

Saturday, December 24.

FIRST DIVISION.

CHURCH OF SCOTLAND v. WATSON
AND OTHERS.

Superior and Vassal—Payment of Casualty—Duplicand of Feu-Duty on Entry of Singular Successor—Prohibition of Subinfeudation—Effect of Implied Entry—Last Vassal who had Paid Casualty still in Life—Conveyancing Scotland Act 1874 (37 and 38 Vict. c. 94), sec. 4, sub-sec. 3.

By a feu-charter, granted in 1825, it was provided that certain subjects were to be holden of and under the granters and their heirs and successors, immediate lawful superiors, the grantee and his heirs and assignees paying therefor yearly a certain sum in name of feu-duty, and a duplicand thereof on the entry of heirs and singular successors. Subinfeudation was prohibited, and it was provided that all purchasers and disponees should be obliged to enter with the superiors by charter of resignation, and to take in-fertment within six months from the date of the sale or disposition in their favour, and "to pay the composition before stipulated for such entry, and that although their author may be then in life, any law or practice to the contrary notwithstanding, and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees of the said subjects shall be held and considered still to remain with the former vassals, and the said area and tenements shall be subject and liable to his debts and deeds notwithstanding the dispositions or other conveyances granted by him." The provisions mentioned were to be engrossed in all future transmissions and investitures.

The superior having demanded payment of a duplicand of the feu-duty from a singular successor in the feu, who had bought it in 1903, and had recorded his disposition in the appropriate Register of Sasines, the latter, founding on the provisions of section 4, sub-section 3, of the Conveyancing Act 1874, maintained that no casualty was due in respect that the last vassal who had paid the casualty was still alive.

Held that the superior was entitled to payment of the casualty.

Superior and Vassal—Payment of Casualty—Duplicand of Feu-Duty on Entry of Singular Successors—Prohibition of Subinfeudation—Prohibition Fenced by an Irritancy—Effect of Implied Entry—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 4, sub-sec. 3.

In a feu-right and disposition granted in 1831 there was a prohibition against subinfeudation and other provisions substantially similar to those in the feu-charter above described, and the contingency of entry-money becoming payable

during the life of the last-entered vassal was expressly provided for. Although the original feu was bound to enter within three months of the date of the feu-right, no corresponding obligation was expressed with reference to his disponees. The prohibition against subinfeudation, however, was fortified by a clause of irritancy, by force of which the disponee might be compelled to enter or to forfeit his right.

The superior having demanded payment of a duplicand of the feu-duty from a singular successor in the feu, who held under a disposition dated and recorded in the Register of Sasines in 1895, the latter, founding on section 4, sub-section 3, of the Conveyancing Act 1874, maintained that no casualty was due in respect that the last vassal who had paid a casualty was still in life.

Held that the existence of the clause of irritancy brought the case directly within the authority of *Dick Lauder v. Thornton*, January 23, 1880, 17 R. 230, 27 S.L.R. 455, and that the superior was entitled to payment of the casualty.

Process—Special Case—Competency—Two Parties to a Special Case each Made a Party to Statements Affecting the Other and not Himself.

Opinion that a special case brought to determine questions between a superior and two vassals holding distinct estates, in which each of the two vassals was made a party to statements of facts affecting the other, with which he himself had no concern, and his concurrence in which was nevertheless made the basis of a judgment *inter alios*, was irregular.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 4, sub-sec. 3, enacts—"Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu right for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-right 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; but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter, or to pay such casualty irrespective of such entry."

This was a special case, to which the parties were—The Church of Scotland, and the General Assembly thereof acting through its Committee for the endorsement of chapels-of-ease, with the consent and concurrence of Sir John Cheyne, K.C., and others as trustees, *first parties*; Alexander Watson,

baker, and Mrs Susan Bruce or Watson, his wife, 2 West Claremont Street, Edinburgh, second parties; and John Charles Grieve, teacher of music, 4 Middleby Street, Edinburgh, third party.

The first parties were superiors of half of the first flat of a tenement at No. 1 West Claremont Street, Edinburgh, which belonged to the second parties; and also of heritable subjects at 4 Middleby Street, which belonged to the third party.

The subjects at 1 West Claremont Street, for which the second parties paid an annual feu-duty of £3, 10s., were held by them under and in terms of a feu-charter granted by Charles Ross, advocate, and others, as trustees, in favour of James Sutherland, builder, Edinburgh, dated 23rd July, 31st August, and 11th November 1825. The superior's interest therein was duly vested in the first parties.

