

In these circumstances a question arose as to whether John Duncan Sim's interest at the date of his death in the estate of Muirton was moveable or heritable, and a special case was presented by (1) Alexander Sim's trustees, (2) John Duncan Sim's mother, his sister Mrs Cornwall, and his elder brother William Sim, and (3) John Duncan Sim's younger brother and heir-at-law, Alexander Sim, in order to obtain the opinion of the Court upon the following question of law—"Was the interest of the late John Duncan Sim, at the time of his death, in the estate of Muirton, moveable so far as his succession is concerned?"

Argued for the second parties—John Duncan Sim's interest in Muirton was moveable. It was plain from the trust-deed that the intention of the testator was that the whole of his estate should be divided equally among his children in money. There was a power of sale given to the trustees, and the whole tenor of the settlement showed that the succession was moveable.

Argued for the third party—Although there was a power of sale, it had never been exercised. It was not necessary for the execution of the trust that the heritable estate should be realised. There was therefore no conversion—*Anderson's Executrix v. Anderson's Trustees*, January 18, 1895, 22 R. 254; *Sheppard's Trustees v. Sheppard*, July 2, 1885, 12 R. 1193; *Auld v. Anderson*, December 8, 1876, 4 R. 211. Even if there had been conversion under the will, the actings of the beneficiaries had operated reconversion—*Grindlay v. Grindlay's Trustees*, November 9, 1853, 16 D. 27; *Hogg v. Hamilton*, June 7, 1877, 4 R. 848.

At advising—

LORD TRAYNER—The question relates to the succession which fell to the late John Duncan Sim under the provision of the trust-disposition and settlement of his father Alexander Sim—a succession, which, at the date of the father's death, consisted of both heritable and moveable estate. It was very ably argued to us by Mr Brown, on behalf of the second parties, that the trust-disposition and settlement of Alexander Sim was throughout indicative of an intention on his part that the whole of his estate should be massed together and divided among his children; that there was an entire absence of anything to show an intention that the heritable estate should be kept as heritable estate, and that the whole tenor of the settlement indicated that the truster meant and intended the beneficiaries under it to receive their respective benefits in money. I cannot, however, say that any such intention is necessarily to be inferred from the words of the settlement, although I do think it very probable that such a mode of dealing with his estate was within the expectation of the truster. That, however, would not operate conversion. Conversion may take place (1) by the truster's direction to his trustees to sell or realise his heritage, (2) by a power to sell being exercised by the trustees, or (3) where such sale or realisation is

necessary to the execution of the trust purposes. None of these conditions are present here. There was no direction to the trustees to sell the heritable property; there was a power of sale, but it was not exercised; there has been no necessity up to the present time to sell the heritage for the fulfilment of any trust purpose. There is no such necessity now, for the heritage can be conveyed to the several beneficiaries according to their respective rights. I think, therefore, the question must be answered in the negative.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD RUTHERFURD CLARK was absent.

The Court answered the question in the negative.

Counsel for the First Parties—Hunter.

Counsel for the Second Parties—Brown.

Counsel for the Third Party—Abel.

Agents—Ronald & Ritchie, S.S.C.

Thursday, July 18.

#### FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MARSHALL v. CALLANDER AND TROSSACHS HYDROPATHIC COMPANY AND OTHERS.

*Superior and Vassal — Obligation ad factum præstandum—Obligation to Re-erect Buildings in the Event of their Destruction by Fire—Transference of Feu after Obligation had become Prestable.*

After an obligation imposed by a feu-contract, and constituting a condition of the grant, has become prestable, the vassal cannot relieve himself thereof by transferring the feu to another party.

A piece of ground was disposed by feu-contract under, *inter alia*, the condition that the vassal and his successors and assignees whomsoever should be bound to erect and maintain thereon buildings of the value of not less than £15,000, and to keep the same constantly insured to the extent of not less than that amount, and in the event of their destruction by fire, to rebuild the same or the part destroyed, so as to maintain the total value of £15,000. The vassal erected buildings on the feu of more than the stipulated value, and insured them for the stipulated amount. The buildings having been destroyed by fire, the insurance money was paid to the vassal, and the superior brought an action to compel him to re-erect buildings upon his feu. Before defences were lodged the vassal transferred the feu to another party.

Held (*aff.* judgment of Lord Kyllachy) that the original vassal could not relieve

himself of the obligation to rebuild by transferring the feu to another party after that obligation had become prestable, and that he and the vassal in possession of the feu were jointly and severally liable in the obligation.

On 2nd March 1881 Mr William Hunter Marshall, proprietor of the estate of Callander, granted a feu-contract in favour of the Callander Hydropathic Company, Limited, by which he disposed to them, their successors and assignees whomsoever, heritably and irredeemably, part of the lands of Callander, with and under certain obligations, and, *inter alia*, that "the company and its foresaids shall be bound and obliged to erect in conformity with plans and elevations to be approved in writing by the first party or his foresaids . . . upon the said intended feu within 36 months from the term of entry herein-after mentioned a building or buildings suitable for a hydropathic establishment, and of not less value than £15,000 sterling, and that the company shall be bound and obliged to uphold buildings of that value in good order and repair in all time coming, and to keep the same constantly insured with a good and established insurance company to the extent of not less than £15,000 against loss by fire, and in case the said buildings are, or any part thereof is destroyed, to rebuild the same or the part destroyed so as to maintain the total value of £15,000." The obligations were fenced with a clause of irritancy in the event of contravention, and were declared to be real burdens affecting the subjects disposed. On the other part the company bound itself and its successors whomsoever to pay the stipulated feu-duty, and to implement the whole other obligations incumbent on them.

In accordance with their obligation the company erected on the grounds a hydropathic establishment at a cost of about £10,000.

In 1885 the Callander Hydropathic Company sold and conveyed the subjects including the buildings to the Callander and Trossachs Hydropathic Company, Limited, who carried on the business of a hydropathic establishment there till the 7th November 1893, when the buildings were almost totally destroyed by fire. At the time of the fire they were insured for the sum of £15,000, and the company obtained from the insurers the sum of £14,000 as the estimated amount of the damage suffered.

