count should be taxed, and I must express some surprise that any practitioner before this Court should even after the lapse of seven months resist the request that his accounts should be taxed. But the doctrine of settled account is one with which we are familiar. It has a head in the Dictionary and in the Digest, and there are many cases illustrating it. And the Court is certainly slow to open up a settlement which has taken place between parties—*i.e.*, parties who are upon an even footing with one another. But a client meeting with law-agents is in a peculiar position altogether. The client and the law-agent are not upon even terms. The agent knows the proper charges, but the client does not, and trusts entirely to his agent; and if afterwards he is advised that the account is overcharged, most agents would assent to have the account subjected to the usual test. Apart from that, I am of opinion as a matter of law that it is the client's right if the account is overcharged to have it reduced. The agent personally knew what it should be, and the client did not. As I have said, they were not meeting on an equal footing, as Lord Corehouse pointed out in one of the cases referred to by the Sheriff-Substitute. That is one of the exceptions to the doctrine of settled account, not that it is an absolute or universal exception, but consideration of the relation of agent and client is in truth one which leads to the conclusion which I have stated here, and which I think is in conformity with the opinion of Lord Corehouse. I propose therefore that we should simply dismiss the appeal, affirming the judgment, and with expenses.

Lords Craighill and Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant — Campbell Smith — Rhind. Agent—Andrew Clark, S.S.C.

Counsel for Respondent—Baxter. Agent—A. Nivison, S.S.C.

Friday, March 6.

FIRST DIVISION.

(Whole Court.)

[Lord Adam, Ordinary.

CASSELS AND OTHERS *v.* LAMB AND THE SCOTTISH HERITABLE SECURITY COMPANY (LIMITED) AND LIQUIDATOR.

Superior and Vassal—Sub-Vassal—Irritancy ob non solutum canonem — *Conventional Irritancy—Act* 1597, *c.* 250.

Held by a majority of the Whole Court (*diss.* Lord Justice-Clerk, Lord Deas, Lord Young, Lord Craighill, Lord Lee, and Lord Fraser) that when a feu-right is irritated *ob non solutum canonem*, whether by virtue of an irritant clause in the feu-right, or of the Act 1597, c. 250, the right of a sub-vassal, holding of the defaulting vassal, falls under the forfeiture.

Sandeman v. *Scottish Property Investment Co.*, Feb. 16, 1883, 20 S. L. R. 400, and 10 R. 614, *overruled.*

By feu-contract dated 17th May, and 3d and 5th June 1875, Robert Cassels, John Cassels, Robert Cassels junior, and T. L. Paterson, as trustees under a declaration of trust executed by them in 1874, of the first part, feued to Alexander M'Neill, James M'Meekin, and William Reith, and their heirs and assignees, of the second part, a plot of ground at Dowanhill, Glasgow, and containing in all about 8383 square yards 8 square feet. The plot of ground was disponed under the conditions specified in the feu-contract, and, *inter alia*, "*second*, the second party and their foresaids shall, within three years from the term of Whitsunday 1875, erect and finish, and in all time coming maintain, on said plot of ground tenements of dwelling-houses, or of shops and dwelling-houses," of a certain character and description "which tenements shall be capable of yielding and shall yield in all time coming a free yearly rental equal to at least double of the feu-duty hereby payable." Then followed provisions for the securing that the tenement should be of a superior class and of a certain description of architecture. Then followed a clause by which it was "expressly provided and declared that the second party or their foresaids on contravening or not implementing all or any of the conditions, provisions, and others before written, or allowing two years' feu-duty at any time to remain unpaid, shall, in the option of the first party and their foresaids, amit, lose, and tyne all right and title in and to the said lands, or the part thereof in respect of which such contravention or non-implement shall occur, and the same shall revert and return to the first party or their foresaids free and disburdened of the said feu-right and all following thereon, without the necessity of any declarator or process of law for that effect: All which exceptions, reservations, declarations, conditions, servitudes, and others before written, are hereby declared to be essential qualifications of this feu-right, and real liens and burdens and servitudes upon the said plot of ground before disponed, and the proprietors thereof for the time being, and are appointed to be engrossed *ad longum* in the Register of Sasines at the registration of these presents, or in any instrument of sasine or notarial instrument to follow hereon or in any respect hereof, and to be engrossed or validly referred to in all subsequent conveyances, transmissions, and investitures of the premises, otherwise these presents and said deeds and writings and all following thereon shall, in the option of the first party and their foresaids, be void and null."

Entry was to be as at 15th March 1875.

The feu-contract further stipulated that the ground thereby disponed was to be held by the second party and their foresaids of and under the first party as immediate lawful superiors thereof in feu-farm, fee, and heritage forever for the yearly payment to them of £366, 15s. 11d. sterling of yearly feu-duty, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said feu-duty at the term of Whitsunday 1877 for the half-year preceding that term (no feu-duty being payable for the period prior to

Martinmas 1876), and so forth half-yearly, termly, and proportionally thereafter, with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof, and the interest of the said feu-duty at 5 per cent. per annum after the same became due during the non-payment. A duplicand of the feu-duty was to be payable every 19th year. Then followed a clause—"Declaring that in case the second party or their foresaids shall at any time hereafter sell or dispone parts or portions only of the plot of ground above disponed, then the feu-duty may be allocated thereon, at such rates as may be agreed on by the parties hereto or their respective successors, but the said feu-duty shall in no case be sub-divided into or allocated in smaller sums than £10 sterling per annum, and in the event of its being allocated in sums less than £20 sterling per annum, it shall be augmented by an addition thereto of 5 per cent., and no allocation shall be admitted until there shall be erected on the plot on which the allocation is proposed to be made, and also on the remainder of the ground, buildings sufficient to secure the proportions of feu-duty applicable thereto respectively."

By disposition dated 7th and recorded 9th June 1875, M'Neill, M'Meekin, and Reith conveyed to Daniel Gettins and William Melaugh, with entry at Whitsunday 1875, the whole piece of ground, with the whole buildings and erections thereon.

By feu-contract between Melaugh and Gettins on the first part, and Henry Scott Dixon and others, partners of Henry Scott Dixon & Company, builders, on the other part, dated 13th and 19th, and recorded 1st June 1876, Melaugh and Gettins feued to Dixon and others two plots of ground, forming part of the whole 8383 yards 8 square feet, and each of them 607 square yards 3 square feet in extent, "always with and under, so far as applicable to the said two plots or areas of ground before disponed, the exceptions, reservations, declarations, conditions, servitudes, and others specified and contained in the said feu-contract entered into and executed between Robert Cassels, ironmaster in Glasgow, John Cassels, merchant there, Robert Cassels junior, merchant there, and Thomas Lucas Paterson, merchant there, trustees for the parties and for the purposes specified in a declaration of trust executed by them on the 30th day of June 1874, of the first part, and Alexander M'Neill, builder, Glasgow, James M'Meekin, accountant there, and William Reith, accountant there, of the second part, dated 17th May, 3d and 5th June, and recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow 7th June, all in the year 1875, and also with and under the burden of the annual feu-duties after mentioned, and the whole conditions, provisions, declarations, and others before and after written."

It was then declared that the second party (Dixon and others) should erect buildings to yield a yearly rental equal to at least double the whole feu-duties payable out of the lands, and maintain them in repair, and that the whole conditions of the original feu-contract granted by Cassels and others in favour of M'Neill and others should be essential qualifications of the feu-right, and be recorded as such, and inserted or validly referred to in future transmissions. It was then declared that the feu-duty applicable to each plot, and payable by the second party to Cassels and others in virtue of the feu-contract between them and M'Neill and others, was £26, 11s. 5d., and that each plot was to be holden by the second party of and under the first party (Melaugh and Gettins) as their immediate lawful superiors in feu-farm, fee, and heritage for ever for payment of a feu-duty of £11, 7s. 9d.

By disposition *ex facie* absolute, but really in security of a loan, and dated and recorded in June 1876, Dixon and others conveyed the two plots to the Scottish Heritable Security Company, Limited, with and under, so far as applicable to the two plots, the conditions, reservations, &c., contained in (1) the original feu-contract between Cassels and others and M'Neill and others, and (2) the feu-contract between Melaugh and Gettins and Dixon and others. The loan not having been paid, the Scottish Heritable Security Company entered into possession, and were in possession at the date of this action.

By disposition dated 21st, and recorded 22d May 1877, Melaugh and Gettins conveyed, to George Lamb, with entry at Whitsunday 1877, the whole 8383 square yards 8 square feet and buildings thereon with and under the whole conditions, &c., contained in the original feu-contract between Cassels and others and M'Neill and others, but there was excepted the *dominium utile* of the subjects sold to Dixon and others, and in which the Scottish Heritable Security Company were vested at the date of this action as just explained. This change of ownership was intimated to Cassels and others.

Buildings were erected on the two plots of ground which became vested in the Scottish Heritable Security Company. It was not admitted in this action that the buildings were of the description specified in the feu-contract. The over-feu-duty and sub-feu-duty for these plots were paid by the Scottish Heritable Security Company up to Whitsunday 1878.

No buildings were ever erected on the whole ground capable of yielding a rent of double the annual feu-duty of £366, 15s. 11d. stipulated in the original feu-contract.

No allocation of the feu-duty was ever agreed to by Cassels and others.

Lamb became insolvent, and on 14th March 1879 granted a trust-deed for creditors in favour of Alexander Moore, C. A. The annual feu-duty of £366, 15s. 11d. due under the original feu-contract fell into arrear for more than two years, and at the time this action was raised (Nov. 23, 1881) seven half-years' feu-duty, amounting to £1283, 15s. 9d., were unpaid.

Cassels and others raised this action on 23rd November 1881 against Lamb and his trustee, Alexander Moore, to have it found—(1) that buildings of the stipulated description and yielding a rental equal to at least double the annual feu-duty of £366, 15s. 11d., stipulated in the feu-contract between the pursuers and M'Neill and others, had not been erected, and that the defenders, as now in right of the ground, had contravened the contract and incurred the irritancy therein stipulated, and forfeited their right to the ground and all buildings thereon; (2) that the feu-duty payable under the said feu-contract from Whitsunday 1878 to Martinmas 1881, amounting to £1283, 15s., had remained unpaid

for that period, and that the defenders had thereby contravened the feu-contract and incurred the irritancy therein specified, and lost and forfeited all title to the ground thereby conveyed. There was also a conclusion that the defenders were bound to flit and remove from the ground, and leave the same void and redd to the pursuers.

No appearance was entered for Lamb or Moore, and decree in absence passed against them.

The Scottish Heritable Security Company, Limited, and James Romanes, liquidator thereof (the company having gone into liquidation in February 1881), appeared and were sisted as defenders by minute, and allowed to lodge defences. They set forth the transmissions whereby they became entitled to the two plots of ground sub-feued to Dixon and others as above detailed. They averred that the ground vested in them was all built upon, and that the stipulations of the contract on which the pursuers founded, and of the feu-contract in favour of the Dixons in regard to buildings, "so far as vested in the defenders," has been implemented; that, in particular, buildings had been erected upon their ground capable of yielding double the annual feu-duty effeiring to it. They stated that they had paid up till Whitsunday 1878 the over-feu-duty and sub-feu-duty stipulated by the feu-contract in favour of their predecessors, and were willing to pay the arrears of the over-feu-duty and sub-feu-duty on receiving a proper discharge thereof. They averred that the contract had been entered into with a view to sub-feuing, and there had been a *bona fide* and adequate allocation of over-feu-duty calculated and fixed by the superiors' own architect and surveyors.

The pursuers pleaded—"(1) The defenders, or their authors, having failed to erect buildings on said plot of ground in terms of said feu-contract, the defenders have contravened the terms of said feu-contract, and incurred the irritancy therein specified. (2) The defenders having allowed more than two years' feu-duty to remain unpaid, have further contravened the terms of said feu-contract, and incurred the irritancy therein specified. (3) The defenders in respect of said contraventions have forfeited all right and title to said subjects, and the pursuers are entitled to decree as libelled."

The Scottish Heritable Security Company and liquidator pleaded—"(2) The conclusions of the summons, so far as founded on breach of the original feu-contract regarding the erection of buildings, ought, in a question with the present defenders, to be repelled, in respect—(1st) The said stipulations have been complied with, so far as the subjects belonging to the present defenders are concerned; and (2d) so far as the rest of the subjects originally feued out are concerned, the present defenders having neither right nor title to interfere, were never in in a position to purge the irritancy. (3) The present defenders being sub-feuars of only a portion of the whole subjects to which the action relates, are only liable for the feu-duties payable under the feu-contract entered into between them and the mid-superiors, and having been all along ready and willing to make payment of the same, are entitled to be assoilzied. (5) The whole lands in question having been feued out by the pursuers for the express purpose of being sub-feued for building sites, and there having been a *bona fide* and adequate allocation of a proportion of the principal feu-duty on the defenders' subjects, the defenders are not liable to an irritancy of their right."

The Lord Ordinary (ADAM) repelled the defences stated for the Scottish Heritable Security Company and liquidator.

"*Note.*—[*After narrating the terms of the feu-contract by the pursuers to M'Neill and others*]—It does not appear to me that any of these conditions are illegal, or such as the law will not enforce. It is obvious that two of them are of great importance to the pursuers as affording them real security for the payment of the feu-duty, viz., that buildings should be erected on the ground capable of yielding a rental equal to at least double the feu-duty within three years from the term of Whitsunday 1875 under the sanction of an irritancy, and that no allocation of the feu-duty should be admitted unless buildings had been erected not only on the plot of ground on which the allocation was proposed to be made, but also on the remaining portion of ground sufficient to secure payment of the proportion of feu-duty applicable to each respectively. It is easy to see that the existence of such conditions must have very much militated against any sub-division of the ground for building purposes, but if the pursuers insisted upon them, and the vassal agreed to them, I do not see why they should not be enforced.

[*His Lordship then narrated the disposition by M'Neill and others to Melaugh and Gettins, the feu-contract by which Melaugh and Gettins conveyed the two plots to Dixon and others, the manner in which these subjects have been transferred to the Scottish Heritable Security Company, and the disposition to Lamb, and proceeded*]—"It is alleged that the foresaid allocation of over-feu-duty made payable to the pursuers was calculated and fixed by the pursuers' own architects and surveyors, and that the sums so fixed are the fair and proper proportions effeiring to the said two plots of ground of the *cumulo* feu-duty of £366, 15s. 11d., payable for the whole plot of ground under the feu-contract thereof, but I did not understand that the defenders maintained that the pursuers had ever consented to this allocation.

"It is also alleged by the defenders that buildings have been erected on the two plots of ground vested in them, capable of yielding double the annual feu-duty effeiring to them, but I did not understand that the defenders disputed that buildings had not been erected on the remainder of the ground in the original feu-contract capable of yielding double of the annual feu-duty which would remain applicable to it, or that buildings had not been erected on the whole ground originally feued capable of yielding double the annual feu-duty of £366, 15s. 11d. It was, however, disputed by the pursuers that the buildings erected on the plots vested in the defenders were of the description required by the original feu-contract.

"Neither was it disputed by the defenders that the whole *cumulo* feu-duty is in arrear to the extent specified on record. The defenders have not tendered payment to the pursuers of these arrears, but they offer to pay the arrears of the

foresaid annual sums of over-feu-duty and sub-feu-duty, amounting to £53, 2s. 10d. and £22, 15s. 6d. respectively, and they maintain that in respect of such tender they are not liable to have the feu-rights vested in them irritated.

"In so far as regards the irritancy *ob non solutum canonem*, I should not have doubted, but for the case of *Sandeman* v. *Stiven and Others*, February 21, 1883, that the irritancy concluded for could not have been purged except upon payment of the whole arrears of the *cumulo* feu-duty. I am bound, however, to give effect to that case in so far as it is applicable to the present case. In this case we have no question of statutory irritancy to deal with, but only a case as to a conventional irritancy. In *Sandeman's* case the Court irritated the right of the original feuars under burden of the sub-feus granted by them. I do not quite understand the meaning of this judgment, as it is difficult to see how a right which has been declared null and void can be the subject of a burden, but the intention no doubt was, while declaring the nullity of the original feuars' right, at the same time to sustain the validity of the sub-feus, and I am asked by the defenders to pronounce a similar interlocutor in this case.

"I do not quite understand the legal position in which the defenders as sub-feuars would in that case be left. As I understand the feudal law of Scotland, all land possessed by a subject must be held of some superior, but if I irritate the feu-right of the defenders' immediate superior, of whom then would they hold, and under what conditions? I cannot myself answer that question, but I do not think that they can in any view be held to be in a more favourable position than if they held the subjects directly of the pursuers. But if that be their position, then I am clear, upon the construction of the feu-contract entered into between the pursuers and their immediate vassals, that the irritancy now sought to be enforced, can only be purged upon payment of the arrears of the whole *cumulo* feu-duty. It is an express condition of that contract that the pursuers shall not be bound to allocate the *cumulo* feu-duty upon any portion of the ground, unless there be buildings erected upon the remaining portion [yielding a rent] equal to double the annual feu-duty proportionally applicable to it. It is not disputed that there are not buildings of this value, or any buildings at all, erected on the remaining portion of ground. But the result of giving effect to the defenders' contention would be exactly tantamount to allocating a portion of the *cumulo* feu-duty on their feu in direct contradiction to the above stipulation. The object of obtaining an allocation of the original *cumulo* feu-duty is, of course, to exempt the portion of ground on which such allocation is made from liability for any feu-duty beyond the amount so allocated, but until such allocation is made, the whole ground contained in the feu-contract undoubtedly remains liable for the whole feu-duty. The superior is not bound by law to make any such allocation, and to sustain the claim of the defenders would therefore be to deprive the pursuers of the real security for payment of the feu-duty due to them, which they not only had by law, but for which, in this case, they had expressly stipulated. It is true that there is no contract between the pursuers and the defenders, who are sub-vassals, but they must be held to be in possession of the subjects under some conditions and provisions, and surely such conditions and provisions as might have been enforced against them had they held directly of the pursuers, must be enforceable against them although they are sub-vassals; and, as I think, it is clear if the subjects possessed by the defenders had been held directly of the pursuers, they would have been liable for the whole *cumulo* feu-duty, so I think that they are not the less liable because they are in possession of the defenders as sub-vassals. It is said that it is a hardship and an injustice to compel the defenders to pay the whole arrears of feu-duty, or otherwise to deprive them of their property. But whence does this alleged hardship and injustice arise? If before lending their money the defenders had seen, as no doubt they did, the titles to the subject, they must have seen the clauses which the pursuers had had inserted therein for the security of the payment of the feu-duty due to them. The defenders ought to have seen and known that the pursuers held a prior right of security over the subjects in question for payment of the feu-duty, preferable to any security which they could acquire for repayment of a loan, and if the defenders chose to lend their money with this prior security apparent on the face of the deeds, it was their own fault. I can see no equity or justice in depriving in such circumstances the pursuers of a security for payment of the feu-duty for which they had expressly stipulated. It is probable enough that if the pursuers had been asked to feu only the two plots of ground now in possession of the defenders, they would have refused to do so, but would have feued only the whole ground as in the original feu-contract; but if the defender's contention is right, the pursuers must now take back their ground with these two lots excepted, a state of matters to which they never consented, and which may very greatly diminish the value of the ground as a feuing subject.

"I do not therefore consider that the case of *Sandeman* referred to rules this case, unless, indeed, it is to be held that in no case can a conventional irritancy *ob non solutum canonem* be enforced against a sub-vassal, but I do not think the case goes so far as that. I think I am bound to consider the conditions and provisions of the particular contract sought to be enforced, and so considering them I am of opinion that the irritancy in question can only be purged by payment of the arrears of the whole *cumulo* feu-duty.

"There is a further irritancy sought to be enforced in respect that buildings of the description and value specified in the feu-contract have not in terms thereof been erected on the plot of ground thereby disponed. It is not disputed that such buildings have not been erected. For the reasons stated above I do not see why this irritancy also which has been incurred should not be enforced.—*The Magistrates of Glasgow* v. *Hay and Others*, February 23, 1883."

The Scottish Heritable Security Company reclaimed. After hearing counsel, the First Division ordered minutes of debate to be laid before the whole Court in order that the opinion of the whole Judges might be obtained on the questions raised by the record.

Argued for the Scottish Heritable Security Company—The present case was practically undistinguishable from the case of *Sandeman*, for

the feu-contract could not give a more extensive power to the superior in the matter of allocation of feu-duty than they had at common law. If anything, the feuars were in a stronger position in the present case than they were in the case of *Sandeman*. The clause of allocation in the present case seemed to refer rather to sub-division by sale or disposition than by sub-feuing. The contention of the pursuers came to this, that wherever or in whatsoever way an over-feu was irritated, every sub-feu right following upon it was also irritated, unless, as in the case of attainder, it had statutory protection. The reclaimers denied this, and contended that in certain circumstances (as for example in the present case) the sub-feu might subsist although the over-feu had been swept away, otherwise the sub-feuar's right might be irritated without his knowledge or intimation to him. It might even come to this, that by means of sub-feuing the immediate vassal might be so divested that he might have no substantial interest to prevent decree passing in absence, and once it had passed, no third party would have any title to have it recalled. If the contention of the reclaimers prevailed the superior lost no right, nor was he deprived of any security, as sub-feus subsisted yielding a just and competent avail. It lay upon the pursuers to show that it was a necessary part of the feudal law as accepted in Scotland, that upon an irritancy of an over-feu right being declared the sub-feu fell with it.

If the reclaimers were to be evicted from buildings which they had erected in the *bona fide* belief of the permanence of their tenure, in respect of default in paying a debt which they did not contract, they ought to be indemnified according to the rules of equity. It was a mistake to treat the case as merely one of contract, and depending entirely upon the construction of the contract. The real question was, what was the effect upon a proper sub-feu of the well known irritancy *ob non solutum canonem* declared against the immediate superior? The contention of the reclaimers was that a sub-feu was essentially an independent real right, and therefore it was contrary to its nature that it should be defeasible at the instance of the over superior. If the contract between the parties went beyond the law and stipulated for what the respondents maintained it did, then it was an invalid contract under the Conveyancing Act of 1874.

Authorities—*M. of Tweeddale's Trustees* v. *E. of Haddington*, 1880, 7 R. 620; *Sandeman* v. *Scottish Property Investment Company*, February 21, 1883, 10 R. 614; Juridical Styles, 3d ed., i. 11, 27, 34, 101; Menzies' Lectures, 822; 2 Bell's Lectures, 731; Erskine, ii. 5, 2, 10; Stair, ii. 11, 10; Craig's *Jus Feudale*, ii. 4, 16, and iii. 6, 10; Duff's Feud. Conv., 235; *Cockburn Ross* v. *Heriot's Hospital*, June 6, 1815, F.C.; *Bruce* v. *Bruce Carstairs*, 1770, M. 10,805, *affd.* 2 Paton, 258; *Walker* v. *Grieve*, 1827, 5 Sh. 469; *Harvey* v. *Hamilton*, January 29, 1822, F.C.; *Elibank* v. *Campbell*, 1833, 12 Sh. 74; *Bontine* v. *Graham*, 1837, 15 Sh. 711, *affd.* 1 Rob. Appeals, 347; *Wilson* v. *Pollok*, 1839, 2 D. 159; *Dalrymple* v. *E. of Stair*, 1841, 3 D. 837; Act 1457, cap. 71, and Macph. Obs. on Act; Erskine, ii. 5, 44; Stair, ii. 3, 28; Dalrymple's History of Feudal Property, 248; *Dalziel* v. *Caldwell's Tenants*, 1674, M. 4685; *Huntly* v. *Grant*, 1677, M. 4689; *Beaton*, 1672, M. 3664; *King* v. *Tullibardine*, 1517, M. 7179; *Prior of Charterhouse* v. *Borthwick*, 1533, M. 7180; Voet. in Dig. 38, 116; *Stirling* v. *Ewart*, 1842, 4 D. 684, *affd.* 2 B. App. 128-249; *Morrison's Trustees* v. *Webster*, 1878, 5 R. 800; *Hyslop* v. *Shaw*, 1863, 1 Macph. 535; Stair, iii. 3, 31; *Campbell* v. *L. Lochnoras*, 1610, M. 4685; *Wemyss* v. *Thomson*, 1836, 14 Sh. 233; *Gilmour* v. *Balfour*, 1839, 1 D. 403; *Hinshelwood's Trs.* v. *Watson*, July 17, 1877, 8 R. 108 (*note*); *Magistrates of Edinburgh* v. *Horsburgh*, 1834, 12 Sh. 593; *Edinburgh Roperie Company* v. *Magistrates of Edinburgh*, July 10, 1877, 4 R. 1032, *affd.* Nov. 12, 1878, 6 R. (H. of L.) 1; *Knight* v. *Cargill*, 1846, 8 D. 991; *Houldsworth* v. *Brand's Trustees*, 1875, 2 R. 683; Stair, i. 8, 6; Erskine, i. 7, 33, iii. 1, 11; Kames' Equity, i. 140-168, ii. 146; Pothier Propriêtês, secs. 343-353.

