

machine ought to have been fenced, and that such machines are in usual practice fenced, as an averment at all to be disregarded by any means. I think it goes a long way to relevancy if that is averred, but this will not apply to every machine. If the averment were made in regard to a machine in ordinary domestic use, and which we all know perfectly well, namely, a mangle, such a statement would be disregarded because, according to the knowledge of mankind, such a statement was not according to fact. A pursuer does not make a statement relevant by simply putting in a statement in which there can be no truth. I do not think that this is a case of that kind at all, but all I say in regard to the case of *Milligan* is that it is an authority that we may hold a case to be irrelevant although it is averred that a machine was not fenced which caused the accident and that it is the custom to fence such machines. That was the unanimous decision of the Second Division, including Lord Young.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

“Recal the interlocutor appealed against: Sustain the fourth plea-in-law for the defender, dismiss the action, and decern.”

Counsel for the Pursuer — Salvesen —
—M'Clure. Agents—Simpson & Marwick,
W.S.

Counsel for the Defender—W. Campbell
—M'Lennan. Agent—J. Murray Lawson,
S.S.C.

Friday, January 21.

FIRST DIVISION.

[Lord Pearson, Ordinary.

WADDELL AND OTHERS (TRUSTEES
FOR THE GENERAL PROPERTY
INVESTMENT COMPANY,
LIMITED) v. CAMPBELL.

*Superior and Vassal — Feu-Contract —
Condition in Feu-Contract — Interest of
Superior.*

A feu-contract provided that the vassal should be obliged to build tenements of a certain kind on the land feued, and that such tenements should be covered with blue Scotch slates.

In a note of suspension and interdict presented by the superior to have the vassal interdicted from covering the tenements with slates of another kind, the vassal averred that the slates he was using were better in quality and dearer in price than blue Scotch slates, and pleaded that the superior had no interest to insist in the interdict.

Held (aff. judgment of Lord Pearson) that the superior was entitled to enforce

the condition as to slates in the feu-contract.

On 28th April 1897 George Waddell and others, trustees for the General Property Investment Company, Limited, presented a note of suspension and interdict against James Campbell, builder, Edinburgh, to have him interdicted from covering the tenements in course of erection by him on a certain plot of ground with slates other than blue Scotch slates.

The complainers averred that they had feued the piece of ground in question to the respondent in January 1897, and that (Stat. 2)—“By said feu-contract it was expressly provided and declared that the respondent and his heirs and successors in the feu should be bound and obliged to erect, and thereafter to maintain and uphold, upon the said piece of ground two flatted tenements of the height of four storeys, and that ‘such tenements shall be covered with blue Scotch slates.’” They further averred that the feu-contract provided for the ground reverting to the superiors in the event of any of its conditions being violated.

The complainers proceeded (Stat. 4)—“The respondent is in course of erecting tenements on said piece of land in terms of the obligation in the feu-contract. He, however, purposes instead of employing blue Scotch slates, as provided in the feu-contract, to cover the roofs of said tenements with inferior Cumberland slates. Before the respondent commenced to roof the tenements with said slates he was warned by the complainers’ ground officer that he must not do so without obtaining their consent to such a deviation from the terms of the feu-contract. The respondent nevertheless, without obtaining said consent, proceeded to put the slates on the roofs. On this coming to their knowledge the complainers at once, by their architect and law-agents, intimated to the respondent that that would not be allowed, and that he must adhere to the terms of the feu-contract. He, however, refuses to do so, and maintains his right to make use of other than blue Scotch slates, and in particular, to make use of Cumberland slates, and he is proceeding to cover the roofs with said Cumberland slates. Said slates are of a cheap, unsightly, and inferior description, quite different from blue Scotch slates. Their use by the respondent is in direct contravention of his obligations under the feu-contract, is injurious to the amenity and attractiveness of the complainers’ adjoining feuing ground, and is to the complainers’ prejudice. In these circumstances the present action has been rendered necessary.”