On hearing of the fire Mr Marshall wrote to the secretary of the company to ascertain the amount for which the buildings had been insured, and on hearing that the amount recovered was insufficient to cover the cost of rebuilding, he, on 27th November 1893, raised an action against the company in order, *inter alia*, to have it declared that the said company were bound under the feu-contract to rebuild the buildings on their feu, and also to have them ordained to apply the insurance money to that purpose.

After service of the summons the agents for the company wrote on 4th December to Mr Marshall complaining of the action as

being premature, and stating that "the company has no intention of refusing to implement the obligations in the feu-contract, and your client has no reason to infer the contrary." Mr Marshall's agents wrote in reply, that they would delay calling the summons in the hope that matters might be settled. Negotiations were entered into with a view to a settlement, and the summons was not called till 23rd January, with the result that defences became due on 2nd February. On that day, however, the defenders asked for delay and obtained an additional week for lodging defences. In the meantime the defenders had been negotiating for the transfer of the subjects, and towards the end of December they had concluded a bargain with the Eagle Property Company, who agreed to take over the feu and all the obligations connected with it for a sum of £1500, it being stipulated that the Callander and Trossachs Company should defend the action, and that if the defence failed the whole transaction should be at an end. The necessary formalities for the transfer were not completed till 6th February, four days after the original date when defences should have been lodged in the action, and on 7th February the transaction was completed by the defenders sending to Mr Marshall a statutory notice of the assignation. On the same day defences were lodged in the action.

On 9th October 1894 a further notice of change of ownership was made to the superior by the Eagle Company, who had transferred the subjects to Mr John Wilson, accountant, Glasgow.

On 30th October a supplementary action was raised by Mr Marshall against the Callander and Trossachs Company, the Eagle Company, and Mr John Wilson, concluding for declarator, *inter alia* (*First*) that the defenders had been from the dates of their respective infeftments vassals in succession, and that the said John Wilson was now vassal in the lands contained in the feu-contract entered into between the pursuer and the Callander Hydropathic Company, and (buildings of not less value than £15,000 having been erected on the subjects in terms of the feu-contract) that the defenders, as vassals in succession in the subjects, became personally bound by virtue of the feu-contract and of their infeftments to uphold buildings of that value upon the ground, and to keep the same insured for that amount, and rebuild the same, if destroyed by fire, so as to maintain the total value of £15,000; and (*Second*) that the buildings which had been erected on the feu had been almost wholly destroyed by fire while the Callander and Trossachs Hydropathic Company were vested in the subjects; that they had not been rebuilt; that they had been insured for £15,000, and that £14,000 had been recovered from the insurers, but that no part of that sum had been applied in rebuilding the buildings; and (*Seventh*), for decree ordaining the whole defenders jointly and severally to rebuild said buildings to the extent foresaid.

The actions were conjoined.

The pursuer pleaded—“(1) The whole defenders are liable to implement the provisions of the feu-contract as to building or repairing, in respect of the obligations incumbent on them by reason of their respective infeftments; and further, in respect (a) that the Callander and Trossachs Hydropathic Company, Limited, were heritable proprietors of the piece of ground in question at the time when the said fire took place, and that the obligation to restore or build had become prestable from them as vassals prior to the transference of the feu to the other defenders; and (b) that the defenders the Eagle Property Company, Limited, and John Wilson, respectively, acquired the said piece of ground in the knowledge that the said obligation was prestable; or otherwise (c) that each of the said defenders acquired and held the said piece of ground in trust for or for behoof of the said Callander and Trossachs Hydropathic Company, Limited. (4) It being an implied condition of the said feu-contract that the sums secured by the policy or policies of insurance which the vassals are taken bound to effect and keep up should, on occasion of fire, become a *surrogatum* for said buildings, and whether a *surrogatum* or not, should, when received, be applied in rebuilding or repairing the said buildings, the defenders the Callander and Trossachs Hydropathic Company, Limited, are bound to apply the sums received by them in rebuilding or repairing as aforesaid, or to allow the same to be applied for that purpose.”

The defenders the Callander and Trossachs Hydropathic Company pleaded—“(4) Assuming the defenders to have been bound by the obligations in the feu-contract, they are not now liable to implement the same in respect of the recorded conveyance to the Eagle Property Company, Limited, duly followed by notice of change of ownership. (5) The sums contained in the said policy or policies of insurance not having been a *surrogatum* for the buildings, and said policy or policies and sums therein contained not having been held by the defenders in trust for the pursuer, the defenders are not bound to apply or pay said sums or any part thereof in manner craved by the pursuer.”

The defenders the Eagle Company pleaded—“(2) This defender is not liable to implement the prestations of the feu, in respect of the recorded conveyance to the defender John Wilson, followed by the notice of change of ownership libelled. (3) In respect that this defender is not infeft in the subjects contained in the said feu-contract, the pursuer is not entitled to decree of declarator or *ad factum præstandum* concluded for.”

The defender John Wilson pleaded—“(3) On a sound construction of the feu-contract founded on by the pursuer, the pursuer is not entitled to decree of declarator or decree *ad factum præstandum* against the defender.”

The Lord Ordinary (KYLACHY) on 7th December 1894 allowed a proof in regard to

certain averments made by the pursuer and denied by the defenders as to the alleged *non bona fide* character of the transference of the feu.

On 1st March 1895 the Lord Ordinary pronounced the following interlocutor:—“Finds it unnecessary to dispose of the conclusions of the original summons: Finds it also unnecessary to dispose of the third, fourth, fifth, and sixth conclusions of the supplementary summons, signeted 30th October 1891, and dismisses the same: Finds and declares in terms of the first and second declaratory conclusions of the said supplementary summons, and decerns and ordains the whole defenders, jointly and severally, forthwith to proceed to rebuild the buildings of the hydropathic establishment, which were erected on the subjects contained in the feu-contract, referred to in the summons in terms thereof, and which were on or about 7th November 1893 destroyed by fire, and that to the extent necessary to maintain said buildings as of the total value of £15,000—said rebuilding to be commenced within three months of the date hereof, to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof: *Quoad ultra* continues the cause: Finds the pursuer entitled to expenses against the defenders the Callander and Trossachs Hydropathic Company, Limited, in the original action prior to the date of conjunction, and against the whole defenders, jointly and severally, in the supplementary action and in the conjoined actions: Allows accounts thereof to be given in, and remits the same when lodged to the Auditor to tax and report, and decerns; grants leave to reclaim.”

