

in accordance with the documents. Therefore I must say that as regards Stock Exchange transactions carried out in the ordinary course of business, the distinction between contracts for differences and real transactions is of purely theoretical interest and really does not afford mere speculators any available means of being released from their obligations. I concur with your Lordship that this case should be disposed of as your Lordship has suggested.

LORD KINNEAR—I have no doubt at all that the pursuer should be allowed an opportunity of producing his title, which certainly ought to have been produced before the close of the proof, but which from inadvertence he had failed to get certified.

Upon the merits I also agree with your Lordship. There is no question at all as to the law that the Court may refuse to enforce bargains which are not real transactions between the various parties, but are mere wagers for differences on the prices either of stocks or any other commodity between one man and another. I agree that the test which must be applied in order to determine whether any particular transaction is of that kind or not—whether it is a real transaction of purchase and sale, or a mere wager for differences—is to inquire whether or not by the contract as proved the purchaser would have an action to compel delivery of the subject sold, and the seller to have the price paid. Upon the contract as it appears from the face of the documents, I do not think there can be any question that in that sense the transactions between the pursuer and defender were real transactions. The only difficulty appears to me to arise from the evidence of Mr Howat, because if we were to accept that evidence, I should be very much disposed for myself to come to the conclusion that there was no contract at all, but a mere gambling transaction which neither party intended should have any effect otherwise than by paying the differences. But then the evidence of Mr Howat is directly contradicted by the evidence of Mr Lowenfeld, and the Lord Ordinary, who saw the witnesses, has come to an entirely different conclusion, that we must accept Mr Lowenfeld's testimony of the transaction and reject Mr Howat's. Reading the evidence and the documents before us, I come to the same conclusion, and I certainly am not prepared to differ from him. I think it is quite sufficient that upon the question of credibility the Lord Ordinary, who saw the witnesses, has indicated which side he ought to believe. I therefore agree in the judgment which your Lordship proposes.

In Lowenfeld's case the Court recalled the interlocutor reclaimed against, allowed the document now tendered to be produced, and decerned against the defender for the sum sued for with interest as concluded for.

In the case of Howat against Lowenfeld the Court adhered.

Counsel for Lowenfeld—Sol.-Gen. Graham Murray—Dundas—Deas. Agents—Simpson & Marwick, W.S.

Counsel for Howat—Jameson—C. S. Dickson. Agents—J. & A. Hastie, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACRAE (BUCHANAN'S JUDICIAL FACTOR) v. MACKENZIE.

Superior and Vassal—Feu-Contract—Obligation to Build—Personal or Transmissible—Damages.

A superior feued ground to three parties, and the survivors or survivor, and the heir of the last survivor, on condition, *inter alia*, that the vassals should build within two years and maintain dwelling-houses of a certain value, failing which the feu-contract and all following thereon should, in the option of the superior, become null and void. After the lapse of the two years the last surviving vassal died in possession of the subjects without having implemented the obligation to build. His widow, his sole trustee, announced that she did not claim the subjects. The superior sought to have her ordained, as personal representative of her late husband, to erect the stipulated buildings or to pay damages.

The Court *assizied* the defender, *holding* (1) that although there was a personal obligation on the last vassal to fulfil the conditions of the feu, this obligation existed as a condition of holding the subjects, and did not attach to his personal representative, who was not vassal therein; and (2) that as there was no obligation affecting the defender which could be forced, she was not liable in damages.

Observed (*per* Lord Kinneair and Lord Adam) that the claim of irritancy merely conferred an additional remedy by the use of which the superior might enforce the conditions of the contract.

Horatio Ross Macrae, W.S., judicial factor on the trust-estate of the late Neil Griffiths Buchanan of Knockshinnoch, Ayrshire, sued Mrs Mackenzie, the widow and sole surviving trustee of the late Kenneth Mackenzie, coalmaster, New Cumnock, for implement of certain obligations undertaken by the defender's husband under a feu-contract granted by Buchanan's trustees in May 1875.

