Friday, February 23.

FIRST DIVISION.

[Lord Adam, Ordinary.

THE MAGISTRATES OF GLASGOW *v.* HAY AND OTHERS.

Superior and Vassal—Irritancy—Obligation to Build.

By minute annexed to articles of roup and feu dated 17th December 1873 the feuar bound and obliged himself, his heirs and successors, to implement the whole of the conditions therein contained, and, *inter alia*, to erect within two years dwelling-houses of a certain description and value on the subjects feued.

On 10th and 11th May 1876 two feu-contracts were entered into between the superiors and the feuar narrating the terms of the articles of roup and feu, and containing a clause of irritancy in case of contravention of any of the provisions thereof, entry to be as at 17th December 1873. No dwelling-houses were erected as stipulated, and in 1879 the superiors raised a declarator of irritancy against singular successors of the original feuar. *Held* that they were entitled to decree in respect of the failure to build within two years from the date of the feu-contracts.

On 17th December 1873 the Magistrates of Glasgow exposed to public roup and feu two plots of ground. John Athya, merchant in Glasgow, became the purchaser, and by minute annexed to the articles of roup and feu enacted and bound and obliged himself, and his heirs and successors, to implement the whole of the conditions therein contained. It was provided, *inter alia*, by the said articles that the feuar or feuars should be obliged within two years after the roup to erect and maintain on these plots of ground dwelling-houses of a certain description and value.

On 10th and 11th May 1876 two feu-contracts were entered into between the Magistrates of Glasgow and John Athya, by which the Magistrates disponed in feu to John Athya, and his heirs and successors whomsoever, the above-mentioned two plots of ground, with entry as at 17th December 1873, notwithstanding the date of the feu-contracts, and it was expressly provided and declared that they were granted with and under the conditions, provisions, limitations, declarations, irritancies, reservations, and others therein set forth, and, *inter alia*, the following: —"(*Primo*) That the said John Athya should be bound and obliged, as he thereby bound and obliged himself and his foresaids, within two years after the said 17th day of December 1873, to erect on the said plot or area of ground, and thereafter in all time coming to maintain thereon, dwelling-houses" of a style and elevation stipulated. There was also in the feu-contracts a clause of irritancy in the event of the feuar or his successors contravening any of the conditions and provisions in the feu-contracts.

In July 1877 John Athya conveyed the subjects to John Macqueen Barr and James Carstairs, accountants, Glasgow, and the survivor of them, in trust for themselves, who were infeft on 1st November 1877, and on 19th November disponed to Robert Hunter Hay and William Home Hay and John James Hay, partners of the firm of Robert Hunter Hay & Brothers, millers, Glasgow, who recorded their disposition on 31st August 1878. No buildings were then or at the date of this action erected on the ground.

This was an action raised on 13th March 1879 by the Magistrates of Glasgow against R. H. Hay, W. H. Hay, and J. J. Hay, partners of and trustees for their firm of Robert Hunter Hay & Brothers, and also against John Athya, and John Macqueen Barr and James Carstairs, as individuals and as trustees for the firm of Barr & Carstairs, for their interest, to have it found and declared that the defenders R. H. Hay, W. H. Hay, and J. J. Hay, and their predecessors and authors, had failed to erect "within two years after the 17th of December 1873" upon these two plots of ground dwelling-houses according to the stipulations in the feu-contracts, and had therefore forfeited their right in the subjects. The pursuers also concluded for decree of removing.

The defenders averred that it was with the pursuers' full consent and acquiescence that no buildings had been erected. They pleaded, *inter alia*, that the condition that buildings should be erected within two years from 17th December 1873 being impossible, ought to be held *pro non scripto*, and that on a sound construction of the feu-contracts they were only bound to erect buildings on the ground within two years, or within a reasonable period, after being required to do so.

On 26th June 1879 the Lord Ordinary (ADAM) pronounced this interlocutor: — "The Lord Ordinary having heard counsel for the parties, Finds that the defenders are bound, within two years from the 13th March 1879, being the date of the summons in this action, to erect on each of the two plots or areas of ground, respectively contained in the two feu-contracts of date 10th and 11th May 1876, dwelling-houses of the style and elevations and of the values specified in the said feu-contracts respectively: *Quoad ultra* continues the cause, reserving all questions of expenses.

"*Note.*—The feu-contracts founded on contain an obligation on the vassals to erect dwelling-houses of a certain description and value therein specified within two years after 17th December 1873, that having been the date of the defenders' predecessor's entry to the subjects.

"The feu-contracts themselves are, however, dated on the 10th and 11th May 1876, before which time it will be observed the dwelling-houses ought to have been erected.

"The Lord Ordinary thinks that by granting the feu-contracts the pursuers must be taken to have condoned any previous failure on the part of the vassals to implement the obligation in question. The Lord Ordinary accordingly thinks that after having granted these feu-contracts the pursuers are not entitled to decree of declarator that the vassals had incurred an irritancy in respect of their failure to build within two years after the 17th December 1873.

