*Thursday, June* 19.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## M'ELROY *v.* DUKE OF ARGYLL.

*Superior and Vassal — Feu-Contract — Clause of Redemption—Clause of Pre-emption—Clause Entitling Superior to Resume Possession on Payment of Certain Sum—Legality of such Clause—Tenures Abolition Act* 1746 (20 *Geo. II. c.* 50), *sec.* 10.

A feu-contract dated in 1850 contained a provision to the effect that the superior should be entitled, on giving six months' notice, to reacquire the subjects for a sum not exceeding £650. In 1897 the superior gave notice to the vassals that at Whitsunday 1902 he would reacquire the subjects feued in terms of the feu-contract. In an action of declarator at their instance they maintained that the clause founded on by the superior was illegal in respect of the provisions contained in section 10 of the Tenures Abolition Act 1746 against clauses *de non alienando sine consensu superiorum*, or otherwise that it was in the same position as a clause of pre-emption, and that in virtue of section 10 of the Act of 1746 such clauses were rendered illegal unless they provided for payment of the full value as at the date of pre-emption or redemption.

*Held* (*aff.* judgment of Lord Kyllachy, Ordinary) that the feuars' contention was unfounded, that the clause was legal and must receive effect, and that consequently the superior was entitled to re-acquire the subjects in terms of the feu-contract.

By feu-contract entered into between the late Duke of Argyll on the one part and John M'Elroy and another on the other part, dated 2nd October and 4th November 1850, and recorded in the Particular Register of Sasines for Dumbartonshire, &c., on 26th January 1859, the first party disponed to the second parties a certain piece of ground on the shore of Loch Long for the purpose of erecting thereon and upon the shore adjacent a pier or quay and a waiting-room and store at a cost of £650. This feu-contract contained the following provision—"Provided always, as it is hereby expressly provided and declared, that it shall be in the power of the said Duke and his heirs and successors to repurchase and reacquire the ground and pier or quay, waiting-room, store, and others to be erected thereon as aforesaid, at the term of Martinmas 1851, or at any term of Whitsunday or Martinmas thereafter, on giving the said Thomas Forgan and John M'Elroy or their foresaids six months' previous written notice of such their intention, and on payment by the said Duke and his foresaids of such price therefor as shall be fixed by two arbiters, one to be chosen by each party, or in case of difference in opinion on the part of the said arbiters by an oversman to be named by them, or failing such nomination, by an oversman to be named by the sheriff of the said county or his substitute on the application of either party, or in the event of the said Thomas Forgan and John M'Elroy or their foresaids delaying or refusing to name an arbiter within one month after intimation shall be made to them as aforesaid, then by one arbiter to be named by the sheriff-depute of the said county or his substitute on the application of the said Duke or his foresaids: Declaring always that the price or consideration to be thus fixed shall not in any case exceed, but shall be restricted as a maximum to, the original cost of the said pier, waiting-room, store, and others, amounting as aforesaid to £650 sterling, under deduction for tear and wear of such sum as to the arbiters, or arbiter, or oversman appointed as aforesaid, may seem just, estimating the same on the actual condition of the pier or quay, waiting-room, and storehouse when handed over to the said Duke." This condition was declared a real burden on the ground disponed "by which the conveyance thereof" was thereby "expressly modified and restricted."

The question in the present case was whether this clause of redemption was legal and effectual.

On 5th July 1897 the present Duke of Argyll as successor in the superiority intimated to Mary M'Elroy, Annie M'Elroy, and Agnes Shaw M'Elroy, as individuals and as trustees for behoof of themselves, and the successors and survivors of them, who were singular successors of the original feuars, that in terms of the provision quoted above he intended to re-acquire the subjects feued on the conditions therein specified.

The feuars thereupon brought the present action of declarator and interdict, in which they concluded for declarator that the defender was not entitled to re-acquire the subjects on payment of £650, and that the clause in question was not binding on them, or at all events that part of it restricting the price to be paid to £650, and for interdict against the defender molesting the pursuers in the peaceable possession of the subjects.

They averred—"(Cond. 5) The said pier and buildings, which were originally estimated at the value of £650, have from time to time been extended and renewed by the pursuers and their authors, and the same are now moderately estimated at £6000. These extensions and renewals were made from time to time in the knowledge and acquiescence of the defender and his authors, and were necessitated by the demands of the locality and the requirements of the Board of Trade. (Cond. 6) The provision quoted . . is contrary to law, and is not binding on the pursuers in any way, and as the defender persists in maintaining its validity and that he in virtue of it is entitled to re-acquire the *dominium utile* of said subjects, the present action has therefore been rendered necessary."

