

were found due to either party since the date of the Lord Ordinary's interlocutor, and all other expenses were reserved.

Agents for Pursuer—J. & A. Peddie, W.S.  
Agent for Defender—George Cotton, S.S.C.

Saturday, Feb. 23.

## FIRST DIVISION.

### DUNLOP'S TRUSTEES v. ANSTRUTHERS.

*Irritancy of Contract of Ground-Annual—Defence—Relevancy.* Held that it was not a relevant defence to a declarator of irritancy of a contract of ground-annual, that the superior had not given the vassal possession of a material part of the subjects, in respect that merely founded an illiquid claim of damages.

This was an action of declarator of irritancy of a contract of ground-annual. The summons concluded for declarator "that the ground-annual or yearly ground rent of £68, 5s. 2d. sterling, after-mentioned, payable by the defender, the said John Fulton Anstruther, and his heirs, executors, and successors, in the lands and others after described, and which said ground-annual or yearly ground rent it was, by the contract of ground-annual aftermentioned, provided and declared, should be uplifted and taken by the said Elizabeth Lyon Dunlop, and by William or Willie Dunlop, residing in Port Glasgow, sister of the said Elizabeth Lyon Dunlop, equally between them, and their respective heirs and successors, furth of and from the subjects respectively hereinafter described, and whole houses and buildings erected, or to be erected thereon, and furth of any part or portion thereof, readiest, rents, maills, and duties of the same has fallen into arrear, and that two years' payments thereof (being the half-year's ground rents or ground-annuals due respectively at the terms of Whitsunday and Martinmas 1863, and Whitsunday and Martinmas 1864) are resting-owing and unpaid, and that thereby the irritancy specified and provided in the said contract of ground-annual has been incurred; and that the contract of ground-annual before referred to, dated the 18th day of March and 9th day of April, both in the year 1858, entered into between the said William or Willie Dunlop for herself, and as factor, commissioner, and attorney for the said Miss Elizabeth Lyon Dunlop, her sister, conform to factory and commission granted by the said Elizabeth Lyon Dunlop in her favour, of date the 18th day of February 1857, the said William or Willie Dunlop and Elizabeth Lyon Dunlop, being heritable proprietors of the subjects, lands, and others after described; and also with the special advice and consent of the defender, the said Mrs Margaret Adam or Anstruther, spouse of the said John Fulton Anstruther, as therein mentioned of the first part, and the said John Fulton Anstruther of the second part, with all that has followed thereon, has become void and null; and that the said subjects, lands, and others, and whole houses and buildings thereon, described in the said contract of ground-annual as follows—(Here follows description of lands)—have reverted to, and do now belong to the pursuers, trustees foresaid and their foresaids, successors of the said Elizabeth Lyon Dunlop and William or Willie Dunlop, in, and having right to the said contract of ground-annual the said ground-annual or yearly ground-rent subjects and others therein mentioned; and that the pursuers, trustees foresaid, and their fore-

said may enter into possession of the said subjects, lands and others, and whole houses and buildings thereon, and dispose thereof at pleasure." There were also conclusions for decree of removing and for expenses.

The defenders pleaded, *inter alia*, "The pursuers having, *inter alia*, wrongfully failed to put the said defender into possession of a material part of the subjects, of which the pursuers' authors, Miss William or Willie Dunlop and Miss Elizabeth Lyon Dunlop, who is represented by the pursuers, became, under the contract of ground-annual libelled on, bound to give the said defender possession, the said defender is not bound to pay to the pursuers the ground-annual specified in said contract."

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

"*Edinburgh, 6th March 1866.*—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, productions, and whole process—Sustains the first plea in law stated for the pursuers; and, in respect thereof, finds, declares, and decrees in terms of the first conclusion of the summons; and, before answer on the remaining conclusions, allows the defender to state, within ten days from the date hereof, whether or not he is prepared to purge the irritancy referred to in the said first conclusion of the summons—reserving meanwhile all questions of expenses.

"CHARLES BAILLIE.

"*Note.*—The Lord Ordinary does not mean to prejudge in any respect the merits of the question raised in the action of damages at the instance of the defender against the present pursuers. But he is of opinion that the claim for damages, as stated, cannot be relevantly pleaded against the demand of the pursuers here for present payment of the ground-annual, as sued for.

"C. B."

The defenders reclaimed. When the reclaiming note came to be discussed, the irritancy was purged at the bar by payment of the arrears of ground-annual, and it was stated that the cause of complaint on which the defender's plea was founded had been removed. It became necessary, however, to review the interlocutor in order to determine the question of expenses.

BLACK was heard for the defenders and reclaimers.

GIFFORD and GLOAG for the pursuers.

At advising,

Lord ARMILLAN—This is an action of declarator of irritancy brought to enforce a forfeiture of a right conferred by a contract of ground-annual. The contract bears that, "in the event of the said ground-annual or yearly ground-rent, created by the said contract of ground-annual, falling into arrear, and two years' payment thereof being at any time resting-owing and unpaid, or in the event of the said John Fulton Anstruther, or his foresaids, failing to erect and continually to maintain houses and buildings of the description and value provided for by the said contract of ground-annual on the subjects before described, or to keep the said houses and buildings constantly insured, as also provided for in the said contract of ground-annual, then, and in any of these cases, the said contract of ground-annual, and all following thereon, should, in the option of the said first party and their foresaids, become *ipso facto* void and null, and the said subjects should revert and belong to the said first parties and their foresaids having right to the said ground-annual or yearly ground-rent, but without prejudice to the said