“*Opinion.*—The pursuer here is the superior of a certain feu in the outskirts of Callander, which he gave off in the year 1881 to the Callander Hydropathic Company, Limited, and upon which that company erected a hydropathic establishment, which was burned down in November 1893.

“The present action is brought for the purpose of enforcing implement of certain obligations in the feu-contract by which the feu was constituted; and speaking in the meantime generally, the object is to compel the re-erection upon the ground of buildings suitable for a hydropathic establishment, or at all events, buildings having a value of not less than £15,000.

“It is not necessary to recite the clauses in the feu-contract by which the said obligations are imposed. They come shortly to this—(1) That the feuars shall, within a certain time, erect buildings of the value of £15,000, suitable for a hydropathic establishment; (2) that they shall uphold buildings of that value in good order and repair in all time coming; (3) that they shall keep the same constantly insured for at least £15,000; (4) that in case the said buildings, or part thereof, may be destroyed by fire, they shall rebuild the same or the part destroyed, so as to maintain the total value of £15,000. All these obligations are made

conditions of the feu-right. They are expressed as such in the dispositive clause, they are made part of the reddendo, and the feuars bind themselves and their successors whomsoever in the subjects to implement and perform them. Beyond doubt therefore they run with the lands, and when they emerge by the occurrence of the events contemplated, they give rise to a personal action *ex contractu* at the instance of the superior against the feuair for the time. I say 'feuair,' because although the point is not probably in this case material, the personal obligation attaches not only to the proper vassal for the time, but also to any sub-vassal or disponee infeft or in possession, under a title derived from the feu-contract—*Hyslop & Shaw*, 1 Macph. 535; *Marquis of Tweeddale's Trustees*, 7 R. 620.

"The present defenders, the Callander and Trossachs Hydropathic Company, are disponees and successors of the Callander Hydropathic Company, the original feuars. The latter company, it appears, expended about £40,000 in the erection on the feu of the buildings contemplated, but their enterprise having been unsuccessful they, in 1887, sold and disposed the subjects for the sum of £10,000 to the present defenders, who duly took infeftment, and thereby entered with the superior and possessed the subjects until November 1893, when, as I have said, the buildings were wholly—or almost wholly—destroyed by fire. Upon that occurrence, the obligation to rebuild of course became prestable, and the premises having been kept insured in terms of the feu-contract, the defenders obtained from the insurance company the sum of £14,000, which was available, if they chose, for performing their obligation. They seem, however, to have conveyed to the pursuer some distrust as to their intentions, and accordingly he, on 27th November 1893, brought against them the action, which was the first step in this litigation. In that action he concluded for declarator of the defenders' obligation to rebuild, and for specific performance. He also concluded for interdict against the application of the insurance money to any other purpose. But that conclusion has not been pressed, and does not require to be considered.

It is not maintained—at least it has not been seriously argued—that, when the pursuer's action was thus raised, the defenders had any good defence to the demand made. They were the pursuer's vassals when the obligation to rebuild arose; they still held the feu; there was, in short, no obstacle to specific performance. Accordingly it may, I think, be taken as at least more than probable that if the pursuer had pressed his action, he must, before the occurrence of any change in the situation, have obtained decree against the defenders *ad factum præstandum*.

"In point of fact, however, the pursuer did not do so. He was induced to delay by certain assurances to which I shall presently refer, and in the meantime there occurred certain transactions which on the

one hand are said to have altered the situation and armed the defenders with a defence, and on the other hand are said to have been of the nature of a fraudulent scheme to defeat the pursuer's rights. In the view which I take of the case it is not necessary to characterise these transactions. As, however, they give rise to the only question which is involved in the case, it is necessary that I should state what they were.

"The pursuer, as I have already said, raised his summons on 27th November 1893. Shortly after, on 4th December, he (or rather his agents) received a letter from the defenders' agents, in which they complained of his action as premature, and went on to say 'the company has no intention of refusing to implement the obligations in the feu contract, and your client has had no reason to infer the contrary.' To this the pursuer's agents replied on 5th December—'In compliance with your request, we shall delay calling the summons for a few days in the hope that matters may be arranged without further proceedings.' Negotiations thereupon ensued, which appear to have been directed to a pecuniary commutation of the pursuer's claims, and these negotiations continued until 19th January 1894. It is not necessary to go into particulars, but on 23rd December the defenders' agents wrote with respect to a proposed modification of the pursuer's terms—'We will communicate the modification to our clients. On the correspondence between us they have come to the decision that the terms offered by Mr Marshall are quite unacceptable.' They did not again write until 19th January 1894, when they wrote as follows—'We refer to our letter to you of 23rd ulto. Our clients have not seen their way to depart from their decision formerly intimated, and they now desire to have the inhibition used on the dependence of the action recalled.'

"It may probably, therefore, be taken that the pursuer, who might have called his summons on 5th December, was led to delay doing so until 19th January by the dependence of negotiations, which at least commenced on the footing that the defenders had, as expressed in their agents' letter, no intention of refusing to implement the obligations of the feu-contract. In point of fact, the summons was called on 23rd January, with the result that defences became due on 2nd February.

"Now, the use which the defenders made of the delay which thus occurred was this:—As early as the 14th December, when the pursuer's pecuniary terms had been tabled, the company's agents entered into communication with certain law agents in Glasgow, asking for any suggestion 'whereby we may defeat a rapacious superior,' and pointing to the possibility of finding some third party who might be willing to become owner of the feu. A correspondence followed on which I prefer not to dwell, but the upshot of it was that a bargain was ultimately concluded, whereby a certain Mr Niven agreed on behalf of a property company to take over the feu, and all the

obligations connected with it, for a sum of £1500, it being, however, stipulated that the defenders' company should defend the pursuer's action, and that, if the defence failed, the whole transaction should be at an end—the £1500 being repaid, and the property reconveyed to the defenders. This bargain was concluded on 21st December, and simultaneously, or shortly afterwards, Niven concluded a corresponding bargain with a company called the Eagle Property Company, the only difference being that that company received only £500 out of the £1500, the remaining £1000 being, as it appears, divided between him (Niven) and a Mr Stark, who seems to have been the managing director and law-agent of the Eagle Company. The Eagle Company was undoubtedly a suitable company for the purpose in view. Its whole subscribed capital was £1500; its paid-up capital was about £700; and its shareholders were about a dozen persons—all, I gather, more or less identified with the managing director. The company, however, such as it was, undertook to accept a disposition of the feu and become the pursuer's vassals.

