[23d *May* 1837.]

The INCORPORATION of TAILORS of ABERDEEN, Appellants. — *Attorney General* (*Campbell*) — *Dr. Lushington* — *Milne.*

ADAM COUTTS, Advocate in Aberdeen, Respondent.— *Stuart*—*Shaw.*

Personal or Real—Irritancy.—Question remitted for the opinion of all the judges of the Court of Session, whether certain conditions, in a building feu contract, were effectual against a singular successor, without being declared real or fortified by clauses of irritancy.

1ST DIVISION.
LordCorehouse.

IN the year 1801 the respondent, Mr. Coutts, was appointed joint clerk along with Mr. David Hutcheon to the seven incorporated trades of Aberdeen, one of which was the incorporation of Tailors. Mr. Hutcheon having resigned, Mr. Alexander Alan was elected in his place.

The Tailors were proprietors of certain heritable subjects within the town of Aberdeen held burgage of the magistrates, called Crabeston, besides other properties. They resolved to dispose of the lands of Crabeston by public roup on feuing contracts; and on 11th September 1823 they executed articles of roup, with the view of disposing of lots according to a plan framed for the formation of a square to be called Bon Accord Square, with adjoining streets, and a terrace. By these articles it was stipulated, inter alia, "fourth, "the Tailor Corporation become bound to erect a "metal railing around the centre of the said square,

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" with all convenient speed, and to erect a metal railing " along the west side of the said terrace whenever 200 " feet of ground are feued along the terrace; this railing " to be kept in repair by the Trade, and to be the exclusive property of the Trade; and to complete the " streets with gravel; and the feuars shall thereafter be " obliged to keep their respective streets in complete " repair, and clean; and the feuars in the square shall " be obliged to maintain the said railing in the square " in complete repair. That the feuars along the " streets leading into said square from the east and west, " along with the feuars in said square, shall have the privilege of walking in the area in the centre of the square, " and be liable with the feuars in the square in keeping " the railing in the centre of the square in complete " repair. The Corporation also become bound to erect " a pump-well in the square, and another in the terrace, " within twelve months from this date, and other two " wells when the population in the streets and square " may render them necessary. That the feuars in the " square, and the streets leading thereto, shall be obliged " to pay along with their first year's feu-duty a proportion, according to their extent of feet in front, of two " third parts of the expense of erecting the railing along " the centre of the square, the Corporation being at the " expense of the other third part thereof.

" Fifth: The rouped feu-duties shall be payable by the " purchasers, their heirs and successors, to the box-" master of the said Trade, for behoof of the said Trade, " at the terms of Whitsunday or Martinmas, as shall be " specified in the minutes of roup, and that for the year " preceding, and so forth yearly thereafter in time " coming, with the legal interest of each year's feu-duty

" from the time the same falls due until paid, and a " fifth part more of liquidate penalty in case of failure; " with this condition always, that if two years feu-duty " shall happen to be resting and unpaid at one time, " the same shall be an irritancy and forfeiture of the " feu, and of the houses or buildings which may be " erected thereupon, which in that event shall revert to " and become the property of the said Corporation, " without the necessity of instituting any process of " declarator or other process for that effect.

" Sixth: The several purchasers, in the event of their " building along the front, shall be obliged to build and " erect upon the whole extent of front of their respective " purchases along the west side of Bon Accord Street " a good and sufficient house or houses within five years " from the term of their entry; and in case of their " building at the back of the ground, the houses shall " be built of dressed stone, and covered with slates or " lead; and the front walls of the houses to be built " along the front shall be close to the side of said street, " and said houses along the front of said street shall " consist of two floors, exclusive of a cellar floor, and " shall be built with well-dressed granite stone from " twenty-two feet to twenty-five feet high from the " level of the said pavement; and the roofs of the " said houses shall be covered with slates or lead, and " the pitch thereof made equal in height to one third " of the breadth of the houses. And the feuars and " their tenants in Bon Accord Street shall be entitled " to the use of the wells in said street, along with the " other feuars along Bon Accord Street.

" Seventh: The several purchasers of the areas upon " each side of the foresaid square, the ground along the

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" streets leading thereto, and along the east side of the " foresaid terrace, shall also be obliged to build and " erect upon the whole extent of front of their respec- " tive purchases a good and sufficient house or houses of " stone and lime within five years from their respective " entries to the premises, and also to erect at the dis- " tance of ten feet from the front walls of all the houses " on each side of the square, streets leading thereto, and " said terrace, an iron railing of three and a half feet " in height upon a base of well-dressed granite stone, " one foot high, upon the edge of the pavement along " the street, but with power to the purchasers to make a " sunk area between their houses and said railing, if " they shall think proper; and the said front walls " shall be built of well-dressed granite stone of the same " quality as Collector Campbell's house in Golden " Square: and farther, it is hereby stipulated and " declared, that the front walls of the houses along both " sides of the foresaid square, streets leading thereto, " and the east side of the foresaid terrace, shall be built " in a line close to the sides of the said streets, accord- " ing to the dimensions and designs laid down in the " plans made out by Mr. Archibald Simpson, architect " in Aberdeen; and the roofs of the whole of said houses " both in the streets and square shall be covered with " slates or lead of the pitch as aforesaid, and of the " elevation exhibited in the designs herein referred to.

" Eighth: None of the purchasers of stances along Bon " Accord Street shall be allowed to have any doors or " window shutters opening outward, nor any step or " steps or other thing projecting without the front walls " of their houses along the street; and in case any of the " houses along said street, or the square, streets leading

" thereto, or the said terrace, shall at any time after being
" built and finished as above happen to decay or be
" destroyed by any accident, the proprietors thereof for
" the time shall be obliged, within two years thereafter,
" to rebuild the same in manner herein directed; and in
" the event of the purchasers or proprietors failing to
" build houses as aforesaid within the respective periods
" before mentioned, they shall forfeit and pay to the
" exposer and his successors in office for the time, for the
" use and behoof of the said Corporation, the sum of
" 100*l.* sterling, and shall also lose all right and title to
" the said lots and stances, which in that event shall
" revert to and become the property of the said Corpo-
" ration, who shall have full power to use and dispose
" thereof at pleasure, without the necessity of raising
" any process whatever to that effect.

" Ninth: The purchasers of any of the foresaid areas
" shall be obliged to carry off the eavesdrop and whole
" water falling from the roofs of their houses by a
" leaden pipe, spout, or gutter, in the manner shown by
" the plan, to be fixed upon the top of the side walls,
" and to convey the same from thence by a proper pipe
" to the street.

" Tenth: The purchaser, or person who builds the first
" house on any of the said lots, shall, in building the
" gavel walls betwixt his property and the next
" adjoining lot, build a back or gavel of at least nine
" inches thick, to which the chimneys and presses of the
" conterminous houses may be built, one half of which he
" shall be allowed to build on the property of the
" adjacent heritor, who, when he comes to build, shall be
" obliged, before being allowed to use said back, to pay
" to the first builder one half of the expense of building

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" a nine-inch gavel wall, so far as he may have occasion " to use the same; but still such heritor or second " builder shall be allowed, in carrying up his chimneys, " to band them into the said back, provided such bands " do not hurt or injure the first builder.

" Eleventh: None of the purchasers of any of the " stances foresaid shall have power previous to building " to stake off the same, but when the foundation is " cleared out they shall be obliged to call upon the box- " master of the said Trade for the time, who shall there- " upon attend and see said lot or stance staked off; " and in like manner it is hereby provided that the " purchasers of all the said stances shall be bound and " obliged to carry off the earth, clay, sand, or other " materials to be dug out of the foundation of their " house, and convey the same from the ground " belonging to the Corporation; and the several pur- " chasers shall have liberty to dig for and make out " cellars under the foot pavement opposite to and in " front of their respective properties, provided that in " doing so such cellars shall be arched, and so secured " as to prevent any risk of the pavement falling in or " giving way.

" Twelfth: The purchasers of all the said stances " shall be obliged, on their own expenses, within three " years from their respective entries to the premises, to " form and lay with well-hewn hill-stone the foot pave- " ment opposite to and along their respective properties, " of eight feet in breadth along each side of said square " and along the terrace, of eight feet along both sides of " the streets leading into said square, and of six feet " along Bon Accord Street.

" Thirteenth: The purchasers of all the said lots, and

" their tenants, are and shall be expressly prohibited and " discharged from carrying on any business upon the " ground hereby exposed of tanning of leather, making " of candle, soap, or glue, slaughtering of cattle, erecting " of glass-works, distilleries, or iron-foundries, making " of bricks or tiles, and in general from employing the " premises in any trade whatever which shall be hurtful, " nauseous, or noxious to the houses and inhabitants of " the neighbourhood thereof.

" Fourteenth: The several purchasers shall be obliged " within eight days after the roup to find sufficient " security, to the satisfaction of the judge of the roup, " for the regular and punctual payment of the rouped " yearly feu-duties during the first five years after their " entry, at such term yearly as the same falls due, and " to grant a bond along with said cautioner, on their own " expenses, to that effect; and also that they shall within " that period build and erect a house or houses upon " their respective lots in manner before specified, under " the penalty of 100*l.* sterling, to be paid to the exposer " and his successors in office for the time, for behoof " of the said Corporation; and in case they fail to find " such caution they shall incur the penalty after men- " tioned, besides forfeiting their several purchases, which " in that event shall devolve upon the immediate pre- " ceding offerer, who shall be obliged to hold the same " at the price last offered by him, and to find caution, " as said is, under the like penalty and forfeiture, and so " on through the whole offerers backward, until these " articles be implemented and fulfilled, due intimation " being always given to such preceding offerers of " such failures within eight days after the same falls " out.

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" Fifteenth: The purchasers and all succeeding heirs " and singular successors to them shall be obliged, " within six months after their acquiring right to the " premises, to grant, on their own expenses, personal " obligations for payment of the feu-duties or annuities " at which the lots may be taken out, as well as for " performance of the whole clauses and conditions " prestable by them in terms of these articles, and that " without prejudice to the real right competent to the " said Corporation, by virtue of the reddendo and pre- " cepts of sasine, to be contained in their charters and " dispositions, and of their infeftments to follow thereon; " declaring hereby, that the foresaid annuities or feu- " duties shall be real burdens affecting the respective " lots or stances hereby exposed, and houses to be " built thereon, and the said Corporation shall have " power to distress the tenants and possessors thereof " for payment of the said feu-duties in the most full " and ample manner.

" Sixteenth: Upon finding caution as aforesaid, the " purchasers shall receive, upon their own expenses, from " the exposer and his successors in office charters or " dispositions of their respective lots or stances in favour " of them, their heirs and assignees, containing precept " of sasine, clause of absolute warrandice, relief of " public burdens preceding the term of their entry, and " all other usual and necessary clauses, to be holden of " the exposer and his successors in office, for yearly " payment to the said boxmaster, for the use and " behoof of said Corporation, of the respective yearly " feu-duties or annuities, in manner before mentioned, " and with and under the several conditions, provisions, " and declarations herein-before specified, all which are

" to be engrossed in the said charters, and infeftments " to follow thereon, and in all future rights and conveyances of the premises."

A builder of the name of George Nicol offered the upset yearly feu-duty, and was preferred to the purchase of a lot of ground situated at the south-west corner of the street, called at one time Bon Accord Street, afterwards Crabeston Street, leading into the Square from the Terrace; and on the 20th January 1824 he privately, under the same articles, feued an additional lot. These articles of roup were prepared by Mr. Allan.

On the 22d April 1824 the Tailors executed in favour of Nicol a feu charter, which was afterwards superseded by a burgage disposition.

This deed bore to be written by an apprentice of the respondent. Nicol was infeft, in terms of this charter, on the 11th, and the sasine was recorded on the 29th of May thereafter. On the 24th of December of the same year Nicol borrowed from the respondent 550*l.*, and granted him a heritable bond over the subjects on which the respondent was infeft.

In the meanwhile the Tailors had proceeded to make a common sewer for the benefit of the building grounds; and on the 6th May 1825 this additional article of roup was executed and agreed to by Nicol:—

" That as the said Tailor trade are with all convenient " speed to erect a common sewer for the purpose of " carrying off the water from Bon Accord Square, " Bon Accord Terrace, and streets entering into the " said square, the feuars of the Tailor trade's ground, " described in the foregoing articles of roup, along the " said square, terrace, and streets, shall be bound to pay " with their first payment of feu-duty a proportion of

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" the expense attending the forming and erection of the " said sewer, corresponding to the extent of their ground " fronting the said square, terrace, or streets respectively, " and shall be at a like proportional part of the expense, " along with the other feuars bound so to do, of keeping " the said sewer in repair in all time coming. It being " hereby declared, that as the said sewer is to be erected " for the accommodation of the feuars, the said Tailor " trade shall not be at any part of the expense of " repairing or other expense attending the said sewer, " after the same is erected. Which additional article " shall be inserted in all subsequent charters of any part " of the ground above described. Farther, that the " persons who have already feued any part of the said " ground from the said Trade shall be at liberty to " use the said sewer upon the conditions above written " applicable to subsequent feuars, with this variation, " that they pay their proportion of the expense of the " erection of the said sewer before they are entitled to " make use of the same."