By this contract the superior feued to the late Kenneth Mackenzie and three other persons carrying on business under the firm of the "Bank Coal Company," and the survivors and survivor of them, and the heir of the last survivor, as trustees for behoof of the company, two pieces of ground in the parish of New Cumnock and county of Ayr—"To

be holden the said subjects and others of and under the said first parties and their successors for payment of the feu-duty and other prestations after mentioned, but always with and under the burden of the whole conditions, reservations, burdens, qualifications, and irritancies underwritten, which are declared to be real liens and burdens affecting the said two pieces of ground hereby disposed, *videlicet*—That dwelling-houses, offices, and other buildings of the yearly value of at least £50 sterling per annum, or of the capital value of twenty years' purchase thereof, shall be erected by the said second parties within two years upon both or either of the said two pieces of ground hereby feued, at the distance of not less than 25 feet from the centre of the said turnpike road, and that the plans for the said buildings shall be submitted to the first parties for approval, and that the said second parties shall maintain, uphold, and keep the said houses so to be erected in such good order and repair as will be sufficient to make them yield such rent or continue of such value in all time coming: And failing such houses being erected, or in the event of the same after having been erected falling into decay or being destroyed by fire, and the said second parties failing to rebuild the same within one year and six months after they and their fore-saids shall have been required by the said first parties or their successors so to do, then and in that event these presents and all following thereon shall, in the option of the said first parties, become null and void." The company entered into possession of the lands, continued to possess them until 1889, and paid the feu-duty, but failed to build as stipulated. The company was dissolved at Whitsunday 1879, and in the settlement of its affairs Kenneth Mackenzie, the sole surviving partner, in 1889, with the consent of the two deceased partners' trustees, disposed the subjects feued by the said feu-contract to himself and his heirs and successors whomsoever.

Mr Mackenzie died on 20th May 1890 without having implemented the obligation to build on the subjects.

Besides founding on these facts the pursuer further alleged that Mr Mackenzie had offered £600 for leave to renounce the feu. He specified the terms of the agreement, and produced the following letter and docquet as evidence of the agreement—"J. B. Cunningham, Esq., Bank of Scotland, New Cumnock. *Edinburgh, 7th May 1890.*—Dear Sir,—Knockshinnoch. I have now received the consent of the greater number of the beneficiaries on the trust-estate of the late Neil Griffiths Buchanan of Knockshinnoch, to the proposal made by you on behalf of Mr Mackenzie for renouncing the feu, and propose now to take steps for obtaining the authority of the Court to the transaction. I understand the terms are that Mr Mackenzie will pay to the trust a sum of £600 and renounce the feu, all the obligants in the contract being relieved of further liability in connection with it. Mr Mackenzie also agrees to pay the expenses of the neces-

sary application to the Court. When I hear from you confirming this letter I will proceed to take the necessary steps for carrying out the arrangement.—I remain, yours faithfully, HORATIO R. MACRAE. *New Cumnock, 10th May 1890.*—I approve of this.—KENNETH MACKENZIE." The body of the letter was not holograph of the pursuer, and the docquet was not holograph of Mr Mackenzie.

The defender having been required by the pursuer to implement the obligation to build, intimated to him that she did not claim the property feued, and repudiated all liability in connection therewith, and the present action was accordingly raised.

The summons concluded, first, for declarator of the alleged agreement for renunciation of the feu, and for an order on the defender to carry out the same; and second and alternatively, that the defender should be ordained to erect buildings of the stipulated value on the lands. The pursuer was allowed by the Lord Ordinary to amend his summons by adding an averment of, and an alternative conclusion for damages.

The pursuer pleaded, *inter alia*—" (1) that he was entitled to decree for implement of the alleged agreement. (4) That he was entitled to decree against the defender to erect dwelling-houses, or alternatively to pay damages."

The defender pleaded, *inter alia*—" (4) The letter of agreement being neither holograph nor tested, no valid agreement has been made. (5) The defender being under no obligation to implement the terms of the feu-contract, she should be assolizied."

On 8th July 1891 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—Sustains the fourth plea-in-law for the defender, and assolizies the defender from the first alternative declaratory and petitory conclusions of the summons: *Quoad ultra* finds that at the date of his death the late Kenneth Mackenzie was personally bound, under the feu-contract condescended on, to erect buildings of the character and value specified therein, and that he failed to erect the said buildings within the time fixed: Finds that the said personal obligation is now binding on the defender as his general representative: Finds that it is inexpedient to order specific implement of the said obligation by the defender; and before further answer, and of consent, allows the pursuer to amend the summons in terms of the minute No. 26 of process; and the said amendment having been made, of new closes the record; appoints the case to be put to the roll for further procedure; meantime reserves all questions of expenses.

"*Opinion.*—In regard to the first alternative declaratory and petitory conclusion of the summons, the defender, who is the widow and general representative *qua* trustee of the late Kenneth Mackenzie, pleads that the pursuer's averments are irrelevant, in respect that he has not set forth or founded on any holograph or tested deed under the hand of Mr Kenneth

Mackenzie to instruct the agreement referred to in the condensation, the said agreement being an agreement relating to heritage.

