Tuesday, March 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

AITON *v.* MILNE AND OTHERS (RUSSELL'S EXECUTORS).

Superior and Vassal—Personal Obligation in Feu-Contract—Obligation on Vassal, his Heirs, Executors, and Successors whomsoever.

A feu-contract provided that the subjects disponed should in all time coming descend to and be acquired by the heirs and successors of the vassal, who bound "himself, his heirs, executors, and successors whomsoever" to pay the feu-duties and implement the other prestations incumbent on them. On the death of the vassal his heir-at-law refused to take up the succession. In an action at the instance of the superior—*held* (1) (following the case of *The Police Commissioners of Dundee* v. *Straton*, February 22, 1884, 11 R. 586) that the deceased's executors were liable only for feu-duties falling due in the vassal's lifetime; and (2) that they were not liable for damages in respect of the heir's failure to enter.

By feu-contract dated 17th and 26th September 1879 William Aiton of Boddam, Aberdeenshire, disponed to James George Ferguson Russell of Aden and Buchanness Lodge, Aberdeenshire, and his heirs and assignees, an area of ground measuring about 9 acres adjoining Buchanness. The feu-contract, after specifying certain conditions, provided, *inter alia*:—"And further, as the pieces of ground and others hereby disponed are so disponed for the purpose of adding to or extending the grounds already attached to, and for increasing the amenities of Buchanness Lodge, it is hereby expressly provided and declared, that the said pieces of ground and others hereby disponed shall continue and in all time coming remain attached to, and shall not be separated from Buchanness Lodge and grounds, and the said James George Ferguson Russell and his foresaids shall not be entitled to dispone, assign, or gratuitously convey the said pieces or portions of ground hereby disponed or any part thereof, except as a part of and along with the said lodge and grounds, and the same shall in all time coming descend to and be acquired by the heirs and successors of the said James George Ferguson Russell in the said lodge and grounds: . . . All which conditions, &c., are hereby declared to be real burdens affecting the said pieces of ground and others hereby disponed, &c., . . . And it is hereby expressly provided and declared that if the said James George Ferguson Russell or his foresaids shall contravene or fail to implement any of the conditions, provisions, and obligations herein written, this present right and all that may have followed thereon shall, in the option of the said William Aiton and his foresaids, become null and void, without declarator or other process of law to that effect, any law or practice to the contrary notwithstanding; and the said James George Ferguson Russell and his foresaids shall admit, lose, and forfeit all right and interest in the ground hereby feued, and buildings thereon, which shall thereupon revert to the said William Aiton and his foresaids free and disencumbered of all burdens whatsoever, in like manner as if this feu-right had never been granted." . . . "For which causes, and on the other part, the said James George Ferguson Russell binds and obliges himself, and his heirs, executors, and successors whomsoever, to make payment to the said William Aiton, and his heirs and assignees, of the sum of £117, 15s. sterling yearly, being at the rate of £12 per imperial acre, in name of feu-duty, for the said pieces of ground and others hereby disponed, and that at the term of Martinmas yearly, beginning the first term's payment thereof at the term of Martinmas next, 1879 for the year ending at that date, and so forth yearly in all time thereafter; . . . and further, the said James George Ferguson Russell binds and obliges himself and his foresaids to implement and perform the whole other prestations, conditions, and provisions herein contained, incumbent on them." The feu-duty was duly paid to Martinmas 1886.

Mr Russell died on 15th April 1887, and there being no heirs of his body his younger and only surviving brother Colonel Frank Shirley Russell, his heir-at-law, succeeded to the entailed estates of Aden and others, including Buchanness Lodge. Mr Russell left no other heritage except the said feu.

Colonel Russell refused to take up the said contract of feu, or to implement the obligation therein.

Mr Aiton raised the present action against John Duguid Milne and others, James Russell's executors, concluding for payment of (1) the sum of £117, 15s. in name of feu-duty due at Martinmas 1887 and interest, or of £50 (the proportion thereof accruing between Martinmas 1886 and 15th April 1887) and interest; (2) of £2000 of damages for breach of contract.