On the same day Nicol feued, under the articles of roup, an additional lot of ground extending along Bon Accord Square.

Again, on 15th July 1825 the Tailors privately agreed to feu to him, and accordingly granted him a feu charter of a triangular piece of ground in Bon Accord Terrace. He had borrowed an additional sum of 150*l.* from the respondent in May preceding, for which he then granted a heritable bond on the subjects at that time acquired by him, on which the respondent was infeft. Nicol subsequently borrowed 400*l.* from the respondent, for which in like manner a heritable bond was granted and infeftment taken.

On the 9th September 1825 the Tailors made the following minute in their books:—

" In respect the feu-right granted to George Nicol, " over ground extending 95 feet along West Crabeston " Street, is made to be held in feu, when it is of burgage " tenure; and as application has been made to rectify the " mistake, and grant a feu-disposition to be held in bur- " gage, and on the same conditions; and the Trade having, " at last meeting on the 6th instant, appointed a commit- " tee, consisting of the deacon, boxmaster, Mr. Innes, and " Mr. Fyffe, to obtain the opinion of two lawyers of ex- " perience and ability on the subject; and the committee " having accordingly obtained such opinion, and laid the " same before the meeting, the tenor of which follows, " viz.: 'We are of opinion that, in so far as the lands, " 'specified in the articles of roup laid before us by a " 'committee of the incorporated Tailor trade of Aber- " 'deen, are held burgage by the Incorporation, the " 'rights to be granted by the Incorporation to pur- " 'chasers of these lands for building areas ought also to " 'be by the tenure of burgage, and the considerations " 'or annual ground rents payable to the Incorporation " 'should be declared real burdens on the properties. " 'This would be a legal and safe mode of transmitting " 'the building areas. We are farther of opinion, that " 'the Corporation cannot legally convey the lands to be " 'holden of itself, and not burgage, as such conveyance " 'would be base, and would alter the tenure of the " 'property; at any rate, such a course might give rise " 'to questions of law, which ought to be avoided. " '(Signed) HUGH FULLARTON, JOHN GILL.—Aber- " 'deen, 8th September 1825.'—And a draft of the " proposed disposition being read to the Trade, they, in

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" consideration of the opinion there given, and on ma-
" turely deliberating thereon, being sensible that no
" blame is imputable to them, but desirous, however,
" to oblige their feuar, without incurring any respon-
" sibility relative thereto, authorized the boxmaster to
" subscribe the same when extended on stamped paper,
" it being understood that the Trade shall be at no
" expense whatever; and that the boxmaster's doing
" so shall not imply that the Trade is in any respect
" liable for the consequences of this error, or any
" similar error in the feu-rights of other feuars."

This burgage disposition, which was granted on the same day, was, in regard to the conditions, in the same terms as the feu-contract, with the necessary variation, that in place of being taken in favour of the Tailors as superiors, they were constituted in their favour as creditors.

The deed was in these terms:—" Know all men,
" by these presents, that I, John Finlayson, tailor in
" Aberdeen, present boxmaster of the Tailor Trade of
" Aberdeen, in virtue of my office heritable proprietor
" of the piece of ground after disponed, in considera-
" tion of the payment of the yearly duty or ground rent
" after mentioned, and performance of the conditions
" after specified, have sold and disponed, as I hereby,
" in virtue of my office, and of special powers from the
" said Trade, from me and my successors in office, sell,
" alienate, and dispone, to and in favour of George
" Nicol, &c., all and whole, &c., together with the
" privilege of walking in the area in the middle of
" Bon Accord Square, and the use of the pump-wells
" erected or to be erected in said square and terrace,
" in common with the other feuars and tenants of said
" Corporation in the neighbourhood: But always with

" and under the following conditions, provisions, and " limitations, which the said George Nicol and his " foresaids shall be obliged to comply with; viz. that " they shall, within five years from the term of Mar- " tinmas last, erect, along the whole extent of front of " said piece of ground to said street and square, good " and sufficient houses of stone and lime, the front " walls whereof shall be of well-dressed granite stone, " of the same quality as Collector Campbell's house in " Golden Square, and shall be built in a line close to " the sides of said street and square, according to the " dimensions and design laid down in the plans thereof " made out by Mr. Archibald Simpson, architect in " Aberdeen; and the roofs of said houses shall be " covered with slates or lead, and the pitch thereof " made equal in height to one third of the breadth of the " houses; and the houses fronting said square shall be " built agreeably to an obligation granted by him and " James Small his cautioner, dated the day of " ; and also to erect, at the distance of " ten feet from the front walls of said houses in the " square, and at the distance of eight feet from the " front walls of said houses in said street, an iron rail- " ing of three and a half feet high, upon a base of well- " dressed granite one foot high, upon the inner edge of " the pavement after mentioned, with power to them to " make a sunk area between said houses and railing: " And in case, after any houses are built and finished " on said piece of ground, they should happen to decay " or be destroyed, the proprietor thereof for the time " shall be obliged, within two years thereafter, to re- " build the same in manner before directed: And in " the event of the said George Nicol and his foresaids

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" failing to build a house or houses as aforesaid within " the respective periods before mentioned, they shall " forfeit and pay to me or my foresaids, for the behoof " of said Trade, 100*l.* sterling, and shall also lose all " right and title to said piece of ground, which, in that " event, shall revert to and become the property of " said Trade, who shall have power to use and dispose " thereof at pleasure, without the necessity of raising " any process to that effect: And the said George Nicol " and his foresaids shall be obliged to carry off the " eavesdrop and whole water falling from the roofs of " their front houses by a leaden spout or gutter, to be " fixed at the top of the side walls, as shown by said " plan, and to convey the same thence by a proper pipe " to the street: Also, the person who builds the first " house on said piece of ground shall, in building the " gable walls between his property and the next adjoin- " ing ground, build a back or gable of at least nine " inches thick, to which the chimneys and presses of " the conterminous houses may be built, one half of " which he shall be allowed to build upon the property " of the adjacent heritor, who, when he comes to build, " shall be obliged, before being allowed to use said back " or gable, to pay to the first builder one half the " expense of building a nine-inch gable wall, so far as " he may have occasion to use the same; and such " second builder shall be allowed, in carrying up his " chimneys, to band them into said back, provided such " bands do not hurt or injure the first builder: And " the said George Nicol shall have liberty to dig for " and make out cellars under the foot-pavement oppo- " site to and in front of said piece of ground, provided " that in doing so such cellars be arched, and so

" secured as to prevent any risk of the pavement fall-
" ing in or giving way: Farther, the said George
" Nicol and his foresaids shall be obliged, on their own
" expenses, within three years after Martinmas 1823
" (being the term of his entry to the premises), to form
" and lay, with well-hewn hill-stone, foot-pavement op-
" posite to and along the sides of said piece of ground,
" eight feet broad in front of said square and street:
" Also to pay me or my foresaids a proportion of two
" third parts of the expense of forming and enclosing
" the area in the middle of said square, according to
" their extent of feet in front towards said street,
" and that as at Martinmas last, and thereafter to con-
" tribute their proportions, according to their extent
" in front as aforesaid, of the expense of upholding
" same in complete repair, along with the other feuars
" in said square and streets leading thereto; and
" to be at a like proportion of the expense with the
" other feuars of upholding and keeping in repair the
" well nearest to said piece of ground, or such other
" well as he and his foresaids may draw water from,
" belonging to said Trade: Farther, they are obliged
" hereby to keep that part of said street, terrace, and
" square, in front of said piece of ground, in complete
" repair and clean in all time coming: And they are
" hereby expressly prohibited from carrying on any
" business upon said piece of ground of tanning leather,
" refining tallow, making candles, soap, or glue, slaugh-
" tering cattle, erecting glass-works, distilleries, or iron-
" foundries, making bricks or tiles, and, in general,
" from employing the premises in any trade which may
" be hurtful, nauseous, or noxious to the houses or
" inhabitants in the neighbourhood thereof."

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The obligation to infeft and procuratory of resignation was in these terms:—" In which piece of ground " I oblige myself and my foresaids to infeft and seise " the said George Nicol and his foresaids, upon their " own expenses, by resignation thereof in manner " underwritten; and for that purpose I make and " constitute , " and each of them, jointly and severally, my lawful " and irrevocable procurators, empowering them to " appear before the provost or any of the bailies of " Aberdeen, and there, by staff and baton, as use is, to " resign, as I hereby, for me and my foresaids, instantly " resign, renounce, and surrender, upgive, overgive, " and deliver, all and whole the said piece of ground " lying bounded and described as aforesaid, here held " as repeated, with all right or title which I or my fore- " saids had, have, or can pretend thereto, in the hands " of the said provost or bailies, as in the hands of our " Sovereign Lord the King, immediate lawful superior " thereof, in favour and for new infeftment thereof to " be made and granted to the said George Nicol and " his foresaids, in due and competent form, as effeirs, " to be holden burgage for service within burgh, used " and wont, and for payment to me and my successors " in office, as the said George Nicol, by acceptance " hereof, binds and obliges himself, his heirs, executors, " and successors, to pay to me and my foresaids, box- " masters foresaid, 18*l.* 2*s.* 6*d.* sterling at Martinmas " yearly, as ground-rent therefor, having begun the " first term's payment thereof as at Martinmas last for " the year preceding, and so forth to continue the " yearly payment of said duty or ground rent in all " time thereafter, with interest of each year's payment

" thereof from the time the same falls due and till
" paid, and a fifth part more of liquidate penalty in
" case of failure in punctual payment, and for perform-
" ance of the whole conditions, provisions, and declara-
" tions above and under written: Farther, providing
" and declaring that the said George Nicol, and all
" succeeding heirs and singular successors to him in
" said piece of ground, shall be obliged, within six
" months after their acquiring right thereto, to grant,
" upon their own expenses, personal obligations for
" payment of said duties or ground rents, and perform-
" ance of the whole clauses and conditions prestable by
" them herein contained, and that without prejudice of
" the real right competent to me and my foresaids in
" virtue hereof and of the infeftment to follow hereon:
" Declaring, that the foresaid duties or ground rents
" shall be real burdens affecting said piece of ground
" and houses built or to be built thereon; and that I
" and my foresaids shall have power to poind and dis-
" tress the tenants and possessors thereof for payment
" of the same in the most full and ample manner:
" Declaring, that if two years duties or ground rents
" shall happen to be resting and unpaid at one time,
" the same shall be an irritancy and forfeiture of said
" piece of ground, houses, and buildings thereon, which,
" in that event, shall revert to and become the pro-
" perty of me and my foresaids without the necessity
" of instituting any declarator or other process to that
" effect: All which conditions and provisions herein-
" before written are appointed to be engrossed in the
" instrument of sasine to follow hereon, otherwise this
" disposition, and the said instrument, and all subse-
" quent conveyances of said subjects, shall be void and

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" null: Farther, the said George Nicol and his fore-
" saids shall be bound to free and relieve said Trade of
" all cess, taxation, teinds, and other public burdens
" affecting or that may affect said piece of ground in
" all time from and after the said term of his entry;
" and he and his foresaids shall have good and un-
" doubted right thereto, and to the rents, mails, and
" duties thereof, in all time thereafter: Declaring, that
" these presents are granted under the several condi-
" tions above mentioned, and under the whole other
" conditions contained in the articles of roup of said
" Trade's ground, dated 11th September 1823, and
" shall be so accepted allenarly, and no otherwise:
" And I oblige myself, as boxmaster foresaid, and my
" foresaids, to warrant this disposition, infeftment to
" follow hereon, and piece of ground above disponed,
" under the conditions above expressed, to be good,
" valid, and effectual to the said George Nicol and his
" foresaids, at all hands and against all mortals: De-
" claring, that this disposition comes in place of the
" charter of said subjects formerly granted to the said
" George Nicol, in order to change the holding from
" feu to burgage: And I consent," &c.

Sasine was taken on the 15th September 1825, and immediately recorded.

