

Tuesday, November 20.

SECOND DIVISION.

SPECIAL CASE—MAGISTRATES OF DUNDEE
AND OTHERS.

*Superior and Vassal—Feu-Contract—Casualty—
Implied Discharge of Casualty—Clause provid-
ing for Payment of Duplication of Feu-duty every
Twenty-five years—Conveyancing (Scotland)
Act 1874 (37 and 38 Vict. cap. 94).*

*Held (diss. Lord Rutherford Clark), in con-
struing a feu-contract dated prior to the
Conveyancing Act 1874, that the legal casual-
ties were impliedly excluded by the follow-
ing clause in the feu-contract:—“ Besides mak-
ing payment of the said yearly feu-duty at the
terms after-mentioned, the said R. [the vassal]
or his foresaids shall be bound to pay a dupli-
cation of the said feu-duty at the expiry of
every twenty-fifth year.”*

The Provost, Magistrates, and Town Council of the Burgh of Dundee, as patrons and trustees of the mortification of charity established by the will of the late Robert Johnston of London, dated 30th September 1639, are proprietors of the piece of land called Monorgan's Croft, situated in the burgh of Dundee, which they purchased with a portion of a legacy of £1000 left by the said Robert Johnston. By the extension of the town this land became a feuing subject. In the course of feuing the subjects in the year 1863 they resolved to expose to sale a portion of the ground in lots. On 30th December 1863 they accordingly exposed the same for sale in terms of articles of roup. The ground was divided into five separate lots, and it was provided that the same should be exposed to public auction for payment of the respective sums of yearly feu-duty there specified, and, *inter alia*, lot 2 at the upset yearly feu-duty of £38, lot 3 at £60, and lot 4 at £51; and the articles of roup also stipulated as follows, viz. :—“ But besides the said yearly feu-duty, the purchaser of each lot shall be bound to pay a duplication of said feu-duty at the expiry of every twenty-fifth year, commencing the first payment of said duplication at the expiry of twenty-five years from the date of the purchaser's entry, and each offer after the upset yearly feu-duty is offered for said respective lots shall be an increase of that feu-duty, not for one year only, but for every year.” The articles of roup, which also contained obligations and restrictions on the purchasers as to buildings, provided that a feu-contract containing all usual and necessary clauses, and containing all the clauses and stipulations as to the buildings, should be entered into by the purchaser, and that the subjects were to be held under the expositors as superiors for payment and performance of the feu-duties and other prestations mentioned in the articles. In the advertisements of the proposed sale there was inserted, after a specification of the respective sums of upset yearly feu-duty at which the various lots were to be exposed, the following clause—“ Besides the respective yearly feu-duties above mentioned, the purchaser of each lot will be taken bound to pay a duplication thereof every twenty-fifth year, commencing said duplication at the termination of the first twenty-fifth year after Whitsunday 1864.”

Peter Rattray, slater, Dundee, became purchaser of lots 2 and 3, lot 2 at the yearly feu-duty of £43, 5s., and lot 3 at the yearly feu-duty of £85, 5s., and George Dunn Whyte became purchaser of lot 4 at the annual feu-duty of £61, 5s. Accordingly, and in terms of the articles of roup, feu-contracts were entered into between these purchasers and the patrons as superiors. In these two feu-contracts the essential clauses affecting the present question were in like terms. In the contract with Rattray the superiors conveyed the lots “ to and in favour of the said Peter Rattray, and to his heirs and assignees, heritably and irredeemably, but with and under the following provisions and declarations, namely, that the said Peter Rattray and his foresaids” — [Here followed a restriction as to the height of buildings which might be erected; and then this clause]—“ That besides making payment of the said yearly feu-duty at the terms after mentioned, the said Peter Rattray or his foresaids shall be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year, commencing the first payment of said duplication at the expiry of twenty-five years from the 1st day of April 1864, being the date of the said Peter Rattray's entry to the said subjects.” Then followed various provisions to ensure the building and maintaining of houses on the land, and restrictions against certain uses of it, and a clause by which the patrons bound themselves “ to infest and seise the said Peter Rattray and his foresaids at their own expense” in the subjects, “ with and under the conditions and obligations fore-said, to be holden immediately of and under us and our successors in office in feu-farm, fee, and heritage for ever, for payment and performance of the feu-duties, duplication thereof, and other prestations before and aftermentioned.” . . . “ For which causes, and on the other part, the said Peter Rattray binds and obliges himself and his foresaids to make payment to the said parties of the first part, and their successors in office, and assignees or others in their name having right to receive the same, of the foresaid sum of £43, 5s. in name of feu-duty for said lot second, and the said sum of £70, 12s. 8½d. in name of feu-duty for said lot third, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at Whitsunday 1864 for the period from the date of entry to that term, the next payment at Martinmas thereafter for the half year preceding, and so on at the said two terms of Whitsunday and Martinmas in all time coming, with a fifth part more of each term's payment of liquidate penalty in case of failure, and the due and legal interest of the said feu-duty from and after the respective terms of payment thereof, and thereafter during the non-payment.” The feu-contract with Peter Rattray was executed by both parties on 5th April 1866, and the contract with the said George Dunn Whyte in the same terms was dated 8th and 25th September 1865.

