

part of it to which the conclusions of proving the tenor relate. (2) As the said alleged report is not duly authenticated, and is *ex facie* an incomplete and unfinished document, it is not one which can competently be made the subject of a proving of the tenor. (3) The pursuer has not condescended on any adminicles relevant or sufficient to instruct the tenor of the writ sought to be set up, and no such adminicles exist. (4) The present action being incompetent, or otherwise irrelevant or unfounded, decree as concluded for should be refused, and the defender assolizied from the conclusions of the summons, with expenses."

Authorities cited:—7 Macph. 956; 5 B. S. p. 98; E. I. 4, 15, 14; E. Comm. p. 299; Dickson on Evidence, 1, 299.

At advising—

LORD BENHOLME—My mind is clear that we should sustain the adminicles and find the tenor proved. The report is impugned by the defender, on the mere supposition that it was not authenticated. He does not say the docquet is wanting, though there is room for it, or that there never had been a docquet there. Then we have approbations which showed the Court thought it could be sustained as an original sub-valuation. There are also copies, and it is strange parties would take the trouble to copy a worthless document.

The other Judges concurred, and the Court sustained the adminicles and found the tenor proved.

Counsel for Pursuer—Rutherford and Solicitor-General. Agent—A. Howe, W.S.

Counsel for Defender—Duncan. Agents—M'Niell & Sime, W.S.

Saturday, May 17th.

FIRST DIVISION.

[Lord Mure, Ordinary.]

DICK LAUDER v. SHIELS.

Feu—Conditions of feu—Writ of confirmation—Competency—Titles to Land Consolidation Act, §§ 10, 98, § 100.

The heir in possession of an entailed estate was empowered to grant feus thereof by an Act of Parliament, which imposed certain conditions under which the feus were to be granted. The Act also provided that these conditions were to be inserted in all subsequent investitures, and that the heir of entail omitting to do so should incur an irritancy. *Held* that the provisions of the 10th, 98th, and 100th sections of the Titles to Lands Consolidation Act, 1868, did not debar the superior from referring to the Act of Parliament in a writ of confirmation.

This was an action of declarator, irritancy, and removing, at the instance of Sir Thomas North Dick Lauder, heir of entail in possession of the estates of Grange, against Daniel Shiels, Edinburgh, who was proprietor of a certain portion of the said estate, Sir Thomas North Dick Lauder being his superior. The circumstances which gave rise to the case were as follows:—By the Act 6 Geo. IV. c. 28, entitled "An Act to enable Sir Thomas Dick Lauder, Baronet, and the heirs of entail succeeding

to him in the estate of Grange, to grant feus thereof upon certain terms and conditions," the said Sir Thomas Dick Lauder and the heirs of entail succeeding to him and in possession of the said estate were authorised to grant feus upon the conditions therein set forth. Section 4 of the Act provided that every charter or contract by which a feu right in the said lands was granted should contain the following clauses:—(1) a clause declaring it to be incompetent for the vassal to assign the precepts of sasine contained in the feu-charters or feu-contract; (2) a clause declaring it unlawful to interject any mid-superior; (3) a clause providing that the feu-duties and casualties should be paid to the heir of entail in possession entitled to receive the rents for the time being; (4) a clause providing that the conveyances and infeftments should be made out, taken and extended by the agent of the heir of entail. Then followed a declaration that any sale or conveyance inconsistent with these conditions should be null and void; and then there was this provision:—"All which clauses, and the conditions, declarations, and provisions thereof, with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow upon such feu-charter or feu-charters, or feu-contract or feu-contracts, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feu or feus, otherwise such feu-charter or feu-charters, feu-contract or feu-contracts, and such sasines, conveyances, transmissions, charters, and investitures of any such feu or feus, shall not only be void and null, but the said Sir Thomas Dick Lauder, and every other heir of entail in possession of the said entailed lands and estates, omitting to insert the same in the original feu-charter or feu-charters, feu-contract or feu-contracts, or omitting to repeat the same in the subsequent charters or other investitures granted by him, or them, of such feu or feus, shall thereupon, for himself or herself only, incur an irritancy, as in a case of contravention of the said entail; and, in the like manner, the said vassal or vassals, or other person or persons in the right of the said feu or feus, contravening any of the conditions, declarations, and provisions above expressed, or omitting to insert the said clauses in any instrument or instruments of sasine to be taken of the said feu or feus, or in any of the transmissions or conveyances thereof, such sasines, transmissions, and conveyances shall not only be void and null, but such vassal or vassals, or other person or persons in right of the said feu or feus, shall forfeit and lose all right and title thereto, and the same shall belong to the said Sir Thomas Dick Lauder, or the heir of entail in possession as said is, in the same manner as if such feu or feus had never been granted."