In November 1826 Nicol became insolvent, and executed a disposition of all his property in favour of trustees for behoof of his creditors. He had erected houses and buildings on all the ground feued, except that situated in Bon Accord Square; and he had incurred an arrear of feu-duty or ground-annual. It was admitted by the appellants, that after Nicol's bankruptcy, and about the month of August 1827, they

laid before counsel the title in favour of Nicol, with the articles of roup, and consulted him as to whether they had a preference over the subjects for implement of Nicol's obligations as to building on a vacant space of eight feet, as to contributing to the expense of the common sewer, and also paying a proportion of the expense of forming and enclosing the area in the square; and that on the 3d of that month they received an opinion, that those obligations were not real burdens, but only of a personal nature, for which they must rank on Nicol's estate.

On the 16th of the same month the trustees of Nicol's creditors gave the appellants notice that they abandoned the piece of ground in the square; and they had previously advertised the other subjects for sale by public roup on the 17th. On the morning of that day three members of the Corporation waited on the respondent, and laid before him the following questions, to which he made the subjoined answers: —

Questions.—" 1. Whether the boxmaster should keep " a separate account of his intromissions for the unbuilt " feu abandoned by the trustees?

" 2. Whether it would be a proper step to arrest the " rents of the property, as the conditions are not com- " plied with?

" 3. Whether the Trade could shut up the common " sewer, so as to prevent George Nicol's tenants from " having the benefit of it?"

Answers.—" 1. If there was any binding agreement " with George Nicol to feu the area on the north of Bon " Accord Square under the usual conditions, I am of " opinion the Tailor trade would be entitled to rank " on his estate for a dividend on the amount of such

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" damages as the Trade could qualify; and if the Trade " intend to follow out proceedings with a view to get " a dividend, they had better not interfere with it.

" 2. The Tailor trade could legally arrest the rents of " George Nicol's houses, in security of damages arising " from non-implement of the conditions of feu, and " would be entitled to full payment of the damages.

" 3. As to the proportion of the expense of the com- " mon sewer, it is very doubtful, in the whole circum- " stances, whether the Tailor trade would or would not be " confined to a dividend with George Nicol's creditors. " I rather think the Trade would be entitled to full pay- " ment. Shutting up the common sewer would not be " advisable in the meantime.

" N. B.—It occurs to me that there is no immediate " necessity for having recourse to arrestment, or to " stoppage of the sale of the property. The Trade's " preference remains a real burden on George Nicol's " buildings, and must continue so, whoever buys them. " It may be that more may be gained by negotiation " than by adopting legal steps, which are uncertain in " the issue, but always attended with certain expense."

The subjects were exposed to sale, but no offerers appeared; and on the 24th October the creditors resolved to abandon them to the heritable creditors. Besides the respondent, other two persons held heritable bonds over them, and the respondent was the postponed creditor. In the month of November, Nicol, with concurrence of the trustees, executed a disposition of the subjects to the respondent. This deed set forth to have been granted " in consideration of the sum of 86*l.* " sterling instantly paid to us, for behoof of the trust " funds, by Adam Coutts, advocate in Aberdeen, and

" of his relieving us of the heritable bonds after men-
" tioned, as the agreed price of said subjects," &c.

The procuratory of resignation was in these terms:—

" And for completing said infeftment by resignation,
" we hereby make and constitute ,
" and each of them, jointly and severally, our lawful
" and irrevocable procurators, empowering them to
" appear before the provost or any of the bailies of
" Aberdeen, and there, by staff and baton, as use is, to
" resign, as we, the saids George Nicol, &c., hereby
" resign, surrender, upgive, overgive, and deliver, all
" and whole the two pieces of ground, subjects and
" pertinents before disponed, lying bounded and de-
" scribed in manner foresaid (but excepting as afore-
" said), together with all right, &c., which we, &c., had,
" have, or anywise may have claim or pretend thereto
" in time coming, in the hands of the said provost, &c.,
" for new infeftment of the same to be made, given,
" and granted to the said Adam Coutts, &c., as effeirs,
" acts, instruments, and documents in the premises to
" ask and take, and generally to do every thing in
" relation thereto which we or any of us could have
" done ourselves if personally present, or which to the
" office of procuratory in such cases is known to belong,
" promising hereby to hold firm and stable all and
" whatever things our said procurators shall lawfully
" do or cause to be done in the premises." Then followed a clause of warrandice and obligation to relieve the respondent " of all interests, feu-duties, cess, taxa-
" tion, and all other public and parochial burdens
" affecting the premises at and preceding the term of
" Whitsunday last," with certain exceptions; " the said
" Adam Coutts and his foresaids being bound to relieve

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" us, the said trustees, of all the conditions, provisions
" and limitations contained in the said two feu-disposi-
" tions granted in favour of me, the said George Nicol,
" by the boxmaster of the Tailor trade of Aberdeen, s
" far as the same are applicable to the ground hereb
" disponed, in all time from and after the time of th
" said Adam Coutts's entry above mentioned; but it
" is understood that the said Adam Coutts does not
" become bound to relieve us of any personal claims
" against me the said George Nicol."

None of the conditions which were in the disposition in favour of Nicol were inserted in this deed. It was written by the respondent, who took possession by letting the houses which had been built. In consequence of the state of the level of the street opposite one of them, a pool of water accumulated; and having got involved in disputes with the appellants, he, in place of applying to them for permission, caused a mason, during the night, to cut a communication through the street with the common sewer, by which the water was carried off.

In the month of February 1829 the Tailors instituted an action before the Court of Session against the respondent, founding on the articles of roup, the feu charter and sasine, the burgage disposition and sasine in favour of Nicol, the disposition by him and the trustees in favour of the respondent; and setting forth, " that the above-mentioned articles and conditions of " roup, and the above-mentioned feu charter, and the " above-mentioned disposition in favour of the said " George Nicol, were prepared, or at least revised and " sanctioned, on the part and for the behoof of the said " Incorporation of tailors, by the said Adam Coutts, " advocate in Aberdeen, one of the clerks and assessors

" or consultors of the said Incorporation, in the capacity " of clerk and of professional agent and of legal adviser " for the said Incorporation; that it was the distinct " and decided intention and understanding of the said " Incorporation, (which was well known to the said " Adam Coutts,) when the said deeds were prepared as " aforesaid, that the various obligations, stipulations, " provisions, conditions, and declarations therein con- " tained should apply and attach, not only to the original " feuars or purchasers of the foresaid piece of ground " first above described, but that they should also apply " and attach to heirs, disponees, assignees, singular " successors, and successors of every description who " might succeed to or acquire the said piece of ground " or any part thereof; that the said Adam Coutts " represented to the said Incorporation that the said " deeds were prepared and framed in conformity with " the said intention and understanding, and that the " various obligations, stipulations, provisions, conditions, " and declarations therein contained would accordingly " apply and attach, not only to the original feuars or " purchasers of the said piece of ground, but that they " would also apply and attach to heirs, disponees, " assignees, singular successors, and successors of every " description who might succeed to or acquire the said " piece of ground or any part thereof; that the said " deeds were granted and executed by the said Incorpo- " ration of tailors on the faith of the assurances given " them by the said Adam Coutts in his foresaid capacity " of clerk and professional agent and legal adviser as " aforesaid, and on the faith that the various obligations, " stipulations, provisions, conditions, and declarations " therein contained would accordingly apply and attach

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" to heirs, disponees, assignees, singular successors, and " successors of every description who might succeed to " or acquire the said piece of ground or any part " thereof as aforesaid; that although it was provided " by the foresaid articles and conditions of roup above " quoted that the charters or dispositions to be granted " by the said William Fyfe as boxmaster aforesaid, " the exposer and his successors in office, should contain " a clause declaring that the several conditions, pro- " visions, and declarations contained in the said articles " and conditions of roup should be engrossed, not only " in the said charters and infeftments to follow thereon, " but also in all future rights and conveyances of the " premises, nevertheless the said Adam Coutts failed to " insert a clause to the said effect both in the foresaid " feu charter and in the foresaid disposition in favour of " the said George Nicol; that the said Adam Coutts " was personally interested in withholding the insertion " of the said clause in the said deeds in favour of the " said George Nicol, as having by himself, and others " his relations, posterior to the date of the said articles " and conditions of roup, and prior to the date of the " said deeds, agreed to advance large sums of money to " the said George Nicol, and taken from him heritable " securities therefor over the said piece of ground " above described; that it was to further and promote " his own personal interest that the said Adam Coutts " failed to insert the said clause in the said charter and " the said disposition in favour of the said George " Nicol; that, in consequence of the said failure on the " part of the said Adam Coutts to insert the said clause " in the said charter and disposition in favour of the " said George Nicol, none of the said several obligations,

" stipulations, provisions, conditions, and declarations " appear in the dispositions granted by the said George " Nicol in favour of the said Adam Coutts and the " others his relations, above referred to, in security of " the said sums of money advanced by them as afore- " said, nor in the said disposition granted by the said " George Nicol and his said trustees before named in " favour of the said Adam Coutts." They then stated that they had " fulfilled all the obligations incumbent " on them under the foresaid articles and conditions of " roup, and under the foresaid feu charter, and foresaid " disposition following thereon in favour of the said " George Nicol, and in particular they erected the " foresaid metal railing round the centre of the said " square, with a dwarf wall as a base thereto, and " formed the said common sewer for the purpose of " carrying off the water from Bon Accord Square, Bon " Accord Terrace, and the streets entering into the " said square; that the expense of erecting the said " metal railing round the centre of the said square, and " said dwarf wall, amounted to 244*l.* 7*s.*, &c., and the " proportion thereof effeiring to the subjects acquired " by the said Adam Coutts from the said George Nicol " as aforesaid amounts to the sum of 16*l.* 6*s.* 6$\frac{3}{4}$*d.*; and " that the expense of forming the said common sewer " amounted to the sum of 442*l.* 17*s.*, and the propor- " tion thereof effeiring to the subjects acquired by the " said Adam Coutts from the said George Nicol as " aforesaid amounts to the sum of 27*l.* 14*s.* 2*d.*; that " the said Adam Coutts, after acquiring the said piece " of ground and houses built thereon, between the 1st " and 10th days of January 1828, proceeded, without " the sanction of the said Incorporation, and under

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" cloud of night, to form a drain from the same, com-
" municating with the said common sewer constructed
" by the said Incorporation as above mentioned; that
" the said drain so formed by the said Adam Coutts
" still remains, and he, by means of it and of various
" other drains from the said piece of ground and houses
" built thereon, communicating with the said common
" sewer, has hitherto used and still uses the said common
" sewer for his own use and benefit, along with the
" other feuars of the said Incorporation." They then alleged that " the whole foresaid obligations, stipula-
" tions, provisions, conditions, and declarations con-
" tained in the said articles and conditions of roup, and
" in the said feu charter, and in the foresaid disposition,
" both in favour of the said George Nicol, attach and
" apply to and are binding upon the said Adam Coutts
" as disponee of the said George Nicol, and upon his
" heirs and successors, and he the said Adam Coutts
" and his foresaids are bound to implement and fulfil
" the same in so far as the same are not already imple-
" mented; that the said Adam Coutts is farther and
" separately bound to implement and fulfil the whole
" of the said obligations, stipulations, provisions, con-
" ditions, and declarations to the extent foresaid, in
" consequence of having been the clerk and professional
" agent and legal adviser of the said Incorporation in
" the foresaid transaction, and in consequence of his
" having in these capacities prepared and framed or
" revised and sanctioned on the part of the said Incor-
" poration the foresaid articles and conditions of roup,
" and the foresaid feu charter, and the foresaid dispo-
" sition, both in favour of the said George Nicol, and
" in consequence of his having in the said capacities

" actually represented to the said Incorporation that the " foresaid intention and understanding of the said " Incorporation had been legitimately carried into " effect, and that accordingly the whole foresaid obliga- " tions, stipulations, provisions, conditions, and decla- " rations therein contained did attach and apply to and " were binding upon heirs, disponees, assignees, singu- " lar successors, and successors of every description who " might succeed to or acquire the said piece of ground, " and houses built or to be built thereon, or any part " or portion thereof." They therefore concluded that " it ought and should be found and declared, by decreet, " &c., that by the terms of the said articles and con- " ditions of roup, and of the said feu charter, and of the " said disposition in favour of the said George Nicol, " the whole foresaid obligations, stipulations, provisions, " conditions, and declarations contained in the said " articles and conditions of roup, and in the said feu " charter, and in the said disposition, attach and apply " to and are binding upon the said Adam Coutts as " disponee of the said George Nicol, and upon his heirs " and successors, and that he the said Adam Coutts " and his foresaids are bound to implement and fulfil " the same in so far as the same are not already imple- " mented; and farther, that the said Adam Coutts is " farther and separately bound to implement and fulfil " the whole of the said obligations, stipulations, pro- " visions, conditions, and declarations to the extent " foresaid, in consequence of having been clerk to and " professional agent and legal adviser of the said Incor- " poration in the foresaid transaction, and in conse- " quence of his having in these capacities prepared and " framed or revised and sanctioned, on the part of the