The feu-charter contained the following clauses:—"To be holden and to hold All and whole the said lot or area of ground and tenements to be erected thereon conform to the said plan and elevation, and not otherwise, of and under us the said trust disponees and our heirs and successors, immediate lawful superiors thereof, in feu-farm, fee, and heritage forever: . . . Paying therefor yearly the said James Sutherland and his foresaids to us and our foresaids the sum of £90, 4s. sterling in name of feu-duty, at the terms of Whitsunday and Martinmas by equal moieties, commencing payment of the first moiety thereof at the term of Martinmas 1827, and the next at the term of Whitsunday 1828, for the year from Whitsunday 1827 to Whitsunday 1828, and so forth half-yearly at the said terms in all time coming, with the legal interest of the said feu-duty from the time the same falls due during the not-payment: And doubling the said feu-duty at the entry of each heir and singular successor to the premises: And providing always, as it is hereby provided and declared, that it shall not be competent to nor in the power of the said James Sutherland and his foresaids to sub-feu, sell, or dispose of all or any part of the foresaid area of ground or tenements to be erected thereon, to be held of them or of any other interjected superior, but to be held allanarily of and under us the said trust disponees and our foresaids as superiors in all time coming, without prejudice nevertheless to the said James Sutherland or his foresaids to grant securities over the said subjects, or to exercise any other act of ownership thereupon which may not be inconsistent with the manner of holding hereby prescribed: . . . And it is hereby also provided and declared that all purchasers from or disponees of the vassals in the area before disposed or any part thereof, after the said James Sutherland and his heir taking infettment as aforesaid, shall be obliged to enter with us or our foresaids as superiors by charter of resignation, and be infett therein within six months after the date of the sale or dispositions in their favour, and to pay the composition before stipulated for such entry, and that although their

author may be then in life, any law or practice to the contrary notwithstanding, and in case of their, failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees of the said subjects shall be held and considered still to remain with the former vassals, and the said area and tenements shall be subject and liable to his debts and deeds notwithstanding the dispositions or other conveyances granted by him. . . . Which whole provisions, conditions, declarations, and conditions contained in these presents are hereby appointed to be engrossed in the instrument or the instruments of sasine to follow hereon, and in all the future transmissions and investitures of the said area or tenements to be erected thereon or any part thereof, and if the same shall not be inserted therein, such instruments of sasine and transmission shall be *ipso facto* void and null as if the said writing had never been made or granted." . . . The parties were agreed that the proportion of the said feu-duty of £90, 4s. and relative duplicand affecting the subjects No. 1 West Claremont Street was £3, 10s.

The vassal in the subjects at 1 West Claremont Street who last paid a duplicand was Robert Dods, who paid a duplicand of £3, 10s. on 27th February 1833.

The second parties acquired right to the said subjects by the following writs, namely, (1) disposition by Robert Dods in favour of Alexander Watson, dated 16th April, and recorded in the General Register of Sasines, 15th May 1903; and (2) disposition by Alexander Watson in favour of the second parties, dated 31st July, and recorded in the General Register of Sasines 8th August 1903.

The said Robert Dods was still alive.

The subjects at 4 Middleby Street, for which the third party paid an annual feu-duty of £8, 15s. 6d., were held by him under and in terms of a feu-right and disposition granted by Robert Bell, advocate, commissioner for George Bell, surgeon in Edinburgh, in favour of William Bell, W.S., dated 21st May 1831. The superior's interest in the feu-right and disposition was duly vested in the first parties.

The feu-right and disposition contained the following clauses:—"In which several subjects hereby disposed, under the declarations and reservations above and after mentioned, I, as commissioner foresaid, with consent foresaid, bind and oblige the said George Bell and his heirs and successors to infett and seise the said William Bell and his foresaids, upon their own charges and expenses, to be holden of and under the said George Bell and his foresaids, immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever for the yearly payment of the sum of £37, 6s. 6d. of feu-duty, which the said William Bell shall have it in his power to allocate upon the said five dwelling-houses and lots of ground above disposed . . . and which feu-duty for each of the said lots shall commence to run from the term of Whitsunday or Martinmas after the house built thereon shall be let or sold, and shall be payable

thereafter at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said feu-duty at the first term of Whitsunday or Martinmas subsequent to said period for the half-year preceding, and the next term's payment at the first term of Martinmas or Whitsunday thereafter, and so forth half-yearly and termly in all time coming, and interest and penalty as after specified, and paying two years' feu-duty for the entry of each heir and singular successor in name of entry-money (or one year's feu-duty in the event of the vassal last entered with the superior being then alive), over and above the duty for the year wherein the entry is made, and interest of the said sum of feu-duty from and after the date of its becoming due and until payment, and a fifth part more in case of not due and punctual payment thereof. . . . And in regard the entry of heirs and singular successors is taxed as above, the said William Bell and his foresaids shall be bound and obliged to infest himself on these presents within three months of the date hereof. . . . Declaring also that the said William Bell and his foresaids shall not . . . be entitled to sell, let, or dispose of the said subjects . . . to be held of themselves or of any interjected superior, but only of and under the said George Bell and his foresaids in time coming, without prejudice, however, to their granting securities over the same, to be held of themselves, or exercising any other act of ownership which shall not be inconsistent with the manner of holding hereby prescribed. . . . Declaring always, as it is hereby expressly provided and declared, that if the said William Bell or his foresaids shall act contrary to any of the conditions above expressed, not only shall this feu-right and disposition, with all that may have followed hereon, become void and null, but the person or persons so contravening shall amit and forfeit all right and interest in the foresaid subjects, which shall revert to the said George Bell and his foresaids in like manner as if this feu-right had never been granted; all of which conditions with this irritant and resolute clause are hereby appointed to be inserted in the instrument of sasine to follow hereon, and in all the future renovations and investitures of the said subjects in favour of heirs and disponees." The parties were agreed that the proportion of the said feu-duty of £37, 6s. 6d. affecting the subjects 4 Middleby Street was £8, 15s. 6d., and that if any composition was at present due it amounted to £8, 15s. 6d.