“I am of opinion that this objection is well founded. I understand it to be admitted that the body of the letter No. 16 of process is not holograph of the pursuer, and that the docquet is not holograph of Kenneth Mackenzie. Now the law requires that in order to the constitution of a contract regarding heritage there must be writing; and even if there is writing, unless the writing is tested or holograph, there is *locus pœnitentiæ* to either party so long as matters remain entire—*Goldston v. Young*, 7 Macph. 188; *Scottish Lands and Building Company, Limited v. Shaw*, 7 R. 756.

“In the present case the contract alleged is a contract for the renunciation of a feu. It makes no difference as to the application of the rule which I have mentioned, that part of the alleged agreement was that a sum of money was to be paid as a condition of the renunciation being accepted, payment of the money being an inseparable part of the alleged agreement—*Allan v. Gilchrist*, 2 R. 587.

“I am of opinion, however, that the pursuer has stated a relevant case for inquiry in connection with the second alternative conclusion of the summons. The defence to this conclusion is that under the feu-contract the condition of the erection of buildings by the second parties is merely a real burden which perhaps might be enforced against the vassal actually in possession, and failure to implement which might be followed, in the option of the superior, by irritancy of the feu, but that it is not a personal obligation or debt which transmits against the representatives of the deceased vassal who do not take up the feu. I am of opinion that this defence is not well founded. The condition that buildings of the character and value of those specified ‘shall be erected by the second parties’ was a condition of the grant which was personally binding on the disponees, and became prestable, and should have been implemented within two years after the date of the feu-contract, a period which expired during Kenneth Mackenzie’s lifetime. It is true that it is provided that in the event of the second parties failing to build, the feu-contract shall, in the option of the first party, become null and void. But this provision, I take it, is in addition to the first party’s right to demand and enforce implement of the obligation; and it scarcely can be disputed that the pursuer could have enforced it against the original vassal, or claimed damages instead of irritating the feu.

“The obligation to build is just as much a matter of contract and condition of the right as the obligation to pay feu-duty. Now the established rule in regard to the latter condition is that the representatives of a deceased vassal are liable for arrears of feu-duty which became due during the vassal’s lifetime, although they are not liable to implement such conditions of the

feu as do not become due or prestable until after his death. As the Lord President says in *Aiton v. Russell’s Executors*, 16 R. 625—‘Under a feu-charter the vassal by acceptance of the feu puts himself under a personal obligation to pay the reddendo, and subjects his representatives to pay whatever feu-duties may become due during the possession of the feu. That obligation becomes on his death a personal debt. On the other hand, his heir, if he takes up the succession in like manner, becomes liable for feu-duties.’ The decision in the case of *Aiton*, which was founded on by the defenders, does not I think apply, because it related to payment of feu-duties which became due after the vassal’s death.

“The logical result of this would be that the defender should be ordained to implement her husband’s obligation by building in terms of the feu-contract. But it appears to me that this is not a case in which specific implement should be enforced. No doubt specific implement is not impossible, but I think it would be inexpedient and unreasonable to ordain the defender to erect upon the pursuer’s land buildings from which she can derive no benefit, especially as such a decree can only be enforced by imprisonment, if indeed that is competent.

“It seems to me that the pursuer’s true claim is one of damages, if he can qualify damages. It will be for consideration what is the true measure of the claim. That is not a very simple question. The purpose for which the feuar was taken bound to build, so far as the superior was concerned, was not to make the buildings the superior’s property, but to secure the superior’s feu-duty by increasing the value of the subjects. If Mr Mackenzie had built, and the defender after his death declined to enter, no doubt the pursuer would have got back the land with the buildings on it. But if the feuar had built on the ground, it is not probable that the defender would have declined to take up the feu. Again, if the pursuer had irritated the feu during Mackenzie’s lifetime, in respect of his failure to build, he would have simply got back the lands without buildings on it. The present is a third case. The feuar dies, having failed to build, and his heir, as she is entitled to do, declines to take up the feu. The superior has not lost any feu-duties to which he was entitled, but he is thus left with the land on his hands, without the buildings which should have been erected. The land will therefore bring a smaller return if sold or feued again than if buildings had been erected—but is the superior entitled to the whole of the difference?