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" said Incorporation, the foresaid articles and conditions " of roup, and the foresaid feu charter, and the foresaid " disposition in favour of the said George Nicol, and in " consequence of his having in the said capacities " actually represented to the said Incorporation that " the foresaid intention and understanding of the said " Incorporation had been legitimately carried into " effect, and that accordingly the whole foresaid obliga- " tions, stipulations, provisions, conditions, and decla- " rations therein contained did attach and apply and " were binding upon heirs, disponees, assignees, sin- " gular successors, and successors of every description " who might succeed to or acquire the said piece of " ground, and houses built or to be built thereon, or " any part or portion thereof; and farther, the said " Adam Coutts ought and should be decerned and " ordained, by decree foresaid, in the first place, to " grant upon his own charges and expenses in favour " of the pursuers a personal obligation for payment of " the foresaid yearly duty or ground rent above speci- " fied, and for performance of the whole clauses and " conditions contained in the foresaid articles and con- " ditions of roup, and in the foresaid feu charter, and in " the foresaid disposition, both in favour of the said " George Nicol, in so far as the same are not already " implemented; in the second place, to make payment " to the pursuers of the foresaid sum of 16*l.* 6*s.* 6$\frac{3}{4}$*d.*, " being the proportion effeiring to the said subjects " acquired by him the said Adam Coutts from the said " George Nicol as aforesaid of the foresaid sum of " 244*l.* 7*s.*, being the whole expense of erecting the " foresaid metal railing and dwarf wall round the centre " of the said square, together with the legal interest of

" the said sum of 16*l.* 6*s.* 6¾*d.* from the said term of " Whitsunday 1827, and in time coming during the " nonpayment; in the third place, to lay the pavement " at the east end of the said subjects fronting the said " square, and also to lay the pavement at the west end " thereof fronting Bon Accord Terrace, in terms of and " in conformity to the provisions thereanent above " quoted, contained in the foresaid articles and condi- " tions of roup, and in the foresaid feu charter, and in " the foresaid disposition; in the fourth place, to erect, " and that within the space of five years from and after " the said term of Martinmas 1824, an iron railing at " the east end of the said subjects fronting the said " square, in terms of and in conformity to the provisions " thereanent above quoted, contained in the said arti- " cles and conditions of roup, and in the foresaid feu " charter, and in the foresaid disposition last above " mentioned; in the fifth place, to make payment to " the pursuers or to their successors in office, for behoof " foresaid, of the foresaid sum of 27*l.* 14*s.* 2*d.*, being " the proportion effeiring to the said subjects of the " foresaid sum of 442*l.* 17*s.*, being the whole expense " of forming the said common sewer as aforesaid, toge- " ther with the legal interest of the said sum of " 27*l.* 14*s.* 2*d.* from the said term of Whitsunday 1827, " and in time coming during the not payment."

In defence the respondent denied all the charges of fraud made against him, and as these were abandoned both in the Inner House and at the bar of the House of Lords, and the grounds of action were confined, 1st, to a plea of personal exception in respect of the answers made to the questions put to him on the 17th August 1827; and, 2d, to the effect of the conditions in the

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original investiture on a singular successor or heritable creditor buying in order to protect himself;—it is unnecessary to go into a detail of the circumstances. In regard to the sewer it was proved that the operations were performed during the night, but the appellants judicially admitted "that the object and effect of the "drain made by the defender Mr. Coutts, communi-"cating with the common sewer formed by the pur-"suers, was to carry off such surface water as from the "state of the levels accumulated in the street in front "of the house, whence it flowed into the kitchen, and "that it did not communicate with the house itself."

Lord Corehouse pronounced this interlocutor on 16th November 1832:—"Finds, that the burgage dis-"position by John Finlason, boxmaster of the corpor-"ation of tailors in Aberdeen, in favour of George "Nicol, on which Nicol was infeft, superseded, by the "consent of these parties, the feu charter previously "granted by the corporation to Nicol: Finds, that the "following obligations imposed upon Nicol, the disponee, "by that disposition; viz., an obligation to grant a per-"sonal bond for the payment of the ground rent and "performance of the conditions in the articles of roup; "the obligation to pay a proportion of the expense of "erecting the rail and wall round the centre of Bon "Accord Square; the obligation to lay pavement on "the east and west ends of the subjects conveyed; "and the obligation to erect an iron rail at the east "end of the subjects fronting the said square—not "being protected by clauses of irritancy, nor con-"tained in Nicol's infeftment, are not binding on his "singular successors in the subjects: Finds, that the "pursuers have not proved their averment, that the

" defender, in drawing or revising the feu charter and
" burgage disposition to Nicol, omitted intentionally,
" and from corrupt and fraudulent motives, such
" clauses as were requisite to make these obligations
" real burdens, or to render them effectual against
" singular successors; and farther, that the pursuers
" have not proved their averment, that the defender
" had an interest, at the date of the said conveyances,
" to act corruptly or fraudulently in preparing them:
" Finds the averment of the defender proved, that
" during a long series of years, and in a number of
" cases before the date of the said conveyances to
" Nicol, and in some instances afterwards, conveyances
" were granted by the corporation to persons acquiring
" lands from them under articles of roup the same,
" in so far as this question is concerned, with the
" articles under which Nicol purchased; which convey-
" ances were in substance the same as his, or equally
" defective, and were prepared, some of them by the
" defender, and some of them by other agents, and
" were occasionally revised and approved of by the cor-
" poration, or their legal advisers: Finds, that the
" defender is not barred, personali exceptione, on the
" ground of professional ignorance, negligence, or any
" other cause, from availing himself of the rights and
" privileges which would have been competent to any
" other singular successor to Nicol; and therefore
" assoilzies the defender from the conclusions of the
" libel in so far as the above-mentioned obligations are
" concerned, and decerns: Finds the averment of the
" pursuers proved, that the defender, without the con-
" sent or knowledge of the corporation, did clandes-
" tinely and under cloud of night open a communica-

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" tion between his property and the common sewer men-
" tioned in the libel, and used the said common sewer, or
" took benefit by it; in respect of which, and of drains
" conducted to the said sewer by his author, Nicol, finds
" the defender liable to the pursuers in the sum of
" 27*l.* 14*s.* 2*d.*, being his proportion of the expense of
" the said sewer, with interest as libelled, and decerns:
" Finds the pursuers liable to the defender in the ex-
" penses of process in so far as they relate to the con-
" clusions from which the defender is hereby assoilzied,
" and the defender liable to the pursuers in the ex-
" penses of process in so far as they relate to the question
" concerning the common sewer; and remits the ac-
" counts, when lodged, to the auditor to tax and to
" report."

Both parties reclaimed against this interlocutor,—the appellants praying the Court to recal it, except in so far as it found and decerned against the respondent; and to decern and declare, quoad ultra, in terms of the conclusions of the libel;—and the respondent praying that it might be altered in so far as concerned the findings and decerniture against him applicable to the conclusion in the summons for 27*l.* 14*s.* 2*d.* as the proportion of the expense of the common sewer, with the interest thereof, and for the expenses corresponding to that branch of the discussion; and that he should be assoilzied from that conclusion, as well as from all the other conclusions of the action, and found entitled to his expenses for that branch of the discussion.

The Court, on 27th February 1833, pronounced this interlocutor:—" The Lords, having advised the re-
" claiming notes for both parties, and heard counsel
" for the parties, in respect that the infeftment in

" favour of George Nicol does contain the conditions " relative to granting a personal bond, the expense of " erecting the rail and wall round the centre of Bon " Accord Square, the pavement and the iron railing " fronting the square, (which the Lord Ordinary had " been led to believe were not mentioned in that infeft- " ment,) before answer, recal the interlocutor reclaimed " against, and remit to the Lord Ordinary to re- " consider the cause, and proceed therein as to him " shall seem just."

The case having returned to the Lord Ordinary, his Lordship pronounced the following interlocutor on the 19th November 1833:—" The Lord Ordinary, hav- " ing considered the remit from the Court, and the " whole cause, and having again heard counsel for the " parties, finds that the defender is not bound to grant " to the pursuer, for behoof of the corporation, a per- " sonal obligation for payment of the yearly duties or " ground rents specified in the libel, or for performance " of the clauses and conditions contained in the articles " of roup, or in the burgage disposition granted by " John Finlason, boxmaster of the corporation, in " favour of George Nicol: Finds, that the defender is " not liable to pay to the pursuers, or their successors " in office, the sum of 16*l.* 6*s.* 6$\frac{3}{4}$*d.*, with interest, as " part of the expense of erecting the metal railing and " dwarf wall round the centre of Bon Accord Square: " Finds, that the defender is bound to lay the foot-pave- " ment opposite to and along the sides of the subjects " disponed to George Nicol, and to erect an iron rail- " ing at the east end of the said subjects, in conformity " with the provisions in the burgage disposition, and " within the time therein mentioned: Finds, that the

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" defender is not bound to lay the pavement at the " west end of the subjects fronting Bon Accord Ter- " race, there being no obligation to that effect in the " disposition to Nicol: Finds, that the defender is liable " to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his " proportion of the expense of erecting a common " sewer, of which he has taken benefit since his pur- " chase from Nicol: Assoilzies the defender from all " the other conclusions of the libel, and decerns: Finds " the pursuers liable to the defender in expenses of " process, except in so far as the discussion and proof " regarding the common sewer is concerned: Finds the " defender liable to the pursuers in the expense of the " said discussion and proof; and remits the accounts " thereof, when given in, to the auditor to tax and to " report."[1]

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[1] *Note.*—" The Lord Ordinary regrets that a clerical error in transcribing " the interlocutor of the 16th November 1832 should have given unneces- " sary trouble to the court and the parties; but he is glad to have an " opportunity of reconsidering that interlocutor, as he does not now regard " the case in exactly the same light as he did when it was pronounced. He " intended to find that certain obligations, specified in the interlocutor, " which were imposed on Nicol by the burgage disposition in his favour, " not being protected by clauses of irritancy, and the obligation to engross " these obligations in future rights and conveyances not being inserted in " Nicol's infeftment, they are not binding on Nicol's singular suc- " cessors.

" The action is laid on two grounds: 1st, that certain conditions or " obligations contained in the articles of roup, and in the burgage disposi- " tion to Nicol, are constituted real burdens, and therefore affect the " defender as a singular successor. 2dly, that, whether they have been " properly constituted real burdens or not, the defender, as the clerk of " the corporation, and occasionally its law adviser, in consequence of his " negligence or fraud, or both, is barred, personali exceptione, from main- " taining that they are not effectual against him, in a question with the " corporation.

" The first is a pure question of conveyancing or feudal law. The bur- " gage disposition to Nicol contains two classes of conditions or obligations. " The first class are expressly declared in the deed itself to be real " burdens, and they are protected by clauses of irritancy: with regard to

Against this judgment both parties again reclaimed to the same effect as formerly; and on the Court, after hearing counsel, intimating that they intended to refuse

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" this class there is no dispute between the parties. The second class are " not declared real burdens, nor protected by irritancies; and it is this class " which the pursuers attempt in the present action to enforce against the " defender as a singular successor.

" 1. In the burgage disposition there is an obligation on the disponee, " and his heirs and successors, to pay a proportion of the expense of " forming and enclosing the area in the middle of Bon Accord Square, as " at Martinmas 1824, *i. e.*, at Martinmas, ten months before the date of " the disposition, with interest from that date. But an obligation to pay " an indefinite sum of money, which is not declared to be a real burden, " and, indeed, cannot be so constituted, though obligatory on the disponee " and his representatives, in terms of the personal contract, is not effectual " against a singular successor. It is coupled with an obligation to up- " hold and keep in repair this enclosure, but there is no conclusion in the " libel relative to the last-mentioned obligation.

" 2. There is an obligation on the disponee to lay a foot-pavement " opposite to and along the sides of the subjects disponed. This obliga- " tion ad factum præstandum may be held as a condition of the grant, in " terms of several decisions quoted in the cases; and, as it entered the " investiture of Nicol, the Lord Ordinary is now of opinion that it may " be enforced against the defender, though neither declared a real burden " nor protected by an irritancy.

