children at the sole discretion of Mrs Finnie. In February 1873 Mrs Hill executed a deed of assumption in favour of John Hill, farmer in Carlowrie, by which he was to act along with herself in the execution of the trust.

In May 1873, Mrs Finnie having fallen into a state of mental incapacity, Mr A. T. Niven, C.A., Edinburgh, was appointed her *curator bonis*.

In consequence of Mrs Finnie's continued incapacity, Mr Hill became sole trustee, and he, in March 1874, assumed Mr Adam Curror to be his co-trustee, under the 11th section of the Trusts (Scotland) Act.

By the death of one of the annuitants the sum of £1250 was set free, of which one-third became available for distribution amongst the children of Mr and Mrs Thomson. The whole sum so available at the presentation of the case was thus £816, 12s. 6d.

The beneficiaries having applied to the trustees for payment of their share of this residue, a difficulty arose as to the proportion each beneficiary should take, the power of determining which was reposed in Mrs Finnie alone.

In these circumstances, it was agreed that the present case should be presented to the Court by the various parties, viz., John Hill and Adam Curror, of the first part; Alexander Niven, of the second part; and William Hill Thomson and others, of the third part.

The questions submitted for opinion and judgment were two:—"(1) Whether the parties of the first part, as the acting trustees and executors under the trust-disposition and settlement of Mrs Hill, are, during the incapacity of Mrs Finnie, entitled to distribute among the parties hereto of the third part the whole or any part of the one-third share of the residue which the truster directed Mrs Finnie to retain and apply for behoof of the children of Mr and Mrs Thomson? (2) Whether the sums presently available for division are to be distributed equally among the parties hereto of the third part, or in such proportions as, when added to the payments to account previously made, will make the payments to all the five children of equal amount?"

At advising—

LORD JUSTICE-CLERK—This is not an application for special powers from the Court. In so far as these powers were communicable, they have been exercised by the assumption of a new trustee. Where there is a manifest *delectus personæ*, and large discretionary powers are left with a trustee, who becomes incapable of exercising these powers, I doubt if it is clear that the Court could grant power to another party to exercise the discretion; but, on the other hand, though there may be discretionary powers vested in a trustee, if they do not imply a *delectus personæ* in the trustee, the Court perhaps might interfere, and transfer the powers to another party. But this question does not arise here. My view is, that on the words of the settlement there is a valid bequest to the children of Mr and Mrs Thomson, as a class, of the whole one-third, and that the discretionary power given to the trustee is simply a burden, which flies off on insanity supervening, and leaves the bequest unlimited, and that no question of the power of the new trustee arises. The trustee is entitled to divide the whole free fund, and the rest as it may emerge. As there is no longer a possibility of the discretionary power being exercised, owing to the insanity of the trustee Mrs Finnie, the result is equal division.

LORD NEAVES—I concur. We are not here in an application for the interposition of our discretionary power. We are asked only to interpret the law on the terms of the writing, and that takes away our *nobile officium*. This is our mere judicial decision on the import of the settlement, and I think the discretionary power is at an end, and that the fund should be divided as if the natural term of division had arrived.

LORD ORMIDALE—I concur. It is unnecessary to consider how far the Court can interpose to exercise a discretion as to division left to a trustee now incapable. If it were necessary we would require fuller statements of facts and circumstances.

The first question was answered in the affirmative. The answer to the second question was, that the distribution was to be made so as to produce ultimate equality amongst the children.

Counsel for Parties of First and Second Parts—Marshall and Hall. Agent—W. Kennedy, W.S.

Counsel for Parties of the Third Part—M'Kie. Agent—J. N. Forman, W.S.

Friday, October 30.

FIRST DIVISION.

[Lord Young, Ordinary.

MAGISTRATES OF INVERKEITHING *v.* ROSS.

Superior and Vassal—Singular Successor—Assignee—Entry—Composition—Novodamus.

In a charter of confirmation and *novodamus* the clause of confirmation set forth that the lands were conveyed to A and "his heirs and assignees (excluding assignees before infeftment)." The clause of *novodamus* was expressed in similar terms. The reddendo stipulated that the vassal's "heirs and assignees" should pay double feu duty the first year of their entry. By no former charter had the entry of singular successors been taxed. *Held* that the superior's right to composition for the entry of singular successors was intact.