The last vassal in the subjects at 4 Middleby Street who paid a casualty was James Dallas, who paid a casualty of £17, 11s. on 13th March 1885.

The third party acquired right to the said subject by the following writs—(1) Factory and commission by the said James Dallas in favour of Mrs Jane Rose or Dallas, his mother, dated 30th September 1884, and recorded in the Books of Council and Session [6th] May, 1885; (2) disposition by the said Mrs Jane Rose or Dallas in favour of William Richardson, dated 9th, and re-

corded in the General Register of Sasines 13th May 1885; and (3) disposition by William Richardson in favour of the third party, dated 14th and recorded in the General Register of Sasines 28th May 1895.

The said James Dallas was still alive.

In these circumstances the first parties maintained that the second and third parties were due compositions of £3, 10s. and £3, 15s. 6d. respectively, in respect of the change of ownership and their entry to the respective subjects. The second and third parties maintained that no casualty was at present due, in respect that in each case the vassal who last paid duplicand was still in life.

The questions of law were—“(1) Are the first parties, through the said Sir John Cheyne and others, as trustees foresaid, entitled now to recover from the second parties a composition of £3, 10s. although the said Robert Dods remains in life? (2) Are the first parties, through the said James Alexander Campbell and others, as trustees foresaid, entitled now to recover from the third party a composition of £8, 15s. 6d. although the said James Dallas remains in life?”

Argued for the first parties—(1) *Re* second parties' charter—The charter contained a distinct prohibition against subinfeudation, and although there was not an irritancy distinctly applicable to the prohibition there was one in reference to failure to insert the conditions in all future sasines and transmissions of the subjects—Bell's Com. vol. 1, p. 28. The present case was within the principle of *Dick Lauder v. Thornton*, January 23, 1890, 17 R. 320, 27 S.L.R. 455, and differed from *Hamilton v. Chassels*, January 30, 1902, 4 F. 494, 39 S.L.R. 337. It also fell within the same category as the cases of *Stewart v. Gibson's Trustee*, December 10, 1880, 8 R. 270, 18 S.L.R. 140, and *Morrison's Trustees v. Webster*, May 16, 1878, 5 R. 800, 15 S.L.R. 559. The payment sought was really part of the *reddendo*. It was expressly stipulated for and was due though the fee was full. The cases of *Stewart v. Gibson's Trustees* and *Morrison's Trustees v. Webster* settled that a stipulation for a taxed composition was a *debitum fundi*, which prior to the Act of 1874 could have been recovered by a pointing of the ground. Section 4, sub-sec. 3, of the 1874 Act did not affect the present case, for there was a special provision for payment which would have been enforceable prior to 1874, even though the fee was full. (2) *Re* third party's charter—There was an express prohibition against subinfeudation, and also an express irritancy in the event of a contravention of any of the provisions, so that this case was expressly ruled by the decision in *Dick Lauder v. Thornton*, *supra*. There was also a provision for payment irrespective of the implied entry. The vassal had a feudalised title, and so could not maintain that he held on other conditions than those of his charter.

Argued for second and third parties—(1) *Re* second parties' charter—The superiors were not entitled to recover the casualty claimed, as no means were provided for enforcing the irritancy. Entry on the lands

was of no avail as the fee was full. The case fell within the rule laid down in *Hamilton v. Chassels*, *supra*. By section 4, sub-sec. 3, of the Conveyancing Act, a superior could not recover any earlier than he could prior to 1874. Under the old law a superior had no remedy against subinfeudation so long as the disponer was alive—the disponer was still the vassal. A superior could not prior to 1874 have demanded payment till the vassal's death, and he had no means of enforcing payment till then. The Act 1874 did not make a casualty exigible any sooner than it would have been prior to the Act—*Governors of Heriot's Trust v. Drumsheugh Baths Company*, June 13, 1890, 17 R. 937, 27 S.L.R. 751. (2) *Re* third party's charter—There had not been any contravention of the prohibition against subinfeudation. The present feuar was infeft *a me*, and so no sub-feu had been granted—*Colquhoun v. Walker*, May 17, 1867, 5 Macph. 773, 4 S.L.R. 15. The obligation in the *reddendo* was to pay on entry, *i.e.*, on the date of the vassal's death.