“I was referred by the pursuer to the case of *Napier v. Spiers’ Trustees*, 9 Sh. 655, as a case in which the Court ordered specific implement by ordaining the representatives of the deceased vassal to build. That case is full of specialties, and is not very well reported. But it appears that in the course of the inquiry ordered by the Court it was ascertained that not merely the original feuar but also his trustees had been in possession

of the feu. It would also seem, although this is not so clear, that the trustees were given an opportunity of building in order to avoid irritancy of the feu. For instance the Lord Justice-Clerk says—'Our present interlocutor must bear that now the condition of the contract shall be implemented within a reasonable time or the irritancy take place.'

"The case of *Moore v. Paterson*, 9 R. 337, may be referred to for opinions to the effect that the Court will in some circumstances not order specific implement even although the *factum præstandum* may not be impossible of performance.

"The conclusion for damages in the summons is awkwardly expressed, because although it appears from the condescendence that it was intended to be alternative to the conclusion for building, it is worded as if it were cumulative. I therefore propose to allow the pursuer to amend the summons by making the conclusion for damages alternative, and I shall then hear parties, and if necessary order proof or inquiry in regard to the amount of damages."

The defender reclaimed, and argued—The position of the defender was that she refused to take up the feu, and in such circumstances she was neither under an obligation to build or to pay damages. There was here no personal obligation on the vassal to build, nor any obligation which could be transmitted against a representative who refused to take up the feu. The obligation to build was simply a condition of the grant; if not implemented, the superior could sue a declarator of irritancy—*Police Commissioners of Dundee v. Stratton*, February 22, 1884, 11 R. 590; *Magistrates of Glasgow v. Hay*, February 23, 1883, 10 R. 635; *Marshall's Trustees v. Macneill & Company*, June 19, 1888, 15 R. 762. This was not a case in which specific implement could be demanded from the defender, because she was not vassal in the feu. Even admitting that the obligation was on the vassal during his occupancy of the feu, it did not transmit to his personal representative. No damages were due—*Tweeddale's Trustees v. Earl of Haddington*, February 25, 1880, 7 R. 620; *Magistrates of Edinburgh v. Begg*, December 20, 1883, 11 R. 352.

Argued for the respondent—In granting the feu the superior had in view not only the feu-duty, but also the other prestations, and the erection of buildings not only fortified the feu-duty but also gave security for it. This was a bilateral contract, and the prestations were personally binding on the original vassal *contractu*, and transmitted to his representatives—*Napier v. Spiers' Trustees*, May 31, 1831, 9 Sh. 655; *Hunter v. Boog*, December 16, 1834, 13 Sh. 205. Arrears of feu-duties had been recognised as a debt against the estate by the deceased vassal, and due by his personal representative—*Aiton v. Russell's Executors*, March 19, 1889, 16 R. 625. The present obligation, which was prestable before the vassal's death, was in a similar position. The

obligation on the defender's author was fully recognised by his copartners' trustees, and in the arrangement which they entered into with him he received from them a sum of money in implement of it. If this was not a case for specific implement, then damages were due, and the sum claimed was twenty-three years' purchase of the feu-duty, less the value of the buildings presently on the lands.

At advising—

LORD KINNEAR—In this case the summons contains two alternative conclusions. It is not disputed that the Lord Ordinary has disposed rightly of the first of these conclusions; and accordingly we have not been asked to review his Lordship's judgment in so far as it sustains the fourth plea-in-law for the defender and assoziies the defender from the first alternative conclusion of the summons. The only question is, whether the judgment is also right in so far as it gives effect to the second alternative conclusion.

This is a conclusion by which the pursuer seeks to have the defender, as the personal representative of the deceased Kenneth Mackenzie, ordained to implement an obligation to build on certain lands in which Kenneth Mackenzie died infest, and, failing implement, to pay damages for the loss sustained by the pursuer from such failure.

I think it is material to see, in the first place, what was exactly the position of Kenneth Mackenzie, the deceased, whom the defender represents, under his title. By feu-contract between the superior and Kenneth Mackenzie and others the superior conveys to him and two other persons named—John Mackenzie and John Hyslop—and the survivors and survivor of them, and the heir of the last survivor, certain lands, as trustees in trust for behoof of a company. Now, the effect of that conveyance was that Kenneth Mackenzie and his two partners were made conjunct fiars in the subject during their joint lives, but that on the death of the first deceiver of the three fiars the feu was not divided—the share of the first deceiver passing, in terms of the conveyance, on his death, to the other two, instead of descending to his own heirs, and the share of the second deceiver, in like manner, passing, upon his death to the sole survivor and his heirs. Therefore during the joint lives of John Mackenzie and John Hyslop, Kenneth Mackenzie was joint fiar with them in the lands. After their death he became the sole fiar and the sole vassal liable to the superior in the prestations of the feu. It appears that for reasons which were probably perfectly valid, but with which we have nothing to do, he was advised to execute a new conveyance in his own favour. But that made no difference in his feudal relation to the superior.

