vant should subsist—that so long as Nicolson should trust Burt, so long should Paterson remain bound; but it was in his power at any time to intimate his withdrawal.

That being the view I take of the deed, the ground of the Lord Ordinary's judgment disappears. The Lord Ordinary says—"What the bond of caution says is, that Mr Paterson is to be liable for Mr Burt's intromissions. The question immediately arises, what intromissions? That is a question of fact, and the only answer that can be given to it is—his intromissions under his agreement with the pursuers." As I read the deed, which does not refer to the agreement, the obligation was to subsist so long as Burt remained in Nicolson's service.

Something has been said to the effect that Mr Paterson knew of the fact that the agreement was to last for three years. Take it to be so, it does not affect the case. Under this obligation the cautioner became bound for the time during which the contract of service lasted, whether three or four years, or whatever the time might be. Another point for the defender was founded on the transactions between the master and servant, to which your Lordship has fully referred. If it had appeared that the transactions were not known to the cautioner, or that Mr Nicolson had given time to the debtor, I should have held this defence fatal, for Nicolson kept Burt in his service though knowing of his defalcations, and the cautioner, if he had not had notice, would have been released. But the cautioner had notice. Nicolson did not give the debtor time, and therefore he did not tie up his hands from pursuing this action, and this defence fails. The cautioner was made aware that the moneys were due, and had to be provided, and I do not see how he was prejudiced. The claim is not made in reference to the earlier defalcations, for the debt due in respect of these was probably novated, and I do not see how that fact affords a defence to a claim arising on subsequent intromissions.

The Court recalled the Lord Ordinary's interlocutor and gave decree in terms of the conclusions of the summons.

Counsel for Pursuers (Reclaimers)—Mackintosh—Darling. Agent—J. Young Guthrie, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Lang. Agents—Macbrair & Keith, S.S.C.

Tuesday, November 7.

FIRST DIVISION.

WELSH *v.* BROWN AND OTHERS.

Superior and Vassal—Feu-Contract—Property—Clause of Irritancy—Separate Subjects Conveyed by One Dispositive Clause.

A superior in one disposition gave off to a vassal as separate tenements, and at different feu-duties, two separate parcels of feuing ground. The various stipulations as to each parcel of ground were constituted real burdens by the disposition, which also contained an irritant clause declaring, *inter alia*, that in the event of failure within a certain period to erect buildings of the kind required by the contract "this feu-right" should, in the option of the superior, become null and void, and the lands revert to the superior. One of the parcels of land came into the hands of a singular successor of the vassal. Buildings of the kind required by the feu-contract had been duly erected upon it. The other parcel remained in the hands of the original vassal, who became bankrupt and failed to erect the stipulated buildings upon it. In a declarator of irritancy at the instance of the superior against the original vassal, and against his singular successor in the parcel of ground sold by him,—*held*, as to right of the latter, that the parcels of ground forming different tenements, his right in that parcel which belonged to him was not liable to be irritated in consequence of the failure of the original vassal to erect the stipulated buildings on the other parcel of ground which he had retained.

By feu-contract, dated 16th and 17th July 1880, John Welsh, S.S.C., Edinburgh, heritable proprietor of the areas of ground after referred to, disponed to John Brown and James Brown, individual partners of and trustees for the firm of J. & J. Brown, cab proprietors, Edinburgh, but under the reservations and irritancies mentioned in the deed, certain areas of building ground in and facing Easter Road, and lying in the parish of South Leith. The ground thus disponed consisted (first) of two areas marked Nos. 17 and 18 upon the feuing plan, upon which, by the terms of the feu-contract, the vassals were taken bound to erect within one year of the term of entry, and to maintain, a range of stables and coach-houses, conform to a plan to be approved of by the superior, while the feu-duty for these two areas was to be £30, 16s. 8d. per annum. (Second) The other parcel of the ground disponed consisted of a feuing stance marked No. 1 on the feuing plan, and facing Easter Road, on which the vassals were taken bound, within eighteen months from the term of entry, to erect dwelling-houses of a style and elevation to be approved of by the superior, with a pend or entrance by which access might be obtained through the building on this parcel of ground to the stables and coach-houses to be erected on the first parcel. The feu-duty payable for this area was £47, 12s. 6d.

