

Thursday, May 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MIDDLETON v. LESLIES.

*Process—Decree ad factum præstandum—Time Fixed for Implementing Decree—Superior and Vassal—Failure to Erect Buildings as required by Feu-Disposition.*

A superior sought to have his vassals, who had failed to erect buildings as required by the feu-disposition, decerned and ordained to erect such buildings "forthwith."

The Court granted decree, but prescribed a time within which such buildings must be erected, on the ground that persons against whom a decree *ad factum præstandum*, enforceable by imprisonment, was pronounced, were entitled to be clearly certiorated as to the obligation they were called upon to discharge.

Alexander Middleton, cattle salesman, Aberdeen, was superior of certain lands held by the Misses Lamond Leslie, Powis House, near Aberdeen, under a feu-disposition dated 17th and recorded 28th May 1889, which bound the disponee "within two years from the date of entry under these presents (being the date of the feu-disposition) to erect on the ground hereby disposed one or more dwelling-houses, or shops and dwelling-houses combined, similar in style and quality to, and not exceeding in height the houses already erected by me."

In November 1891 Middleton brought an action against the Misses Lamond Leslie to have them "decerned and ordained, conjunctly and severally, by decree of the Lords of our Council and Session, in implement of the obligations in favour of the pursuer contained in a feu-disposition granted by the pursuer . . . (being the feu-disposition above referred to) of the subjects after described, and of which subjects the defenders are now in right, forthwith to erect on all and whole that piece of ground . . . being the ground or subjects conveyed by and particularly described in the said feu-disposition, one or more dwelling-houses or shops and dwelling-houses combined similar in style and quality to, and not exceeding in height the houses already erected by the pursuer. . . . And further, in the event of the defenders failing to erect and maintain said buildings as aforesaid within twelve months, or within such other period as your Lordships may direct, they ought and should be decerned and ordained, conjunctly and severally, by decree foresaid, to make payment to the pursuer of the sum of £800 in name of damages."

The defenders admitted the obligation laid upon them by the feu-disposition, and averred that they intended to comply with it, but explained that they had delayed building until negotiations could be con-

cluded with the Town Council of Aberdeen, which it was hoped would determine the direction to be taken by a street to be opened up through the property in question. Until that matter was decided they alleged that it would be highly inexpedient and against public interest to proceed to build.

Upon 3rd February 1892 the Lord Ordinary (KYLACHY) pronounced the following interlocutor:—"Decerns against the defenders in terms of the first and leading conclusion of the summons: Finds the pursuer entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and report: *Quoad ultra* continues the cause, and grants leave to reclaim."

"*Note.*—In this case I have given my best consideration to the excellent argument which I lately heard from the defenders' counsel, but I have not been able to find sufficient grounds for refusing to the pursuer the remedy which he seeks. There is no dispute as to the meaning of the obligation in the feu-disposition, nor is there any suggestion that the defenders, although singular successors, are not bound by it. The only question seems to be, whether the pursuer is entitled to demand specific implement? I am bound to say that I see nothing in the averments of parties to suggest that such implement is either actually or naturally impossible, or even that its enforcement would be in the circumstances inequitable, and that being so, I do not think I can do otherwise than grant the pursuer decree in terms of the first and leading conclusion in the summons. I shall also find him entitled to expenses, and *quoad ultra* continue the cause, giving at same time leave to reclaim."

The defenders reclaimed, and argued—The delay was justifiable, and they were under the impression the pursuer had acquiesced. They were willing to build now, but they must be allowed a reasonable time, say two years. That was the time originally contemplated for the erection of the buildings. It would not be fair to leave to the pursuer the interpretation of the term "forthwith," especially as he could enforce his decree, being one *ad factum præstandum*, by imprisonment. In the case of *Napier v. Spiers' Trustees*, May 31, 1831, 9 Sh. 655, two years were allowed. The cases of *Alexander v. Stobo*, March 3, 1871, 9 Macph. 599, and of *Naismith v. Cairnduff*, June 21, 1876, 3 R. 863, were cases of taking down houses. That could be done immediately. Even there time was allowed—nearly five months from the date of the interlocutor in the first case, and at sight of an architect named in the second.

Argued for respondent—He was entitled to decree as pronounced by the Lord Ordinary. In *Magistrates of Glasgow v. Hay*, February 23, 1883, 10 R. 635, declarator of forfeiture was pronounced at once. Still he was not averse to a time limit being set.