"The bargain however, although thus made towards the end of December, required some time to enable it to be carried out; and it so happened that the necessary deeds were not completed when the pursuer at length called his summons on 23rd January, or even when on 2nd February defences fell to be lodged. Unless, therefore, decree was to be allowed to pass in absence, it was necessary to obtain some further indulgence from the pursuer; and, accordingly, on 2nd February, a week's delay for lodging defences was asked and obtained—the object I need hardly say not being explained, but the request being based on some delay on the pursuer's part in discharging a certain inhibition. The result was that on 6th February there was recorded in the Register of Sasines a disposition dated 1st February, whereby the defenders disposed their feu to the Eagle Property Company, and the latter company being thus infeft and entered with the superior, the transaction was completed by sending to the pursuer on 7th February a statutory notice of change of ownership under the Conveyancing Act of 1874.

"Thereupon defences were lodged setting forth the defenders' divestiture, and pleading that being no longer feuars of the pursuer in the subjects referred to, the defenders were entitled to absolvitor. There were also some other pleas, but none which I think have been or could be seriously maintained.

"Whatever, therefore, the value of it all may be, there can be no doubt—(1) that when the pursuer's action was raised, the defenders, the Callander and Trossachs Company, were under obligation to rebuild, and had no defence against the pursuer's demand to that effect; (2) that if they have now any defence, it is in respect of a voluntary transaction initiated by themselves after a judicial demand for implement; (3) that but for the pursuer's delay in calling

his summons, and his further indulgence in the matter of the defences, the transactions in question must have been preceded by liti-contestation, or at all events, by decree in absence in the depending action.

"To complete, however, the narrative—the case having come up for discussion in the Procedure Roll, it became at once apparent that whatever might be the merits of the defenders' case otherwise, the divestiture of the defenders (assumed at that time to be absolute) was an obstacle, at least, to a decree for specific performance. It also appeared that the pursuer's action contained no conclusion for damages. In these circumstances I was asked to allow a sist in order that the pursuer might consider as to bringing a supplementary action. I did so, and the result was that after some delay a supplementary action was brought, which has been conjoined with the original action, and has now become for practical purposes the leading action of the two. It contains a variety of alternative conclusions, directed not only against the original defenders, but also against the Eagle Company, and against a certain Mr Wilson, to whom, before the supplementary summons was brought, the Eagle Company had it appears disposed the feu.

"The question which I have now to decide is, whether I can give the pursuer decree under one or more of the conclusions of this supplementary summons. I should explain that a record was made up and closed, and that a proof was afterwards led, such proof being necessary to exhaust the case in view of certain averments made by the pursuer impugning the reality of the transactions on which the defence was founded.

"I shall first consider the case of the Callander and Trossachs Company, whom I shall in the meantime continue to call the defenders. The question with them is whether their divestiture in favour of the Eagle Company relieved them of the obligation to rebuild. They maintain that the implied entry of that company as the pursuer's vassals discharged them (the defenders) of all obligations under the feu-contract, present or future, prestable or to become prestable, except only arrears of feu-duty, as to which the Act of 1874 makes, they say, an express exception; and they contend further that if that is the legal result, it makes no difference whether the divestiture took place before or after the arising of the action, before or after liti-contestation, or before or after final decree.

"The pursuer's first answer to all this is that the divestiture of the defenders on which the whole defence rests was no real divestiture, the disposition to the Eagle Company and all that followed upon it being, as he says, a sham, and the Eagle Company being truly trustees for the defenders, who are still the true owners of the feu.

"I am of opinion upon the proof that this view of the transaction between the defenders and the Eagle Company is not made out. That transaction, whether honest or dishonest, was, I think, suffi-

ciently real. No doubt it was entered into for the purpose of furnishing the defenders with a defence to the pursuer's claim, and it includes an agreement that if that defence is unsuccessful the whole transaction shall be rescinded. But, if the defence succeeds, the transaction is to have full effect. The Eagle Company is, in that event, to keep the property and to meet the superior's claims. The proof, therefore, helps the pursuer only to this extent, that it removes all difficulty in the way of specific performance. If decree *ad factum præstandum* shall go out against the defenders, they will, as it now appears, be quite able to obey it.

"The pursuer's second point is also a special one. He urges that, even assuming that the defenders' divestiture would, in the general case, have had the effect alleged, it cannot have that effect here, because it took place *post litem motam*; and further, must be held to have taken place after litiscontestation, inasmuch as the defenders obtained the delay which enabled them to carry through the transaction before litiscontestation, by what, according to the pursuer, was fraudulent misrepresentation and concealment.

"I am not prepared to decide the case on any of these special grounds. I heard a long argument on the effect of litigiousity, but I do not think that doctrine has any application to the case. I had also a reference to cases which were said to illustrate the maxim *pendente lite nihil innovandum*; and I had also cases cited as to the effect of litiscontestation. I desire to reserve my opinion as to the effect of these cases and authorities. I desire also to say as little as possible as to the correspondence which passed between the parties' agents prior to the lodging of the defences. I cannot commend the defenders' part in that correspondence. I should not myself like to have been mixed up in any of the transactions in which the defenders were at this time engaged. But I cannot hold it proved that the pursuer's delay to press on his action was induced by fraud. Further, I have at least a strong impression that, if the entry of a new vassal under the old law, or an implied entry under the Act of 1874, has the effect in law for which the defenders contend, that effect could hardly be barred by the dependence of an action, or by that action having reached the stage of litiscontestation, or even by its having reached the stage of decree. That was, as I have said, the argument of the defenders' counsel, and I am disposed to think that, if their (the defenders') general argument is sound at all, it carries and must carry them that entire length.

