SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

PATON . . . . . *Appellant.*
BREBNER and another . . . . *Respondents.*

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PURCHASE OF FEU BY LESSEE —MERGER OF LEASE.

A lessee becoming purchaser takes upon himself the covenants or warranties of the lessor.

A. and B. having a lease for years of lands "with the privi-"lege of taking water from an adjoining river, for the pur-"pose of driving machinery, &c." which lease and privilege were warranted to the lessees, they enter into a contract with the lessor, in which it is expressed, "that the lessor "agrees to grant a feu-charter of the lands under lease, "with all the right members, privileges, and appurte-"nances thereunto belonging, or which ever have been "competent to the heritor of the said lands to claim and "enjoy. It being the intention of the parties thereto, "that all rights and privileges of or belonging to the "said lands formerly leased, should be feudally con-"veyed by the lessor to the lessees, &c. It was insisted by the lessees, that under this contract they were intitled to have a feu-charter executed according to the words of the lease. But the House of Lords reversing the judgment of the Court of Sessions, decided, that the feu-charter must follow the words of the contract; and Eldon, Chancellor, in moving the judgment, intimated his opinion that the privilege of taking water from the river, *was not included in the words*, or legal *import of the* contract.

THE Appellant in this case was proprietor of an estate called Grandhome, on the northern bank of the river Don, near the city of Aberdeen. The Respondents were at first lessees, and afterwards pending the leases, purchasers under feu-contracts of lands forming part of the estate of Grandhome, with certain rights and privileges

which in the feu-contracts were expressed in words differing from those inserted in the leases.

The question between the parties to the appeal was, whether the feu-contracts (or agreements for sale and purchase) were to be carried into execution by inserting in the feu-charter (or deed of conveyance) the words respecting privileges, as expressed in the leases, or those which appeared in the feu-contracts.

On the 20th of February,* 1792, articles of lease, between John Paton, (the Appellant) on the one part, and Messrs. Brebner, and Hadden, (the Respondents) and Thomas Leys, (a partner of the Respondents, since deceased,) on the other part, were drawn up and signed by the parties.

By the first article, " the said John Paton sets " and lets in tack to the saids Alexander Brebner, " James Hadden, and Thomas Leys, and to their " heirs and assignees, for the space of 99 years, " from and after the term of Whitsunday in the " year 1793, for payment of the yearly rent, and " upon the other conditions underwritten, all and " whole the haugh of Mains of Grandhome, " consisting of, &c."

By the second article it is agreed, " that the " said tacksmen and their foresaids shall have *the* " *privilege and liberty of taking in water from the* " *river Don for the purpose of driving machinery* " *and other uses*, and of cutting canals through

* The instruments out of which the question arises, are long and numerous. The material parts of them, forming the basis of the judgment given in the House of Lords, are extracted and inserted in the text.

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" the said grounds, as they shall judge necessary;
" with the privilege of all roads to the bridge of
" Don and Aberdeen, and such right to a pas-
" sage-boat across the said river Don, opposite to
" their grounds, as the said John Paton may have to
" give; together with the privilege of quarrying
" stones, to be used for any purposes which the
" said tacksmen shall think proper upon the
" grounds hereby set, on such parts of the hill of
" Grandhome as shall not happen to be planted or
" improved, also in any other quarries on said
" estate already opened or to be opened by the
" heritor, or by others having his authority: and
" that the said John Paton, either as proprietor
" of the lands hereby set, or as an heritor of the
" cruives, shall allow, as far as he can, the said
" tacksmen to discharge their water on any part
" of the said haugh they may see proper; and
" whatever trees the said tacksmen shall plant,
" that they shall have liberty to cut or dispose of
" the same during the lease."

By the third article, it is agreed between the parties, " that the said tacksmen shall have li-
" berty at any time betwixt the date hereof and the
" said term of Whitsunday 1793 years, to cut a canal
" through the said grounds for the purpose of in-
" troducing water, upon allowing to the present
" tenant the amount of whatever damage he shall
" be found to have sustained thereby, as the same
" shall be ascertained by two arbiters, to be mu-
" tually chosen, with liberty to them, if they
" should happen to differ, to choose an oversman
" for finally determining the same; and farther, if

" the said tacksmen shall think proper, in the " mean time, to erect any houses upon any part of " the grounds above described hereby set, that " they shall have liberty to do so, upon their in- " demnifying the present tenant of the damage " which he may also thereby sustain, as the same " shall be ascertained in like manner by proper " judges, to be mutually chosen by the par- " ties."

By the fourth article, " the saids Alexander " Brebner, James Hadden, and Thomas Leys, " agreed, &c. to pay to the said John Paton, &c. " for the lands set to them as above, at the rate " of 3*l.* sterling for each acre thereof, but with a " deduction therefrom yearly of 7*l.* 17*s.* 6*d.* sterl- " ing, on account of the barren ground compre- " hended therein; and also with a deduction from " said rent of 1*l.* 11*s.* 6*d.* sterling yearly, for each " acre of the foresaid pieces of ground called the " Devil's Hillock and the Lowing-ill Hillock, the " said sum of 3*l.* per acre, to be in full for rent, " multure, and every thing else exigible by the " heritor, and to be payable at Martinmas and " Whitsunday, after shearing each crop, by " equal portions, with interest thereafter till " paid, and a fifth part more of liquidate pe- " nalty in case of faillie; and also, they became " bound to build, upon their own expence, a " sufficient march-dike of stones, as far as the " head or west end of Downie's Hillock, and to " uphold the same during this lease."

By the fifth article, it is agreed, " that the said " tacksmen shall be obliged to erect and make out

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" a bleachfield or manufactory upon the said haugh;
" but, on account of the expensive buildings
" which they must thereby erect, the heritor to
" be obliged to pay or allow for such buildings as
" may be standing on the grounds so set at the
" issue of this lease; the value thereof to the ex-
" tent of 500*l.* sterling, including mason, smith,
" slater, glazier, and wright work, according as
" the same shall be ascertained by skilful persons
" to be mutually chosen by the heritor and tacks-
" men; but that the said tacksmen shall have
" right to remove whatever machinery they may
" see proper."

By the sixth article, it is agreed, " that the
" said tacksmen shall be obliged to carry all the
" grindable grain which may grow on the lands
" so set to them, and which they may have oc-
" casion to grind, to the mill of Grandhome, and
" to pay the miller for his trouble in grinding the
" same the one-and-fortieth peck; and if the mill
" is frequented by the said tenants, they are to
" join in supporting the same and the dam-dike, as
" the other tenants, in proportion to their ground.

By the seventh article, it is agreed, " that
" the tenants of Mains of Grandhome and Dens-
" town, and the heritor for his own use, shall
" have the use of the road through the haugh of
" Rappahanna for all purposes whatsoever; but
" that the other tenants shall only have right to
" use it as a foot-road; but if the present road
" shall interfere with their operations, the said
" tacksmen shall have full liberty to turn the said
" road to the lower part of the haugh."

By the eighth article, it is provided that, " if, in " using any of the aforesaid quarries, the said " tacksmen shall happen to go into inclosures or " improved grounds, that they shall be obliged to " make good to those concerned any damage which " may be occasioned thereby."