Argued for the pursuers — The irritancy sought to be enforced was conventional, and it was not disputed by the defenders that it had been incurred, but it was maintained by them that houses in terms of the contract had been built by the sub-vassals whom they represented, and that as they were willing to pay the pursuers the proportion of the feu-duty effeiring to the sub-feu, any declarator of irritancy should reserve their rights to the two plots of ground. Such a contention was untenable, as the effect of irritating the feu was to cause the subjects to revert to the superiors freed from all subsequent rights as if the feu had never been given off. The clause of irritancy made this quite clear. In considering the terms of the original contract it was clear what its meaning and intention was, viz., that a failure to erect houses yielding a rental double of the feu-duty should involve an irritancy of the feu, that an irritancy should also be incurred if the feu-duty remained unpaid for two years, and that the superior should not be compelled to recognise subdivision until buildings were erected upon the whole subjects sufficient to secure the proportion of feu-duty applicable to each part. Such a contract was perfectly legal at common law, and its stipulations were in accordance with the ordinary principles of feudal law. A superior was not bound to recognise any subdivision of the subject of a feu, or any allocation of feu-duty following on such division. On this point see cases of *Wemyss* v. *Thomson*, Jan. 19, 1836, 14 Sh. 233; *Raeburn* v. *Geddes*, Oct. 24, 1870, 9 Macph. 20; and Lord Shand in *Sandeman*, June 8, 1881, 8 R. 797; *Creditors of Eyemouth*, 5 Brown's Supp. 856. A superior in enforcing an irritancy was not bound to recognise any right upon the part of the sub-feuar except the right to step in and purge the irritancy before decree by fulfilling the conditions of the original feu-right. What was forfeited was not the vassal's right but the feu-right itself, so the sub-feuars could have no estate left in their persons. The present question between the parties depended upon the interpretation of a contract, and no question of hardship to one party or the other was relevant to the inquiry. The conditions of the original contract were made known to all interested, and it was provided that the provisions of the original feu-right should be imported into all subsequent deeds.

Authorities—Bell's Principles, sec. 701; *Drummond*, M. 7235; *Hinshelwood*, 8 R. 108; *Mon-*

crieff, 1635, M. 9315; *Coltart*, 1782, M. 9313; *Beveridge* v. *Moffat*, June 9, 1842, 4 D. 1381; Bell's Conveyancing, 1st ed. vol. ii. p. 729; *Ross* v. *Heriot's Hospital*, June 6, 1815, F.C. 2, and Bligh, 709; *Magistrates of Glasgow* v. *Hay and Others*, 23d February 1883, 10 R. 635.

The following opinions were returned by the consulted Judges:—

Lord-Justice Clerk—I cannot distinguish this case from that of *Sandeman* v. *Stiven*, which was decided in the Second Division in the course of last year. Indeed, I assume that in requesting the opinions of the whole Court the First Division rather desired to have the result at which we then arrived reconsidered. As the judgment in the case of *Sandeman* is now under appeal to the House of Lords, I should have thought it might have been desirable if the decision here had been postponed until we had been instructed by the result of that appeal. At the same time the questions and principles involved are of great importance, and I have carefully reconsidered the views I have expressed in the case *Sandeman* with the aid of the intelligent papers which have been lodged in this case. But I have found no reason to alter or modify those views; on the contrary, much to confirm them. I shall subjoin, in this consultation of the whole Court, some memoranda in illustration of my former remarks.

I pointed out in the case of *Sandeman* an historical fact, familiar to all students of feudal jurisprudence, that the main question at issue here is a revival, for the first time for 200 years, of a very old controversy. In the fifteenth century—and indeed earlier—a reaction had set in on the Continent against stringent views of the feudal rights of superiors. In Scotland these views took shape by the legislation in the reign of James I. of Scotland and his successors, after the return of the former from his captivity, during which he and his advisers had learned much of Continental opinion in the French Court of Henry V. of England. From this source sprung the Act 1449 regarding tenants, that of 1457 regarding sub-vassals, and that of 1469 regarding the entry of creditors. All these had a tendency in the same direction—to promote the security of subaltern rights, in feu, or lease, or credit, with a view to the better cultivation of the land and the wellbeing of the people. The statutes of 1449 and 1469 have substantially survived to this day, and that of 1457, construed as our best lawyers have always construed it, was of not less importance.

This statute came to be regarded with jealousy by the Crown in the next century, mainly because it limited the Crown claim on the forfeiture of ward-vassals; and it experienced several vicissitudes in the legislation of James VI. and Charles I. and II., to which I shall advert. But the statutes passed in this direction never affected, and did not apply to, sub-feus held of a subject-superior, granted for a competent avail or feu-duty—the statute being held to operate as a general consent by superiors to such sub-feus; and this I apprehend is its effect at the present day.

In 1597, nearly a century and a half after the date of this memorable statute, was passed the Act on which this action proceeds. It introduces into the relation of superior and vassal what is known as the forfeiture *ob non solutum canonem*, whereby a vassal who had failed to pay his feu-duty for two years was held to have forfeited his holding. This was not a casualty under the feudal system, but was borrowed, as the statute itself bears, from the Roman and Canon law. The pursuers, themselves the vassals of a subject-superior, have sub-feued part of their holding to building speculators, who again, as they were intended to do, have sub-feued, by grants to be held *de me*, building plots for the erection of urban tenements. Of these, two have been sub-feued to the defenders. The mid-superior is in arrear of seven years' feu-duty, and the pursuers desire by their action not only to forfeit what belongs to their own vassal, but to include in the forfeiture the property of the sub-vassals also. It is to the law applicable to this demand that I mean to address myself.

It was decided in the well-known case of *Bald* v. *Buchanan* (M. 15,084), which occurred in 1780, that a holding granted *de me* is not a mere burden on the granter's title, but is a separate real estate; that it is not extinguished by renunciation, nor consolidated *ipso jure* with the superiority, when reacquired by the superior, and that it requires a resignation *ad remanentiam* to effect this object. Mr Bell in his Principles (788) lays this down without reserve, and it does not admit of dispute.

Further, it seems to be admitted that there is no instance to be found in our reported cases, of the lands of a sub-vassal, holding *de me* of a subject-superior, for a competent avail, being included in the forfeiture of his immediate superior. No precedent to this effect was cited in *Sandeman's* case, and none is referred to in the pursuers' argument here.

No question arises here, or can arise, as to the proper feudal remedies competent to the superior for recovery of his feu-duty. These have been well settled by a long train of decisions; but no question in regard to them can be raised under this action of forfeiture, nor has the argument the slightest bearing on them. Indeed, the improvement of the subject of the sub-feu was and must be in favour of, and not against, the over-superior.

In these circumstances the inquiry commences with every presumption against the very stringent remedy which the pursuers wish us to grant them. In one respect the case is more barren of authority than the argument in the case of *Sandeman* was. It is true that in that case it was in effect conceded that our reports furnished no instance of the forfeiture under the Act 1597 of a sub-vassal holding of a subject-superior for a competent avail, on account of the mid-superior's delinquency. But it was contended—and this formed a material element in the argument—that certain decisions of authority had recognised in analogous cases the application of the brocard of the civil law, *Resoluto jure dantis, solvitur etiam jus accipientis;* and we were referred to cases in Morison's Dictionary, under the head of Forfeiture, in support of that contention. These were cases of forfeiture for treason, and we were specially referred to the case of the *Lady Caldwell* v. *Dalzel* (M. 4690) as bearing on the argument.

Unfortunately for the pursuers in *Sandeman's* case, it turned out that all these cases had ceased to have any juridical existence; that they had

been recalled and annulled by the Scottish Parliament, as a grievance to the nation, and contrary to the laws and liberties of the country. The course followed by the Convention of Estates in Scotland in 1689, and by the Parliament in 1690, seems to have fallen so much out of mind as to justify some further reference to it.

The history of these events is of importance in this question in two respects—First, because it entirely destroys the authority of the only precedents referred to by the pursuers in *Sandeman's* case; and secondly, because it proves conclusively that the principles on which those judgments proceeded were not then, and are not now, consistent with the law of Scotland.

At the Revolution the Convention of Estates in Scotland were not content merely to declare the throne vacant by reason of the desertion of James II., but they held his right to have been forfeited by his acts before his flight. On the 11th of April 1689 they formally passed a resolution that, by a series of acts which they declared to be contrary to the laws and liberties of the realm, and which are set out *in extenso* in the resolution, James II. had forfeited the throne of Scotland. Two days afterwards, on the 13th of April, they resolved on a list of grievances to be presented to the new sovereigns William and Mary. Among the articles contained in the first enumeration was one to the effect—'That the causing pursue and forfeit persons upon stretches of old and obsolete laws, upon frivolous and weak pretences, upon lame and defective probation, as particularly the late Earl of Argyll, are contrary to law;" and among the grievances represented to King William and Queen Mary was the following:—"That the forfeitures in prejudice of vassals, creditors, and heirs of entail are a great grievance."

The Convention of Estates in the same year (1689) passed an Act (c. 23) "In favour of the vassals and creditors of forfeited persons"—the preamble of which bears, "That it being one of the great grievances of this nation that in the late times many honest and faithful subjects have been ruined and undone in their estates and fortunes for other men's crimes and rebellions to which they had no accession," the Act goes on to provide that no vassal or creditor should lose their lands or estates by their superiors' or debtors' forfeitures, unless the said vassals or creditors had joined in the treason or rebellion. In the next year Parliament followed up these proceedings with vigour. Dealing first with the decrees of forfeiture themselves, they passed the well-known Rescissory Act 1690, c. 18, by which the whole of the forfeitures since 1665, and all the proceedings in the relative processes, and all that had followed upon them, were absolutely recalled and annulled, and the forfeited persons themselves were *nominatim* restored against them, and the proceedings themselves were directed to be buried in perpetual oblivion. Secondly, they had already rescinded all sentences pronounced against those who had not been personally concerned in the acts on which the forfeitures proceeded; and then, by c. 33 of 1690, on a recital of the article of grievances above quoted, and on a most weighty and significant preamble, they proceeded to regulate the relations of superior, vassal, and sub-vassal for the future on the footing announced in that preamble, in these words:—"That it is just that every man suffer for his own fault, and not the innocent with or for the guilty, and that such rights as are not in a man's power to alienate by consent should not confiscate by his crime." The last clause of this historic declaration of the law was a repudiation of the maxim *resoluto jure dantis*, &c., as applied to subinfeudation under the Statute 1457. On this preamble the Act proceeds to provide, "That the subaltern real rights holden of them" (the forfeited persons) "by their vassals, whether in fee or liferent, and by whatever manner of holding, shall noways be prejudged by the forfeiture of the superior, but shall remain with the vassal in the same manner and way as if their rights had been confirmed under the Great Seal before committing of the crime for which the superior was forfeited."

I cannot doubt that the Second Division, in the case of *Sandeman*, rightly disregarded the precedents drawn from decisions so solemnly denounced, and the reasoning by which they were supported. The case of the *Lady Caldwell* v. *Dalzel*, which the Court in *Sandeman's* case were invited to follow, had an instructive sequel. The forfeiture of Mure of Caldwell, whose widow, for her provisions, was the party in that case, was rescinded, with those of two others, in 1690, by a Special Act of Parliament (c. 31). This was followed by a demand against the heir of the donator, General Dalzel, for bygones; and he was compelled to refund by a decree in 1706 (M. 4750).

The present pursuer, however, has not founded on these cases. It is now maintained that treason is not a feudal delinquency, that cases relating to it have no bearing on the present, and that the proceedings and legislation of 1690 did not embrace or apply to forfeiture for any other cause than treason. But this is an error as far on the other side. The law was not doubtful before these statutes passed, and these condemned judgments had already been declared to be at variance with the law as it stood when they were pronounced, and they were annulled accordingly. The Act 1690, c. 33, only declared and regulated the existing law, which had been transgressed only in these cases of treason. But there can be no doubt that the Statute 1690, c. 33, did not proceed on any subtle feudal distinction, but intended to affirm and to enforce the broad principle of law and policy set out in its preamble—that a man should suffer for his own acts only, and not for those of others; and that property which a man cannot affect by his voluntary acts should not be lost to the true owner by his delinquency. That this is so is proved by Lord Stair's commentary on the Statute (iii. 3, 39). His words are—"And likewise the 33d Act of Parliament 1690, King William and Queen Mary, although more extensive in prejudice of the Royal prerogative, wants not ground and example that nothing should be forfeited which could not have been alienated by the forfeited person."

As to whether the Court was right or wrong in holding treason to be a feudal delinquency, it is of no moment to inquire. That they did so in these discredited cases is certain, both from the reports themselves and from the concurring testimony of Dirleton and Sir James Stewart.

Dirleton died in 1687, before the crash came

which his own policy as Lord Advocate had done so much to produce, and therefore before the statutes which reversed it were passed. Never since the Revolution has the great principle which prefaced the Act 1690, c. 33, been gainsaid in judgment. But the subject has once and again been treated by text-writers of authority, and incidentally by the Bench in cognate cases; and these I shall shortly resume.

Sir James Stewart, who composed "Answers to Dirleton's Doubts," wrote after the legislation of 1689 and 1690; and his account of the effect of it affords contemporaneous testimony in support of these views. He treats Dirleton's speculations on forfeiture as a mere juridical thesis, having no practical application to the law after the passing of the Statute 1690, c. 33. He says, "The Act of Parliament 1690, entitled an Act for the security of the creditors, vassals, and heirs of entail of persons forfeited, hath made a great alteration on this subject. But it is here reviewed more for argument's sake than for anything else." As to the case of *Sempronia*, which Dirleton elaborates, and the pursuers call in aid, he somewhat scornfully puts it aside with the remark that "the rigour of the forfeitures, *according to the then law*, would prevail against all the author's reasoning." Having gone over the title of forfeitures, he concludes his commentary on it by saying, "Thus I have gone through the author's title of forfeitures, writ, no doubt, before the Act of Parliament 1690, which so much the more commends the author's moderation, that forfeitures were then in their rigour and vigour. But the said Act of Parliament *hath now regulate this whole matter as to creditors, vassals, and heirs of tailzie;* and yet," he continues, "not so thoroughly as might have been expected after the great abuse of forfeitures," as indeed appears from this case.

It has been said that this Act only applies to forfeiture for treason. There are no such limiting words in the statute. On the contrary, the words are as wide as the inductive declaration in the preamble, and, I imagine, were intended to reach all cases of forfeiture for any cause in which similar injustice was attempted. Excepting in cases of treason, this had not occurred, and so there was no other existing grievance in this direction; and beyond the declaration of the law it was not necessary that other causes of forfeiture should be specified, seeing that the words embrace them all.

So the matter practically took end. The brocard to which I have adverted was never again applied to the right of a sub-vassal under the Act 1457, and there is neither decision nor *dictum* to the contrary. To Lord Stair's views I fully adverted in my former opinion, and I find the subject only twice discussed afterwards by lawyers of authority—once in the "Commentary on Lord Stair's Institute," now universally ascribed to Lord Elchies; and a second time, after the interval of a century, by Lord Glenlee and Lord Meadowbank in the case of *Cockburn Ross* v. *Heriot's Hospital* in 1815 (F.C., p. 390).

Lord Elchies wrote his notes on "Stair's Institute" between 1712 and 1725, when these judgments and events were recent. He considers at large the Act 1457, and against what casualties it protects a sub-vassal. He says that sub-feuars are secured not only against "recognitions that fall by the diligence of the ward superior, but likewise against forfeiture by treason." After some remarks in regard to subfeus by Crown vassals, he says (p. 128 *et seq.*), "But the forfeiture of those who are not the King's immediate vassals confiscates their ward-holdings as a penal statute, but with the burden of all subaltern rights and deeds of the forfeited person." These are the words of the judgment in the case of the *Marquis of Huntly* v. *Cairnborrow* (M. 4174). He proceeds, "And they found the same over again—10th Nov. 1680—*Campbell* v. *Auchinbreck* (4175); and the reason of both these decisions is that this Act 1457 is equal to a confirmation, and imported a consent *de præsenti*, which excludes forfeiture or recognition." He goes on to consider whether the Act excludes non-entry. "It seems by the opinion of our lawyers the non-entry would not affect such sub-vassals, for in the pleading between *Marquis of Huntly* v. *Cairnborrow* it is expressly alleged that these feus have always been found valid, not only against ward, but also against recognition and *all other apertures of the vassal's fee to the superior.*"

There are many other passages on the same subject scattered over this interesting treatise, including that quoted at length by Lord Glenlee in the case of *Cockburn Ross*. Elchies' remarks extend the operation of the Act 1457 to "all other apertures of the vassal's fee to the superior."

It will also be observed that both Stair and his commentator refer to these two cases of *Huntly* and of *Campbell* as subsisting and binding authorities as regards the sub-vassals of those who are not the king's vassals, and make not the slightest reference to the case of *Caldwell*, or the views attributed to the Bench in that case, in the report of it by Harcarse (M. 4693).

Stair, in iii. 3, 31, says expressly that "the Act 1457, which secures against ward and recognition, must also secure feus against the forfeiture of the vassal granter of the feus." He speaks of it in 1693 as an operative Act. It is plain, therefore, that it is a misapprehension on the pursuers' part to consider the statute as being repealed or in abeyance either at that date or now. The Act of 1606, forbidding ward vassals to set their lands in feu, referred solely to ward lands. It was renewed in 1633, repealed in 1643, and revived in 1660; but this never in any instance, or at any time, was held to affect the operation of the Act 1457 as a present confirmation of feus held of a subject-superior.

There is, no doubt, in Elchies' notes a certain hesitation and reserve about admitting that the Act of 1457 applied to any but ward lands. To some extent this remark applies even to Lord Stair, who, however, ultimately writes with more confidence. See Mr Brodie's note on Stair iii. 3, 34, p. 398. Fortunately we have this doctrine laid down by unimpeachable authority, long after Elchies wrote, and after ward holdings had ceased to exist, in the well-known case of *Cockburn Ross* v. *The Governors of Heriot's Hospital*, June 6, 1815, decided in 1815 (F.C. p. 393), a century later than the Commentary of Elchies.

The case of *Cockburn Ross* arose under the Statute 1469, and the subsequent Act of George II., and the question raised by it was in effect, whether in calculating the amount of the year's

mail, as the lands were set for the time, payable by a singular successor for an entry, the superior was entitled to include the value of buildings erected by a sub-vassal. Precisely the same arguments were used by the superior in favour of that contention as those which have been used here. There, as here, it was contended that the Act 1457 was obsolete—that the superior was not bound to recognise any sub-right to which he had not consented, and that the Act 1606 was conclusive against the vassal's claim. Lord Glenlee, in a few short but authoritative sentences, dismissed all these suggestions as at variance with settled law.

He commences by setting aside a contention which the pursuer in this case revives, that until the Jurisdiction Act in 1746 superiors had successfully resisted the operation of the Act 1457. Lord Glenlee corrected this impression. He says—"Were it of consequence to inquire by what progress the law has come to its present state, I should differ a good deal from some of the opinions that have been delivered as to what that progress has been. I should think that long before the Jurisdiction Act the law of Scotland was much nearer what it is at present than is generally supposed to be the case." He then proceeds to consider the effect of the Act 1606 on that of 1457, holding that the Act of 1606 was confined to ward holdings, and then he deals with the case of sub-feus held of subject-superiors. "But as to subject-superiors, where the holding was feu or blench, as the Act 1606 did not refer to them, the matter stood as if it had never existed, and consequently in that sort of tenure the superior's claim for entry-money was burdened by every base right which the vassal had granted, whether consented to by the superior or not."

Lord Meadowbank's opinion on the points I have been considering is equally precise, and is expressed with his usual force and lucidity. "I conceive," he says, "as to those feus called improper feus, which are only imitations of the proper feudal title—originally adopted as a convenient mode of conveyancing—there is nothing in the whole history of them which demonstrates that there ever was a period when this question was considered in the light in which it is now viewed by his Lordship," [Lord Bannatyne, who differed from the judgment]. "Custom everywhere overruled any strict opinions regarding them, that otherwise might have been deduced from the feudal grants of benefices bestowed by great proprietors for military services. It was held that the property conveyed to vassals for an adequate value was too sacred not to over-rule the right of the superior, and modified it so far as to sanction sub-feus."

I need not pursue this, as I cannot add to the authority or expression of these *dicta* of two of our greatest feudal lawyers, delivered at a time when such questions were more frequent than they are now. If, as they lay it down, the Act 1457 is still in full force, and is equivalent to a confirmation by the superior of all sub-feus granted by subject-superiors for a competent avail, no question remains; nor can it alter or detract from the weight of these opinions that they were delivered in a case relating to the Act 1449, which, like the Act 1597, was not proper to the feudal system, but engrafted on it by statute.

One or two side issues have been raised by the pursuer, but they do not seem to require detailed examination. It is said, for instance, that a heritable bond in the usual form is an example of a sub-feu with a *de me* holding which falls by the forfeiture of the granter. It would be so only if a heritable bond were a permanent feudal estate granted for a competent avail—for to such rights alone does the Act 1457 apply. But every one knows that a heritable bond is exactly the converse of this. It is not a permanent right, but a temporary burden on the granter's title; it is not a separate but a subordinate right, dependent entirely on the subsistence of the personal obligation in the bond. It is extinguished by renunciation or discharge. When the debt in security of which it is granted is paid, extinguished, or satisfied, the feudal conveyance flies off without reconveyance—(See Menzies on Conveyancing, p. 798). Compare this with Mr Bell's definition of a sub-feu—Prin. 788.

It is thus clear that a heritable bond is not within the terms of the Act 1457, and has no relation of any kind to the question in hand.

Another difficulty has been started which, no doubt, if there were any foundation for it, goes deep into the very elements of the question—so deep that, had it been consistent with feudal principle, the controversy which engaged the attention of so many great lawyers never could have arisen. It is said that if it were true, as the authorities I have quoted decide, that sub-vassals holding of a subject-superior for a competent avail, do not forfeit their property under the forfeiture of the mid-superior, the sub-vassal would be left in the air, so to speak, holding of no superior, for his original superior has ceased to possess that character, and the over-superior cannot be forced to accept a new vassal without his own consent. But this gives no aid to the argument either way. It is a mere statement of a supposed result, and, as I think, an impossible result, on either alternative of the argument. If, on one hand, the effect of the forfeiture is to extinguish the *dominium utile* created in the sub-vassal by the sub-feu, it is needless to search for the owner of the *dominium directum* which, in that relation, has perished. But if the over-superior can acquire by the forfeiture no more than what belonged to his immediate vassal—no more than what his immediate vassal could alienate, as Lord Stair says—then the over-superior will acquire by his decree only the *dominium directum* which his immediate vassal had, and thereby necessarily become the superior of the sub-vassal. He acquires this right of superiority not only with his own consent, but on his own demand, and his right will be analogous to what it would have been if the mode of aquisition had been diligence, or succession, or purchase, all of which are familiar cases. See Mr Robert Bell's Treatise on Completing a Title, p. 330. No other result seems to me in accordance with our present forms, and while the pursuers avoid formulating the proposition they maintain, they leave it in doubt whether they dispute a conclusion which has been assumed ever since the Act 1457 passed. If the view I have adopted in the general question should prevail, I should doubt if the pursuers would admit that the defenders are not their vassals. So that this obstacle is only a *petitio principii* after all.