At advising—

LORD KINNEAR—This special case is brought for the determination of questions between the first parties as superiors and two different vassals holding separate and distinct estates, and in this respect it is in my opinion irregular in point of form. For by this method of combining two distinct litigations in one special case, each of the vassals is made a party to statements of fact affecting the other, with which he himself has no concern, and his concurrence in which is nevertheless made the basis of a judgment *inter alios*. The two cases may, however, be separated without difficulty for the purpose of consideration, and as each party is undoubtedly bound by the statements affecting his own case, I think there is no fatal objection to the competency of the proceeding, although it is proper to advert to the irregularity lest it should be supposed to have been overlooked or to be sanctioned by the Court.

It is necessary, however, to consider the two cases separately. To begin with the first, it is stated that the first parties are the superiors of certain subjects in West Claremont Street, and the second parties are the vassals infeft in these subjects. The vassals' right is constituted by a feu-charter granted in 1825, and they hold by virtue of a disposition granted by a singular successor of the original vassal, dated and recorded in the Register of Sasines in 1903. By the terms of this charter the lands are to be holden of and under the granters and their heirs and successors, immediate lawful superiors thereof, in feu farm, the grantee and his heirs and assignees "paying therefor yearly" a certain sum of money in name of feu-duty, with legal interest "from the term the same falls due during the not-payment, and doubling the said feu-duty at the entry of each heir and singular successor to the premises," and providing that it shall not be competent nor in the power of the said grantee and his foresaids "to subfeu, sell, or dispose of

all or any part" of the subjects to be held of them "or of any other interjected superiors, but be held allanor of and under" the granters and their foresaids. It is also provided that all purchasers from and disponees of the vassals shall be obliged to enter with the superiors "by charter of resignation, and be infeft therein within six months after the date of the sale or disposition in their favour, and to pay the composition before stipulated for such entry, and that although their author may be then in life, any law or practice to the contrary notwithstanding, and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees shall be held and considered still to remain with the former vassal, and the said area and tenements shall be subject and liable to his debts and deeds notwithstanding the dispositions and other conveyances granted by him." There is a corresponding provision providing for the case of the grantee assigning his right before infeftment. But as no question can now arise as to that, it is unnecessary to quote it.

The question depends upon the provisions I have quoted which were to be engrossed in all future transmissions and investitures, and their meaning and effect is perfectly clear and distinct. Subinfeudation is absolutely prohibited, and the grantee and his heirs and successors have no power to dispose the subjects to be holden otherwise than from the disponer and his heirs and successors of and under their immediate lawful superiors in the same manner as the disponer held. It follows that the only way in which any disponee or singular successor can obtain a real right in the subjects without violating the conditions of the charter is by taking infeftment immediately of and under the superiors, or in other words by entering with the superior and paying the fine exigible on such entry. Under this charter, then, the second parties now hold the subjects by virtue of (1) a disposition by Robert Dods in favour of Alexander Watson, dated 16th April and recorded in the Register of Sasines on 15th May 1903, and (2) a disposition by Alexander Watson in their favour recorded in August of the same year, and it is stated that the last singular successor who paid a duplicand on entry was Robert Dods, who is still alive. The two dispositions are not before us, but we must assume, because it was assumed in argument, as it is in the special case, that they are regular and correct in point of form, and effectual to carry the lands subject to the conditions of the original charter; and that by recording them in the Register of Sasines the respective disponees were duly infeft. It is part of the stated case, indeed, on which judgment is invited that the subjects are held by the second parties "under and in terms of the feu charter."

In these circumstances the question which has arisen for decision between the parties is, whether the superiors are entitled to receive from the second parties the dupli-

cand payable under the charter on the entry of singular successors, the parties being agreed as to the amount of such duplicand if it is payable at all.

At first sight it would seem to me hopeless for the second parties to deny their liability in the face of their admission that they are singular successors, that they are entered with the superior, and that they hold in terms of the charter. The terms of the charter are as plain as words can make them that the vassals are to pay a certain annual feu-duty and to pay double that sum on the entry of singular successors. It is beyond all question that they are liable for the feu-duty, because they have taken infestment in the lands in terms of the charter, and by the same reasoning they must be liable for the duplicand also. The ground of liability is that no one can take benefit under a contract or grant and at the same time refuse to perform the stipulated conditions on which the benefit is given.

But then it is said that the condition on which the duplicand is payable has not emerged, because the second parties have not come forward to demand an entry according to the law in force when the charter was granted, but are only entered by implication of the statute of 1874. The implied entry must be subject to all the qualifications which the statute has created, and one of those qualifications is that an implied entry "shall not entitle any superior to demand a casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering." Now, it is said that Robert Dods, the last vassal who paid a duplicand, is still in life, and that so long as he lives the superior could not under the old law have brought a declarator of non-entry because the fee was full and therefore could not have demanded a casualty. But in the actual state of the titles the life of Robert Dods is altogether irrelevant to the question. The superior has nothing whatever to do with him and is not concerned to inquire whether he is still in life or not. For Robert Dods is no longer the vassal in the feu. He is absolutely and entirely divested of all right and title in the lands, and the second parties are invested in his room and place. It is true that the fee is full, but only in consequence of the infestment of the second parties as vassals. The infestment of the former vassal is evacuated by the infestment of his disponees, and there is no other infestment in existence establishing the relation of superior and vassal except that which created that relation between the first and second parties. I agree that the superiors are not in a position to raise a declarator of non-entry or the statutory action that comes in its place, because the vassals are infest in the feu, but for the very same reason the vassals are bound to pay the duties stipulated by the feu-charter. It must be kept in view that the constitution of a feu is matter of contract whether the conditions are embodied in a mutual deed or in a uni-

lateral charter, and by the law of contract the vassals cannot be allowed to take the land and refuse to perform the conditions on which it is given. It need hardly be said that the law of tenure coincides in this respect with the law of contract.