The respondent admitted that the feu-charter contained the alleged condition with regard to slates, and in answer to Stat. 4 explained “that prior to the raising of the present note the respondent had covered the roofs of the buildings in question with slates of a bright green colour, obtained from the quarries of Westmoreland. The complainers knew that the respondent had contracted for the slating of

the roofs with the slates actually used, and they saw and acquiesced in the roofs being so covered, and not until the slating was nearly completed did they make any complaint that the slates were not 'blue Scotch slates.' The slates used by the respondent are superior in quality to 'blue Scotch slates,' and are not, as the complainers aver, of a 'cheap, unsightly, and inferior description.' As a matter of fact, the respondent contracted for the slating of the buildings with slates from the Westmoreland quarries, because the slates are better in every way than the slates mentioned in the feu-contract. The roofs would have been covered at a smaller cost with Scotch blue slates than with the slates which the respondent has used. Further, the complainers have allowed their feuars, whose grounds adjoin the ground of the respondent, to cover their buildings with slates other than Scotch blue slates, and the slates used by these feuars, whose feu-contracts contain the same stipulation as the respondents', are inferior to the slates used by and the style of workmanship of the respondent."

The complainers pleaded, *inter alia*—“(1) The operations complained of being in contravention of the respondent's obligations under his feu-contract, and being to the prejudice of the complainers, they are entitled to interdict as craved.”

The respondent pleaded—“(1) That the complainers' averments were irrelevant, and (3) that the note should be dismissed in respect that (1st) the work complained of was practically completed before the note was presented, (2nd) the complainers were barred *personali exceptione* from insisting in it, and (3rd) the complainers “have no interest to insist in it.”

On 27th November 1897 the Lord Ordinary (PEARSON) repelled the respondent's first plea-in-law, and the first and third branches of his third plea; and before further answer allowed the respondent a proof of his averments in support of the plea of bar *personali exceptione*.

Opinion.—“In January of this year the respondent feued from the complainers two building stances at North Merchiston, on which he bound himself to erect and maintain two four-storey tenements. The title was in the form of a feu-contract, in which it was expressly stipulated that ‘such tenements shall be covered with blue Scotch slates.’

“Less than four months afterwards the superiors presented this note to have the respondent interdicted from contravening that stipulation; and in his answer the respondent explains that he has roofed the tenements with Westmoreland slates of a bright green colour. Apart from the averments of acquiescence, which I will deal with presently, there is no statement that the circumstances had changed at all since the date of the contract. The respondent's case was argued on the footing that before his signature to the contract was dry he was entitled to say to the other contracting party, ‘I give you notice that I mean to disregard that stipulation.’

“Now, there are certain well-known classes of stipulations which are not enforceable. A stipulation may be immoral, or against public policy, or inconsistent with the rights of proprietorship. But the respondent's case is not pleaded on any of these grounds. It rests on the averment that the superiors here have not, and never had, any interest to enforce this stipulation; and the respondent asks to be allowed a proof in support of this view. He alleges that the slates used, while differing in colour, are superior in quality, and ‘better in every way’ than the slates contracted for, besides being more expensive. He further alleges that the superiors have allowed the adjoining feuars, with similar clauses in their contracts, to disregard the stipulation and use inferior slates.

“In my opinion all these averments are irrelevant. So far as I know or have heard in argument, the case is not ruled by any of the decisions; the general law is clear enough. ‘Where a superior feus under reasonable conditions, he is entitled to enforce them. He has a presumed interest in law to maintain the stipulations which he has made’ (*per* Lord Murray in *Magistrates of Edinburgh v. Macfarlane*, 1857, 20 D. 175), or as it has been expressed more recently, in the case of the *Earl of Zetland* (1882, 9 R., H.L. 47)—‘*Prima facie*, the vassal in consenting to be bound by the restriction, concedes the interest of the superior; and therefore it appears to me that the onus is upon the vassal who is pleading a release from his contract to allege and prove that owing to some change of circumstances any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist’ (*per* Lord Watson).

“Here there is no change of circumstances; for the liberty given to other feuars to disregard similar stipulations is not alleged to have been conferred after the date of the respondent's contract. The question, therefore, is narrowed to this—Is the person, on signing a feu-contract, to be allowed to prove that an express stipulation of the contract, not being on the mere statement of it unreasonable or trivial, is one which the other contracting party has no interest to enforce? It is said that though he has conceded the interest of the superior, he has only conceded it *prima facie*; that while the superior has a ‘presumed interest,’ the presumption may be overcome by evidence. But I see no reason why the obligations of this direct personal contract should depend for their validity upon the result of a parole proof as to the obligee's interest to enforce them.

“It is true that a stipulation which was in itself absurd or trivial might not be enforceable by the superior. But then that would be because stipulations of that character cannot be effectually attached to ownership. These would be the ‘extreme and absurd cases,’ figured by the Lord Justice-Clerk Hope in the case of the *Magistrates of Edinburgh* (20 D. 171), where he says—‘If the feu contained regulations as to

painting the outside of the houses, and one directed the house to be painted sea-green, while all the rest had become dark blue, I do not mean to say that the superior could insist on the sea-green.’