second party and his foresaids purging the irritancy at the bar." Now it is admitted that upwards of two years' ground-annual had fallen into arrears, and that admission brings into play, if the superior think fit, the provision of the contract. It was maintained that it was a good defence that the pursuers having failed to put the defender into possession of a material part of the subjects, the defender was not bound to pay the ground-annual. I am of opinion that that plea, as an answer to a demand for payment of ground-annual, is not a good defence, because the claim which it involves is illiquid. This is fixed by the cases of *Dun v. Craig* (November 12, 1824, 3 S. 193) and *Dods v. Fortune* (February 4, 1854, 16 D. 478), and the rule is quite settled. If this had been a suspension of a charge for payment of ground-annual, the same plea, if stated, would have been equally unfounded. But then this is an action of declarator of irritancy. I do not think that the nature of such an action is that it is merely a mode of compelling payment. It is one of two alternative proceedings which a superior may resort to, and its true object is to bring the contract to an end. This was deliberately considered in the case of the *Magistrates of Edinburgh v. Horsburgh* (May 16, 1834, 12 S. 593), in which Lord Balgray begins his opinion by saying—"I had persuaded myself that there were some points fixed and settled in the law of Scotland beyond the power of challenge. But I find I have been mistaken at least as to one of these, for the question is now raised whether a superior who has taken a declarator of tinsel of the feu can also demand arrears of feu-duty from the vassal. It was the opinion of Lord Justice-Clerk Miller that he could not. I have heard Lord Justice-Clerk Braxfield and Lord Justice-Clerk Rae confirm that opinion, and after these authorities, especially the first, who was one of our greatest feudal lawyers in modern times, I am not disposed to treat the matter as an open question or one upon which the law admits of change." Therefore, I think, that when a party brings an action for declaring the forfeiture, he is selecting a most severe remedy, and I think he must set up his title not altogether at the cost of his opponent. The plea of the defender was, I think, a bad plea; but then, dealing with the question of expenses, I think the pursuers took a severe course, and looking to the nature of the pleas, I am disposed to suggest that the defender should be found liable in expenses, but subject to modification.

Lord CURRIEHILL concurred.

Lord DEAS also concurred in the result, but expressed an opinion that the pursuers had selected the proper and most suitable remedy.

Agents for Pursuers—A. G. R. & W. Ellis, W.S.  
Agent for Defenders—William Muir, S.S.C.

Saturday, Feb. 23.

## SECOND DIVISION.

M'LEAN AND HOPE *v.* FLEMING.

*Process—Evidence (Scotland) Act, 1866—Commission—Witnesses abroad—Jury Trial.* Held that under this Act it is only competent to grant commission to take the whole evidence in a cause where there is either an interlocutor of the Court to that effect or a consent of parties, and interlocutor of Lord Ordinary granting commission for the examination of certain witnesses abroad recalled, in respect it did not recognise the existing practice adopted in jury trials.

In this action, which is one of the enumerated causes that falls under the 47th section of the Act of 1850, Lord Kinloch pronounced the following interlocutor. He had previously pronounced an interlocutor appointing the proof to be taken before himself:—"The Lord Ordinary, having heard parties' procurators, in respect it is stated by the defenders, Messrs M'Lean & Hope, that there are a number of witnesses in Constantinople, and on the coast of the Mediterranean Sea, whose evidence is of great importance in the case, and that there is danger of its being lost owing to their residence abroad, and their not being likely to come within the jurisdiction of the Court, grants commission to the British Consul-General, or to the Vice-Consul at Constantinople, to examine such witnesses as shall be adduced by the defenders on the subject-matter of the closed record in the conjoined actions, with the exception of the conclusion for damages in the action at the instance of George Fleming, which has been abandoned, due notice being given to the pursuers, to the satisfaction of the said commissioner, of the time and place fixed for the witnesses' examination before such examination proceeds, and appoints the depositions of the witnesses to be reported by the third sederunt day in May next."

The pursuer reclaimed, and asked the Court to remit to the Lord Ordinary to appoint a day for taking the proof under the Evidence (Scotland) Act 1866.

At the discussion the defender departed from the interlocutor of the Lord Ordinary and made a motion that the whole of the evidence in the cause should be allowed to be taken on commission.

To-day the Court unanimously recalled the interlocutor, holding that under the Evidence Act it was only competent to grant commission to take the whole evidence in a cause when there was either an interlocutor of the Court to that effect or a consent by parties, but the Court could not entertain this motion under the reclaiming note. As to the power to grant commission to examine witnesses abroad, that could only be done under reference to the existing practice of making affidavit and adjusting interrogatories, and that practice was entirely disregarded by the Lord Ordinary.

The interlocutor, therefore, was recalled as incompetent, and expenses were granted to the reclaimers.

Counsel for Reclaimers—Mr Clark and Mr Watson. Agent—J. Henry, S.S.C.

Counsel for Respondent—Mr Young and Mr Mackenzie. Agents—White-Millar & Robson, S.S.C.

Tuesday, Feb. 26.

Lord Glencorse, late Lord Justice-Clerk, this day presented her Majesty's letter appointing him Lord Justice-General of Scotland and Lord President of the Court of Session, and having taken the customary oaths, his Lordship took his seat on the bench as Lord President.

Wednesday, Feb. 27.

## FIRST DIVISION.

ANDERSON AND WATT *v.* SCOTTISH N.-E.

RAILWAY CO. (*ante*, vol. i. p. 116).

*Diligence—Arrestment—Validity.* An arrestment by a railway company of stock and dividends belonging to an alleged debtor reduced as