The question, however, is whether the right to immediate payment of a duplicand is displaced by the third sub-section of the fourth section of the statute. It appeared to me that some confusion was introduced into the argument by an indiscriminate application of the language of this section to very different forms of title. If the word "infestment" were to be construed in its ordinary technical sense, it would be difficult to apply any part of the enactment to the case of a conveyance with an *a me* holding. For the main enactment is that every proprietor who is at the commencement of the Act, or thereafter shall be, duly infest, shall be deemed to be entered as at the date of such infestment; and in the case of an *a me* holding infestment and entry are only two different words for one and the same thing. In such a case therefore the statute would mean that every proprietor duly infest shall be deemed to be duly infest, which would be futile. There can, I think, be no question that the form of title primarily contemplated by the fourth section was the *a me vel de me* holding. The purpose was to simplify the completion of such a title by entering a disponee at once without the intervention of the superior, and at the same time to leave the pecuniary rights of parties undisturbed, by saving on the one hand the superior's right to a casualty on entry, and on the other hand allowing the disponees of an entered vassal to postpone payment in the same way as if they had taken infestment for a time under the disposer. The statute therefore postulates the infestment of the disponee as the condition on which the new regulations for entry are to take effect, and it assumes that the disponee may at will defeat the estate of the superior under whom he is infest. This is directly applicable to the case of a proprietor infest by virtue of a conveyance with a double manner of holding and an indefinite precept. But nobody else can be infest in lands and yet be in a position to extinguish the estate of his superior and come to hold directly of an over-superior. If infestment therefore is to receive its ordinary significance the enactment has no meaning with reference to an *a me* holding. A proprietor so infest is entered already, and no further entry can be either necessary or possible.

But the difficulty seems to be removed, so far as regards the main enactment, by the special meaning assigned to the word by the interpretation clause. For the purposes of the Act, as I read the clause, "infestment" is made to "include every title to an estate requiring and admitting of infestment which is duly recorded in the Register of Sasines," irrespective altogether of the condition by which the corresponding definition in the Titles Act of 1868 is qualified—that such registration shall have constituted a real right to lands. If before 1874, therefore, a conveyance were recorded

which either expressed or, in terms of the Act of 1868, implied that the manner of holding should be *a me*, that would not by the law then in force have been complete infeftment, but only a step towards infeftment which might be perfected by obtaining a writ of confirmation from the superior. But then by the 1874 Act charters and writs of confirmation and other writs by progress are abolished, registration of the conveyance is called infeftment, and the proprietor so described as infeft is entered with the superior. It seems to follow that the only way in which such a title can now be completed is by recording the conveyance in the Register of Sasines, whereupon the disponee will be duly infeft, for entry in the case supposed is just infeftment and nothing more.

But if the positive enactment of section 4 is thus satisfied, the language of the negative proviso at the end of the section is still inapposite, because it assumes that a proprietor has been duly infeft under the prior law, but without as yet having entered with the superior, and on that assumption prescribes the conditions on which he is to be entered by force of the statute itself. In applying the proviso therefore to a case where infeftment and entry are one and the same thing, we must be careful to see that we do not force language which is certainly inexact so far as to go beyond the true intent and meaning of the statute, to the prejudice of either superior or vassal. The true purpose of the enactment is not doubtful. It is intended to secure that a superior with whom a vassal has been entered by implication shall not get payment sooner than he would have done under the prior law. But that is a risk to which a disponee with an *a me* holding is in no way exposed. If he takes infeftment by registration of his conveyance under the new law he must pay a casualty, because that is a condition of the title he has chosen to complete. If he had applied for infeftment by writ of confirmation under the old law, he would have been required to pay a casualty as a condition of granting the writ for which he asked. But it is said that under the old law the superior could not have required the vassal to enter so soon because a former vassal is still in life. Now, it seems to me to be obvious that in order to ascertain the time which is intended by the phrase "not sooner than he could have required the vassal to enter," the condition must be related to some hypothetical position of the vassal's right with reference to which the statutory question is to be proposed, and I think the position which the statute itself postulates is that the vassal has a real right. In reading the negative proviso which refers us to the prior law, we must discard the new artificial meaning which the statute gives to "infeftment," and keep in view that by that law the real right which the statute now attaches to the registration of a conveyance could only be obtained by the intervention of the superior. But apart from that consideration the only hypothesis on which it is reasonable to inquire whether a casualty would have been exigible is that the disponee desires to