In 1865, Sir John Dick Lauder feued a portion of the estate to Daniel Mackay, by whom it was disposed to William Alexander Aikman, who in turn conveyed it to the defender. In the conveyances of the subject, and also in the infeftments of Messrs Mackay and Aikman, the provisions of the Act of Parliament were observed. The defender, however, refused to take a writ of confirmation containing a reference to the Act of Parliament, and in terms similar to the writ of confirmation of the disposition by Mr Mackay to Mr Aikman.

The defender consented to a clause being inserted in the writ to the following effect, "With and

under the whole provisions and conditions contained in the said feu-contract, dated and recorded as aforesaid," but refused to allow any reference to the Act of Parliament.

The following was the writ of confirmation proposed by the pursuer:—

"I, John Bruce, Writer to the Signet, Edinburgh, commissioner for Sir Thomas North Dick Lauder of Grange and Fountainhall, Baronet, heir of entail in possession of the estate of Grange and others, immediate lawful superior of the subjects and others disposed in this disposition, conform to factory and commission by the said Sir Thomas North Dick Lauder, dated the 11th day of May, and additional factory and commission by him, dated the 15th day of July, and both recorded in the Books of Council and Session the 18th day of said month of July, all in the year 1867, whereby I am empowered to execute these presents, hereby confirm this disposition in favour of Daniel Shiels, one of the partners of Messrs Robert Shiels & Son, wholesale confectioners in Edinburgh, as vassal in room and place of William Alexander Aikman of the Royal Bank of Scotland, Edinburgh, entered by the writ of confirmation granted by me, as commissioner foresaid, in favour of the said William Alexander Aikman, dated 3d January 1868, but only in so far as consistent with the feu-contract entered into between the now deceased Sir John Dick Lauder of Grange and Fountainhall, Baronet, and Daniel Mackay, clothier, Edinburgh, dated the 16th day of September and 16th day of October, and with warrant of registration thereon on behalf of the said Daniel Mackay, recorded in the New Particular Register of Sasines, &c., kept for the Sheriffdom of Edinburgh, &c., at Edinburgh, the 6th day of November, all in the year 1865, and with the statute therein mentioned, and with the said writ of confirmation, and with the said Sir Thomas North Dick Lauder's own rights; and declaring that these presents are granted by me as commissioner foresaid, always with and under the obligations, conditions, declarations, and provisions specified and prescribed in an Act of Parliament, dated the 22d day of June 1825, entitled 'An Act to enable Sir Thomas Dick Lauder, Baronet, and the heirs of entail succeeding to him in the estate of Grange, to grant feus thereon upon certain terms and conditions,' and in the said feu-contract recorded as aforesaid on 6th November 1865."

The Lord Ordinary (MURE) pronounced the following interlocutor:—

"8th February 1873.—The Lord Ordinary having heard parties' procurators and considered the closed record and productions, Finds that in the special circumstances of this case the pursuer is entitled to have the conditions and declarations under which the fee in question was granted which are prescribed by the private Act of Parliament founded on, referred to as conditions of this investiture, *ex facie* of the writ of confirmation to be granted by him, and that either in some such terms as those contained in the declaration at the end of the draft writ of confirmation printed as an appendix, page 14 of the record, and proposed to be deleted by the defender, or by inserting a reference to that Act of Parliament, as well as to the original feu-contract, at the marginal addition proposed to be inserted in the draft writ by the defender, in lieu of the above declaration; and appoints the case to be put to the roll that parties may arrange in which of the forms the conditions

are to be referred to, and reserves in the meantime all questions of expenses.