In May 1874 Rattray sold his property to Peter Duncan, who disposed it in 1876 to J. F. Calder and James Paterson as trustees for Calder & Paterson. Rattray died in September 1874, at which time the gross rental of the subjects bought by him was £500. At the date of Rattray's death

Duncan stood infeft in the subjects, and at the date of this case Calder, the surviving partner of Calder & Paterson, was infeft in them.

Whyte died in 1877. and at the date of this case his son James F. Whyte was vested in them. His subjects had been sub-feued, and the annual feu-duties received by Whyte were £104, which was claimed by the patrons as the casualty for an entry due to them as superiors.

This Special Case was stated by the patrons the Provost and Magistrates in the character of superiors, first parties, and by Duncan, Calder & Paterson, and Calder, and also James F. Whyte, second parties, to determine whether the patrons were entitled to casualties in addition to the duplication of feu-duties every fifth year. The first parties maintained—(1) That there being no express or implied discharge or taxing of the legal casualties of superiority payable on the entry of heirs and singular successors in the feu-contracts referred to, the legal casualties and rules of law applicable thereto applied, and the same were payable to the first parties; (2) that having regard to the articles of roup and subsequent feu-contract, the duplication of feu at the expiry of 25 years could not be held to be in lieu of or operate as a discharge of the legal casualties of superiority of entry payable to the superiors. The second parties maintained that the stipulations contained in the articles of roup and feu-contracts for payment of a duplication of said feu-duty every twenty-fifth year, were, according to the true meaning and import of these deeds, in respect and in lieu and stead of the casualties payable on the entry of heirs and singular successors; that the first parties granted warrandice of the feu-contracts in respect of the payments expressly stipulated; and that they had no legal claim for payment of any other casualties of superiority than the duplication of feu-duty.

The question stated for the determination of the Court was as follows—"Are the first parties entitled to payment of the casualties of superiority chargeable against heirs and singular successors in feus granted prior to the date of the Conveyancing (Scotland) Act 1874, in addition to the duplication of feu-duty stipulated by the said feu-contracts to be paid every twenty-fifth year?"

Argued for first parties—If the legal casualties of superiority payable on the entry of heirs and singular successors were to be discharged or taxed, it was essential that this should have been effected in the *reddendo* clause. Now, the *reddendo* clause here dealt with the duplication of the feu-duty at the expiry of every 25th year, making no mention of such a discharge or taxation as being intended in respect of the stipulated duplication. The result, therefore, must be that the superiority rights remained *ex lege*, and the question of law fell to be answered affirmatively—*Duff's Feudal Conveyancing*, 56; *Aitchison v. Hopekirk*, February 14, 1775, M. 15,060; *Earl of Zetland v. Carron Co.*, June 30, 1841, 3 D. 1124.

The second parties replied—It was the plain meaning of the deeds that the duplication of feu-duty at the expiry of every 25th year should be substituted for the legal casualties of superiority payable on the entry of heirs and singular successors. It was unknown in the practice of the

law of Scotland to make a provision for the periodical increase of feu-duty—*Hamilton v. Dunn*, July 16, 1853, 15 D. 925; *Magistrates of Inverkeithing v. Ross*, October 30, 1874, 2 R. 48; *Morrison's Trs. v. Webster, &c.*, May 16, 1878, 5 R. 800.

At advising—

LORD YOUNG—It is not doubtful or disputed that before the Act of 1874 the law implied a term in every feu-contract, that besides the annual feu-duty expressly reserved, the superior should have as casualties a sum equal to a year's feu-duty on the entry of each heir, and to a year's rent on the entry of each singular successor. The parties were of course at liberty to bargain otherwise if they pleased, but if content with the legal implication in the absence of anything to the contrary, it was unnecessary to express the implied term. By the Act of 1874 the rule which I have stated is preserved with respect to feu-contracts prior to its date. The two feu-contracts before us are both of date prior to the Act, and the question submitted to us on each of them is, whether or not it satisfactorily shows a bargain with respect to casualties exclusive of the legal implication arising in the absence of bargain? And I am of opinion that each of them does.

The contracts being identical so far as we are concerned to consider them, I shall confine my attention to the first. After a recital of the articles of roup as specifying the prior agreement in execution of which the contract is made, and a disposition of the property, a clause follows introduced by the words "but with and under the following provisions and declarations," in which these words occur—"that besides making payment of the said yearly feu-duty at the terms after mentioned, the said Peter Rattray or his foresaids shall be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year." I must regard this as a special provision—that is, bargain—for something else than feu-duty—a bargain for something "besides" the feu-duty, the payment of which is provided for in the customary manner in a usual and appropriate clause. That clause occurs in a subsequent part of the contract, separated by a long interval from the special provision. The payment thus specially bargained for is measured by reference to the feu-duty, but is not, I think, on that account to be regarded as itself feu-duty. The proper feu-duty clause, which corresponds to the *reddendo* of a charter, throws no light on the question before us otherwise than negatively. It contains only the usual obligation to pay yearly the feu-duty agreed on. There is nothing about increasing the amount of it in any event.