By the ninth article, " the said John Paton " reserves to himself and his foresaids a right " to allow stones to be carried to the cruives " along the haugh of Rappahanna as formerly; " and if the heritors of the cruives shall have oc- " casion to build more houses for the accommo- " dation of their fishings, the said John Paton " thereby reserves for that purpose, from the lands " thereby set, a space of ground equal to what " they at present occupy, adjoining thereto, and " that without any diminution from the rent " above-mentioned; and the heritors of the cruives " are to have liberty of laying down stones as " formerly along the river, on their making an " acknowledgment therefore to the said tacksmen, " as they now do to the present tenant."

Under a provision contained in the preceding articles, and in pursuance of the contract, a lease was executed, bearing date the 31st of March, 1797, by which " it is contracted, finally " ended, and mutually covenanted and agreed " upon, between John Paton, Esq. of Grandhome, " heritable proprietor of the lands after-mentioned, " on the one part, and Alexander Brebner, James " Hadden, and Thomas Leys, all merchants in " Aberdeen, on the other part, in manner and to " the effect following: That is to say, Whereas

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" by articles and conditions of lease entered into " and executed between the said parties, of date " the 20th day of February, 1792, the said John " Paton, &c. And whereas, in consequence, and " upon the faith of the foresaid articles and con- " ditions of lease, the saids Alexander Brebner, " James Hadden, and Thomas Leys, have, at a " very great expence, cut a canal through the " grounds set to them, as above, and that they " have thereby introduced water from the river " Don, for the purposes of the manufactory and " machinery already erected, or that may here- " after be erected, upon the premises, and that " they have also erected various buildings, and " made sundry other considerable improvements " upon the foresaid lands: And whereas both the " said parties are now desirous, in further imple- " ment of the foresaid articles and conditions of " lease, to enter into the tack under-written by " way of amplification and extension of the fore- " said articles and conditions of lease, and for " ascertaining the precise rent or tack-duty to " be payable by the tacksmen above-named, and " their foresaids, to the said John Paton and his " above-written; but always without hurt or pre- " judice of the before-mentioned articles and " conditions of lease, and only in further corro- " boration thereof by the said parties respectively: " Therefore the said John Paton, for him, his " heirs and successors whomsoever, on the one " part, hereby not only ratifies, homologates, and " approves of the articles and conditions of lease " above deduced, in the haill heads, articles,

" clauses, and conditions thereof, prestable or " binding upon him as proprietor of the said " land, with all that has followed thereon, except- " ing only in as far as is now precisely fixed and " determinately ascertained by these presents; " but also, by these presents, in further imple- " ment and extension of the same, on his part, " of new sets, and in tack and assedation lets to " the saids Alexander Brebner, James Hadden, " and Thomas Leys, and to their heirs and assig- " nees, for the space of ninety-six years, &c. all " and whole the foresaid haugh of Mains of " Grandhome, consisting of, &c. together with " the whole *liberties and privileges* in favour of " the said tacksmen, *particularly specified in the* " *articles and conditions of lease* above-mention- " ed, to which reference is hereby had for that " purpose, and which shall remain as effectual aud " binding upon the said John Paton and his fore- " saids as if the same had been again herein par- " ticularly enumerated and expressed, &c. But " excepting always from this lease that piece of " ground feued off by the said John Paton to the " heritors or proprietors of the cruive fishings " upon the Don, as the same has been lately in- " closed. Which tack, with and under the reser- " vations and declarations above written, the said " John Paton binds and obliges himself, his heirs " and successors, to warrant to the saids Alexan- " der Brebner, James Hadden, and Thomas Leys, " and their foresaids, at all hands, and against all " deadly, as law will. And, on the other part, " the saids Alexander Brebner, James Hadden,

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" and Thomas Leys, not only hereby ratify, ho-
" mologate, and approve of the articles and con-
" ditions of lease above-mentioned, in the haill
" heads, articles, clauses, and conditions thereof
" binding and prestable upon them, with all that
" has followed thereon, excepting only in as far as
" are now precisely fixed and determinately ascer-
" tained by these presents; but also, in consider-
" ation of said lease, and privileges thereby grant-
" ed to them, bind and oblige themselves, &c. to
" make payment to the said John Paton, &c. of
" the sum of 202*l.* 8*s.* 3*d.* sterling, and that in full
" of rent, multures, or services, for the subjects
" and privileges so let to them, &c. yearly, in the
" name of tack-duty."

By an agreement entered into between the Appellant and Respondents, dated 3d and 9th February, 1810, reciting the effect of the leases theretofore made, and still subsisting, it is agreed, " That the said John Paton shall forthwith es-
" tablish, and make out a good and satisfactory
" title in his own person, as heritable proprietor
" of the lands therein-before specified; and,
" moreover, upon the request of the said Alex-
" ander Brebner and James Hadden, (Thomas
" Leys being dead), in consideration of the pur-
" chase-money, and subject to the annual feu-
" duty therein after to be mentioned, by sufficient
" and proper conveyances in the law, but at the
" cost and charge of the said Alexander Brebner
" and James Hadden, he, the said John Paton,
" shall and will grant one or more feu-charters
" to and in favour of the said Alexander Brebner

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" and James Hadden, their heirs, executors, and
" assigns, or as they shall direct, over and upon
" all the lands therein before-mentioned and re-
" ferred to, comprising Old Grandhome, Grand-
" home Haugh, Downie's Hillock, Chapel Park
" of Mains of Grandhome, and others, by what-
" soever names or descriptions known, which are
" comprised in the leases theretofore granted to
" the said Thomas Leys, Alexander Brebner, and
" James Hadden, jointly, and in the lease granted
" to the said James Hadden individually, with
" the small addition since made thereto, and for
" which lands they now pay a rent of 345*l.* 5*s.* 10½*d.*
" in the whole, *with all the rights, members, pri-*
" *vileges, and appurtenances thereunto belonging,*
" *or which ever have been competent to the heritor*
" *of the said lands to claim and enjoy;* it being the
" intention of the parties thereto, that *all rights*
" *and privileges of*, or belonging to, the said *lands*
" *formerly leased* to the said Thomas Leys, Alex-
" ander Brebner, and James Hadden, jointly, and
" to the said James Hadden individually, for a
" limited period, (including also the aforesaid
" three additional acres) shall now be feudally
" and for ever conveyed by the said John Paton
" to the said Alexander Brebner and James Had-
" den, their heirs, executors, and assigns, or as
" they shall direct; in consideration whereof,
" the said Alexander Brebner and James Hadden
" hereby agree to pay to the said John Paton,
" his heirs, executors, or assigns, the sum of
" 5000*l.* sterling money, at the term of Whitsun-
" day next ensuing the date thereof; and more-

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" over, to pay to the said John Paton, his heirs, ex-
" ecutors, or assigns, the sum of 345*l.* 5*s.* 10⅓*d.*
" yearly, as a feu-duty for ever of and upon the
" several premises herein before described. And
" it is hereby further agreed, by and between the
" said parties, that if, on or before the 1st day
" of April, 1810, the said Alexander Brebner and
" James Hadden, or their heirs, executors, or as-
" signs shall be inclined to purchase up and re-
" deem the said annual feu-duty, it shall be com-
" petent to them, and they shall have an option
" so to do, upon paying a consideration therefore,
" equal to 25 years amount of the said annual
" feu-duty."