The disposition contained the following clause of irritancy:—"Declaring always, as it is hereby provided and declared, that in the event of John Brown and James Brown, trustees foresaid, and their foresaids, failing to erect within the period before specified buildings of the description foresaid, or in the event of their allowing the same to fall out of good condition and repair, or in the event of their failing in the case of fire to rebuild as aforesaid the said stables and coach-houses or tenement of dwelling-houses, or the part or parts thereof destroyed by fire, then, and in any of these events, this feu-right, and all that has followed thereon, shall, in the option of the said John Welsh, become null and void, and the pieces of ground hereby feued, and the buildings thereon, shall revert and return to the said John Welsh or his foresaids, freed from all burdens and encumbrances thereon, saving and excepting securities and burdens *bona fide* contracted or laid upon the said subjects by the said John Brown and James Brown, trustees foresaid, and their foresaids."

The Browns' title was recorded on the 19th of

July 1880, and on the same day they reconveyed the areas marked 17 and 18 on the feuing plan (*i.e.*, the first parcel of ground) to the Leith Property Investment Company, *ex facie* absolutely, but truly in security for an advance of £1000 which the company had made to them to enable them to erect the buildings stipulated in the feu-contract. The Browns erected the stables and coach-house according to the feu-contract on this parcel of ground, but failed to repay the advance as required by the rules of the company, and the parcel of ground was exposed to public roup and sale on the 11th November 1881 by the Property Investment Company, and purchased by Richard Laing, solicitor, Stirling, at the price of £1000, on behalf of James Jack, Rose Street Lane, Edinburgh. The firm of J. & J. Brown and the individual partners thereof were sequestrated in December 1880, and Mr Samuel Kelly Orr, accountant, was confirmed trustee on the sequestrated estates. No tenements of the kind provided for in the feu-contract had been built upon the area marked No. 1 on the feuing plan (the second parcel of ground), which still remained with the Browns.

The rights of property in the different areas of ground, which were originally disponed under one dispositive clause in the feu-contract between Welsh and the Browns, had thus been separated, the area for stables having passed into the hands of Mr Jack for value, that for tenements being vested in the trustee of the original disponees. In these circumstances the present action was raised by the superior Welsh against the Browns and their trustee, and also against Jack, to have it declared that owing to the failure of the original disponees to erect tenements on the second parcel (the area of ground marked No. 1 on the feuing plan), the whole subjects contained in the dispositions by him to the Browns, including the portion which had been afterwards disponed to Jack, and on which the stipulated buildings had been erected, should be forfeited to him under the clause of irritancy in the feu-charter.

The Browns' trustee did not defend the action.

Jack lodged defences, pleading—"(1) On a sound construction of the said feu-contract, the obligations applicable to the subjects second therein disponed are not made a burden upon the subjects first therein disponed, and the failure to implement said obligations does not form a ground for irritating the said feu-right *quoad* the subjects first therein disponed. (2) The defender as a singular successor in the said first disponed subjects, duly entered with the pursuer as superior, is not liable to implement the obligations undertaken by the said John Brown and James Brown in respect of the subjects second disponed."

The Lord Ordinary, by interlocutor of June 2d 1882, assoilzied the defender Jack from the whole conclusions of the summons.

"*Opinion.*—By the feu-contract libelled, the pursuer disponed in feu-farm to John and James Brown, and the survivor, and the heirs of the survivor, as trustees for the firm of J. & J. Brown, in the first place, two areas or pieces of ground said to be marked 17 and 18, and, in the second place, an area or piece of ground marked No. 1, on a feuing plan referred to in the contract. These two parcels of land, although conveyed by the same instrument, are feued as separate tenements; separate feu-duties are stipulated for each; and the stipulations with regard to building and access make it clear that it was within the contemplation of parties that the first feuar might dispose of the two subjects separately to different purchasers.