The pursuers pleaded, *inter alia*—"(1) The pursuers being heritable proprietors of said subjects are entitled to decree of declarator and of interdict as concluded for. (2) On a sound construction of the terms of said feu-contract, and in respect of the facts condescended on, the pursuers are entitled to decree as concluded for, with expenses. (3) The defender is barred by acquiescence and *mora* from insisting in his defence."

The defender pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the summons."

The Tenures Abolition Act 1746 (20 Geo. II. c. 50), enacts—section 10—"And whereas there are certain lands in Scotland held . . . with clauses *de non alienando sine consensu superiorum:* It is also hereby enacted by the authority foresaid that in all time coming . . . all such prohibitory clauses restraining the power of alienation be taken away and discharged." . . .

On 19th December 1901 the Lord Ordinary (LORD KYLLACHY) assoilzied the defender from the conclusions of the action.

*Note.*—"The pursuers in this case are three ladies who are in right of a certain plot or area of ground on the shore of Loch Long, which was in 1850 feued off by the late Duke of Argyll to Thomas Forgan and John M'Elroy and their heirs and assignees. The defender is the present Duke of Argyll, who is now superior of the subjects; and the question is whether the defender is entitled to exercise as against the pursuers a power of resumption which is expressed in the feu-contract, and which is made one of the conditions of the grant, and, so far as that is important, is also declared a real burden on the subjects.

"The pursuers are, it is not disputed, singular successors, having acquired the subjects from the City of Glasgow Bank in the year 1879 at a price of £800. They are also, as it happens, daughters of one of the original feuars, but they are not his heirs, nor do they sue in that character. The defender, on the other hand, is, it is not disputed, fully vested in all the rights which were vested in his father, the original superior.

"The feu was, as the feu-contract bears, obtained by the original feuars for the purpose of erecting upon the ground, and upon the shore adjacent, a pier or quay and waiting-room and store, according to adjusted plans and specifications, and at the cost of £650. The ground was to be used for no other purpose, nor were there to be any other erections thereon of any other description. The feu-duty was to be 10s. per annum; and in addition to various other conditions, the feu-contract contained a provision and declaration to the effect that it should be in the power of the superior or his successors to repurchase and re-acquire the ground and erections upon it at the term of Martinmas 1851, or at any term of Whitsunday or Martinmas thereafter, on giving the feuars six months' previous notice of such intention, and on payment of such price as should be found by arbiters or an oversman appointed as therein mentioned: 'Declaring always that the price or consideration to be thus fixed shall not in any case exceed, but shall be restricted as a maximum to the original cost of the said pier, waiting-room, store, and others, amounting as aforesaid to £650 sterling, under deduction for tear and wear of such sum as to the arbiters or arbiter, or oversman appointed as aforesaid, may seem just, estimating the same on the actual condition of the pier, or quay, waiting-room, and store-house, when handed over to the said Duke.'

"In terms of this provision, the defender, on 5th July 1897, gave notice to the pursuers that at Whitsunday 1902 (five years afterwards) he would reacquire the subjects feued under and subject to the terms of the feu-contract. The defender explains that the five years' notice was given by way of grace, and by way of extending the pursuers' enjoyment. The notice, however, was not accepted or acquiesced in, and in July of the present year the feuars brought the present action to have it declared that the clause in question is not binding on them (the pursuers), or at all events that the part of it is not binding on them which restricts the price or consideration to £650.

"In support of this conclusion I heard the other day an elaborate argument, and what I have now to decide is whether there exists any ground sufficient for denying to the defender the right of repurchase which on the terms of the feu-contract he possesses.

"There is, I think, no suggestion—at least it was not ultimately maintained—that if the stipulated power is in itself lawful, it is yet ineffectual as against singular successors. It would, I think, be quite impossible so to contend. The power is made a condition of the grant. As between superior and vassal it runs with the lands. It is besides, if that were necessary, declared a real burden. It is therefore, in my opinion, vain to contend that it only affects the original feuars.

"The question therefore really is whether it is in any way contrary to law. If it were so, it would, I think, follow that even as between the original parties to the feu-contract it was ineffectual. And of course, *a fortiori*, it would be ineffectual as against the pursuers.

"But the illegality, if there be illegality, does not certainly arise at common law. The arrangement made was not contrary to public policy. It was, as it seems to me, a very fair and a very reasonable arrangement, not unusual in building leases, and not, I believe, unusual in feus. It is not inconsistent with the vassal's right of property in the feu. (See Lord Cunningham's opinion in *Strathallan* case, *infra*). At least I know no doctrine of our feudal law which would make it so. Nor, again, can it be suggested that the superior has no interest (that is to say, patrimonial interest) to enforce it. That, of course, is here out of the question. Accordingly the pursuer's case came in the end to rest really on this—that such a power of resumption, or

rather redemption, is contrary to the enactment of the Act 20 Geo. II., cap. 50, sec. 10, which, with reference to clauses *de non alienando sine consensu superiorum*, discharges all such prohibitory clauses restraining the power of alienation.