" 3. In the articles of roup there is an obligation to lay the pavement " at the west end of the subjects fronting Bon Accord Terrace, but it is " not in Nicol's investiture, and therefore, having in view the first ground " of action only, it can be of no avail against the defender as a singular " successor.

" 4. There is an obligation on the disponee, his heirs and singular suc- " cessors, to grant personal bonds for payment of the duties and ground " rents, and for performance of all the conditions of the grant, within six " months after acquiring the subjects. If by ' singular successors' is " meant singular successors after Nicol's infeftment, it is plain that the " obligation can import only that a bond should be granted for perform- " ance of obligations which are real rights, independently, and not for the " performance of personal obligations, otherwise ineffectual against sin- " gular successors. Any other construction would infer that obligations " which cannot be made real in the ordinary form, may become so by a " provision of this description, for which there is no authority whatever " in the law of Scotland. The defender may be bound by this clause to " grant a personal bond for payment of yearly duties and ground rents, " which would facilitate execution at the instance of the corporation, " and for performance of any other real burden in the grant; and it is

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the reclaiming note for the appellants, the senior counsel for the respondent stated, that he would not trouble their Lordships with any argument on his reclaiming note. Nothing was, therefore, said at the bar in regard to it; but an interlocutor was pronounced (18th December 1834) on each reclaiming note, refusing it, and adhering to the interlocutor of the Lord Ordinary.

" plain, from the context, that nothing more was intended by the " parties.

" There is no obligation in the disposition to Nicol to pay any part of " the expense of the common sewer. But it appears that the defender, " under cloud of night, opened a drain from the street, in front of one of " his feus, and close to the curbstone of the pavement, to which his cellars " reached, by which the water was let into the sewer. It is, indeed, " admitted by the pursuers that the drain did not communicate directly " with the defender's house, but it had the effect of carrying off the water " which flowed from the street into his kitchen, and which must have " rendered that part of the house very inconvenient, if not uninhabitable. " It was in this respect, therefore, as much for his benefit as if it had " communicated with the house. There is no evidence that the corpora- " tion was bound to carry off that water at their own expense. If that " had been the case, the defender would have had no motive to make the " drain in the clandestine manner he did.

" As a question of feudal conveyancing, the case resolves into a simple " issue. But the corporation have taken a different ground, of much " greater importance to the defender than the small pecuniary interest at " stake. He is charged, not only with gross negligence as the clerk and " occasionally the law adviser of the corporation, but with direct and long " premeditated fraud. The investigation of this serious charge gave " occasion to the voluminous productions, the proof, and the elaborate " arguments which have swelled the process to an unusual size. After " reconsidering the whole matter the Lord Ordinary remains of opinion " that the pursuers have not succeeded in establishing those charges " against the defender, with the exception of that relative to the operation " on the drain, which may have proceeded from an erroneous view of his " rights, and a wish to avoid a lawsuit with the corporation about a trifle. " There is a satisfactory reason assigned for his not inserting in the bur- " gage disposition the obligation in the articles relative to the pavement " fronting Bon Accord Terrace, and an apology for omitting the obliga- " tion to engross all the obligations of the grant in subsequent investitures, " as well as in that of the first disponee. On the whole, though the de- " fender has not, perhaps, acted as an accurate and vigilant officer, he has " cleared himself, in the Lord Ordinary's opinion, from the imputation of " gross negligence and actual fraud."

Both parties appealed,—the Tailors in so far as decree had not been pronounced in terms of the conclusions of their summons,—and Mr. Coutts against the interlocutors finding him liable in the expense of the sewer.[1]

Appellants (Tailors.)—1. The stipulations and conditions contained in the disposition to Nicol are effectual and binding obligations upon the proprietors of the subjects, whether singular successors or otherwise.

On this subject the respondent, in his argument in the Court below, confounded two points which are entirely distinct: the one being, whether obligations and conditions are susceptible of being made permanent provisions attaching to the feu; and the other, how, in particular cases, that is best to be done.

It seems difficult to say that stipulations of any kind, provided they be legal and allowable, and involving a fair patrimonial advantage or intelligible interest, may not be made the conditions of a feu or of a building grant.[2]

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[1] The Attorney General, in opening the case for the Tailors, objected to the competency of the appeal by Mr. Coutts, in respect of his having acquiesced by his counsel in the interlocutor of the Lord Ordinary. To this it was answered, that all that had been done was to waive the right of addressing the Court below, orally, against the Lord Ordinary's interlocutor; that the judges had been referred to the printed pleadings containing the argument; that the reclaiming note was not withdrawn, and that accordingly an interlocutor adhering to that of the Lord Ordinary had been pronounced. There was, therefore, no reason either for an objection to the competency of the appeal, or to the plea of waiver or acquiescence. Lord Brougham, after looking into the short-hand writer's notes of what had occurred, intimated, that although the appeal was not incompetent, yet he thought the respondent was precluded from insisting in the appeal; but he appointed counsel to be heard as to the question of costs of this appeal.

[2] Campbell v. Dunn, May 28, 1833; remitted on appeal, June 29, 1825; 1 Wilson's & Shaw's Appeals, p. 690; Opinions of Judges, March 4, 1828, 6 Shaw, 679.

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In the present instance the conditions were partly of a pecuniary nature, and partly ad factum præstandum. The latter related to the very essence of the whole arrangement, and formed the foundation of the original grant. The effect of them was to secure the proper execution of that plan of building and of laying out the subjects, which the appellants were entitled originally to regulate, and at all times to enforce. Upon the observance of them the elegance, the commodiousness, the value, and the permanence of the feus materially depended. And if it is to be maintained that there is no means in the law of Scotland by which proprietors, disposing of building ground, can fix a plan upon which the buildings and streets are to proceed, beyond the mere personal obligation of the first contractor or purchaser, this would be a limitation upon the legal interests of parties never hitherto contemplated in law, and which, in practice, would be accompanied with the most injurious results. In England such stipulations are well known as conventions running with the land, which are effectual against purchasers. According to the respondent's argument it is impossible to enforce any fixed plan as to a street or square beyond the first feuar, and according to his doctrine it is not by their legal effect, but it is by mere accident, or ignorance, or favour, that the plans laid down for the more regular parts of Aberdeen, Edinburgh, and Glasgow are observed for a single year.

It is inappropriate to talk of these stipulations as being real burdens. The question is not whether the appellants can be ranked preferably for them in a competition with creditors, or whether they can adjudge or poind the ground for implement of such conditions;

neither are they to be considered with reference to mere feudal peculiarities. They are to be viewed as inherent and standing conditions in a grant of lands, which form between the parties a permanent and a transmissible mutual contract. The disponer of lands in this situation comes under obligations of a different kind from those undertaken by an ordinary superior or seller; and the feuar, in the same way, undertakes for himself and all his successors in the premises certain counter obligations, which are characteristic of this relation of parties, and which are different from what an ordinary vassal would assume. In the present case, for instance, the appellants undertook certain obligations as to erecting pump-wells, laying out grounds in the centre of the square, putting up railings, making common sewers, &c. There cannot be a question, that the privilege of demanding implement of these obligations transmits to singular successors in the feus, and would also pass against any party to whom the appellants might convey their interest in these lands. It is equally clear, on the other hand, that singular successors in the feus, whether voluntary purchasers or adjudgers, but more particularly purchasers, cannot take and enjoy these feus, and participate in the various privileges annexed to them, without becoming, each personally, bound in succession to perform the whole stipulations and conditions imposed upon them. They cannot build or occupy their houses without conforming to the plan laid down in all respects; they cannot reap the other advantages of the subject, without performing their part in keeping them in repair, or contributing to the expense of doing so in the manner prescribed. The whole arrangements introduced into the feu contracts

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and dispositions in Edinburgh and other large towns, whether as to the mode of building or using their houses, or as to apportioning the expense of the causeways and pavements of the roofs, vents, &c., are binding upon the successive proprietors upon the principle now laid down; and the idea that such obligations are merely personal to the first feuar, and do not attach to subsequent purchasers, would be subversive of the whole system of urban occupancy.

In regard to the pecuniary conditions, they are sufficiently specific, and are made effectual real burdens. They are not of the nature of debts, but are properly surrogata for acts to be done, and so are to be dealt with as if they were obligations ad facta præstanda. But if any difficulty should be entertained on this subject, in consequence of the imperfect terms in which the deeds are in some respects expressed, this is obviated by the personal objection against the respondent, which precludes him from maintaining any legal plea to that effect.[1]

Respondent.—Although a fixed sum may be declared a real burden, yet an obligation to perform an act, such as laying a pavement, erecting a rail, paying an indefinite and unascertained proportion of another railing, or of a sewer, an obligation to create no nuisances, and an obligation to grant a personal obligation, cannot be declared real burdens. They can only be made effectual against singular successors by being fenced with irritant clauses. If not so fenced, they are merely personal

[1] In support of this plea the appellants entered on a full detail of minute circumstances, and rested particularly on the questions and answers of the 17th Aug. 1827, but as no general point is deducible from that branch of the case, it is unnecessary to state the argument.

obligations binding on the party undertaking them, but not on singular successors.

If a party purchases a property, subject to a variety of conditions, some of which are declared to be real burdens, and fenced with irritancies, and others simply stated as personal obligations, it surely cannot be maintained that there is not here an intentional distinction, and that the latter one is to be equally as effectual against a singular successor as the former. Taking the articles of roup as the basis of the contract of parties, it is clear that no new and additional restriction or burden can be imposed on the purchaser beyond what they contain. The conversion of personal obligations into real forms a very serious addition to the burdens on a property, as an impediment to the free transmission of it by sale or otherwise.

The whole ground of liability is made to rest on this, that the conditions were intended to be real burdens, or at all events effectual against singular successors of every kind.

The articles contained various stipulations and conditions incumbent on the feuars. By one article the feuars in the square, and along the streets leading into the square, are taken bound to pay, with their first year's feu duty, a proportion of the expense of a railing to be erected round the square, and afterwards to maintain it and the streets in repair. By another article, if two years feu duty shall fall into arrear, this shall operate as an irritancy and forfeiture of the feu, and of the house or buildings which may be erected thereon. By another, feuars are to build houses on their feus within five years after their entry, and to erect an iron railing in front of their houses, at the distance of ten

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feet from the front, in the said streets and square, and to rebuild the houses in case of their being destroyed or in disrepair, on pain of being subjected in a penalty of 100*l.* and an irritancy of the feu. By another article they are bound to lay a foot-pavement along their property in the streets or square within three years after their entry; and by another, to grant personal obligations for payment of their feu duties within six months after their purchase, and that "without prejudice to the real right "competent to the said corporation by virtue of the "reddendo and precepts of sasine to be contained in "their charters and dispositions, and infeftments to "follow thereon; declaring hereby, that the foresaid "annuities or feu duties shall be real burdens affect-"ing the respective lots or stances hereby exposed, "and houses to be built thereon; and the said cor-"poration shall have power to distress the tenants and "possessors thereof for payment of the said feu duties," &c. But it is nowhere declared, that the omission by the purchaser to insert these in future conveyances shall have the effect of nullifying his right, or that of the acquirer from him.

Thus the feu duties alone are declared to be a real burden; and if they are unpaid for two years the right to the feu and houses thereon is to be irritated, and in the event of a failure to build within the period mentioned, or to rebuild, the feu is to be irritated, and a penalty paid. But no such consequence is declared to attach to the infringement or nonperformance of the other conditions, which in all the varied expressions of the deed are treated as personal, and contradistinguished from the clauses about the feu duties and buildings; and this shows distinctly the contrast between them.

The obligation to pay a proportion of a sum not yet ascertained, and altogether indefinite, could not from its nature be declared a real burden. If the appellants had thought it of importance that these, and the other condition as to the pavement, should have been rendered burdens effectual against the subject, they should have stipulated that the failure to implement them should be an irritancy of the feu. But they limit the declaration of an irritancy to the important points of the failure to pay the feu duty for two years, and the failure to build or to rebuild. The other less important obligations were left on the personal credit of the feuar.

Such being the case, it is impossible that the appellants can maintain that a purchaser under these articles of roup would have been bound to admit into the charter or disposition granted to him a declaration that all the other conditions should be real burdens; or still more, a provision that the failure to perform them should be held an irritancy and forfeiture of the feu. Even if it were the fact, that they ever intended the conditions to be so guarded, they could not, after selling under these articles of roup, have insisted on this being done.