Again, it is of no consequence to the feudal relation, and therefore it is of no consequence to this case, what were his liabilities to the representatives of his deceased co-feuars or copartners during their lives,

because he became on their death the sole vassal of the superior and the only person liable to perform the prestations of the feu-contract. Now, Kenneth Mackenzie died in 1890, and it is said that the defender is the sole trustee under his trust-disposition and settlement, and it is upon that ground that the action is brought against her. We know nothing as to her beneficial interest under this trust-disposition, and in particular, we are not informed whether she had any right to take up the feu, or whether it passed to the heir of the last vassal. I infer from the statement in the 12th article of the condescendence that the pursuer means to represent that the feu was conveyed to her, because he says that she is desirous of disposing of it, but he does not explicitly state that. At all events, I take it to be clear, from what is stated upon the record, that she is not now in the position of being the pursuer's vassal in these subjects. That being so, it appears to me to be of no consequence to inquire whether that is because Kenneth Mackenzie's right to the lands has passed to someone else, or because she, having right to take up the estate as donee, has refrained from doing so. The only ground in law which the pursuer alleges against the defender is, that she is the personal representative of her deceased husband, and if she is liable in that character, it is of no consequence whether the estate has passed to the heir of the last vassal or to some stranger donee, or whether it is in the *hereditas jacens* of the deceased. If she is not liable in that character, then it is equally of no importance what has become of the estate. The only question therefore is, whether the defender, as the personal representative of the late vassal, is liable to perform the conditions of the feu-contract.

Now, the particular condition which she is required to perform in this action is to erect certain dwelling-houses, and after having erected them, to maintain and uphold them in good order. I am unable to agree with the Lord Ordinary in thinking that any obligation to that effect has been imposed upon the representatives of the late vassal, so as to subject them to an action for specific implement of the obligation.

The general rule in the construction of feu-contracts upon which the Lord Ordinary considers that this case depends is perfectly well settled. It had been settled long before the cases of *Russell v. Aiton* and *The Police Commissioners of Dundee v. Stratton*, to which his Lordship refers; but it is stated nowhere more clearly than in the judgment of the Lord President in the latter case. The only difficulty in these cases arose from the imposition of an obligation on the vassal, and his heirs, executors, and successors whomsoever. If that means that all the heirs, executors, and successors are bound conjunctly and severally, then there can be no doubt they are all liable in *solidum*, and no question would arise; but if they are not bound jointly but severally, then a question which is sometimes of difficulty arises—since the

vassal has bound himself and his executors to a certain extent, and his successors in the feu to a certain extent—on what conditions the obligation arises against each of the different sets of successors.

Now, the rule which has been laid down in the cases to which I have referred is perfectly clear, at all events in its application to the main prestation in a feu-contract—the obligation to pay feu-duty—because the Lord President says—“According to invariable practice, an obligation imposed in the terms in which I have quoted is an obligation upon the vassal himself so long as he remains vassal and lives, and after his death upon his heirs and executors, for payment of arrears, but upon his successors in the feu only, to the exclusion of his personal representatives, for payment of the feu-duty in future.” Now, if the obligation which we have to consider had been expressed in the same terms as those which are contained in an ordinary feu-contract, and if the vassal had thus bound himself and his heirs, executors, and successors to build and uphold the buildings after they had been erected, I confess I should not have thought there was much difficulty in applying the general rule explained by the Lord President to such a case, because it really rests upon this principle—that every continuous obligation in a feu-contract or feu-charter, in the absence of special stipulation to the contrary, must be transmissible and enforceable against the vassal in the feu, and not transmissible or enforceable against the personal representatives of the deceased vassal, who are not themselves vassals in the feu.

In applying that rule I should certainly think it very difficult to suppose that a superior imposing an obligation to build houses upon his land should look to anyone for the performance of that obligation, excepting to the owner of the land for the time being, and it is not conceivable that he should look to anybody else for implement of an obligation to uphold and maintain houses after they had been erected. Therefore if the condition in question were imposed upon the vassal and his heirs and successors by the words of the obligation in ordinary feu-contracts, I should, as I have said, have very little difficulty in holding that that transmitted to the successive feuars but did not transmit against personal representatives.

But in this case it appears to me that the question does not even arise, because it is absolutely excluded by the terms of the feu-contract itself.