This was an action of declarator of non-entry, brought by the Magistrates of Inverkeithing against Alexander Ross. The subjects were described in the summons in the following terms:—"First, All and Whole these eight sixteenth parts of Crooks or Cruicks Easter, excepting and reserving a piece of ground of said lands on which a tomb was built, consisting of one acre and one eighth part of an acre Scots: Second, All and Whole one sixteenth part of the lands of Crooks or Cruicks Wester, called Foul Briggs, as sometime possessed by John Davie: Third, All and Whole that piece of ground at the old toll, consisting of twenty falls and one-half Scots measure: Fourth, All and Whole these five sixteenth parts of land lying in Easter Cruicks, sometime possessed by John Lindsay, tenant thereof, excepting therefrom a piece of ground at West Ness, consisting of

three-fourth parts of an acre Scots, and also that piece of ground adjoining, feued by John Forrest to the Commissioners of Customs,—All which several lands and others lie within the parish of Inverkeithing and county of Fife, as particularly described in the instrument of sasine in favour of the deceased Alexander Wilson, contractor, sometime residing at Granton, recorded in the general register of sasines at Edinburgh the 25th day of June 1858, but always with and under the exceptions and reservations specified in the said instrument of sasine recorded as aforesaid." At this stage of the case there was no dispute in reference to the third subject.

The pursuers were superiors of the subjects. The defender had acquired the *dominium utile* of the subjects in May 1873 from William Wilson, who was the disponee of James Wilson, who was the last entered vassal. The disposition to William Wilson was dated 13th August 1868, and James Wilson after granting that disposition died in 1872. William Wilson, disponee of the last entered vassal, was willing to enter with the superiors, but he maintained, and the defender as his disponee maintained, that he (William Wilson) was entitled to an entry on payment of the duplicand of feu duty, which he contended was the composition at which the entry of the disponee or singular successor was taxed by a charter of confirmation and *novodamus* of 2d June 1858, granted by the pursuers to Alexander Wilson, father of the said James Wilson. This charter, and other charters founded on by the parties, are quoted, in so far as bearing upon the question, in the opinion of the Lord President.

The pursuers pleaded—"The lands and others described in the summons being in non-entry, the pursuers, as superiors thereof, are entitled to decree of declarator and payment against the defender, in terms of the conclusions of the summons, with expenses."

The defender pleaded—"(1) The defender should be assoilzied, in respect of the offer made on the part of William Wilson, the successor of the last entered vassal, to enter as vassal in the subjects libelled. Separately, and in any view, in respect of said offer, the pursuers are not entitled to non-entry duties prior to the date of any decree which they may obtain in this action. (2) The entry of singular successors in the subjects first, second, and fourth described in the conclusions of the summons, being taxed at a double of the feu-duty, the pursuers are not entitled to demand a year's rent as a condition of their granting an entry."

The Lord Ordinary (YOUNG) pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties, and made avizandum with the debate and whole process—Finds that the pursuers are bound to grant an entry to William Wilson, contractor, Granton Villa, as vassal in the lands comprehended in the charter of confirmation and *novodamus* of date 2d June 1858, referred to in the record, being the lands first, second, and fourth specified in the summons, on payment of a duplicand of the feu duties exigible for said subjects, the said William Wilson being ready and willing to take such entry; and appoints the case to be put to the roll. Grants leave to the pursuers to reclaim, if so advised.

"*Note.*—The discussion was confined to the lands to which the preceding interlocutor refers, the parties being, as I understood, agreed with respect to the lands third and fifth specified in the summons and specially referred to in articles 1 and 4 of the defender's statement.

"With respect to the lands first, second, and fourth specified, and which are comprehended in the charter of *novodamus* of 2d June 1858, the question between the parties turns on the construction of the word 'assignees' as used in the reddendo in that charter. The pursuers maintain that it means only those to whom the personal right before infeftment is transferred, assignation being in that case only the proper form of conveyance. The defender, on the other hand, while conceding that the terms 'assignation' and 'assignee,' when used with technical accuracy are only applicable, the one to the transference, and the other to the transferee, of the personal right, maintains that the term 'assignee' is sufficiently flexible to admit of another construction which will comprehend a disponee of the complete feudal right, when that clearly appears to be in accordance with the meaning and intention of the party using it, which he contends is the case here, and relies on the case of *Hamilton* v. *Dunn*, 15 D. 925.

"I agree with the defender, 1*st*, that the term 'assignees' is flexible, and *may* mean disponees of the feudal subject: and 2*d*, that this is the sense in which it is used in the charter of 2d June 1858. The exclusion of 'assignees before infeftment' shows clearly that the term is not used in the sense of assignees before infeftment, and disponees is the only other meaning that it admits of. That it does admit of this meaning is settled by the case of *Hamilton* v. *Dunn*.

