custom. Then I find that on some of these surf-days the log-book shows that cargo was discharged, and therefore I cannot think there was any absolute prohibition by the master of the port of all working on those days. On that point also I agree with Lord Shand.

Then as to the homeward voyage—There may have been circumstances which made it desirable that the ships should be altogether loaded at one port, and as to that point I again concur with Lord Shand. The captain unfortunately is dead, and his evidence, which might have cleared up the matter, is lost. We have this item of evidence however, that in his protest he distinctly allows four days on the understanding that he was not to proceed to these other ports.

LORD PRESIDENT—I concur so entirely in the able and distinct opinion of Lord Shand with regard to every point that it would be unnecessary for me to say anything were it not for the difference of opinion on what is by far the most important question raised in this case, viz., Whether surf-days are to be reckoned as working-days or not?

The rule for construing charter-parties cannot be doubted, in so far as it is not affected by any custom to the contrary. From the time that notice is given to the charterer's agent of the arrival of the ship at the port of discharge till the discharge is completed, the charterer takes the risk of the weather—at all other times the risk is with the shipowner. This is a rule so clearly established by all the authorities, and founded on such clear principles of equity and expediency, that I should be very sorry if any of your Lordships intended to throw any doubt on it. I do not, however, understand Lord Deas to dissent from this rule of law unless there is proved to be a contrary custom tending against this rule. But it is said that there is a custom at Iquique which would prevent us from holding that surf-days can be reckoned as working-days. Now, we must see what that custom is that we may understand what effect it is to have on written instruments. That there is a custom of not working on dangerous or improper days is not peculiar to Iquique, and I daresay that there are local regulations made for determining when it is safe to work and when it is unsafe. But the custom must go a great deal further than that before we can recognise it as affecting such a con-

tract as this. It must be a custom that charterers should demand that such days should be allowed to them, and that shipowners should yield to them. There is no proof at all, or at least very unsatisfactory proof of that, but even if there were proof of it, I do not think it would be sufficient. The contract is made in London; the shipowners are not said to have had any knowledge of this local custom, assuming that it has been proved to exist. Now, where there is a custom peculiar to any locality, it cannot be allowed to control the terms of a contract unless it is known to both the parties to that contract. I am surprised to hear that rule called in question by Lord Deas. I shall only appeal to one authority, but that a very high one, viz., Lord Kingsdown, in the case of *Kirchner*, 12 Moore's P.C. Repts. 361. Now, it is not pretended that the shipowner who made this charter-party had any knowledge of the local custom. I think, therefore, that, even if it were proved, it cannot be held to affect the contract.

The Lords pronounced the following interlocutor:—

"The Lords having heard counsel for John Holman & Sons, pursuers, against Lord Young's interlocutor of 18th July 1877, Recal the said interlocutor: Decern against the defenders to make payment to the pursuers of £189, 12s. 8d., with interest thereon at the rate of 5 per centum per annum from the 27th October 1875 until payment: Find the defenders liable to the pursuers in the expenses of process, under deduction of one-fifth of the taxed amount: Remit to the Auditor to tax the account of the said expenses, and to report."

Counsel for Pursuers (Reclaimers)—Trayner—Kirkpatrick. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defenders (Respondents)—Guthrie Smith—A. J. Young. Agent—Thomas Dowie, S.S.C.

Friday, February 8. \*

## OUTER HOUSE.

[Lord Curriehill, Ordinary.

DUNCANSON *v.* GIFFEN.

*Superior and Vassal—Conventional Irritancy, Whether Purgeable at the Bar.*

Held (by Lord Curriehill, Ordinary, and acquiesced in) that conventional irritancies attached to obligations *ad facta præstanda*, or for payment of annual duties contained in conveyances of property, whether by way of feu-right or by contract of ground-annual, are purgeable at any time before extract of a decree of declarator of irritancy.

Review of the law relating to the purging of irritancies.

By contract of ground-annual, dated 13th March and 18th May, and recorded 26th June 1876, entered into between John Duncaison, builder, Glasgow, the pursuer of this action, and Andrew

\* Decided January 18, 1878.

