

At advising, the opinion of the Court was delivered by

LORD PRESIDENT—We have looked into this matter and we have consulted the Auditor, and the Auditor has informed us that the practice of the office has been to treat the phrase in the Act of Parliament as imperative. In the older practice it was not thought necessary in view of the imperative phrase in the Act of Parliament to put anything into the interlocutor. It seems that in some more modern cases that practice has been departed from, and an instruction in the interlocutor has been inserted that expenses were to be taxed as between agent and client; but we think that is unnecessary, that the older practice is the right one, and that the Auditor will continue as before to treat the phrase in the Act of Parliament as imperative on him. We shall therefore make no express finding on the point, but as a matter of fact expenses will be taxed as between agent and client.

The Court found the co-defender liable to the pursuer in expenses, and remitted the account thereof to the Auditor to tax and to report.

Counsel for Pursuer—Crabb Watt, K.C.—R. S. Brown. Agent—John Robertson, Solicitor.

Counsel for Co-defender—Blackburn, K.C.—Wilton. Agent—J. Ogilvie Grey, S.S.C.

Friday, March 15.

FIRST DIVISION.

GOVERNORS OF GEORGE HERIOT'S TRUST v. FALCONER AND OTHERS (LAWRIE'S TRUSTEES).

Superior and Vassal—Feu-Contract—Construction—Composition—“A Double” of the Feu-Duty.

The reddendo clause in a feu-contract entered into in 1889 was for certain sums of feu-duty for each of three lots of ground, to be payable “at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term’s payment” at certain dates respectively. There followed a clause providing for liquidate penalty in case of failure and for interest, and then came these words—“As also paying to” the superiors “a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years from the following terms,” which were in each case a term of Whitsunday only.

Held (dub. Lord Johnston) that the sums payable to the superior in name of composition in addition to the annual feu-duties were twice the amounts of the respective feu-duties.

Alexander’s Trustees v. Muir, January 28, 1903, 5 F. 406, 40 S.L.R. 316, distinguished.

A Special Case was presented for the opinion and judgment of the Court by (1) the Governors of George Heriot’s Trust, incorporated by scheme made in terms of the Educational Endowments (Scotland) Act 1882, and approved of by her late Majesty Queen Victoria by Order in Council dated 12th August 1885, as amended by the Court of Session in terms of interlocutors dated 2nd December 1897 and 27th October 1908 (*first parties*), and (2) William Falconer and others, the surviving trustees of Charles Lawrie, builder, acting under his trust-disposition and settlement (*second parties*).

By contract of feu dated 9th and 11th February and recorded in the General Register of Sasines 9th April 1889, entered into between the Governors of George Heriot’s Trust, on the one part, and Messrs Lawrie & Scott, builders and joiners, Edinburgh, and Charles Lawrie and Thomas Scott, the individual partners of the said firm, as trustees for the firm, on the other part, the said Governors, under the burdens therein mentioned, disposed to Charles Lawrie and Thomas Scott and the survivor of them, as trustees or trustee for behoof of the firm of Lawrie & Scott, all and whole that area of ground in Hillside Crescent, Edinburgh, marked Nos. 1, 2, and 3 on the feuing plan for building purposes, and that on the conditions contained in the said contract of feu. Thomas Scott was survived by Charles Lawrie, and the second parties were infest as vassals in the said subjects as trustees of Charles Lawrie.

The clauses of tenandas and reddendo in the said contract of feu were in the following terms, viz.—“To be holden the said subjects before disposed of the said the Governors of George Heriot’s Trust and their successors as immediate lawful superiors thereof, in feu farm, fee, and heritage for ever: Paying therefor, yearly, the said Charles Lawrie and Thomas Scott, trustees foresaid and their foresaids, to the said the Governors of George Heriot’s Trust and their foresaids, in name of feu-duty as follows, *videlicet*—For the said lot number one on the plan prepared by said John Chesser the sum of thirty-six pounds; for the said lot number two on said plan the sum of thirty-six pounds; and for the said lot number three on said plan the sum of thirty-four pounds sixteen shillings; and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term’s payment of the said sum of thirty-six pounds for said lot number one at the term of Martinmas Eighteen hundred and eighty-nine, and the next term’s payment at the term of Whitsunday following (said feu-duty commencing to run at the term of Whitsunday Eighteen hundred and eighty-nine), and so forth, half-yearly thereafter in all time coming, beginning the first term’s payment of the said sum of thirty-six pounds of feu-duty payable for said lot number two at the term of Martinmas Eighteen hundred and ninety, and the next term’s payment at the term of Whitsunday following (said