LORD BROUGHAM.—My Lords, in this case there are two questions for your Lordships consideration, which are of very different degrees of importance, but both of which it may, by possibility, become necessary for your Lordships to determine. One is, whether or not the burdens imposed by the incorporation upon the original feuar are to follow the feu into whose hands soever it may come,—whether or not they are binding upon singular

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successors? The second is, whether, supposing they are not so binding, the present defendant, Mr. Coutts, having been clerk, confidentially employed as a person of skill by the superior in making out the burgage disposition, shall now be allowed to take advantage of any omission by means of which the burdens are made not to follow the feu, and bind singular successors? I have stated that these two questions are of very different degrees of importance. I have also said that it may, by possibility, be necessary for your Lordships to dispose of them both. If the decision in the Court below is to be supported, both of these questions must be decided against the appellants. It must be decided, first, that Mr. Coutts is not barred, personali exceptione, from setting up a defence that the burdens are not binding upon singular successors; and it must also be decided that the burdens do not bind singular successors.

Now the Court below unfortunately does not seem to have taken that course which would have been most desirable. I expressed my regret on this account when the case was first opened, and every thing that has passed since has tended to deepen that impression of regret, that the Court should, however naturally and allowably, have taken the course pursued. Character was the principal matter in issue below. Charges had been brought, and, as we have right now to say, without foundation brought, against Mr. Coutts, of not merely unprofessional conduct, but of conduct amounting to fraud. From those charges he has since been entirely freed by the admissions to a great degree in the Court below, and still more effectually by the decision of that Court—a decision in this particular not questioned here,

for the charge of fraud is now distinctly abandoned. In respect to character, therefore, it is fit I should state, even in now breaking the question, that Mr. Coutts's character stands entirely free from any charge, or indeed from any suspicion of fraud or even of impropriety. The utmost that is now alleged against him is a certain degree of negligence, a certain degree of laches, and possibly a want of skill; but nothing that can be designated as fraudulent, or even incorrect.

In consequence, however, of the Court below having had its attention chiefly drawn to the graver charges against Mr. Coutts, which then formed the main subject of contention between the parties, it appears that its attention was directed away from one of the main questions, the most important, in point of law, which now comes before us, and even not very much directed towards the other and less important question—that of the personalis exceptio. Although this question undoubtedly was argued, and was maintained to the very last there, still it was maintained upon different grounds, because it was mixed up very much with the question of fraud. The consequence has been, that though both points were brought before the Court in argument, though, in the cases before the Court, they were both discussed at considerable length, yet apparently a very disproportionate degree of attention was paid by the Court especially to the first of those general questions, the general question whether or not these burdens followed the feu, and were binding upon singular successors.

We have unfortunately no account of any reasons for the judgment given by the learned judges. Any account we have would rather lead us to suppose that no

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reasons at all had been given; that the interlocutor of the Lord Ordinary had been pronounced, and had been adhered to without any reason being assigned. It is also clear, that in the latter part of the argument, the parole argument, little, if any, mention was made of the first point; but the learned counsel appear to have confined themselves to the second, that of the personalis exceptio.

Now, it being clear that this decision cannot be supported without dealing with both questions, it becomes absolutely necessary that time should be given for looking into them, and especially the first. It is one of very great importance. It is encumbered with no little difficulty. There are to a certain degree conflicting authorities, I will not say decisions. There is a want, possibly, of direct decision, but the authorities are numerous, and they are conflicting. It seems impossible to reconcile the passage cited from Lord Stair with the passage cited from Mr. Erskine. It seems equally impossible to reconcile the passages cited from Lord Stair with what appears to have been assumed in several of the decisions; and it appears impossible to reconcile the passages cited from Lord Stair with the practice of conveyancing in Scotland. Those passages to which I allude in the 14th title of the first book, and the 5th section, show not only a doubt, but almost a negation, of the possibility of imposing real burdens upon the successive feuars and disponees of the feu, except in particular cases. In the case of creditors they would seem to show that that is impossible. I speak without having had an opportunity of thoroughly considering that passage; but from what passed yesterday, and from looking at it in the course of the Attorney General's reply, I should say

that such is the inference to be drawn from that passage. It is generally understood that all conveyancers agree in there being means of making the burdens follow the feu, and binding on singular successors—such burdens as Lord Stair is there alluding to. The only question is, what are the means,—in what way steps shall be taken for making the burdens effectual; whereas Lord Stair apparently assumes that they cannot in any way be made effectual. It is even doubtful, according to that passage, whether this could be done effectually in the case of voluntary purchasers; but in the case of a creditor, he seems to say that there are no means of effectually doing it, and that even an irritancy cannot be supported.

My Lords, these considerations show the great difficulty and embarrassment in which your Lordships may find yourselves, if you should be of opinion that the respondent, Mr. Coutts, was not barred personali exceptione, and if you should have to deal with the first and more general and difficult of these questions. If you are of opinion that the decision should be reversed, inasmuch as Mr. Coutts was barred personali exceptione, then of course there will be no occasion for addressing yourselves to the first point; but if you should be of opinion that Mr. Coutts is not barred, then of course you cannot support this decision, nor come to any determination upon the question, without addressing yourselves to the first point, whether or not the burdens are of a nature to bind singular successors.

My Lords, the difficulties arising in this case are, among other circumstances, certainly not diminished, but considerably increased, by the two interlocutors of the Lord Ordinary standing upon different grounds. The difficulty I find in reconciling not only the second interlo-

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cutor of the Lord Ordinary with some material parts of the note, but in reconciling some parts of the interlocutor with other parts, increases the necessity imposed upon me of further considering the case.

But, my Lords, the greatest embarrassment of all will be, if it shall be found that Mr. Coutts is not barred personali exceptione, so as to make it necessary to address yourselves to the first point; and if it shall be found, upon further consideration, that, as regards that point, this is either a case of the first impression altogether, or that in the generality in which it may be necessary to dispose of the question, it never has yet been decided, then it will be a very serious matter indeed for your Lordships to consider, because unfortunately you have no opinions of the Court below, even of any one branch of the Court, given upon that point. You have only the result of the decision, which is, that unless the Court had been of opinion upon both points in favour of Mr. Coutts, they could not have come to the decision at which they arrived. But in what way they consider it, or upon what grounds, you have no light whatever before you. Still less have you any light from the other branches of the Court. And yet, I confess, this is just one of these questions with which, if your Lordships should be obliged to deal, I should, more almost than upon any other, have wished to have had the opinions with the reasons, not only of those learned judges who decided the case, but of all the other judges. Although it will be attended with great difficulty, on the one hand, to dispose of that question here without sending it back, yet, on the other hand, I shall feel great reluctance to send it back, after all the proceedings that have taken place. We must deal with this embarrassment in the

best way we can; and the only opinion I can now give your Lordships for your government upon the present occasion, valeat quantum, is, that we ought to take time for further consideration.

LORD BROUGHAM.—My Lords, two questions are raised by this appeal which remain for decision, after laying out of view the one that has been disposed of by the appellants no longer urging any argument against the respondent upon the ground of misconduct, and after laying out of view the object of the cross appeal, into which I formerly stated that it would not have been fitting to enter here after what had passed below upon this part of the case.

Those two questions are, first, whether or not the obligations found by the interlocutors to be personal only, and ineffectual against singular successors in consequence of there being no words in the disposition which make them real burdens, nor any clause of irritancy affecting them, are thus personal and ineffectual; and secondly, whether the respondent, having taken the title from Nicol, the disposition to whom he had before prepared as law adviser and agent of the corporation, is not barred personali exceptione from taking advantage of the omission in the disposition, which omission is supposed to make the obligations ineffectual against singular successors.

In order to support the decree in the respondent's favour it is necessary to decide both these questions for him. If he is barred personali exceptione, then the case is given in favour of the appellants, and the first question does not arise; but as I am of opinion that he

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is not barred, it becomes necessary to dispose of the first question as well as of the second.

1. The first question is of great importance, and upon it we have not the benefit of any opinion given in the Court below. We only know that their Lordships must have considered it to be against the appellants, because they could not otherwise have arrived at the conclusion in the respondent's favour, affirming the interlocutor of the Lord Ordinary. We may also be aware that much more attention was paid in the argument, and probably in the decision, to the other points in the cause, and especially to those charges personally affecting the respondent's character, which are no longer matter of controversy.

Feeling the great inconvenience of sending back this case after the long litigation it has undergone, I should have been disposed to advise your Lordships to decide it now, but for the following considerations, of which I am bound to admit the force. There are some parts of the interlocutor under appeal not easily reconcileable with others or with the note annexed to it, and a view seems to have been taken in one of the two interlocutors materially different from that on which the other is rested. There is a difference of opinion, too, among very learned men regarding the effect of obligations relating to the subject of a feudal grant, but not declared real nor fenced by irritancies. Then the adjudged cases are silent on this point. It is one, nevertheless, of great moment, and which may arise in cases of the greatest importance. That it may be of daily occurrence is also certain; but then it may be said, if the law is once declared, no difficulty can in future exist in framing

conveyances accordingly. However, that declaration may affect existing titles, and on this account requires to be most maturely considered. Furthermore, the opinions said to have been delivered in the case of Preston v. Dundonald,[1] though the point was not decided, have also been considered to cast doubt upon the principles which must rule the present question; and the opinions of such eminent feudal lawyers as Lord Chief Justice Braxfield and Lord President Miller were on that occasion cited by one of the learned judges, as known to him privately. The learned judge states in so citing it, that he was the son-in-law of one of those learned persons, and had the opinion from him. But what I think must be admitted to leave no doubt as to the course your Lordships should take, is the case formerly brought here by appeal, and, after argument, remitted for further consideration. I allude to the case of Harley v. Campbell,[2] in which, although the present question did not arise, yet some doctrines nearly related to it and materially influencing its decision were in controversy; and while the learned judges below differed widely among themselves, (some doctrines being laid down, or rather assumed, which seem wholly irreconcileable with the established principles of law, and calculated altogether to unsettle those principles,) your Lordships, not being satisfied that the question had undergone sufficient discussion, sent it back in order to have the opinion of the whole Court. This opinion never was obtained, the case having been compromised.

With respect to the case of Harley against Campbell, it is to be observed that the learned and luminous

[1] 20 Dec. 1781 (Mor. 6.569); 6 March 1805 (No. 2. Pers and Real.)
[2] 1 Wilson & Shaw, 690; 6 Shaw, 679.

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judgment of Lord Gillies has met with no answer in the opinions delivered by the other judges, and also that Lord Gillies expresses great alarm at the doctrine laid down by one of the learned judges who deals with that question, to which the main part of Lord Gillies's argument applies. Lord Balgray goes to this extent, that you may annex to the enjoyment of the subject of a feudal grant any one condition whatsoever, so as to be binding upon the purchaser, provided that condition is not contra bonos mores. It is true that he says in another part of his judgment "any condition that "is legal, and not contra bonos mores;" but if by "legal" he means any condition which by law you may annex, that is only a truism; it is saying "you may "annex any condition to a feudal grant which by law "you may annex;" and therefore it must be taken that the learned judge means that you may annex any condition that is not invalid in itself as being contra bonos mores, or as promoting malum prohibitum, and illegal in that sense. This proposition, as Lord Gillies states, is remarkable, and is totally contrary to the whole acknowledged law upon this subject. For instance, an obligation to pay an uncertain and indeterminate sum of money is not illegal and is not contra bonos mores, and yet it is admitted on all hands that you cannot annex that condition.

I feel that it would not be right in these circumstances were I to recommend to your Lordships an immediate decision now, without having the opinion of the consulted judges. It will, however, only be necessary to take this upon the one point, and I shall state to your Lordships in what way all the parts of the cause ought to be disposed of, sending such questions only as are

necessary for obtaining the opinions of their Lordships upon that one point. To those questions I now proceed.

In order to raise these questions, let us take any of the provisions connected with the enjoyment of the property feued and not fenced by irritant clauses, as the obligation to lay a pavement opposite to the premises, (by which obligation the purchaser has been held bound,) or the prohibition to carry on certain trades, from which he is relieved generally by the finding assoilzieing him from the other conclusions not specified in the summons. These obligations are not made real burdens by any words in the dispositive clause; nor are they in the clause of engrossment in the sasine described as burdens, but only as conditions and provisions; nor are they in the precept of sasine. Not that if it be necessary to declare them real burdens, it would suffice so to describe them in the repetition clause or in the precept; for I take it to be clear that supposing the expressly making them real to be necessary, the dispositive clause must contain the imposition of the burdens by express words, though no technical form of expression may be required. Again, there are no fencing clauses at all affecting these provisions. Three questions therefore arise: First, whether or not those provisions are suâpte naturâ real without being made so in terms by the charter. Secondly, whether, if they are real, a fencing clause is necessary. Thirdly, whether an irritant clause would have been sufficient, supposing the provisions not to be made real by the express words of the grant. This third question may seem of less importance, because that irritant clause would clearly have bound singular successors, supposing always that

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the provisions are of such a nature as to be capable of annexation to feudal property, and not something wholly collateral to the nature of the property or incapable of being connected with it, as one of the learned judges in Harley v. Campbell (the Blythswood case) appears to have held the condition of employing the superior's agent to be. But even this third question (whether or not the fencing clause is of itself sufficient to realize the provision) may become material; because, if it be not sufficient, the superior has only his remedy of re-entry for the forfeiture, and the vassal might escape a performance of the obligation, whereas upon feudal principles he cannot refute, how unprofitable soever he may find the feu.