By a tack, dated the 26th of October, 1797,
" it is contracted, ended, and agreed betwixt
" John Paton of Grandhome, heritable proprietor
" of the lands, and others under-written, on the
" one part, and Alexander Brebner, Thomas Leys,
" and James Hadden, merchants in Aberdeen, on
" the other part, in manner following, that is to
" say, whereas the said Alexander Brebner,
" Thomas Leys, and James Hadden, have fixed
" on the grounds hereinafter described, as afford-
" ing an eligible situation for the erection of ma-
" chinery fitted for manufacturing purposes, and
" have in that view *agreed with* the said John
" Paton for the lease under-written, and *for the*
" *liberty and privilege of taking water from the*
" *river Don by a canal or cut for serving such*
" *machinery*, and for other purposes connected
" with any manufactory or manufactories to be

" erected by them on the grounds after-mentioned. " Therefore, and for completing the said agree- " ment, the said John Paton hath set, and by these " presents for him, his heirs and successors whom- " soever, but with and under the conditions, de- " clarations, limitations, and reservations under- " written, and for payment of the rents and others " after specified, sets and in tack and assedation " lets to the saids Alexander Brebner, Thomas " Leys, and James Hadden, equally among them, " and to their heirs, assignees, or subtenants, for " the space of one hundred and twenty-nine years, " from, &c. all and whole the crofts of land called " the Crofts of Craighaar of Grandhome, &c. toge- " ther with that patch of planted ground lying " betwixt the said crofts and the river Don; and " also, &c. Moreover, the said John Paton hath " given and granted, and by these presents for him " and his foresaids, gives, grants, and lets to the " saids Alexander Brebner, Thomas Leys, and " James Hadden, equally among them and their " above-written, for the space and term of one " hundred and twenty-nine years above-mention- " ed, from and after the said term of the com- " mencement hereof, the *full right, privilege, and* " *liberty of taking off water from the river Don,* " and of digging, making, embanking, and main- " taining a canal, cut, or water-draught, commu- " nicating with and conveying water from the said " river at or near, &c. together also with the sole " and exclusive use, benefit, right, and privilege to " the tacksmen above-named and their foresaids, " of the said canal or water-draught, and of all and

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" every fall or falls of water which they shall think " proper to make and be able to establish along " the course of the same, within the limits of the " lands set to them as above for the purpose of " any manufactory or manufactories they may " think proper to erect and carry on upon the pre- " mises at any time or times during the term of " years above-written; and with full power, &c. " as also, in regard it will be necessary for the " tacksmen above-named to build, at a considerable " expence, various houses for the purpose of their " intended manufactories, on the grounds above " set to them, of which expence it is reasonable " that they should be indemnified at the issue of " this lease to a certain extent, the said John " Paton therefore binds and obliges himself and " his above-written at that period, to pay to the " said tacksmen and their foresaids the value of " such houses as they may then have or leave " standing thereon, according to the appreciation " of persons of skill, to be mutually named by the " parties at the time, in which valuation is to be " included stones, brick, timber, slate, tyle, iron, " glass, plaister, and lead work; but the proprietor " shall not be obliged to pay for such buildings or " materials to a higher amount than 1500*l.* ster- " ling; and the tacksmen shall be at liberty to " remove their machinery and implements of ma- " nufacture of all kinds, wherewith it is hereby " declared the proprietor is to have no concern, " the same being understood to be the absolute " property of the tacksmen, &c. for which causes, " and on the other part, Alexander Brebner, &c.

" bind themselves, &c. to make payment and satis-
" faction to the said John Paton, &c. of the yearly
" rents, duties, and consideration money under-
" written, that is to say, of the sum of 13*l.* sterling
" in full of rent, multures, and services, for the
" crofts of Craighaar and whole, &c.—Item, of
" the sum of 100*l.* money foresaid in the name of
" *rent or consideration money* for the *grant or*
" *privilege of taking water from the river Don,*
" and of making, using, and maintaining the fore-
" said intended canal or water-draught, with the
" benefit and use of the fall or falls of water to be
" obtained thereby for the purposes before ex-
" pressed, and other privileges before enumerated
" connected therewith, &c.

By an instrument, dated the 19th and 23d of May, 1810,* " it is contracted between John
" Paton, &c. and A. Brebner, &c. that John Paton,
" in consideration of the feu-duties, sums of
" money, and other prestations after specified, hath
" sold, and in feu-farm and heritage disponed to
" the said Alexander Brebner and James Hadden,
" equally between them, and their heirs and as-
" signees whomsoever, all and whole those parts
" of the lands and estate of Grandhome called
" Persleys, with the whole other possessions, water-
" falls, quarries, *privileges, and pertinents of the*
" *same, as at present enjoyed by and under lease or*

* In extracting the above instruments, it should have been noticed that the leases have respectively clauses of absolute warrandice.

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" *leases to the partner or partners* of the company " trade carried on at Aberdeen and Persley, under " the firm of Milne, Cruden, and Company, &c. " Moreóver, the said John Paton sells and dis- " pones to the said Alexander Brebner and James " Hadden, and their foresaids, (subject to the feu- " duty after-mentioned) all and whole these crofts " of land called the Crofts of Craighaar of Grand- " home, with the whole other grounds, waterfalls, " *privileges, and pertinents specified and described* " *in a lease thereof,* bearing date the 26th day of " October, 1797, &c. But *reserving* always to the " said John Paton, his heirs and successors, *the* " *right of fishing in the river Don,* opposite to " and along the whole of the lands above men- " tioned, &c."

After the signing of the agreements, the Respondents paid 5,500*l.* to the Appellant, on account of the purchase money, for which the agent of the Appellant gave a receipt in the following terms: " For a feu-right to be granted in their " favor by Mr. Paton, on the lands of, &c. in the " terms of two agreements, entered into between " them dated, &c." The Respondents, from the respective dates of the leases until the signing of the contracts of sale, had been in possession of the premises as lessees. They had erected machinery at a great cost, and had exercised the right of drawing water from the river, with the other rights granted under the leases. Shortly after the signature of the contracts, the Respondents called upon the Appellant to fulfil the contracts by executing a feu-charter. Thereupon

differences arose between the parties, as to the terms in which those contracts ought to be carried into execution. The Appellant proposed to grant a charter in the terms of the agreement which he had signed. The Respondents insisted that the charter should comprehend the clauses contained in the leases to them, and to Milne, Cruden, respectively, and Co. with absolute warrandice of all the rights granted by the leases to use the water of the Don, as rights and privileges warranted to belong to the lands. The clauses by the Respondents proposed to be inserted were as follows:—

" That John Paton, &c. in consideration, &c. in " feu-farm disposes, &c. to A. Brebner, &c. all the " lands of Grandhome, (the lands in the first " agreement) &c. *together with the privilege and* " *liberty of taking in water from the river Don,* " for the purpose of driving machinery and other " uses, and of cutting canals, &c. As also that " piece of ground, &c. (under lease to Milne, " Cruden, and Co. being the lands in the second " agreement) together with the privilege, &c. of " taking off water from the river Don, and digging " &c. a canal, &c. and conveying water from the " said river, &c. for serving machinery," &c.

