possible with the rights of the superior, either by enlarging or restricting them. Before the passing of the Act the superior had no direct mode of recovering payment of the casualty; he could only do so by suing an action of declarator of non-entry and entering into possession of the lands and drawing the rents, and thus putting a compulsitor upon the vassal to pay the casualty. The vassal was not bound to pay a casualty until the superior demanded it, and if the superior delayed to demand it until another vassal was in possession of the lands he was bound to direct his declarator of non-entry against the vassal then in possession.

Now, the remedy provided by the Conveyancing Act 1874, sec. 4 (4), and Schedule B, practically preserves intact the superior's rights. The action must be at the instance of the superior at the time when the action is raised, and it must be directed against the vassal in possession of the lands at the same date. Under it the superior is entitled as before to enter into possession of the lands and draw the rents. It is true that the summons contains a conclusion for decree for payment of the casualty, but section 4 (4) provides that "any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry according to the now existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses, if any, contained in said decree." It may therefore be doubted whether such a decree could be enforced by ordinary diligence.

The main point, however, to be noted is that the casualty must still, as before, be demanded by the superior, that the person entitled to demand it is the superior at the time the demand is made, and that the person bound to pay it is the vassal in possession of the lands when the demand is made, however many implied entries may have intervened since the casualty first became exigible.

If, then, the vassal liable in 1885 had been a person other than the superior himself, there would have been no doubt as to the present pursuer's right, and although the question is highly technical, I do not think it is affected by the fact that William Motherwell, who was infeft by separate titles in the superiority and *dominium utile* in 1885, became debtor to himself in the casualty. He did not consolidate the two estates, neither did he take any steps to record that the casualty was extinguished. He did nothing, and such indication of intention as we find is in the direction of the two estates with all their incidents being allowed to remain separate.

It may be said that it would have been a useless form for William Motherwell to record the payment of a composition to himself, but the same might be said of consolidation; it is a form, but a form which is rendered necessary from the character of the estates.

I therefore agree that the Sheriff's judgment should be affirmed.

The Court dismissed the appeal, found and declared in terms of the declaratory conclusions of the action, and decerned against the defender for the sum sued for, with interest, &c.

Counsel for the Pursuer and Respondent —Clyde, K.C.—J. A. T. Robertson. Agent —W. B. Rankine, W.S.

Counsel for the Defender and Appellant — Craigie — M'Millan. Agent — William Balfour, S.S.C.

Friday, March 6.

FIRST DIVISION.

[Lord Low, Ordinary.

MITCHELL'S TRUSTEE *v.* GALLOWAY'S TRUSTEES.

Contract—Feu-Contract—Mutual Obligations—Obligation to Build—Obligation to Allocate Feu-Duty when Obligation to Build in Part Implemented—Refusal to Proceed Further with Building—Bankruptcy.

By a feu-charter the vassal was taken bound to erect buildings on the subjects feued to the value of £5000, and it was provided that when these buildings were erected the feu-duty might be allocated in such proportions as might be approved by the superiors. In the course of building on one portion of the subjects the vassal, requiring a loan, applied to the superior to allocate a portion of the feu-duty. The agents of the superiors wrote a letter in which they said that their client was satisfied with the plans of the building, and that "when the same is completed they are prepared to allocate thereon" a certain portion of the feu-duty. Thereafter the vassal was sequestrated, and his trustee having completed the building, called upon the superiors to allocate the feu-duty. He declined to give any undertaking to proceed to erect any other buildings on the ground feued. It was not disputed that the buildings erected were not worth £5000. On the superiors refusing to make the required allocation the trustee brought an action of declarator, implement, and damages. *Held* (*rev.* judgment of Lord Low, Ordinary) that the feu-charter and the letter of the superiors' agent must be read as forming one contract, and that as the trustee in bankruptcy was not prepared to fulfil the vassal's obligations under it by erecting buildings of the required value he was not entitled to call upon the superiors to implement their obligation to allocate the feu-duty.