obtain a substantial right to the land which he has purchased. What is contemplated by the enactment, as I understand it, is the completion of a purchaser's title in accordance with the recognised practice and in the ordinary course of business. And this is in accordance with the view taken by the Court in the cases which have been decided with reference to entry on an alternative holding. In that view the question to be determined is at what time could the superior have required a disponee to enter who had obtained a conveyance from a vassal infeft and desired to obtain a real right in the subjects conveyed. And in answering that question the first thing to be observed is that by "required" the statute cannot mean "compelled by action." For the superior could never at any time in the history of the law have brought an action to have a man ordained to enter as vassal. All that he could do was to resume possession of the land and hold it for his own use, to the exclusion of any one alleging a proprietary right who did not choose to come forward and enter on the terms fixed by the charter or by the general law. There is no known practice therefore to which the word could refer, if it meant "compel by an action at law." But it is a word of ordinary English, and it does not mean compel. It means demand as of right. And what the superior could have demanded as of right in the case I am supposing does not seem to me to be open to doubt. I think it must be conceded that he could have made no demand at all so long as a purchaser did nothing to obtain a substantial right to the lands. He had nothing to do with the personal contracts of his vassal, and had no right to see them. But it is not to be supposed that the purchaser would leave the land he had bought open to the debts and deeds of the vendor, and would take no step to make good his own right to it. The reasonable assumption is that he would desire to obtain a real right which would protect him against fraud and against the diligence of the vendor's creditors; and what the superior required for that purpose is fixed and determined by the terms of the charter. In the first place, it is required by the charter that the purchaser shall obtain a conveyance which will enable him to take infeftment directly of and under the superior, and will not enable him to infeft himself under the disponent, either by a permanent or by a temporary title; in the second place, that he shall carry out his right by taking infeftment of the superior within six months of the purchase, and shall pay the stipulated entry-money whether the last-entered vassal is still in life or not; and lastly, that if he fails to perform these conditions his title shall be treated by the superior as if it were non-existent, and his author shall be considered as the undivested owner of the land, which shall still be subject, notwithstanding the sale, to his debts and deeds. These are the conditions under which alone a disponee could make his title effectual under the old law as well as under the new law; and it is "under and in terms of" a title expressing

these conditions that the second parties assert that they now hold the lands of the superior. It cannot be assumed that if the Act of 1874 had not been passed they would not have completed a title which subjected them to such conditions, because no other course was open to them if they were to have any valid title. The disponee of a conveyance to be holden *a me vel de me* had alternative titles; and when the Legislature interposed to choose for him the alternative which accelerated the superior's claim for a casualty, it was thought reasonable to provide that nevertheless he should not be called upon to pay sooner than if he had been left to take the alternative which in ordinary circumstances a disponee in his position would choose for himself. But a disponee with a conveyance in terms of the present charter had no such alternative. His only option was to choose between making up a valid title under the superior and running the risk of losing his land because he had no title whatever. And exactly the same option was open to the second parties under the Act of 1874. It is not open to them to say that they would not have exercised that option in the same way before 1874, because the considerations to determine their option were exactly the same at the earlier as they are now at the later date. There is no change in the title or in the law operating upon the title. The only change is in the form by which the title is completed. I see no reason why the substitution of a new method for completing the feudal relation without altering its legal effect, or the conditions upon which the mutual rights and liabilities come into force, should entitle the vassal to possess and occupy the land without performing the conditions of the investiture by which he holds, and of the contract which he has chosen to make. The superior demands nothing as a consequence of the infeftment which he could not have insisted upon as a condition-precedent to his giving infeftment if the methods of the prior law had been still in operation. It appears to me to be irrelevant that the last vassal is still in life, because by the charter under and in terms of which the second parties aver that they hold, a casualty would have become exigible, under the prior law, six months after the purchase, just as if the lands had fallen into non-entry by the death of the last vassal.

But if it were necessary, which in my opinion it is not, to establish that the claim could have been enforced by action, I am disposed to think that under the prior law superiors were not so helpless as the vassal's argument supposes. A superior has always been entitled by virtue of his own right in the lands to resume the fief and exclude any occupier who could not show that he was in possession mediately or immediately by virtue of a grant from the superior himself. This is, as Mr Erskine puts it, "a fixed right of superiority," and for making it effectual the superior may bring an action for having the deeds which are alleged to constitute a right of property judicially exhibited, that their validity and import may be ascertained. The most

ancient form of this action, which was called the action for showing the holding, hath now, says Mr Erskine, "been long laid aside." But he adds that its purposes are fully answered by the more modern action of reduction improbatum, by which the superior, setting out his own right to the land, compelled all persons claiming to have a good right under him to produce their titles on pain of nullity. If a title were produced, its conditions must be performed. If none were produced the superior had decree of reduction *contra non producta*.