feu-duty commencing to run at the term of Whitsunday Eighteen hundred and ninety), and so forth half-yearly thereafter in all time coming; and beginning the first payment of the sum of thirty-four pounds sixteen shillings of feu-duty payable for said lot number three at the term of Martinmas Eighteen hundred and ninety-one, and the next term's payment at the term of Whitsunday following (said feu-duty commencing to run at the term of Whitsunday Eighteen hundred and ninety-one), and so forth half-yearly thereafter in all time coming; with a fifth part more of each term's payment of the said respective feu-duties of liquidate penalty in case of failure, and interest at the rate of five per centum per annum of each term's feu-duty from the respective terms of payment until the actual payment thereof; as also paying to the said the Governors of George Heriot's Trust and their foresaids a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years from the following terms, *videlicet*—From the term of Whitsunday Eighteen hundred and eighty-nine for said lot number one, beginning the first payment thereof at the term of Whitsunday nineteen hundred and eleven; from the term of Whitsunday Eighteen hundred and ninety for said lot number two, beginning the first payment thereof at the term of Whitsunday Nineteen hundred and twelve; and from the term of Whitsunday Eighteen hundred and ninety-one for said lot number three, beginning the first payment thereof at the term of Whitsunday Nineteen hundred and thirteen; and so forth at the expiration of every twenty-two years after said respective terms, with interest at the rate of five per centum per annum on said respective compositions from the respective terms when the same become payable until the actual payment thereof: Declaring that each of the said lots and building or dwelling-house thereon and the piece of back ground offering thereto respectively shall be liable only in the feu-duty and composition payable therefor as above mentioned."

In terms of the last-mentioned clause a composition became due in respect of lot 1 of the said subjects at Whitsunday 1911, and compositions in respect of the other two lots would fall due at Whitsunday 1912 and Whitsunday 1913 respectively.

The contractual obligations of the feuars in the said contract of feu were expressed as follows:—"For which causes and on the other part the said Charles Lawrie and Thomas Scott, as trustees foresaid, bind and oblige themselves and their foresaids to make payment to the said the Governors of George Heriot's Trust and their foresaids of the foresaid sums of feu-duties at the respective terms of payment before mentioned, with penalty and interest as aforesaid; as also to make payment to the said the Governors of George Heriot's Trust and their foresaids of a double of the respective feu-duties before mentioned of composition, and that at the terms and with interest as aforesaid."

The first parties' *contention* was that on a sound construction of the said feu-contract the sums payable in name of composition for each of said lots were fixed at twice the amount of the respective feu-duties, viz., £72, £72, and £69, 12s., and that over and above the annual feu-duty of the year in which the composition became payable.

The second parties *maintained* that the sums payable in name of composition as aforesaid were respectively the amount of one year's feu-duty in addition to the annual feu-duty of the year in which the said composition became payable, and that on that basis the sums payable in name of composition as aforesaid were respectively £36, £36, and £34, 16s.

The *question of law* stated for the opinion and judgment of the Court was—"Are the sums payable to the first parties by the second parties in name of composition, in addition to the annual feu-duty, (a) twice the amount of the said respective feu-duties, viz., compositions of £72, £72, and £69, 12s. respectively; or (b) the amount of one year's said feu-duty respectively, viz., £36, £36, and £34, 16s.?"

The following authorities were referred to at the hearing—*Earl of Zetland v. Carron Company*, June 30, 1841, 3 D. 1124; *Cheyne v. Phillips*, June 3, 1897, 5 S.L.T. 27; *Alexander's Trustees v. Muir*, January 28, 1903, 5 F. 406, 40 S.L.R. 316; *Ersk. ii, 5, 49; Stair, ii, 4, 27.*

At advising—

LORD PRESIDENT—This is a Special Case for the Governors of George Heriot's Trust and the trustees of the deceased Charles Lawrie, and the question put before us is, What is the sum which the second parties as trustees are bound to pay in name of composition?