Giffen, horse dealer there, the defender, the former disposed to the latter a certain portion of ground in Glasgow, containing 1069 square yards or thereby imperial measure. The subjects were disposed under the real lien and burden of a yearly ground-annual of £40, 2s. from and after Martinmas 1872, beginning the first term's payment as at Whitsunday 1873.

It was declared that the defender should be bound and obliged to erect and finish, on or before the 31st day of August 1877, good and substantial buildings upon the portion of ground thereby disposed, capable of yielding a yearly rental equal to at least double the yearly ground-rent or ground-annual payable therefrom, and should thenceforward maintain and uphold the buildings in such good order and repair as should make them capable of yielding the rental in all time coming. It was further declared by the contract that in the event of the defender failing to comply with the stipulations as to erecting and finishing the buildings and maintaining them, then the contract of ground-annual, and all that might have followed thereon, should, in the option of the party having right to the ground-annual for the time, be void and null, and the ground, with the buildings thereon, should revert, fall, and belong to such party. The conditions of the contract of ground-annual were made real burdens upon the ground.

The defender had failed to erect buildings on the ground, and the pursuer thereafter brought this action to have it found that there had been this failure, and that the contract of ground-annual was therefore void and null, and that the ground had reverted to the pursuer, and now belonged to him, and that he was entitled to enter into possession of it. There was also a conclusion for removing.

The defender admitted that buildings of the value stated were not completed. He had sold the subjects to a Mr Horne, of Glasgow, from whom he had understood that the pursuer was willing to prolong the time for building. Mr Horne's purchase had fallen through, and the defender now stated on record that he was prepared to proceed with the building with all possible despatch. He further consigned two years' ground-annual, being £80, 4s., so that the pursuer might be sufficiently secured in the payments falling due at Whitsunday 1878 and the two following terms.

The pursuer pleaded, *inter alia*—" (1) The defender having failed to erect buildings on the ground libelled, has forfeited his right thereto under the said contract of ground-annual, and the pursuer is entitled to the decrees concluded for, to establish his right to the said subjects under the clause of forfeiture and reversion."

The defender, *inter alia*, pleaded—" (3) The irritancy created by the contract of ground-annual being penal, and requiring declarator, the defender, in respect of the consignations made by him, and of his now offering and being willing to implement the contract by building, is entitled to have the same purged at the bar."

The Lord Ordinary issued the following interlocutor:—

"Edinburgh, 18th January 1878.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, minute for the

defender, No. 16 of process, and whole proceedings—(1) Finds that by contract of ground-annual libelled the defender became bound, *inter alia*, on or before the 31st day of August 1877, to erect and finish good and substantial buildings upon the ground thereby disposed to him, capable of yielding a yearly rental equal to at least double of the yearly ground-rent or ground-annual payable therefrom under said contract, and thenceforward to maintain and uphold the said buildings in such good order and repair as should make them capable of yielding the said rental in all time coming:

(2) Finds that by the said contract it was, *inter alia*, declared that in the event of the defender and his heirs and assignees failing to comply with the stipulations as to erecting and finishing said buildings on the said ground and maintaining such buildings, then the said contract of ground-annual and all that might have followed thereon should, in the option of the party having right to the ground-rent or ground-annual for the time, be void and null, and the said ground with the buildings thereon should revert, fall, and belong to such party: (3) Finds that no buildings were prior to 31st August 1877, or have since that date, been erected on said ground, and that the defender has therefore failed to comply with the stipulations as to the erection of buildings contained in the said contract of ground-annual: (4) Finds that the defender has consigned in bank, subject to the order of the Lord Ordinary and of the Court, the sum of £20, 1s. sterling, being the amount of the said ground-rent or ground-annual which became due and payable at the term of Martinmas 1877, and in addition thereto the sum of £80, 4s. sterling, being two years' ground-rent or ground-annual, in order that the pursuer may receive therefrom, if the same is not otherwise paid by the defender, the ground-annuals falling due at Whitsunday 1878 and at the three successive half-yearly terms thereafter respectively, and that the defender undertakes in the said minute, No. 16 of process, to have the necessary buildings erected and finished in terms of said contract of ground-annual within six months from and after the 17th day of January 1878: (5) Finds that in virtue of the option reserved to him in the said contract the pursuer is entitled to raise and insist in the present action for declarator of the conventional irritancy stipulated for in said contract, but that the defender is entitled to purge said irritancy before decree in this action is pronounced or extracted, and to have a reasonable time allowed to him for that purpose: Therefore supersedes further consideration of the cause until the 17th day of July 1878, in order that the defenders may have an opportunity of purging said irritancy; reserving all questions of expenses.

