A duplicand of the feu-duty, and not a year's actual rents. The moment that you find that the obligation is limited to heirs, whether of the original tenant or of singular successors, there can be no doubt as to the rest of the case. I am therefore for adhering to the Lord Ordinary's interlocutor, though not precisely on the same ground.

LORD DEAS—I am of the same opinion. I am disposed to think that the first question arises equally as to both tacks, viz., What was stipulated to be paid in addition to the annual rent? The second question is, By whom was it to be paid? Now, I think we must keep in view that we are dealing with a tack and not with a feu-right. These tacks have not the qualities of feu-rights. There is nothing feudal about the rights at all. There is a very long term of endurance no doubt, but, except for that, there is no difference between a tack of this kind and an ordinary tack for nineteen years or for one year. The rights and obligations on both sides are those of landlord and tenant, and not of superior and vassal. When the landlord grants a tack, and stipulates a certain rent, and further, that on certain occasions a year's real rent shall be paid by the tenant in addition to the ordinary rent, the natural construction is that the additional rent is a duplicand of the actual rent. It does not mean the value of the subjects. It is not a very reasonable supposition that, in accepting a building lease comprehending a piece of ground worth very little, but on which valuable buildings are to be erected, the tenant undertakes to pay the whole annual value to which he has raised the subjects by laying out his capital: that the more he lays out the more he has to pay. If the landlord intended that to be the construction of the document, he ought to have made it very clear—much more clear than it is here. If to the stipulation of a year's real rent, the landlord had added the words "as it shall be at the time," the matter might have been made clear. The argument of the landlord comes to rest on the use of the words tack-duty in the outset of the deed. But when you come to the obligation, it is merely stated that the sum of six shillings and ninepence is to be paid. It is not called a tack-duty there. I am therefore disposed to think, that whatever may have been in the mind of the landlord at the time of the deed, he did not make it clear that he is entitled to make this claim. My only difficulty is, that in 1854, on a renewal of the grant, a sum of £12 was paid to the landlord. I rather think that at that time the advisers of the tenant thought that the landlord's construction was right. If that had happened often, the case might have been stronger, but this is a single instance, and under exceptional circumstances, for it was in favour of a party who had no title at all. I am confirmed in this opinion by the fact that, according to the very words of the contract, the obligation is limited to heirs of the original vassal. These are the very words, and we cannot extend them by implication. The obligation is on heirs only. The landlord seems to have trusted that assignees and singular successors could not come in without his consent, and then he could insist on any terms he chose.

Lord Ardmillan concurred.

Adhere.

Agent for Reclaimers—John Kennedy, W.S.

Agents for Respondent—Dalmahoy & Cowan, W.S.

BUCHANAN'S TRUSTEES *v.* KIRKLAND.

This was a similar case in which the Court, without hearing argument, pronounced a similar judgment.

Thursday, October 15.

MEIKLAM'S TRUSTEES *v.* MEIKLAM AND OTHERS.

Trust—Legacy—Cumulative Bequest—Mutual Contract—Obligation to Educate—Debitor non presumitur donare. A testator executed a deed of contract in which, *inter alia*, he bound himself to settle a sum of £2000 on each of his two children, payable at the first term after his death, and also to provide a suitable education for them. On the same day he executed a trust-settlement directing his trustees to pay £2000 to each of the children, payable at majority, with interest from the first term after his death. *Held* (1) that the provision in the trust-settlement was in implement of the provision in the contract; and (2) that the children were further entitled to the expense of education until they attained majority, the obligation thereanent not being terminated by the death of the testator.

On 31st January 1853 Mr Meiklam executed an onerous deed, whereby, in consideration of certain obligations undertaken by the other party to the deed, he bound himself, *inter alia*, to "settle £2000 on each of his two children, Philip Harper and Ada Harper, payable at the first term of Whitsunday after his death." He further bound himself to be at the expense of a suitable education for the children. On the same day he executed a testamentary deed providing, *inter alia*, that his trustees should pay to each of his said children, Philip and Ada, "the sum of £2000, payable at the first term of Whitsunday or Martinmas after my death, on their respectively attaining majority, with legal interest until that period from the first term of Whitsunday or Martinmas after my death." Mr Meiklam died in 1854, before either of his children attained majority.

In this action the children claimed payment from Mr Meiklam's trustees of a sum of £4000 to each, on the ground that the provisions in the two deeds were cumulative. They also claimed a sum of money for the expenses of their education.

The trustees contended that the provision by Mr Meiklam in the trust-deed was in implement of his obligation in the contract, and that the obligation for payment of expenses of education applied only to the education of the children during Mr Meiklam's life.