For the obligation to build, whatever may be its effect, is not in terms imposed upon heirs, executors, or successors whatsoever, but solely upon the vassal holding the lands under the grant for the time being. The feuars do not, either in words or substance, undertake an obligation that they are to build houses, and to perform any one of the prestations which are to be found in that part of the deed. The subject is conveyed under certain conditions and obligations, which are declared to be real burdens affecting the pieces of ground thereby disposed,

and one of these obligations is that dwelling-houses of a certain value shall be erected "by the second parties within two years upon both or either of the said two pieces of ground," and that "the said second parties shall maintain, uphold, and keep the said houses so to be erected in" good order and repair. Now, the second parties are simply the first feuars—that is to say, the three persons to whom the subject is conveyed in the feu-contract. There is no obligation undertaken or imposed upon anybody else. I am very far indeed from holding that a conveyance in these terms does not create a personal obligation enforceable against anybody who may take up the land under this grant. I think it is settled law—at all events since the case of *Hunter v. Boog*—that when land is feued out for onerous considerations on certain conditions, these conditions are imposed as obligations upon the feuar or vassal who accepts delivery of the land. They are obligations *ex contractu*, which he is bound to perform, because they are the conditions upon which the grant is made, and upon which he has accepted it. I think such obligations are binding upon him and enforceable against him in exactly the same way as if he had undertaken and bound himself to perform them in express terms. It appears to me to be of no consequence whether such obligations are expressed in a feu-charter or in a bilateral contract; or if in a bilateral contract, whether they are expressed in that part of the deed by which the superior conveys under certain express conditions, or in that part of it by which the feuar undertakes to perform certain prestations in return for the grant. It is of no consequence in what form the conditions are expressed. The feuar who takes the land under the superior's grant puts himself under the personal obligation to perform the conditions of the grant. I think it equally clear in the present case that nobody could take the land from the first feuar as heir or dispoonee, and so become the vassal in his place, without subjecting himself to the same conditions and to the same extent as the original grantee, because by declaring that the conditions are to be real burdens the superior has taken the ordinary and perfectly effectual method of providing that they shall attach not only to the first vassal but to all heirs or singular successors who take the estate from him. But then these are obligations or conditions of the grant binding upon the vassal who for the time being holds the land in terms of the grant, and upon nobody else. Therefore it appears to me to be quite out of the question to hold that they affect not only the grantee and his successors in the feu, but also the personal representatives of the deceased vassal who had no interest in the land.

I think it is of no consequence whether such representatives are also *mortis causa* dispoonees of the original grantee, who have declined to take benefit from his conveyance, or whether they are in the position of

being personal representatives merely, who have no right under the grant.

As personal representatives they are in my opinion in no way liable to perform any conditions attaching solely to the vassals holding the land under the grant. I am therefore unable to agree with the Lord Ordinary.

His Lordship thinks that the defender ought not to be compelled to implement the obligation, because it would not be expedient to enforce specific implement. I think the true reason that she cannot be compelled to do so is that there is no obligation affecting her which could be enforced.

If that be so—if the defender is under no obligation to build, and cannot for that reason be compelled to do so—it follows as a matter of course that she is under no liability in damages. She cannot be subjected to damages for failing to perform an obligation which does not attach to her.

But the Lord Ordinary suggests a different ground—and it has been urged on us in argument—upon which he thinks the defender may be made liable, because he says that there was no doubt a personal obligation upon the late Kenneth Mackenzie, whom she represents, that he failed in breach of his contract to perform that obligation, that in consequence he became liable in damages to the superior, and that that liability transmits as a personal debt against the defender as his representative; and he likens the case to that of a claim for arrears of feu-duty which could undoubtedly be enforced against the personal representatives of a deceased vassal, although a claim for future feu-duties could attach only to the deceased vassal's successors in the feu. But arrears of feu-duty become debts of the debtor's representatives, not because they are under any continuous obligation to pay feu-duty, but because the debt had arisen against the deceased during his life, and for which they as his representatives are liable.

As I have already indicated, I agree with the Lord Ordinary in thinking that there was a personal obligation binding upon Kenneth Mackenzie, and I do not see any reason to doubt—although I do not think it is absolutely necessary to decide the point—that that was an obligation which might be enforced by the ordinary legal remedies, either by an action for implement, or by an action to recover damages for breach of contract. It does not occur to me that the stipulation by which the superior declares that in the event of the obligation to build not being performed, the grant shall in his own option become null and void, could be construed as excluding the ordinary legal remedies which would be available to him in the event of failure to perform the obligation. I think that is a provision by which the superior secures to himself, in his option, an additional right beyond what the common law would have given him if it had not been expressed. A provision that he shall have a further and exceptional remedy does not appear to me to import that he is

excluded from enforcing his obligation by the ordinary remedies that would be available to him at common law.

