

prefaced. There is no presumption in favour of the view that this part of the settlement was a contract. The contrary is the natural conclusion. Mrs Nicoll could spend it. She could gift it in her lifetime. What was bequeathed to her by her husband, and what moveable property she had inherited from her husband—what of her own she had before his death, and what she acquired afterwards—were all absolutely at her own disposal so long as she lived. This being the case, the reasonable inference is, that as the legacy could be defeated in this way it might also be revoked. The exercise of such a power would, I think, require to be expressly, or at any rate unambiguously, excluded. But there is no such exclusion. On the contrary, the legacy stands upon what is merely the will of the survivor, and as Mrs Nicoll was the survivor, she might by revocation, as well as by spending or by gifting the money in her lifetime, put an end to the bequest, the benefit of which is claimed by the pursuers of the present action.

The Lord Ordinary so far shares these views, but he thinks the revocation could not take effect upon that portion of the moveable property belonging to the wife which she had acquired from her husband by the joint settlement. I think no reason for this limitation is supplied by the settlement. The words upon which this depends are, "All and sundry, the whole goods and gear . . . that may pertain or belong, or be resting-owing, to the longest liver of the said David Nicoll or the said Mrs Isabella Kay or Nicoll at the time of his or her decease." Whatever therefore the survivor left was included in this bequest, and my opinion is that the widow was entitled to revoke as well the portion of her moveable property which she acquired from her husband as that which was her own previous to the making of the joint-settlement or which she acquired during her viduity.

For these reasons I think that the interlocutor should be recalled.

LORD RUTHERFURD CLARK concurred in the opinion of the Lord Justice-Clerk.

The Court recalled the Lord Ordinary's interlocutor, sustained the defences, and assoltized the defenders from the conclusions of the action.

Counsel for Pursuers—Darling—Dunsmore.
Agent—David Milne, S.S.C.

Counsel for Defenders—Balfour, Q.C.—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Tuesday, January 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

THE DUKE OF MONTROSE v. PROVAN AND ANOTHER (PROVAN'S TRUSTEES).

Superior and Vassal—Casualty—Singular Successor—Taxed Composition on Entry.

By a feu-contract dated in 1631 there were given out to each of certain persons who had previously been "kindly tenants" of certain lands, and their heirs whatsoever or assignees who should not exceed three chalders victual in yearly rent, the portions of these lands previously occupied by them, the superior binding himself and his heirs and successors to receive the heirs of the vassals for a certain relief-duty, and to receive purchasers from the said vassals, or any of them, or their foresaids (such purchasers not exceeding the rank of three chalders victual rent), for payment of a taxed composition of £10 Scots for their entry. *Held* (1) that this obligation to receive for a taxed composition of £10 Scots extended not only to purchasers from these persons or their heirs, but to purchasers from such purchasers; (2) that persons who held a heritable property in a street in Glasgow, the agricultural rental of which would not be so much as three chalders victual, were within the class of singular successors who were entitled under the feu-contract to be so received; and *therefore* that on tendering payment of the taxed composition of £10 Scots they should be *assoltized* in an action under the Conveyancing Act 1874 of declarator and for payment of a casualty of one year's rent as singular successor.

This was an action under the Conveyancing Act of 1874 by the Duke of Montrose, superior of certain lands described in the summons, against the trustees of the late Moses Provan, concluding for declarator that in consequence of the death of James Provan, the vassal last vest and seized in certain of these lands as described in the summons, a casualty, being one year's rent of the lands, became due to the pursuer, and for payment thereof, and that in consequence of the death of Anne Caldwell Holmes, the vassal last vest and seized in certain other lands described in the second place in the summons, a casualty of one year's rent of these lands became due to the pursuer, and for payment thereof.