"The Lord Ordinary, on the other hand, does not think the obligation is to be held *pro non scripto* because it is impossible to implement it in its exact terms. He thinks that the pursuers are entitled to have the obligation fulfilled in substance, although it may not be now possible to enforce it in its exact terms.

"He thinks that the defenders are bound to complete the buildings stipulated for within two years after being required to do so by the pursuers. He thinks it reasonable that the raising of this action should be taken as a requisition to that effect, and he has accordingly pronounced the preceding interlocutor."

The defenders having failed to erect the buildings, the Lord Ordinary on 28th October 1882 pronounced this interlocutor:—"Finds, decerns, and declares, and decerns in terms of the whole conclusions of the summons, with this variation, that the words 'the seventeenth day of December Eighteen hundred and seventy-three,' in the first conclusion for declarator, occurring on page second of the summons, shall be held as deleted, and the words 'the thirteenth day of March Eighteen hundred and seventy-nine shall be held as inserted in their place: Finds the defenders Robert Hunter Hay and William Home Hay and John James Hay liable to the pursuers in expenses; and remits," &c.

The defenders reclaimed, and argued—The pursuers were not entitled to enforce the irritancy in the circumstances of the case. The condition ought to be held *pro non scripto*. At most the pursuers could only have a personal action, and not the extreme remedy they claimed. In no view could the condition be applied to another date than that mentioned in its own terms—Ersk. Princ. iii. 3, 34; Bell's Lect. (2d ed.), 618; *Napier* v. *Speir's Trustees*, May 31, 1831, 9 S. 655; *Tailors of Aberdeen* v. *Coutts*, 1 Rob. App. 296; *Earl of Mar* v. *Ramsay*, November 28, 1838, 1 D. 116; *Croall* v. *Magistrates of Edinburgh*, December 20, 1870, 9 Macph. 323; Pollock on Contracts.

During the debate in the Inner House they added this plea-in-law to their defences—"(6) The irritancy contained in the two feu-contracts cannot be extended beyond its terms, and does not apply to any condition, even if such exists, that buildings are to be erected within two years of the date of the summons."

The pursuers replied—The superiors had not lost their right to enforce this condition merely because they had allowed time to the vassals—*Napier* v. *Spier's Trustees, supra cit.*

On the suggestion of the Court, the pursuers amended the summons by adding the words given within brackets, concluding that it should be found and declared that the defenders "have failed to erect, within two years after the 17th December 1873 [or at all events within two years from the date of the feu-contracts after mentioned], upon each of the two plots or areas of grounds after mentioned, dwelling-houses," &c.

At advising—

Lord President—This is a declarator of irritancy of certain feu-rights said to have been incurred by the failure of the feuars to implement what is a very important condition in two feu-contracts by which the Magistrates of Glasgow conveyed certain subjects situated there to Athya, the predecessor of the defenders, and the question is, whether in the circumstances the irritancy has been incurred? The two feu-contracts are dated in the year 1876, and the condition which the defenders have failed to fulfil was that the feuars should erect buildings of a certain kind within two years from the 17th of December 1873. This provision in the feu-contract seems most anomalous, and without explanation it would not be intelligible. The explanation is on the face of the feu-contract itself—I take the one by way of example, because they are both the same—which proceeds on the narrative that in terms of certain articles and conditions of roup two plots or areas of ground were exposed by the Magistrates of Glasgow on 17th December 1873 to public roup and feu, and John Athya, merchant in Glasgow, being the last and highest offerer therefor, was preferred to the said plots or areas of ground, and by minute annexed to the said articles of roup and feu enacted and bound and obliged himself and his heirs and successors to implement the whole of the said articles and conditions of roup and feu.

Thus it appears that there was a personal contract of sale or feu between the Magistrates and Athya in 1873 constituted by act of roup and minute of enactment, and it was part of that personal contract that the feuar should be bound within two years from the roup to erect on the ground buildings of a certain kind and value.

It was natural that in framing the feu-contract the conditions which were in the articles of roup should be verbatim inserted in the feu-contract, but it so happened that the feu-contract was not executed until 1876, and therefore the condition about building could not be strictly enforced so far as concerned the date. The Lord Ordinary correctly expresses the effect of the execution of the feu-contract so long after the personal contract was completed, when he says that the Magistrates as superiors must be taken to have condoned any previous failure on the part of the vassals to implement the obligation in question, and he accordingly thinks that the pursuers are not entitled to decree in respect of their failure to build within two years after the 17th of December 1873.

The question then comes to be, whether, after their condonation in favour of Athya, the pursuers have altogether lost their right to enforce the conditions of the contract, and that by bringing a declarator of irritancy. I agree with the Lord Ordinary that they have not lost their right altogether. Until the feu-contract was executed there was a certain indulgence, because until the feuar had obtained a title and was infeft he was not in safety to build; but the moment a person obtains a title he is bound to comply with the conditions of it, and Athya as feuar was bound to build within two years from the date of the feu-contract. There is no doubt that the defenders here, who are his singular successors, must take up the obligation, because it is not merely personal but runs with the land, and it is of such a nature that singular successors are bound to fulfil it. On the whole case I should have found it hard, as the summons originally stood, to pronounce decree in terms of the libel; but that difficulty has been removed by the amendment which has been made, and it is not necessary to resort to the singular device of the Lord Ordinary, who has disposed of the case as if the date in the conclusions of the summons was different from what it really is. I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and decree pronounced in terms of the libel as now amended, which stands as a declarator of irritancy of the feu-right

on failure to build within two years from the date of the feu-contracts, against which there is no relevant defence.