"*Note.*—If the Lord Ordinary was now called upon to decide whether the pursuer by granting a writ of confirmation in the precise form given in Schedule V. of the Titles to Land Consolidation Act, 1868, and without mention of or reference to the conditions and declarations of the Private Act of Parliament under which alone the estate is authorised to be feued, would thereby commit an irritancy of the entail in respect of his non-compliance with the provisions of the Private Act, he would be disposed to hold that no such irritancy had been committed, provided the whole clauses, burdens, and conditions prescribed by the Private Act were validly referred to, in terms of the 10th section of the Act of 1868, in the deed or instrument confirmed by the writ of confirmation. This, however, in the view the Lord Ordinary takes of the case, would not be an altogether satisfactory solution of the question raised between the parties; because any opinion entertained, or even any judgment pronounced by the Lord Ordinary as to the validity of the reference contained in the deed to be confirmed, would not, he conceives, be *res judicata* in a question with an heir of entail challenging the validity of the reference, or seeking to have an irritancy declared in respect of the omission to comply with the requirements of the Private Act. In these circumstances, it appears to the Lord Ordinary that any reasonable proposal made on the part of an entailed proprietor, who is only authorised to feu under the provisions of a Private Act which is not specially repealed by the Act of 1868, to have the conditions of the Private Act referred to in the writ by which the vassal's title is to be completed, so as thereby to avoid the risk of after challenge, is one which may be given effect to, provided the proposed reference will not be prejudicial to the rights and interests of the vassal, and is not expressly prohibited by the provisions of the statute under which the writ of confirmation is to be expedited.

"In the present case it is not alleged in the record, and it was not suggested on the part of the defender at the debate, that his rights would in any respect be prejudiced, or that any injury would be sustained by him by the insertion in the writ of confirmation of the words proposed by the pursuer, which are substantially the same as those inserted in the writ by which the title of the last entered vassal was confirmed in January 1868, so that the solution of the question here raised appears to the Lord Ordinary to depend upon whether the addition of any such reference as that here proposed is prohibited by the Consolidation Act of 1868; and although the point is not free from difficulty, the Lord Ordinary is not satisfied that the Act of 1868 contains any such prohibition.

"The clauses on which the question mainly depends are sections 98 and 100. They are, however, not distinct upon the subject, and as the main object of the Act was merely to consolidate the clauses in the earlier statutes, under which it was not considered incompetent to refer to such conditions in a writ of confirmation, as the titles in the present case show, it would, the Lord Ordinary conceives, require some very express prohibition to the effect that the superior shall in no circumstances be entitled or allowed to alter the form of the writ, or to insert a reference to burdens, or to

the conditions of a Private Act of Parliament, to exclude such a reference, if reasonable in itself and necessary in the view the superior takes of the obligation prescribed by the Private Act to protect him from challenge at the instance of any of the heirs of entail, on the ground that he had committed a contravention of the entail.

"Now, the Lord Ordinary does not think that either of these sections must necessarily be read as containing a prohibition against any such alteration. Both sections, on the contrary, rather appear to him, by implication at least, to admit of reasonable alterations being made on the examples given in the schedules. Because, although by section 98 it is made competent for a superior, and he is taken bound in one view, to confirm a conveyance in one or other of the short forms given in the Act, he is not taken bound to do so in the precise words of these forms, but only as nearly as may be in the forms given. While section 100 expressly authorises such necessary alterations to be made on the forms given as the denomination or nature of the particular charter or writ may require, and with reference to real burdens and conditions all that it provides is that 'it shall not be necessary' in writs of confirmation or resignation to insert or refer to burdens or conditions if the same are inserted in or validly referred to, in terms of the 10th section of the Act, in the deed or conveyance on which the writ is engrossed. But as the Lord Ordinary reads these sections it is nowhere declared to be incompetent or illegal to insert a reference to such conditions, and it therefore appears to him that in this case a reference clause to the conditions of the Private Act may be allowed."

Subsequently the Lord Ordinary pronounced this interlocutor:—

"1st March 1873.—The Lord Ordinary having heard parties' procurators in terms of the appointment contained in the interlocutor of the 8th of February, and made avizandum, approves of the draft writ of confirmation printed at page 14 of the copy printed record, No. 44 of process, as now adjusted in black ink, as the form of the writ of confirmation to be granted in favour of the defender, and sists process for ten days, that the defender may complete an entry to the subjects in question by writ of confirmation in terms of the said form; and upon that being done, appoints the case to be put to the roll that parties may be heard as to the terms of the interlocutor to be pronounced disposing of the action, and upon the question of expenses. One word delete.