First,—It must be admitted on all hands that certain provisions must, in order to bind singular successors, be made real burdens; such are all those which in their own nature are personal and not immediately connected with the holding or its fruits. The payment of debts or of any sums of money are the obvious and frequent instances of this kind, and it is quite settled law that to affect the land such obligations must be declared to be burdens upon it. That the intention to make the burden real may be collected from an irritancy as well as from express declaration is said to be established by one case, Cumming v. Johnstone,[1] of which I shall have occasion to speak hereafter. It does not indeed follow that by declaring any such personal obligation a burden you can make it real; but if the obligation be of a kind which can be made real, this is only to be effected by such a declaration or something equivalent. Now, it

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[1] 7 Nov. 1666 (Mor. 10,234.)

was argued in the Blythswood case, as it has been argued here, that many decisions show the necessity of declaring any provision, of what nature soever, to be a real burden before it can be effectual against singular successors. But upon examining all the cases referred to, and indeed all the cases upon this subject which are to be found in the books, they appear to be of one kind, namely, where it was attempted to make a pecuniary obligation, as the payment of a given sum or of debts or some other money incumbrance, effectual against purchasers from the disponee. With the exception of the Blythswood case itself, I can find none in which the question arose upon the necessity of making the obligation ad factum præstandum a real burden. It by no means follows, however, that we are to reject the authority of these cases in disposing of the present question; on the contrary, they throw great light upon the principles which ought to govern the decision of it. They prove incontestably the necessity of making whatever obligation is to be cast upon purchasers apparent on the face of the title, and that not merely by giving him a general notice that there is such a burden, but by specifying its exact nature and amount; not merely calling his attention to it, and sending him to seek for it in a known and accessible repository, or even referring to it as revealed in the same repository, but of disclosing it fully upon the face of the title itself; nay, that the disclosing of the obligation on the face of the title is not sufficient, unless the title declares it to be binding upon the property. The obligation must not only be there, but it must be stated as a burden upon the subject of the grant; nothing must be left to conjecture or inference.

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Some of the earlier cases seem to hold less strictness necessary; yet in Cumming v. Johnstone (or Canham v. Adamson), where the reservation was personal in the dispositive clause, but was likewise contained in the sasine, it appears that there was an irritancy in the dispositive clause; and according to Lord Stair's report of the case, the decision turned upon that. And in the case of Marjoribank's creditors,[1] where there was no irritancy, both Fountainhall and Harcarses report, but the latter especially, shows that another clause indicated the granter to have regarded the dispositive clause as constituting a real burden. Besides, both those cases were decided before the reversal in this House of the judgment in the Duff[2] and Prestonhall[3] cases, which, though on another point, yet confirmed the opinion of those who held the greatest strictness necessary. In most of the cases where no real burden had been declared, the attempt was made to treat the reservation as a condition under which the grant was made, and upon which the feu was to be holden, and from thence the inference was drawn that the performance of the condition was the ground on which each successive owner, whether by descent or purchase, took the property; and so it was contended the obligation must be held to follow the property.

But the obvious answer to this has always been, that supposing the nature of the condition to be such as to enable a granter to annex it to his grant, he must show clearly that he has annexed it, otherwise the purchaser will take the property without knowing that it is burdened. In Martin v. Paterson (22d June 1808) it was clearly laid down, after great argument, that the

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1 14 June 1687, (Mor. 10,241.) [2] July 1719 (Mor. 10,244.)
3 13 April 1802 (see Mor. No. 2. Appendix, Personal and Real.)

intention " to constitute a real lien must be expressed " in the most explicit, precise, and perspicuous manner," and that " where the clause admits of a doubt, onerous " singular successors shall not be affected." There the lands were disponed " under the burdens, provisions, " and conditions following," and then it was provided that certain sums should be paid by the disponees and their heirs, the sasine being " under the same burdens, " provisions, and conditions." But the debt was not held to be real.

Now, is there any thing in the nature of obligations connected with the property granted which precludes the necessity of declaring them real burdens? This question will best be answered by inquiring whether it is merely the personal nature of such obligations as we have been considering in the cases referred to which makes it necessary that they should be declared real in the titles. Plainly it is rather the security of the purchaser which is considered. The personal nature of the obligations does not prevent them from being made real, and words casting them on heirs and successors are quite consistent with the intention that they should be real. But unless the granter has signified that intention clearly, the law does not hold purchasers bound to know that it was intended, for it is possible that he might not have so intended; and the rule laid down in Martin v. Paterson considers it enough if this " admits of a " doubt." Then it is very possible that an obligation, though connected with the property, may be intended only to be imposed upon the disponee and his heirs.

I pass over for the present an important peculiarity of this case, namely, the different manner in which different conditions equally connected with the property are stated and fenced, because I am now dealing with

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the general question. But supposing we had merely one condition, or class of conditions, connected with the property, as the obligation to make a foot pavement near the premises, or not to carry on a certain trade on the premises, it can hardly be denied that these might by possibility be intended only to affect the disponee and his heirs, though connected with the enjoyment of these premises. An obligation to pay a sum of money out of the rents and profits of the land granted is nearly as much connected with the property as an obligation to enjoy it in a particular way; and yet such an obligation would not affect purchasers without being made real by express provision. There should seem, then, to be nearly the same necessity for expressly imposing the obligation ad factum præstandum upon the property granted as for imposing the pecuniary obligation; a necessity arising from the same regard to the rights of purchasers, which forms the governing principle of the law in dealing with the question. No doubt there is this difference, that the purchaser, from seeing that the obligation is more nearly connected with the property in the one case, may conceive, and may be expected to conceive, that it is more likely the intention of annexing it to the subject of the grant should exist than in the other case. But that scarcely seems enough; the rule is, that nothing at all must be left to conjecture. The purchaser, from seeing the performance of the pecuniary obligation called a condition of the grant, nay, a burden on the subject granted, and that the sasine is to be given only under that burden, and that it is always to be inserted in subsequent infeftments, may well suppose,—indeed can hardly avoid supposing,—that there was an intention to fix it upon the land. Nevertheless, if no clause is added actually fixing

it in language which admits of no doubt, the burden is not real, and he is not bound. It is safer to hold, that the difference between the two kinds of obligations, as regards this argument, is only in degree, it being only somewhat more improbable in the one case than in the other that the granter intended the obligation to be limited, and not to follow the grant. If so, it seems more safe likewise to hold, that unless he has distinctly declared his intention of attaching the obligation to the subject of the grant it shall not be effectual against purchasers.

In truth, the distinction between different kinds of obligation, when it is closely examined, does not carry us very far in the argument; it will not suffice to lay much weight upon. All conditions annexed to the enjoyment of property, be they merely pecuniary, or be they connected more immediately with the use of it, are to be strictly construed as against the granter and in the grantee's favour, but especially as between the granter and parties who have no privity of contract with him, and can therefore only tell by their titles what was the nature of the grant—how much was given, and how much reserved. They have an absolute right, unless in so far as they are fettered; and no fetters are to be raised by implication or conjecture. Some cannot be imposed at all, as being inconsistent with the nature of the property and repugnant to the grant; no declaration, no provision, will suffice to create these. Others are consistent with the nature of the property, and may be imposed; but they must be unequivocally imposed, so that the purchaser may know what he buys, and whether he is fettered or free.

Secondly. But suppose it should be held that those obligations are suâpte naturâ real,—that they are such as

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by merely being declared conditions of the grant become real without more; then the question arises, whether or not an irritancy is necessary to render them effectual against singular successors? And I think there can be no doubt that it would be unnecessary; for the supposition must be, that the mere nature of the obligations is such as at once indicates, and indicates conclusively, the intention of the granter to make them real burdens; and they are therefore real, without any fencing clause. The purchaser being bound, decree may be obtained against him as if he had been a party to the feu contract. No forfeiture may accrue from his breach of the condition; but the irritant clause can only, I think, be considered as a cumulative remedy, and not as at all necessary to bind the singular successors.

Thirdly. Supposing it should be held that the obligations in question are not suâpte naturâ real without more, would an irritancy added be sufficient to make them effectual against purchasers without any declaration imposing them as burdens on the property? That this irritant clause would give the superior a right to re-entry upon a breach seems undeniable; for we cannot apply to this subject the same rules which have been introduced in construing the act of 1685, and hold that a forfeiture plainly denounced for certain acts or certain failures is inoperative, unless the conveyance directs the requisitions or prohibitions against the estate in terms. But, without going to this length, it is possible to hold that the forfeiture may be sufficiently provided for, and yet that no other remedy should be competent to the superior; that there being no express imposition of the burden upon the property, the purchaser is not answerable farther than the irritancy provides, that is, by forfeiting the feu.

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In his learned and able judgment on the Blythswood case, Lord Gillies considers the irritancy as not sufficient of itself to make the burden real; and although his Lordship questions the possibility of making real, by any declaration or fencing clause, such a condition as was there sought to be imposed, yet his argument also turns upon there being no words in the charter making it real, though there undoubtedly was an irritancy. Against this view, however, it deserves to be considered, that what is required to make a burden real is the plain manifestation of the granter's intention to connect it with the subject of the grant; and that a provision cutting down the title to that subject, and securing its reversion to the granter whensoever the condition shall be broken, appears an effectual mode, perhaps the most effectual mode, of manifesting the intention.

It may further be observed, which would perhaps reconcile Lord Gillies's opinion with that towards which I venture to express my leaning, that in the Blythswood case the irritancy was imperfect; it was only a forfeiture of the rights granted in contravention of the fetter, and not of the contravener's right, — not a return of the feu to the superior; and on this much of his Lordship's argument turned. Whereas the question now under consideration applies to a clause resolving, as well as irritating.

In truth, the origin of irritant clauses is derived from this source. They are contrived in order to maintain and perpetuate the granter's connexion with the property, into what hands soever it may pass; and so to realize, to infix as it were in the property, the conditions on which the grant was first made. They were resorted to for this purpose, in order to create perpetuities both in England and Scotland. In Scotland

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they were at one time held, but, according to the soundest opinions, erroneously held, sufficient for this purpose at common law; but as they seemed to introduce a kind of qualified right of enjoyment inconsistent with the nature of property, they were soon found to require the aid of statutory enactment. In England the same experiment had been tried, and had failed, about half a century earlier, to say nothing of the attempt of Mr. Justice Richel in Richard the Second's time, mentioned by Littleton. Corbett's case, Mildmay's case, and Mary Portington's case, are all cases of destinations with irritancies, or rather resolutive clauses, for the forfeitures are levelled at the attempts to bar remainders; and the rule has ever since been well established, that such forfeitures, the condition being not repugnant to the nature of the estate, though good if they destroy the whole estate and let in the reversion, or carry the estate to third parties, are ineffectual to carry on the estate and let in the remote remainders.

It is now necessary to consider more particularly the different obligations in this charter and the judgment appealed from as applicable to each. The obligations specified in the interlocutor and the note subjoined are the granting bonds, the paying part of the expense of making the square, the laying a foot pavement and making a railing opposite to the premises granted, the laying a pavement at the west end of the premises, and the paying part of the expense of the common sewer. This last finding rests not on the obligation in the disposition, but on the proceedings of the respondent, and his use and occupation of the sewer; and to it I see no objection; it forms the subject of the cross appeal. The other findings require consideration. In the summons there are conclusions referring in general terms

to the other obligations in the disposition, and from all of those the respondent is assoilzied also in general terms. The most material of these obligations is that of keeping the gutters and walls in proper repair, maintaining the roofs of the cellars under the street, and not carrying on certain trades noxious, or supposed to be noxious.