Three hundred years ago (1573) the Scottish Parliament passed an Act "In favour of the vassals and feu tenants of persons forfeited during that Parliament," which provided that "such vassals and tenants should bruik and joy their tenandries whatsomever notwithstanding the forfeiture of their superiors thereof, and hold the same of their immediate superiors." In the same way the Act 1690, c. 3, provides that "the subaltern real rights shall remain with the vassal in the same manner and way as if their rights had been confirmed under the Great Seal before committing of the crime for which their superior was forfeited." So Elchies, in considering the question whether a confirmation of a feu-right granted by a ward vassal contrary to the Statute 1606, was valid, says, "So that in case of the feu opening to the superior by the crime or delict or deed of the immediate vassal, the sub-vassal confirmed comes in his place and holds his lands in the same way as the immediate former vassal held them, whatever might be the holding of the bare right confirmed." In like manner Walter Ross, in a most learned historical review of this subject, says in regard to the confirmation of subaltern rights by the superior, that it had no immediate effect on the relations of the mid-superior and the sub-vassal. He says, "The alteration (if any afterwards happened) depended on the accident of the right of the sub-vassal being extinguished by a recognition or forfeiture. In which event the person holding the confirmed sub-feu might either claim to hold immediately of the first superior, or, if he did not, the superior could force him forward to supply the former sub-vassal's place." —(Ross' Lectures, ii., 253). The effect ascribed to the Act 1457 may be questioned, but if it be equivalent to a confirmation, the result is inevitable.

I have considered this general question with some care, for it is one of deep importance to the community, and to the security of commercial transactions in land. I think it will be very unfortunate if at this day we should revert to technicalities so long in abeyance, and create a precedent by which one man may possess himself, without equivalent, of property which another has acquired by onerous contract, and for full value. I have only to repeat that the question now considered leaves the superior's ordinary feudal remedies for recovery of his feu-duty out of the whole terrritory of the original grant entirely untouched. No such matter is involved in the present demand, or indeed could be.

The other questions raised I shall not consider at length. I concur entirely in Lord Young's exposition of the practical results of the doctrine contended for; and I am of opinion that the clauses founded on do not attach any conventional irritancy to the sub-vassal, either in respect of the non-payment of the *cumulo* feu-duty under the original feu-right, or in respect of the alleged failure to build.

Lord Deas—I concur in the opinion of Lord Fraser.

[His Lordship had resigned before the cause was advised in the First Division.]

Lord Young—The object of the pursuers in this action is not to avoid loss, but to enrich themselves at the defenders' expense to the amount of the value of the houses built on the ground in question. The houses were built by the defenders, or those in whose right they are, and their only aim in this action is to prevent the pursuers, who contributed nothing to their erection, appropriating them without payment. Their precise value is not material to the argument, but as £4000 was lent upon them, although subject to a feu-duty (or perpetual ground-rent) of £75, 18s. 4d., the value is probably not less than £8000. Whether or not the rules of law on which the pursuers rely entitle them to confiscate and appropriate the defenders' property to the value of £8000 without compensation or consideration, is the practical question in the case. That the houses were lawfully erected by the defenders at their own cost, and that the pursuers will be purely and simply and without consideration enriched at the defenders' expense to the extent of their value if permitted to appropriate them, is not disputed. Nor is the iniquity of the result attempted to be disguised or palliated—the only argument for it being that it is according to the rule of the feudal law that all land is holden of a superior, from which it follows that if the right of the defenders' superiors is irritated, the defenders will have no one off whom to hold the ground on which their houses stand, and so must submit to the pursuers, as over-superior, taking them without any equivalent. The ground on which the houses stand is about a sixth of the two acres which the pursuers feued—and the feu-duty which the defenders are bound to pay for it is about 50 per cent. in excess of one-sixth of the feu-duty which the pursuers bargained to be paid for the two acres. In short, the pursuers' speculation has been a success to the extent of this sixth part of their two acres of ground, which will accordingly yield them about a half more than they expected from it. They are thus gainers, not losers, by the defenders. But they seek to make the defenders' property, viz., the houses built on the one-sixth, which they took up, liable, not for their loss—for there was no loss—but for their disappointment of gain on the other five-sixths, which they are, without any question or dispute, to get back upon their irritancy *ob non solutum canonem.*

The Lord Ordinary observes that "the defenders ought to have seen and known that the pursuers held a prior right of security over the subjects in question for payment of the feu-duty, preferable to any security which they could acquire for repayment of a loan, and if the defenders chose to lend their money with this prior security apparent on the face of the deeds it was their own fault. I can see no equity or justice in depriving in such circumstances the pursuers of a security for payment of the feu-duty for which they had expressly stipulated."

But for these remarks I should have thought it superfluous to point out that although the defenders are money-lenders, interested only that their debt shall be paid, their security is a title of property which puts them in the position and right of their debtor who bought the ground and erected the houses, and that they are bound and willing to pay therefor to the pursuers termly the perpetual ground-rent or feu-duty of £75; 18s. 4d. That this is the full value of the ground

on which the houses stand, and that it is tendered to the pursuers, is not questioned. The extent of it is 1214⅔ square yards of the 8383 which the pursuers feued. The remainder of 7168⅓ square yards returns to the pursuers under their decree of irritancy, which to that extent is not impeached—for it was their defaulting vassal's estate. Nor is it doubtful or disputed that the decree carries to them their defaulting vassal's estate in the 1214⅔ yards also—so that they shall be entitled to draw in perpetuity therefor £75, 18s. 4d. a-year, being nearly a half more than they ever contemplated or expected. But they claim the houses on it, and if the claim is allowed, as the Lord Ordinary has allowed it, they will be directly and simply enriched to the extent of £8000 at the cost of others who owe them nothing and never did them any wrong. I have taken £8000 as the value of the buildings, which may be rather less, but just as likely rather more. I should have been disposed to characterise the demand as unconscionable but for the views of the Lord Ordinary and some other Judges for whose opinion I have great respect. The Lord Ordinary indeed expresses himself as if he thought, which perhaps he does, that the pursuers will be really ill-used if their demand is not allowed, and that the defenders will have nothing to complain of if it is.

It is admitted that there is no precedent for such a demand except in the recent case of *Sandeman*, where it was disallowed. It is now conceded, and is, I understand, the opinion of all the Judges that the cases are indistinguishable. The pursuers do indeed say that they "never admitted that the present is indistinguishable from *Sandeman's* case; on the contrary, they maintain that there are several important points of difference." I do not consume time by examining these, as stated by the pursuers—for they say frankly that "the question was put to them by the Court whether, if the opinions of the majority of the Judges in *Sandeman's* case were correct, they could maintain the Lord Ordinary's interlocutor, and they were obliged to answer that they could not." I therefore understand—and indeed it was so stated to us—that we are not consulted by the Judges of the First Division with respect to suggested points of difference between this case and that of *Sandeman*, but on the very question which was decided in the latter, the object being to aid the House of Lords in reviewing the decision in *Sandeman's* case by informing them of the opinion of all the Judges on the question which it presents. It occurred to some of us that this course of procedure was of questionable propriety, and it is confessedly unprecedented. The majority, however, thought that as the consultation had been ordered before the appeal was presented in *Sandeman's* case it was proper to proceed with it. I am disposed to yield to the opinion of the majority of my brethren on this point, though I think it according to my duty to say that individually I disapprove of it, considering it unfitting to put the parties in this case to the cost of affording undesired, certainly unasked, aid to the House of Lords in deciding upon the appeal in the case of *Sandeman*. I should have thought it more fitting and becoming every way to follow the usual course of allowing this case to stand over till after the judgment in the case of *Sandeman*, by which it must admittedly be governed.

But to resume, without reference to *Sandeman's* case, the pursuers' demand is admittedly unprecedented. I do not, of course, refer to their demand to irritate their vassal's right *ob non solutum canonem*, but to their demand to confiscate and appropriate the house property of the defenders, and so to enrich themselves to that extent at the defenders' expense. Thus stated, this unprecedented demand is so startling that one might be pardoned for doubting whether it is possible that a demand which has received any judicial countenance can be fairly so stated. Now, as I individually put my judgment in the case of *Sandeman*, and am disposed to put it here, on the character of the demand and the gross injustice, as I thought and think, of allowing it, I take leave to dwell a little further on this topic, although it may perhaps be thought that I have already said enough to make my views upon it sufficiently clear.

When the pursuers in 1875 put their 8383 square yards of ground into the market and sold it to Messrs M'Neill, M'Meekin, & Reith, they intended that the buyers should in turn sell it off in lots or sites to builders or the general public for the erection "of dwelling-houses, or of shops and dwelling-houses." This is plain from their deed of conveyance, and indeed it was practically impossible that about two acres of ground could otherwise be covered "within three years" with buildings which should "be capable of yielding, and shall yield in all time coming, a free yearly rental equal to at least double of the feu-duty hereby payable"—that is, £733, 11s. 10d. In 1876, Henry Scott Dixon & Co., builders in Glasgow, and the four partners of that firm, bought 1214¾ square yards, or rather less than one-sixth of the ground, and proceeded to erect dwelling-houses and shops on it of the value, as I have assumed, and continue for the purpose of the argument to assume, of £8000, borrowing for the purpose £4000 from the defenders, to whom they communicated their title, and who are now accordingly in their room and place—this building adventure having apparently ruined themselves. Now, these buildings were lawfully erected in pursuance of the pursuers' intention when they sold the ground, and not only without detriment to them but to their manifest gain, as securing to them in the very way they bargained for the full return for so much of the ground they sold as these buildings occupy and the defenders now own. The remaining five-sixths, with which the defenders never had any concern, remains exactly as it was when the pursuers sold it, and the pursuers have got or will get it back under their irritancy undeteriorated by any act of the defenders, who have exactly carried out the pursuers' plan, and, profitably to them, fulfilled their intention to the extent of the ground built upon. To say that the pursuers will suffer injustice or hardship if they are not allowed to appropriate these buildings, and that the defenders will suffer none if they are, seems to me extravagant, for it is very clear that the one party would thereby gain at the cost of the other to the extent of their value. The defenders, indeed, are interested only to the amount of their loan, but they are for any surplus trustees for the borrowers or their creditors, whose interests, the legal title

being with them, they are bound to protect, and certainly entitled to plead.

I have already observed that the injustice of taking so much property from the party who created it at his own cost and giving it to another who has done nothing whatever to earn it, and who will be simply enriched to that extent at the other's cost, is not sought to be disguised. It is not suggested that the defenders had any advantage or indulgence, or that their buildings were not upon plans approved by the pursuers' architects. The case is exactly the same as that of a party who, with a title otherwise similar to the defender, took up one of six (or of a hundred) building sites in a street or square, and erected a house on it according to the prescribed plans. To suggest as a reason for forfeiting his house without compensation—the other sites not having been taken up or built on—that "it is probable enough that if the pursuers had been asked to feu only the plot of ground now in possession of the defender, they would have refused to do so, but would have feued only the whole ground as in the original feu-contract," would hardly, I venture to think, have occurred to one. Streets and squares are not built on these terms. But the pursuers maintain that the defenders (or those in whose right they are—I need not keep on repeating this) must be held to have built their houses on these terms—that they should forfeit them without compensation if the other sites were not taken up and built on "within three years" of the original feu, which three years might indeed have elapsed, as one of them in fact had, before their purchase. I need hardly say that no one capable of managing his own affairs would wittingly build houses on such a contract. It was accordingly suggested at consultation by one learned Judge that there might be a distinction between the obligation to build on all the sites within the time limited, and the obligation to pay the feu-duty for all of them, so that the house of the solitary builder might be forfeited for default of the one obligation but not of the other. Such a distinction would obviously greatly, and indeed fatally, interfere with the pursuers' argument, and enable the sub-feuar of a single site to frustrate the condition that a hundred other sites should be built on. The only alternative indeed is that the sites unbuilt on might be forfeited, exempting from the forfeiture the one which had been built on, the owner of it paying the feu-duty for the whole. But then of whom would he hold *his* built-on site? If he could by any contrivance or device hold it at all conformably to the feudal-law rules after his author's right was irritated, the mainstay of the pursuers' argument here in support of the injustice which they purpose to perpetrate would be gone. I do not myself regard the feudal-title difficulty as insuperable or even serious, but if it exists at all—and the pursuers have, so far as I see, nothing else to rely on—the suggested distinction does not obviate it. The condition which the forfeiture secures is not merely that the whole feu-duty shall be paid as it falls due, but that it shall be secured by buildings erected and maintained of double its annual value. The injustice, as I regard it, proposed to be done, has therefore, I think, to be faced and dealt with, and it is this—that the sub-feuar of any one or more of any number of building sites shall forfeit his house or houses unless all the other sites are built on within the time limited, and the feu-duty duly paid for them also. I repeat that no man would wittingly so contract, and add that no man could honestly think that anyone had wittingly so contracted with him.

I have not thought it necessary to occupy time by examining the feudal law, rules, and doctrines on which the pursuers rely, because I concur in the judgment of Lord Moncreiff in the case of *Sandeman*, and also in his opinion in this case, which I have had an opportunity of reading. I am persuaded that at any period of our history, and even in a very backward state of civilisation when the feudal law was held in greatest reverence, judges would have shrunk from so interpreting any feudal rules as to permit the perpetration of such injustice as is here aimed at, and indeed avowed. That there is no recorded instance of similar injustice being judicially sanctioned is admitted.

The suggestion that the pursuers on obtaining a degree of irritancy against their defaulting vassal cannot recognise the defenders' sub-feu, draw the feu-duty payable by them, and hold the position of their superior, but must, as matter of legal necessity, take their land and houses from them as incapable of being "holden," is, I venture to think, quite fanciful. It is, I must hold, not at all doubtful that the judgment in the case of *Sandeman*, if allowed to stand, will be found quite operative. If I thought the law such that the pursuers must have the defenders' houses, I should certainly make them pay for them under a rule of law which is as binding on us as any rule of the feudal law. I refer to the rule of recompense *in quantum lucupletiores facti sumus*, which is spoken of with considerable respect, and even reverence, by both Stair (i. 8, 6) and Erskine (iii. 1, 11), the latter remarking that being "strongly founded in natural equity the laws of all civilised nations have adopted it." I do not dwell on this topic, thinking with Lord Moncreiff that the principle and reason of the feudal rules appealed to by the pursuers are adverse to their demand, and being decidedly of opinion that the Court ought in this case to follow the only precedent which is exactly in point—I mean the case of *Sandeman*. That there is no decision for the injustice aimed at, but a very recent decision against it, is really not disputed, and so I only notice without enlarging on the rule "so strongly founded on natural equity that the laws of all civilised nations have adopted it," which would deprive the pursuers of the gain which they seek, by compelling them to recompense the defenders if the law should turn out to be otherwise than it was in the case of *Sandeman* decided to be.

Lord Craighill—This case ought, I think, to be decided in conformity with the judgment of the Second Division of the Court in the case of *Sandeman*.

In the first place, there is nothing in the facts to which the law is now to be applied that can reasonably be said to constitute a substantial distinction between the two cases. The law for the one, therefore, must also be the law for the other.

In the second place, the judgment in *Sande-*

man's case was, according to my view of the law a sound decision. My reasons for this opinion are those which have been presented by the Lord Justice-Clerk, with whose opinion in *Sandeman's* case, as well as with his supplemental opinion in the present case, I generally concur.

Lord Rutherfurd Clark—I adhere to the opinion which I expressed in the case of *Sandeman*, and in consequence I think that the interlocutor of the Lord Ordinary should be affirmed.

I think it right to explain that I did not proceed on any analogy which may be conceived to exist in forfeiture for treason. That analogy was appealed to in aid of the defence, and I endeavoured to show that no aid could be taken from it, because according to the common law the irritancy of the traitor's right involved the annihilation of all rights that were dependent on his. I cannot regard the Act of 1690 as declaratory of the common law. On the contrary, it was, I think, an alteration of it, and confined in its operation to the case with which it professes to deal, viz., the case of forfeiture for treason.

My opinion is based on the principles of our land tenure, and the legal necessities arising from them. In this question I do not think it to be of the least importance whether that tenure is a part of the feudal system, or is derived from the Roman *Emphyteusis*. With the exception of allodial subjects, with which we have here nothing to do, there is in either view no independent estate in land. Every such estate must be held from and under a superior. This is a legal necessity. A feu or sub-feu holding of no one is a legal impossibility.

It seems to me to follow that when for any reason a feu is extinguished, the sub-feu cannot subsist unless the sub-vassal can hold it of some one. This is, as I have said, a legal necessity. Consequently to preserve the sub-feu the sub-vassal must have the right of entering with the overlord. There is no other possible superior. In order to their success the defenders must show that they are entitled to enter with the pursuers, and that the pursuers are bound to receive them as their vassals.

It is to my mind a remarkable fact that in the case of *Sandeman* neither the Lord Ordinary nor any one of the Judges in the majority in the Inner House touched on this vital point They seemed to have assumed that by the tinsel of the feu-right the sub-vassal came to hold of the overlord. But this is not a matter which can be assumed. It must be shown that the sub-vassal has a right to hold from the overlord, and that the overlord is bound to receive him as his vassal. I confess that I can see neither principle nor authority for such a right or such an obligation.

By the very terms of this sub-feu the sub-feuar is to hold of the feuar, and of him alone. Why is he, contrary to the terms of his right to hold of the overlord when the feu is extinguished? Because, say the defenders, he can hold of no one else. But this is begging the whole question. It assumes that the sub-feu is to subsist, and that as he can hold from no other person he must hold of the overlord. It certainly does not prove that he has a right to do so.

Again, the overlord is a stranger to the sub-feu-contract. He could not interfere in the settlement of its term and conditions. Why is he to receive as a vassal a person with whom he never had any contract, and to submit to receive feu-duties for which he never stipulated? The only answer is, that he must do so, or the sub-feu would be destroyed. This is not reasoning but assertion. It assumes that the sub-feu must subsist, and therefore that these anomalous consequences must follow as being necessary to its subsistence. It would be safer to hold that a doctrine which creates a feu which the superior never granted, and forces on him obligations which he never undertook, is without foundation in legal principle.

It is said—and this is the only theory for the defence—that the superior by the very fact of irritating the feu *ob non solutum canonem* comes under an obligation to receive the sub-vassal as his vassal. Again, this is mere assertion. The right given to the superior by the feu-contract and by the statute is absolute. But the exercise of an absolute right cannot create any obligation. If it did the right would not be absolute but conditional.

A very simple illustration will serve to show that this theory of the defenders cannot be well founded. It may happen, and I believe it does happen, that a feuar may sub-feu for a smaller feu-duty than he himself pays. In such a case the contract usually partakes of the nature of a sale, for the sub-feuar pays a price in addition to the sub-feu-duty. This price is paid once for all, and cannot of course affect the tenure. But whether a price be paid or not the sub-feu-duty is fixed by the feuar and the sub-vassal. The superior has no concern with it, and could not object because the sub-feu-duty was less than the feu-duty.

Let it now be assumed that the conventional or statutory irritancy has been incurred, and that the feu-right is irritated. If the case of the defenders is well founded the sub-feuar will be entitled to enter with and hold of the superior for the sub-feu-duty payable under the sub-feu-contract, for, of course, if the superior is bound to receive any sub-feuar, he is bound to receive all. Either the sub-feu falls with the feu, or it is preserved by the sub-vassal becoming the vassal of the over-superior. But the latter alternative would be wholly subversive of the superior's rights. He would be forced to submit to a contract which he did not make, and the terms of which he could in no wise regulate, and he would lose the feu-duty for which he stipulated. To be sure, it is urged that he need not enforce the irritancy unless he pleases. But it would be a strange result if a contract to which he was no party could have the effect of depriving him of all benefit from the conventional or statutory irritancy, and if by proceeding under a statute which, according to its recital, was intended to relieve superiors of the damage which they sustained "throw evill and untimeous payment of the feu-duties of their lands let in feu-farm," he should not only fail to recover the subjects which he had feued out, but should lose the feu-duties for which he stipulated, and become the superior of another vassal with whom he never transacted, and who could only be required to pay a smaller, and it might be a nominal feu-duty.

The effect of an irritancy cannot depend on the amount of the sub-feu-duty. It must be the

same whether it is larger or smaller than the feu-duty. Of course I except any question of fraud, which might introduce other considerations. But there may be, and I believe are, many honest transactions where the sub-feu-duty is smaller than the feu-duty, and the superior must have an absolute right to enforce the irritancy unfettered by any conditions, and without incurring any obligation, unless it be the case that he cannot enforce the irritancy at all except to his own manifest loss.

One word more. After the irritancy, on what title does the sub-feuar hold? His only title is that which he received from the feuar. How does it become a title flowing from the superior? He is infeft on the precept granted by the feuar. How does that precept become the precept of the superior? The only answer is that the superior has irritated the feu-right, and therefore that the sub-feu-contract and the precept therein contained became his. I do not see how this reasoning, if it be entitled to the name, is sound. When a man, by reason of rights reserved to him by contract or created by statutes, irritates a right which he had granted, he does nothing more. He does not by such irritancy grant new or other rights, or adopt as his own the deeds of another person.

Nor is the argument of the defenders on this head consistent with itself. It seems to be assumed by them that by the tinsel of a feu-right an heritable creditor would lose his security though in the form of a sub-feu. The explanation is, that the security is temporary while the sub-feu is permanent, or that it can be extinguished by renunciation, while a sub-feu can only be extinguished by conveyance. I do not see the distinction. There is as much equity in preserving a temporary as a permanent right, and while the security subsists—that is, so long as the debt is not paid—the nature of the heritable title is the same in both cases.

There are two small matters to which I think it right to advert. It is supposed that I am in error in regarding a feu-right as a burden on the superiority. A burden, it is said, can be extinguished by renunciation, which a feu cannot be. I have for a long time been aware of the very elementary doctrine that a feu-right cannot be extinguished by renunciation but only by conveyance, or, to speak more correctly, by resigning it into the hands of the superior. I spoke of a sub-feu as a burden on the feu only in the sense of its dependence on the feu, so that in substance, and in its relation to the superior, it forms a part of it, and so that it is annihilated by the extinction of that on which it depends, and of which it forms a part. This is, in my opinion, a consequence of that interdependence of estates in land which is an essential part of our land tenure.

Again, I am charged with having cited in support of my opinion [in *Sandeman's* case], a passage which it is said has become one of the curiosities of our legal literature. It is taken from the writings of Lord Kames. I always conceived that Lord Kames was a great lawyer, and that his authority stood very high. He was sometimes quaint in his expression, and in this instance his metaphor is perhaps not happy. But his meaning is clear; and I am glad that my views have his sanction, though the form in which it is expressed may seem to be curious. There is nothing curious but the expression.

These are the grounds of my opinion. I have considered the case in its legal aspect only. Until it can be shown how the sub-vassal, consistently with legal principle, can hold his sub-feu, either of the overlord or without a superior at all, no benefit, in my opinion, can be taken from historical or antiquarian research. Our system of land-tenure is so well fixed that it cannot be affected by any inquiry into its origin; and no research, however extensive, into the history of forfeiture for treason will aid us in solving the consequences of a conventional or statutory irritancy affecting the feu-right itself. Nor can we be affected by considerations of hardship. We must administer the law as it is, and leave it to the Legislature to remove such inconvenience or hardship as may be found to exist. Indeed I do not see the hardship by which some of my brethren are so much moved. The defenders may purge the irritancy by paying the feu-duty which is in arrear, and they will have all the rights competent to the superior for recovering it from those by whom it is legally due. If the defenders so act the superior cannot obtain more than the feu-duty for which he has stipulated. This action is merely one of the remedies to which he is entitled to resort for recovering that feu-duty. He is forcing the defenders to pay it in order that they avoid the consequences of an irritancy.

There is another irritancy founded on, viz., the irritancy from failure to build. I do not think that it is necessary to consider it. An irritancy has been incurred by failure to pay the feu-duty for two successive years, and so long as that irritancy remains unpurged it is not, in my opinion, necessary to deal with any other question.

LORD ADAM concurred in the opinion returned by Lord Rutherfurd Clark.

LORD LEE—I am unable to distinguish this case from that of *Sandeman* v. *Stiven*.