After a long negotiation carried on to adjust these differences, a feu-charter was drawn up by the Appellant's agent, containing the clauses contended for by the Respondents. The only matter in difference then remaining to be settled, as the Respondents represented, was, whether a clause of irritancy *ob non solutum canonem*, should be inserted in the charter, the Appellant claiming

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and the Respondents resisting the introduction of such a clause. The differences being brought to this point, the matter was referred, upon a case drawn up and signed by the parties, to Mr. Cathcart, now one of the Lords of Session, who gave his award against the Appellant.*

The Appellant having finally refused to execute a feu-charter, containing the clauses proposed by the Respondents, an action for implement of the agreements was commenced in the Court of Session. The summons (after setting forth the agreements, the draft of a feu-charter, the negotiations, the single point to which the differences were reduced, the case reciting that fact, signed by the Appellant, and the award) concludes by praying, that "the said John Paton should be "decerned and ordained, by decree of the Lords

* By the pleadings in the court below, and in the printed case presented to the House of Lords, it was alleged by the Respondent, that the Appellant had finally settled and approved the feu-charter, with the exception stated in the text, and had given up his objection to execute the charter with a clause, giving the right to take water from the Don. This allegation was contradicted by the Appellant, who averred that he had annexed to the case submitted to Mr. Cathcart, a writing, or letter, in which he desired that the question as to the privilege of taking water from the Don, might be considered and *decided by the arbitrator*. But this collateral question as to the case submitted to arbitration, and the effect of the award, does not seem to have been much discussed in the court below, nor to have been considered as a material ingredient in the formation of the judgment of the Lord Ordinary, or the Court of Session. It was necessary to state in the text the facts as they appear upon the pleading in the court below, because the Lord Chancellor, in moving the judgment in the House of Lords, adverts to this branch of the matters in dispute between the parties.

" of Council and Session, to execute and deliver a " feu-charter in favour of the pursuers, in terms " of the foresaid draft thereof, and relative de- " scription of marches, both herewith produced " and referred to, *salvo justo calculo*, as to the " feu duties specified in the clause of *reddendo* " thereof. That he should produce a legal and " sufficient feudal title in his person, to the said " lands *and others* foresaid, for establishing his " right to grant the said feu-charter in favour of " the pursuers, and that he should be decerned " to purge all real incumbrances affecting the said " lands *and others*, and to convey the same unin- " cumbered to the pursuers."

The defences to the action consisted of three points:

1st, It is admitted by the defender that he entered into the obligations contained in the two agreements; but that these agreements contain no obligation whatever upon the defender to admit or introduce into the feu-charter the clauses contained in the draft of the feu-charter produced, whereby it is proposed to bind the defender specially to grant to the pursuers power and liberty to take water from the river Don, for the purpose of serving the machineries and manufactories already established and to be established by them, and also to grant absolute warrandice of these privileges and liberties of taking the water, because he might expose himself to future actions of damages at their instance, to a far greater extent than the whole price he was to receive for the feus in question. That

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the pursuers having made a cut of great extent, for the purpose of taking a great quantity of water from the river Don, to serve their machinery and manufactures, they have been opposed and judicially interdicted from proceeding farther, by the proprietors of the salmon-fishings in the river Don, and the question is still in dependence.

2dly, The special conclusion of the summons being, that the defender "should be decerned to "grant feu-charters, not in terms of the feu-"agreements previously entered into, but in terms "of a scroll or draft of a feu-charter produced "and founded on by the pursuers," this conclusion of the action is utterly untenable. His intention in the feu-agreements having been to put the pursuers precisely in his own place, as proprietor of the lands to be feued, with all the privileges belonging to such right of property; but more than this he never agreed, nor can be bound in law to grant.

3dly, The defender never, at any time, agreed to dispone or convey to the pursuers, the liberty and privilege of taking water at pleasure from the Don, which, as an individual heritor on the banks of that river, he had perhaps no right to grant, and which it would be most imprudent and dangerous in him to warrant to the pursuers. The defender never attested, or meant to attest, that part of the case laid before Mr. Cathcart, which stated that all parties were agreed upon the whole clauses contained in the proposed scroll, or draft, of a feu-charter, except the clause of conventional irritancy *ob non solutum canonem*; on the contrary,

at the very time when the defender *returned* to Dr. Dauney the case to be laid before Mr. Cathcart, he accompanied it by a holograph writing in these terms: "As Mr. Cathcart will have the "agreement and copy of the feu-charter all before "him, he will see exactly my situation, might I "not have his opinion by itself on that head, *as* "*to my being obliged to warrant all these powers of* "*taking in water from the river. It was what I* "*had no idea of at the time I entered into these* "*agreements; as, by selling the property, I thought* "*I placed the purchaser exactly in the place I was* "*in before.*"

The action was brought to hearing before Lord Alloway, as Ordinary, on the 9th of February, 1814, when his Lordship pronounced the following interlocutor: "The Lord Ordinary, having "heard parties' procurators on the libel, and "grounds of defence, appoints the defender, "within fourteen days, to prepare and lodge in "the process the draught of a feu-charter, con-"taining all the clauses and obligations which he "considers himself bound and is willing to grant "to the pursuers, in reference to the whole sub-"jects in question."

After this, Mr. Paton put into process two separate draughts of feu-charters, or contracts, the one applicable to the subjects contained in the first feu-agreement, and the other relative to the subjects in the second agreement. The Respondents were allowed to be heard in objection to these proposed deeds, and the Lord Ordinary afterwards pronounced the following interlocutor: "The "Lord Ordinary, having considered the original

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" agreements betwixt the parties, and the draft of " the feu-contracts produced in implement of " these agreements, the minute given in by the " pursuers, as containing objections to the feu- " contracts produced by the defender, and an- " swers thereto, together with the whole process, " —finds, that two specific agreements, &c. " finds, that the first feu-contract should proceed " *narrativé*, by reciting *verbatim* the whole of " the agreement entered into betwixt the " pursuers and defender upon the 3d and 9th " February, 1810, and state, that in implement " of that agreement, the present feu-contract has " been entered into betwixt the parties: finds, " that the feu-contract should then contain an " exact description of the subjects contained in " the leases specially referred to in the agree- " ment; and if the parties are agreed that a more " minute and particular description of any part of " the subjects should be inserted, it may, with " their mutual consent, be inserted in this part of " the deed; but if they do not agree, then the " very words used in the description of the sub- " jects in the leases should be adopted, *and the* " *feu-contract shall dispone and confer all the* " *rights and privileges contained in the leases as to* " *those subjects contained in the leases*; and with " regard to the additional space of land contained " in the agreement, but not included in the for- " mer leases therein referred to, finds, that this land " must be conveyed, with all the rights, members, " privileges, and appurtenances thereunto belong- " ing, or which ever have been competent to the " heritors of the said lands to claim and enjoy:

" finds, that the second feu-contract* shall also re-
" cite the precise terms of the second agreement
" entered into by the parties upon the 19th and
" 23d May, 1810, and that it shall in like manner
" narrate the whole of that agreement; and also,
" that the description of the subjects feued shall
" contain the whole subjects under lease to Milne,
" Cruden, and Company; and that with regard
" to the additional subjects thereby feued, they
" shall be conveyed in terms of the agreement,
" together with all the rights, privileges, and ap-
" purtenances thereto belonging, or which ever
" have been competent to the heritors of the said
" lands to claim and enjoy: finds, that the de-
" fender is not entitled to insert any reservation
" with regard to the lands feued, as to his right
" of cutting and quarrying stones: finds, that the
" clause introduced by the pursuers as to the roads
" ought to be adopted: finds, that with regard to
" the crofts of Craighaar, there is no difference
" betwixt the parties, as the defender consents
" that the clause proposed shall apply to them in
" terms of the lease thereof: finds, that the great
" anxiety of the parties seems to arise from the
" different views which they entertain of the effect
" of the clauses contained in the leases, and whe-
" ther the proprietor under the leases had war-
" ranted any other than a legal use of the water, or
" those rights and privileges which the proprietor
" upon the bank of a river is entitled to exercise:
" finds, that, however beneficial it might be to
" both parties to be acquainted with their precise
" rights, and the guarantee undertaken under the

* This appellation, which occurs throughout this interlocutor, is more correctly expressed in the former interlocutor by the term *feu-charter*.