"The pursuers further maintain that it appears from the negotiations and correspondence which resulted in the charter of June 1858, that the *novodamus* was for the purpose of settling some controversies about mineral rights, and that it was not in the view of the parties to make any change upon the reddendo with respect to the casualties or otherwise. But *first*, I think it is not allowable to refer to negotiations or correspondence in order to construe the charter; and *second*, the original charters of the lands embraced in the *novodamus* have not been produced, and I understand are not now obtainable. Farther, the previous charters by progress produced are not clear in the pursuers' favour for an untaxed entry of singular successors, and it is a legitimate purpose of a *novodamus* to make the reddendo, including the taxation of casualties, certain."

The pursuer reclaimed, and argued—In none of the earlier charters is there any limitation of the superior's right to claim composition upon the entry of a singular successor, and so, if there is such limitation, it must be found in the charter of confirmation and *novodamus*. In that charter there occurs in the confirmation clause and clause of *novodamus* the expression "excluding assignees before infeftment," while in the reddendo the usual expression "heirs and assignees" is used. The question is, does the expression in the two former clauses limit and explain that in the latter clause? It does not have any such effect, for the plain reason that the insertion of the expression was to benefit the superior, and not for the purpose of limiting or abandoning a right which he formerly had. The purpose was to make it clear that the disponee and his heirs alone could take infeftment, and to prevent him assigning the charter with open

precept. It was not intended to make any change in the holding.

The defender argued—Assignee was a word of the widest signification, meaning a person to whom a right was conveyed in one way or another from the original vassal. Here the meaning which parties intended to put upon the word was clear, from the use of the words "excluding assignees before infeftment" in the dispositive clause. When in one clause of a charter a distinct meaning was impressed upon a word, a different meaning would not be given to the word in another clause except upon the strongest grounds and the clearest indication that such different meaning was to be used. But there was no indication of any qualification of the word assignee in the reddendo clause, and it must be there read as excluding assignees before infeftment—that was, as meaning disponees or singular successors.

When there was a new grant *in gremio* of a deed it was not competent to go back to former grants. In all cases in which the Court held that they were bound and entitled to go back to the old infeftments, the *novodamus* expressly stipulated that such should be the case. But if the Court did go back they would find one change of great importance, for in the charter of *novodamus* the words "as use is of feu-ferme" which appeared in the older infeftments, were omitted—and the use in feu farm was to enter singular successors upon payment of composition.

Authorities—*Magistrates of Inverness* v. *Duff*, M. 15,059; *Thomson*, May 22, 1810, F.C.; *M'Lachlan* v. *Tait*, Dec. 6, 1822, 2 S. 69; *Boyd* v. *The Vassals of the Estate of Linlithgow*, Elchies, *voce* Superior and Vassal, No. 13; Bell's Illustrations, p. 34.

At advising—

The Lord President—This is a declarator of non-entry, brought by the Magistrates of Inverkeithing against Alexander Ross, and it is not disputed that the lands concerning which the question has arisen are in non-entry, nor that the pursuers are the superiors of the lands. The question is, whether the vassal is not entitled to entry to some portions of the lands on payment of a duplicand of the feu-duty instead of composition. These portions of the lands are those standing 1st, 2d, and 4th in the conclusions of the summons. The pursuers contend that they are entitled to composition for entering a singular successor, while the defender, on the other hand, maintains that they are only entitled to a duplicand of the feu-duty. The Lord Ordinary has found for the defender, and has not proceeded further in the case. The question is one of importance, and in considering it, it is necessary to pay particular attention to the charters under which the lands are held. We have not before us the original charters of the portions of land mentioned 1st and 2d in the summons, but we have the original charter of that portion mentioned 4th in the summons. But although, in the case of the first two, the original charter is not produced, we have charters which set forth the reddendo and terms of entry. The first parcel of land consists of eight-sixteenth parts of Crooks or Cruicks Easter, and is contained in a charter of confirmation, dated 25th February 1690, in which the reddendo is thus expressed:—"The said Master Duncan Whyt and his foresaids paying yerily for the lands above written to us and our successors or treasurer for the tyme, the soume of threttie four pund ten shillin Scots money, and that at two termes in the year, Whitsonday and Mertimies, be equall portiones, In name of few ferme, doubleing the saids few ferm in and at the entrie of everie air or assigney, or airs or assigneyes to the foresaids lands, with ther pertinents as use is of few ferme."

The second parcel of land consists of one-sixteenth part of the lands of Crooks Wester, and the earliest charter we have is a charter of resignation of 23d February of 1826. The reddendo is there set forth as follows:—"For payment to us and our successors in office, or our treasurer for the time, for the use and behoof of the community of the said burgh for the said one-sixteenth part of Crooks or Cruicks Wester of the sum of four pounds six shillings and six pennies Scots, at the term of Lammas yearly, in name of feu-farm, beginning the first year's payment at Lammas next to come, with the double of the said feu at the entry of every heir or assignee to the said lands, and that for all burden, secular service, question or demand, which can be exacted or required furth thereof."