"But this brings one to what is the real point in the case, namely, the general question, whether, after an obligation *ad factum præstandum*, imposed by a feu-contract, and constituting a condition of the grant, has become prestable, the feuar (the debtor in the obligation) can discharge himself of the same by transferring the feu to a third party, who takes infestment, and

thereby enters with the superior. The pursuer, I need hardly say, disputes this altogether, and, in my judgment, does so on much safer and simpler grounds than by reference to the specialities which I have mentioned, and which have bulked so largely in the discussion.

"Now, the first question probably is, whether the entry of the new vassal discharges, *ipso facto* and absolutely, both as to the old vassal and the new, all obligations which have become exigible by the superior prior to the new vassal's entry. I am not sure whether the defenders really maintained this proposition, because I rather understood them to maintain, not that the obligation was extinguished, but that it was transferred to the new vassal, the old vassal being thereby discharged on the principle of delegation. And that, of course, is a different argument, which I shall consider presently. But the defenders did appear to assimilate the pursuer's demand to a demand for arrears of feu-duty, and I understood them, at least alternatively, to argue—(1) That all obligations of that class were, under the old law, extinguished by the entry of a new vassal; and (2) that the implied entry, which now takes place under the Conveyancing Act of 1874, has the same effect, except only as to arrears of feu-duty and past due casualties with which the Act of 1874, it is said, specially deals.

"Now, it must be confessed that this argument, if really maintained, goes very far. It involves the proposition that the defenders here, being admittedly bound to rebuild after the fire, and having been required to do so, the law yet permitted them, not merely to transfer their obligation, but, at their own hand, and without the consent of the pursuer, to wipe it out. I must say that I think, if the law so stood, it would require amendment. But, in my opinion, the whole argument proceeds upon a misapprehension both of the old law and of the new.

"In the first place, I am not satisfied that obligations *ad factum præstandum*, exigible but unperformed, are in the same category with, *e.g.*, liability for arrears of feu-duty. They are, I should say, rather in a category of their own—a category intermediate between, *e.g.*, liability for arrears of feu-duty and, *e.g.*, liability for future feu-duties. They are in fact continuing obligations, not like that for a term's feu-duty, applicable to because due for a particular period of possession, but applicable while unperformed to every period of possession under the feu-right. I am, of course, speaking apart from any question of *debitum fundi*, and with respect only to the personal obligations of successive vassals.

"Passing, however, from that point, it is, in my judgment, an entire misapprehension that obligations of the class of arrears of feu-duty were under the old law extinguished by the superior's entry of a new vassal. The entry of such new vassal did not, by statute or under the earlier law, imply any discharge either of arrears of

feu-duty or of any other existing obligation. The doctrine was that the entry discharged only such claims as were inconsistent with the right of property, e.g., the casualty of recognition (*Ayton*, M. 6464). By certain decisions, however, and particularly by that of the *Tailors of Glasgow*, 13 D. 1073—decisions proceeding on what was said to be the understanding and practice of conveyancers—the rule did come to be established that unless the superior reserved his claim for past casualties and feu-duties these should be held discharged. Whether the rule so established applied to the liability of the old vassal, or only to the liability of the new vassal, as for *debita fundi*, does not very clearly appear. Neither does it appear whether the rule applied to obligations *ad factum præstandum*. But one thing is certain, namely, that what was established was a mere presumption—a presumption based upon practice—and that it applied only when the superior did not protect himself by a reservation in his charter. That the superior might do so if he pleased was quite recognised. Accordingly, if the old law still stood the obligation here in question could never, in any view of its character, have been discharged against the pursuer's will. He would have had the right when asked to enter the Eagle Company to refuse to do so except under reservation, *inter alia*, of all his claims against the defenders, and I do not suppose it can be doubted that in the events which happened he would have taken that course.

"Now, that being the old law, it is not, I think, possible to hold that the Conveyancing Act of 1874 deprived the pursuer of this valuable right. Indeed, I am disposed to be of opinion that so far from doing so the Legislature took pains in the matter to keep the position intact. For the clause in the Act which reserves the superior's claim to arrears of feu-duties, &c. (section 4, subsection 3) goes on to make this provision, 'all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming.' I have not been able to see what this proviso covers, if it does not cover the present case. It was suggested that it applied only to future obligations, but it was not disputed that if that was its only purpose it was unnecessary. Supposing, however, that the statute is to be held as silent on the subject—what is the result? The question must then be determined by reference to the general scheme and scope of the Act; and I think there is authority for saying that it is a legitimate deduction from the Act as a whole, that wherever a superior under the old law might and would, in ordinary course, have inserted a reservation in his charters by progress, the implied entry authorised by the Act will always, when the superior's interests require it, be held subject to a similar reservation. That I take to have been the opinion, if not the

judgment, of the Court in the recent case of the *Lord Advocate v. Drummond Moray*, 21 R. 553; and it is an opinion which, if I may say so, I entirely adopt.

"The defenders, therefore, were not discharged on the entry of the Eagle Company by the extinction of the obligation. It remains to consider whether they were discharged by its transference, that is to say, by what is known in law as delegation.

"Now, it is probably true (it is at least in this part of the case common ground) that where a transfer of a feu occurs after an obligation *ad factum præstandum* has emerged and become exigible but remains unperformed, the succeeding feuar becomes bound to the superior as a debtor in that obligation. He does so so soon as he enters, but he also probably does so by the mere acceptance of his disposition, such acceptance (at least when followed by possession) implying adoption of all the obligations which are conditions of the right which he has acquired. Such appears to have been the opinion of all the judges in the case of *Hyslop & Shaw*. At all events it is here common ground. I shall therefore assume that the obligation to rebuild here in question is now enforceable against the Eagle Company, or at all events against their successor, Mr Wilson.

"Again, it is perfectly true that there are certain cases where a new debtor being introduced under a continuing contract, the presumption of law is against the multiplication of debtors, and in favour of the substitution of the new debtor for the old. In other words, there are certain cases where the law implies what is known as delegation, which is defined (*Ersk.* iii. 4, 22) as 'the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged.'

"For example, where a landlord grants an assignable lease, or consents to the assignation of a lease which is not assignable, it is not unreasonably presumed that as regards future rents and future prestations, he accepts the assignee as his sole debtor. So also when a superior enters, or is held to enter a new vassal, it is similarly, and with equal reason, presumed that he accepts the new vassal as his sole debtor for future feu-duties and future prestations. These are well-established presumptions, and are familiar instances of discharge by delegation.