"Note—The Lord Ordinary has adopted the general outline of the form of writ proposed by the pursuer in preference to that with the marginal additions proposed by the defender, because the former appears to him to be in strict conformity with the form given in the 'Titles to Land Consolidation Act, 1868,' down to the words 'and with the said Sir Thomas Dick Lauder's own rights;' and he has restricted the additional declaration to the words 'obligations, conditions, declarations, and provisions,' because these words appear to him sufficient to cover everything which the Private Act prescribes, and it is with reference to the statutory requirements alone of that Act that the pursuer maintained the propriety, as a matter of safety, of making an addition to the form of writ given in the General Act. In this view of the matter, the line at the end of the declaration beginning with

the words, 'and in the said feu-contract,' &c., might have been omitted; but as the defender, in the form proposed by him as noted in one of the marginal additions, did not object to some such reference to the original feu-contract, he has allowed these words to remain."

The defender reclaimed.

At advising—

LORD PRESIDENT—Sir Thomas Dick Lauder is the heir of entail in possession of the estate of Grange, and he is empowered to grant feus of that estate by an Act of Parliament. He can only grant these feus, however, on condition of complying with the provisions and limitations of the Act, and these are both numerous and important. One condition is that the conditions, declarations, and provisions of the Act, "with this present clause or provision respecting the same, shall be repeated in the instrument or instruments of sasine to follow upon such feu-charter or feu-charters, or feu-contract or feu-contracts, and the same shall also be repeated in all the after conveyances, transmissions, charters, and investitures of the said feu or feus: otherwise such feu-charter or feu-charters, feu-contract or feu-contracts, and such sasines, conveyances, transmissions, charters, and investitures of any such feu or feus, shall not only be void and null, but the said Sir Thomas Dick Lauder, and every other heir of entail in possession of the said entailed lands and estates omitting to insert the same in the original feu-charter or feu-charters, feu-contract or feu-contracts, or omitting to repeat the same in the subsequent charters or other investitures granted by him, or them, of such feu or feus, shall thereupon, for himself or herself, only incur an irritancy, as in a case of contravention of the said entail." Now, it cannot be doubted that, under the older law, in any charter of confirmation of any feu of these lands it would have been necessary to insert the provisions of the said Act of Parliament in full. But this very important alteration was made in the law, viz., that instead of inserting any such limitations and conditions, it was sufficient to refer to them as contained in some previous title to the same estate, recorded in some public record, and this provision was repeated in the 10th section of the Titles to Land Consolidation Act of 1868. So it is not made a matter of doubt that in a charter or writ of confirmation it would be sufficient to refer to the conditions and limitations of the Act as set forth in some recorded deed. But the further question arises, Whether, by the 98th and 100th sections of the Titles to Land Consolidation Act any such reference even is dispensed with in a writ of confirmation? Now, for certain purposes it is provided in these sections that where the deed to be confirmed contains burdens, conditions, or limitations, or refers to a title in which they are contained in manner set forth in the 10th section, it is not necessary either to repeat or to refer to them in the writ of confirmation. But although it is not necessary, the question still remains, Whether the conditions imposed upon Sir Thomas Dick Lauder by the Act of Parliament under which he feus his lands do not render it incumbent upon him to do so? Now I do not think it either necessary or expedient to give an opinion upon that point. All that it is necessary to say is, that as there may be a risk to the heir in possession if he grants a writ of confirmation without such a reference, it is not unwarrantable on his part to introduce such a clause into

the writ of confirmation. If there is any risk at all to the superior, such a proceeding is not unwarrantable unless it is prejudicial to the interests of the vassal, and no such thing is suggested here. The only plausible ground of objection stated for the vassal was that the proposed writ of confirmation was not in fair compliance with the requirements of the statute. But I am of opinion that this objection is untenable in face of the peculiar position in which the superior is here placed.

Although, however, it is allowable under a fair construction of the statute to amplify the writ of confirmation when the superior has such good reasons for doing so, the Court will carefully guard against any undue redundancy in writs of confirmation. I am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS—This is a question of importance and interest to both parties. The Titles to Land Consolidation Act gives in the first part of Schedule V a form of a writ of confirmation which has been here adopted. Now the writ of confirmation approved of by the Lord Ordinary is quite in terms of this form, except the last clause which begins with the words "and declaring that these presents are granted," &c. This last clause I consider to be redundant and unnecessary, and in a form not sanctioned by the Statute. The variations here proposed upon the form given in the statute I consider to be dangerous to both parties, and I am unwilling to sanction any such variation.