The pursuer averred that by the feu-contract it was provided that the lands disponed should in all time coming descend to and be acquired by the heirs and successors of James Russell in the lodge of Buchanness which was held by him at the date of the feu-contract under a strict entail. In consequence of the declinature of Colonel Russell to take up the feu, the pursuer had called upon the executors of the deceased to make payment of the feu-duties due under the said contract, and also either to take up the said contract of feu or to pay damages. By the breach of the said feu-contract the pursuer has sustained loss and damage to the extent of £2000.

The defenders averred that the clause of payment of feu-duty was in the usual words of style, as given in the last two editions of the Juridical Styles, and that, according to inveterate practice, it imported after the death of the vassal no obligation on his executors for payment of the feu-duty in the future. They denied the liability which the pursuer sought to impose upon them, and they tendered payment of £50 in full of the conclusions of the summons.

The pursuer pleaded, *inter alia*—"(1) The defenders as executors foresaid are due and resting-owing to the pursuer the feu-duty payable for year ending at Martinmas last to the superior under the said feu-contract, or at least the proportion thereof to the date of Mr Russell's death. (2) The defenders as executors foresaid are liable

to the pursuer in implement of the obligations in his favour contained in the foresaid contract of feu. (3) In consequence of the breach of said contract as condescended upon, the said defenders are liable to the pursuer in damages as concluded for."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2) On a sound construction of the feu-contract libelled, the present defenders are not liable for any feu-duties after the death of the vassal, the late Mr Russell. (4) No damages are due, in respect that there has been no breach of contract or fault on the part of the late vassal or the present defenders, and *separatim*, that the pursuer has suffered no damage."

On 12th June 1888 the Lord Ordinary (KINNEAR) decerned against the executors for payment of £50, the amount of feu-duty which became due during the lifetime of the deceased vassal; *quoad ultra* he sustained the first and second pleas-in-law for the defenders, and assoilzied them from the conclusions of the action, and found them entitled to expenses.

"*Opinion.*—This action is founded upon a feu-contract between the pursuer and the late Mr James Russell of Aden, in Aberdeenshire, by virtue of which Mr Russell held certain lands under the pursuer from 1879 till his death on 15th April 1887. The pursuer avers that the heir of line of the deceased vassal has refused to take up the feu, or to perform the obligations incumbent on the vassal, and in consequence of this declinature he claims a right to recover from the defenders, as the late Mr Russell's executors, the feu-duty which fell due at Martinmas 1887, the term following their author's death, and £2000 as damages for breach of contract.

"I do not think it doubtful that the vassal's executors are liable for the feu-duties accruing due during his lifetime, and I shall accordingly give decree for £50, which is admitted to be the proportion of the feu-duty payable at Martinmas 1879, corresponding to the period of Mr Russell's survivance of the last term. But I think it equally clear in law that no action lies against the executors, either for feu-duties accruing due since the last vassal's death, or for damages in respect of the heir's failure to enter.

"The obligation for payment of the feu-duty is in the usual terms. The feuar binds himself and his heirs, executors, and successors whomsoever, and there can be no question as to the construction of such an obligation in a feu-contract. It must be read, as the Lord President explains in *The Police Commissioners of Dundee* v. *Straton*, 11 R. 590, as an obligation on the original feuar himself, 'so long as he remains vassal and lives, and after his death on his heirs and executors, for payment of arrears, and on his successors in the feu for payment of the feu-duty in the future.' It is possible for the feuar to bind his heirs, executors, and successors so as to make them all liable, jointly and severally, to fulfil the whole obligations of the feu, and the case just cited is a good instance of such a contract. But in the present case there is no room for a construction which would make the several successors of the original feuar liable *singuli in solidum*. The feuar binds himself, so long as he lives and continues to be the vassal in the feu, in the whole prestations of the contract; he binds his successor in the feu in like manner in the whole obligations of the contract after his death; and he binds his heirs and executors for the arrears which may be due at his death, and for nothing more. The pursuer's counsel accordingly did not maintain in argument that the executors would continue liable along with the successor in the feu right if the latter had completed a title and entered with the superior. But if they are not liable jointly with the heir of the investiture, there appears to me to be no ground in law upon which they can be made liable for future prestations at all. The several liabilities of the successor in the feu on the one hand, and the personal representatives of the deceased vassal on the other, are perfectly clear and distinct; and if there be no joint liability, I am unable to see any reasonable ground for subjecting representatives who cannot succeed to the feu to the liabilities attaching only to the vassal.