"The vassals are taken bound to erect on the area of ground disponed in the first place a range of stables and coach-houses within a year from the term of entry, and upon the area disponed in the second place to erect a tenement of dwelling-houses within eighteen months from the same date, the buildings in each case to be capable of yielding a yearly rent equal to the double of the feu-duty applicable to the particular area on which they are to be erected; and it is specially stipulated that a pend of a certain breadth and height shall be constructed upon the second parcel, by which access may be obtained to the stables and coach-houses to be constructed on the first. These conditions are fenced with an irritant clause, by which it is provided that in the event of the defenders (the Browns), as trustees foresaid, and their foresaids, 'failing to erect, within the period before specified, buildings of the description foresaid, or in the event of their allowing the same to fall out of good condition and repair, or of their failing in the case of fire to rebuild as aforesaid the said stables and coach-houses or tenement of dwelling-houses, or the part or parts thereof destroyed by fire, then, and in any of these events, this feu-right, and all that had followed thereon, shall, in the option of the said John Welsh, become null and void, and the pieces of ground hereby feued, and the buildings thereon, shall revert and return to the said John Welsh or his foresaids, freed from all burdens and encumbrances thereon, saving and excepting securities and burdens *bona fide* contracted or laid upon the subjects by the said John Brown and James Brown, trustees foresaid, and their foresaids.'

"The property in the two tenements has now been separated. The areas first described have been acquired by the defender Mr Jack, as purchaser from a disponee of the original vassals, and his title has been duly completed by registration in the Register of Sasines. The second remained in the hands of the original vassals until their estates were sequestrated in December 1880, and is now vested in their trustee.

"In this position of the title the superior has brought the present action for declarator of irritancy of the original feu-right, with all that has followed upon it, including the conveyance to the defender Mr Jack and his immediate author, on the averment that although the obligation to build stables and coach-houses on the ground now belonging to Mr Jack has been duly performed, the obligation to build dwelling-houses on the other piece of ground, which does not belong to him, has not been implemented in terms of the contract; and the pursuer's contention is, that notwithstanding the severance of the subjects, and the consequent creation of two distinct and separate feu-rights, the failure of the vassal in one feu to perform his obligations under the contract entitles him to forfeit the right of the other vassal, although the obligations incumbent upon him have been fully performed.

"I am of opinion that the claim is not well founded. I am unable to accede to the argument of the defender's counsel, that upon a construc-

tion of the feu-contract the obligations to build are not well imposed upon the singular successors of the original vassals. But I think it clear that upon a severance of the two tenements the obligations applicable to each were necessarily separated also, and that the defender Jack has no more concern with the obligation to build upon any other subject than that which belongs to himself, than the obligation to pay feu-duty for any other. He has acquired a part only of the original estate. But he has effectually severed the portion so acquired from the remainder by completing a title and obtaining an entry with the superior as his vassal in that portion as a distinct and independent feu. It is true that he holds his feu subject to the conditions of the original contract. But the only conditions of the original contract which can be imported by implication into the new feu-right, or which could have been insisted on by the superior if it had been still necessary to apply for a charter of confirmation as under the old law, are those applicable to the particular portion of the estate which the new vassal has acquired.

"The pursuer, however, maintains that although the obligations to build are separable upon a division of the property, the irritancy by which these obligations are fenced is indivisible. It is said that by the terms of the clause it is provided that upon the breach of any one of the recited conditions 'this feu-right' shall be irritated, and all that followed thereon, and that 'this feu-right' means the entire right created by the contract. Now, it may be that so long as the feu created by the contract remained undivided—and the rights of the superior were determined by that alone—that must have been the effect of the clause. But after the original feu has been divided, the rights of parties stand not merely upon the contract, but upon the new titles which the conditions of the original contract have allowed to be created. The question therefore comes to be, what are the conditions which the superior is entitled to import from the original contract into the new right which he creates by his charter of confirmation, or which is created for him by the confirmation implied in the registration of a conveyance? And the argument must be, that according to the true intent and meaning of the original feu, the superior had stipulated, that although upon a division each proprietor was only to be subject to the obligations properly applicable to his own estate, each was still to remain liable to an irritancy in the event of his neighbour's obligations being unfulfilled. It is to be observed that the irritancy applies not only to the case of the stipulated buildings not being erected at all, but to the case of their being allowed to fall out of condition and repair, or of their being burned down and not repaired. And the argument therefore is, that if at any time the singular successor of the original feuar in one tenement shall allow his buildings to fall into disrepair, the singular successor in the other tenement shall suffer an irritancy. It is conceded that that would be a very harsh and a very unreasonable result. But it is said that, however harsh, it is the bargain the parties made, and if the contract were so expressed no doubt the Court must give effect to it. But I cannot find that it is so expressed. It appears to me that although it was within the contemplation of the contract that the property of the two tenements might come to be severed, there is no express provision for what is to be done upon the severance in order to distribute or to enforce the obligations applicable to each. As the clause stands, the irritancy which it provides is applicable only to the right created by the original feu. So long as there is only one feu-right, obligations applicable to each tenement are incumbent upon one vassal, and the irritancy conditioned upon a breach of these obligations is necessarily applicable to that one vassal's entire right. But upon a division of the right the obligations must be separated, and the condition of irritancy consequent upon breach is necessarily distributable in the same manner as the obligations to which it relates.