The fourth parcel of land consists of one-fourth of the lands of Easter Cruicks, together with one-sixteenth part of the same lands, the whole being described in the summons as five-sixteenths of land lying in Easter Cruicks. The original charter of the one-fourth part is dated 24th March 1603. In that charter the reddendo is thus expressed:—"Reddendo inde annuatim predicti Thomas Mitchell et Isobella Broun ejus spousa heredesque eorum et assignati ut supra nobis et successoribus nostris seu Thesaurariis pro tempore pro dictis terris cum pertinentiis ejusdem summam triginta solidorum saulis monete regni Scotie tanquam firmam antiquam seu annuum redditum de predictiis terris solvi solitum, nec non summam duodecem librarum monete predicte in augmentationem rentalis extendendo in toto ad summam tredecem librarum et decem solidorum monete prescripte, annuatim solvendarum ad duos anni terminos consuetos festa viz. Pentecostes et Sancti Martini in hieme per equales medias portiones nomine feudifirme Duplicando dictam feudifirmam seu annuum redditum in introitu cujuslibet eorum heredis vel assignati tantum ad dictas terras cum pertinentiis jacentis ut supra prout usus est feudifirme tantum pro omni alio onere seruicio seculari questione seu demanda que de predictis terris cum pertinentiis prefato burgo spectantibus per quoscumque juste exigi poterint quomodolibet vel requiri."

Then, of date 20th September 1664, we have a charter of confirmation of the whole five-sixteenths of Easter Cruicks, in which the reddendo is expressed in terms substantially the same as in the original charter of the one-fourth part. The clause proceeds thus:—"Paying therefor yearly the said John Hodge and his foresaids furth of the foresaid five-sixtene pairts Cruicks with the pertinents to us and our successors, or the treasurer for the time, the sum of twenty-ane pund eleven shillings and three pennies, at twa terms in the year, Whitsunday and Mertinmas in , be equal portions, in name of feu-ferme, doubling the said feu-ferme at the entrie of any of their heir or heirs or assignees to the said lands, with the pertents whatsomever as use is of feu-ferme."

Now, the right of the superior to composition is a clear legal right belonging to him, which is not

to be held to be abandoned unless it is distinctly so expressed, and there is no such restriction here. So I begin this inquiry by holding that there is no taxation of the composition payable by singular successors in any of the original charters. But there is considerable variation in the obligation in the charters by progress. It is, however, most unsafe to infer abandonment from mere variation. To illustrate this, refer to the charter of resignation of 4th April 1850. In that charter the magistrates of Inverkeithing dispone to John Forrest, "his heirs and disponees, secluding assignees before infeftment, heritably and irredeemably, all and whole those five-sixteenth parts of land lying in Easter Cruicks;" and afterwards there is this clause, "doubling the feu at the entry of every heir or assignee to the same." Now, it might be contended that, as "assignees before infeftment" are excluded, and as the conveyance is to John Forrest and his heirs and disponees, the word assignee, used with heir in the clause doubling the feu-duty, must be meant to be covered by the word disponee. However, we find that nine years before this a singular succession was entered under a charter in the same terms, upon payment of composition. I refer to this to show that to infer from the use of a particular expression in any charter by progress the purpose of abandonment is rash.

But the defender's case rests on the charter of confirmation and *novodamus*, and, undoubtedly, the very expression *novodamus* suggests that it contains something not in the ordinary charter by progress, and it is competent and necessary to enquire what the superior meant to alter or change by the charter of *novodamus*.

The charter of confirmation and *novodamus* is dated the 2d June 1856, and sets forth a distinct reason of the cause of granting in the following terms:—"Considering that the conditions and reservations under which some of the lands aftermentioned are held as expressed in the recent charters thereof are not conform to the conditions contained in the original and more ancient charters of these lands, and that questions have arisen between us and Alexander Wilson, contractor, residing at Granton, the vassal, as to the clauses and conditions which are obligatory upon him, and we have agreed to compromise and transact all such questions by the said Alexander Wilson paying to the Town Council of said burgh the sum of three hundred pounds sterling upon our granting him a charter of confirmation and *novodamus* in the terms and manner afterwritten."