"Note.—The sole question in this case is, Whether the defender, as disponee under the contract of ground-annual libelled, is entitled to purge a conventional irritancy incurred by him in respect of his failure to comply with a stipulation in the contract that he should erect buildings of the annual value of double the amount of the ground-annual on or before 31st August 1877? The ground-annual amounts to £40, 2s. per annum, and has been fully paid up by the defender from the date of the contract, with the exception of the payment due at Martinmas 1877, a few days before this action was raised. But he has

consigned that sum and the ground-annual for the next two years in order to give the pursuer full security for these annual payments. It is plain from the whole terms of the contract that the stipulation as to the erection of buildings was made solely to provide adequate security for payment of the yearly ground-rents, and the option reserved by the pursuer as disposer of the ground to declare the contract at an end, and to resume the ownership of the ground in the event of the defender's failure to erect the stipulated buildings, was intended as a compulsitor on the latter to provide such security. The defender has undoubtedly not complied with the stipulation as to building, inasmuch as no buildings have yet been erected on the ground. But he has not only, as I have said, consigned in advance two years' ground-annual in order to provide ample security to the pursuer, but he now undertakes by minute to erect and complete the necessary buildings within the next six months. In other words, he proposes in this way to purge the irritancy at the bar.

“The pursuer maintains that it is now too late for the defender to make such a proposal, and that the irritancy must be at once declared, and he refers in support of his contention to the statement of Mr Menzies in his Lectures on Conveyancing, 524, and to the cases of *Sutherland*, 1664, M. 7229, and *Stewart v. Watson*, July 20, 1864, 2 Macph. 1414. The statement of Mr Menzies has reference to the casualty of ‘tinsel of the feu *ob non solutum canonem*’ enacted by the Statute 1597, c. 250, and to conventional irritancies for non-payment of feu-duties expressed in a feu-right. His words are—‘The irritancy may be purged by payment at the bar, but when it is conventional (*i.e.*, expressed in the title) purgation is not allowed, unless the vassal gives a reasonable excuse for his delay—*Laird of Wedderburn v. Wardlaw*, February 13, 1666, 2 B. Sup. 138.’ If it were necessary to consider whether in the present case the defender has stated a reasonable excuse for his past delay, I am inclined to think that the delay, although great, has been not altogether inexcusable. But it is not necessary to consider that question, because it appears to me that the authorities do not support the doctrine of Mr Menzies. It is quite true that at the dates of the judgment in the case referred to by Mr Menzies, and in the case of *Sutherland*, cited by the pursuer in his argument, *i.e.*, in 1664 and 1666, the practice of the Court seems to have been to distinguish between the statutory and conventional irritancies in feu-rights, and to allow the former to be purged at the bar, but to refuse to allow the latter to be so purged. But the practice soon changed. Lord Stair, who is the reporter of both these cases, states in the third edition of his Institutions, which was carefully revised by himself and published in 1693, (ii. 3, 51)—‘The law doth also introduce conditions in infefments which do not arise from their nature, as in feus, by the common feudal law and by special statute with us, whereby if the feu-duty be not paid by the space of two years, whole and together, that the feu shall be extinct and lost—Parl. 1597, c. 250. So the Roman emphyteusis by three years not-payment became void—l. 2, c. *de jure emphyt.* It is therefore beyond doubt that such clauses are effectual whether expressed or not expressed in the infefment.’ Here the statu-