"I think it is not doubtful that if the question had arisen before the recent change in conveyancing, the superior could have been compelled to give a disponee of one out of the two tenements embraced in the original feu-right a charter of confirmation embracing the conditions applicable to that tenement alone, and fenced by a clause of irritancy applicable to a breach of these conditions alone. An irritancy of a feu-right consequent upon a breach of conditions applicable to a totally different estate, and which the vassal has no power to fulfil, is unprecedented; and I am clearly of opinion that there is no ground for the contention which would enable the superior to impose such irritancy in the present case."

The pursuer reclaimed. Argued for him—Under the clause of irritancy, the whole feus being in one disposition, a failure to build on one part forfeited the whole feu to the superior. If the whole ground did not revert to the superior, as no buildings had been erected upon a large part there would be no security for the feu-duties. The defender knew the conditions upon which the ground was feued, and had thereafter nothing to complain of.

Argued for respondent (Jack)—This irritancy, even if good against the original disponees, could not be made available against a new vassal. The respondent had implemented all the obligations effeiring to his feu, and could not be made responsible for the omissions of those over whom he had no control.

Authorities—*M'Culloch* v. *Lawrie*, July 8, 1835, 13 S. 1029; *Edinburgh Roperie Company* v. *The Magistrates of Edinburgh*, 4 R. 1032, 6 R. (H. of L.) 1.

At advising—

Lord President—The Lord Ordinary has in this case assoilzied the defender Jack from the whole conclusions of the summons, and the question is, whether what the Lord Ordinary has done is in the circumstances right.

It is to be observed that the feu-contract conveys two separate and distinct subjects. The first of these is marked Nos. 17 and 18 on the feuing plan, while the other appears to be marked No. 1. As to the first of these, it is apparently background, and was intended for stables, while the other is a feu facing Easter Road, leading down to Leith Links. We have thus two separable and distinguishable subjects referred to in one dispositive clause, and conveyed by the same instrument, yet separate feu-duties are stipulated for each, while the conditions as to building and access make it clear that it was contemplated that

the first feuar might dispose of the two subjects separately to different purchasers if he were so minded. We find also a variety of conditions contained in the feu-contract, by the second of which it provides that "The said John Brown and James Brown, as trustees foresaid, and their foresaids, shall be bound, within one year from the term of entry before mentioned, to erect, and thereafter to uphold and maintain, on the said areas or pieces of ground first above disponed, a range of stables and coach-houses, conform to plans to be approved of by the superior, and which shall yield a yearly rent equal to at least a double of the feu-duty after mentioned payable for said areas or pieces of ground first above disponed; and shall, within eighteen months from said term of entry, erect on the area or piece of ground second above disponed a tenement of dwelling-houses according to said elevation plan, and having therein a pend of the breadth after mentioned, and sufficient height to allow a carriage or cart to pass thereon, and which shall yield a yearly rent equal to at least a double of the feu-duty after mentioned payable for the area or piece of ground second above disponed." The object of the pend was undoubtedly for the benefit of the background, and to provide an access in the event of the front part being built over. Then under the sixth head it is provided that "The said John Brown and James Brown, trustees foresaid, and their foresaids, shall be bound and obliged to uphold the said range of stables and coach-houses and the said tenement of dwelling-houses, and boundary walls and railings, in good order and repair in all time coming, and to keep the same constantly insured against loss by fire to the extent of the full value thereof; and in case the said stables and coach-houses, or tenement of dwelling-houses, or any part thereof, shall be destroyed by fire, they shall be bound to rebuild the same, or the part or parts thereof destroyed, in the style and of the description above specified." Then follows the clause upon which this action of declarator is founded—"Declaring always, as it is hereby provided and declared, that in the event of the said John Brown and James Brown, trustees foresaid, and their foresaids, failing to erect, within the period before specified, buildings of the description foresaid, or in the event of their allowing the same to fall out of good condition and repair, or in the event of their failing in the case of fire to rebuild as aforesaid the said stables and coach-houses, or tenement of dwelling-houses, or the part or parts thereof destroyed by fire, then, and in any of these events, this feu-right, and all that has followed thereon, shall, in the option of the said John Welsh or his foresaids, become null and void, and the pieces of ground hereby feued, and the buildings thereon, shall revert and return to the said John Welsh and his foresaids, freed from all burdens and encumbrances thereon, saving and excepting securities and burdens *bona fide* contracted or laid upon the said subjects by the said John Brown and James Brown, trustees foresaid, and their foresaids."