The specialty upon which the Lord Ordinary chiefly relies is, that it was a condition of the feu-contract in this case that no allocation of the feu-duty should be admitted until there should be erected "on the plot on which the allocation is proposed to be made, and also on the remainder of the ground," buildings sufficient to secure the proportions of feu-duty applicable thereto respectively. As I read the contract, the condition referred to is applicable only to the case of an allocation being demanded in sums less than £20 per annum. The whole clause is as follows:—"Declaring that, in case the second party or their foresaids shall at any time hereafter sell or dispone parts or portions only of the plot of ground above disponed, then the feu-duty may be allocated thereon at such rates as may be agreed on by the parties hereto or their respective successors; but the said feu-duty shall in no case be subdivided into or allocated in smaller sums than £10 sterling per annum, and in the event of its being allocated in sums less than £20 sterling per annum, it shall be augmented by an addition thereto of five per cent., and no allocation shall be admitted until there shall be erected on the plot on which the allocation is proposed to be

made, and also on the remainder of the ground, buildings sufficient to secure the proportions of feu-duty applicable thereto respectively." This is an express declaration of a right to allocation, qualified, firstly, by a condition that in no case is there to be an allocation in smaller sums than £10; and secondly, by certain conditions "in the event of its being allocated in sums less than £20." Had it been intended to provide against an allocation in any case until sufficient buildings had been erected on the remainder of the ground, as well as on the plot on which the allocation was to be made, I think that the clause should have been differently expressed. To disconnect the words "and no allocation," &c., from the immediately preceding words for the purpose of reading them as a condition universally applicable, seems to me to be contrary to the ordinary rules of construction applicable to restrictive clauses.

Upon the general question as to the effect of an irritancy *ob non solutum canonem*, I remain of the opinion which I expressed in *Sandeman* v. *Stiven;* and I only add that the considerations stated by Lord Rutherfurd Clark in dissenting from the judgment in that case appear to me to be insufficient to support the claim of a superior who has consented to sub-feuing to remove a sub-feuar from his estate on account of the default of the vassal in the original feu.

It seems to be conceded that if the superior had confirmed the sub-feu—as in the case put by Dirleton—an irritancy of the right of the original feuar would not destroy the right of the sub-feuar. If so, I fail to see why the same result should not follow where the superior has consented beforehand to such a sub-feu, and is therefore bound to confirm it. I could quite understand an argument that the original feu-right made it a condition that the sub-feu should suffer an irritancy by reason of the original feuar's default, purgeable only by payment of the whole feu-duties. But I find nothing in the terms of the feu-right sufficient to support such an argument in the present case. It is said that a statute was required to protect vassals against the consequences of forfeiture of their superior's rights, and that no statute has been passed to protect sub-feuars against an irritancy incurred *ob non solutum canonem.* But in my view no statute was required to save a right to which the over-superior had consented, or which he was bound to confirm.

It has long been settled that the rights and obligations of superiors and vassals under the modern feu-charter depend upon contract (Duff's Feudal Rights, p. 86, and *Hunter* v. *Boog*, 13 Sh. 205-7). My opinion is, that it would be contrary to the true meaning of the contract in this case to allow the superior to take, as a part of the estate of his immediate vassal, the *dominium utile* of the sub-feuar's portion of the feu, enriched by buildings worth more than double the amount of feu-duty which the superior had agreed, or was bound to agree, to accept as applicable thereto, and actually yielding a higher rate of feu-duty than that exigible under the original feu-right.

Containing as it does clauses which imply an obligation upon the superior to agree to a reasonable allocation of the feu-duty, I cannot think that the feu-contract authorises the superior to irritate the sub-feuar's right on the ground that the particular allocation had not been finally adjusted and agreed to at the date when the *cumulo* feu-duty fell into arrear.

Lord Fraser—The Court is required to affirm the proposition, that when a superior obtains a declarator of irritancy of his vassal's right, by reason of the latter not paying for two years the stipulated feu-duty, and for not complying with conditions as to the erection of buildings, he is entitled to claim the whole buildings erected by sub-feuars, although sub-feuing for the purpose of building was in contemplation of the parties when entering into the contract, and although the vassal had power to sub-feu even without the superior's consent.

The sub-vassals are noway in arrear with the payment of their own sub-feu-duty, and are willing to pay it in the future to the superior; but notwithstanding of this the latter demands that they shall surrender the houses that they have built; and this without any delinquency on their part, and also without compensation for the value of the houses so taken from them.

Now this is a very hard case if the superior's claim be well founded. The saying has often been printed, that with the hardships of the case Judges have nothing to do, but must apply the law as they find it. To a great extent this remark is true; but to a great extent it is also inaccurate and misleading. The whole of our rules of equity proceed upon a contrary assumption, and one half of our law would be blotted out if it were not so. Equitable considerations are allowed to come into play—to control, to mitigate, and sometimes altogether to evade a legal rule which carries with it intolerable hardship, and when the "right too rigid hardens into wrong." I do not think, however, that in the present case any legal rule is violated by refusing the claim now made by the superiors, and no violence need be done to the common law or to the contract of parties by such refusal.

The claim for the pursuers is rested, first, upon contract, and secondly, upon what is called the "feudal law." If the claim upon contract be well founded it is unnecessary to deal with the feudal law; and hence it is proper to consider this foundation of the claim in the first place.

I. As regards, therefore, *contract*, the case (shortly stated) for the pursuers is this, that the prime vassal undertook to pay a feu-duty of £366 per annum, and to erect houses, within three years of the date of his charter, of a certain style—minutely described—of an annual value representing double the amount of the feu-duty; that he has failed in both these particulars, the feu-duty being more than two years in arrear, and houses of the value stipulated not having been erected; that, accordingly, there comes into operation the clause in the contract which provides that, on failure in these two particulars, the vassal, "shall, in the option of the first party, and their foresaids, amit, lose, and tyne all right and title in and to the said lands, or the part thereof, in respect of which such contravention or non-implement shall occur, and the same shall revert and return to the first party or their foresaids free and disburdened of the said feu-right, *and all following thereon*, without the necessity of any declarator or process of

law for that effect." The sub-feuars, it is said, before they took their sub-feu, must have seen this stipulation in the contract between the superior and the prime vassal, and thereby were warned of the danger they ran, in case the prime vassal should not perform the conditions which he had subscribed; and their own sub-feu-contract declared that it was granted under, "so far as applicable" to the ground sub-feued, the conditions in the feu-contract between the superior and the vassal.

It is contended that by the very terms of the contract thus entered into, the right of the sub-feuar must fall when the right of his author—the prime vassal—is irritated; and this therefore renders it necessary to construe the language used. It is not said, as it was in the case of *Sandeman*, that the *feu* should be forfeited, but only that "the right and title" of the vassal should be so. I notice this merely because Lord Rutherfurd Clark in the case of *Sandeman* dwells upon this distinction as one of the reasons for his judgment. I do not regard it as bearing materially upon the case. But be this matter as it may, the whole force of the argument to the effect that the sub-feu is gone, because the right and title of the prime vassal is irritated, turns upon the words, "*and all following thereon.*" I shall consider what is the meaning of these words immediately, but in the meantime I desire to say something as to the distinction if any, between legal and conventional irritancies.

The distinction between legal and conventional irritancies, so far as regards feus, was thought to consist in this,—that the legal irritancy was purgeable and the conventional was not. Erskine (ii. 5, 27) states it thus:—"But though the aforesaid Act gives, by the letter of it, the same force to a legal irritancy as to a conventional one, the following distinction has been observed by the Court of Session: Where no irritant clause is inserted in the feu-charter, the vassal is allowed to purge the legal irritancy at the bar before sentence, —*i.e.*, he is allowed to prevent his forfeiture by making payment at any time during the dependence of the action of declarator, before judgment pronounced in it. But where the legal irritancy is fortified by a conventional, the vassal cannot, or at least by the old practice could not, purge, without his being able to assign a reasonable cause why payment was not regularly made, or unless an obscurity appeared in the words of the irritant clause."

This distinction was departed from at an early period, and is thus referred to by the Judges who gave the leading opinion in the *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. 316). "The Statute 1567, c. 246, enacted that all vassals by feu-farm, failing to pay their feu-duty for two years together, shall lose their right in the same manner as if an irritant clause had been specially engrossed in their charters. Notwithstanding this irritancy by statute, it was the practice to introduce an irritant clause in the charter, with the view of preventing the vassal from purging before declarator; for it was held that although legal irritancies might be purged, conventional irritancies could not. The same practice continues still, although the distinction between legal and conventional irritancies no longer obtains, and when there is therefore no use for the provision. In the present case the irritant clause, in the event of the duties not being paid, is extremely proper; for the Statute 1597 expressly applies only to vassals by feu-farm, and it is very doubtful whether it could be extended to the duties here, which are not feu-duties, but ground-annuals only, not payable to the superior, but to the granter of the burgage right."

But it is said that the conventional irritancy in this case is stronger than the legal irritancy, because it declares that if the feuar contravenes all or any of the conditions and provisions in the feu-contract, or allows two years' feu-duty to remain unpaid, he is to lose all rights to the lands, or the part thereof in respect of which the contravention or non-implement should occur, and that the same should revert to the superior "free and disburdened of the said feu-right, and all following thereon, without the necessity of any declarator or other process of law for that effect." The last part of this clause has no force or validity, it being settled in our practice that there must be a decree of declarator before the irritancy can be enforced. But the words, "and all following thereon," are said to mean that all the sub-feus that may have been granted by the prime vassal were things which followed upon the feu-right, and are to be absolutely void. In the case of *Sandeman* (10 R. 629) I observed that this view is expressed in various parts of his opinion by Lord Rutherfurd Clark. "I accentuate," said his Lordship, "these words, 'all that may follow thereon,' not because they add anything to the nullity that is stipulated for, but because they express the consequence of that nullity. Anything that could follow on the feu-right—that is to say, anything that depended on it—is annulled along with the feu-right itself."

The learned Judge carries the rights of the superior too high, and refuses to recognise the undoubted rights of the person who is called the *vassal*. He quotes with approbation the ideas of Lord Kames on this subject, which were somewhat singular. The feudal estate of a vassal was, according to Lord Kames, a *burden* on the superiority, and when the burden was removed, the superior's right, like air formerly compressed, expanded itself over the whole, &c. This view of the relation of superior and vassal has long been ranked among the curiosities of legal opinion. The vassal's right is not a burden upon the superior's, but is a fee in itself. It cannot be *renounced;* it must be *conveyed*, even when the superior is the person who buys it. As regards the words, "And all following thereon," I have arrived at a different conclusion. These are as purely words of style as any words in the style book, and which I had always thought meant nothing more than this, that all the steps of procedure necessary to complete the right which is irritated or annulled — all the *naturalia* following upon the grant—shall also be held null. But it seems to me to be a very arbitrary extension of their meaning to hold that they apply to deeds that were executed by the person whose right is irritated—deeds executed before any irritancy was incurred. These do not necessarily or naturally follow on the contract. They are deeds in the exercise of the power of ownership, which do not follow upon the contract. The words are so used by all our stylists—(Dallas, 344; Jurid. Styles, vol. i. p. 562, &c.). Subordinate rights no doubt may fall if the rule of law,

resoluto jure dantis, &c., be held applicable,—as to which I have something to say. But what we are here dealing with are words of style, occurring in every deed where an irritancy is contracted for, and which, so far as I can find, have never received the wide construction now sought to be put upon them. On referring to the Acts of Parliament which followed upon the Revolution of 1688, and which annulled the dooms of forfeiture passed in the preceding reigns, it will be found that the Legislature did not understand the words to have that meaning. The dooms of forfeiture are declared void, and as if they had never been. But this was not thought to be sufficient. All the charters and other rights granted by the donatories of the forfeited estates are in a separate clause expressly annulled. Thus the Act 1690, c. 16, declared the sentence of forfeiture pronounced against Andrew Fletcher "void and null from the beginning, and rescinds and reverses the same, as to all intents, constructions, and purposes whatsoever, as if no such sentence and doom of forfeiture had ever been pronounced; And further declares that all gifts or grants of the foresaid forfeiture in favours of whatsoever persons, and all charters and seasins following thereupon, and all rights and securities derived from them any manner of way, are void, and of no avail in all time coming." Again, in the same year we have the Act 1690, c. 18, which declares the decreets and dooms of forfeiture pronounced against any of the subjects of the kingdom, from the 1st of May 1665, to be null and void, and then the statute proceeds expressly to enact as follows:—"And in like manner all and sundry infeftments, charters, precepts, instruments of seasin, presentations, and other rights whatsoever of lands, heretages, teinds, and possessions, made and granted, and proceeding upon the said forfeitures and hornings, to and in favours of whatsoever persons, mediatly or immediatly, with all decreets and sentences given and pronounced by any judges consequent, depending upon the saids forefaultures and hornings, are void and null from the beginning, and of no force, strength, nor effect, and that without any special process of reduction, or other declarator to follow thereupon."

The Act of 1597, c. 250, sanctioning irritancy *ob non solutum canonem*, affords an argument for the restricted meaning of the words "and all following thereon." It declares that the statutory irritancy which it sanctioned was to be the same as if an irritant clause were inserted in the contract. But the whole effect of the statutory irritancy is directed *against the vassal who makes failure:* "Statutis and ordainis that in case it sall happen in time cumming ony vassall or fewar haldand landis in few-ferme of our Soveraine Lord, or of ony uther superiour immediatly in few-ferme, to failzie in making of payment of his few-dewty to our Soveraine Lordis Comptroller, or uther havand power of him, or to uther immediate superiour, or uthers haveand power of him, be the space of twa zeires, haill and togidder, That they sall amitte and tine their said few of their saids lands, conforme to the civill and cannon law."

Here the forfeiture is only declared against the contravener; and Legislature did not, as we have seen it do in other cases, declare to be null all the deeds which the contravener had granted. If there be any doubt as to the scope of the words, the construction, according to settled rule, must be against him *qui potuit apertius dixisse*. It was a stipulation in favour of the superior, and of a highly penal character against sub-vassals; and if he has left any ambiguity in the language he chose to employ, the construction must be against him.

The conclusion I have come to, therefore, is that there was here no stipulation or contract entitling the superior to disregard the sub-feu in the circumstances which have occurred. I think that the present question must be determined on a just construction of the contract, and without reference to what is called feudal law, and so dealing with the case I cannot hold that it was contemplated by the parties that the sub-feus that were authorised were to be liable to extinction for delinquencies of which the sub-feuars were not guilty.

That the question is one of contract cannot now be disputed after the decisions of recent years. In the case of *Hunter* v. *Boog* (Dec. 16, 1834, 13 S. 205) it was determined that a vassal could not, *invito superiore*, refute his feu, and this because it was a *contract*, whereby one person obtained land for payment of a perpetual duty to the other. Now, this was in express contradiction of the feudal law, which allowed a vassal to renounce the service of his master, upon giving up the *beneficium* which he had obtained in return for feudal services. "*Vassalus etiam sine domini voluntate recte feudum refutare potest: post refutationem tamen ad serviendum non tenetur.*"—Feudorum Consuetudines, lib. ii. tit. 38.

II. But it is in the next place argued that, apart from the stipulations in the contract and the rules of the feudal law, the right of the sub-feuar must fall, because that of his author is at an end according to the rule *resoluto jure dantis*, &c. This is one of those rules which, if applied according to its widest meaning, would work the most manifest injustice; and accordingly it is modified and restrained according to equitable considerations. It is applied to such cases as where a man takes a conveyance to property from a person whose own title is bad, and known to be bad by the disponee, or where it is held under a condition which makes the right temporary or redeemable. "Where," says Bankton, "the author's right was temporary or redeemable, the rights flowing from him and depending upon it must fall with the same. And to this purpose we have a special maxim, viz., *Resoluto jure dantis resolvitur jus accipientis, i.e.*, the acquirer or purchaser's right must fall with his author's" (b. 4, t. 45, sec. 106). But the rule never was applied to a case like the present, where the title of the author was not invalid, nor temporary nor redeemable; where, on the contrary, at the time when the sub-feu was granted, his right was absolute and complete, and was only rendered challengeable by an emerging circumstance, which was not in the natural and ordinary course of things a thing which could be expected to occur. The prime vassal was the owner of the property, with full and absolute power to grant sub-feus, and which power he duly exercised; and it is therefore a stretching of the maxim, *resoluto jure dantis*, &c., to an extent far beyond its true scope and meaning, and such as no court of law has

hitherto done, to apply it to such a case as the present. We are perfectly familiar with cases where the putative proprietor of subjects, who was in the end found to have no title at all, has been saved from the obligation to account for the revenues of the property he possessed; and deeds of alienation, and a provision by way of locality to a wife, have been sustained, granted by a person who at the time stood as legal proprietor, but whose right was cut down by the birth of a nearer heir, which occurred subsequent to his succession to the estate (*M'Kinnon* v. *M'Donald*, M. 10,225); and a minor who reduces a deed upon minority and lesion is not entitled to challenge a deed in the hands of an onerous singular successor (*Gourlie* v. *Gourlie*, Mor. 10,288).

III. If there be no irritancy on the terms of the feu-contract, has an irritancy been incurred according to the rules of the "feudal law?" It is said that the vassal holds his lands, not merely by contract, but by tenure, and that by the tenure under which he holds, all the rights of those subordinate to him are gone when his own right is irritated.

When we speak of the feudal law as existing in Scotland we use a short term in order to express a condition of things which, except in the survival of certain meaningless forms and inappropriate names, has no longer existence among us. The charter of resignation survived till the year 1874, when the statute of that year abolished it, with almost all the old forms, which had lost all meaning. Even before this Act passed it was said of these things that had come down from feudal times—"A horning at the instance of a vassal charging his superior to accept directly of a *humble and reverend resignation*, under the penalty of personal imprisonment, overturns the whole system, and throws a strong ridicule on its surviving forms"—(2 Ross, 302.) The reason or rule of the fourteenth century becomes the ridiculous fiction of the nineteenth. Our land rights are determined by a series of statutes which indicate the struggle between an oligarchy desirous of retaining the hosts of warlike retainers who gave them power, on the one hand, and the commercial spirit on the other hand, which sought to emancipate itself from the trammels of feudalism, and which ultimately triumphed.

A person who takes a strip of land in feu from another, takes it under the conditions imposed by the public law as well as the conditions expressly covenanted between them. The person to whom the grant is made takes it under the condition that the superior may revoke it upon non-payment of two years' duty; that his heir, when he succeeds, shall pay double the feu-duty; and that a singular successor shall pay a year's rent. These are the conditions imposed by statute, and in so far as the word "tenure" covers them, it is an apt enough expression to convey the extent of the relative rights and obligations of parties.

As pointed out by Lord Curriehill in the case of *Hislop* (1 Macph. 535), feudalism became changed at an early period into the Roman contract of *emphyteusis*. That word certainly does not occur in any of the statutes regulating our land rights; but there can be no doubt that the lawyer who drew the Act 1597, c. 250 (which authorised the action of irritancy *ob non solutum canonem* for non-payment of feu-duty), and the Legislature who passed it, intended to make the law conform to that Roman contract, for the Act says it was "conforme to the civill and cannon law." The Civil law allowed the right of the *emphyteuta* to be forfeited for non-payment of the canon or rent for three years, and the Canon law had the same rule, except that it limited the period to two years. The Emperor Zeno stated it thus:—If, he said, there be any stipulation in the contract of *emphyteusis*, as to the eviction of the *emphyteuta* for non-payment of the annual duty, this stipulation shall be given effect to—"*Sin autem nihil super hoc capitulo fuerit pactum, sed per totum triennium neque pecunias solverit, neque apochas domino tributorum reddiderit; volenti ei licere eum a prædijs emphyteuticarijs repellere.*"—Code, iv. 66, 2.

The rule of the Canon law is thus stated in the Decretals:—"*Emphyteuta quoque . . . cessando in solutione canonis per biennium, nisi celeri satisfactione postmodum sibi consulere studuisset juste potuisset expelli.*"—Decretal iii. 18, 4. All our writers from this time forward have treated the subject as being no longer feudal but *emphyteusis*. "When," said Ross (ii. 394), "military services were changed for money and produce, the feudal grant came to be exactly the *emphyteusis* of the Romans; and, accordingly, all its principles were adopted into the construction of that right." In making this statement Ross gave an opinion following that of the lawyers who expounded this branch of our law—Craig (iii. 2, 22 *seq.*), Stair (ii. 3, 34), Mackenzie, in his Commentary upon the Act 1457, c. 71 (p. 53), Bankton (ii. 3, 53), Erskine (ii. 4, 6). In the chartularies of the religious houses there are frequent practical illustrations of the doctrine, because the grants are described as being made "*in feudum vel emphyteusin.*"

In an address which Lord Curriehill gave to the National Association for the Promotion of Social Science in Edinburgh in 1863, he dealt with land as a subject of commerce, and he thus expressed himself in reference to this subject:—"The connection between the parties is not that of superior and vassal, in the sense in which these appellations were used in the feudal system, under which the vassal held the land as a benefice or a fee for military and other services, without any feu-duty or other yearly return being payable to a superior. His right, being inalienable without his superior's consent, was not a commercial subject. The tenure of feu-farm was quite unknown in that system, and, indeed, was not consistent with some of the conditions of the feudal tenure. It was gradually established in Scotland only by a series of statutory enactments during a period of nearly three centuries, extending from the year 1457 to 1748; and instead of continuing, it supplanted the feudal tenure. . . . The tenure of feu-farm, instead of being a feudal one, originated and was matured in the jurisprudence of imperial Rome,—the dominion of which, unlike the conquests of its arms, was destined to be of endless duration. In its progress among the Romans this tenure was known by various names, but at length it became an institution of the empire under the Greek appellation of *Emphyteusis*, by a constitution of the Emperor Zeno, who was reigning at Constantinople at the time of the fall of the Western Empire. On the revival of learning and civilisation in Western

Europe it was adopted to some extent in several of its States. In particular, the Church made grants of its lands by this tenure, and it became an institution in the Canon as well as in the Civil law. In Scotland it made its first encroachment on the feudal system, which had previously been in full vigour here, in the middle of the fifteenth century (by the Statute 1457, c. 71), just about a thousand years after the constitution of Zeno; and thereafter it was gradually, and at last decidedly, adopted in 1748, as already mentioned; and for more than a century past the greater part of our territory has been held under this Roman tenure. . . . There was a controversy among the Roman jurists whether the category under which the contract of *emphyteusis* ought to be classed was sale or location, being what we call lease; and whether the right of the *emphyteuta* (or feuar, as we call him) was owner or lessee of the subject. The truth appears to be, that it was a combination of some of the elements of both of these commercial contracts. Some French writers in analysing this tenure suggest —and the suggestion appears to me to have much force—that in this combination are included some elements not only of the contracts of sale and of location, or lease, but likewise of the contract of partnership—the superior being in some respects in the position of a sleeping partner or *commanditaire*, by providing the original stock, and being secured in a fixed annual return as his share of the profits, but without having any participation in the management; and the feuar being in the position of a managing partner or *gerant*—all the trouble and expense of management, all the profits beyond the fixed yearly return prestable to the grantor, and all the loss, being attached to his share. But the constitution of the Emperor Zeno put an end to such speculative disputes, by creating the right of a separate legal tenure, under which, not indeed the material subject, but the incorporeal right itself, is partitioned between the contracting parties. And, accordingly, it is a settled principle in our own jurisprudence, as it ultimately was in that of the Romans, that the right of each of the parties is a perpetual although a qualified right of property."

The importance of these views will be seen in the sequel, when we have to consider what are to be the conditions on which an irritancy of the sub-feuar's right is to be granted,—if such is the law. The irritancy incurred by non-payment for two years of feu-duty did not originate in the feudal law. There were many rules in that system declaring the forfeiture of the fee upon delinquencies of vassals. Craig has given at great length a list of these (iii. 6, 21); and Stair, commenting upon this portion of "Craig's Treatise" (ii. 11, 31), says that Craig's opinion as to a number of these delinquencies is not in accordance with his. He adds—"Though Craig hath not gone near the length of foreign feudists in assigning the specialties resolving fees, yet if we should go his length, there would be found few unquarrelable rights of superiority or property in the kingdom." Craig does not mention irritancy *ob non solutum canonem* as a cause of forfeiture under the feudal system, and he could not do so consistently with historical fact. One may gather from the terms of the Act 1597, c. 250, that in grants of land to be held in feu, irritant clauses were inserted declaring a forfeiture of the vassal's title upon non-payment of the feu-duty stipulated,—because that statute, while it enacts that if a vassal shall fail to make payment of his feu-duty for two years, he shall amit and tyne his feu "siklike and in the same manner *as gif ane clause irritant were specially engrossed and insert in their said infeftments of few-ferme.*" It declares, not that this is the law of the feus but of the Civil and Canon law. The last clause of the Act clearly refers to an existing practice of having express clauses of irritancy, the legality of which seems to have been doubted, seeing that it was thought necessary to pass an express statute to authorise it.