Both pieces of land formed parts of the twenty shilling lands of Auchengillan, and were originally disposed in a feu-contract dated 25th August 1631 between James, Earl of Montrose, with consent of his curators, and John Wair, Archibald Buchanan, and George M'Indoe. They were there described as part of the twenty-shilling land of Auchingilzean, lying in the "Barronie of Mugdock parochine of Strathblane and sherreffdome of Stirling." They were disposed to the said three persons above named, who were described as "possessors and kyndlie tenants" of the said twenty shilling lands of Auchengillan. The contract narrated that the Earl, in consideration of "certain

great sowmes of money," "set and in feu-ferme and heretadge perpetuallie Dimitts as be thir pnts setts & in feu-ferme & heretadge perpetuallie Dimitts to the said John Wair & his aires whatsoever (or assignayes wha not exceed Three Chalders victuall in yeirlic standant rent) heretablie perpetuallie & Irredimablie All and Hail that Ten shilling land of the said Town & Lands of Auchingilzean presentlie possess be the said John, To the said Archibald Buchanan his aires whatsoever (or assignayes wha shall not exceed the said quantitie of Three chalders Victuall in yeirlic standant rent) All and Hail that Fyve shilling land of the said town and Lands of Auchingilzean presentlie possess be him To the said George M'Indoe & his heirs whatsoever (or assignayes wha shall not exceed the foresaid quantitie of Three Chalders victuall in yeirlic standing rent) All and Hail that Fyve shilling land of the said town & lands of Auchingilzean presentlie possess be him. The lands were "to be holden be them and their foresaids ilk ane for their ain pairts as is above divyded off the said James Earl of Montrose his heirs-male and successors succeeding in the lordship and Barronie of Mugdock in feu-ferme and heritage forever." The feuars were bound to ride with the superior in frays, and perform other feudal services.

The contract then proceeded—"Attour the said Noble Earle with consent foresaid Bind's & obeiss' him his aires & successors to accept or receive the bu or aires of the saids John Wair Archibald Buchanan and George Meindow rexve [i.e., respective] and successive In & to yr particular pairts of the forsd twentie shilling Land with the pertinents as is above divyded And yt be precepts of Clare Constat in dew forme for payment of Fyve merks money for yr entrie for evrie kyndlic air to ilke fyve shilling Land above mentioned Aud also shall receive In & to the foresaids Lands any tennent that shall happin to buy the same frae the saids persons or ony of them or yr forsd (the Buyers yrof not exceeding the Rank above wryttine) And yt be Resignaone Confirmaone or Charter of Alienaone contening precepts of seasine To be Holdine as the Resigner or annalzier held of befor For payment of Tenn pounds money for yr entrie to ilk Fyve shilling Land forsaid And accepting ane new conquerer yrintill."

The defenders were infeft in part of the lands originally feued out in this contract. They claimed to fall within the category "who shall not exceed 3 chalders victuall in yeirlic standant rent," and so to be liable only to pay a casualty such as was to be paid by such successors [i.e., a taxed composition of £10 Scots for each portion of the five shilling land], and not liable as singular successors in a casualty of one year's rent. They stated that except the subjects to which the summons related they had only a heritable property in Glasgow, the agricultural value of which was much less than three chalders victual, and they tendered the taxed composition of £10 Scots for each of the five shilling lands described in the summons, which would be exigible on the footing that their contention was right.

The Lord Ordinary (KINNEAR) pronounced this interlocutor—"Finds (1) that in consequence of the death of James Provan, designed in the summons, a casualty became due and payable to

the pursuer as superior of the lands first described in the summons, amounting to £10 Scots for each of the 5s. lands described in the summons, being in all the sum of £1, 13s. 4d. sterling; and (2) that in consequence of the death of Miss Anne Caldwell Holmes, designed in the summons, a casualty became due and payable to the pursuer as superior of the lands described therein, amounting to £8, 14s. 8d. sterling and decerns against the defenders for payment of these respective sums accordingly: Finds the defenders entitled to expenses, &c.

"*Opinion.*—This is an action for payment of casualties under the Conveyancing Act of 1874. It is admitted that a casualty is due in respect of each of the parcels of land described in the conclusions of the summons in consequence of the death of the last-entered vassal, and the only question is, whether the composition payable by the defenders has been taxed, or whether they are liable for a year's rent of the lands?"