Now, the history of this property is a very simple one. The Browns obtained their feu-contract on the 16th and 17th July 1880, and on the 19th of the same month they disponed lots 17 and 18 of the feuing plan to the Leith Property Investment Company, *ex facie* absolutely, but truly in security for a loan by the company of £1000, as at the time they were in difficulties and shortly after became bankrupt. On the 4th January 1882 the Leith Property Investment Company disponed the said areas for the sum of £1000 to the defender Jack, and thus the two subjects came to be held by different parties.

Meanwhile the provisions of the feu-contract had been complied with as regarded areas 17 and 18, for the stables had been built upon them, but upon the front tenement—that is, upon the area marked 1—no buildings had been erected. On this account it is contended by the pursuer that because the owners of the front tenement have failed to comply with the condition of the feu-charter, not only it, but the adjoining area, with all the buildings which are on it, are forfeited to him as superior. Such is the construction which the pursuer asks us to put upon this feu-contract. It is a startling proposition, and it would require a great deal more than we have yet seen to justify us in coming to such a conclusion. But further, I am of opinion that no such construction of this deed was ever in the contemplation of the parties, for there are separate conditions and separate feu-duties for each piece of ground. Upon what principle should the fault of one vassal warrant the taking away of his feu from another who has fully complied with the conditions of his feu-contract? But further, on an examination of this contract it is clear that these two subjects were intended to be held separately, and all the obligations, including that of building, are laid on each proprietor separately. The buildings on area No. 1 are quite different in character and in the time they are to take in erection from those upon the other; and further, in building on the front stance a pend is to be left for the benefit of and as an access to the background. A servitude is thus created on the front ground for the benefit of that which is behind. But no servitude could exist here so long as the properties are united; it is only after they become separated that the back area becomes the dominant and the front the servient tenement, while as to the front ground the obligations regarding it are clearly inapplicable to that at the back.

Now, with all these differences it becomes all but impossible for the pursuer to prevail in his contention, for not only does he ask irritancy of that feu where there has been a failure to implement the condition of the feu-contract, but he asks also that through the default of the one the other is to be made to suffer. Further, the irritancy would apply not only through a failure to build, but also to uphold—thus, for example, if the owner of the stables failed to keep them in a proper state of repair, if the contention of the pursuer be correct, not only the front area but all the buildings on it would become forfeited to the superior. I am satisfied that the true meaning of the contract is that two feus are given off and are intended to belong to different parties; each has its own obligations, and each feu is fenced with its own irritancy. Upon the whole matter, I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I have arrived at the same conclusion. The subjects, though included in one dispositive clause, are really separate, for the one

has a servitude of right of entrance through the other by means of a pend referred to in the titles. Further, there is no prohibition against separation of the feus after the deed is recorded. This property appears in a short time to have passed through a variety of hands, for we find it first of all disponed to the Browns, then almost immediately transferred to the Leith Property Investment Company, and by them sold to the defender Jack. Stables as required by the conditions of the feu-contract have been erected upon one part, but no buildings of the character specified have been commenced upon the other area. It is in respect of this failure that the pursuer seeks to irritate not only the area unbuilt upon, but also that portion upon which buildings conform to the conditions of the contract have been erected. It would be a very strong step for us to comply with the pursuer's contention, and nothing that I can see in the deeds would warrant us in so doing. The fair presumption is, that as the subjects are separate, and the proprietors separate, nothing omitted or neglected by the one shall irritate or render void the feu held by the other.