"But it is said that there is no successor in the feu, because the heir of the investiture declines to take up the estate, and therefore that the representatives of the first vassal must be liable for the feu-duties, because his liability can only be extinguished *delegatione* by the substitution of a new vassal in his room. I know of no authority for this proposition. It is not in my opinion supported by the case of *Hyslop* v. *Shaw*, on which the pursuer's counsel relied. It was held in that case that an entered vassal continues liable for feu-duties, even after he has sold the lands, until a new vassal shall have entered with the superior. But the ground of judgment was that the disponer continues vassal until the entry of the disponee, and therefore cannot escape from the liabilities attaching to that character. This is perfectly consistent with the doctrine laid down by the Lord President in the case of *Straton*, that the original feuar remains liable 'so long as he lives and continues vassal,' but he ceases to be vassal when he dies. His death vacates the feu, and the whole right and liabilities of the feu-contract or feu-charter, if he has not disponed the estate during his life, thereupon pass to the heir of the investiture. No one else can take the place of the deceased vassal, or be affected by liabilities which are inseparable from the tenure. If the heir does not choose to enter, the superior had his remedy by declarator of non-entry under the old law, and he has an analogous remedy under the Statute of 1874. But there is no authority in principle or precedent for sustaining a personal action againt representatives who have no right to the character of vassal, and no title to take up the feu. The only ground on which such an action could be maintained is that of personal obligation imposed upon the deceased vassal's representatives by a special stipulation for that purpose. Whether there is such an obligation in any particular feu-contract is a question of construction, and in the present case the construction of the contract does not appear to me to be doubtful.

"I am unable to follow the reasoning upon which it is proposed to subject the defenders in damages. If they are liable for feu-duties, their liability must be limited to the amount actually

due. If they are not liable, they have committed no breach of contract."

The pursuer reclaimed, and argued—The claim which the pursuer here made was reasonable, and was in its form of damages the only remedy which he had against the vassal's executry estate. An analogy could be drawn for a claim of this kind from leases, the result of the law as to which was that a tenant in binding himself bound his estate after his death—*Bethune* v. *Morgan*, December 16, 1874, 2 R. 186. Leases and feu-contracts were both personal contracts, and it had been held in such cases that the liability of the tenant only ceased *delegatione*—*Skene* v. *Greenhill*, May 20, 1825, 4 Sh. 25. But when there was no delegation an opposite rule prevailed—*Hyslop* v. *Shaw*, March 13, 1863, 2 Macph. 535. The bargain undertaken by the deceased could be implemented by his rich estate, or it could pay damages for breach of contract—*Abercorn* v. *Marnoch's Trustees*, June 26, 1817, 19 F.C. 364. There was in the present case a double liability and a double contract—*Hunter* v. *Boog*, December 16, 1834, 13 Sh. 205. There was in the present case no one the superior could go against by virtue of his tenure, but he could go against the executors of the deceased in virtue of the contract—*Burns* v *Martin*, February 14, 1887, 14 R. (H. of L.) 20; *Stewart* v. *M'Callum*, February 14, 1868, 6 Macph. 382; *King's College of Aberdeen* v. *Hay*, March 11, 1852, 14 D. 675; Stair, ii. 3, 34; 2 Bankton, 144. It was urged by the other side that no case could be shown in which a demand similar to the present had been made, but that was no satisfactory answer, for in the case of *Hyslop, supra*, no parallel case was cited, and yet the decision was in favour of the superior. In cases like the present a distinction was to be drawn between the feudal relation and the personal contract — *Prudential Assurance Company* v. *Cheyne*, June 4, 1884, 11 R. 871.