Subinfeudation was not regarded, according to the law of the feus, as alienation. The original vassal granting a sub-feu still remained bound to his superior to perform all the duties of a vassal. He owed fealty and military service; and if he failed to perform these the *beneficium* which had been granted to him by the lord was taken away, although in the hands of a sub-vassal. As a historical fact, this practice of sub-feuing for payment by the sub-vassal for the holding cannot be disputed as having existed prior to the Statute 1457, c. 71, which first gave it statutory authority (Innes's Sketches of Early Scottish History, p. 93). How difficult it was to induce the oligarchy by whom Scotland was ruled to consent to any relaxation of the feudal law may be seen from the terms of that Act of Parliament itself. It begins with the words "as anent few-farme," indicating the existence of feuing at the time when it was passed, and then it proceeds, not to enact in general terms that feuing shall be allowed, and that the sub-vassal shall not be evicted because of the forfeiture of the vassal, but that the king should begin and give an example to other superiors; and that if any prelate, baron, or freeholder agree with his tenant (vassal) upon a feu of his land, the king should ratify and approve of the said assedation, so that if the lands should come into the king's hands in ward the tenant should hold his feu unremoved. This statute recognised agreements to feu; but all that it promised was, that the king obtaining any of the lands of the Crown vassals in ward would not remove sub-vassals from them if the latter paid the feu-duty which they were bound to pay to the immediate vassal of the Crown. This statute had very important consequences. It made the system of feuing general and universal. Lord Kames says (Statute Law, p. 435, Note xviii.)—"Though by the Statute 1457 the privilege of feuing land was granted to the king's immediate vassals only, yet every vassal assumed this privilege; and a feu granted by the vassal of a subject-superior was reckoned equally effectual against the casualties of superiority with a feu granted by the king's immediate vassal." Under this system the actual holders of lands became dissociated from the superiors. The retainers of the latter, bound to military services, accordingly declined in number and in attendance on their lords. This was a result not at all in conformity to the views of the barons, whose importance depended upon the number of their feudal retainers. During the reign of James III. no attempt appears to have been made to repeal the Act of 1457 or to change the practice which had grown up under it. But in the reign of James IV. this was attempted. It

was a time of a war of races, the misrule of factions, and the outrageous domination of one class over all beneath them. Two statutes were passed in this reign which clearly indicate the struggle that was going on. These are the Acts 1503, c. 90, and 1503, c. 91, by the former of which the king was allowed to set his lands in feu; and by the latter it was allowed to every man to feu his lands "so that the alienation so made shall be no cause of forfeiture either to the setter nor to the taker." But the Parliament jealously limited the operation of these statutes to the lifetime of the king.

James IV. was the most energetic and intelligent (except James I.) of all the Stuart kings. He was, as Pitscottie narrates, "diligent in the execution of justice," and endeavoured to curb the lawless oppression of the nobles who, when combined, exercised a power against which the powers of the Scottish kings were unavailing. Tytler (vol. v., p. 22) says that the Act of 1457, by loosening the strict ties of the feudal system, promoted agricultural improvement, but was opposed by a large body of the barons, who were jealous of any infringement upon their privileges. That this was the case is obvious enough, even from the very scanty memorials we have of that period of Scottish history. But when this historian suggests that the legislation of 1503, authorising sub-feus during the king's lifetime, was because the Act of 1457 had "fallen so much into disuse that its legality was disputed," he makes a statement not consistent with the history of the time between 1457 and 1503. All that we know of the practice during that period is, that the power to sub-feu, granted by the Act of 1457 to Crown vassals, was taken advantage of by persons who were not Crown vassals. In all probability the Acts of 1503 were the consequence of a movement by the barons for the repeal of the Act 1457; and the matter was compromised with the king by enacting that *during his lifetime* the power of subinfeudation should be possessed by subject-superiors, and that the subfeu should not fall with the superior's forfeiture.

The Acts of 1503 were not re-enacted in the reigns of James V. or of Mary, but, as will be seen immediately, the Courts held that until the year 1606, when a statute was passed in regard to the matter—the rights of sub-feuars were not extinguished by the forfeiture on account of the crime or feudal delinquency of their superiors. When James VI. ascended the throne of England, and his power was thereby increased, he determined to carry out in Scotland the various schemes which he deemed necessary for bringing that country to the subjection which, in his estimation, was necessary if the royal prerogative was to subsist. Amongst others, he determined to upset the Presbyterian system, which had been established and ratified by Act of Parliament in 1592. But to do this it was necessary to conciliate those who had influence and power with the Estates of the Scottish Parliament. In order to obtain the passing of the Act 1606, c. 2, which restored the bishops to their Episcopal dignities, and which was followed up by a persecution of Presbyterian ministers, the king consented to the passing of the Act 1606, c. 12, which, after a narrative of the Act of 1457, and the practice that had followed on it—of persons sub-feuing their lands—enacts that no vassal holding his land by service of ward, of a subject-superior, shall be entitled to feu it out for a feu-duty without the superior's consent. This statute effectually restored ward-holding and reinstated the barons in all their feudal powers; and the same law was enacted in the time of Charles I. in reference to vassals holding ward of the Crown (1633, c. 16).

The hand on the clock was stopped by this legislation for 142 years. Feudal law triumphed, and the commerce in land was put an end to. Even the Revolution Parliament of 1689 and 1690, which effected so many changes, had not courage sufficient to do more than to pass the Act 1690, c. 33, which declared that the rights of sub-vassals should not be affected by the forfeiture for treason of their superior. The Estates had claimed this in the "Claim of Right," as being the law of Scotland. Undoubtedly such was not the law as applied by the Courts between 1606 and the Revolution. Dirleton, *v. Forfeiture*, declares that it was; but Sir James Steuart, while admiring the "moderation," questions the accuracy of his author. The decisions are to a contrary effect. The Revolution Parliament, composed very largely of the men whose interest it was to have a large number of retainers at their call, did not deal with the case of irritancy, but of the right of the vassal, founded, not upon treason, but upon feudal delinquency. It was only in the year 1748 that all this was changed by the following enactment in the Act of 20 Geo. II. c. 50, sec. 1—"That the tenure of lands or heritages in Scotland by ward-holding, whether simple or taxed ward, and the casualties consequent upon the same by ward, marriage, and recognition, be taken away and discharged, and they are hereby taken away and discharged from and after the 25th day of March in the year of our Lord One thousand seven hundred and forty-eight."

Lord Rutherfurd Clark says that in 1690 no statute was passed to protect sub-feuars against the irritancy incurred *ob non solutum canonem*. Nor was any needed, for while the irritancy was intended and required to protect the interests of the superior, the vassal, and those holding under him, could secure their own by purging it. The learned Judge here overlooks the simple fact that from the year 1606 to 1690 there could be no feu granted without the superior's consent. It was necessary that there should be two rebellions before this state of things could be put an end to. The barons determined to hold their power over their retainers. Their influence was too great—even in the Parliament of 1690—to allow of the recognition of feuars, or of sub-feuars, with their rights of purging the irritancy. They were simply non-existent, and remained so till 1748, when the feudal law finally disappeared. It is a misapprehension of the state of things in 1690 to hold that the Estates then abstained from saving the right of sub-vassals because they could purge an irritancy to which a prime vassal was obnoxious.

The Statute 20 Geo. II. c. 50, revived the law which had been in existence prior to 1606. Although it did not expressly repeal the Act of Parliament of that year, it impliedly did so. It restored the law so as to make it that contract of *emphyteusis* which our writers say was the consequence of the Act of 1457.

Now, then, in regard to the period of a century and a half, while feus by a vassal holding ward were held to be legal (1457 to 1606), questions occurred as to whether the forfeiture of the vassal inferred also a forfeiture of the sub-feu. There were decided various cases where the effect of the forfeiture of the vassal's right as regards the interest of the sub-vassal came into discussion. One of these was *Huntly* v. *Cairnborrow* (M. 4170 (1674), and reported also by Mackenzie in his observations upon the statute 1457, c. 71. Mackenzie says that "It was debated whether a sub-feu set by vertue of this Act did fall under the forfaulture of the vassal though it was not confirmed in the person of the sub-vassal, and it was alleadged that the sub-feu could not be quarrelled because the King by this Act having invited men to take sub-feus, it was not just that the invitation given by a public law should become a snare." To this it was answered that the Act of Parliament only imported "a promise to ratify, which did imply that application should have been made for a confirmation." "The Lords found," says Stair, "that feus granted by vassals of ward lands so long as the foresaid Act of Parliament stood (1457, c. 71) did exclude not only ward and recognition but forefaulture of the ward vassal granter thereof, without necessity of confirmation, because forefaulture of the king's immediate vassal being upon the breach of his fidelity, is in effect recognition, whereby the feu is returned without the burden of any deed of the forefault vassal, except such as are preserved by this statute, but forefaulture of those who are not the king's immediate vassals confiscates their ward-holdings as a penal statute, but with the burden of all subaltern rights and deeds of the forefault person." The forfeiture in this case was for treason, and in reference to which there can be no doubt that such forfeiture inferred freedom according to the feudal law from all burdens upon the lands by previous possession, and from all subaltern rights whatever—*Caldwell* v. *Dalzell*, M. 4690; Bankt. iii. 3, 57.

The decision in the case of *Huntly* was followed and was confirmed by other decisions—*Steuart* v. *Ernock*, M. 4169; *Campbell* v. *Auchinbreck*, M. 4171; *Erskine* v. *Arbuthnot*, M. 4174; *Campbell* v. *Argyll's Vassals*, M. 4176.

These decisions of *Huntly* and others have an important bearing upon the present question. They established that an Act of Parliament having allowed feuing, a sub-feuar's right was not affected by the forfeiture of the man from whom the sub-feu was obtained. The rule *resoluto jure dantis*, &c., was not applied. What was done in regard to forfeiture for crime there can be no doubt would have been done on account of any feudal delinquency. The feudal law while ward-holding subsisted regarded forfeiture from whatever cause in the same light.

Now, we have to deal at present with a case where the forfeiture is insisted in by reason of the non-performance by the prime vassal of some of the conditions of his contract. That vassal had the power to sub-feu, and it was intended that he should sub-feu, and furthermore, an Act of Parliament (37 and 38 Vict. c. 94, sec. 22) declares that it is illegal to prevent subinfeudation. In what different respect does the sub-feuar, therefore, stand than did the person who obtained feus and sub-feus for the century and a half before 1606? His sub-feu has got statutory authority, and the case is the same as if it had been expressly recognised by the superior himself.

A superior has no doubt very valuable rights reserved to him even in the case of sub-feus. He is entitled to compel the sub-feuar to pay to him the sub-feu-duties to the extent due by the immediate vassal. He has no personal action against the sub-vassal for the feu-duties, as was decided in the case of *Sandeman* v. *Scottish Property Investment Co.*, 8 R. 790. But he may poind the ground for payment of the feu-duty owing to him, although the articles poinded may be the property of the sub-vassal. But all these privileges have nothing in themselves peculiar to the feudal law. They are privileges competent to everyone who is creditor in a *debitum fundi*. As against the vassal himself, he has, besides his action of irritancy and poinding of the ground, an action of damages for failure to implement the conditions of the feu-contract—*Abercorn* v. *Marnoch*, June 26, 1817, F.C., and 2 Ross' L.C. 242.

The case of resignation *ad remanentiam*, which, says Stair (iii. 2, 8), "is no transmission but an extinction of the fee," seems to me to be precisely analogous to the present. Stair (ii. 11, 1, 5) and Erskine (ii. 7, 21) tell us that upon such a resignation being made, all sub-feus, leases, rights of annual rent, &c., remain burdens upon the feu. It is said, however, that the consent of the superior is necessary to the resignation, and this is quite true, but wherein does the case differ from the present, where the superior insists upon a condition, the effect of which is to take from his vassal the feu that he had granted? It was open to the superior to insist upon the revocation, or irritancy, or forfeiture according to his pleasure. The *vassal* was content that he should recover his feu in this way rather than by the form of resignation *ad remanentiam*, and if in the latter case sub-feus must be held to subsist, it is difficult to see why a different rule should be applied to the case where the result is the same—of the feu being handed back to the superior in consequence of his own voluntary action in declaring an irritancy. The vassal, instead of taking the trouble, or going to the expense, of resigning *ad remanentiam* into the superior's hands, consented to or acquiesced in his taking back the land in another form, and this he did by non-payment of the feu-duty for two years, which gave the power to the superior to take it back.

It is further said, however, that the forfeiture of the immediate vassal in the present case would leave the matter in this position, that there would be a superior without a vassal, or a vassal without a superior. In other words, this is saying that there would be land in Scotland held by one person not bound to pay a feu-duty to another, or that he would hold land which had come from a superior through a forfeited vassal without a title on the part of that superior to demand payment of a feu-duty. This was the idea that seems in the case of *Sandeman* to have weighed heavily with Lord Rutherfurd Clark. With submission to my learned colleague there is here no difficulty at all. Does he not

overlook settled and established rules? To strike a sub-feuar out of the roll of persons who form the chain between the actual holders of the land up to the Crown is a perfectly ordinary affair. (1) We are perfectly familiar with the case of tinsel of superiority which advances the vassal to the next over-superior; and (2) the same result is produced in other cases, such as when the vassal buys the superiority he comes in place of the superior above him. (3) In like manner when the right of a mid-superior is forfeited, what is there inconsistent with what is called "feudal principle," to hold that the sub-vassal then becomes the vassal of the over-superior? This is the case of resignation *ad remanentiam*. The superior who accepts such resignation takes it, as we have seen, with all the burden of subaltern rights—that is to say, he becomes the superior of the sub-vassal.

According to my view of the case, the effect of the irritancy of the prime vassal's right is simply to put him out of the chain of persons who have to do with the property, and to advance the sub-feuar to the position which the prime vassal held. Where an estate of a superior was forfeited for crime, all the statutes enact that the vassal shall hold from the superior above him. There are a number of these statutes, and such is there unfailing provision upon this matter. In like manner here, where the vassal Lamb is struck out, the sub-feuars are just simply advanced to the positions of vassals of the pursuers.

We are not in this case called upon to say what are all the remedies which the pursuers possess in such circumstances for the recovery of the feu-duty of £366. Some of these I have adverted to. The only question that we have here to deal with is, whether besides poinding of the ground, &c., they have the higher privilege of forfeiting the whole estate, including the buildings erected by the sub-feuars.

In the case of an adjudication by the superior of the vassal's feu he takes it *tantum et tale*. With regard to the mode of completing his title upon such adjudication, Stair lays down doctrine which has been called in question by Erskine. In ii. 11, 8, Stair says—"Infeftments are extinct when the superior adjudgeth or appriseth from his vassal, for thereby it was found that the property was consolidated with the superiority;" and this doctrine he repeats in iii. 2, 23. Erskine, on the other hand, states that it is necessary for the superior to resign *ad remanentiam* before consolidation can be effected—ii. 12, 29. Be this, however, as it may, it is quite plain that the adjudging superior could only take the lands *tantum et tale* as they were in the vassal, *i.e.*, with the burden of all the subaltern rights created by the vassal. — See Brodie's Note and Decisions there referred to, p. 100.

The case of *Cockburn Ross*, June 6, 1815, F.C., *affd.* 2 Bligh 707, 6 Paton's App. 640, is an important one as bearing upon the present case. A superior is entitled upon the entry of a singular successor to a year's rent of the lands. Now, undoubtedly the feu-duties paid by sub-feuars to the primary vassal are not the year's rent of the land, and yet the Court held that the vassal who had to pay the composition was obliged to pay no more than one year's feu-duties which he obtained from the sub-feuars. The existence of the sub-feuars was here recognised in a very practical way. It was sought by the superiors to ignore them altogether, and to insist that all that they had to deal with was their own vassal, and the rent which he had to pay was the rent which the subjects yielded, no matter that that rent was payable to other people than the vassal. But this view of the case was disregarded. Subinfeudation was held to be a legal exercise of the vassal's rights, and all that he was required to pay was the amount of one year of the sub feu-duty which he obtained.

It must be kept in view that the irritancy here sought to be declared, not merely on the ground of non-payment of feu-duty, but also for infraction of the building-plans and restrictions. Now let us see what this comes to.

The argument of the pursuers must be carried this length, that supposing the whole ground were sub-feued to different sub-feuars, and one of these had erected a building disconform to the style and character demanded by the superior, not merely shall that sub-feu be forfeited along with the interest in the sub-feu-duty retained by the prime vassal, but also the whole other sub-feus upon which different and unconnected sub-feuars had built villas could be carried off by the superior, although these other sub-feuars had no right or title to enforce implement upon the defaulting member of their body—could not enter upon possession of his holding—take down the objectionable building and erect a better one—nor even crave interdict against the erection of the objectionable building as the work was going on. This very grievous construction of the contract is the right one, if the case stated by the pursuers be well founded. The prime vassal might have a title to object to the erection of buildings contrary to the contracts; but if he does not object, the other sub-feuars can have no remedy, for they cannot compel their author to prosecute the person who is violating the building restrictions. It has been suggested that they have a remedy for this, as they have a remedy as against the irritancy incurred by the non-payment of the feu-duty. It is said that they may purge the irritancy as regards the non-payment of the money by making payment of it, and this is quite true. But it is further said that they may purge the irritancy incurred in consequence of the violation of the building restrictions. In what way?—By paying damages. The object of the covenant was not to have damages but performance. According to what principle of law is it that superiors, if they have all the rights they claim, can be forced to take payment of a sum of money in place of obtaining the decree of irritancy, which when obtained would enable them to clear away the objectionable house which disfigures their property. This suggestion appears to me to have no countenance from any jurisdiction which the Court possesses either as a Court of law or equity.

IV. There still remains in the last place a question of great practical importance.

If, upon any of the grounds stated by the pursuers, the right of the sub-feuars is to be held irritated because that of the prime vassal is so, can this be done without making compensation to the sub-feuars for the value of their

holdings? We are here dealing with a contract of *emphyteusis*, and the question just put was often the subject of consideration as under that contract. I will not occupy space by citing the opinions of legal writers on the matter, because I can refer to the judgment of a court of law whose decisions during the last century were often cited in the Court of Session, and are frequently relied on by our legal writers. The case is reported by President Sande, and occurs in "Decisiones Frisicæ." It was decided at the time that Sande was President of the Court.

The question was, whether seeing that the tenant, or *emphyteuta*, or vassal, had incurred an irritancy, he lost not merely the land but the meliorations he had made upon it. The Court drew a distinction between the ordinary meliorations to be expected in cultivating land, and other meliorations not arising necessarily from ordinary use of the property, such as erecting buildings at great cost, or a mill; and the value of these latter meliorations the Court decided he was entitled to obtain on the irritancy of his right. The reporter of this decision mentions the names of the feudal lawyers who approve of it, and he concludes his report thus:—"*Secundum hanc distinctionem postquam Curia declarasset Emphyteutam jure suo cecidisse, eundem condemnavit rem Emphyteuticam domino restituere, ita tamen, ut ante restitutionem dominus, ad taxationem Curiæ prius Emphyteutæ solveret æstimationem ædificii in fundo Emphyteutico ab ipso Emphyteuta vel ejus majoribus constructi.*"—(Sande—Decisiones Curiæ Frisicæ, lib. iii. tit. vi. def. vi.)

The equity of this determination is clear enough, but it certainly is clearer when the meliorations are made, not by the author of the delinquency, but by an innocent third party, who had obtained a title in good faith to the land on which he made his erections. It is an application of the rule—*Nemo debet locupletari aliena jactura;* and therefore if the irritancy in this case is to be extended to an irritancy of the rights of the sub-feuars, I am of opinion that this can only be on condition of their receiving from the pursuers the full value of the houses they have built.

Lord M'Laren—The facts of the case being fully before the Court, I shall, without any prefatory statement, proceed to consider the three questions:—

(1) Is it the true meaning of the feudal contract that in case of the eventual insolvency of the grantee, his estate, with all subaltern rights, shall be forfeited to the superior?

(2) Is such an agreement for forfeiture permitted by law, and is it binding on singular successors?

(3) In the enforcement of such an agreement, is it possible to lessen the hardship to the subfeuar without impairing the superior's security for his feu-duties?

(1) The feu-contract in question is an agreement between the superior and the feuar for the sale of building-ground in consideration of an annual payment exceeding the value of the estate as land, and it is a condition of the agreement that the feuar shall within three years thereafter erect houses and shops of the description specified. There can be no doubt that the superior had an interest in the insertion of this condition, because the houses to be erected were to be his security for the feu-duty, which in the meantime depended mainly on the personal credit of the grantee. It is at the end of the specification of the building conditions that the clause of forfeiture is introduced. The clause of forfeiture is directed against "the second party or their foresaids"—that is, the grantees, their heirs and assignees. The condition of the forfeiture is the "contravening or not implementing all or any of the conditions, provisions, and others before-written, or allowing two years' feu-duty at any time to remain unpaid;" and the forfeiture has relation to "the said lands or the part thereof in respect of which such contravention or non-implement shall occur." Therefore, so far as relates to the failure to build, there can be no forfeiture except of the particular plots or stances which were laid out for building, and on which the feuar or his assignees had failed to erect houses or buildings of the prescribed description. But as regards that part of the clause of forfeiture which proceeds on the hypothesis that two years' feu-duties are unpaid, I see no evidence of an intention that the obligation to keep down arrears should be treated as a divisible obligation. The *reddendo* clause, which follows the clause of forfeiture, appears to me to create an undivided obligation for an annual payment of £366, 15s. 11d. And while by a subsequent clause provision is made for the allocation of the feu-duty amongst sub-feuars, it is made plain that such allocation is not to take effect unless with the superior's consent, and that until the feu-duty is allocated it is to be and remain an undivided charge upon the lands to whomsoever these lands may pertain. If the grantee were to apply to the superior for an allocation of feu-duty in favour of his sub-feuars, while he himself was in default with reference to the obligation to build, it would be open to the superior to withhold his consent. Until the feu-duty is allocated, I apprehend that the failure to pay the feu-duty during two successive years is a contravention affecting the entire estate, because such a failue is a virtual insolvency of the estate in respect to the fulfilment of a solid obligation affecting it in its entirety. It appears to me, therefore, that the defenders can take no benefit (so far as the action is founded on default in payment of feu-duty) from the expressions limiting the forfeiture to that part of the estate "in respect of which such contravention or non-implement shall occur."

It is a more important question, Whether, in the intention of the parties to the feu-contract, the forfeiture was meant to take effect upon the estates of the sub-feuars to whom the separate houses were to be eventually feued out; or whether it was only to take effect upon the feu-duty or other consideration which the immediate grantee should reserve to himself when he feued out the property?

Now, I think there is much force in the views expressed by Lord Rutherfurd Clark in the case of *Sandeman* as to the legal impossibility (or difficulty, as I should prefer to call it) of working out such a forfeiture as is last supposed. The theory of an irritancy or forfeiture is, that the grant is rescinded by the superior in respect of the feuar's breach of contract. But if, as some of my learned colleagues have held, there is to

be a forfeiture which will not extend to the estate of the sub-feuar or sub-vendee, it seems to me that this would not be a forfeiture in the proper sense of the term, but something different. If the feu-contract is rescinded and rendered null *ab initio*, then I have difficulty in seeing how the sub-feuar is to maintain his right—how, for example, he is to be enabled to defend himself from an action of ejection at the superior's instance, when the title of his immediate author is cut down? But supposing this difficulty is got over, and that a clause of forfeiture is framed which is to take effect merely by way of penalty upon the estate of the immediate grantee, and is to have no effect upon the estates of sub-feuars, except that they are required to pay their feu-duties to the over-superior as a condition of being allowed to retain possession—I do not say that it is impossible to frame such a clause; but can anyone for a moment suppose that this was the meaning of Cassells and M'Neill, the two parties to this feu-contract, when they agreed to the clause of irritancy?

Let it be remembered that the grantee was absolutely unrestricted as to the terms and conditions upon which he was to feu out this unbuilt-on land. He might feu it in one lot or in several lots, for a price or capital sum paid down and a nominal feu-duty, or for a feu-duty representing the fair annual value, or partly for a price paid and partly for a feu-duty. Now if the clause of forfeiture was only intended to take effect upon whatever feu-duty the grantee should arrange to receive from his tenants such a forfeiture would be worth very little as a security to the superior, because it would always be in the power of the grantee to render the security nugatory by feuing out the land for a nominal annual sum. Is it, then, to be supposed that the parties meant no more than this? I think it is more reasonable to suppose that the superior meant to constitute an irritancy which should be an effective security to him for the recovery of his arrears. If he meant this, I think he has done it, because the words of the clause appear to me to be sufficiently comprehensive to include the entire estate conveyed, whether it should continue undivided for all time, or whether it should eventually consist of different portions held by any description of tenure. Having regard to the nature of the contract, the practice of the profession in such cases, and the language used, I do not entertain any doubt that what the parties agreed to was a rescission of the original contract of feu, under which the feuar's right, and all rights derived from it, should revert to the superior.