Lord Shand—I am of the same opinion. This question does not arise between the original superior and the original vassal, for one of these areas of ground has passed into the hands of a third party for value. But even if we had before us the case of the original feuar, I am not prepared to say that I should have formed a different opinion. The pursuer maintains that the provisions of the feu-contract are clear and distinct, but looking to what your Lordship has enumerated as to the differences of feu-duty, and also as to the provisions for building on the different areas, it is clear that the disposition must be regarded as really two and not one. In that view some construction of the deed is required, but fairly looked at it comes to this, that those disponees who fail to erect on their several pieces of ground suitable buildings shall irritate their respective areas to the superior. The separation of the feus which was contemplated in the original feu-contract has taken place, and it remains that each feuar shall build and maintain suitable erections on his own area which shall not be forfeited to the superior through any failure on the part of his neighbour to implement his contract.

Lord Deas was absent.

The Court adhered.

Counsel for Reclaimer—Hon. H. J. Moncreiff—Strachan. Agents—Welsh & Forbes, S.S.C.

Counsel for Respondents—Mackintosh—Thorburn. Agents—Boyd, Macdonald, & Jameson, W.S.

Wednesday, November 8.

FIRST DIVISION.

LAIDLAW (SLOANE'S CURATOR), PETITIONER.

Trust—Nobile Officium—*Where Trustee becomes Insane*—Curator bonis *Resigning Trust on Behalf of Ward.*

A *curator bonis* for a lunatic who was trustee under a *mortis causa* settlement and antenuptial marriage-contract, *authorised* to resign said trusts on behalf of his ward.

William Laidlaw, accountant, Glasgow, was in March 1881 appointed by the Court *curator bonis* to John Sloane, formerly joint agent of the Commercial Bank of Scotland, Limited, Glasgow, on two medical certificates that Sloane was of unsound mind and incapable of managing his affairs. On entering on the management of the estate of the said John Sloane the *curator bonis* discovered that he was an acting trustee along with James Templeton, manufacturer, Glasgow, and Adam Morrison, writer there, under the trust-disposition and settlement, dated 26th September 1850, and codicil thereto dated 20th April 1858, of the deceased Nathaniel Harvey, banker, Campbeltown, and that he and his co-trustees were entered in the register of shareholders of the Commercial Bank of Scotland, Limited, as proprietors of sixteen shares of £100 each (upon which the sum of £20 per share had been paid).

The *curator bonis* also found that the said John Sloane was, along with Patrick Proctor Alexander and Charles Archibald Campbell, both residing in Edinburgh, acting as trustee under the antenuptial contract of marriage between James Hay Stuart, banker, Glasgow, and Jessie Campbell Harvey, his wife, dated 16th March 1857, and that the trustees under that trust were entered in the register of shareholders of the Commercial Bank as proprietors of twenty-seven shares of £100 each (upon which the sum of £20 per share has been paid).

This was a petition presented to the Court by the said William Laidlaw, as *curator bonis* to the said John Sloane, in which, after stating the facts above narrated, and that his ward had no beneficial interest in either of the said trusts, he craved the Court "to remove the said John Sloane from the foresaid trusts . . . . and to authorise and empower the remaining trustees in each of the said trusts to execute the trusts by themselves, and, *inter alia*, to execute all transfers which may be necessary to divest the said John Sloane of the said stock of the Commercial Bank of Scotland, Limited, and to vest the said stock in themselves as trustees foresaid; or otherwise, to grant authority to the petitioner to resign the trusts in question on behalf of his ward, and to execute on behalf of his ward the transfers which may be necessary for divesting his said ward of the said stock."

The petitioner produced letters from the co-trustees in both of the said trusts consenting to this application.

Authorities—M'Laren on Wills and Succession, ii. 224, 228, and cases there cited; *Walker*, July 1, 1868, 6 Macph. 973.