"The question depends upon the construction of a feu-contract dated in 1631 between the Earl of Montrose and his curators, on the one part, and three persons who are described as possessors and kindly tenants of the twenty shilling land of Auchingillan, each for his own part thereof, on the other. The defenders, who are proprietors infeft in certain portions of this twenty shilling land, have not connected themselves by any consecutive progress of titles with the feu-contract, but it is admitted to be the original grant from which their right has been derived, and it follows that it fixes the terms upon which they are entitled to enter with the superior.

"By this contract it is set forth that in consideration of certain great sums of money paid to the Earl by the three kindly tenants above mentioned the Earl sets, and in feu-farm and heritage demits, to each of them, 'and his aires whatsoever (or assignayes wha shall not exceed three chalders victuall in yeirlic standant rent),' a certain portion of the lands of Auchingillan, to be holden 'be them and their foresaids, ilk ane for yr owne pairts as is above divyded, off the said James, Earl of Montrose, his heirs-male, and successors succeeding in the lordship and barronie of Mugdock, in feu-ferme and heretadge forever.'

"The feu-right, therefore, is in favour not only of the original vassals and their heirs, but also in favour of their assignees, provided the rental of the assignee does not exceed the specified amount. And there can be no question that the word 'assignee,' contrary to the ordinary usage in charters of that date, is intended to include disponees of the real right after the infeftment of the original vassal, because the superior after binding himself to receive the vassals and their heirs respectively and successively, goes on to bind himself to receive also 'in and to the foresaids lands ony tennent that shall happin to buy the same frae the saids persons, or ony of them, or yr forsd (the buyers yrof not exceeding the rank above wryttine), and yt be resignaone, confirmaone, or charter of alienaone, contening precepts of seasine, to be holden as the resigner or annalzier held of befor, for payment of tenn pounds money for yr entrie to ilk fyve shilling land forsaid, and accepting ane new conquerer yrintill.'

"There can be no doubt as to the meaning of

this obligation. The feu-right was created at a time when a vassal could not alienate voluntarily without the consent of the superior, and when no heir or singular successor could complete a title without the superior's interposition. The superior consents by anticipation to alienation on certain conditions, and undertakes to give an entry to the singular successors either of his immediate vassals or their heirs, provided they satisfy these conditions, on payment of a taxed composition, just as he is bound to enter heirs on payment of relief-duty. But since his vassals are bound to ride with him in time of war, and 'at frays and followings,' he has an interest to secure that his lands shall not come into the hands of persons having larger holdings under other lords, and accordingly while he obliges himself to receive purchasers not having more than three chalders of victual, he undertakes no obligation to recognise any voluntary alienation in favour of persons who do not answer that description, and he expressly reserves his right 'to take the benefit of the saids lands,' or, in other words, to demand the ordinary composition 'frae ony intrant wha shall obtain the same be compryseing, conforme to the Act of Parliat and common practiq of this realme.'

"The question, therefore, comes to be, whether the defenders belong to the limited class of singular successors who are enfranchised by the feu-contract so as to entitle them to an entry on payment of the taxed composition, or whether they are in the position of ordinary purchasers who can come in only under the statutes enabling singular successors to compel an entry, so that prior to the Act of 1874 they could not have obtained a charter except on payment of a year's rent, and are now liable under that Act for a similar payment by reason of their implied entry.

"I am of opinion that in so far as regards the parcel just described in the conclusions of the summons, they are liable only for the taxed composition, because I think they answer the description of buyers who 'do not exceed three chalders victual in yearly rent.' Victual rent is a term applicable only to the rent of agricultural subjects, and the defenders, although they have heritable property in Glasgow, have no property yielding an agricultural rental.

"It is true that the purpose of the stipulation has entirely failed, and that the superior has no interest in excluding vassals holding lands elsewhere, even if he had power to exclude them. But the obligation to accept a taxed composition from purchasers having a limited rental still remains an integral part of the contract constituting the relation of superior and vassal. It is an obligation which was plainly intended to follow the transmissions of the feu in perpetuity, and I see no reason to doubt that the defenders are entitled to enforce it.