"I am afraid, however, that it is rather late in the day to suggest such a construction of the Act of 1746. It was argued that the clause here was in the same category as clauses of pre-emption, and that such clauses were illegal. But, in the first place, it is, I think, now settled, and has been so, I think, since the case of *Preston* v. *Dundonald's Creditors*, 6th March 1805, M. 6369, App. 2, Personal and Real, 4 Paton's Appeals 331 (a case which went to the House of Lords), that clauses of pre-emption are quite legal, and do not fall under the Act of 1746 at all. And, in the next place, a clause of redemption is not a clause of pre-emption. It is not even prohibitive or even restrictive of alienation. It is at most merely a stipulation which may affect the price likely to be obtained on alienation. Accordingly such a clause, viz., a clause of redemption, was sustained by the Court, apparently without difficulty, in the case of *Strathallan* v. *Grantley*, 4th July 1843, 5 D. 1318, Lord Cunningham, I may note, observing that such clauses, both in feus and sales, are common and useful stipulations, and have never been successfully objected to, even in the transactions between the lieges *inter se*.

"But then the pursuers say alternatively, that clauses of pre-emption, or of redemption, have only been sustained where the price provided to be paid was a price proportionate not to the original value of the subjects, but to the value as at the date of the pre-emption or redemption, and there is no doubt that in some of the cases (*Strathallan's* case in particular) the price to be paid was to be fixed with reference to all improvements made on the subject by the vassal. But there is no word of such a distinction as affecting the judgment in the case of *Strathallan*, nor, so far as I have found, any of the other cases. And it would, I think, obviously be a most artificial and arbitrary distinction, not supported by anything in the statute, and having, as it seems to me, no foundation in principle. Of course if the price to be paid on pre-emption or redemption was elusory, different considerations might arise. But in the present case there is at least no room for that argument. And, indeed, the pursuers' counsel had in the end, I think, to concede that according to his construction the statute always applied whenever there was in any feu-charter or contract any condition or stipulation in favour of the superior which, directly or indirectly prevented, or was fitted to prevent, the vassal obtaining on sale the full market price of the subjects—that is to say, the price which they would have fetched if the condition or stipulation had not existed. That, I must say, struck me as rather a strong proposition.

"On the whole, therefore, I see no reason to doubt the defender's right to follow out his notice, and the defender therefore must have absolvitor, with expenses."

The pursuers reclaimed, and argued—The provision in the feu-contract was in effect a stipulation prohibitive of alienation, and therefore invalid in respect of the Tenures Abolition Act 1746 (20 Geo. II. c. 50), sec. 10—*Farquharson* v. *Keay*, December 2, 1800, Mor. App., *voce* Clause No. 3. The clause in question was in the same category as a clause of pre-emption, and such clauses were only legal and effectual if they were made conditional upon payment of the full value of the subjects as at the date when the clause was proposed to be put in force—*Strathallan* v. *Grantley*, July 4, 1843, 5 D. 1318; *Farquharson*, *cit.*

Counsel for the respondent were not called upon.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Guthrie, K.C.—Craigie. Agent—James Russell, S.S.C.

Counsel for the Defender and Respondent—Henry Johnston, K.C.—Macphail. Agents—Lindsay, Howe, & Co. W.S.

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*Thursday, May 29.*

## WHOLE COURT.

## YUILL'S TRUSTEES *v.* THOMSON.

*Succession—Trust—Absolute Gift of Fee—Direction to Trustees to Retain—Repugnancy—Accumulations Act* 1800 (*Thellusson Act*) (39 *and* 40 *Geo. III. cap.* 98), *sec.* 1.

A testator, by his trust-disposition and settlement, after providing a liferent of his whole estate to his widow, directed his trustees to hold and apply the residue for behoof of and to make over the same to and among his brothers and sisters, the issue of predeceasers succeeding to their parents' share. By a codicil he directed that in the event (which happened) of the children of A and B, his sisters, becoming entitled to provisions under his settlement, such provisions should be held by the trustees during the lives of their respective fathers and the accruing interest added to the principal, but that neither principal nor interest should be paid to the children during the lifetime of their fathers. On the death of the liferentrix, who survived the testator more than 21 years, the children of A and B claimed payment of the capital of their shares of residue.

*Held*, by a majority of the Whole Court (*diss.* Lord Young, and Lord Moncreiff), that the right to their respective shares had vested in the children of A and B, that the trustees were not bound to retain the shares so vested until the deaths of the respective fathers of these beneficiaries, and that these beneficiaries were entitled to demand immediate payment of their shares.