(2) Is an agreement of the nature of a general irritancy *ob non solutum canonem*, permitted by law, and is such an agreement binding on singular successors?

It is understood that at common law the irritant and resolutive clauses of entails would be of no effect against singular successors; and if the question were open, there is something to be said against the policy of giving effect to such clauses in conveyances. Doubtless they operate to some extent as a restraint on alienation. Nevertheless there is, I think, a general agreement amongst writers of authority that a proper feudal prestation may be enforced by a clause of irritancy. This has not been disputed at the bar, nor, as I understand, is it the subject of difference of opinion amongst the consulted Judges. And there is this to be said in favour of the existing law, that its effect is nothing more than the constitution of a mortgage or first security in favour of the superior over the feuar's estate. In an action to declare a forfeiture, the defender may always avoid foreclosure by tendering payment of the arrears of feu-duty and expenses. In the present case I presume that this course will be open to the defenders. Now, it being agreed on all hands that an irritant clause is a proper mode of securing the superior's right to his feu-duties, it seems to me to be entirely a matter for the consideration of the parties to the original feu-contract whether that irritant clause shall be framed so as to create a *nexus* upon the estate under all future transformations of the title, or whether it shall provide, by way of exception, allocation, or other limitation, for the contemplated creation of sub-feus. If the law permits the enforcement of arrears of feu-duty by an irritancy of the feu, I should assume, in the absence of authority to the contrary, that the law permits an effective irritancy; and for the reasons stated I think there can be no effective irritancy which does not render the subaltern feus liable to forfeiture. If the contrary is intended, I think that the parties must make this clear by appropriate words of agreement.

Nor do I think that it would be of advantage to feuars generally that clauses of irritancy should receive the limited construction which some of the consulted Judges think ought to be given to them. Because the only result would be, that superiors, being unable to get a good security for their feu-duties in this form, would require a reconveyance of the heritable estate in security of their feu-duties—just as in the case of burgage property, where feudal clauses are inadmissible, the seller usually takes a back conveyance to secure his ground-rent. No one doubts that such a reconveyance in security may be enforced for the recovery of the full arrear against any one of the burghal proprietors amongst whom the estate comes to be eventually divided. It is a catholic security; and I think that a superior may have a catholic security for his feu-duties by way of irritancy, and that he will be presumed to have obtained it if he protects himself by a clause of irritancy in the usual form.

(3) Is it possible to limit the operation of the forfeiture, and thus to lessen the hardship to the sub-feuar, without impairing the superior's security?

It will be generally admitted that if a conveyance, obligation, or penalty is shown to be a security, a court of justice may refuse execution of the clause in its entirety, reserving its effect as a security in conformity with the intention of the parties. The restriction of penalty clauses in bonds, the restriction of *ex facie* absolute conveyances to securities covering past and future advances, are familiar illustrations. Therefore if it could be shown that the enforcement of a clause of forfeiture in such a case as the present would be productive of injustice, I should not dissent from any reasonable proposal to mitigate its operation. But I do not see how it is possible to interfere further in this direction than by allowing the sub-feuar an opportunity of paying the arrear and thus avoiding the forfeiture. The suggested limitation or allocation of the liability

is open to this objection: Either the lands other than the defender's feu are a sufficient security for the remainder of the feu-duty, or they are not. If those lands are a sufficient security, then it is for the defender to pay the whole arrear, taking an assignation from the superior to so much of the debt as pertains to the other lands. If the other lands are not of such value as will cover the remainder of the arrear, then the result of the proposed limitation is that the superior will lose a part of his arrear. This, I think, would be very unfair to the superior. The superior by the terms of his feu-contract has a general security for his feu-duties over the entirety of the estate conveyed, including the buildings which his disponee is taken bound to erect or to cause to be erected within the three years. It is proposed that this general security shall be cut down, apparently for no better reason than that his disponee without arrangement with the superior has carved out the lands into a series of sub-feus. No such proposal would be entertained for a moment in the case of securities of the ordinary description—I mean in the case of a bond and disposition in security, or a conveyance qualified by a back bond. In such a case each of the sub-vendees is liable for the whole debt originally charged on the estate of which his feu forms a part, even although such debt may exceed the value of his feu. If the sub-vendee is so foolish as to accept an encumbered title, when he might have insisted on the removal or the allocation of the encumbrance, he has no one to blame but himself for the loss of his property. I see no difference in principle between the case supposed and the case under consideration; because according to practice the sub-feuar might have refused to accept a title which exposed him to liability for arrears to become due by his author.

But for the specialities of the law of forfeiture for crime, I do not think there would have been any difference of opinion on this point. But in my view there is a very radical distinction between a forfeiture which is the result of convention, and a forfeiture of an estate for crime. The former depends on the circumstance that the grant is defeasible in a certain contingency, and the criterion of defeasibility is the deed of grant fairly interpreted. The latter depends on the general law of the land, which may vary from time to time according to the policy of the Legislature. Even if it be the case that the exception in favour of sub-feuars deriving right from the convict was established by the common law, independently of statute, this only proves that in the administration of the criminal law it was considered unjust that the innocent should suffer with the guilty. The decisions may establish the legal possibility of upholding a sub-feu after the estate on which it depends has been forfeited. But they do not, in my judgment, offer a true analogy for the decision of the present case; because, however wise and just it may be to protect the subaltern proprietor from the consequences of the forfeiture which his superior has incurred through crime, it is not, as I think, either wise or just to give to the voluntary agreement of parties a less extended signification than that which the parties intended when they settled the conditions of tenure for themselves and their successors.

For these reasons I am of opinion that the pursuers are entitled to decree of forfeiture, though it may be necessary, on the point first mentioned, to vary the terms of the Lord Ordinary's interlocutor.

Lord Kinnear—The pursuers maintain two separate grounds of irritancy: failure to build in terms of the feu-contract, and failure to pay the feu-duty for two successive years. I am of opinion that the first-mentioned irritancy cannot be enforced against disponees or sub-vassals who have erected buildings in terms of the contract upon the lots they have themselves acquired, notwithstanding that other portions of the ground may remain unbuilt upon. The clause of irritancy contemplates that the condition may be performed as to a part of the ground, and left unperformed as to another part; and accordingly declares that the feuar, in case of contravention, "shall amit, lose, and tyne all right and title to the lands, or the part thereof in respect of which such contravention or non-implement shall occur." I think that under this clause the right of a feuar or sub-feuar who had fully complied with the conditions of the contract could not be forfeited because of his neighbour's failure. But the pursuers deny that the conditions have been satisfied as to any portion of the ground; and I think it unnecessary that the question of fact should be determined or considered so long as the irritancy for non-payment of feu-duty remains unpurged.

As to this latter irritancy, I agree with the Lord Ordinary. I am unable to distinguish the case from that of *Sandeman* v. *The Scottish Property Building Society*. But I agree with the opinion of Lord Rutherfurd Clark in that case; and for the reasons given by him I think that the decision ought not to be followed.

The question depends upon the construction and legal effect of the feu-contract; and in this case, as well as in that of *Sandeman*, it is manifest from the terms of the contract that the superior in granting out his land contemplated from the first the probability of its being subfeued for building. That, indeed, is an anticipation which must be imputed to the granter of every feu-right where the lands are in a similar situation. For prohibitions against sub-feuing are now illegal; and therefore, as the Lord President points out in the first case of *Sandeman*, "under the existing law it must always be contemplated that the purpose of taking a feu of a large piece ground may be—and where the land is in close proximity to a town, in all probability is— to feu it out or sell it off in smaller lots for building." But still it is material to observe that the subdivision of the original feu is not only an event which might have been foreseen, but one that is clearly contemplated and provided for by the terms of the contract.

The practical question in such cases is to provide for the manner in which an anticipated subdivision shall affect the rights and remedies reserved to the superior of the entire subject; and this may be done in various ways which are very familiar in practice. The original feu-contract may provide separate conditions and separate feu-duties for each of the building lots, as in the case of *Jack* v. *Welsh*, 10 R. 113; or it may provide for the allocation of the original feu-duty, immediately upon the ground being

divided; or it may fix conditions upon which the superior may be required to allocate, or may be entitled to refuse an allocation. In the present case it is stipulated that if portions of the ground shall be separately sold or disponed, the feu-duty may be allocated upon certain terms; but that no allocation shall be admitted until there shall be erected on the plot upon which the allocation is proposed to be made, and also on the remainder of the ground, buildings sufficient to secure the proportions of feu-duty applicable to each respectively. It is conceived that there can be no question as to the effect of this stipulation so long as the feu-contract subsists and continues to regulate the rights of the parties. The vassal may alienate a portion of the ground; but until the condition is purified upon which the superior may be required to allocate, the whole of the original feu, both what is sold and what is retained, will still remain liable, each portion of it *in solidum*, for the entire original feu-duty. It will make no difference whether the alienation is carried out by disposition of a part of the land to be held of the superior, or by way of a sub-feu. The superior will have no personal action against the sub-feuar, with whom he has no contract; but the immediate vassal or vassals will still be liable *in solidum*, and the ground sub-feued will still be liable as before, and may be poinded for the entire feu-duty. This is well-settled law, for which it is unnecessary to cite authority. The question is, whether the remedy of irritancy which the contract provides for non-payment of the feu-duty remains effectual after the whole or a portion of the subject has been sub-feued. It might seem unnecessary, but that the discussion has been confused with cross issues, to point out that this is the only question. It is a question that does not depend upon any rigorous application of feudal rules to a modern right, but upon the true intent and meaning of the contract under consideration.

The irritancy in respect of failure to pay the stipulated feu-duty for two years successively is by the Act 1597, c. 250, made a condition of every feu-right, and, in my opinion, the superior would have had the same remedy under the statute if no irritant clause had been "specially engrossed and inserted in the infeftment of feu-farm." But in the present case he has not been content to rely upon the statute alone, but has made the right to irritate the subject of express stipulation. It is therefore necessary to consider the terms in which the irritant clause has been expressed. It is stipulated that the second party and their foresaids—that is, the feuars and their heirs and assignees whomsoever—on contravening or not implementing the conditions, or "on allowing two years' feu-duty at any time to remain unpaid, shall in the option of" the superior "amit, lose, and tyne all right and title in and to the said lands, or the part thereof in respect of which such contravention or non-implement shall occur, and the same shall revert and return to" the superior "free and disburdened of the said feu-right, and all following thereon." If the feu-duty had been already allocated in terms of the contract, it may be that this irritancy would only apply to each separate portion of the original estate, in the event of its own proportion of feu-duty remaining unpaid. But no such question can arise so long as the feu-duty is undistributed, and every part of the estate remains liable for the whole.

If in this condition of matters the clause is to receive effect according to its terms, it appears to me that neither the original vassal nor anyone deriving right through him can hold the estate, or any portion of it, except upon condition of purging the irritancy by paying the arrears of feu-duty. I think it of no consequence whether those claiming under the original vassal are his vassals or his disponees. In either case they hold a portion of the estate with regard to which it has been stipulated that it shall revert to the superior if the feu-duty is allowed to remain for two years unpaid. I think it clear that the estate which is to return to the superior is the entire estate which he has given over—that is to say, the *dominium utile* of the lands, and not merely a mid-superiority which may have been created by the grantee. The lands which are to return can mean nothing else, upon the ordinary rules of construction, than the lands which have been given out; and I therefore agree with Lord Rutherfurd Clark that, independently of the words "and all following thereon," upon which he has observed, the irritancy ought not to be construed as limited to the estate of mid-superiority in the original vassal. But I agree with him, also, in thinking that these words very aptly express the consequence of the stipulated nullity. It is said that they are *voces signatæ*, or words of style, meaning the executory writs which may follow upon a charter. If this were so, they would be superfluous in the present contract. But they are words of relation, which can have no fixed meaning independently of the antecedent to which they refer. The antecedent in the present case is the feu-right—that is, the right given by the contract to the lands thereby conveyed. It does not seem doubtful that rights derived from the vassal are rights following upon the feu-right in him. The sub-feuar can have no right as against the superior except that which is derived through the original feuar from the superior's own deed; and the contract assuming, correctly, that the rights of the original vassal, and all the subordinate rights which he may have created, are in a question with the superior to be regarded as burdens on his paramount right, stipulates that if the feu-duty is not paid the lands shall return to him as he gave them, freed and disburdened of all such rights. If this did not include the rights which the vassal may have created, as well as that which the contract has created in him, the clause of irritancy would be a very futile remedy. There is nothing to prevent the vassal sub-feuing the entire estate for payment of a price and for a permanent feu-duty of insignificant amount, and in that event the clause of irritancy, according to the defender's argument, would enable the superior to recover, not the estate which he had given over, but merely the original vassal's right to levy an insignificant sub-feu-duty.

But if, according to the true intent and meaning of the contract, the irritancy is intended to be effectual against sub-vassals as well as against disponees, I see no ground of equity on which the Court can interpose to deprive the superior of his remedy. There is a well-established rule of equity by which the operation of irritant conditions is controlled, so that the estate may

be saved from forfeiture by payment at any time before judgment has been pronounced in an action of declarator. But the true ground of this equitable interference, in violation of the letter of a clause of irritancy, is, that in substance the condition is a stringent remedy for non-payment or non-performance. The Court therefore interferes to carry out the true intention of the contract by allowing the irritancy to be purged when its purpose of compelling performance has been effectuated. But I am not aware of any ground upon which the Court upon equitable considerations can interfere to defeat the intention of the contract by denying effect to a clause of irritancy in spite of non-payment. It may be that if the pursuer's claim is to take its course it may throw a burden upon the sub-vassal disproportioned to the value of his estate. But that is the condition upon which he has taken his right. Every feuar knows that his immediate superior's right, if he also holds in feu of a subject, is dependent upon the payment of a feu-duty, and that if the feu-duty is unpaid for two years the estate is liable to forfeiture. It is no answer to the superior's claim for payment of the arrears that the sub-feu-duty is a fair return for the portion of his estate which is held by the sub-vassal. He is entitled to his estate, or to payment of the feu-duty which is in arrear. I cannot agree with the view that his demand in an action for declarator of irritancy involves any unconscionable attempt to possess himself of the property of others. The action is a legal remedy for non-payment of feu-duty, and it cannot be used for any other purpose than compelling payment if the persons interested in maintaining the feu-right are willing to pay. If the sub-vassal's estate is of greater value than the arrear, he may purge the irritancy by payment, with relief against his immediate superior. If he declines to do so, and the estate cannot be protected otherwise, it must be assumed that he prefers to lose his land rather than to take the risk of recovering the amount of the arrears. It may be that this is a hardship; but it is not a hardship which can affect the validity of the clause of irritancy.

But the question is not merely one of contract. It is a question of property; and it is said that the sub-vassals have acquired a right of property which the superior cannot disregard. It appears to me, however, that the pursuers' contention is entirely in accordance with the nature of this right. The condition of the argument is, that the superior has feued out his land for payment of a certain feu-duty which must be duly rendered to him by the vassal as the condition of his holding the *dominium utile*. The feu-duty has fallen into arrear, and the superior brings an action of declarator of irritancy for the purpose of compelling performance, and payment not being made in answer to the action, he obtains a judgment annulling the right which he had granted and restoring the land. But the vassal has in the meantime feued out a part of the *dominium utile* to a sub-vassal for payment of a lesser feu-duty; and the defenders' proposition is, that the sub-vassal is still entitled to hold for payment of the sub-feu-duties stipulated in his own title, notwithstanding that the feu-duty for which the entire *dominium utile* was given to the vassal from whom he derives his right remains unpaid, and that the right which was conditioned upon its punctual payment has consequently been annulled. In other words, the proposition is, that the sub-vassal is entitled to hold a part of the *dominium utile* against the superior upon conditions to which he has not agreed, and in direct violation of the conditions expressed in his contract. I am aware that in the present case the defenders propose to pay, in terms of their title, not merely a sub-feu-duty, but also what they maintain to be a just proportion of the original feu-duty. But the question of law would be precisely the same, if they held for a sub-feu-duty only. The superior is not bound to take a part for the whole; and the question is, whether the sub-vassals are entitled to hold a part of his estate irrespective of the conditions upon which he has feued, and after the feu-right has been extinguished for non-performance of these conditions.

I think it material in considering this question to observe that the irritancy of the vassal's right arises from the operation of the feu-contract itself. I cannot agree that the question would have been the same if the vassal had suffered forfeiture for causes extrinsic to the contract. The point to be determined is the right of persons holding under him, when his right has been annulled for non-performance of conditions upon which by its constitution it is made to depend.

There can be no real question as to the nature of the sub-vassal's right so long as the original feu-right subsists. In a question with the superior, it is, like the right of the immediate vassal, a burden upon his paramount right. But it is still a right of property in land, which cannot be constituted or transferred otherwise than in feudal form, and by the deeds applicable to the constitution and conveyance of a feudal estate. It is a right, however, which the sub-vassals have acquired from a vassal, who holds the estate to which it relates, of his own superior, upon conditions, and it is a well-established, and indeed an elementary doctrine of law, that the conditions may be such and so expressed as to be effectual, not merely against the vassal and his personal representatives, but against all persons whomsoever, whether purchasers or creditors, into whose hands the estate may come. It is equally elementary that the payment of feu-duty is such a condition, and further, that the superior's right to exact payment is always protected by a clause of irritancy, by virtue of which, whether it be expressed or implied, the vassal's right shall be extinguished in case of non-payment, and the estate shall revert to the superior. The vassal who has acquired his land upon such conditions (which, in so far as concerns payment of feu-duty, means every holder of a feu-right) may sell and alienate, and dispone or sub-feu the estate in whole or in part, as he thinks fit. But he cannot disburden it of conditions which by the terms of his own title have been made real, or enable anyone deriving right through him to hold it against the superior if these conditions are not performed. I apprehend that he can no more enable his sub-vassals than his disponees to enjoy the estate, or any part of it, upon any other terms. If he sells and dispones the estate to be held of the superior, the purchaser takes his place in the contract. Prior to the Act of

1874 the superior was bound to renew the grant, and infeft and enter the successive vassals, whether heirs or singular successors, according to their right, but only upon the conditions of the original grant. As the law now stands, the purchaser may infeft and enter himself without the intervention of the superior, but only upon the conditions to which the superior could formerly have been compelled to assent. If the vassal prefers to sub-feu he may make any bargain he pleases with the sub-feuars, and may be content with any feu-duty, for the contracts between the vassal and his sub-vassals are *res inter alios* to the superior. But it follows that they in no way affect his right to enforce the conditions of his own contract, for in a question with him the land is still held by virtue of his own grant alone and by his own immediate vassal. The infeftment of the vassal, so long as the feu-right stands, will protect the infeftments of the sub-vassals. But the superior cannot be excluded except by his own grant; and it follows that when the grant has been rescinded for violation of its conditions, and the infeftment of the vassal has been annulled, the right of his sub-vassals must necessarily fall with it, unless they have acquired a right which will enable them to bring themselves into direct relation with the superior and enter as his immediate vassals. But they have neither right nor title to hold directly of him. It is plain enough that a title to a sub-feu will not warrant infeftment of and under the superior. But it is not merely a question of title; for the very nature of their claim makes it obvious that they have no right as against him upon which they can demand such infeftment. No one can claim to hold his estate, or any part of it, off him, except upon the terms expressed in his grant; and the condition of the argument is, that they decline to pay the feu-duty stipulated in the grant. If they are ready to pay, there is an end of the question, for payment will purge the irritancy. But I am unable to understand by what right they can take the place of the forfeited mid-superior, leaving the feu-duty still unpaid, and hold the estate upon conditions upon which he was not entitled to hold it. His right is absolute to give any part of his estate to be held of himself; but he can give no part of it to be held of the superior, except upon the conditions prescribed by his contract. It is certain that he could not dispone the estate to be held directly of the superior upon any other conditions; and I think it clear that he cannot bring about the same result indirectly by granting sub-feus upon other conditions, which shall be converted into rights holding of the superior by the mere operation of the irritancy.

It appears to me, therefore, that the claim which the defenders put forward to hold their sub-feu, notwithstanding the operation of the irritancy, and without undertaking to purge it, involves two untenable positions—first, that they can hold a part of the estate embraced in the feu-contract, upon a right derived from the contract but without performing its conditions; and secondly that they can be infeft and enter as the immediate vassals of the superior, upon a title to which he is no party, and upon conditions to which he has not assented.

This is, in my opinion, a fatal objection to the defenders' claim; but the ground upon which it rests appears to me to have been misapprehended. It is supposed to be a purely technical difficulty in bringing the sub-vassal into feudal relation with the over-superior. And accordingly it has been pointed out that this is a very familiar process; and the cases of a tinsel of superiority, of a purchase of a mid-superiority by the sub-vassal, and of a resignation *ad remanentiam* under burden of subaltern rights, have been suggested as analogous instances. But no one disputes that sub-vassals may acquire a right to hold directly of the over-superior, or that in that event they may obtain an investiture according to the nature of their right. The question is whether the defenders have acquired such a right by the operation of the irritancy; and the examples cited appear to me to have no bearing on the solution of that question. In the case of a purchase by a sub-vassal, as in a purchase by any other person, the seller substitutes the purchaser for himself in all the rights and liabilities of the original contract. In the case of tinsel of superiority, in like manner, if the vassal desires to extinguish his immediate superior's right, and to enter permanently with the over-lord, he must be content to hold his lands in future "by tenure, and for the reddendo by and for which his forfeited superiority was held." The investiture which he obtains is defined to be the same as if the superiority had been conveyed to the vassal, and the latter, after completing his title, had duly consolidated the separate rights of superiority and property now in his person by resignation *ad remanentiam* (10 and 11 Vict c. 48, sections 8, 12). The interests of the superior, therefore, are in no way affected in either of these cases. A new vassal is substituted for the former vassal by virtue of his conveyance, or by force of the statute, but the rights and liabilities constituted by the original feu-contract or feu-charter are in no way disturbed. These are illustrations of a doctrine which appears to me indisputable, that a vassal cannot claim to take his superior's place except upon condition of undertaking his superior's obligations to the over-lord.

The case of resignation *ad remanentiam* involves different considerations, because it presumes a new contract with the superior. He is not bound to accept a resignation except upon his own terms. It is a form of conveyance upon a contract between superior and vassal; and if there are sub-vassals who are no parties to the contract, the superior must of course take the estate like any other purchaser, subject to the burden of their existing rights. But the proposition that the enforcement of an irritancy is in this respect analogous to the acceptance of a resignation is quite untenable. The superior who accepts a resignation adopts the feu-contracts of his vassal. But these may contain obligations in favour of the sub-vassal, undertaken by the mid-superior, and binding upon his successors in the mid-superiority. The cases are familiar in which obligations of relief, or *ad factum præstandum*, have been enforced by the successors of the vassal in a feu-right against the successors of the original superior. Does an irritancy operate to impose these obligations upon the over-superior? That cannot be maintained. The operation of the irritancy is to extinguish the feu-contract. It has no other effect, except

such as may follow as the necessary consequence of such extinction. It may or may not leave other rights standing, according as they are capable of subsisting, after the feu-contract has been annulled. But it cannot possibly operate to constitute new obligations. But the sub-vassal's right stands upon contract involving mutual obligations; and the question is, how it is possible for the sub-feu-right to subsist when the right of the mid-superior, who alone is bound by the contract, has been annulled? There is, as Stair points out (ii. 11, 34), "no feudal contract or obligation of fidelity between the superior and the sub-vassal." Upon what conditions is the sub-vassal to hold? He cannot hold upon the conditions of his own contract, because the over-superior is no party to it, and is not bound by the obligations of his forfeited vassal. He cannot hold upon the conditions of the original right, not only because it has not been assigned to him, but because the contract is annulled, and the superior is no longer bound by it. The Court has no power to make a new contract for the parties. The conclusion appears to me to be inevitable, that the extinction of the mid-superiority carries with it the extinction of the sub-feus.