"As to the second parcel, the defenders concede that they must pay the sum claimed by the superior, because by their infetment in the first parcel they became proprietors of land exceeding the stipulated value."

The pursuer reclaimed, and argued—The defenders were liable in payment of a composition of a year's rent, and not merely of the taxed entry as given in the feu-contract. The words used in the deed showed this. In the dispositive clause the words were "to the said John M'Indoe and

his airs whatsoever or assignees quha shall not exceed the foresaid quantity of three chalders victual in yearly standing rent," and the words "foresaid" were used in reference to these all the way through the deed until the taxing clause. There the words were different. The Earl bound himself to receive the "air or airs" of the said John M'Indoe for payment of five merks for the entry of every kindly heir, and also any tenant that should happen to buy the same from him or "his fordsd," for payment of ten pounds for his entry to the lands. And the next clause reverted to "airs and successors fordsd." That showed that the Earl was willing to give a benefit to the kindly tenant, to his heir and to the first purchaser of the lands. But after the first purchaser any other singular successor must pay the full composition.—Bankton's Inst. i. 629; Ross' Lectures, ii. 478; Erskine Inst. ii. 6, 37, 38; Stair Inst. ii. 9, 15; *Brisbane v. Semple*, 6 June 1794, M. 15,061; *Magistrates of Inverkeithing v. Ross*, October 30, 1874, 2. R. 48. The words "assignees" usually applied to assignees before infetment. Even assuming that the taxed entry was to apply to any purchaser beyond the first singular successor, the defenders could not claim the benefit of the clause as the lands could be assigned only to men of "three chalders victual," and they did not come under that category. They admitted that they were infet in the first piece of land mentioned in the summons, and therefore they were in possession of land of more than three chalders victual—*The Laird of Craigie Wallace*, March 21, 1623, M. 6432 and 7191. The purpose of the deed was not merely to get feudal services from the tenants, but also to have a certain kind of tenant, and if a person who sought to become tenant was the owner of land of more than three chalders victual he could not become tenant. It did not matter that the tenant had no heritable property.

The defenders argued—The words in the dispositive clause applied to all persons who came to have right to the lands, and the word "foresaid" used in the deed applied to them all through the deed, so that any tenant entering these lands was entitled to do so upon a taxed entry as in the feu-contract. What the deed purposed to do was to get a large number of tenants upon the property who could act as followers to the Earl either in the King's wars or in his private quarrels, and that was the reason of the insertion of the clause regarding three chalders victual. The defenders were proprietors of some small heritable property in Glasgow only, and although the value of that might be more than three chalders victual, the agricultural value was much less.

At advising the opinion of the Court (Lords Young, Craighill, and Rutherford Clark) was delivered by

LORD CRAIGHILL—As explained by the Lord Ordinary in the opinion annexed to his interlocutor, reclaimed against by the pursuer, this is an action for the payment of casualties under the Conveyancing Act 1874. It is admitted that a casualty is due in respect of each of the parcels of land described in the conclusions of the summons in consequence of the death of the last entered vassal, and the only question is, whether the composition payable by the defender has been taxed, or whether they are liable for a year's rent of the lands. The Lord Ordinary also explains

(in the last paragraph of his opinion) that as to the second parcel "the defenders concede that they must pay the sum claimed by the superior—that is to say, a year's rent of the feu—because by their infestment in the first parcel they became proprietors of land exceeding the stipulated value—that is to say, three chalders victual in yearly standing rent."

The controversy therefore relates to the liability of the defenders for a year's rent of the first of the subjects described in the conclusions of the summons, and the answer depends upon the construction to be put on the second part of the obligation, by which the superior binds and obliges himself, his heirs and successors, "to accept and receive the heir or heirs of the saids John Ware, Archibald Buchanan, and George Macindoe, respective and successive, in and to their particular parts of the foresaid 20s. land, with the pertinents as above described . . . and also shall receive in and to the foresaid lands any tenant that shall happen to buy the same frae the saids persons, or ony of them, or their foresaids, the buyers thereof not exceeding the rank above written."