The contract of feu which embraces the subjects in question was dated in February 1889. It is therefore a contract of feu which has been entered into since the Act of 1874, and as your Lordships are aware, after 1874 it was impossible in a new feu to have casualties in the same way as casualties could be had before the Act; but it was possible to stipulate for a casualty which should be payable at regular intervals. The feu-contract is in ordinary form, and I need not trouble your Lordships with it at all, except to say this, that the reddendo is for a certain sum for each of the various lots which are embraced—a feu-duty of so much money to be payable "at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said sum," &c., "with a fifth part more of each term's payment of the said respective feu-duties of liquidate penalty in case of failure, and interest at the rate of five per centum per annum of each term's feu-duty from the respective terms of payment until the actual payment thereof"—an ordinary clause. Then come the following words—"As also paying to the said the Governors of George Heriot's Trust and their foresaids a double of the said respective

feu-duties before mentioned in name of composition at the expiration of every twenty-two years from the following terms, videlicet"—and then the terms from which the twenty-two years run are given, with different dates for the different lots, for instance, in lot No. 1 the term is Whitsunday 1889, and in lot No. 2 the term is Whitsunday 1890. Now the whole question between the parties is whether this demand of a double of the said respective feu-duties in name of composition means that they are to pay as composition a sum equal to twice the yearly feu-duty as well as paying the feu-duty for the year, or whether they are to pay in all only two feu-duties—one ordinary feu-duty, and another feu-duty as composition.

That is a pure question of construction of what the parties meant, and I cannot say that personally I have had much difficulty in coming to a conclusion.

Certain cases were quoted to us, and in such a matter cases are useful, but unless the cases deal with words which are exactly similar they are not absolutely authoritative. In all these cases the question was the same—that is to say, whether the sum was to be three times or was to be twice the feu-duty. In *Zelland* (3 D. 1124) the words were, paying a sum "over and above" the feu-duty. Probably that left no very easy case for the vassal to argue, although it was argued, but at any rate the Judges thought that the words "over and above" were conclusive. In the deed under consideration in *Cheyne v. Philips* (5 S.L.T. 27) the words "as also" were used, and there were other expressions, including a reference in a subsequent clause to the payment as a "further sum." There again it was held to be a casualty equal to a double of the feu-duty. In *Alexander's Trustees v. Muir* (5 F. 406) the vassal was taken bound to pay a feu-duty of £248, 8s. 2d. yearly at the term of Whitsunday, as also to pay to "me . . . at the term of Whitsunday 1824 the sum of £497, 16s. 4d., being the double of the said yearly feu-duty which will be then due for the said whole subjects; as also to pay to me . . . and my foresaids every nineteenth year (counting from the said term of Whitsunday 1824) the said sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year counting from Whitsunday 1824," and the superior was bound to enter as vassals the heirs, disponees, or singular successors, without demanding or being entitled to exact any composition whatever "in regard that the foresaid feu-duty, together with the double thereof in every nineteenth year . . . are the agreed and fixed consideration hereby accepted of, in lieu of all compositions for the entries of heirs, disponees, and singular successors in the foresaid lands and others." Now in that case it was held that only the two payments were exigible.

I think as a matter of construction clearly

here a composition is meant to be paid over and above the feu-duty. Although the words "as also" were used in *Alexander's* case, there was there a form of expression which showed that there was to be a doubling of the feu-duty every twenty-fourth year, and that in respect of that doubling the lands were to remain free of composition, there is no such expression here. Here you have done with the clause dealing with the feu-duty, and then the deed goes on to say, "as also you shall pay a double of the feu-duty every twenty-second year as a composition." There is another matter which is, that this composition is to be paid at a different term from the feu-duty. The feu-duty is to be paid at two terms in the year, and this composition is to be paid at the term of Whitsunday at the expiration of every twenty-two years.

Upon the whole matter therefore I come to the conclusion that, as matter of construction, the composition is to be paid by paying a sum equivalent to double of the annual feu-duty over and above the feu-duty which falls to be paid at that particular term—that is to say, the half year's feu-duty then due—and accordingly that the question put to us ought to be answered sub-head (a) in the affirmative, and sub-head (b) in the negative.

LORD KINNEAR—I agree.

LORD JOHNSTON—I have experienced considerable difficulty in this case. Were it an isolated case I should not have thought myself justified in expressing the doubt which I entertain of the conclusion at which your Lordship has arrived. But I understand the judgment will cover a considerable amount of property, held under the first parties on the same form of title.

The reddendo for the first of these feus is stated to be "paying therefor yearly in name of feu-duty" a certain sum of money, £72 I think, at two terms in the year, Whitsunday and Martinmas, "as also paying" "a double of" the said feu-duty at the expiry of every twenty-two years from Whitsunday 1889.

The date of the feu-contract is in that year, and therefore section 23 of the Conveyancing Act 1874 abolishes relief and composition as formerly exigible. The payment is simply conditioned as part of the reddendo. Moreover, the sum called feu-duty is payable half-yearly at Whitsunday and Martinmas. This extra payment is payable in whole at every twenty-second Whitsunday. Whatever therefore be the meaning of "a double," the question does not arise in this which has arisen in former cases, viz., whether the extra payment stipulated is cumulative with, or in substitution for, the feu-duty of the year. It is, under the terms of this feu-contract, clearly a separate payment altogether. Nor do I think that the usual addition, "over and above the feu-duty of the year," or some equivalent, would have been apposite, or that its omission calls for remark.