"But there is no rule to the effect that delegation is to be presumed wherever, with respect to obligations in a lease or a feu-right, the landlord or the superior has obtained a new debtor. Nor is there any such rule even where the circumstance is added that the new debtor has become such as assignee to the lease or disponee to the feu. There are well-known examples to the contrary. For instance, it has been decided (*Hyslop & Shaw, supra*) that a vassal who has disposed to a disponee who remains unentered, continues liable to the superior for performance of all the obligations in the feu-right, and so continues notwithstanding that the disponee becomes also liable on the principle of adoption.

The same result follows in the ordinary case of subinfeudation. And it also follows under the new law in the case of a transfer of a feu followed by infestment, but not followed by the statutory notice of change of ownership. Even therefore, in the case of future prestations, the acquisition of a new debtor by no means always liberates the old debtor. Whether it does so or not depends just on this, whether there is or is not room in the particular case for presuming the consent of the superior. And that being so, the question is, what ground there exists for presuming such consent in the case of a debt which has become due, or of an obligation which has become exigible? I can myself conceive of none, and none has been suggested; and accordingly one was not surprised to find that no case could be cited where delegation had been presumed with respect to such debts and obligations. In point of fact, the doctrine of presumed delegation has, so far as I know, been confined to debts and obligations becoming due or exigible *de futuro*. It has certainly never been applied to cases like the present. In such cases—cases between superior and vassal—the principle I apprehend is that each vassal must always remain liable for the obligations, pecuniary or otherwise, becoming prestable in his own time. Whether succeeding vassals are liable along with him depends on the character of the obligation. If it is an obligation applicable solely to the possession of the previous vassal, such as that for arrears of feu-duty, the succeeding vassal will not be liable. But if, on the other hand, it is as here, an obligation to build—an obligation which applies as much to one period of possession as to another—there seems to be no reason in principle why each succeeding vassal—succeeding while the obligation is in default—should not also be liable. It is enough, however, for the present question that there seems to be neither principle nor authority for liberating, on the doctrine of delegation, the vassal who has first incurred the obligation—in whose time it has emerged—and against whom it was primarily exigible.

"I am therefore of opinion that the pursuer is entitled to decree *ad factum prestandum* against the Callander and Trossachs Hydropathic Company.

"As to the other defenders, it is not probably of much consequence practically whether they are liable to have a similar decree pronounced against them or against either of them. But if the pursuer desires such decree, I think it follows, from the views which I have expressed, that he should have it. The performance of the obligation to rebuild was a condition of the right which these defenders successively acquired and accepted. They must, therefore, each be held to have undertaken the obligation, and having undertaken it, they could not, in my opinion, free themselves from it by any transference of the feu. Possibly as regards the Eagle Company there may be a difficulty in the way of specific performance. The terms of their bargain with Wilson do not appear. But no

point on this head was made at the debate, and I think therefore that it may be assumed that they have taken care to protect themselves. In any view, they can only fail, and on their failure being ascertained the pursuer may fall back on his pecuniary conclusions.

"As to the precise form of the decree, I am disposed to think (although the point is not free from doubt) that the pursuer is entitled to have restoration of the buildings forming the hydropathic establishment, and I have found accordingly. But this matter also is of little practical moment, as the pursuer has offered by minute to be satisfied with any buildings of the requisite value which may be erected, according to plans to be approved by him in the usual way."

All the defenders reclaimed, but at the hearing only the defenders, the Callander and Trossachs Company, and the Eagle Company, insisted in support of the reclaiming-note.

Argued for the defenders the Callander and Trossachs Company—The conveyance of the feu operated as a transfer of all the contracted obligations attached to the enjoyment of the lands. The obligation to rebuild was not separate from the other obligations, so as to continue in the original feu after the disposition, and the feu was able to transfer it just as much as the obligation to pay feu-duty. It was not in the same category as arrears of feu-duty, for which a new vassal would not be liable—*Rollo v. Murray*, 1629, M. 4185. The Lord Ordinary was wrong in thinking that these defenders assimilated this obligation to that for arrears of feu-duty. The two were essentially different, in respect that the latter did not pass to the assignee, and that the former did. The case of *Macrae v. Mackenzie's Trustees*, November 20, 1891, 19 R. 138, was an authority for the proposition that a building obligation could only be enforced against the present vassal. The case of *Aiton v. Russel's Executors*, March 19, 1889, 16 R. 625, showed that the ordinary clause of obligation inserted in a feu-charter had acquired a special meaning, and was limited by the implied condition, "so long as I live and continue a vassal." That condition having failed by the transference of the feu, the obligation to build ceased and passed to the assignee—*In re Dundee Police Commissioners v. Straton*, February 22, 1884, 11 R. 586. On the other hand, the obligation would continue binding if the words "conjunctly and severally" were inserted. Here there were no such words. The Conveyancing Act of 1874 (37 and 38 Vict. c. 94), sec. 4, sub-sec. 2, by which the personal liability of the feu was held to continue "until notice of the change of ownership," showed that after such notice the liability passed from him. The 3rd sub-section of the same section did not contradict this view, for it applied to the new vassal, not, as the Lord Ordinary thought, to the original one. In any view, it was quite impossible that both these defenders and their assignees should be held "jointly and severally



liable" in specific performance. It was only the present occupiers of the ground who had the right to enter upon it and put up buildings.

The defenders the Eagle Company adopted the above arguments.