It may be more material, however, to inquire whether the first parties have a good action for payment, notwithstanding or by virtue of the Act of 1874; and as to that I see no difficulty. It is true that they cannot make use of the statutory action provided by sub-section 4, because it is available only when the lands would have been in non-entry but for the Act, and the second parties are entered because they have taken infeftment. But just because they are infeft the first parties have a good action to enforce payment of the duplicand, which is part of the reddendo, in terms of the feu-charter. This was decided in *Dick Lauder v. Thornton*. The superior in that case brought an action with alternative conclusions, the first for decree in terms of the statutory action in room of the declarator of non-entry, and the second for payment of a certain sum in terms of the feu right. The first was dismissed by the Lord Ordinary, for the reason I have given, but decree for payment was pronounced under the second. I do not find that the judges in the Inner House make any observations upon this point, but they adhered without qualification to the Lord Ordinary's interlocutor; and in the later case of *Heriot's Hospital v. The Drumsheugh Baths* the Lord President said that where a superior has contracted in the feu charter or feu contract that a casualty shall be due on change of ownership, that is matter of contract by which the parties are bound, and to give effect to it does not require recourse to sub-section 4. "Of this," says his Lordship, "we had recently an instructive example in the case of *Dick Lauder*, where the action was a common law action to enforce such a contract, and where a casualty of the nature of composition was held to be due, though no legal investiture was required and the fee was full." I am therefore of opinion that the first parties would have had a perfectly good action at common law to enforce payment of the duplicand due to them as matter of contract if they had not preferred to try the question by means of a special case.

It was maintained that *Dick Lauder v. Thornton* is in favour of the second parties, because the superior's claim could not have been supported but for a clause of irritancy in the feu-contract. I do not think that case creates any difficulty. It is true that the ground of judgment in the Inner House was that if the Conveyancing Act of 1874 had not been passed the superior might have brought a declarator of irritancy, and so compelled the vassal to enter or forfeit

his right, and that was quite enough for the decision of the case, because it showed that the superior was not attempting to get payment of a casualty sooner than he could have done so by the prior law. But it does not follow that there is no other way by which that can be shown; and, as I have already pointed out, the importance which the Lord President attached in that case to the element of contract is brought out very clearly in the case of *Heriot's Hospital*.

The case of *Hamilton v. Chassels* is not in point, because there was no prohibition of subinfeudation; and that is the ground of judgment explained in the opinion of Lord Adam.

The second parties relied most upon *Colquhoun v. Walker*, maintaining on the authority of that decision that a purchaser from a vassal who is prohibited from subfeuing or disposing the lands to be held of himself, is nevertheless for the purpose of entering by implication of the statute exactly in the same position as if his author had been free to subfeu. In that case the feuar sold his land, and notwithstanding the prohibition gave his purchaser a disposition in the usual form of a conveyance on sale, containing an obligation to infeft by two manners of holding, a procuratory of resignation and a precept of sasine. It was held in an action at the superior's instance, that he was not entitled to reduce both the original feu contract and the disposition, but without deciding whether he might have reduced the disposition alone. So far as this decision goes, I do not see that the vassal's argument derives any support from it. But the learned Judges held that inasmuch as the conveyance was not intended to create a permanent base right, it was not a contravention; and this is said to be in accordance with the doctrine stated by Mr Bell, that when subinfeudation is prohibited a sub-feu right will be effectual while the right of the vassal stands, although it will fail when it becomes necessary to come to the superior for an entry, which he may refuse and destroy the right by a declarator of non-entry. The Lord President (M'Neill) goes further, and says that there was no objection to the precept of sasine, because there could be "no question that the disponee could have gone to the superior and compelled him to grant a charter of confirmation." This was not necessary for the judgment. But it is the dictum of a very high authority; and its inconsistency with Mr Bell's doctrine may probably be explained by the passing of the Lands Transference Act of 1847 between the date of Mr Bell's work and the date of the decision. Assuming it, however, to be sound law in reference to the case then in hand, I think the present case clearly distinguishable. The charter now before us, as I read it, contains an absolute prohibition not only of subinfeudation but also of alternative holdings, and for making the latter stipulation more effectual the disponee is required to enter by resignation within six months, and to pay a duplicand although the disponent may be still in life.