The sole question then is, what is the meaning of "a double of"? I have care

fully considered the authorities cited, but I cannot say that I think they afford much assistance, as so much depends on the particular turn of expression. The question is to my mind very much one of impression. But I think that one ought to approach that question with the knowledge that the payment is really, though not formally, in lieu of the old casualty of relief and the payment of composition, on the footing that the feu-duty was a competent avail and therefore the measure of composition as well as of relief in the normal case; and further, that from nineteen to twenty-two years has come to be regarded as, so to speak, the average duration of a generation in feu holdings. Hence if parties were merely seeking for an average equivalent of the former feudal exactions on transmission, a payment as such equivalent of a sum equal to the feu-duty is what one would fairly expect. But it was quite open to the superior to stipulate for any payment he could get his vassal to assent to, provided he made the stipulation so as clearly to disclose his meaning. Not only then is he *in petitorio*, but he is asking for what would not be based on the fair calculation of the normal, but would have a colour of the severe or exacting condition. I therefore think that I am specially bound to be satisfied, not on probability but on language which is conclusive, that the stipulation in question bears the superior's interpretation.

Now I must say that the impression which the words used have made upon me is, that "a double of" in the collocation in which the words occur, naturally means a replica of—that is, as "the double" is something to be calculated in money, that these words mean a sum which is the same as, and not twice as much as, the feu-duty. Had the superior intended to stipulate the latter, it would have been easy for him to use words distinctly expressing that the parties meant a sum equal to twice the amount of the sum which is the stipulated feu-duty. I cannot say that I am satisfied that the superior has done so. And I do not think that I am entitled to give him the benefit of the doubt, on the assumption that it is most probable that he intended the higher exaction.

But the words used are susceptible of a different meaning. Your Lordships, being differently impressed by them, are prepared to give them a different interpretation. Accordingly, though I have expressed my doubt, I agree in the judgment which your Lordship has proposed.

LORD MACKENZIE concurred.

The Court answered the question in the affirmative of sub-head (a), and in the negative of sub-head (b).

Counsel for the First Parties—Constable, K.C.—Russell. Agent—Peter Macnaughton, S.S.C.

Counsel for the Second Parties—Cooper, K.C.—Menzies. Agents—Duncan Smith & M'Laren, S.S.C.

Friday March 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

SHANKLAND & COMPANY v.
M'GILDOWNY.

Arrestment—Jurisdiction—Arrestment ad fundandam jurisdictionem—Consignation—Arrestment in Hands of Clerk of Court—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) section 6.

A domiciled Irishman raised an action in a Sheriff Court against a Scotsman for payment of sums alleged to be due for limestone and sand. The Scotsman lodged defences in which he admitted that he was due a certain sum for the limestone, but denied that he was due anything for the sand, in respect of which he counter-claimed for a larger sum. With his defences he consigned with the Sheriff-Clerk a sum corresponding to the amount admittedly due for the limestone, and obtained from the Sheriff-Clerk a simple acknowledgment which did not state why the money was consigned. While the money was in the Sheriff-Clerk's hands notice of arrestment *jurisdictionis fundandæ causæ* at the instance of a firm was served upon the Sheriff-Clerk of all sums due to the Irishman. Thereafter the action was settled and the money consigned was, by order of Court, paid back to the Scotsman, the consigner.

The firm having raised an action against the Irishman, *held (diss. Lord Johnston, who was of opinion that after consignment the Irishman was bound to get the benefit of the fund, if not in cash at least in account) that the arrestment was bad, because it was uncertain who would eventually get the money, and accordingly the Sheriff-Clerk was not at the time of the attempted arrestment accountable to the Irishman.*

Lockwood, July 4, 1738, M. 736, and Pollock v. Scott, July 9, 1844, 6 D. 1297, commented on.

The Sheriff Courts (Scotland) Act 1907, sec. 6, enacts—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff—(c) where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction."

Shankland & Company, coal, sand, and limestone merchants, Glasgow, *pursuers*, raised an action in the Sheriff Court at Glasgow against H. M. M'Gildowny, residing at Clare Park, Ballycastle, County Antrim, Ireland, *defender*, "against whom jurisdiction has been founded by arrestment *jurisdictionis fundandæ causæ*."

The pursuers sought payment of £228,