tory and conventional irritancies are dealt with as being in *pari casu*, and although both are stated to be ‘effectual,’ and nothing is said as to the right of the vassal to purge either irritancy at the bar, it is undoubted that in the case of the statutory irritancy the vassal had such right. But in book iv., which did not form part of the original edition of his work, Stair says (tit. xviii. sec. 3), speaking of clauses irritant, *i.e.*, of conventional irritancies—‘Sometimes they bear that in the cases therein mentioned the rights shall thereby become null, *ipso facto*, without declarator. But notwithstanding of this, clauses irritant are not effectual till they be declared where they are exorbitantly penal. For the Lords *ex officio* have power to modify exorbitant penalties, albeit they bear to be liquidated of consent of parties. And for the same cause they have power to qualify these clauses irritant, and to allow time for purging the same,—yet only if they be truly exorbitantly penal. For such clauses contained in gratuitous rights take their full effect, because then they are not penal, but are conditions and provisions qualifying the right, and therefore they need no declarator.’ And accordingly, although for some time the decisions of the Court may have fluctuated, the practice appears to have become general—at all events by the middle of the eighteenth century—to hold in the case of irritancies in feu-rights, whether statutory or conventional, that the right of the contravener was not void, but only voidable, and that the irritancies might be purged at the bar, *i.e.*, *Baillie*, 1693, M. 7254; *Forsyth*, 1708, M. 7255; *Lord Eli-bank*, 1767, M. 7241; *Lockhart*, 1770, M. 7244.

“Mr Erskine, whose greater work, though not published till 1773, five years after his death, must have been written before 1768, says (ii. 5, 27)—‘But where the legal irritancy is fortified by a conventional, the vassal cannot, or at least by the old practice could not, purge without his being able to assign a reasonable cause why payment was not regularly made—*Wedderburn*, February 13, 1666, 2 B. Sup. 138; or unless an obscurity appeared in the words of the irritant clause—*E. of Mar*, February 18, 1680, 2 B. Sup. 256.’ Mr Erskine’s reference to the ‘old practice’ seems to show that he was aware that the practice had changed or was undergoing a change. And Mr Bell, writing in 1839, says (Prin. sec. 701)—‘This irritancy is provided by statute, and sometimes enforced by conventional stipulation. But in all cases it requires a declarator, the forfeiture being purgeable at the bar before decree of declarator is extracted.’

“In the case of the *Tailors of Aberdeen v. Coutts*, August 3, 1840, 1 Rob. App. 296, the whole question was raised, and was deliberately considered by the Judges, who were unanimous in concurring in the general exposition of the law contained in the opinion of Lords Gillies, Mackenzie, Corehouse, and Jeffrey, the authorship of which is commonly attributed to Lord Corehouse. The passage in that opinion which bears upon the present question is as follows (p. 315)—‘It may therefore be considered as undoubted law that if a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors. If it is clearly personal or exposed to objections, an irritant clause will not

support it. But an irritancy is often found adjoined to those conditions, for various reasons. It gives a readier and more powerful remedy in case of contravention. Thus, in the present grant there is an obligation on the vassal to erect houses of a certain description on the subject. In case of failure a penalty of £100 is stipulated, and that condition might be enforced in an ordinary action. But as the pursuers of the action might be involved in a question as to the amount of damages which they sustained by the failure—penalties being restricted in a court of equity to the actual loss sustained—a clause of irritancy, as in this case, is added, providing that the vassal, besides the penalty, ‘shall also lose all right and title to said piece of ground, which in that event shall revert to and become the property of said trade.’ This is more stringent and effectual, for it could not be evaded except by purging before decree of declarator. The Statute 1597, cap. 250, enacted that all vassals by feu-farm failing to pay their feu-duty for two years together shall lose their right in the same manner as if an irritant clause had been specially engrossed in their charters. Notwithstanding this irritancy by statute, it was the practice to introduce an irritant clause in the charter, with the view of preventing the vassal from purging before declarator, for it was held that although legal irritancies might be purged, conventional irritancies could not. The same practice continues still, although the distinction between legal and conventional irritancies no longer obtains, and when there is therefore no use for the provision. In the present case the irritant clause, in the event of the duties not being paid, is extremely proper, for the Statute 1597 expressly applies to vassals by feu-farm, and it is very doubtful whether it could be extended to the duties here, which are not feu-duties, but ground-annuals only, not payable to the superior, but to the grantor of the burgage right.’ It appears to me that these observations apply to the present case, which is one not of a proper feu-right, but of a conveyance of property by way of a contract of ground-annual.