But assuming that there was a good personal obligation affecting Kenneth Mackenzie, and that the superior might have recovered damages from him for his breach of contract during his life, then the question might arise whether a debt has been created against him which may now be enforced against his personal representative. I do not think it necessary to decide that question, because that is not the demand which the pursuer makes in this case. If there is any such liability, it is the liability of a representative for her ancestor's breach of contract; and that is not what the pursuer seeks to enforce in this case. The conclusion of the summons is for implement of an obligation attaching to the defender herself; and the conclusion for damages is a conclusion "that in the event of the defender failing or refusing to erect said dwelling-houses," and so on, the defender "should be decerned and ordained to make payment to the pursuer of £600" in name of damages. That is to say, there is an obligation now attaching to the defender; she is to be compelled to perform that; and if she does not perform it, then she is to be liable in damages in consequence of her breach of her own obligation. Now, it is quite impossible to make any use of that conclusion for the purpose of recovering from her damages, not for her own breach of the obligation at all, but for a previous breach of contract by the person whom she represents. Upon that ground I am of opinion that it is neither necessary nor proper to consider the question whether if there was a personal obligation affecting the deceased vassal, the defender, as his representative, is liable in damages for his failure. The conclusions of the action exclude any other demand except a demand that she should perform an obligation attaching to herself, or pay damages for her own breach. I am therefore of opinion that the Lord Ordinary's interlocutor must be recalled, and that the defender should be assoltized from the conclusions of the action.

LORD ADAM—The question in this case arises upon the construction of a feu-contract by which the superior conveys and disposes to the three partners of the Bank Coal Company, and to the survivors and survivor of them, and the heir of the last survivor, in trust for behoof of their said company, certain pieces of ground, to be holden "of and under the first parties and their successors for payment of the feu-duty and other prestations after mentioned," but under the burden of the whole conditions, reservations, and so on, which are declared to be real burdens. Then follows the particular condition in question.

There was first a provision that the vassal should build dwelling-houses of a certain annual value, and that he should maintain them, and if burned down should rebuild them; and then there follows this condition—not very happily expressed—that in

the event of the feuars failing to implement their obligations, "these presents and all following thereon shall, in the option of the said first parties, become null and void." These are the three clauses of this feu-contract with which we have to deal. The husband of the defender, Mr Kenneth Mackenzie, came to be the last survivor of those mentioned in the contract, and he died in possession of the subjects. Now, I do not see any reason to doubt that Kenneth Mackenzie, the defender's husband, by accepting the feu and becoming vassal under this feu-contract, came under the conditions on which alone he was entitled to hold the subjects, viz., that he would erect dwelling-houses of a certain value. I should not doubt that in a feu-contract so expressed—where lands are given under the express condition of something being done, and these lands are accepted by the vassal under that condition—that out of that state of circumstances a personal obligation arises against the vassal to fulfil the condition during his tenancy of the feu. I think that the vassal's duty would have been stronger if the feu-contract had in this particular case used words of direct obligation. But anybody accepting it under these conditions necessarily came under an obligation to fulfil them. That is my construction of this part of the deed.

The superior stipulated that in a certain event there should be an irritancy imposed, in his option. I concur with Lord Kinnear's observations on that matter. Of course we are familiar with an irritancy in respect of arrears of feu-duty for two years, but I am not quite sure that there would have been any legal irritancy implied here for infringing this condition. I rather think there would not, but I quite agree with Lord Kinnear in his observations in this matter, that unless there be something in the deed to show the contrary, where a superior stipulates for an irritancy of that sort, he is merely stipulating for an additional remedy, by the use of which he may enforce performance of the conditions of the contract, and that because he so stipulates for an additional remedy he does not, and the parties do not, mean that that should in any way interfere with the use and employment of the ordinary and only remedies which he has in such cases. I have no doubt that it might be stipulated that such irritancy should be the only remedy, but I find nothing to indicate such intention here. Therefore I think although that clause of irritancy be there, the vassal who holds the feu is not relieved from the personal obligation to fulfil it, and I think he undertakes it by entering into and taking possession of the subjects.