Argued for the pursuer—(1) When the obligation to rebuild once became prestable the vassal could not relieve himself by transferring it to another. It would have been impossible to get rid of it under the old law, and there was nothing in the Act of 1874 to enable a vassal to do so. Sub-section 3 of section 4 of that Act specially reserved the superior's right. Before 1874 the superior, in granting a charter, impliedly discharged obligations, such as casualties, &c., if he did not reserve them expressly, but it had been held that where, under the old law, he had such right of reservation, the implied entry authorised by the Act was subject to a similar reservation—*Lord Advocate v. Drummond Moray*, February 16, 1894, 21 R. 553. By the terms of the obligation to rebuild the original vassals were bound unconditionally, and there was no qualification to the effect that, after having once become exigible, it should cease to be binding on the transfer of the subjects to another party. In *Aiton v. Russel's Executors* the obligation was on the vassal and his heirs, and they were asked for feu-duty which had accrued after the vassal's death, while here the obligation became prestable before the transference. The case of *The Dundee Police Commissioners* was a very special one owing to the insertion of the words "jointly and severally," which had the effect of making the vassal liable for future feu-duty. The same principle was followed in *Burns v. Martin*, February 14, 1887, 14 R. (H. L.) 12. There was no authority really supporting the defenders' view, for in the case of *Macrae v. Mackenzie's Trustees*, quoted by them, the present point did not properly arise. (2) The succeeding vassals were equally liable in specific performance of this obligation—*Hyslop v. Shaw*, March 13, 1863, 1 Macph. 535; *Clarke v. City of Glasgow Assurance Company*, August 8, 1854, 1 Macq. App. 663. The performance of their obligation to rebuild along with the other obligations of the feu was a condition of the right which the succeeding vassals took up, and they were therefore liable to perform it jointly and severally with their authors.

At advising—

LORD KINNEAR—The question in this case is of general importance, and it is not ruled by any direct decision. But it depends on principles that are clear in themselves and well established. I think the Lord Ordinary has decided it rightly, and I agree so entirely with the reasoning by which his judgment is supported that I have little to add in explanation of my own opinion.

The first and most material question is, whether the Callander and Trossachs Com-

pany have been relieved by the sale of the land, and its conveyance to a purchaser, of their obligation to replace the buildings which were destroyed by fire in November 1893. The general rule on which they founded their argument in defence is not open to question. A conveyance of land held in feu operates in general as a transfer of all the contracted obligations which are attached to the enjoyment of the land by the terms of the feu-charter. This follows of necessity from the transferable character of the right. The superior cannot prevent his vassal from alienating the feu, subject always to the conditions of the grant, and it follows that he is bound to accept the disponee in place of the disponent, so as to substitute the obligations of the new vassal for those of the old, whose liability is thus extinguished *delegatione*. But the delegation takes effect only on those obligations which become prestable after the date of the transmission. The general rule is established by a series of decisions, and it is very clearly expounded in the opinion of the Lord President in *The Police Commissioners of Dundee v. Straton*. The doctrine there laid down appears to me to be, that, when a feu disponent the lands, the disponee, on the completion of his title, becomes, in place of the disponent, the debtor in the obligations imposed by the feu-contract upon the vassal; and further, that the disponent is, *ipso facto*, freed from such of these obligations as had not become prestable at the time of the transmission.

The original obligant is still liable for payment of the feu-duties, and performance of the obligations which became prestable before the transmission of the lands, and while he was still in the position of being vassal in the feu, but not for the feu-duties and obligations which were not prestable until after the transmission, and when he has ceased to be in that position.

There can be no question as to the application of the rule to obligations of annual recurrence, such as the payment of yearly feu-duty. There may be greater difficulty in applying it to obligations of perpetual endurance which are not so clearly referable to fixed periods of possession by which the respective interests and liabilities of successive owners may be distinguished. But I know of no authority, and none has been cited to us, for holding that an obligation which has once become prestable by a vassal in possession can be discharged without the superior's consent, even although a new vassal has subjected himself to the same liability by entering with the superior while the obligation is still unperformed. The question, therefore, must depend upon the true meaning and effect of the contract. Does it in terms impose a personal obligation on the vassal which may be enforced in the circumstances which have occurred irrespective of the continuance of his interest in the land? The superior stipulates that the vassal shall "be bound and obliged to erect a building or buildings of not less value than

fifteen thousand pounds sterling, and to uphold buildings of that value in good order and repair in all time coming, and to keep the same constantly insured with a good and established insurance company to the extent of not less than £15,000 against loss by fire, and in case the said buildings are, or any part thereof is destroyed, to rebuild the same or the part destroyed so as to maintain the total value of £15,000." Now it appears that the buildings were destroyed by fire while the Callander and Trossachs Company were still in possession as vassals in the feu. They had performed their obligation to insure, and obtained payment of the insurance money. The superior called upon them to rebuild, and as they delayed he brought an action to enforce their liability. There can be no question that so long as they continued to hold the lands they had no answer to the demand, and that if the action had been pursued to judgment the superior must have obtained decree. But before the record was made up they sold the lands, and they maintain that they have thereby absolved themselves from their liability. The question is, whether that is in accordance with the true intent and meaning of the contract. Now, the obligation to rebuild is in terms absolute. The vassals bind themselves to uphold the buildings, and if they are destroyed by fire to rebuild them. That is not qualified by any condition that the obligation shall cease to be enforceable if the vassal shall transfer the land to some-one else before the building is restored, and I can see no reason for implying a condition which would leave performance at the option of the vassal. Such an implication would appear to me inconsistent with the plain meaning of the contract. The direct obligation is to rebuild. But the vassal is also taken bound to insure to the extent of £15,000, and the covenant to insure, as the Lord Chancellor points out in *Clark v. The Glasgow Assurance Company*, is an additional benefit to the superior by securing to the feu the means of performing his obligations. The benefit would be nugatory if the feu were entitled to carry off the insurance money, and relieve himself of his liability by transferring the land to a pauper. And yet that, if the defender's argument were sound, would be the legal effect of the contract. I cannot think this a reasonable construction. It is said that the continuance of the original vassal's liability would be repugnant to the principle of delegation, by which the new vassal is substituted for the old in all the rights and liabilities of the feu-contract. But the delegation takes effect at and from the entry of the new vassal. There is no substitution of the new vassal for the old in obligations which attached to the latter before the transmission of the feu. I agree that the liability to rebuild is incumbent on the new vassal, but that is not because the undischarged liability of his author has been transmitted to him, but because the obligation is equally applicable to his own period of possession. I do not think it doubtful that the obligation to rebuild, and

thereafter to uphold and maintain, attaches to the owners of the land for the time being. But it is not inconsistent with the duty of the entered vassal to perform the conditions of the grant, that the former vassal should also continue liable for the obligations which had attached during his own possession. And accordingly, in *Clark v. The Glasgow Assurance Company*, the Lord Chancellor, while deciding that the vassal in possession was liable, seems to have said that the original vassal may still be liable also. The question did not arise for decision, and his Lordship's observations by the way can hardly be taken as the expression of a definite opinion. But still it is authority for saying that there is no manifest inconsistency in the supposition that the disponents' liability may subsist along with that of the disponent, and that is a sufficient answer to the argument from the effect of the conveyance. The defenders say that they are relieved of their obligation by the mere transfer of the land, and, if that be so, their liberation must have been effected either by the express terms of the contract when properly construed, or by the operation of some fixed rule of law; or lastly, as a necessary consequence of the transmission of the lands by reason of some manifest inconsistency or absurdity in the supposed co-existence of their personal liability with the rights and liabilities arising from the admission of the new vassal. I think they have failed to establish any one of these points. But it lies upon them to show how their liability has been determined, and if its continuance is not inconsistent with the contract or with the legal results of the transfer of the land, I think it must be held that it is still undischarged.