Argued for the defenders—The defenders' liability here was quite limited in its character, and was settled by the case of *The Police Commissioners of Dundee* v. *Straton*, February 22, 1884, 11 R. 590; they were bound for the feu-duty due at the death of the vassal, but for no more. The defenders had no right to make up a title to these subjects, and if Russell had disponed them to them, he would by so doing have broken the feu-contract. The pursuer was therefore seeking to make the defenders liable in feu-duty for a subject from which they never could derive any benefit. The words in the feu-contract imported no higher liability than would have been incurred under an ordinary feu-charter—Jur. Styles, vol. i. (3rd ed.) p. 32. Divestiture terminated liability. There were two kinds of divestiture—(1) by devolution, (2) by death—Duff's Feudal Conveyancing, p. 133. As the defenders were not the successors of the vassal in the feu, they were not liable in feu-duties after the deceased's death, and it was absurd to suggest that any obligation lay upon them to provide a vassal in all perpetuity—*Peddie* v. *Gibson*, February 27, 1846, 8 D. 560. No analogy could be drawn for the case of leases—*Scott's Executors* v. *Hepburn*, June 14, 1876, 3 R. 816; *M'Callum* v. *Stewart*, February 17, 1870, 8 Macph. (H. of L.) 1. It had never been decided that when a vassal died the superior had two remedies, one against the land and another against the executors. The tenure ended with the vassal's death as effectually as it did *inter vivos* by the entry of a new vassal, and all obligations depending on the tenure ended with it—*Brown's Trustees* v. *Webster*, March 11, 1852, 14 D. 675. The case of *Hyslop, supra*, on which the pursuer so much relied, could not be taken as settling that a landlord had the right to go against his tenant's executors in implement of the prestations of the lease; the question was left open, but the law of leases did not affect the present question as there was no *reddendo* in a lease, only a personal obligation.

At advising—

Lord President—The late Mr Russell of Aden and Buchanness Lodge, Aberdeenshire, died on the 15th April 1887. He had been for some time before his death a vassal of the pursuer's under a feu-contract dated 17th and 26th September 1879. Mr Russell's heir-at-law is not inclined to take up this succession, and he refuses to enter with the pursuer as superior; and accordingly the present action has been brought by the superior against Mr Russell's executors in which he seeks to have them ordained to pay the feu-duty due at Martinmas 1887, the term following their author's death, and to pay a sum of £2000 as damages for breach of contract.

I think this is a very clear case, and I entirely agree in the view adopted by the Lord Ordinary.

The relation of superior and vassal is constituted either by feu-charter or by feu-contract. Under an ordinary charter the vassal, by accepting the feu, comes under an obligation to pay the feu-duty, and he subjects his personal representatives to all feu-duties accruing due during his lifetime. If the vassal's heir takes up the succession, he in like manner becomes liable to the superior in payment of the feu-duty, while if the feu be sold, the successor in the feu becomes liable to the superior for the feu-duty, and the original feuar is discharged.

In the present case, the deed being a feu-contract, the vassal binds himself, his heirs, executors, and successors whomsoever—that is to say, there is an expressed obligation upon the successors in feu, instead of an implied obligation, as there would have been in a feu-charter. All that the vassal here does by his acceptance of the feu is to bind himself and his executors in payment of the stipulated feu-duty accruing during his life, and his successors in the feu for payment of feu-duty in the future.

It is not necessary to consider the various obligations which may be entered into, and which may be made to form part of a feu-contract, because we have none of these to deal with in the present case.

Anything may be the subject of contract between the various parties, but in the ordinary case the personal representatives of the original vassal can only be made liable for the feu-duties accruing due during the vassal's lifetime.