This charter contains *inter alia* the whole three parcels of land in question. The object of granting the *novodamus* is to reconcile the ancient and recent charters as to certain conditions, and it is necessary to examine the charters in order to see what the discrepancies are. We find that in the older charters there is a reservation of minerals, with the qualification that they are "for the use of the superior," while in the more modern charters the reservation is absolute. Here we have a very substantial discrepancy, and as far as I can see there is no other discrepancies between the ancient and more recent charters. Certainly, before 1858 there were no discrepancies as to the terms of entry of singular successors, and so there was nothing to reconcile in reference to that point. It is, however, a very sufficient reason for granting the charter of *novodamus* that the qualification upon the reservation of minerals is restored. But it is said that being a charter of confirmation and *novodamus* it is expressed in such terms as necessarily to imply a peculiar entry for heirs and also for singular successors. That may be so if it is distinctly so set forth in the deed, and in that case it must be given effect to. But a charter of *novodamus* is not by mere implication to be extended beyond what is warranted by express words. Now, the confirmation clause is in the following terms:—"We, the said provost, bailies, treasurer, and councillors, for ourselves and our foresaids, and representing as aforesaid, do hereby confirm for ever to and in favour of the said Alexander Wilson, and his heirs and assignees whomsoever (but excluding assignees before infeftment)."

Then the clause of *novodamus* is in the following terms:—"And we, the said provost, bailies, and treasurer, and councillors of said burgh of Inverkeithing, for ourselves and our successors in office, and representing as aforesaid, do hereby of new sell, alienate, and in feu-farm dispone to and in favour of the said Alexander Wilson, his heirs and assignees whomsoever, but excluding assignees before infeftment, and declaring that these presents shall not be a valid warrant for sasine after the term of Martinmas next."

Now, in connection with these clauses the defender points out that the reddendo clause is thus expressed:—"The said Alexander Wilson and his foresaids paying yearly to us and our successors in office, or to our treasurer for the time being, for the several lands as follows, viz., For the said eight-sixteenth parts of Crooks Easter, the sum of thirty-four pounds ten shillings Scots money; for the said one-sixteenth part of Crooks Wester, the sum of four pounds six shillings and sixpence Scots money; and for the said five-sixteenth parts of Crooks Easter, the sum of twenty-one pounds eleven shillings and threepence Scots money; amounting together the said several sums to the sum of sixty pounds seventeen shillings and ninepence Scots money, or five pounds and sevenpence and nine-twelfths of a penny sterling, and that in name of feu-farm yearly, beginning the first year's payment at the term of Martinmas eighteen hundred and fifty-eight for the year preceding, doubling the said feu-duties at the entry of every heir or assignee to the said several lands."

The argument is that assignees before infeftment being excluded, the word assignees in the charter cannot be read as meaning assignees before infeftment, but must mean singular successors or disponees. In the reddendo clause the persons spoken of are Alexander Wilson and his foresaids, which can only mean Alexander Wilson and his heirs and disponees or singular successors.

This argument is plausible, but when we examine the clauses more minutely, and look at the circumstances of granting, the argument is not sufficiently strong to outweigh the right of the superior to composition.

The object for which the peculiar restriction (excluding assignees before infeftment) is introduced, is plain. The restriction occurs in the confirmation clause, but it also occurs in the clause of *novodamus*, with the declaration that "these presents shall not be a valid warrant for sasine after the term of Martinmas next." This provision shows that the right was meant to be immediately feudalised in the person of the vassal. This was of importance, for the charter did make a difference in the feu, and it was desirable that it should be at

once feudalized and fixed in the future. Now, finding in this way a sufficient explanation of the introduction of the restriction, I cannot believe it possible that it was inserted in the confirmation clause and clause of *novodamus* in order to give a new construction to the reddendo and duplicand of feu-duty. That would be much too strained a construction. Again, it is said that the effect of the dispositive clause is to make the sale in favour of Wilson and his disponees. That, however, means nothing more than a conveyance to A. You can't convey to A and his disponees. A conveyance to A and his assignees, which in the most common form, means to A and his assignees of any kind, both before and after infeftment, and shows that the superior is prepared to receive both heirs and singular successors. It is impossible to explain the growth of the clause in our system in any other way. So I cannot read the words "excluding assignees before infeftment," as used for the purpose of construing the reddendo and duplicand of feu-duty in any different way from former charters.

So I am of opinion that the superior's right to composition for the entry of singular successors is intact.

LORD DEAS concurred.

LORD ARDMILLAN—There seems little room for doubt as to the facts of this case. The question raised is entirely one of construction of feudal title.

The pursuers are superiors of the subjects. The defender, Mr Ross, acquired the *dominium utile* of the subjects in May 1873 from William Wilson, who was the disponee of James Wilson, the last entered vassal. The disposition to William Wilson is dated 13th August 1868, and was followed by Sasine on 14th August 1868. James Wilson after granting that disposition died in 1872.