It may be very probable that after the Lands Transference Act the superior might notwithstanding the stipulation for entry by resignation have been required to confirm an infeftment on a precept to be held *a me* only, because that would, in the words of the statute, have been a more convenient form of entry without being of prejudice to the interests of the superior. But the statute did not compel him to confirm if he could shew cause for refusing to do so; and it would in my opinion have been sufficient cause if he could shew that the infeftment was in contravention of the terms of the investiture, and that its recognition would be in the highest degree prejudicial to his interests, inasmuch as it would enable disponees to postpone or evade the payments for which the charter stipulated. Moreover, the prohibition must be repeated in every instrument of sasine; and a superior could not on any sound principle of law have been required to confirm an infeftment which bore in terms to have been taken in contravention of the very warrants on which it had proceeded. It appears to me, therefore, that the first parties and their authors could not have been compelled to confirm an infeftment on an indefinite precept; and it would have been nothing to the purpose to say that the conveyance was not intended to create a permanent base right, because the object of the prohibiting clause was to prevent the creation of temporary rights, and so to compel purchasers and disponees to come forward and pay the stipulated casualty on entry within a certain limited time. I do not know, however, that it is necessary to decide this question, because it is not stated that the second parties or their authors ever held upon an alternative title. The dispositions mentioned in the statement are all subsequent to 1874, and if the manner of holding were expressed, which would be superfluous, it may be assumed to have been *a me*, because there can be no holding otherwise since the date of the statute. With regard to previous conveyances by the original vassal and his disponees it must be assumed, since nothing is stated to the contrary in the special case, that they were in accordance with the charter, and therefore must have expressed, or by virtue of the Titles Acts implied, that the holding was directly of and under the superior. But it is said that the question is not what was actually done but what might have been done if the Act of 1874 had not intervened; and that the case of *Colquhoun* shows that a purchaser might have obtained a conveyance with an indefinite precept and taken infeftment of the disponent. It is possible that this might have been done if the disponent had agreed to it, and the disponee had chosen the risk of losing his land by the superior's refusal to enter him when the time came. But I do not think the statute requires us to speculate as to any possible devices for evading the conditions of the feu right, or as to the chances of their success or failure if they were followed. We are to consider what would have been required to carry

out the rights of parties in the ordinary course of conveyancing; and for the reasons already given I am of opinion that a disponee before 1874 must have completed his title by infestment of and under the superior. I am therefore of opinion that the first question must be answered in the affirmative.

The question between the first and the third parties depends upon the same principles. I do not think it necessary to examine the title of the third parties in detail, because the point of distinction between it and that which we have just considered may be stated in a sentence. The prohibition against subfeuing is substantially the same, and the contingency of entry-money becoming payable during the life of the last-entered vassal is expressly provided for, but although the original feuar is bound to enter within three months of the date of the feu right, there is no corresponding condition expressed with reference to his disponees; but, on the other hand, the prohibition is fortified by a clause of irritancy by force of which the disponee may be compelled to enter or to forfeit his right. The clause of irritancy brings this case directly within the authority of *Dick Lauder v. Thornton*, and that is enough for the decision. I am therefore of opinion that the second question also must be answered in the affirmative.

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

The Court answered both questions in the affirmative.

Counsel for the First Parties—Wilson, K.C.—Chree. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Second and Third Parties—Campbell, K.C.—D. Anderson. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, January 10, 1905.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

H. M. ADVOCATE v. ALEXANDER'S
TRUSTEES.

Revenue—Estate-Duty—Property Passing on Death—Deductions Allowable as Debts—Marriage Contract Provisions—Debt Incurred “for Full Consideration in Money or Money’s Worth Wholly for the Deceased’s Own Use and Benefit”—Counter-Obligations in Marriage Contract—Aliment of Widow from Date of Death of Husband till First Term thereafter—Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 7.

By antenuptial contract of marriage A bound himself, his heirs and successors, to pay to the marriage contract trustees during the lifetime of his intended wife in the event of her sur-

viving him—(1) a free yearly annuity of £1500, and (2) a sum of £2000 for her behoof in lieu of household furniture, payable at the first term after his death. He also bound himself to aliment her from the day of his death till the first term of Whitsunday or Martinmas thereafter, suitably to his station in life. On her part A’s intended wife conveyed to the trustees a sum of £11,000, which she had in her own right, and also her contingent interest in a further sum of £6000, and that for the following purposes, viz.—Payment of the income to the spouses and the survivor, division of the capital amongst the children, and failing children disposal as she might direct. She also accepted the provisions made by her husband in her favour as in full satisfaction of her legal rights in the event of her survivance.

In his son’s marriage contract A bound himself, his heirs and executors, to pay to the trustees therein mentioned a sum of £30,000 as a provision for the intended spouses and the children of their marriage, declaring, however, that the trustees should not be entitled during his lifetime to demand payment of that sum so long as he regularly paid £1000 per annum in full. On the other part corresponding provisions were made by the son’s intended wife and her father in favour of the spouses and the children of the marriage.

Held on the death of A (1) that neither the provisions made by him in his own marriage contract nor those undertaken by him in his son’s marriage contract were debts incurred “for full consideration in money or money’s worth wholly for the deceased’s own use and benefit” within the meaning of section 7 (1) of the Finance Act 1894, and consequently that, in determining the value of his estate for the purpose of estate-duty, no deduction fell to be made in respect of these provisions; and (2) that no deduction was to be allowed in respect of the obligation undertaken by him in his marriage contract to provide *interim* aliment for his widow.

The Finance Act 1894 (57 and 58 Vict. c. 30), sec. 7, enacts—“Value of Property.—(1) In determining the value of an estate for the purpose of estate-duty allowance shall be made for reasonable funeral expenses and for debts and encumbrances, but an allowance shall not be made (a) for debts incurred by the deceased or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money’s worth wholly for the deceased’s own use and benefit, . . . and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.”

This was an action by the Lord Advocate for and on behalf of the Commissioners of Inland Revenue against the testamentary trustees and executors of the deceased