I must therefore dissent from the view that there is here only a provision for payment of a higher feu-duty every twenty-fifth year. We were told that no instance has been found of such a provision, or of anything stipulated for in name of feu-duty except an unvarying yearly payment, and I am of opinion that the provision here is not to vary the amount of feu-duty in any year, which is a thing unknown in our practice, but at specified intervals to pay "besides" the feu-duty a sum of money equal in amount to the feu-duty of two years, or twice that of one. Now, such a provision is well known, and indeed familiar, as a substitute or equivalent for the casualties

implied by law in the absence of bargain, or when the law denies them, as in the case of corporations; so much so that any conveyancer or man of business finding it in a feu-contract would *prima facie* conclude that casualties were intended to be excluded, or that the parties meant that none should be payable. This ought no doubt to have been expressed in words, and the omission (assuming the intention) was very careless. But if in the absence of express words the Court may, as I think it may, be judicially convinced that the parties so intended, I am disposed to hold that effect may be given to the intention. Now, I am satisfied that these parties so intended. In the first place, the provision is such as is well known, and indeed familiar, as a substitute or equivalent for casualties, and is quite unknown, and I believe unprecedented, when the casualties are intended to subsist. In the second place, the conduct of the first parties may, I think, be regarded as *contemporanea exposita* of their understanding of the bargain. For their claim, if good, arose in September 1874.

I am therefore of opinion that the question ought to be answered in the negative.

LORD RUTHERFURD CLARK—I am of opinion that the question put to us should be answered in the affirmative, and upon a very simple ground.

Composition is by statute due on the entry of every singular successor, and must be paid, unless it be shown that it has been discharged by the superior. I cannot infer any discharge of this statutory claim from the mere circumstance that by the feu-charter a duplicand of the feu-duty is payable at the expiration of every twenty-fifth year. The *onus* is upon the second party to show that composition is not due, and in my opinion he has not discharged that *onus*.

For a similar reason I hold that the entry of feirs also remains untaxed.

LORD JUSTICE-CLERK—I cannot say that this question is unattended with difficulty, but on the whole matter I arrive at the result reached by Lord Young, and I think that the duplication of the feu-duty was in full of all casualties payable *ex lege*.

LORD CRAIGHILL was absent.

The Court answered the question in the negative.

Counsel for First Parties—Hon. H. J. Moncreiff—Hay. Agents—Rbind, Lindsay, & Wallace, W.S.

Counsel for Second Parties—J. P. B. Robertson—Begg. Agents—Morton, Neilson, & Smart, W.S., and Henderson & Clark, W.S.

Wednesday, November 21.

FIRST DIVISION.

[Lord Adam, Ordinary.

MENZIES AND OTHERS (MURRAY'S TRUSTEES) v. FRASER AND OTHERS.

Writ—Subscription before Witnesses—Statute 1681, c. 5.

Circumstances under which objections to a bond and assignation in security, that the granters had neither signed in the presence of one of the testamentary witnesses, nor acknowledged their signatures to him, *re-pelled*.

Onerous Deed—Latent and Technical Objection—Personal Exception.

The grantor of an onerous deed, tested, *ex facie* valid, and delivered to the grantee, cannot thereafter challenge it on a latent and technical ground.

By antenuptial contract of marriage dated 23d January 1845, and recorded in the Books of Council and Session 18th May 1853, entered into between Admiral Jack Henry Murray and Catharine Menzies or Murray, Admiral Murray conveyed to himself and his intended wife, in conjunct fee and liferent, for her liferent use allenary, and to the children of the marriage in fee (under the reservation therein specified), all his property *acquisita et acquirenda*. On the other hand, Mrs Murray conveyed her whole estates then belonging to her, or which should belong to her at the time of her death, to Fletcher Norton Menzies and others, as trustees, for the following purposes, *inter alia*, viz.—(1st) For payment of the annual rent or revenue arising therefrom to her said intended husband and herself, and the survivor of them, under the conditions therein specified; (2d) for payment of the fee of the whole of the said trust-funds and effects generally and particularly thereby conveyed to the child or children of the intended marriage. It was declared by the contract that the trustees should be bound, on Mrs Murray's application to them, without her husband's consent, to take up and apply the whole or part of the trust-funds in order to their being laid out in the purchase of lands. In the year 1857 the trustees, on the requisition of Mrs Murray, and in terms of the contract of marriage, applied the whole funds in their possession and falling under the trust, then amounting to £8953 or thereby, in the purchase of the house and lands of Croftinloan, burdened with a debt of £2000. The title was taken in name of the trustees.

The children of the marriage were Mrs Emily Niel Murray or Baird, who became wife of Arthur Edward Baird, Miss Frances Balfour Murray, and Jack George Murray.

By bond and assignation in security dated 9th February 1876, and intimated to the marriage-contract trustees on 17th February 1876, Admiral Murray granted him to have then and formerly borrowed and received from his son-in-law Arthur Edward Baird the sum of £7386, conform to schedule of advances thereto annexed, and signed by him as relative thereto, which sum he bound himself and his heirs, ex-