Lord Mure—I am of the same opinion. It appears to me that in pronouncing decree in terms of the conclusions of the summons as now amended we should in effect be following the course laid down in the case of *Napier* v. *Spier's Trustees*. In that case the obligation was on the feuars to build by the term of Martinmas 1787, and they did not; then in 1831 an action of declarator of irritancy was raised by the superior. There it was held that it was not a case for declarator of irritancy *de plano*, but still the Court held the obligation incumbent on the feuar, and allowed him two years from the date of the decree to implement the contract.

Lord Shand—By the terms of the feu-contracts which are here founded on it appears that the term of entry was 17th December 1873, and that the obligation to build and relative irritancy have reference to the same date. The explanation of this, however, is to be found in the feu-contracts themselves, for those narrate the articles of roup and contract of sale dated 17th December 1873, which is the explanation of that date in the feu-contract, and it is obvious from the form of the deed that it embodies the original contract of the parties. The vassals were therefore under obligation from the date of taking the feu-contract to build within two years. If they did not build then the clause of irritancy applied, for the indulgence which had been given them as to time could not wipe out the obligation. As the buildings have not been put up within two years, the pursuers are *prima facie* entitled to succeed. The defenders might have offered to purge, but they did not, and every favour has been extended to them. The Lord Ordinary has allowed them two years since the date of the raising of the action, and in these circumstances I think the pursuers are entitled to found on the obligation in the feu-contracts, and that decree should be given in terms of the conclusions of the summons as amended.

Lord Deas was absent on Circuit.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for R. H. Hay and others against Lord Adam's interlocutor of 28th October 1882, with the amendment of the libel, Recal the said interlocutor: Find, declare, and decern in terms of the whole conclusions of the libel as amended: Find the defenders (reclaimers) liable in the expenses of process, and remit," &c.

Counsel for Pursuers—J. P. B. Robertson—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for Defenders—R. Johnstone—Graham Murray. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Friday, February 23.

OUTER HOUSE.

[Lord M'Laren.

GREIG (WILLIAMSON & SONS' TRUSTEE) *v.* ANDERSON

Bankruptcy Act 1696, *c.* 5 — *Computation of Time.*

A firm of merchants sent on the 20th April delivery-orders for goods to a creditor for the purpose of giving him security for certain acceptances of theirs which he held. On the 19th June thereafter they were made notour bankrupt. *Held* that the transaction was not struck at by the Act 1696, c. 5.

Observed that in calculating the time in retrospective bankruptcy, the principle to be taken is that of approximation.

This action was brought by J. K. Greig, C.A., trustee on the sequestrated estates of James Williamson & Sons, wine and spirit merchants in Aberdeen, to have the defender James H. Anderson, a spirit broker in Dundee, ordained to deliver up to him as such trustee 29 casks of whisky, as part of the said estates, or otherwise to pay the value of the whisky and of the casks.

On 12th June 1882 Messrs Williamson & Sons were charged at the instance of Messrs Gove, Balfour, & Co., Spring Gardens, Aberdeen, to make payment of the contents of a past-due bill drawn on them by Messrs Gove, Balfour, & Co. The days of charge expired on the 19th June 1882 without payment having been made. James Williamson & Sons were thus rendered notour bankrupt. On 30th June 1882 the Sheriff awarded sequestration of their estates, and thereafter the pursuer was appointed trustee thereon.

The bankrupts had had dealings with the defender. An acceptance of theirs to the defender for £99, 8s. 7d. fell due on 8th April 1882; they were unable to meet it; the defender, who had discounted it with the bank, had to take it up. They had also accepted a bill drawn on them by the defender, and payable 14th July 1882. The sum contained in it was £155, 1s. 11d. They entered into negotiations with the defender with the view of obtaining a renewal of the former acceptance. On 18th April they wrote to the defender offering the two parcels of whisky, containing one 18, the other 11 casks, which constituted the 29 casks of whisky in dispute in this action, in security of a renewal of the past-due bill, and of the bill for £155 which had not yet become due. On the 19th the defender wrote agreeing to take the two parcels in security, and enclosing his draft for £75 and £25, 12s. 4d., in renewal of the bill for £99, 8s. 7d., together with bank charges, &c., these bills to become due on 11th July. The bankrupts on 20th April wrote returning the renewal bills accepted, and enclosing two delivery-orders for the two parcels of whisky, addressed to the keeper of the bonded stores in Aberdeen in which the whisky was lying. On 21st April the defender forwarded the delivery-orders to the keeper of the bonded stores, and on 22d they were transferred in his books from the bankrupts' to the defender's name. The defender subsequently removed the whisky to another store, where it remained unsold at the date of this action.