“Here the stipulation is on the face of it reasonable and not unimportant. There is obviously a great deal more between the parties than a question of colour. And I am not prepared to put the complainers to a defence of their contract merely because the respondent assures them through his witnesses that his breach of contract will do them no harm.

“Two other matters remain. The respondent pleads that the note should be dismissed in respect that the work complained of was ‘practically completed’ before the note was presented, and that the complainers’ remedy was a declarator. But in the case of a continuous operation, like slating a roof, it is always a question of circumstances whether the preventive jurisdiction of the Court is excluded. The question always is, whether the application was timely. But having regard to the powers conferred by the 98th section of the Court of Session Act 1868, I think a respondent must now make precise and pointed averments in order to avail himself of this objection, and no such averments are here made. The statement on this head in answer 4 does not seem to me sufficient.

“But there is another plea which I think cannot be satisfactorily disposed of without a proof, namely, that the complainers are barred by personal exception from enforcing the restriction. They are said to have seen and acquiesced in the work now complained of, and to have made no complaint until the slating was nearly completed. This averment is very bare, but as it relates to matters within the complainers’ knowledge, I am not disposed to criticise it too carefully, and I think it should be cleared up by proof.”

The respondent reclaimed, and argued—Feu-contracts were interpreted and dealt with upon different principles from ordinary contracts; and it was a well-settled rule in regard to feu-contracts that a superior could not enforce a condition of such a contract unless he show an interest to do so. Here the superior could show no such interest; indeed, the slates which the respondent had employed were superior in quality to those which under the contract he was bound to supply—*Campbell v. Clydesdale Bank*, June 19, 1868, 6 Macph. 943; *McNeill v. Mackenzie*, February 5, 1870, 8 Macph. 520; *Nat Smith v. Cairnduff*, June 21, 1876, 3 R. 863, per Lord Rutherford Clark, 865.

Argued for the complainers—The Lord Ordinary was right in repelling the respondent’s pleas. It was only when a question of real burden was involved that the respondent’s contention was applicable. Here there was no such question. The condition in question must be implemented once for all, and could not become a permanent burden. The contract must be construed like any other, and the

respondent was bound to supply slates in conformity with the description in the contract—*Bowes v. Shand*, 1877, 2 A.C. 455. In addition to *Lord Zeland’s* case referred to by the Lord Ordinary, *Campbell v. Allan*, December 18, 1855, 18 D. 267, and *Magistrates of Edinburgh v. Macfarlane*, December 2, 1857, 20 D. 156, were conclusive authorities in the complainers’ favour.

At advising—

LORD PRESIDENT—The present dispute is between the parties to a contract. In that contract the respondent bound himself to erect two flatted tenements, and it was agreed that those “tenements shall be covered with blue Scotch slates.” The respondent claims right to cover the houses, not with blue Scotch slates but with green Westmoreland slates; and he says that the one is as good as the other. It was admitted at the bar that if the respondent had bought from a merchant blue Scotch slates, he would have been entitled to reject green Westmoreland slates as being disconform to contract. This being so, the only ground upon which the respondent can maintain his position is that the contract in question is a feu-contract, and that the seller of land is not entitled to insist on a contract obligation to do something upon the land sold unless he can show that the manner in which it is broken does not involve patrimonial loss. Now, it is important to observe that we have not here to deal with a question between a superior and a singular successor. Nor do I think that, of itself and apart from acquiescence by the complainers, the circumstance that the respondent has succeeded in finishing his slating, or nearly finishing his slating, gives him an answer to the case of the complainers. The question is, I think, the same as if (to use the illustration of the Lord Ordinary) the respondent, before his signature to the contract was dry, had said to the complainers, “I give you notice that I mean to disregard that stipulation.”