The following narrative of the facts in this case, as they appeared from a proof, is taken from the opinion of the Lord Ordinary (Low)—"This action is brought by the trustee on the sequestrated estate of Alexander Mitchell, builder in Edinburgh,

who acquired a piece of ground at Jessfield Terrace, Leith, from the defenders the trustees of the late James Galloway, conform to feu-charter dated 17th and recorded 19th August 1899. The summons concludes, in the first place, for declarator that the defenders Galloway's trustees are bound to allocate on a part of the ground feued upon which a tenement of buildings has been erected the sum of £20, as the proportional part of the *cumulo* feu-duty of £50. There is also a conclusion for damages in respect of loss which the pursuer alleges that he has sustained by reason of the refusal of the defenders to make the allocation. Although the feu-charter was not executed until August 1899, the term of entry thereunder was Whitsunday of that year, and a considerable time prior to the date of the charter Mitchell had entered into possession of the ground, and had commenced to erect a tenement of dwelling-houses upon the portion of it referred to in the summons. Mitchell was taken bound to erect upon the ground within three years of the date of entry buildings of the value of not less than £5000, conform to plans to be approved by Galloway's trustees. Mitchell had some months before the date of the charter submitted plans of buildings, which were approved of by the trustees and by the Dean of Guild. These buildings consisted of a tenement of dwelling-houses upon the eastmost portion of the feu (which is that now in question), and a hall and dwelling-houses upon the remainder of the ground. Mitchell proposed in the first place to erect the tenement upon the eastern portion of the ground, and to enable him to do so he required a building loan. He accordingly in July 1899 applied to the Standard Property Investment Company, who agreed to advance to him a sum of £2500 upon the footing that the feu-duty of the ground upon which the tenement was being erected was £20. The total feu-duty for the ground feued was £50, but it was provided in the charter (the terms of which had been adjusted although the formal deed had not been executed) that Mitchell should have power, as soon as buildings were erected upon the ground to the stipulated value, to sell any part thereof, and to allocate the feu-duty among the purchasers in such proportions as might be approved of by the superiors. It was apparently in view of that provision that Mitchell stated in his application to the Standard Property Investment Company that the feu-duty of the ground upon which he was building was £20. The company having agreed to advance £2500, their law-agent Mr M'Laren was instructed to prepare the necessary bond, and he then ascertained that the *cumulo* feu-duty was £50, and that the superiors had not consented to £20 being allocated upon the portion of the ground in question. Mr M'Laren therefore informed Messrs Emslie & Guthrie, Mitchell's law-agents, that they must obtain a letter from the superiors 'fixing £20 as the feu-duty upon the area of ground disponed in the bond.' Messrs Emslie & Guthrie accordingly entered into communication with Messrs Galloway & Davidson, who were the law-agents for the superiors, and on 17th August they wrote to Mr George Galloway, a partner of the firm of Galloway & Davidson, saying—'As arranged by telephone to-day, we now send draft letter which the bondholders require at settlement to-morrow morning. The feu-charter states that the superiors require to approve of the feu-duty and also the plans, and it will be a favour if you can send us this letter to-night.' Mr George Galloway on the 18th August, after consultation with his brother James Galloway, who was one of Galloway's trustees (the superiors), wrote to Emslie & Guthrie a letter in terms of the draft which they had enclosed in their letter of 17th August. The letter of 18th August, which is signed 'Galloway & Davidson,' was in the following terms—'With reference to our telephone conversation to-day, we beg to state that the superiors are satisfied with the plans of the tenement in course of erection on the north side of Jessfield Terrace, and that when the same is completed they are prepared to allocate thereon £20 of the *cumulo* feu-duty payable under the charter.' Upon the faith of that letter the transaction between Mitchell and the Standard Property Investment Company was completed, and the Company made advances from time to time to Mitchell as the building proceeded. If it had not been for the letter the advances to Mitchell would not have been made. Mr George Galloway admitted that he was informed early in August that Mitchell required a building loan, and that he knew that the object of the letter of 18th August was to enable the loan to be arranged. Mitchell's estates were sequestrated under the Bankruptcy Acts in February 1900. The building was not then finished, but it was completed by Mitchell's trustee, who then advertised it for sale, and he received an offer of £3250 from Messrs Mackay & Young upon the footing that the proportion of the feu-duty allocated upon the ground was £20. Messrs Galloway & Davidson, however, refused to grant a formal allocation of the feu-duty, or to recognise that their letter of 18th August 1899 amounted to an obligation to do so, and accordingly the proposed sale fell through."

In addition to the facts stated by the Lord Ordinary in the foregoing narrative it appeared that the trustee had taken no steps to erect any other buildings upon the ground feued. He declined to give any undertaking to do so. It was not disputed that the buildings already erected were not worth £5000.

The pursuer pleaded, *inter alia*—"(1) The defenders having agreed to allocate a feu-duty of £20 on the eastmost portion of the said feu, and *rei interventus* having followed upon the said agreement, the pursuer is entitled to decree of declarator and implement, as concluded for."