It is nothing to the purpose to say that the superior is bound to recognise the right of a sub-vassal, or that he consented beforehand to the constitution of such rights. The superior's consent is of no moment, for he has no power to prohibit sub-feuing. But independently of his consent, it is not disputed that the right of the sub-vassal is good against him, and against all the world, so long as the feu-right subsists. But it does not follow from the validity of the sub-feu right as such, either that it will bar the irritancy or that it will enable the sub-feuar to hold the estate after the irritancy has been declared. On the contrary, it appears to me that the operation of a right which is involved as a legal consequence in the conception of every feu-contract cannot possibly be inconsistent with the enforcement of a lawful condition, which is expressed or implied in every such contract. The vassal's right to sub-feu, therefore, must be carried out consistently with the superior's right to determine the feu-contract and recover his land if the feu-duty is not paid. It adds nothing to the argument to ascribe the sub-feus to the superior's consent. His consent must be qualified by the conditions of the contract from which it is inferred.

I say so with due deference, but it appears to me that in the judgment in the case of *Sandeman* the element of contract which is inherent in every feu-right, and the effect of an irritancy in rescinding the contract, were overlooked. At least I cannot see how the rights of parties are to be explicated in accordance with the decree. The judgment declares the feu-right to be null and void under burden of the sub-feu rights. This form of judgment I presume to have been borrowed from that which was adopted in certain cases of forfeiture, and which appears to me to have been very correct and apposite in such cases, since the forfeited estate was not extinguished but confiscated and carried with all its existing burdens to a donatary of the Crown. But I am at a loss to appreciate its effect in an action of irritancy upon a contract where the right created by the contract is entirely extinguished, or, in the language of the judgment, declared to be null and void. If it is to be construed as in cases of forfeiture, it would seem to mean that the sub-feuar is to hold of the over-superior, not upon the terms of the original feu-right, which indeed has been annulled, but upon the terms expressed in his own contract of sub-feu, whatever these may be. But I think it clear that the Court has no power to force contracts upon the superior which may be very onerous, and to which he has not agreed, and I am not satisfied that this is what was intended. It seems to have been supposed that the sub-vassal's right might be in some way qualified by the conditions of the right which had been annulled, for the Lord Ordinary says—and the Judges in the Inner House do not dissent from his opinion—that he does not think "the vassal had power to apportion the feu-duty so as to limit the superior's rights without his consent, and therefore that the pursuer was not bound to deal with the feu as sub-divided." If this means that upon the irritancy being declared the sub-vassal is to hold of the over-superior for payment of the entire original feu-duty, the exemption of his right from the effect of the irritancy would appear to have conferred upon him a very unsubstantial benefit. He will simply have been advanced to his superior's right, but with the same liability for the prestations of the original contract, for his own contract makes him liable only for his own feu-duty, and if the irritancy brings him under the conditions of his superior's contract in one respect, it must on the same grounds bring him under all its conditions. Again, if the feu-duty cannot be apportioned without the superior's consent, it is equally clear that it cannot be diminished; and by the same reasoning, a sub-vassal who had acquired the entire estate for a lesser feu-duty would be liable after the irritancy for the feu-duty of his forfeited superior. But this cannot be the operation of an irritancy. If the sub-vassal satisfies the liabilities of his immediate superior, he does not take his superior's place, but maintains him in his own estate. He purges the irritancy. On the other hand, if the irritancy has been declared the feu-contract is determined, and none of its conditions can thenceforth have any force or effect whatever. Nothing can be better settled than this—that a superior who has taken decree of declarator of irritancy can have no claim for bygone feu-duties, and *a fortiori* he can have no claim for feu-duties still to run. The reason is, that the decree of declarator annihilates the feu, and extinguishes along with it the superior's claims for feu-duty. Lord Balgray states the doctrine in the *Magistrates of Edinburgh* v. *Horsburgh*, 12 Sh. 597—"So soon as his decree of declarator is extracted the feu is gone, and, of course, the superiority is equally annihilated. How can a claim for feu-duties remain after this? The poinding of the ground is the most regular and appropriate method of recovering feu-duties, but I should wish to know how a superior is to recur to that remedy after a declator of tinsel has brought the feu to an end." And the Lord President says—"That the superior who forfeits the feu cannot also claim arrears of feu-duty, appears to me as clear a proposition as that if a seller under an irritant condition shall void a contract of sale he cannot

also claim the price." Accordingly it was held in the case of *Ballantyne* v. *The Duke of Athol*, that after decree the superior was entitled to refuse payment of the arrears, which most "distinctly implied that his acceptance of them would have inferred the restoration of the feu." The suggestion, therefore, that the rights of sub-vassals may be protected from the operation of a decree of irritancy, but without prejudice to the other remedies of the superior for recovering his feu-duties, appears to me to involve a misapprehension of the nature and effect of such a decree. I take it to be clear that when a feu-right has been irritated its conditions can no longer be enforced either against the forfeited vassal or against any other person. I agree that a superior's rights cannot be restricted without his own consent. But the logical consequence is not, in my opinion, that the rights of sub-vassals are to be qualified by the conditions of an extinguished feu-contract, but that these rights afford no answer to the action of declarator of irritancy, except in so far as they enable the sub-vassals to purge the irritancy, and so maintain the contract, for the protection of their own interest in the estate. There are only two views possible—either the existence of sub-feus is an absolute bar to the declarator of irritancy, or else the decree must extinguish the sub-feus as completely as it extinguishes the original contract, and restore the estate to the superior, as he stipulated that it should be restored, disburdened of the feu-right and of all its consequences.

The true conclusion, in my opinion, is that the sub-vassal's remedy is to purge the irritancy and to sue the mid-superior for relief upon an assignation, if necessary, of the superior's claims; and I think this is in accordance both with principle and with authority. I agree with what is said by Lord Rutherfurd Clark as to the authorities, and I do not think it necessary to repeat what he has said. But I may add, that while the direct authority is certainly meagre, I cannot assent to the view that the pursuers' claim is at all a novel one. I believe the question has occurred in practice; and if it has not arisen for judicial decision, it is because sub-vassals have been advised that they must make terms with the superior. If there had been any practice to the contrary, some form for effectuating their right, after the extinction of the mid-superiority, must have become known to conveyancers. On the other hand, the decisions cited by the defenders appear to me to have no bearing. The nearest case is probably that of *Cockburn Ross* v. *Heriot's Hospital*. But that decided merely that while a feu-contract subsists sub-feu-duties must be taken as rent in estimating the statutory compensation payable on the entry of single successors. This certainly implied, what cannot now be disputed, that the granting of sub-feus for a competent avail is a legitimate exercise of the vassal's right of property. But it has no direct bearing upon the question whether the irritancy of a feu-right does not carry with it as a consequence the extinction of sub-feus also.

But there remains an argument which is undoubtedly weighty, both in itself and from the high authority of the learned Judge by whom it has been expounded—I mean the argument on the analogy of forfeiture for treason, upon which the judgment in the case of *Sandeman* is mainly based. I am very sensible of the weight which is due to the judgment of the Lord Justice-Clerk in that case. But, with great respect, I am bound to express my own opinion, that all the reasoning which may be based upon the law of forfeiture for treason proceeds upon a false analogy. The vital distinction is, that in that case the forfeiture arises from causes extrinsic to the feu-contract, and therefore operates not to extinguish the contract with all its incidents, but merely to confiscate the traitor's estate and carry it to another person, who takes his place, with all his rights and burdens, in a still subsisting fee. It is true that it was at one time maintained that the forfeiture of a vassal extinguished all subaltern rights. But the main point in controversy was whether treason did not necessarily involve a violation of the conditions of a feu-right. If it did, there was no question that the right must be annulled with all its incidents. If it did not, the question was whether one man's right should be forfeited for the crime of another. There was also a question, to which Stair adverts, whether other delinquencies of a vassal could infer the forfeiture of the feu, if they were not direct violations of its conditions. But throughout the discussion it is assumed as indisputable that the violation of conditions, expressed or implied, upon which the feu-right has been made to depend, must infer the annulling of the right with all its consequences, and therefore the extinction of subaltern rights. The point is so clearly brought out by Lord Stair that it may be worth while to quote the passages in which the matter is discussed in the Institutes.

The first occurs in the eleventh title of the second book, where he explains the doctrine of Recognition, using that word in its widest sense, to include all the grounds upon which by the law and custom of Scotland the fee may be recognosced or revert to the superior. He says that all the causes of dissolving fees ought to be deduced from "the acknowledgment of the superior and fidelity to him, that are necessarily implied in the acceptance of the fee," and adds (section 31) that "all infeftments being in the terms and tenor of fees, they must have a reddendo and acknowledgment of the superior and fidelity too, not only as obligements, but as restrictive conditions implied therein; and therefore wilful and open disowning the superior, by disclamation, or infidelity, or breach of trust, should from the nature of the feudal contract resolve the same." This leads him to consider the effect of various delinquencies of the vassal in dissolving the feu, and in the 34th section he proposes the question which, he says, has been much debated, whether the same result should arise from the delinquencies of the sub-vassal also. As an example, he considers whether the forfeiture of a sub-vassal for rebellion should infer recognition, and argues that if it did "it behoved to infer a general rule that recognition might be incurred by all atrocious deeds against gratitude and fidelity, committed not only by the immediate vassals but by all subaltern vassals . . . . so that the question behoved to return, whether there were any feudal contract or obligation of fidelity betwixt the superior and his sub-vassals; for if that were, these vassals might fall in recognition by such deeds, not only against

their immediate superiors, but against all their mediate superiors, though never so many. For though the case in question be most odious and unfavourable, being rebellion, yet it hath its proper punishment introduced by law and statute, whereby the rebel loses his life, land, and goods to the king, to whom all his subjects owe fidelity as subjects, although all do not owe the feudal fidelity as vassals, and therefore, as in liferent escheats, the fee returneth to the king, or any other superior, with all its haill burdens, it seems to return in the forfeiture of sub-vassals; yet if recognition takes place as to the king, it must likewise fall to all other superiors, whatever way the land be held, whether ward, feu, blench, or mortification, and must cut off all real burdens upon the land, if they have not a confirmation or consent of the superior anterior to the deeds inferring recognition." It is to be observed that throughout this argument Lord Stair assumes that in the case of recognition—that is, of an irritancy by force of conditions that are inherent in the constitution of the right—the fee must return to the superior exactly as he gave it to the vassal, unaffected by subaltern infeftments. But forfeiture for treason is a punishment for crime which does not necessarily involve a breach of the feudal contract between superior and vassal, excepting only in the case of the immediate vassals of the Crown. In that case it is a breach of duty to the immediate feudal superior, and therefore infers recognition. But in other cases it is to be considered as the delinquency of a sub-vassal which may be punishable by law, but ought not, in Lord Stair's judgment, to infer recognition to the over-superior, because there is no tie by contract or obligation between the latter and the delinquent.

In a subsequent passage (iii. 3, 31) he repeats the same doctrine. The question there discussed is whether sub-infeftments granted by a forfeited person are annulled by forfeiture, and if the Act of Parliament 1457, c. 71, should not only defend feus "against recognition, and the casualties of superiority, but also against forfeiture itself, it being therein declared that the king will ratify the said feus." His solution of the question is that the declaration of the statute stands "as an obligement upon all superiors against which they nor their donators cannot come . . . while feus are allowed by law"—that is, during the period from 1457 to 1633. He adds that it was so decided in the case of *Huntly* v. *Cairnborrow* (Dict. 4170), and *Campbell* v. *Auchinbreck* (Dict. 4171), "not only because the said Act of Parliament imports a confirmation of feus granted thereafter, but also because forfeiture is by statute penal, and not by the feudal right. . . . And therefore when any person has been forfeited that is not the king's immediate vassal, his estate, both property and superiority, falls to the king, but with the burden of all rights constituted by his vassal; yet forfeiture of the king's immediate ward vassal proceedeth upon crimes which infer recognition, and therefore returns his ward lands to the king, as they came from the king free of all burden." The question as to the forfeiture of sub-vassals was decided contrary to Stair's opinion in the cases of *Campbell* (Dict. 4685), and of *Lady Caldwell* (Dict. 4690), cited by Lord Rutherfurd Clark in his opinion in the case of *Sandeman*. But the material point is, that the question under discussion was not whether the irritancy of a feu-right affects subaltern infeftments, but whether forfeiture for treason infers an irritancy.

The law stated by Erskine is to the same effect. He says (ii. 5, 79)—"When the fee returns to the superior on the falling of any casualty or forfeiture implied in the nature of a feudal grant as non-entry (and formerly ward and recognition), his right is doubtless affected with such burdens as are established by the law itself, as the terce, &c., and with all deeds granted by the vassal, to which the superior hath consented, but he is not bound to regard the voluntary grants made by the vassal without his consent, though these grants were effectual against the vassal himself as long as the fee remained in him, because in casualties arising from the genuine nature of feus the superior is understood, when he first made the grant, to have stipulated that the right of fee should return to himself in the event of their falling as ample as he granted it." He goes on to distinguish the case of liferent escheat, which he says "seems extraneous and foreign to the true nature of feudal grants, as it is entirely founded on denunciation, which proceeds not from any feudal delinquency against the superior, but from an offence against the sovereign. For this reason no higher right accrues to him by that casualty than was vested in the vassal himself at the time of its falling."

It is said that an irritancy *ob non solutum canonem* is analogous to liferent escheat, since it does not arise from the genuine nature of feus, but was borrowed, as the statute shows, from the Canon and Civil law. But the material distinction is between forfeitures which result from the inherent conditions of the grant, and those that arise from extrinsic causes, and the effect which Erskine ascribes to casualties arising from the genuine nature of feus, as he very clearly explains, is simply that they operate as implied conditions of the grant. But a stipulation expressed in terms, or imported into every feu-contract by force of statute, must be equally effectual. The distinction is consonant to reason and legal principle. If an estate is forfeited for rebellion or any other delinquency, it is unjust that the rights of vassals who are in no way implicated should be confiscated also. Nor is there any principle or doctrine of law to necessitate such injustice, for the forfeiture being a penalty for crime does not operate, or at least does not necessarily operate, to extinguish the estate of which the delinquent is deprived, but transfers it as a still subsisting fee with its rights and burdens. Accordingly the Crown's donatary entered with the superior in room of the forfeited vassal, and, of course, subject to the conditions of the original grant, and the mode in which the forfeiture was held to operate cannot be better described than in the language of the Statute 1584, c. 2, which enabled him to enter gratuitously. The preamble sets forth that "by the common law of this realm, the lands and heritages of persons convict of treason, halden immediately of our sovereign lord, are adjudged to pertain to his Highness, and to return as property to his crowne, and that his Highness has right and power to dispone whatsumever other lands and heritages pertaining to the persons convict of lese-majesty quhilk are immediately

holden of any of his subjects by presentation of an heritable tenant to the overlord."—*Blair* v. *Montgomerie*, Dict. 15,045. It is entirely in accordance with feudal principle that the vassal so presented should take up the estate as it stood before the forefeiture in the person of the traitor, and without disturbing the subaltern rights. But an irritancy, on the other hand, operates by rescinding the grant, and extinguishing absolutely all the rights which it created. It is inaccurate and misleading to describe the sub-vassals whose rights may be affected as persons who are made to suffer for the delinquency of another. It is not a question of delict but of contract. The sub-vassals claim to hold a part of the superior's estate, and by the constitution of the right upon which their right is dependent he is entitled to recover the entire estate if certain feu-duties are not paid. They may protect the estate by making payment, but if they decline to do so, his right must be as good against them as against the immediate vassal. The principle is, that no one can hold the superior's estate except mediately or immediately by virtue of his grant, and no one can plead upon a grant which has been rescinded by reason of the non-performance of its conditions.

At advising in First Division (6th March)—

Lord Mure—This action, as I read it, is not laid on the statutory irritancy created by the Act 1597, c. 246, but solely and exclusively on the conventional irritancy embodied in the feu-contracts under which the property in question is held; and in that view I propose to deal with it.

The terms of the clause of irritancy are clear and express to the effect that the second parties and their heirs or assignees, on contravening or not implementing "any of the conditions or provisions before written, or allowing two years' feu-duty at any time to remain unpaid, shall, in the option of the first party, lose all right and title to the said lands, or the part thereof in respect of which such contravention or non-implement shall occur, and the same shall revert and return to the first party or their foresaids free and disburdened of the said feu-rights and all following thereon." It is further expressly declared that all these conditions are "to be essential qualifications of this feu-right, and real liens and burdens and servitudes upon the said plot of ground before disponed, and the proprietors thereof for the time being, and are appointed to be engrossed *ad longum* in the Register of Sasines," and in the titles. They are also appointed "to be engrossed and validly referred to in all the subsequent conveyances, transmissions, and investitures," under pains of nullity; and in the title and transmission of the sub-feu acquired by the defenders they have accordingly all been so engrossed, and are declared to be essential qualification of the feu-right.

The whole feu-rights, therefore, or in other words, the whole lands feued, and every part thereof, are qualified and appointed to be held under the express burden and declaration that in the event of the feu-duty remaining unpaid for two years "all right and title to the said lands" shall be lost, and the same shall revert to the first party (the present pursuers) free and disburdened of the said feu-right and all following thereon."

These provisions and declarations are very express and very stringent, and have in clear and distinct language been made matters of actual contract and stipulation, not only between the pursuers and the original feuars, but also between those feuars and Scott & Dixon, the parties who acquired the sub-feu, in whose titles they have also been validly engrossed. They must therefore have been quite well known to the defenders, the Heritable Security Company, when they made advances of money to Scott & Dixon in 1876, on the security of their title to the sub-feu, and took their own title to the ground sub-feued with those conditions and declarations duly engrossed.

The object of the present action is to have this irritancy declared and enforced because the feu-duty to the extent of two years at least is admittedly unpaid, and the titles to the portion of the lands held by the defenders are admittedly qualified by the declaration that in such circumstances all right and title to the lands shall be lost, and the same shall revert to the pursuers free and disburdened of the feu-right and everything that has followed thereupon, in terms of the provision of the feu-contract.

Now, it has not, in so far as I understand, been contended that it is beyond the power of parties so to contract. There is no provision in any Act of Parliament, and no decision or authority in the books has been referred to, and there is none in so far as I am aware, to the effect that it shall be illegal or incompetent to make such a contract, or for a party to feu ground under a stipulation that in any case where the feu-duty payable under the contract shall fall into arrears for two consecutive years the land shall revert to the granter of the feu, free and disburdened of the feu-right and all following thereon, as has here been duly and validly done.

It is accordingly not disputed that the pursuers are entitled to enforce this irritancy as against the original feuars and the present holders of that feu. But the defenders, the Heritable Security Company, who are now in right of the sub-feuars, claim to have the decree of declarator of irritancy of the feu-right pronounced under burden of the sub-feu. Now this, as it humbly appears to me, is simply to ask to have something done which is directly at variance with the express provision of the feu-contract which is embodied in the defenders' titles, and which declares that in the circumstances which have occurred the lands shall revert to the pursuers, "disburdened of the said feu-right and all following thereon."

The demand therefore is one with which the pursuers cannot, in my opinion, be required to comply. For the words used are amply sufficient to cover the subfeus which have followed upon the original feu-right, and were granted in virtue of the implied powers which the feuars had to sell or dispone portions of the feu, and cannot, I conceive, be got the better of, as is attempted to be done in the defenders' case, and in the opinions of some of the consulted Judges, by saying that the words "and all following thereon" are mere words of style, and mean nothing more than the "infeftment" following upon the feu-contract itself. They are clearly words which admit of a much wider acceptation, and the authority of Dallas' Styles, which is referred to in support of this statement in the opinion of one of those learned Judges, is not a very fortunate selection in a question of this description as

an authority in favour of the defenders' views. For the reference is to the style of a summons of declarator of irritancy, bearing to be founded upon a clause of irritancy in a feu-contract, in respect of failure to pay feu-duties, and the summons there bears that the pursuers, after seeking to have it declared that the irritancy had been incurred, ask also to have it declared that the feu-right had become void and extinct, and the property thereby consolidated with the superiority in the pursuer's person for ever in manner underwritten. Now, by the manner underwritten in the style the pursuer seeks to have it declared as follows—"That this contract and feu-charter, with the sasine and all that has followed thereupon, are become extinct, void, and null, and of no force and effect, sicklike in the same manner and as freely in all respects as if the same had never been granted or subscribed, and that it shall be lawful to the pursuer and his foresaids instantly to enter to the real, actual, and peaceable possession of the lands and others disponed and feued, with the pertinents as said is, and to set, use, and dispone thereupon as their own proper heritage, heritably and irredeemably, and declared established, and consolidated with superiority in their person for ever," &c. Such is the form of style given by Dallas as in use in his time. It contains among other things a distinct consolidation of the property irritated with the superiority, in order that it may be dealt with by the superior as his own proper heritage, and this humbly appears to me to be altogether inconsistent with the view that the irritated feu-right was to be burdened with subaltern rights granted by the vassal before the feu-right was annulled.

As regards the clause of allocation of feu-duties contained in this contract, it does not appear to me that the defender can take any benefit from it. It is very special in its nature, and was never acted on by the parties, and it does not appear that any proposal was ever made to do so till after the present question arose. One main provision of it is that "no allocation shall be admitted until there shall be erected on the part on which allocation is proposed to be made, and also on the remainder of the ground, buildings sufficient to secure the proportion of the feu-duty applicable thereto respectively." This has admittedly not been done, and may suffice to explain why no such proposal was made.

Upon the main question, therefore, viz., the construction and effect of this contract, taken by itself, I have come to the conclusion that the claim of the pursuers is well founded, and if I am right in this, I do not think that any of the answers made to this claim by the defenders can be given effect to.

The ground on which this plea of the defenders is mainly supported is upon the analogy said to be derived from the consideration of the rules of law applicable to the case of forfeiture for treason, and upon the terms of the Act 1690, c. 33. I am, however, unable to see that the provisions of that Act have here any direct application. It is in its terms expressly limited to the case of forfeiture for crime, and I cannot look upon it as in any respect declaratory of the common law in regard to any matters other than those with which it bears to deal. One main difficulty, moreover, which lies in the way of holding the sub-feu, in such a case as the present, to remain a burden on the irritated feu-right, viz., that there would in reality be no proper feudal tenure to hold by, does not apply in the case of forfeiture for crimes. For there, as explained by Lord Kinnear in his opinion, the forfeited estate is not extinguished, but confiscated and carried with all existing burdens to the donatary of the Crown, who under the feudal tenure assumes the place of the vassal who has been forfeited.

Upon the other and more general grounds on which the defence is attempted to be maintained, —the right of the vassal to have the subfeus kept up as a burden on the irritated feu-right—I do not deem it necessary to enter at any length. They have, in my opinion, been fully and conclusively met and anwered in the note of the Lord Ordinary, and in the opinion of the minority of the consulted Judges, in whose opinion, in that respect, I substantially concur, more especially in those parts of their opinions where the inapplicability of the rules relative to the operation of entries under charter of resignation to a case like the present is, I conceive, very clearly established.

Allusion has been made in the pleadings and in some of the opinions to the circumstance that there is no case reported before the date of that of *Sandeman* in which any such question as the present had been raised, and from which it is, I think, rather hastily assumed, that because no such action has been raised no one ever thought of endeavouring to enforce what is said to be so untenable a claim. I am, however, very clearly of opinion that this is not the only inference which may be drawn from the absence of reported cases, and I am rather disposed to think that the opposite inference drawn by the pursuers is just as likely to be correct, viz., that the question has never been raised for judicial decision because sub-vassals have been in use to make arrangement with the superior, and that before the case of *Sandeman* such actions had never been defended. How this matter actually stands I have of course no means of knowing. But although there is no reported case upon the subject, I think that there are opinions from Judges of eminence, and of intimate knowledge of feudal law, which show that in 1842 an action of the present nature would not have been looked upon as so novel and extravagant a claim as the defenders have assumed. I allude to the case of *Beveridge* v. *Moffat*, June 9, 1842, 4 D., referred to in the revised minute for the pursuer. It was not necessary for the disposal of that case, as the pursuers point out in their minute, that the question should be there actually decided, but it was, as the report shows, distinctly assumed in argument, and in the opinions of one at least of the Judges, that such an action as the present would lie.