The Lord Ordinary (MURE) pronounced this interlocutor:—"Finds, 1st, that according to the sound construction of the third purpose of the trust-deed executed by the late Mr Meiklam in 1853, the provision thereby settled upon the claimants, Philip Harper and Ada Harper, must be held to be the fulfilment of the obligation undertaken by the truster under the second head of the conditions of separation founded on by the claimants, and not as a legacy or provision of £2000 to each of the said claimants in addition to the sums of £2000 which the truster undertook to settle upon them by the deed of separation: Finds, 2d, that in addition to the said sums of £2000 settled upon the claimants

by the trust-deed, they are each of them entitled, in respect of the obligation undertaken by the truster under the third head of the conditions of separation, to the expense of a suitable education from the date of the said deed of separation until they respectively attain to majority: Therefore ranks and prefers the said Philip Harper for the sum of £2000, with legal interest from the first term of Whitsunday or Martinmas after the death of the truster. But, in respect that the said Ada Harper has not yet attained majority, supersedes in the meantime the further disposal of her claim; and appoints the case to be put to the Roll, that parties may be heard as to the amount of the sum which ought to be allowed for the expense of a suitable education, and decerns: Reserving in the meantime all questions of expenses.

"*Note.*—Although the wording of the provision contained in the third purpose of the trust-deed, by which £2000 is settled on each of the claimants, is somewhat different from the wording of the obligation come under by the deed of separation, that provision appears to the Lord Ordinary to be substantially a settlement of £2000 in fulfilment of the obligation. The only difference is in regard to the term of payment, which, by the trust-deed, is not to be actually made till majority, whereas, by the deed of separation it is fixed as at the first term of Whitsunday or Martinmas after the truster's death. But although payment is not, under the trust-deed, to be made till majority, there is an express provision that it is then to be made 'with legal interest until that period from the first term of Whitsunday or Martinmas' after the truster's death; and as this declaration as to interest appears to the Lord Ordinary to place the claimants in very much the same position, in a pecuniary point of view, as they would have been if the money had been paid on the death of the truster and invested on their account, the provision in the trust-deed must, he conceives, be dealt with as the stipulated settlement of £2000 upon each of them, and not as a separate and additional bequest.

"But the Lord Ordinary is unable to adopt the view contended for by the trustees, to the effect that this provision in the trust-deed is to be regarded as a fulfilment of the obligation in the deed of separation, to provide for the education of the claimants, as well as of that to settle £2000 upon each of them. For the declaration as to the payment of interest, which it was contended had been inserted in order to meet the necessary expenses of education during the minority of the claimants, cannot, it is thought, be so imputed; because, in the view the Lord Ordinary takes of the case, the third purpose of the trust, without that declaration as to interest, would not have been a substantial fulfilment of the obligation in the second head of the deed of separation. And as there is nothing in the wording of the third head of the condition to show that the obligation there undertaken was to be limited to the expense of education during Mr Meiklam's life, the Lord Ordinary has come to the conclusion that the claimants are entitled to have the expense of a suitable education made good to them out of the trust-estate."

Philip and Ada Harper reclaimed.

CLARK and DUNCAN for reclaimers.

YOUNG and W. IVORY for respondents.

At advising—

LORD PRESIDENT—I have no doubt on either question. The contract of separation, which contains the obligation on Meiklam to settle £2000 on his son and daughter, was a present obligation, and became binding from the date of that contract. His settlement could not come into operation until after his death, and, though of the same date as the other deed, it was contemplated that it might not come into operation for some considerable time. What did he do in that revocable deed, which remained revocable and ambulatory until his death? He settled £2000 on his two children, and the question occurs, was that in performance of the obligation in the contract of separation? That obligation was not to "pay" but to "settle" a sum of £2000. But that is just an obligation to leave them £2000, and that is the very thing he does. No doubt in the deed of settlement it is provided that the £2000 shall not be paid till majority, but that does not make any practical difference between the one obligation and the other, for though the deed provides that the sums are not to be paid until majority, the testator made them bear interest from the time of his death, the effect being to make his family trustees for these children. Therefore I can hardly conceive a case in which it is so impossible to read the provision in the testamentary deed as anything but a fulfilment of the thing which stood *in obligatione* in the other deed. The principle founded on the maxim *debitor non presumitur donare* is, that where a sum is provided in an onerous deed, and the same sum is provided in a testamentary deed, the one is in fulfilment of the other. This is one of the strongest cases for applying the principle.

As to the education of the children, that is matter of express stipulation. It is contained in the third head of the contract of separation, and that is clearly over and above the obligation to settle £2000. It was not in Meiklam's power to depart from that obligation.

I am therefore for adhering to the interlocutor of the Lord Ordinary.

The other judges concurred.

Adhere.

Agents for Reclaimers—Horne, Horne & Lyell, W.S.

Agents for Respondents—Maclachlan, Ivory & Rodger, W.S.

Thursday, October 15.

STEWART'S TRUSTEES *v.* STEWART AND OTHERS.

Trust—Legacy—Liferent—Failure of Children. A testator left the liferent of his estate, deducting certain annuities, to his brother George, and failing him, to his cousin John. After their death and the termination of the annuities, the trustees were to hold for payment and delivery to the children of George, and in the event of his leaving no children, for payment, out of the residue, of a specific sum in a certain way, and the balance to the children of Archibald, whom failing, the children of William. At the death of all the annuitants, and of John and George—George leaving no children—Archibald was alive, but had no children. *Held* that the only child of William was entitled to immediate payment of the whole fund.

The late Abbe Chevalier Thomas Stewart left a trust-disposition and settlement whereby he provided that certain annuities should be paid out of the yearly proceeds of his trust-estate, and that the balance of these proceeds should be made over year