At the close of the argument, in answer

to the Court, counsel for both parties agreed that if a time were to be fixed, that time should be twelve months.

At advising—

LORD PRESIDENT—Upon this record my opinion may be stated in a single word. The defender has not stated any relevant defence, and I cannot discover in the narrative of the negotiations which have taken place, and in which a solution might have been found, any justification of his non-fulfilment of the obligation, which is unambiguous in its terms, and quite capable of performance. I therefore think decree *ad factum præstandum* must be pronounced. But the Lord Ordinary has granted decree in terms of the first and leading conclusion of the summons, and which is, that the defenders be decerned and ordained forthwith to erect certain houses.

Now, in pronouncing a decree *ad factum præstandum* the Court has to bear in mind the consequences and the sanction of such a decree. If such a decree is pronounced, and there is failure on the defender's part to implement it, that exposes him to the remedy of imprisonment at the hands of the pursuer. Therefore in pronouncing a decree which may be thus enforced, and which may lead to penal consequences, it is right that the Court should be careful so to pronounce their decree that the person against whom it is pronounced shall be in no doubt as to the obligation which he is bound to discharge. I may compare the case to that of interdict. If the person interdicted breaks the order of Court he may be imprisoned, and therefore it is the custom of Court to frame interdicts so that the person interdicted may be in no doubt as to the measure of his liability. The same reasoning applies to the decree here, which may be followed by imprisonment, and therefore I think we should not agree to pronounce a decree against the defenders forthwith to build. An order to do a thing forthwith is appropriate where it is a single act that is to be done, such as delivery of a writ which can be performed in a moment; but where there is a long operation requiring a tract of time even for the most diligent, an order to do it forthwith is not advisable. Such an order would leave the enforcement of the order to the arbitrament of the person in whose favour the decree is pronounced. The defender might be imprisoned without our ever knowing when he was in default. I therefore think the decree asked and pronounced by the Lord Ordinary is not one which can safely be issued.

That brings me to the point of determining what time should be allowed for the specific performance of the decree, and we are fortunately relieved from fixing any time by the counsel very properly agreeing that if time is to be given it should be twelve months from this date. Accordingly, not as ourselves selecting that time or saying that shall in future be the time given for implementing such obligations, we may safely ordain in terms of the summons, but with the addition that implementation of the obligation must be within a year of our interlocutor.

LORD ADAM—I agree. When the Court decern against a person with penal consequences in case of his failure to implement their order, they ought to inform him specifically what he is bound to do. They are not entitled to ordain something vague and indefinite, so that he cannot know exactly what the Court mean. The Lord Ordinary has decerned the defenders here to do a certain act forthwith. What is the meaning of that word? It cannot have the primary meaning it would have in such a case as your Lordship suggested. If it were a definite act which could be done in a moment there would be no difficulty about the word forthwith, but you cannot build instantly, and therefore it cannot mean that. It must mean in some future time, and the defenders cannot tell whether that future time is intended to be three, six, nine, or twelve months. Therefore where specific implement is ordained the party must be told distinctly what he has to do.

LORD M'LAREN—Under a feu-disposition in 1889 the defenders are allowed two years for the erection of houses upon the feu as security for the feu-duty. As the two years have expired, the obligation, if we are to take all the elements into account, has become one of paying damages, and the superior is entitled to sue for them. But he may in his discretion waive the time limit, and now ask for specific implement which must be within a reasonable time. I do not think the Lord Ordinary meant anything substantially different from the view now indicated by your Lordship, but as the Court will not grant decree ordaining a person to do something impossible forthwith, it follows that if decree for specific implement is sought a time must be set within which the obligation must be implemented. I agree with your Lordship that subject to that variation the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR was absent.

The Court pronounced the following interlocutor:—

“Recal the decerniture contained in the Lord Ordinary's interlocutor, decern the defenders, in implement of the obligation contained in the feu-disposition libelled, to erect within one year from the date of this interlocutor, on the piece of ground described in the summons, one or more dwelling-houses, or shops and dwelling-houses combined, all as specified in the summons and feu-disposition; *quoad ultra* adhere to the said interlocutor of the Lord Ordinary and remit to his Lordship, and find no expenses due to or by either party since the date thereof.”

Counsel for Pursuer and Respondent—Jameson—Kemp. Agents—Henry & Scott, W.S.

Counsel for Defenders and Reclaimers—Dickson—Abel. Agent—Thomas Dalgleish, S.S.C.