The circumstances of the case were these—A piece of ground at Leith was feued out for building purposes in 1811 at a gross annual feu-duty of £120, and with an irritancy applicable to the non-payment of two years' feu-duty. The feu was to a builder named Grant, and he sub-feued the whole to several sub-feuars. The builder became bankrupt, when there was a large arrear of feu-duty due to his superior, and arrangements were then made by the sub-feuars as to payment of the arrears, of which it was understood that each was to pay a certain proportion. It appears from the report that the mid-superiority

was, with a view to this arrangement, purchased by two of the sub-feuars, but a dispute having arisen as to the proportions each of the sub-feuars should pay, the case came into Court by an action in the Sheriff Court of Midlothian. It further appears from the report that it was stated and assumed in argument that the reason why the arrangement had been made was in order to obviate the forfeiture that would be incurred by the prime superior bringing an action of irritancy against the sub-feuars in respect of Grant's failure to pay his feu-duties. The Sheriff in his interlocutor distinctly assumes that, for he finds "that in November 1830 the arrears of feu-duties due by Grant to Gavin, his immediate superior, amounted to £783, with interest, &c., for which the lands sub-feued by Grant or possessed under titles originally derived from him, including those belonging to the pursuers and defender respectively, were liable to be evicted by Gavin as superior thereof" in respect of Grant's failure to pay the feu-duty, and repelled the defence that the defender was only liable for the sub-feu-duty payable to Grant.

This judgment of the Sheriff was brought under review, and in the advocation it is distinctly pleaded, "*Separatim*, the properties of the whole sub-vassals being liable to forfeiture for the said arrear of the prime feu-duty, and proceedings for that purpose on the part of the prime superior being apprehended by the sub-vassals," &c., they were each of them bound to pay their share of Grant's arrears. Lord Cunninghame, in his interlocutor as Lord Ordinary, gave effect to that plea, and alludes to the arrangement as having been entered into, and the payment of the arrears made, "so as to save the property from forfeiture at the instance of the superior." And in the note appended to his interlocutor he says that he "rests his opinion upon this plain proposition, that when the prime superior's claim against the sub-feuars and their properties emerged in 1829 on the bankruptcy of Grant, it was clearly their interest to save their properties from forfeiture. The prime superior could undoubtedly have instituted an action of irritancy *ob non solutum canonem* against all the sub-feuars without regard to their settlement with the mid-superior, and Moffat and Grant as assignees of Gavin could have taken a similar step."

Lord Cunninghame thus assumes as the basis of his judgment the proposition in law which is now maintained on the part of the present pursuers. And although in the Inner House where his interlocutor is in effect adhered to, there is no actual expression of agreement with the opinion Lord Cunninghame gives as to the right of the superior, it appears to me that the Lord Justice-Clerk Hope uses expressions which are equivalent, and neither in his opinion nor in those of Lord Medwyn or Lord Moncreiff is there one word of disapprobation expressed of what the Sheriff and Lord Cunninghame had assumed to be undoubted law upon the subject, and a remedy open to every superior in the situation of the present pursuers. If an action of this description had been such an unheard of proceeding as the defenders maintain it to be, it is in my opinion impossible to suppose that such lawyers as Lord Justice-Clerk Hope, Lord Medwyn, and Lord Moncreiff would have allowed it to pass without dissenting from it.

The only other point to which I think it necessary to allude is, to the hardship which the defenders say they will be subjected to if their feu is irritated without any qualification, and unquestionably there will in one view be a hardship in the shape of some loss sustained by them. I am afraid, however, that in such a case as the present one or other of the parties must always have to submit to loss, but I cannot look upon the superior as here endeavouring to make money by improper means out of the defenders. I think both parties are in the same position, viz., that of struggling to avoid a loss. It unfortunately often happens that in these building speculations the expectations of parties are disappointed. I have no doubt it was thought by all of them that these transactions would turn out well, and probably the original feuars thought the ground would soon be all feued off and built upon. But the superior made provision for protecting himself against the opposite alternative, for he knew that if the building speculations then going on should fail, he might be placed in difficulties for recovering his feu-duties, and caused the irritant clause to be inserted in the feu-contracts to protect him in the event of his not being able to recover his feu-duty, which was all he was to get for the ground. The other parties no doubt also expected that matters would turn out well, but they accepted the risk which was clear on the face of the titles, and if there is loss they have themselves alone to blame. The question is, who is to suffer? Is it the superior, who has taken the usual means which the law allows him of protecting himself by inserting the conventional irritancy in the feu-contract, or is it the party who has entered into these building arrangements which have ended in a loss? I think this is just a case where a loss being now inevitable, each party is endeavouring to get rid of it by maintaining on their respective views of the law that they are not to be subjected to it. But in the view I humbly take of the provisions of the feu-contract and of the law, the superior has taken the necessary steps to protect himself by inserting openly and with the full knowledge of the defenders, the clause of irritancy in the feu-contract, and all the subsequent titles to the ground, and I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Lord Shand—I am also very clearly of opinion that in respect of the failure in payment of the feu-duties stipulated by the feu-contract of May and June 1875, for upwards of two years, and in the absence of any offer on the part of the defenders or any of them to pay these feu-duties, the pursuers are entitled to declarator of irritancy of the feu-right, and all that has followed thereon.

So much has been said and written on the question in controversy, both in the case of *Sandeman* and in the present case, that I should only repeat what has been already very clearly stated were I to deliver an opinion discussing in detail the whole arguments of the parties. Accordingly, I may say that I concur in and adopt the opinion of Lord Rutherfurd Clark in the case of *Sandeman*, and the opinions of the same learned Judge, and of Lord Adam, Lord Kinnear, and Lord M'Laren in the present case. Such additional observations as I shall now make

will be directed in the first place to stating shortly the main ground on which my judgment is rested, and secondly, to a reference to one or two points only which have been the subject of argument, and have been mainly founded on in the opinions of the learned Judges whose opinions are in favour of the defenders.

I must observe at the outset that it was with satisfaction that I found that the question, decided in the case of *Sandeman* was again submitted for the consideration of the Court. No more important decision has been given for a length of time than that in *Sandeman's* case, dealing as it did with a feu-right expressed in terms of the most frequent and ordinary occurrence in all large towns where the erection of blocks of buildings is contemplated. The judgment was one which I humbly thought unsound when it was pronounced, running counter, as it seemed to me, to what I had always understood to be the recognised law. It was, in my opinion, calculated to unsettle the principles which have long determined the rights to heritable properties held in feu, which is almost the universal tenure throughout the country, and it is, I think, satisfactory that the whole question has now undergone farther discussion, and that the Court of Appeal in reviewing questions of so great importance will have the additional light to be got from the opinions of the consulted Judges and the judgment of this Court in the present case.

A great deal of learned research has been bestowed—I shall not say on the question raised between the parties in this and *Sandeman's* case but rather on other questions which have been introduced into the controversy—with the result, as I think, of causing confusion and withdrawing attention from the true issue. The opinions of the minority of the learned Judges who are in favour of the defenders in this case have been arrived at as the result of an examination of the history and practice of the law of forfeiture for treason as applicable to feu-rights held of and under the person whose estates have been forfeited. I confess that, even if the case of forfeiture for treason had an analogy or true bearing on the argument in the present case, I find myself unable to see that it supports the argument for the defenders. For, according to the common law, it seems to have been held that the forfeiture of the vassal inferred the extinction and loss of even the innocent sub-vassal's feu-rights. It was only by force of the Statute of 1690 that this harsh and obviously inequitable and unjust consequence was saved even in the case of forfeiture for treason. But it appears to me, for the reasons so clearly and fully stated in the opinions of Lord Rutherfurd Clark, Lord Kinnear, and Lord M'Laren, that there is no real analogy between irritancy of the rights of a vassal or sub-vassal arising through forfeiture of a superior for treason, and the irritancy of a sub-vassal's right arising from a breach of the stipulations and conditions of a written contract of feu. There are surely strong reasons for holding that the forfeiture of a sub-feu should not follow the attainder of the superior, that the estate of the superior alone should be forfeited for his own crime, and that the innocent sub-feuar should not suffer the deprivation of his property; and yet, that a sub-feuar who takes his right under a title which on the face of it is conditional, depending for its validity on the continued payments to the superior of his feu-duties, should be liable to have his sub-feu forfeited if this condition of the right be not fulfilled. In the latter case the question is one of contract; in the former it is one of public policy and justice as between a guilty and an innocent party. If the supposed analogy does exist or be unsound, the reason or principle of judgment in the case of *Sandeman*, and again adopted by the learned Judges favourable to the defenders in this case, entirely fails. The point to be now determined is, as it seems to me, simply one of contract. It must be determined by the meaning of the language used in the feu-contract of May and June 1875, on which the action is founded. I can see nothing ambiguous in that language. The deed provides that the feuars, or their heirs or assignees, "allowing two years' feu-duty at any time to remain unpaid, shall, in the option of the first party and their foresaids, amit, lose, and tyne all right and title in and to the said lands," and provides further that the lands shall revert and return to the superior "free and disburdened of the said feu-right, and all following thereon." If these words do not effectually stipulate for an irritancy of the feu-right, and "all following thereon," that is, all rights depending on it, in the event of two years' feu-duty of the amount stipulated in the deed remaining unpaid, I confess myself unable to suggest language which will have that effect. But it is conceded at all hands that the language is effectual, for it is admitted that the vassal, now represented by Mr Lamb and his trustee, have incurred the irritancy, and that the pursuer by force of the contract has right to a decree accordingly against them. It is said, however that the sub-vassals are not liable to a similar decree. I must ask, why not? The question here again is simply one of the meaning of the contract, and where in the language used can any exception be found of the right of the superior to a decree of irritancy of sub-feu-rights which the vassal may have granted? It is true that the deed contemplated sub-feuing. It is equally true that the allocation of a proportional amount of the feu-duty is contemplated, with the result in the end that each part of the property sub-feued shall be liable only for its own proportion of feu-duty so allocated, and that an irritancy applicable to that part shall thereafter only be incurred by the non-payment for the requisite period of its own proportion of feu-duty. But the superior has carefully provided that "no allocation shall be admitted until there shall be erected on the plot on which the allocation is proposed to be made, and also on the remainder of the ground, buildings sufficient to secure the proportions of feu-duty applicable thereto respectively." There were here two sub-feus granted, but there never was any allocation of the proportions of feu-duty to which the superior was a party, and by which he became bound in a question of irritancy of the feu-right, and it is not possible to maintain that the sub-feuars were ever in a position to require the superiors to consent to an allocation. What then was the contract? Plainly this, that while sub-feuing was admitted and recognised, yet until an allocation of feu-duty in the proper and complete sense was sanctioned, sub-feuing was always

subject to the whole conditions of the feu-contract, and amongst others, subject to a condition of irritancy of the feu-right of the whole property, and all following thereon, if the feu-duty remained for two years unpaid. It is conceded that the original feuar's right may by the contract be brought to an end. Can he then give a higher or different right to another than he himself has acquired and possesses? The argument for the defenders assumes that he can. But that cannot be assumed. It must be shown that the superiors have contracted to allow such a higher right to be transferred to a sub-feuar, though not given to the original feuar himself. The defenders are unable to point to any terms in the contract to that effect. On the contrary, the superiors have stipulated that till allocation sanctioned by them—which they will only authorise when their whole feu-duty is thoroughly secured by buildings—the whole property shall be subject to the whole feu-duty, and the whole property shall revert to them if that feu-duty fall into arrears for two years and remain unpaid. It is nothing to say the deed permits sub-feuing—of course it does. But the sub-feuar of a part, in the same way as a security-holder over the whole or a part, or the purchaser and ordinary disponee of the whole or a part, is bound by the conditions of the right of which he indeed claims and takes the benefit; and one of these conditions plainly expressed in ordinary and simple language is that the right itself, with all following on it—words which are quite unnecessary, but which being there must plainly include securities, conveyances, and sub-feus granted by the vassal—may at any time be declared null and void at the instance of the superior should two years' arrears of feu-duty be allowed to remain unpaid.

In my view, the considerations now stated are enough for the complete and satisfactory disposal of the case. The question is one of contract. The terms are clear. I can see no words or expression in any of its clauses which can warrant the defender's argument, that while the condition as to non-payment of feu-duties affects the original feuars and all others deriving right from them by ordinary disposition on absolute terms or by way of security, an exception has been made in favour of sub-feuars until at east a new and separate contract is made by them directly with the superior, by which he agrees to allocate the feu-duty after the whole has been secured to his satisfaction by buildings. The sub-feuars under the terms of the contract are in no different position from the original feuar. The argument for the defenders comes to this, that while the superiors stipulated for their complete security that they should either have the feu-duty or have the whole property back, they lose the right to have the property back should sub-feus be granted. The defenders fail, however, to point to any part of the contract which authorises the granting of sub-feus free from the conditions which admittedly bind the feuar, the granter of the sub-feus, and which plainly apply to the whole property. On the ground now stated I am of opinion that the pursuers are entitled to decree of irritancy. My judgment rests entirely on the terms of what appears to me to be a plain and unambiguous contract. But I may add that my judgment would be the same even if the conventional irritancy applicable to the case of non-payment of rent were not in terms expressed in the feu-contract; for in virtue of the Statute 1597 such an irritancy is made a condition of every feu-right, and it receives effect constantly in practice as a means of enabling the superior either to recover his feu-duties or to regain his property free from burdens of any kind imposed by the vassal.

Much stress has been laid on the alleged hardship to the defenders the Scottish Heritable Security Company if the pursuers' demand be given effect to, and if I am not mistaken this alleged hardship is the main ground of judgment in the view of Lord Young, as expressed in his Lordship's opinion, both in the case of *Sandeman* and, more fully and decidedly, in this case. It is represented that the pursuers are seeking "to enrich themselves at the expense of the defenders," and the learned Judge to whose opinion I refer, has indicated that he should have been disposed to characterise the pursuers' demand as unconscionable but for the views of the Lord Ordinary and some of the other Judges, for whose opinion he has great respect. His Lordship adds,—"The Lord Ordinary indeed expresses himself as if he thought, which perhaps he does, that the pursuers will be really ill-used if their demand is not allowed, and that the defenders will have nothing to complain of if it is." I need hardly say, that even if the pursuers' demand were open to the charge of being harsh and grasping, and productive of great hardship to the defenders, that would afford no defence to the terms of a clear and unambiguous contract; and as in this instance the language of the deed admits of but one construction, the argument arising from hardship to the defenders' case can be of no avail. In the case of *Andrew* v. *Henderson & Dimmack*, 9 Macph. 554—a case undoubtedly of great hardship to a feuar in the town of Coatbridge whose property was most severely injured by mineral workings—the Lord Justice-Clerk truly observed "that an engagement may turn out profitable or burdensome to one of the parties, but this is a consideration with which a court of law has no concern. Our duty is to ascertain what the parties undertook to each other, and to see that they fulfil their mutual obligations." And his Lordship's view in that case received effect in the House of Lords, who, reversing the decision of the Court of Session, held that the feuars of Coatbridge were liable to have their houses brought down by mineral workings without compensation, on a sound construction of the terms of their feu-contracts. But for my part, I feel bound to say, with reference to the general representation of the pursuers' position and the nature of their demand, that I am quite unable to agree in his Lordship's [Lord Young's] views, and that I can see nothing in the pursuers' demand which would lead me to characterise it as unreasonable or unfair. I do not doubt that the Lord Ordinary is of the opinion attributed to him, and I do not hesitate to say that I think that the pursuers will be really ill-used if their demand is not allowed, and that the defenders will have nothing to complain of if it is. The pursuers ask no more than fulfilment of their contract. Their demand in substance is that their feu-duties shall be paid, and if not, then that they shall get back their property and not a part of it only. The

original feuars, or anyone representing them, can prevent the decree of irritancy being pronounced by paying the feu-duties now in arrear. If the defenders desire to prevent the stipulated condition of forfeiture taking effect, they can avert this by paying the feu-duties—a payment for which the contract stipulates as the condition of preventing a decree of irritancy being pronounced. It appears to me, for the reasons stated by me in the case of *Guthrie and Maconnachy* v. *Smith*, 8 R. 107, that the defenders on paying the whole feu-duty should be entitled to an assignation of the superior's rights of recovery against the owners of the remainder of the property not belonging to them, qualified as was proposed in that case. But in any view forfeiture may be averted by the defenders implementing the conditions of the original feu-right as to payment of feu-duty. If this payment be neither made nor offered, and yet the pursuers' demand were refused, it seems to me that the Court would be denying them the benefit of the most important and effectual security for which they stipulated for payment of their feu-duties, and would indeed be refusing to give effect to a clear term in their contract, that term, viz., by which they stipulated that if they did not get payment of their feu-duties they should get back their property.

What is the hardship to the defenders on the other hand? It is said that as £4000 has been lent on the houses built on the sub-feus, the property may be taken as worth say £8000, and that the pursuers are seeking to enrich themselves by acquiring this without payment. But the pursuers really want to recover their feu-duties and take this proceeding in order to do so. If they do not get payment, then they only ask to be restored to their property as they stipulated they should be. The defence is that they shall neither have their feu-duties nor their property. If the buildings and property were really worth the large sum above mentioned, the feu-duty would probably be tendered. But unfortunately recent experience has shewn from innumerable instances occurring in the liquidations of building and heritable security companies now in the course of being carried on in this Division of the Court, including the case of the defenders, the Scottish Heritable Security Company, Limited, themselves, that the valuations for loans granted some years ago, including the year 1876, when the loan in question was given, were made on an unsound and inflated view of the speculative value of building property, and that in very many cases the properties over which the security extends are unsaleable, while in others two-thirds or even a half of the amount lent cannot now be recovered on a sale. This is particularly the case of course with buildings of an inferior class and in bad repair, and in this view the pursuers' statements in Ans. 6 in regard to the buildings in question must not be thrown out of view. The liquidator of the defenders' company transmitted to the Judges of this Court copies of his printed annual reports, and having referred to these I notice that the observations just made are specially applicable to the numerous properties over which the company held securities. He explains that a very great amount of money advanced by the company has been most injudiciously expended, having been advanced upon buildings which appear to have been constructed without due regard to substantiality of workmanship or proper sanitary arrangements, many persons having gone into building speculations and obtained advances without being possessed of the necessary skill and capital. He states that during the last year he selected for exposure fourteen properties and made every effort to get them disposed of, many of them having been exposed for sale as often as three times, and at prices greatly below the valuations of 1881, which were made at a time when property was much depressed, but that in no instance was a sale effected. In this state of matters it would in my view be quite erroneous to assume that the pursuers would acquire buildings worth £8000, or even half that sum, belonging to the defenders if they obtained decree of declarator of irritancy—though even if this were the case I do not see that it could affect the judgment one way or another.

Suppose the original feuars had themselves erected the buildings referred to, and that a security had been created by them in favour of a third party for the sum of £4000 over the property, the demand for declarator of irritancy in respect of non-payment of feu-duties in these circumstances would have been open to all the observations as to its being a claim of an unconscionable nature, and an injustice to the defenders. But whether these terms could be properly applied to the case (as I think they could not) or no, there can be no doubt of the question of legal right. It is conceded that there could be no defence (Bell's Principles, sec. 701), and in the present case there could admittedly be no defence, except by a sub-feuar or one deriving right from him. It follows that the alleged hardship cannot affect the question of legal right. The condition is not of the nature of a penalty which the Court can restrict. It is a legitimate and well recognised condition of feu-rights. A sub-feuar finds the condition plainly expressed in the title to which he must trace his right. If he has reason to fear the forfeiture of the original feu, he ought not to accept a sub-feu and proceed to build on the ground, unless, indeed, as is often done in practice, he can in the first instance make a special arrangement with his sub-feuar for an allocation of the feu-duty and a condition of irritancy limited to the non-payment of the sub-feu duty only. If he think fit to erect buildings without any such arrangement, any loss that may result can be traced only to his having made an improvident and ill-considered bargain. It would, I think, go very far to destroy the security which it has hitherto been understood that a superior has for his feu-duties in his right to a decree of irritancy for arrears of unpaid feu-duties, if that decree could only be got subject to all the sub-feus by which, it might be, the property had been so intersected and cut up as to destroy the remainder (which alone would revert to the superior) for any valuable feasible scheme of feuing, or for building purposes by which an adequate return could be got.

On one point further only I desire to make an observation. I refer to the argument of the defenders—which has received some support from the opinions of certain of the learned Judges favourable to the defenders' case—that the case of *Sandeman* was the first in which it had ever been proposed by a decree of irritancy to have the subject feued restored to the superior free of

all burdens, including sub-feus. On that point I entirely adopt as sound the answer of the superior as reported in the case of *Sandeman* (11 R. 620), and repeated in the present case. I believe that so well recognised was the superior's right in practice, and so well known to practical conveyancers, that until the case of *Sandeman* the right had not been disputed. The right to a decree of irritancy was, I believe, considered so clear as inferring the forfeiture of sub-vassal's rights, that persons who had, it might be incautiously, taken such rights without having previously arranged with the superior to have the feu-duty allocated and their rights directly secured, were content to take the best terms they could get from the superior, whose rights to a decree in terms of his charter could not be gainsaid. That is, in my opinion, the true explanation of the fact that the present controversy was never raised until the defenders did so in the case of *Sandeman*. This view is strongly supported by the authority of Professor Bell (Prin. sec. 701), for if it had been mooted that a sub-feuar had the rights now contended for, the fact would there have been mentioned, and a similar inference may be drawn from the views of Lord Cunninghame in the case of *Beveridge*, 4 D. 1381, against which no dissent was stated by the Judges when the case was taken to review.

In conclusion, I can see no grounds for a claim of recompense for the alleged value of the buildings erected by the sub-feuars. It would be very difficult to find the elements for such a claim, for the pursuers' have a large amount of feu-duties due to them, and are sufferers by the breach of contract in the failure of the feuars to pay the future feu-duties which they contracted to pay. The buildings were erected in fulfilment of the contract, which provides for the forfeiture now to receive effect without recognising any claim for erections made on the ground, and the defenders must suffer the stipulated consequences if they are not prepared to purge the irritancy by payment of the arrears.

I have thought it unnecessary to say anything of the alleged irritancy from failure to erect buildings on the ground feued generally as stipulated for. That such an irritancy will receive effect in ordinary circumstances is shown by the case of *The Magistrates of Glasgow* v. *Hay and Others*, 10 R. 635. The clause in this case is in somewhat peculiar and exceptional terms. It is enough that the pursuers are entitled to succeed in respect of the arrears of feu-duty.

LORD ADAM—I have twice already expressed my opinion in this case, first as Lord Ordinary, and then as a consulted Judge, and all I have heard to-day only confirms my opinion. I should wish, however, to add that in deciding this case originally I endeavoured to distinguish it from that of *Sandeman*, but I am now satisfied that I was in error in that, and that there is no sound distinction between this case and the case of *Sandeman*, and that I should have held the case of *Sandeman* as ruling this. With that exception, I adhere to the views expressed in my interlocutor.

LORD PRESIDENT—I am of opinion that the pursuers are entitled to a decree of declarator in terms of the second conclusion of the summons, to the effect that the feu-duty of the subjects in question being in arrear for the period of about three years, the defenders have thereby contravened the terms of the feu-contract and incurred the irritancy specified in that contract, and that they are further entitled to a declarator that in consequence of this forfeiture the feu-contract and all that has followed thereon has become void and null as if the same had never been granted, and further, that they are entitled to a decree of removal. My reasons for forming that opinion have been stated very clearly and fully by Lord Rutherfurd Clark and Lord Kinnear, and I think it would be mere waste of time now for me to repeat in other language that which they have so fully and well expounded. The result of this advising, therefore, will be that a judgment will be pronounced in the terms which I have now indicated.

The Court continued the cause to allow the Scottish Heritable Security Company an opportunity of purging the irritancy, if so advised, and this not having been done, pronounced on 17th March this interlocutor:—

> "The Lords having resumed consideration of the reclaiming-note for the defenders, with the minutes of debate and the opinions of the consulted Judges, in conformity with the opinions of the whole Court, Recal the Lord Ordinary's interlocutor of 16th and 17th November 1883: Find, declare, and decern, in terms of the second conclusion of the summons, that the feu-duty payable under the feu-contract libelled having remained unpaid for the terms and years between Whitsunday 1878 and Martinmas 1881, the defenders have contravened the terms of the said feu-contract and incurred the irritancy therein stipulated, and thereby forfeited all right and title to the subjects conveyed by the said contract: Further, find and declare that the said feu-contract, and all that has followed thereon, is null and void, as if the same had never been granted, and that the pursuers are entitled to enter into possession of the said subjects, and all buildings and erections thereon, and dispose thereof at pleasure, and decern and ordain the defenders immediately to flit and remove from the said subjects, and leave the same void and redd, that the pursuers may enter thereto, and possess and dispose thereof at pleasure."

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