The defender pleaded, *inter alia*—"(4) *Esto*, that the said letter imports a binding obligation upon the defenders, such obligation must be construed along with the feu-charter to which it refers; and, upon a

sound construction of the charter and relative letter no obligation is imposed on the defenders to allocate the feu-duty in question unless and until the whole of the stipulated buildings are erected in terms of the charter, and such not having been erected the defenders are entitled to absolvitor. (5) The pursuer, in respect that he is seeking to enforce against the defenders the provisions of the said charter in favour of the vassal, without offering implement of the reciprocal provisions therein incumbent on the vassal, is not entitled to maintain this action, and the defenders are therefore entitled to absolvitor."

On 18th April 1902 the Lord Ordinary pronounced an interlocutor by which he decerned in terms of the declaratory conclusions of the summons; found the defenders liable to the pursuer in damages; assessed the same at £300; and *quoad ultra* continued the cause.

Opinion.—[*After stating the facts, ut supra*]—"These are the circumstances under which the present action is raised, and the first question is, what is the meaning and effect of the letter of 18th August?

"The defenders contended that the letter only amounted to an agreement on their part that £20 should be allocated upon the tenement in question when the time for allocation arrived, namely, when buildings had been erected upon the ground feued to the stipulated value, and that as that had not been done they were under no obligation to make the allocation.

"I am unable so to construe the letter. It refers to 'the tenement in course of erection,' and provides that the allocation is to take place 'when the same is completed.' These words seem to me to be unambiguous, and not to be capable of being read (as the defenders seek to read them) as meaning that the allocation was to be made not when the tenement in course of erection was completed, but when certain other buildings had also been erected.

"The defenders further argued that, even assuming that they bound themselves to allocate the feu-duty when the tenement was completed, the circumstances had so changed when that event occurred that they were absolved from their obligation.

"As I have said, Mitchell was bound within three years to erect buildings upon the ground to the value of not less than £5000, and when he became bankrupt he was unable to fulfil that obligation. Further, his trustee, although he completed the tenement at considerable cost to himself, does not appear to have contemplated proceeding with buildings upon the remainder of the ground. In these circumstances the defenders maintain that as Mitchell was unable to implement his obligation in regard to building they were not bound to allocate the feu-duty.

"Now I do not doubt that when Mr Galloway wrote the letter he assumed that when the tenement was completed Mitchell would proceed with the erection of the other buildings proposed, and would thereby secure the remainder of the feu-duty; but I think he took the chance of Mitchell not being able to do so. The right of the defenders under the charter was to refuse to consent to any allocation until the whole of the feu-duty was secured by the erection of buildings to the stipulated amount, but by the letter they consented to an allocation upon the completion of the tenement then in course of erection, in order that Mitchell might obtain the building loan which he required to enable him to complete that tenement. The loan was in fact obtained upon the faith of the letter, and the proceeds were expended in erecting the tenement. In these circumstances I am of opinion that the defenders were not entitled to refuse to allocate the feu-duty when the tenement was completed, and I shall accordingly grant decree in terms of the declaratory conclusions of the summons.

"In regard to the claim for damages, it is proved that if the defenders had not refused to allocate the feu-duty the tenement would have been sold at Whitsunday 1901 at the price of £3250. It is also proved that since that date property of the kind in question has very considerably depreciated in value. I am therefore of opinion that damages are due, and upon consideration of the whole evidence I think that a fair sum to assess is £300."

The defenders reclaimed. Besides an argument to the effect that the letter of 18th August (quoted *supra*) only bound the superior to allocate when the whole buildings were erected, they maintained that, even if that letter was to be construed as an obligation to allocate when the particular building in question was erected, it had to be read with the feu-charter as forming one contract, and that the pursuer could not insist upon their fulfilling the obligation to allocate unless he was prepared to fulfil the obligation to erect buildings of the value of £5000—*Anderson* v. *Hamilton & Company*, January 22, 1875, 2 R. 355, opinion of Lord Neaves at p. 363, 12 S.L.R. 267.

Counsel for the respondent supported the reasoning of the Lord Ordinary.