The interlocutor of the Lord Ordinary originally found that none of the above obligations were effectual against the purchaser, because none of them were fenced with irritancies nor contained in Nicol's infeftment. There appears to have been some oversight or clerical error in the statement as to their not being in the infeftment. However, the second interlocutor, the one affirmed by the Court and now appealed from, proceeds upon the assumption that irritancies are not necessary; and also that it is not necessary the burden should be declared real; for it finds the obligation to lay a foot pavement opposite the premises effectual against the purchaser, "though neither declared a real burden nor "protected by an irritancy;" and upon this ground, that it is an obligation ad factum præstandum, and "may be held a condition of the grant in terms of "several decisions quoted in the cases." I have already commented upon this argument generally, both on the distinction taken between obligations pecuniary and ad factum præstandum, and on the view which regards them as conditions of the holding. The reference here made, however, to "several decisions quoted in the "cases" must arise from some mistake; at least no such decisions can be found, and certainly there are none quoted in the printed cases, except Harley v. Campbell, which was never finally disposed of; and if it were, would not rule this point, inasmuch as there was

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an irritancy in that disposition to the extent at least of affecting the conveyance to the purchaser.

The interlocutor holds the obligation to pay part of the expense of making and keeping up the square as neither made real by the charter nor capable of being so made, on the ground of its being an obligation to pay an indefinite sum of money. Nor can there be any reason to question the soundness of this position according to the authority of all the cases, especially of those relating to the payment of the granter's debts, where it was found that the specification of the sums of money without the names of the creditors, and even the specification of both sum and names in a schedule referred to, but recorded in another register, or even if recorded in the register of sasines itself, was insufficient to make the burden real, though declared such in express terms, and even fenced with irritancies. On this point I would refer to Stenhouse v. Innes, 21 Feb. 1765;[1] Chalmers v. the Creditors of Redcastle, 27 Jan. 1791; Douglas, 1765; Place v. M'Nab, 24 Feb. 1811; and several earlier cases.

But surely a strong illustration is derived from hence of the view already taken, when we find how difficult it is to distinguish upon principle the obligation ad factum præstandum from the indefinite pecuniary obligation. Had the obligation, which the interlocutor finds to be not only not real, but not capable of being made real, been to make the inclosure and railing, that is, to defray the whole expense by doing the thing, it must have been found to be effectual against the purchaser if the other finding with respect to the pavement is right. There is, however, some slight difference in the two cases,

[1] Mor. 10,264.

arising from the one being to do a given thing defined, and the other being to pay a given proportion of an expense not ascertained, and capable of being ascertained only after the thing is done. But there is no difference at all so far as regards definiteness between the obligation to do a given thing, e. g. such as laying a pavement, and the obligation not to do a given thing, e. g. such as carrying on a certain trade, and yet the interlocutor finds the former binding on purchasers as a condition of the grant, and the latter not binding. Nay, an obligation equally affirmative with that of the foot pavement (if any thing turns on the difference between positive and negative, or if the latter be treated as in the nature of servitude,) is found not to be binding, though of exactly the same description as regards its connexion with the property, namely, the obligation to make and keep in repair gutters, walls, roofs, &c., from all which the respondent is assoilzied. It seems impossible that these findings should stand together, (I speak this with the most profound and unfeigned respect for the very able and learned Judge whose attention was probably called more particularly to the controversy respecting the respondent's conduct,) and accordingly as we shall ultimately be enabled to answer the questions before stated, one or other class of these findings must be altered. If the obligations are held not to be effectual, though in some sort inter naturalia feudi, because not declared real nor fenced with irritancies, the respondent ought to be assoilzied from the conclusions respecting the pavement, the only difficulty here being that he has not cross-appealed against that part of the interlocutor which may make a remit necessary.

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If these obligations shall be held real, then he must also be found affected by the obligations relating to the gutters, the cellars, the forbidden trades, &c. The finding respecting the expense of inclosing the square must stand whichever way those questions may be answered. So must the finding that the obligation to lay a foot pavement at the west end of the premises is not binding upon the purchaser, for, on examining the plan and the description, it is clear that the interlocutor is right in holding that obligation not to be in the disposition at all. There can also be no reason for shaking the part of the interlocutor respecting the obligation to grant personal bonds for payment of the duties and ground rents and performance of all other conditions. That finding is general and absolute, although I observe that the part of the note which refers to it intimates that the respondent may be bound by this clause to grant a personal bond for payment of yearly duties. Whether he is or not by the terms of the charter so bound, will depend upon the former question as to the realization of a condition adfactum præstandum. But it may further be doubted if any authority can be shown for the power of making by any clauses such an obligation as this real. The note seems to hold it not only possible, but that it has been accomplished in the present charter; however, the finding is the other way, and I incline to think right. Whether any distinction can be drawn between an obligation like that of laying the foot pavement, and an obligation to secure the feudal render by personal bond, is another question. I confess I can see no material difference between the two obligations as regards their connexion with the subject of the feudal grant.

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It remains to take notice of one very material circumstance in this charter, as bearing closely upon the argument and upon the principles which have governed the only decided cases that touch it. There are, beside those obligations to which we have been adverting as left unprotected by irritancies and not declared real burdens, several which are fenced and realized in express terms. The obligation to erect buildings, the most important by far of the whole, is fenced by an irritancy; in fact, by a clause in substance both irritating the right of the purchaser and resolving that of the intermediate disponee, for it carries the feu back to the subject superior. The feu duties are declared to be real burdens on the ground feued and houses to be built, which if these were proper feu duties would seem to be a superfluous provision; and there is an irritancy and forfeiture to the superior without declarator if two years remain in arrear; a provision probably introduced as an attempt to avoid the necessity of a declarator, and preclude the right of purging at the bar.

Now, when the purchaser sees upon the investiture some obligations thus realized by express declaration or fenced by irritancies, and these moreover the obligations of most importance, as well as those where nonperformance is the least likely to happen through oversight, while he sees others, generally speaking of an opposite description, left vague and naked, without any declarations and any protection, it seems extremely natural for him to conceive that there may have been an intention to leave the one set personal, while the other were made real. But the cases, and especially the later ones, as Martin v. Paterson in 1808, declare that the purchaser must see the burden distinctly and unequivocally levelled

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at himself by being laid upon the property, and they hold him entirely protected if there be "any room for "ambiguity."

It is to be noted, that the first irritancy regards the not building; and there is no reference in it to the houses falling down, being burnt, or in any way requiring repair or rebuilding; that rests on simple obligation, and is not fenced. But I understand no question to be raised upon that condition, and upon the general finding, which seems to assoilzie the respondent from the conclusion regarding it.

2. This peculiarity in the charter, as it is also to be found in the articles of roup, naturally enough introduce the second question, Whether or not the respondent is barred personali exceptione? Upon this your Lordships need not be long detained. It is clear, at all events, that this bar cannot exist as to any of the obligations, which are of a nature incapable of being made real by any clauses in the conveyance. If no skill or attention could have made those effectual against any strangers to the feu contract, the purchaser happening to have prepared it never can make them binding upon him. But there seems no ground for holding him bound in respect of any of the obligations when the facts of the case are considered. Fraud or misconduct of any kind is now out of the question; the only alleged ground is negligence. Now, it does not appear that he was bound to make all the burdens real when the corporation employed him to frame the conveyance. They had not in their other conveyances of a similar description taken that course. A committee of their number watchfully superintended the whole of these proceedings. The articles of roup were the instruc-

tions upon which the respondent was to frame the disposition; for they were the advertisement of the conditions upon which the disponees made their biddings. These articles declared some burdens real in terms, and fenced others with irritancies, while some were left personal and unprotected. Was the respondent bound to know that his employers intended the whole to be made real? He could only be so bound, if it was impossible, or next to impossible, that they should have meant to leave some of the obligations only binding upon the disponees and their heirs. But it was not only not impossible, it was far from unlikely, that they should have had such a distinction in view. Making too many real burdens, denouncing too many forfeitures, had a tendency to prevent bidders from coming forward, for it made the title less marketable in the first purchaser's hands. It was, therefore, not very improbable that the corporation should intend only to make the most material of the obligations real; those, to wit, respecting the erection of buildings and payment of feu duty, on which the security of their property, of their interest as superiors, mainly depended.

The proof here lies emphatically upon the corporation; for design—contrivance—misconduct of any kind is out of the question; and they can only succeed in barring the respondent by showing manifest negligence or want of skill in executing their instructions. I am of opinion that they have not done this in such a way as to preclude him from taking advantage of any defect in the charter which could have been available to any stranger purchasing from the disponee. It might well admit of doubt whether he could be barred, supposing he had framed the charter with a view to make the

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burdens all real, and believed he had effected this, and then it was found, after much litigation and many arguments, that the words used were insufficient for the purpose. In the end he is found to have mistaken the law, but on a point very far from clear, and on which much diversity of opinion has prevailed among learned men, and even on the Bench. This cannot be called either negligence or want of skill; and it may be questioned whether the personal exception would apply where neither exist. However, there is no occasion for going into this view of the matter; upon the other grounds it seems clear enough that he is not barred.

It therefore, my Lords, appears to me, as I stated in the outset, that the second question being decided in favour of the respondent, it is necessary for your Lordships to remit this case to the Court below, with instructions to take the opinion of the consulted Judges upon the three questions I have just suggested. I should, therefore, humbly submit to your Lordships the propriety of retaining the cause here till the answers shall be received from the Court below to these questions, and your Lordships have those answers before you, and then of disposing of the cause according as your Lordships shall find those answers, and shall adopt or differ from the view taken by the Court below. Wherefore I would now move your Lordships that the further consideration of this cause be postponed, with a view to a remit to the Court of Session.

LORD BROUGHAM.—I stated to your Lordships on a former day, on moving a remit to the Court of Session in this case, certain questions which it would be neces-

sary to submit to that Court; and those questions are as follow. I have drawn them out separately, and I have added a fourth question, in order to call the attention of the Court below to the sense in which irritancy may be used in answering the three first questions.

The first question is:—"Are any of the obligations of the feu charter, and which of them, of such a nature that they are binding upon singular successors without either being declared real burdens or being fenced by irritancies?"

The second—"If any one of the obligations is such as to be a real burden without being so declared, is an irritancy necessary to make it binding upon singular successors?"

The third—"Are any of the obligations, and which of them, of such a nature that the irritancy would not make them binding upon singular successors as real burdens without words declaring them real burdens?"

And then the question which I have added, though I did not when I last mentioned the case, think it necessary, is this:—"Is there any difference, and what, between the effect of an irritancy which forfeits the right of the singular successor only, and one which gives the feu back to the superior, in making the obligation to which it is annexed binding upon singular successors?" I have stated that the fourth question is added with the view of directing the attention of the Court to the matter of it in considering the other three questions; and I should hope that it may not be necessary to subject the parties below to the expense of printing any additional papers in the cause, for I find in a case which was before your Lordships, being sent back in the year 1826, that it was

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"ordered and adjudged, that the cause be remitted to "the Second Division of the Court of Session, to state "their opinion whether that Court by the law of Scot- "land has any jurisdiction," and so forth, and then a direction follows, "that the Court take that question "into consideration in the following manner;" and it appears from the certified copy of the proceedings of the Court on the remit that on the 10th of March 1831 the Lords of the Second Division pronounced an interlocutor, appointing parties to lay the printed papers before the Lords of the First Division. If what they meant was, not to lay other printed papers, but "the" printed papers, and if the word "the" has not been inserted by mistake, then the anxious wish I have to avoid as far as possible further expense to the parties below will be accomplished, because they will be able upon the papers in the cause to obtain the opinion of the First Division and of the consulted judges.

The House of Lords ordered and adjudged, That the said cause be remitted back to the First Division of the Court of Session in Scotland, to consider and state to this House their opinion upon the following questions:—

1. Are any of the obligations in the feu charter, and which of them, of such a nature that they are binding upon singular successors without either being declared real burdens or being fenced by irritancies?
2. If any one of the obligations is such that it may be a real burden without being so declared, is an irritancy necessary to make it binding upon singular successors?
3. Are any of the obligations, and which of them, of such a nature that an irritancy would not make them binding upon singular successors as real burdens without words declaring them real burdens?

4. Is there any difference, and what, between the effect of an irritancy which forfeits the right of the singular successor only, and one which sends the feu back to the superior, in making the obligation to which it is annexed binding upon singular successors?

And the said First Division of the Court is hereby required to take the opinion of the Judges of the other Division of the Court, and of the Permanent Lords Ordinary, upon these questions; and for this purpose to direct the printed papers in the cause, including the printed cases laid before this House, to be laid before the Judges of the other Division and the Permanent Lords Ordinary for their opinions in writing thereupon; and this House does not think fit to pronounce any judgment upon the said appeals until after the whole Judges of the Court of Session, including the Lords Ordinary, shall have given their opinion upon the questions hereby referred to their consideration according to the directions of this order.

ALEXANDER DOBIE—ANDREW MACRAE, Solicitors.