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" existing leases referred to, yet as there is no " declaratory action to that effect, the Lord Or- " dinary has not the means of determining that " question: appoints each of the parties to pre- " pare a feu-contract upon each of the agreements, " in terms of this interlocutor, as the Lord Ordi- " nary, in case of their differing with regard to " the arrangement of the clauses, will remit to " some conveyancer of eminence, to report upon " the proposed deeds."

Against this interlocutor Mr. Paton complained by representation to the Lord Ordinary, and twice reclaimed by petition to the whole Court. But the Courts respectively refused the prayers of the petitioner, and adhered without variation to the interlocutor pronounced. Whereupon Mr. Paton, the defender in the Court below, presented his appeal to parliament.

For the Appellants—*Mr. Wetherell* and *Mr. Heald.* For the Respondents—*the Solicitor General* and *Mr. Lumsden.**

The Lord Chancellor. The question arising out of this case may be presented accurately, by stating, that it was, whether the Lord Ordinary in an interlocutor of the 2d of June, 1814, had rightly construed the feu-contract in question, when in his interlocutor he directed that it should be carried into execution in these words: " And the " feu-contract shall dispone and confer all the " rights and privileges contained in the leases as

* The most material of the arguments at the bar are noticed in the judgment. The reasons for and against the appeal are to be found in the printed cases.

" to those subjects contained in the leases." The subsequent interlocutors of the Court of Session appear to me simply to affirm what the Lord Ordinary had so directed to be done, and therefore it is only necessary to consider the effect of his interlocutor to arrive at a decision of the present question.

The summons, according to the literal effect of it, is a summons calling upon the Appellant to execute a draft which had been drawn, pursuant to the award of Mr. Cathcart; and it called upon him also to produce *a legal and sufficient feudal title in his person*, to the " *said lands and others* " *foresaid.*" The meaning of this must be, that he was to produce a legal and sufficient feudal title in his person, to the *lands and others foresaid privileges* which are now claimed. It was *impossible he should* ever produce a feudal title to appurtenances and privileges which do not belong to the lands. In such case, his obligation would rest only in covenant or agreement.

It struck me that it would have been very important to consider whether the Respondents could succeed at all, unless they succeeded in obtaining a decree from the Court of Session, calling upon the Appellant to execute that draft. To answer the difficulty, it was urged, that the party against whom this summons was levied, had waived the right of raising such a question; because he finally rested his defence upon the ground that he was required by the Respondents to grant certain privileges which were not within the terms or the intent of his contract. And it was farther argued, that if this Court should be

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of opinion, that, according to the true intent of the contract, the Appellant could not be required to execute such a feu, the case ought to be remitted to the Court of Session, upon the question arising out of the reference to Mr. Cathcart and his award: Because he, as an arbitrator, chosen by the parties, and upon a case settled and signed, had directed that the Appellant should execute a feu-charter according to the draft produced in process. Upon that question I am of opinion, that if the Respondents, knowing the circumstances, present their appeal here, insisting that the Appellant has waived his objection to the form of the interlocutor, as being inconsistent with the conclusion of the summons, they cannot revert to the question upon the award; and then assuming, that the Appellant has in fact waived the technical objection, the parties by their own acts have narrowed the matter of controversy, and the judgment of the House is confined to this point, what is the feu, which, according to the previous contract, the one was bound to execute, and the other to accept without reference to the award?

This suit is in substance or effect, (allowing for dissimilarities between English and Scotch proceedings), in the nature of a suit in a court of equity in England, for the specific performance of a contract. In such a suit, if it turns out that the Defendant cannot make a title to that which he has agreed to convey, the Court will not compel him to convey something less, with indemnity against the risk of eviction. The purchaser

is left to seek his remedy at law, in damages for the breach of the agreement.* In the case now under consideration, the summons prays that the Appellant may make a feudal title to the lands

* In the English Courts of Equity, the general rule is, that a vendor shall not be compelled to give an indemnity. *Balmanno v. Lumley*, 1 Ves. & Bea. 224. The purchaser has no remedy for defect of title, but by action at law for the damage he has suffered by the non-performance of the contract. But in a case where the subject was a church lease, and the contract in effect, as construed by the Chancellor, was, that C. and his representatives should use their utmost endeavours to obtain renewals before expiration, so as to give an interest for 63 years to the vendee; and the right and interest, by such means of renewal, was to be secured to the vendee according to the contract by a covenant, binding all the real and personal assets which C. should leave at his death; and it proved, that the bulk of C.'s property was bound up by an entail, and therefore the covenant which the vendee obtained could only bind such unentailed property as C. should leave to his heir. Eldon, C. directed, that if the difference between the interest described in the particulars of sale, and that which the vendor had to give, which was in fact the difference in value between the covenants before-mentioned, could be ascertained, the purchaser should have a compensation to that amount, by abatement from the purchase money; or if the difference could not be valued, that he should have *an indemnity*. An inquiry was directed before a Master in Chancery, to ascertain such difference in value; and if he should be unable to do so, then he was directed to settle such security by way of *indemnity*, as, under all the circumstances of the title, it should appear just and reasonable that the defendant should execute, to indemnify the purchaser and those claiming under him, in case he or they should be evicted, molested, disturbed, or prevented, by reason that a title cannot be made according to the representation of the title in the particular, for the same enjoyment as if the vendor could have made good the representation, and the contract had been carried into execution accordingly. See *Milligan v. Cooke*, 16 Ves. p. 1.

The contract in this case may be considered as a contract for indemnity.

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and others. Supposing the word *others* to mean liberties: if he could make a feudal title to all the liberties in question in this cause, it would be exactly like a case in the English Courts, where the Defendant can make a title, and where he would be ordered specifically to perform his agreement.

In a case like the present, where no title can be made, it is the practice, I presume, of the Court of Session to direct, (as they seem to have done in this case), that the vendor shall make a title as far as he can; and for all that is defective; for all such parts of the contract as he cannot specifically perform, they compel him to enter into warrandice, and render himself liable in damages. The question has been argued at the bar, and is discussed in the printed papers before the House, whether that is the course which the Court of Session ought to have taken. In the view which I take of the case, it is not necessary to decide that question.