At advising—

LORD ADAM—By feu-charter dated 17th August 1899 the defenders feued to Alexander Mitchell, builder, Edinburgh, his heirs and assignees, an area or piece of ground part of the lands of Jessfield, therein described, with entry at the term of Whitsunday 1899. This feu-charter was granted, among other conditions, on the condition that Mitchell and his foresaids should be bound to erect within three years from the date of entry, and to maintain in all time thereafter, on the said area or piece of ground buildings of the value of not less than £5000 conform to plans and elevations to be approved of by the granters, and Mitchell and his foresaids were further bound to keep the buildings insured against fire to the extent of at least £5000. These conditions were declared to be real burdens upon the subjects disponed.

The feu-duty payable for the subjects was £50 yearly, with a duplicand at the end of each twenty-first year; and it was declared that "it should be in the power of

the said Alexander Mitchell and his foresaids, so soon as buildings are erected on the said area or piece of ground of the value before mentioned, to sell any part thereof, and to allocate or apportion the said feu-duty and duplications thereof in such proportions as may be approved by us."

Although the feu-charter was not executed or delivered until August 1899, its essential terms and conditions had been arranged some months before, and Mitchell had proceeded with the erection of buildings upon the ground, plans of which he had submitted to the Dean of Guild, and which had been approved of by him and by the defenders. These plans showed a tenement of dwelling-houses upon the eastmost portion of the feu, and a hall and dwelling-houses on the remainder of the ground.

Mitchell proceeded with the erection, in the first place, of the tenement of dwelling-houses on the eastern portion of the feu, and when this building was sufficiently advanced to afford security for a loan he applied to the Standard Property Investment Company for a loan. That company agreed to give him a loan of £2500 over the subjects on the footing that the feu-duty was £20, as had been stated to them. When the bond, however, was being prepared it appeared that the subjects were affected with the feu-duty of £50, payable for the whole subjects in the feu-charter, and the company therefore declined to go on with the loan unless the defenders consented to allocate £20 as the feu-duty payable for the portion of the ground on which the buildings were being erected.

This led to a correspondence between the agents for the parties, which resulted in a letter, in the following terms, being written by the agents for the defenders to the agents for Mr Mitchell:—

"18*th August* 1899.

"Dear Sirs,—With reference to our telephone conversation to-day, we beg to state that the superiors are satisfied with the plans of the tenement in course of erection on the north side of Jessfield Terrace, and that when the same is completed they are prepared to allocate thereon £20 of the *cumulo* feu-duty payable under the charter."

The first question, as the Lord Ordinary says, is what is the meaning and effect of this letter; and I agree with him on the construction which he puts upon it. At its date the only tenement which was in course of erection was the tenement on the eastern portion of the feu, and the letter binds the superiors, when (that is, as soon as) it should be completed, to allocate thereon £20 of the *cumulo* feu-duty of £50 payable under the feu-charter. I think with the Lord Ordinary that the words are too unambiguous to be capable of any other construction.

The feu-contract stipulated that, so soon as buildings had been erected on the feu to the value of £5000, Mitchell might allocate, with the approval of the superiors, the *cumulo* feu-duty among the different purchasers; and I think that the effect of the letter was to modify this clause of the contract to the effect that, as regards this particular tenement, the allocation should be made upon it when completed, although buildings to the value of £5000 had not at that time been erected on the feu. But I see nothing whatever in the letter to free Mitchell of his obligation under the charter to erect buildings of that value on the feu and to maintain and insure them against fire, or of the other obligations imposed upon him by the charter.

There is no doubt that the defenders or their agents knew that the letter in question was wanted in order that the loan of £2500 to Mitchell might be obtained, and that the letter would be communicated to the lenders. The loan was accordingly obtained and was applied in the further construction of the buildings.

Mitchell in February 1900 became bankrupt and his estates were sequestrated, and a Mr Pollard was appointed trustee on the sequestrated estates.

The position of matters at this time was this:—The buildings were not completed; a good deal of money was still required for their completion; a part of the loan which had not been advanced was insufficient for the purpose of completing them; while no buildings whatever had been erected on the other portion of the feu.

In that state of matters the position of the trustee appears to me to have been this:—He might either have abandoned the feu-charter, in which case, no doubt, the sequestrated estate might have been liable in damages for non-implement; or he might adopt the charter and proceed with the buildings, but in that case, as it appears to me, he necessarily became liable to implement all the obligations contained in the feu-charter. He could not adopt it in so far as advantageous to the sequestrated estate and repudiate it in so far as it was prejudicial.