“I think it is thus quite clear that, according to the law as it now stands, conventional irritancies attached to obligations *ad facta præstanda*, or for payment of annual-duties contained in conveyances of property, whether by way of feu-right or by contract of ground-annual, are purgeable at the bar, *i.e.*, at any time before decree of declarator of irritancy is extracted. And although Mr Menzies appears to have overlooked both the statement of Mr Bell in his Principles and the opinion in the case of *Coutts* which has just been quoted, Professor Montgomerie Bell, in his Lectures, vol. i. p. 585 (1st ed.), states the law to be as I have now stated it.

“The pursuer, however, refers to the case of *Stewart v. Watson*, July 20, 1864, 2 Macph. 1414, as supporting his contention, that notwithstanding the authorities just cited, conventional irritancies cannot be purged at the bar. But that was a case not of a right of property, but of a lease for a limited period of years—a consensual contract in which there is *delectus personæ*—and the irritancy which was there sought to be declared was not incurred by the tenant’s failure to perform certain acts or to pay the rents, but by his having suffered sequestration for non-

payment of rent to take place. The Court there held, that as the tenant had suffered sequestration to take place after great indulgence on the part of the landlord, he had incurred an irritancy which it was impossible to purge. But there is nothing in the opinions of any of the Judges to countenance the view that such irritancies would be enforced in contracts other than leases, or where they were attached to obligations *ad facta præstanda*, or for mere payment of annual-duties. Indeed, Lord Neaves expressly says—‘In all consensual contracts the agreements of parties ought to be enforced. I speak specially of consensual contracts, because location, which is the contract here, is a consensual contract. I do not speak of feus, which confer a right of property. But in a lease, which gives no right of property, the parties may stipulate for any conventional irritancies they please, provided they are not contrary to law.’ The case of *Stewart v. Watson* therefore does not, in my opinion, in any way infringe the general rule that conventional irritancies occurring in rights of property in land may be purged at the bar, at all events where the irritancy is attached not to a condition *ne quid fiat*, but to a certain *ut aliquid fiat*—see the case of *Forsyth* already cited.

“I am therefore of opinion that the defender, who undertakes judicially now to comply with the stipulation as to building, is entitled to a reasonable time in which to make and finish the erection, and the period of six months specified in his minute appears to me to be in the circumstances a reasonable one. But it must be distinctly understood that no further delay will be granted, and that at the expiration of the time fixed the pursuer will be entitled to decree of declarator in terms of the conclusions of the summons, unless the buildings are then completed or a satisfactory reason is assigned for their non-completion. All questions of expenses are in the meantime reserved.”

The interlocutor was acquiesced in.

Counsel for Pursuer—J. P. B. Robertson.  
Agent—Lockhart Thomson, S.S.C.

Counsel for Defender—M’Kechnie. Agent—A. Kelly Morrison, S.S.C.

Friday, February 8.

## FIRST DIVISION

[Lord Rutherford Clark,  
Ordinary.

GARDNER v. BERESFORD’S TRUSTEES.

(*Vide ante*, June 13, 1877, vol. xiv. 570, 4 R. 885.)

*Writ*—Statute 1696, c. 15—*Subscription by Initials*.

*Held* that a writing dated in 1873, which consisted of two separate sheets of paper and seven pages, and was subscribed on the last page by the granters and witnesses, but merely initialed on those before it, was an improbable instrument under the Act 1696, c. 15.

*Writ*—*Conveyancing (Scotland) Act 1874* (37 and 38 Vict. c. 94), *secs. 38 and 39*—*Retrospective Effect*.