Before I advert to the several instruments upon which this question occurs, I will state what I conceive to be the settled doctrine of English Law upon the subject now in discussion. If a lease be made of a house or an estate, the lessor having no title,—and the instrument by which the lease is made contain nothing more than words of demise, with a general covenant that the lessee shall enjoy the premises, that is as long as the relation of lessor and lessee continues.—In such a case, the lessee does not usually look into the lessor's title, but he takes a covenant which binds the lessor, that he shall have the enjoyment of the thing

demised. But if that lessee afterwards becomes the purchaser of the inheritance of the estate, the consequence is, that having assumed the character of vendee, it becomes his duty to call upon the vendor to show that he can make a title to the inheritance; and, as vendee, he subjects himself to the necessity of using diligence to investigate that title which he takes or refuses, as he may be advised. With respect to covenants, he can have nothing more from that very person who, as lessor, had entered into an absolute covenant, if I may so express it, for his enjoying the premises in the relation of lessee. He can have no covenants, except such as belong to the title and interest vested in the individual who, ceasing to be lessor, takes upon himself the new character of vendor. If he claims his estate under a will, the vendor covenants only against the acts of his devisor and himself. If he claims by descent, his covenant is adapted to that species of title; but in as much as he, and those under whom he claims, had taken the title at the hazard of limited covenants, he transmits the estate and title with such limited covenants from himself; and the relation of vendor and vendee, when acquired by conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between lessor and lessee.

I do not presume to say, that there may not be special agreements, which might entitle the vendee to call for much larger covenants than those to which he is entitled under ordinary contracts: but, according to the established principles of the

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law, unless there be such explicit terms in the contract, giving more than ordinary covenants, he is not entitled, in his relation of vendee, to covenants so express as those which he had in his relation of lessee. Here, the relation originally was that of lessor and lessee; it was afterwards to be changed into the new relation of vendor and vendee, in consideration of a certain sum, and also a feu-duty; but in the contract, there is an express liberty given to the vendee, within a certain time to extinguish that feu-duty, by becoming the purchaser, at the additional gross sum of 25 years' purchase; and therefore the feu contract is to be considered, not merely as a contract, in which the vendor was to receive the gross sum of 5,500*l.* and likewise to be paid a feu-duty; but as a contract in which the person who was to take that feu might, within a limited time, elect not to pay the feu-duty thenceforward, but by the payment of an additional sum, calculated upon the feu-duty, to become the purchaser. The question is, whether, supposing that option not to be acted upon, it is to be taken as settled, that he granted this most extensive warranty which is contended for by these Respondents. Because, if there was to be that warranty, after the purchase was made out and out, it is impossible, in my opinion, to contend that there was not to be that warranty while the feu-duty was payable.—It must be in both cases, or not at all.

With respect to the first instrument, the articles bearing date the 20th of February, 1792, it is to be observed, that they were reduced into a formal

tack in March, 1797; and that the notion of the purchase of the feu-duty did not take place till February, in the year 1810. In the mean time, according to the allegations of the printed papers, there had been an expenditure upon the premises, in matters of machinery for carrying on the business of the Respondents, of about 100,000*l.*; and the water had, with little or no interruption, except in a particular case, been enjoyed as far as the necessity of that machinery required, from the time that they first took the water out of the river Don, till the time when the feu-contract was entered into, in February 1810; a circumstance which shews, that they had had the use of the water to the extent of the supply that was necessary for machinery, which had cost, as they allege, no less than 100,000*l.* with no other interruption than the slight interruption to which I have alluded. The fact of that use, so little interrupted, is not immaterial, in considering the probability how far a purchaser in 1810 of that which he had possessed under lease ever since 1792, would or would not be inclined to give up a large and extensive warranty, if it be the real effect of the agreement of 1792 that he was to have that extensive warranty.

Upon inspection of the *agreement of* 1792, it is to be observed, that the whole of the first article is confined in its terms to the agreement to set and let in tack the lands; there is not in this first article a single word about privileges or appurtenances, *or others*; the words which are usually engrossed in the formal conveyance; yet

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no lawyer can doubt, that, if this first article was to be specifically performed, and a tack set of those lands accordingly, the scroll of tacks, if regularly drawn out in implement of that article, would have conveyed with those lands for the term all the privileges, and so forth, which, (to use a term we frequently employ on these occasions) *belonged to the lands.* Although no mention whatever is made of the privileges which belong to the land, upon an agreement to make a tack, the privileges belonging to the land are included by operation of law, and ought to be expressed in the tack.

The second article applies to privileges which cannot belong to lands, lying very near the river Don. That the owner of these lands might be intitled to certain uses of the river, as privileges belonging to the situation, is not difficult to believe; but that he should have as privileges belonging to the lands, such a privilege as the second article professes to confer, appears to me incredible. The words used in that article are so large, that, upon repeated questions addressed to the Bar, no person has been able to state the precise meaning of them.

In the printed papers, (which I have read very carefully) as well as at the Bar, it has been contended, that this article has not the extensive sense in which the Respondents construe it; but more extensive words I think cannot be used. Where the Appellant means to restrict his grant within the limits of his power, he does so in words, for in granting a right to a passage boat

to cross the river opposite to the grounds, he expresses his intention to give that only, as far as he has it to give. Such a restrictive precaution he does not apply to "the privilege and liberty "of taking in water from the river Don;" but he says, expressly, "that they shall have the liberty "of taking in water from the river Don, for the "purpose of driving machinery and other uses, "and of cutting canals through the said grounds, "as they shall judge necessary."

"Again, as to the privilege of quarrying stones, "to be used on such parts of the hill of Grand-"home as shall not happen to be planted or im-"proved;" that is a privilege which cannot possibly belong to the land. The privilege of quarrying on my estate could not belong to land, part of my estate demised by lease; it could not be a privilege inherent or belonging to the lands so demised. The right of cutting a canal through the grounds, which is given by a subsequent article, is another liberty which could not possibly be inherent in the lands demised.

Upon that part of the articles by which it is agreed, that the lands demised shall be paid for at a certain rate per acre, much observation is made in the papers; and it has been suggested also at the Bar, with respect to the instrument relating to the lands first demised, that a money payment is to be made for the land of so much for each acre, and that therefore it is distinguishable from that other instrument which has been made the subject of comment, in which a sum is expressly given for the liberty of taking the water. But

The tack dated 26th Oct. 1797, by which other lands, &c. were demised

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those observations and arguments are founded in too much nicety of distinction. Can it be supposed, that because this 3*l.* per acre is to be given for the land only, the parties did not mean that as a compensation for all that the one was to grant, and the other to enjoy under the agreement and the lease, which was to follow. Although there is no separation between the different parts of this 3*l.* sterling for the land, and the liberties to be granted, it would be extravagant to say that the lessee did not contemplate the advantage he was to receive from the whole he had stipulated to enjoy under that lease. At the same time, it does not appear to me ultimately to make any difference in the construction of the instruments, or the decision of this case.

There is much argument in the papers on both sides, with respect to the effect of the clause in the articles, which provides for the building of the bleach field, and the price to be given for it at the end of the term. On the one hand it is contended, that, as the Appellant is to pay only 500*l.* at the end of this term for all he was to take, he had a valuable consideration to look to, if he continued to be the lessor to the end of the term, which he would not have, if he was to be considered as feuing in perpetuity. On the other hand it is answered, that the lessees might strip or denude these buildings of all the machinery in them, and leave only the naked walls. Undoubtedly the difference of consideration is very great between the walls with the machinery, and the walls only, without the machinery.