William Wilson, disponee of the last entered vassal, is willing to enter with the superiors. But he maintains, and the defender Mr Ross as his disponee maintains, that he (William Wilson) is entitled to an entry on payment of the duplicand of feu-duty, which he contends is the composition at which the entry of a disponee or singular successor is taxed by the charter of confirmation and *novodamus* granted in June 1858. The pursuers deny that William Wilson is entitled to enter on payment of a taxed composition, and they demand payment of a year's rent.

The question depends, as I think, on the ascertainment of the true meaning of the charter of *novodamus*, read of course in connection with the older titles. The language of the *novodamus* is most unusual; the meaning is by no means clear; and the question of construction is, in my view, attended with extreme difficulty.

We must look, in the first place, at the original charter of 24th March 1603. The construction of that charter is not quite free from doubt; but reading it by the light derived from the authorities, both institutional and judicial, I concur in the opinion expressed by your Lordships, that the entry of a disponee or singular successor is not by that charter taxed to a duplicand of the feu-duty. The words "*cujus-libet eorum heredis vel assignati*" are qualified by the words "*prout usus est feu-deferme*;" and these qualifying words are considered by all our authorities as most important. At the date of this charter, in 1603, there can be no doubt what was the feudal usage of Scotland on the subject of the entry of vassals. Therefore, giving effect to the reference and to the usage as referred to, I arrive at the same conclusion as your Lordships in regard to this charter. I come to the same conclusion in regard to the construction of the charter of 1690; and also, though not without some difficulty, in regard to the construction of the charter of 1826.

But the real difficulty arises on the construction of the charter of confirmation and *novodamus* in 1858.

This charter proceeds on the consideration "that the conditions and reservations under which some of the lands after-mentioned are held, as expressed in the recent charters thereof, are not conform to the original and more ancient charters of these lands, and that questions have arisen between us and Alexander Wilson, the vassal, as to the clauses and conditions which are obligatory on him." This introduction to the charter is important, as explaining the meaning of the charter. The cause and consideration of granting is disconformity between the conditions of recent charters and the conditions of the original and more ancient charters. In construing the grant of *novodamus* we must bear in mind that this disconformity in previous charters was the occasion and consideration of the grant. The charter then proceeds to narrate that "we (the superior and the vassal) have agreed to compromise all such questions." By these words I understand all questions which had arisen, or such as had arisen, between the superior and vassal out of the disconformity which I have explained between the old and the recent charters. No other questions appear to have arisen. The mode of effecting the compromise and transaction of such questions which had been agreed on is then stated. The vassal pays £300, and the superiors grant a charter of confirmation and *novodamus* in the terms now before us. It is rightly maintained for the vassal that the terms of the charter, and especially of the *novodamus* as expressed, form the counter-part of the payment which he made; and that he is entitled to enforce it according to its true meaning. On the other hand, it is rightly contended for the superiors that the cause or consideration of granting the *novodamus* was the discovery of disconformity between the old and recent charters, and that the questions which had arisen related to the clauses and conditions in these conflicting charters, and that the agreement to compromise and transact embraced only all such questions as arose out of such disconformity.

The ascertainment of the true meaning of this introductory part of the charter is of great importance, and I shall have occasion for a moment to return to it. In the meantime, I proceed to consider the terms of the clause of confirmation and the terms of the clause of *novodamus*.

By this charter the superiors do confirm the subjects, which are fully described "to and in favour of the said Alexander Wilson and his heirs and assignees whomsoever (but excluding assignees before infeftment)." Then the superiors proceed "of new to sell, alienate, and in feu-farm dispone to and in favour of the said Alexander Wilson, his heirs and assignees whomsoever, but excluding assignees before infeftment, and declaring that these presents shall not be a valid warrant for

sasine after the term of Martinmas next." The obligation to infeft is "to infeft the said Alexander Wilson and his foresaids,"—and it is a fair remark that this seems a singular obligation, if by foresaids are meant disponees and not merely assignees before infeftment. The tenure is thus set forth: "to be holden of us and our successors in office in feu-farm and heritage for ever by all the rights, meaths, and marches of the same, ancient and accustomed as they lie in length and breadth." I am disposed to concur with the counsel for the defender in holding that the word "rights" may be a mistake for the word "righteous" meaths and marches. But still the holding is to be apparently according to ancient and accustomed possession. No new condition of tenure is in this clause set forth or suggested. Then the charter proceeds to set forth the sums annually payable by Alexander Wilson as feu-duty, which is followed by the words "doubling the said feu-duties at the entry of every heir or assignee to the said several lands." The words, "as use is," or similar words equivalent to the words "*pro ut usus est feu defermie*," do not occur in this charter of *novodamus*. The omission of these words is strongly and very properly founded on by the vassal, because such words have in several cases been held as qualifying the language in the context.