This latter provision is that with which alone we are now concerned, though for its interpretation it is necessary to take into account the first part of the clause which has just been quoted. The pursuer contends that the true interpretation is, that the obligation to receive "in and to the foresaid lands any tenant that shall happen to buy the same frae the saids persons, or ony of them, or their foresaids," is only to receive any buyer from these persons or their heir or heirs.

The defenders, on the other hand, contend that the obligation extends not only to buyers from the original feuars, or their heir or heirs, but also to buyers from buyers or their heir or heirs. The Lord Ordinary has adopted the latter view, and I concur in his judgment, the reasons for which are explained in his note. My view of the matter is short and simple. I think that by the words "from the said persons, or any of them or their foresaids," we are referred back to the dispositive clause of the feu-contract, which bears that the superior has "set and in feu-ferm and heritage perpetually demites, as he by their presents sets, and in feu-ferm and heritage perpetually demites, to the said John Wair and his heirs whatsoever or assignees (wha shall not exceed three chalders victual in yearly standard rent) heritably, perpetually, and irredeemably, all and whole," &c. The assignees who are here mentioned are not merely those to whom assignation has been granted before infestment on the feu-charter was expedite, but "ony tenant that shall happen to buy the same from the saids persons or ony of them or their foresaids." These assignees are entitled to acquire the lands; they are entitled—for that is the clear implication—to convey the lands, and those to whom they convey, as much as the assignees themselves, are entitled to an entry on the terms which are specified in this clause of obligation.

This appears to me to be the true, and it is the natural interpretation, for the idea that a buyer from an heir was to be received by payment of a taxed composition, and that a buyer from him was to be received only on payment of a year's rent, is a fanciful and unreasonable intention to ascribe to a superior.

The view of the contract taken by the Lord Ordinary seems to me to be warranted by the terms of the feu-contract itself, and to be recommended by the considerations which influenced him in reaching his conclusion.

With reference to the other question, whether the defenders are not in the sense of the feu-charter "three chalders men," I think it unnecessary to say anything, as that subject is as good as exhausted by the explanation given by the Lord Ordinary.

The Court adhered.

Counsel for Pursuer (Reclaimer) — D. F. Mackintosh, Q. C.—Dundas. Agents — Dundas & Wilson, C. S.

Counsel for Defenders (Respondents)—Pearson—W. Campbell. Agents—Murray, Beith, & Murray, W. S.

Tuesday, January 25.

SECOND DIVISION.

GILLIGAN v. MILNE & COMPANY.

Master and Servant—Reparation—Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 1.

A labourer was injured while removing logs from a pile to a cart by the pile falling on him. He raised an action against his employer stating that the workmen who formed the pile had done so carelessly, that he had never been instructed as to the proper mode of taking it down, and was unskilled in such work, and that the foreman was present when he was taking it down in an improper way, and did not interfere with him. Held that the work to which he had been put being ordinary unskilled labour, there was no blame attachable to the master or his foreman in sending him to do it without special instruction, and that no relevant averment of fault had been made. Action therefore dismissed.

This was an action of damages for bodily injury raised by Peter Gilligan, a labourer, against his employers George Milne & Company, shipowners and timber merchants, Aberdeen. The action was laid both at common law and under the Employers Liability Act 1880.

The pursuer was a labourer in the defenders' woodyard, and on 29th July 1886 his leg was broken by the fall upon him of some planks of wood which had been piled in the defenders' yard, and which he was assisting to remove to a cart.

In the record (as amended) he averred that there was a foreman over the squad of four men to which he belonged, and that neither he himself nor any of those working with him had ever been instructed how to conduct the work of taking the wood from the piles to the carts. "(Cond. 3) The logs or planks, which were of considerable weight, measured 20 feet long, and were 6 inches by 3 in breadth and depth, were piled up in tiers or ranks to the height of about 6 feet. They were not piled in such a way as to insure safety to the men working at them. The planks were cut at