In more than one of these articles allusion is made to certain cruives; and rights are reserved by the Appellant, with a view to their maintenance. The cruives, I suppose, were fishing cruives in this river, of which it is contended these articles are so improvident as to entitle the lessees utterly to destroy the value. Under these circumstances, a question would arise, whether the agreement, even according to the articles, must not be construed as giving so much of the water of the Don as to leave the cruives for the fisheries uninjured.

According to my construction of this agreement, the Appellant had exceeded his powers; he had agreed somehow or other to secure, whether by covenant or warrandice, or otherwise, "the privilege and liberty of taking in water from "the river Don, for the purpose of driving ma- "chinery, and other uses, and of cutting canals "through the grounds, as the Respondents should "judge necessary;" a most improvident agreement to warrant a privilege which perhaps he could not secure, and for the failure of which he must be answerable in damages, if the Respondents were disturbed in their enjoyment. If, under these circumstances, the inheritance had been purchased by the lessee, no doubt such a purchase might have been so managed, as to prevent a merger of the lease; but, in the absence of special provision, there would have been a merger of the lease, and the lessee having become the purchaser, would in law have taken upon himself all the obligations by which the former owner of the

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inheritance had bound himself to his lessee; in other words the *quondam* lessee, in his new character of purchaser, would be the person to warrant to himself the liberties and privileges which the former lessor had agreed to assure to him, as long as the old relation of lessor and lessee continued. Undoubtedly the vendor might have conceded the advantage which by law he derived from the new relation of vendor and vendee; and, as the purchase was a matter of option, the vendor might have warranted, at the risk of any damages which could be recovered against him, those liberties and privileges which he as lessor had agreed to give the Respondents as lessees. But, according to our law, and in all laws which rest on principle, such a contract between vendor and vendee must be expressed in terms which are free from all doubt or ambiguity. The terms of a contract so special must indicate, unequivocally, what was the intention of the parties.

In the case before us, it must be remembered, that the contract provided an option for the Respondents, either to pay a feu-duty in perpetuity, or that they might redeem the duties at so many years' purchase, within a given time after the feu-contract was executed, and yet the special contract is supposed to be this, that after vesting the inheritance in the vendee for ever, the vendor was for ever to continue liable for all the damages which might be incurred by the vendee, in the exercise of the privileges and liberties in question. That a man may make such a covenant I do not

deny; but when the question is, whether he has made it; the terms of the contract should leave no room for doubt.

In the tack made in the year 1797, the demise is of the lands, "with the privilege and liberty to the "said tacksmen and their foresaids, of taking in "water from the river Don, for the purpose of "driving machinery and other uses, and of cut-"ting canals through the said grounds, as they "shall judge necessary." Upon this lease there can be no doubt, and improvident as it was for the Appellant as lessor to enter into such a warranty as he did in this lease, yet if that is clear upon the terms of the instrument, he must abide by his contract. Now in this lease, to remove all doubt as to the privileges and liberties intended to be granted, they insert these special words, "together with the whole liberties and "privileges in favour of the said tacksmen," (not *belonging to lands*, but) "particularly specified in "the articles and conditions of lease above-men-"tioned, to which reference is hereby had for "that purpose, and which shall remain as effectual "and as binding upon the said John Paton and "his foresaids, as if the same had been again "herein particularly enumerated and expressed." In this instance, there is a contract specifically executed, according to terms which leave no doubt, and it is a contract between the same parties, who had, or might have had, that transaction in their memory. If, upon framing the feu-contract, it had been expressly stipulated, that the Appellant was to warrant or feu the privileges and

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liberties, (not merely belonging to the land, but the liberties and privileges) *particularly specified in the articles or conditions of lease*, as though they had been there particularly enumerated, or all the privileges and liberties *mentioned in the tack itself*, as if they had been in the feu-contract particularly enumerated, no doubt could have arisen. In the opinion of my Lord Alloway, (an opinion which deserves our respect;) as well as that of the Court of Session, the words, *privileges belonging to the lands*, have not so extensive a meaning as the Respondents suppose and argue. Can the words, "*privileges and liberties belonging to the lands*," appearing in a feu-contract, be applied not only to what was in the instrument, but to what was not in the instrument? In a case where it is of necessity that the claimant should shew the plainest and most unambiguous terms, can he have more than privileges which belong to the lands, where he stipulates in terms which are admitted to describe *primâ facié*, nothing but privileges which do belong to the lands?

It is not immaterial to observe, that in another part of the instrument now under consideration, the Respondents are bound "to implement, per-"form, and fulfil the whole other obligations, "prestations, and conditions, incumbent upon "them as tacksmen, contained in the foresaid "articles and conditions of tack." I refer to that part of the case, because these are articles of tack, which grant not only privileges beyond those which belong to the lands, but they are articles of tack which contain a great many reservations to

the owner, with respect to his enjoyment of the lands leased, and other estates belonging to him. If he has entered into a feu-contract, which puts an end to those reservations, he must abide by the consequences of a feu-contract so drawn up. I do not say that he has done so, but the words of the instrument are to be weighed, and the parties must abide by what they have expressed, although it be contrary to what they meant.

By the feu-contract, after the recital of the leases, grants, and agreements, and a description of the premises, it is agreed, that the Appellant shall establish and make out a good and satisfactory title in his own person, as heritable proprietor of the lands aforesaid, which would bring an obligation upon him to make out a good title to those lands, as heritable proprietor of them, and such title would carry with it a good title to all the privileges belonging to the lands. But how he is to make a good title to privileges not belonging to the lands, I do not comprehend. He may warrant the privileges, and *agree* to make a title to them, but if they do not belong to him, how is he to fulfil such an obligation specifically? 3d & 9th Feb 1810.

The parties to this contract had before them the tack and the articles of agreement; which articles of agreement enumerated all those privileges which are now the subject of litigation; and in a separate article from that which would have carried the privileges incident or belonging to the land. In the contract which followed, the Respondents had expressly, in one part of it, (in order to remove all doubt), provided that The lease dated 31st March, 1797.

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they were to have all the privileges, liberties, &c. &c. which were mentioned in the articles specified in that contract, and that as largely and specifically as if they were therein particularly enumerated. Is it consistent with this conduct, that when they were making a feu-contract upon the lands comprised in the leases, now in question, and when they used only the words "privileges "*belonging to the lands*," that they could have intended to affect the relation of proprietor and vendee with the same obligations which by contract attached upon the relation of lessor and lessee. If such had been the intention, they had only to repeat, *totidem verbis*, the words to be found in the tack which followed upon the articles; and such a special contract, when carried into execution, would have comprised reservations with respect to the estate, the subject of the tack, which were beneficial to the Appellant, as owner of the land.