Now, the question before us turns on the construction of the word "assignees," as used in the reddendo in this charter of *novodamus*. I am of opinion that a charter of *novodamus*, in so far as it is a *novodamus*, has the character of an original grant. It is a grant *de novo*. In the words of Lord Stair, "the clause '*de novodamus*' doth dispone the fee as by an original right." Whatever is within a clause of *novodamus* by a subject superior is held to be validly granted, if the superior had the power to grant it. A variation from the original grant, if in favour of the superior, is unfavourably viewed by the law. He cannot augment his own rights and impair his vassal's rights in a charter of *novodamus*, unless by transaction with the vassal. Where the words require construction, an intention to withdraw or to restrict the rights of the vassal cannot be presumed in a charter of *novodamus*. The clause must, *in dubio*, be construed against such withdrawal or restriction of right. But where there is in the *novodamus* a concession of right by the superior, and where the right of the vassal is extended or amended, there is no such adverse presumption or unfavourable canon of construction. In such a case the power to make the concession being beyond question, the words of the grant must receive a fair, and as regards the vassal, a not unfavourable construction, and their true meaning must be ascertained.

Now, what is the true meaning of the reddendo in this clause of *novodamus*, read in connection with the other clauses in the charter.

In approaching this question of construction I am disposed to go very much along with the argument for the vassal. The words must be fairly construed as they stand. There is no presumption against the vassal's claim. For my part, I must say that I think the claim is not in itself unreasonable. The superior's right to demand a year's rent from the vassal on his entry may surely be surrendered by the superior on substitution of a duplicand of feu-duty. There is no presumption to exclude it; and looking to the relative rights of superior and vassal as now recognised, and as affected by equities which have arisen in the progress of society, I am disposed to think that the law would not look unfavourably on a construction in support of such a substitution.

I think it right also to add, that the date of this charter of *novodamus* is, in the question of construction, of some importance. This charter was granted in 1858, and I am not aware of any case in which a decision unfavourable to the vassal on such a question has been pronounced where the charter of *novodamus* was of recent date.

According to our older law, a feu was inalienable without consent of the superior. While such was the relation between the superior and the vassal, it was to be expected that the clauses of a charter would be read in favour of the superior's rights which the law then fully supported, and against the rights claimed by the vassal, which the law then refused to recognise. Therefore, charters dated during that early period of our law seem to have been construed *in dubio* in favour of the superior. But, when we look at the progress in the course of legislation on the subject—to the Act 1469, c. 37, an Act anent apprisers for debt—to the statute 1669, c. 18, anent adjudications—to the statute 1681, c. 17—and above all to the statute 20 George II, c. 50,—it seems impossible to doubt that the unfavourable presumptions, and the severe rules of construction enforced in the construction of old charters, have now lost much of their appropriate force, and are no longer applicable.

In the case of *Hamilton* v. *Dunn*, July 16, 1853, the charters were of date 1643 and 1659, a period when the vassal's right to alienate the feu had not been fully recognised, and yet, even in that case, and in regard to such a charter, the opinion of a majority of the Court was in favour of the vassal. In the case of the *Magistrates of Inverness*, and several of the other cases quoted, the charters were of old date, and suitable rules of construction were applied. In no case has a charter granted since the 20th of George II. been construed on a presumption so unfavourable to the vassal. If I understand aright the opinion of Lord Curriehill, whose opinion in the case of *Hamilton* v. *Dunn* was in favour of the superior, he would have taken a different view if he had been construing a modern charter. Therefore, up to the point of entering on the ascertainment of the meaning of this particular clause, my view of this case is favourable to the vassal.

But notwithstanding this, and setting aside as inapplicable all unfavourable presumptions or rules of construction adverse to the vassal's claim, I have come to the conclusion that, reading the words of the charter before us fairly, and endeavouring to ascertain their true meaning, it was not intended to alter the former holding—to change the customary entry—or to substitute a duplicand of feu-duty for payment of a year's rent. The charter was granted as the result of a compromise and transaction, and that was limited to disputes arising out of the disconformity of charters. There is no indication or suggestion of any question having arisen in regard to the conditions of entry before the date of this *novodamus*; there is no disconformity on that subject between the more recent and the more ancient charters; and there was, so far as we can see, no necessity, no occasion, and no desire, for compromise or transaction in regard to entry. The omission of the words "as use is," is, I admit, not without importance, for the introduc-

tion of these words has in several cases been viewed as qualifying the language of the context by reference to the prior usage. But here, where the new grant was issued as the result and in terms of a compromise and transaction not relating to the subject of the vassal's entry, I do not think that the omission of the words "as use is" can have the effect contended for by the vassal.