Now the facts being so, I should have thought that the defender's late husband Kenneth Mackenzie was, as the Lord Ordinary says, under a personal obligation to fulfil the conditions of this feu, and therefore that he was bound to build, and that he having failed in that obligation, the defender, as his trustee, is bound to fulfil that debt of his. But that is not the nature of this

action at all, because, as Lord Kinnear has stated, it is an action to have her compelled to perform a personal obligation which is alleged to be incumbent upon herself, and for damages for failure to fulfil that personal obligation of hers. Now, that is just where I think the Lord Ordinary has gone wrong in this case. He "finds that the said personal obligation is now binding on the defender as his general representative." I do not think that it falls upon the defender as personal representative of the late Kenneth Mackenzie. I think that the obligation is transmissible and enforceable against nobody but the vassal himself. I agree with Lord Kinnear that the questions which arose in the cases of *Russell v. Aiton*, and the *Magistrates of Dundee v. Stratton*, are not in this case, because from the very nature of the case it can only arise where a person becomes vassal in the feu, because these conditions are not imposed as separate obligations; they are only imposed as conditions of the acceptance and holding of the feu. Now, if that be so—if a person never takes possession and never accepts the feu, as the defender has not—there is no condition which can raise an obligation against her. It is only in respect of the acceptance of the feu that the obligation arises. If the feu is never accepted, the obligation can never arise. In my view that is enough for the disposal of this action, because, as Lord Kinnear has pointed out, this action is founded upon a certain obligation the fulfilment of which is personal to the defender. If she is under no obligation to fulfil any stipulation, it is clear that she can be under no liability in damages for not fulfilling a condition which is not binding upon her at all; that is the state of this process.

Upon these grounds I entirely concur in all that Lord Kinnear has said.

LORD M'LAREN—I concur in Lord Kinnear's opinion, and I only wish to express one qualification which I think is implied in the opinions which have been given—I mean, when we say that an obligation of this kind if unfulfilled by the immediate grantee transmits against the heir in heritage, it is understood that we are speaking of an obligation which has some natural relation to the lands or the subjects of disposition. This is the character of the obligation in the present case. It is an obligation to put buildings on the lands. We know that there are decisions of this Court, and also of the House of Lords, where the subject has received very great consideration, to the effect that a continuing obligation having relation to lands, such as an obligation to relieve the other party of the payment of tithes or public burdens, will transmit against the heir in heritage, assuming that the relation of superior and feuar existed between the original contracting parties. But it is conceivable that obligations unconnected with the land or subject of conveyance may be undertaken in a feu-contract, and such obligations would not in general affect the heir in heritage. There of course are some obligations

which would not be binding on anyone—I mean such as are annulled by the operation of the statute law. Of this nature are obligations to render personal services to the superior, and obligations restraining alienation without the consent of the superior, both of which are prohibited as to all future grants by the Act abolishing Ward Holdings, 20 Geo. II. c. 20. Another instance is the condition that deeds of transmission of the feu are to be prepared by the superior's agent—a condition which is made illegal by one of the sections of the Conveyancing Act. But setting aside these cases, it is evident that these are conditions which may be binding as matter of contract between the parties to the original feu-contract or charter although not relating to the subject-matter of the charter, and as to these the question might arise, whether the obligation, after the death of the original obligant, is to be performed by his heir or by his executors. Such cases of course are not very likely to arise, and I only wish to say that our decision in this case would not necessarily govern the case of the effect to be given in a question with the grantee's heirs to an obligation which is outside the proper scope of the feudal contract.

LORD PRESIDENT—I agree in holding that the defender, who is not the vassal, is not bound to erect houses in terms of the clause in this feu-contract, and by consequence that she is not bound to pay damages if she does not do so. The conclusion of this action being solely to compel her to do one or other of these things, I think she is entitled to absolvitor.

We recal the interlocutor and assoilzie the defender.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for the Pursuer—Jameson—N. J. Kennedy. Agents—R. D. C. Marshall, W.S.

Counsel for the Defender—C. S. Dickson—Wilson. Agents—Gray & Handyside, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Court of Exchequer.]

ARIZONA COPPER COMPANY *v.*
SMILES (SURVEYOR OF TAXES).

Revenue—Income-Tax—Act 5 and 6 Vict. c. 35, Sched. D, First Case, Rule 4, sec. 159—Profits—Deduction.

A limited company borrowed a large sum of money, and undertook, along with repayment of the capital sum borrowed, to pay the lenders a bonus of 10 per cent. thereon. Held that in "intimating the balance of profits and gains chargeable under Schedule D," the company were not entitled to deduct the amount of the bonus from