I do not forget the words which are added, "with all the rights, members, privileges and appur- "tenances thereunto belonging, or which ever "have been competent to the heritor of the lands "to claim and enjoy." If it has been competent to the heritor of the lands to claim and enjoy the privilege of drawing water from the Don, it is a privilege thereto belonging; and if the Respondent takes the feu-charter in the very terms in which this feu-contract is expressed, he will have that privilege. On the other hand, if the privilege of drawing the water is not a privilege belonging to the lands, or not a privilege which it was ever competent to the heritor of the lands *qua* heritor of the lands to

claim and enjoy, you have not that privilege, unless those words enable you to claim a privilege not competent to the heritor of the land to claim and enjoy. As to the additional words expressing that it is " the intention of the parties, that all " rights and privileges of or belonging to *the lands* " *formerly leased* to Leys, Brebner, and Hadden, " &c. shall now be finally and for ever conveyed " by Paton to Brebner and Hadden, their heirs, " and executors, and assigns, or as they shall " direct," it is said that they mean not the *lands* formerly leased, but the *rights and privileges formerly leased*; and in order to shew that this does not mean the lands formerly leased, but the rights and privileges formerly leased, we are referred to the words in former contracts between the parties, in order to gather from them the construction of these words in the feu-contract. Considering the words in question in this point of view, I observe, that in the year 1792, the parties agreed by articles that a tack should be made. In the year 1797 a tack was accordingly executed. In order to avoid all question, they included in that tack by special words all the liberties and privileges granted in those articles. It was quite unnecessary upon this transaction in the year 1797, to consider, whether these were rights and privileges belonging to the lands or not, for the parties had agreed, as lessor and lessee, that the lessee should have those privileges, whether he could have them by way of tack, by way of agreement, or only in compensation for damages. When they came to make this feu-contract, the inference I draw from the ab-

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sence of these special words, and of the reference to the lease and articles, is, that they had agreed not to insert those words, although they were lying before them. The natural import of the words is this,—If these are rights and privileges belonging to the lands, and which, as the heritor, I can grant, you will have them:—If they are rights and privileges which I cannot give to you as vendor of the estate, without entering into those special covenants, then you will not have them. We will not determine whether they are of the one nature or the other, if they are of such a nature that they can be said to belong to the lands leased, you have them:—If they are not of such a nature as to belong to the lands leased, but your rights are to depend upon a personal covenant, that is not what I mean to give; and therefore, instead of using those words which I find in the articles and in the tack, I will use more cautious and restrictive words.

Such appears to me to be the right construction of the instrument, and I think the words used do not include the privilege claimed. I am the more confirmed in that opinion when I consider that part of this instrument by which the Respondents have an option to redeem the annual feu-duty, and purchase the inheritance upon paying a consideration about equal to a sum of 12,300*l.* Under these circumstances it is supposed that the Appellant entered into a contract to deliver over the inheritance of the lands to the Respondents, with a covenant, binding him to all eternity to secure to the new owners the use of

the water of the Don, not only for the purpose of machinery, upon which they state that they had laid out 100,000*l.* prior to this feu-contract, but for *other* purposes, and to such unlimited extent as they might think proper to employ that water for machinery, and for other purposes which, to this moment, have neither been defined nor ascertained. According to the literal import of the articles and the tack, the Respondents are to exercise uncontrouled power over the river, under the guarantee of the Appellant, and at his risk.

To the objection that this is an extravagant warranty, which it is hardly credible a man parting with the inheritance of lands should agree to give, it is answered, that he did warrant the same privilege for 99 years. That is undoubtedly an improvident undertaking, but nothing like the improvidence of a guarantee of such a privilege in perpetuity. On the other hand, when the Respondents became the heritors of the lands, it is not unreasonable to suppose, that having purchased the inheritance, they took upon themselves the bargain and warranty of their lessor. He had by agreement bound himself by warranty for 99 years; and from the year 1792 to 1797, the Respondents, under that agreement and the lease which followed, had taken water for the supply of their extensive machinery, without disturbance, except in a trifling instance. But upon the new contract for purchase of the inheritance, the question is, Whether the Respondents by the specialties of their contract, have precluded the application of that rule which governs such transactions be-

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tween the vendor and vendee of an inheritance, that the vendee takes upon himself the relation of the vendor with respect to lessees, and as to claims which the vendor had created, unless the terms of the agreement expressly shut out the application of such a rule to his case.

May 19 and 23, 1810, ante, p. 55.

As to the other feu-contract, if that by express terms binds the Appellant to perpetual warranty, upon which I give no opinion, are we to say that, because one agreement operates by express terms, the same construction is to be put upon the other agreement which has no such terms, and where the parties think proper to use precisely the same terms, with respect to the premises which never were in lease,* as with respect to those which were?

The case does not require any judgment to be given upon the construction of the feu-contract. The only question now at issue is, How it shall be carried into execution? That will be most properly done by transferring to the proposed feu-charter the very terms respecting rights and privileges which were used, and are to be found in the contract. The question, what are the rights and privileges which pass under the terms contained in the feu-charter, may then become the subject of actions of *declaratur;* and the Court of Session, sitting as a Court of Equity, must consider

* This observation relates to a grant of three acres of land, not before in lease, which are included in the agreement of the 3d and 9th of February, 1810. In abstracting the deeds which form the ground-work of the case, this material passage was omitted, partly from inadvertence and partly from the desire of curtailment.

whether they will be justified in the conclusion that the recital appears to be for the purpose of ascertaining what rights and privileges are to be conveyed, and that the rights and privileges in question are such as do not belong to the lands; or whether they can safely determine, from the words which are to be found in this feu-contract, that it was the intention of the parties to include in their agreement not only the rights and privileges which belong to the lands, but the rights and privileges which are claimed. If the parties do not come to some compromise upon that question, the conveyance must be submitted to the Court of Session, to consider and decide, whether the great privilege which is the subject of dispute does pass by it or not. In my opinion, it does not pass. But the opinion thus given is extra-judicial. It cannot interfere with the rights of the parties to agitate that question. If hereafter the Court shall say, this is a liberty and privilege belonging to the lands, the Appellant must abide by that decision, because he has agreed to grant the liberties and the privileges belonging to the lands; and even supposing it not to be a right and privilege belonging to the lands, yet, if upon consideration of the special words of the recital, it can be inferred that the Appellant has bound himself by agreement, he must, in that case, also convey the rights and privileges, which come within the terms of his agreement, though not belonging to the lands.

Whenever the question shall arise as to the right construction of the conveyance so executed, it will be matter of consideration on the one hand,

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how far it was the intention of the Appellant to part with an inheritance affected by the same terms and conditions, which affected that estate under the lease; or on the other hand to withhold what was granted by the lease.

With respect to the medium of proof assumed in the Court below, it may be remarked as singular, that although the two agreements were separated in the progress, yet one of them was admitted as evidence to assist in the construction of the other; and the judicial conclusion is, that because *the one* agreement has words which in the judgment of the Court conveyed, or meant to convey, certain rights, therefore *the other* agreement must be considered to have embodied in it the same intention, although different words are used.

May 19 and 23, 1810.

Feb. 3 and 9, 1810.

It appears to me upon the whole, that if the interlocutor of the Lord Ordinary is altered, by striking out the words in italics,* and by declaring that, instead of those words in italics being inserted, this conveyance ought to be made in the very terms of the feu-contract, that alteration will be sufficient, and that is an alteration which the rights of the parties require.

April 7, 1819. The judgment of the House was given according to the suggestion of the Lord Chancellor, with the alterations proposed by him as above stated.

* The words are, "and the feu-contract shall dispose and "confer all the rights and privileges contained in the leases, as "to those subjects contained in the leases."