I agree with the Lord Ordinary that the implied entry under the Act of 1874 affords no additional support to the defenders' argument. The statute enables a disponent to complete his title without the intervention of the superior, and a proceeding to which the superior was no party cannot be construed as a discharge by him of claims which he might otherwise have been entitled to enforce.

For these reasons, and for the reasons assigned by the Lord Ordinary, I agree with his Lordship that all the defenders are liable jointly and severally. For where several persons are liable in an obligation *ad factum præstandum*, each is bound for the whole. The Callander Company argue that, so far as they are concerned, the obligation has been rendered impossible of performance by the sale and conveyance of the land, because no man can build upon another man's land. If that were so, the alleged impossibility would not excuse them from performance, because it arises from their own voluntary act, and might have been effectually guarded against by their taking their disponent bound to perform the obligation or to allow them to do so. But it might have presented an obstacle to a decree for specific implement if the vassal in possession had not himself been subject to the same liability. But he

does not complain of the interlocutor, and it is therefore conclusively determined against him that he is bound severally as well as jointly with the other defenders to erect the buildings required by the superior. For this reason, as well as that given by the Lord Ordinary, I think the objection taken to the form of the judgment is not well founded.

The Lord Ordinary has dismissed certain conclusions of the summons as unnecessary. This may probably turn out in the result to be quite right. But it seems to me to be premature to throw out alternative conclusions, which may possibly be made available to the pursuer if the defenders fail to build. I express no opinion as to the competency of these conclusions. But in the meantime I am disposed to think that that part of the interlocutor should be recalled so as not to foreclose any question which may be raised hereafter.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court pronounced this interlocutor—

“Recal said interlocutor (of 1st March 1895) in so far as it dismisses the fourth, fifth, and sixth conclusions of the summons: *Quoad ultra* adhere to the interlocutor with this variation, that the rebuilding is to be commenced within three months from the date of this interlocutor: Find the defenders the Callander and Trossachs Hydropathic Company and the Eagle Property Company, Limited, conjunctly and severally liable in additional expenses since the date of said interlocutor, . . . and decern” &c.

Counsel for the Pursuer—H. Johnston—J. Wilson. Agents—J. & J. Turnbull, W.S.

Counsel for the Defenders the Callander and Trossachs Company—Asher, Q.C.—W. Campbell. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders The Eagle Company—Deas. Agent—Wm. C. Dudgeon, W.S.

Thursday, July 18.

## SECOND DIVISION.

### CAMPBELLS' TRUSTEES v. HUDSON'S EXECUTOR.

*Promissory-Note—Sexennial Prescription—Proof by Writ—Resting-Owing—12 Geo. III. c. 72, secs. 37 and 39.*

In a question as to the liability of a debtor in a promissory-note which had prescribed, held (1) (*diss.* Lord Young) that it was not necessary for the creditor to prove that a debt had existed prior to and independent of the promissory-note; (2) (*diss.* Lord Young) that the promissory-note, being in the hands of the creditor, was available as an ad-

minicle of evidence to prove the existence of the debt; and (3) that receipts granted by the creditor for interest on the promissory-note paid by the debtor after the period of prescription had elapsed were constructively the writs of the debtor.

A promissory-note for £800 granted by three parties prescribed in 1881. One of the co-obligants died in 1893, and a Special Case was presented to have it determined whether the debt contained in the prescribed promissory-note was resting-owing by the deceased obligant's executor. The evidence placed before the Court consisted of (1) the promissory-note, which had remained in the creditor's possession; (2) a retired promissory-note, granted by the deceased obligant in September 1882 “for value received in interest,” which was admitted to have been granted for interest due on the promissory-note for £800; and (3) receipts by the creditor for interest on the promissory-note for £800, paid by the deceased obligant from 1883 down to the date of his death.

Held (*diss.* Lord Young) that the debt was proved to be resting-owing by the deceased's executor.

The Act 12 Geo. III. c. 72, section 37, provides “That no bill of exchange or inland bill or promissory-note . . . shall be of force or effectual to produce any diligence or action in that part of Great Britain called Scotland unless such diligence shall be raised and executed or action commenced thereon within the space of six years after the terms at which the sums in the said bills or notes became exigible.” Section 39 enacts—“Provided always . . . that it shall and may be lawful and competent at any time after the expiration of the said six years in either of the cases before mentioned, to prove the debts contained in the said bills and promissory-notes, and that the same are resting and owing, by the oaths or writs of the debtor.”

On 2nd June 1869, Mrs Gibb, George Gibb, her son, and John Hudson, her brother, jointly and severally, granted to John Darling's trustees a promissory-note for £800 “for value received.” The said sum of £800 was the total amount of sums received by Mrs Gibb at various times from John Darling or his trustees. In real security, and for the more sure payment of that sum, Mrs Gibb also executed a bond and disposition in security of certain heritable subjects in Duns in favour of Mr Darling's trustees, dated 7th, and recorded 8th June 1869.

On 2nd June 1875, no part of the £800 having been repaid, the promissory-note was renewed by said grantors the new note being in the following terms:—

“£800. “Dunse, 2nd June 1875.

“One day after date, we, jointly and severally, promise to pay to Messrs Robert Rae and James Wylie, the trustees of the deceased John Darling, formerly in Cockburn Mill, or their order, within the British Linen Company's Banking Office here, the