Then I do not think that the use of the word "assignees" is of itself sufficient to support the defender's plea. A fixed and inflexible meaning is not attached to the word, and it does not necessarily and exclusively express assignees to the personal right and before infeftment. But it may do so, and it has frequently done so, and in this case, when I consider the introduction to the charter—the whole structure of the charter,—the obligation to infeft "Alexander Wilson and his foresaids," which would be inapplicable if it meant his disponees,—and the fact of the existence of other questions regarding minerals really turning on disconformity between the old and the recent charters—I feel unable to resist the conclusion at which your Lordships have arrived, that taxation of this entry by substitution of a duplicand feu-duty for a year's rent was not intended by the parties in 1858—not demanded by the vassal, and not conceded by the superior. I have considered this case with great anxiety. The views which I entertain in regard to the change in the relations between superior and vassal, and in regard to the presumptions and canons of construction in application to modern charters of *novodamus*, tended to dispose me to concur, if I could, with the Lord Ordinary's judgment. But notwithstanding these views, and not rejecting or overlooking the equitable considerations to which I have adverted, I have been unable to read the words of this charter before us otherwise than as your Lordships have done.

LORD MURE concurred.

The Court pronounced this Interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the Magistrates of Inverkeithing against Lord Young's interlocutor of 25th June 1874, Recal the said interlocutor, Find that the entry of original successors to the lands first, second, and fourth mentioned in the conclusions of the summons is not taxed; find the pursuers entitled to expenses since the date of the interlocutor reclaimed against, and remit to the Auditor to tax the account of the said expenses, and report to the Lord Ordinary, reserving all other questions of expenses; and remit to the Lord Ordinary to proceed with the cause, and with power to decern for the expenses now found due."

Counsel for Pursuers—Dean of Faculty (Clark) and Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for Defenders—Marshall and M'Laren. Agents—Lindsay, Paterson, & Hall, W.S.

Friday, October 30.

FIRST DIVISION.

[Sheriff of Wigtown.

SHENNAN *v.* AUSTIN.

Poor—Poor Law Amendment (Scotland) Act, 1845, *sec.* 71.

Held (dub. Lord Deas)—(1) that the travelling expenses incurred by an Inspector of Poor for a parish in obtaining information as to the true settlement of a pauper to whom the said parish had afforded relief, and (2) that the expense incurred by the said parish in prosecuting the husband of the said pauper for desertion, could not be claimed in terms of the 71st section of Poor Law Amendment (Scotland) Act, 1845, against the parish to which the pauper was ultimately found to belong.

Counsel for the Pursuer—Macdonald. Agent—James Somerville, S.S.C.

Counsel for the Defender — Solicitor-General (Watson) and Guthrie Smith. Agent — W. S. Stuart, S.S.C.

Tuesday, November 4.

FIRST DIVISION.

DAVIDSON *v.* FLETCHER.

Process—Removing, Action of—Decree—Appeal—Suspension—Act 6 *Geo. IV. c.* 120, *sec.* 44.

Held that under the 44th section of the Judicature Act, 1825, a decree of the Sheriff in an action of removing, brought in terms of the 5th section of the Act of Sederunt of 14th December 1756, can only be brought under review of the Court of Session by suspension.

Counsel for the Pursuer—M'Kechnie. Agent—W. Kelso Thwaites, S.S.C.

Counsel for the Defender—Pearson. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Wednesday, November 4.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

DANIEL STEWART *v.* JOHN STEWART'S TRUSTEES.

Succession—Deathbed—Ratification—Homologation.

Circumstances *held* to bar a pursuer from reducing a trust-disposition and settlement made by his brother on deathbed.

This was a reclaiming note in two actions, in which the question between the parties was as to whether the pursuer Daniel Stewart, at one time shipbuilder, and now carpenter at Saltcoats, homologated the will of his late brother John Stewart, merchant at Ardrossan. The actions were defended by the trustees under the will. In the first action Daniel Stewart asked for reduction of the will on the ground of deathbed, a plea which was in itself well-founded, but the defenders contended that he was barred from insisting in it in respect (1) that he had ratified and approved of the deed of settlement, and had renounced his right to challenge it on the head of deathbed; (2) that he had taken payment of the two first half-yearly portions of an annuity payable to him under the will; (3) that in the receipt thereof he had acknowledged receiving it from his brother's testamentary trustees; and (4) that on 3d May 1869 he obtained from them an advance of £40, with the