LORD ARDMILLAN—The Titles to Land Consolidation Act makes it unnecessary to insert in a writ of confirmation even a reference to limitations and conditions of the feu, but it does not absolutely preclude that being done. So where it may be hurtful to the superior to omit such a reference, and cannot possibly harm the vassal to insert it, I see no reason why the reference should not be made. I therefore agree with your Lordship in the chair, that we should adhere to the interlocutor of the Lord Ordinary. I would however suggest that in the last clause of the proposed writ, instead of the words "and declaring that these presents are granted by me as commissioner aforesaid, always with and under," the words "and with and under," should be substituted. I think that this alteration would make the wording of the deed more consistent with simplicity desirable in writs of this sort.

LORD JERVISWOODE concurred with the opinions expressed by the Lord President and Lord Ardmillan.

Counsel for the Pursuer—Solicitor-General and Johnstone. Agents—Scott, Bruce, & Glover, W.S.

Counsel for the Defender—Marshall and Jameson. Agent—Lindsay Mackersy, W.S.

Tuesday, May 20.

SECOND DIVISION.

[Sheriff of Inverness.

MACDONALD & COMPANY *v.* HIGHLAND RAILWAY CO.

Railway—Damages—Contract.

Held railway company liable in damages for

delaying without sufficient cause to forward perishable goods specially marked as such.

The summons in this suit, at the instance of Messrs Macdonald & Company, pastry-cooks and confectioners, Inverness, against the Highland Railway Company, concluded for "the sum of £11, 3s. 6d. sterling, being loss and damage sustained by the pursuers by and through the defenders' failure timeously to convey and deliver a certain quantity of perishable goods which the defenders, on or about the 30th day of September last, contracted with the pursuers to carry, and received delivery of for that purpose, by their line of railway from Inverness to Dingwall, and thence to Strome Ferry, and thence per steamer to Broadford, to which latter place they were addressed and consigned to the pursuers, for the purpose of being thence conveyed by the pursuers to Armadale Castle, there to be used at a banquet given by Lord Macdonald on the occasion of his coming of age, and for the supply and preparation of which the pursuers were purveyors and contractors, but which, owing to the negligence of the defenders, did not arrive at Strome Ferry in time for the steamer which left for Broadford on said 1st day of October, and had to be conveyed thence by special boat hired for the purpose by the pursuers, thereby necessitating the expenditure by the pursuers detailed in the account appended hereto, and causing damage to the goods themselves to the extent also detailed in said account; Second, the sum of £14, 2s. 10d., being loss and damage sustained by the pursuers by and through the defenders' failure timeously to convey and deliver a second quantity of perishable goods which the defenders, on or about the 1st day of October last, contracted with the pursuers to carry, and received delivery of for that purpose, by their line of railway from Inverness to Dingwall, and thence to Strome Ferry, and thence per steamer to Broadford, to be thence taken to Armadale Castle, to which latter place they were addressed and consigned to the pursuers, and were to be used at another banquet of a similar description held on the 5th of October, and for that supply and preparation of which the pursuers were purveyors and contractors, but which goods, owing to the negligence of the defenders, did not arrive at Strome Ferry until after the departure therefrom, on Monday the 3d October, of the steamer intended to convey them to Broadford, and did not arrive at final destination until the evening of Wednesday the 5th of October, when they were of no use for the purpose for which they were intended, as above mentioned, thereby causing damage to said articles themselves to the extent of £10, and causing the useless expenditure to the pursuers of a sum of £2, 3s. sterling, paid by them for the loan of lamps from Edinburgh, and £1, 19s. 10d. sterling for carriage of said lamps from Edinburgh to Inverness, which lamps formed a part of said second parcel of goods, amounting in all to the above sum of £14, 2s. 10d. sterling; Third, the sum of £50 sterling, being loss and damage sustained by the pursuers in their business character and reputation as purveyors and contractors, by the negligence above mentioned on the part of the defenders, which rendered them unable to fulfil with promptitude the contract undertaken by them to supply the said contract, and as a *solatium* for the trouble, anxiety, and annoyance caused by the non-arrival of the said goods timeously; and the expenses of process."