The obligations of the vassal might very easily have been made much wider, as in the case cited by the Lord Ordinary. The words used there were, as in the present case, "heirs, executors, and successors whomsoever," but there was

added, "conjunctly and severally." Now, these were fatal words for the feuar, because each was bound along with all the others. This was not a separate but a conjunct obligation. The Court were all of opinion that but for these words the result at which it arrived would have been the opposite. I see that in that case I said—"If the clause had stood precisely as it does, but without the words 'conjunctly and severally,' it could not have been contended that any party was bound but those who would generally be bound under such clauses in an ordinary feu-contract. The imposition of the obligations on the vassal, his heirs, executors, and successors, would have been read, according to inveterate practice, as an obligation on himself so long as he remained vassal and lived, and after his death on his heirs and executors, for payment of arrears, and on his successors in the feu for payment of feu-duty in the future." Now, that is just the clause which we have to construe here, and accordingly the case of *Straton* becomes an express authority on the present question.

Lord Adam—I think this a very clear case, and I concur in the opinion expressed by your Lordship. The question turns upon the construction which is to be put upon what would be termed the *reddendo* clause in a feu-charter. By it the vassal Russell bound himself during his lifetime, and his heirs and executors, and his successors after his death, in payment of these feu-duties, and accordingly the question comes to be, are the defenders Russell's successors in the feu? If they are, then they are liable in the payments claimed; if they are not, then the sums demanded are not exigible from them. As they are not the vassal's successors in the feu, they are in my opinion entitled to absolvitor. But it was urged in addition that the true reading of the obligation undertaken by Russell was that he bound himself to provide a successor in the feu for all time coming, and that as he had failed in his undertaking, the sum now claimed in name of damages was due. I cannot see anything to warrant such a reading of this contract, and accordingly I think the only course open to the pursuer is just to adopt his ordinary remedy and resume possession of the feu.

The Lord President intimated that Lord Mure (who was absent from illness) concurred in the judgment.

The Court adhered.

Counsel for the Pursuer—Sir C. Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—D.-F. Mackintosh, Q.C.—Begg. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Commissariot of Edinburgh.

VINCENT AND GUARDIAN *v.* THE EARL OF BUCHAN.

Foreign—Domicile—Proof—Onus.

A lady whose domicile of origin was Scottish married in 1855 a domiciled Scotsman, with whom she resided, partly in Scotland and partly in England, down to the date of his death in 1883.

Her husband left her considerable property, consisting of a house in London, which after occupying for a few months, she sold along with most of the furniture which it contained, two farms in Scotland, which were in her possession at the time of her death, and about £15,000, which was invested by her Scottish agents on heritable security in Scotland. During the five years which she survived her husband she only revisited Scotland twice, residing for the most part in London in furnished houses, or in lodgings. She frequently went abroad, and she also visited occasionally various watering places in England. She died in London in 1888.

After her death a question arose as to whether her domicile was Scottish or English. *Held* that the *onus* of proving that the deceased had abandoned her domicile of origin fell upon the party alleging that she had *animo et facto* acquired an English domicile; and, on the proof, that this *onus* had *not* been discharged.

This was an application in the Commissary Court of Edinburgh for the appointment of an executor to the deceased Lady Elizabeth Lee Harvey, widow of Henry Lee Harvey of Castle Semple, Renfrewshire. She died in London on 13th January 1888.

Francis Erskine Vincent presented a petition to be decerned executor. He was the nephew of the deceased, and her sole next-of-kin by the law of Scotland. He alleged that Lady Elizabeth died domiciled in Scotland.

The application was opposed by the Right Honourable David Stuart, Earl of Buchan, the eldest brother consanguinean of the said Lady Harvey, who alleged that at the date of her death she was a domiciled Englishwoman, that her succession fell to be regulated by the law of England, and that by it, in cases of intestacy, brothers and sisters consanguinean were entitled to participate in the division of the deceased's estate, and to the office of executor, equally with the brothers and sisters german. The respondent maintained that he was entitled to be substituted for the petitioner, who was a minor, or to be conjoined with him in the office of executor.

The Sheriff Commissary allowed a proof, the petitioner being appointed to lead. The following facts were established—Lady Elizabeth Lee Harvey was a daughter of the late Henry David Erskine, 12th Earl of Buchan, who was a domiciled Scotsman. She was born in Scotland. In 1855 she married Henry Lee Harvey of Castle