I am entirely unable to discover any principle or reason why because a contract is a feu-contract such a position should be tenable. It seems to me contrary to the principle that a man who parts with his land on condition, *inter alia*, that the person who gets it shall forthwith erect a house of a certain kind should be put to show that he will be worse off if not this but something different is done. The respondent’s contention comes to this, that a man who sells his land in consideration of so much feu-duty, plus an obligation to put up a particular kind of house, is in the same position as a man who stipulates for the feu-duty, and any kind of house that will secure the feu-duty. The same reasoning would lead to this result that if in the contract there were no feu-duty, or a nominal feu-duty, and the consideration were a sum paid down, plus an obligation to put up a house of a particular kind, this is the same thing as if there were no stipulation about the kind of house, or about a house at all. I am not aware of any authority for refusing effect in this way to

stipulations *ad factum præstandum* in feu-contracts when the complainer is not barred by conduct from seeking their enforcement, and that is the hypothesis of the present debate. Upon these clear grounds I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—I am of the same opinion. The complainers and the respondent entered into a feu-contract in 1897, and this is a question between these contracting parties. We have it set forth in the second article of the statement of facts that the contract contains an obligation upon the respondent to erect and thereafter to maintain two flatted tenements of the height of four storeys, and that "such tenements shall be covered with blue Scotch slates." It is not said anywhere that that is an unlawful condition or one which is not to be enforced. What the respondent says here is this—I propose, instead of furnishing you with blue Scotch slates, to roof the premises with bright green Westmoreland slates, and I am prepared to prove to the satisfaction of a jury or a judge that those slates which I propose to substitute for the others are as good as or better than those which I am under contract to furnish, and you have no interest to insist upon the condition. It appears to me to be entirely immaterial whether the slates which he proposes to substitute are better than the blue slates in the opinion of anyone else than the parties themselves. The complainers here contracted for and desired to have a particular kind of slate, and I cannot see why that contract should not be fulfilled. We have no question here to deal with except one between two contracting parties.

LORD M'LAREN—I concur in the judgment proposed, on the grounds stated by your Lordship.

This is a question between the parties to a personal contract, and it is the result of the decisions in this branch of the law that when a question arises between the original contracting parties or their heirs, the only defence to an action for enforcement of a feu-contract is that the condition sought to be enforced is an unlawful condition. If the condition is lawful, then it is binding as being a part of a personal contract, irrespective of its relation to the contract for a grant of land. Of course if the question were with a singular successor other considerations would come into view, because then, in order that the obligations should be enforced against a purchaser, it would be necessary to show that it was either an inherent condition of the grant or a real burden on the land, otherwise the case would be within the region of equitable restriction, and the condition within that class of conditions which are only enforceable against a singular successor in so far as the superior has a legitimate interest to enforce them.

LORD KINNEAR—I agree with your Lordship. I attach importance to the consideration that this is not a case in which it is attempted to subject a singular successor

to burdensome conditions imposed by an ancient grant. It is true that the purchaser of land must necessarily undertake all the obligations which are laid on the successive vassals by the original grant. He does so by making himself a party to the continuing contract between superior and vassal because he cannot make up a title in any other way. Still it may be reasonable—and it has been held to be so—that a purchaser may be allowed to show that conditions and restrictions on the freedom of use and administration which belong to rights of property have ceased to be of substantial value to the superior, so that there is no legitimate interest to enforce against a purchaser burdens which prejudice him and do not benefit the superior himself. Even in that case there is a heavier onus on the vassal than that of merely saying that the superior has no interest. According to the law as laid down in Lord Zetland's case (*Earl of Zetland v. Hislop*, 9 R. (H.L.) 40, at p. 47) something more is required, for Lord Watson points out that *prima facie* the vassal in consenting to be bound by restriction concedes the interest of the superior, and therefore his Lordship says, "It appears to me that the onus is upon the vassal who is pleading a release from his contract to allege and prove that owing to some change of circumstances any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist." But then this is a stronger case. It is, indeed, in a different class of cases from the case of Lord Zetland, because here we have a direct contract between the complainer and the respondent, and these two parties agree to certain mutual and reciprocal stipulations and obligations. If the respondent thought that the condition as to slates was burdensome and unreasonable, then he ought not to have consented to it; but he agreed to it, and I fail to see any reason why he should be freed from a contract deliberately undertaken, and the benefit of which he still proposes to retain.

I also agree that it is altogether irrelevant to show that any number of expert witnesses consider that green Westmoreland slates are as good as blue Scotch slates, because a person who is making a contract is entitled to please himself and to stipulate for what he desires. The complainer having stipulated for a particular kind of slate, and the respondent having deliberately agreed to that stipulation, I see no reason why the respondent should be relieved of his bargain.

The Court adhered.

Counsel for the Complainers—Johnston, Q.C.—Chree. Agents—Jack & Bryson, S.S.C.

Counsel for the Respondent—Craigie—D. Anderson. Agent—Alexander Campbell, S.S.C.