What the trustee did was to proceed with the completion of the buildings, having had to advance, it is said, some money of his own for the purpose. Having completed the buildings, he advertised them for sale, and having obtained a firm offer for them of £3250 on the footing that a feu-duty of £20 should be allocated on them, he called upon the defenders to make an allocation in terms of the letter of 18th August 1899. The defenders refused, and the present pursuer, who has succeeded Mr Pollard as trustee, has now raised the present action against them to have it found and declared that they were bound so to do, and for damages in consequence of their refusal. The Lord Ordinary has decerned in terms of the declaratory conclusions of the action, and has found the defenders liable in damages. I do not, however, concur with the Lord Ordinary.

I do not think that the letter in question can be treated as an entirely independent document, but must be read in connection with the conditions and provisions of the feu-charter, which sets forth the terms of what is, in effect, a mutual contract between the parties, one of the provisions of

which it alters or modifies, but leaves the others untouched. But I think that when one party to a contract calls upon the other to fulfil his part of the contract, he must be prepared to show that he is ready to fulfil his own part of the contract so far as it has not been fulfilled, and that that is especially the case when dealing with a bankrupt estate. Now the trustee was, in my view, just as much bound as Mitchell would have been to erect buildings on the entire feu to the amount of £5000, but when he made the demand for allocation he had not done so. He had erected no buildings whatever on the other portion of the feu, and he declined to give any undertaking that he would. Had the defenders granted the allocation demanded they might, and probably would, have been left with a part of the feu, for which a feu-duty of £30 would in that case have been payable by the trustee, but on which there existed no security in the shape of buildings for its payment, such as the defenders were entitled to demand.

I think that, in the circumstances, the defenders were entitled to refuse to make the allocation demanded, seeing that they had no security that the trustee would fulfil the counter obligations to them which were unfulfilled, and that he would give no undertaking that he would fulfil them.

I think the defenders should be assoilzied.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR—I also agree with Lord Adam for the reasons he has given. I think the agreement in question modified one of the terms of the contract in favour of the vassal, but his trustee, although he may take up the entire contract, or might have taken up the entire contract, if he had chosen, cannot take up a single term of the contract and leave the rest untouched—he must take up the contract as a whole. It was urged that the effect of the agreement for allocation was to divide the property into two portions, so that the portion to which the allocation refers was separated from the remainder and might be treated as a distinct estate. I think that is entirely fallacious. The agreement gave the vassal facilities for making an allocation if he chose to take advantage of them, but no actual separation was made; and in order to separate the two parts of the estate on the favourable terms which it is assumed were given, the trustee must in the first place take up the contract.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuer and Respondent—Shaw, K.C.—Sandeman. Agents—Peter Morison & Son, S.S.C.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Hunter. Agents—Galloway & Davidson, S.S.C.

Friday, March 6.

FIRST DIVISION.

[Lord Low, Ordinary.

M'FADZEAN AND OTHERS *v.* SCHOOL BOARD OF KILMALCOLM.

School — Title to Sue — "Parent" — Subordinate Manager of Orphan Home — Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 1.

The Education Act of 1872 lays upon every "parent" the duty of providing education for his children, and section 1 defines "parent" as including "guardian and any person who is liable to maintain or has the actual custody of any child."

An orphanage consisted of a number of detached houses, in each of which a certain number of children lived under the charge of a lady or a married couple, who were known as the "fathers" and "mothers" of the children. These "fathers" and "mothers" were appointed by the founder and general manager of the orphanage, who had the power to dismiss them at any time. They had the same authority over the children for ordinary domestic purposes as if they were their own, but the ultimate disposal of the children by emigration or otherwise rested with the founder, to whose disposal they were committed at entry. In an action at the instance of these "fathers" and "mothers" against a school board for declarator that the defenders were bound to provide school accommodation for the children in the orphanage, *held* that the pursuers were not the "parents" of the children within the meaning of the Education Act, and had no title to sue.

School—Sufficiency of School Accommodation—Process—Declarator—Competency—Question of Government Administration—Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *secs.* 27, 28, 30, *and* 36.

In an action at the instance of certain persons, who alleged themselves to be "parents" within the meaning of the Education Act 1872, against a school board, concluding for declarator that there was not a sufficient amount of accommodation in the public schools in the parish, and that it was the duty of the defenders to supply the deficiency in the manner provided by the Education Act 1872, *held* (*per* Lord Low, Ordinary) that the action was incompetent, in respect that the provisions of the Education Act 1872 made the question of the sufficiency of school accommodation one for the school board, subject only to the control of the Scotch Education Department, whose determination is final.

Question reserved in the Inner House.

This was an action at the instance of David M'Fadzean and others, superintendents of