charge, but repelling the objection to the charge at common law.

The Court sustained the objection to the relevancy of the charge under the statute, and *quoad ultra* found the libel relevant.

Counsel for the Crown—Sym, A.-D.—J. C. C. Brown.

Counsel for Simon Macleod—Ure.

Counsel for Roderick Macleod—Strachan.

COURT OF SESSION.

Tuesday, October 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EDMONSTONE AND ANOTHER (LUMSDEN'S TRUSTEES) *v.* SETON AND OTHERS.

Succession—Marriage-Contract—Bond and Disposition in Security—Heir and Executor—Real Burden—Obligation ad factum præstandum.

An obligation to transfer into the names of certain parties a certain amount of Consolidated Bank Annuity stock is an obligation *ad factum præstandum*, and being of a definite nature, may, along with an obligation to pay interest until fulfilment, be validly imposed as a real burden upon land.

A person borrowed from his marriage-contract trustees two sums of £5000 and £3500 3 per cent. consols, and these stocks were accordingly transferred from their names to his. In return, by bonds and dispositions in security he bound and obliged himself, and his heirs, executors, and representatives, when required, to purchase and transfer to the trustees the like sums of £5000 and £3500 3 per cent. consols, and in the meantime to pay them the amount of the interest which would have become due and payable to them had the transferred stocks been left standing in their names. In security of these obligations he disponed certain lands, which he subsequently disponed to gratuitous disponees.

In an action against these parties at the instance of the marriage-contract trustees, *held* that the bonds and dispositions in security created good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees took the lands under burden of the said securities without relief against the executors.

Under a settlement made in contemplation of marriage between Henry Thomas Lumsden and Susannah Edmonstone, dated 28th April 1832, there were *inter alia* conveyed, for the purposes of the settlement, two sums of £5000 and £3500 3 per cent. consols. These sums Mr Lumsden subsequently borrowed on separate occasions from his marriage-contract trustees, and the stocks were transferred from their name to his. In return, by two bonds and dispositions in security, dated respectively on 28th March 1849 and 9th November 1858, and duly recorded, he bound and obliged himself, his heirs, executors, and representatives whomsoever, at any time during his life or after his death when required, in manner provided for in the bonds, "to purchase and transfer, or procure to be transferred in the books of the Governor and Company of the Bank of England, unto and into the names of the trustees or the survivors or survivor of them, or their representatives," the capital stocks or sums of £5000 and of £3500 three pounds per centum Consolidated Bank Annuities, "and that upon or within the day or time to be specified in the notice to be given to or left for me in manner after mentioned." He also bound himself and his foresaids to pay to the grantees sums equal to the interest and dividends which would have accrued on the stock had they remained in the grantees' names, and at the time when such dividends would have become payable. In security of these obligations he disponed to the trustees the lands of Guisway or Cushnie, of which he was fee-simple proprietor.

By disposition and settlement dated 28th October 1867 Mr Lumsden granted and disponed the lands of Guisway or Cushnie to his wife Mrs Susanna Edmonstone or Lumsden, in the event of her surviving him, in liferent, for her liferent use allenarly, and to the heirs of his body in fee, whom failing to certain other parties. The disposition and settlement was recorded in the Register of Sasines on September 17, 1886.

Mr Lumsden died on 19th November 1867, and up to that date he had regularly paid and accounted for the interest or dividends on the two sums of £5000 and £3500 consols; but had not retransferred these stocks to the trustees under his marriage settlement.

In virtue of the disposition and settlement Mrs Lumsden succeeded on Mr Lumsden's death to the estate of Guisway, and enjoyed the liferent of it till her death on 18th April 1886. She was succeeded by Sir William Samuel Seton.

The present action was brought by Charles Welland Edmonstone and William Trotter, the surviving trustees under the marriage-contract.

They called as defenders the heirs of entail of the lands of Guisway, and sought, *inter alia*, to have it declared that by the bonds and dispositions in security before mentioned, valid securities had been created over the lands of Guisway for the obligation to purchase and transfer to the trustees the two sums of £5000 and £3500 3 per cent. consols, or for the sums of £5000 and £3500, or for a sum equal to the value of the stocks either at the date of the bonds or of citation in the summons, or for an annual payment of £255 till the stocks should be transferred.

The defenders pleaded—"(2) The said two bonds are not effectual incumbrances upon the said estate, in respect that they are truly obligations *ad factum præstandum*, or otherwise are obligations for the payment of an indefinite and unascertained amount. (3) The obligation undertaken by the granter of the said bonds being of a personal nature, is primarily enforceable against his moveable estate, and the holders of his moveable estate have no right of relief against his heritable estate."

The Lord Ordinary pronounced the following interlocutor on 31st January 1888:—"Finds that

the bonds and dispositions in security libelled in the summons create good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees of Henry Thomas Lumsden take the said lands under burden of the said securities without relief against his executors: Appoints the cause to be put to the roll for further procedure, &c.

"*Opinion.*—The first question is, whether the two bonds and dispositions in security libelled in the summons are good charges upon the lands thereby disponed? The late Mr Lumsden had borrowed from his marriage-contract trustees two sums of £5000 and £3500 3 per cent. Consolidated Annuities standing in their names in the books of the Bank of England. These sums were accordingly transferred from their names to his, and by the bonds in question he binds himself, and his heirs, executors, and representatives, when required, in a certain manner, or if not required during his life, then within six months after his death, to purchase and transfer, or procure to be transferred to the trustees, the like sums of £5000 and £3500 3 per cent. consols, and in the meantime to pay to them the amount of the interest which would have become due and payable to them upon the transferred stock if it had been left standing in their names. In security of these obligations he dispones his lands of Cushnie or Guisway and others; and in case the granter or his heirs or executors shall make default in transferring the stock or in paying interest, each of the bonds contains a provision that in that case it shall be lawful for the trustees to recover payment of such a sum as will at the time be sufficient to purchase the stock and replace the interest which may be due.

"The defenders maintain that these are not effectual securities upon the lands, because the obligations secured are *ad factum præstandum*, or otherwise are obligations for payment of an indefinite and unascertained amount. The primary obligation to purchase and transfer a certain amount of Government stock is in form an obligation *ad factum præstandum*. But it results in the payment of money; and it does not appear to be very material to the question whether it is in form an obligation to pay or an obligation to transfer.

"There can be no doubt that an obligation *ad factum præstandum* may be made a real burden on land, and the only question in either view is, whether it is sufficiently definite to satisfy the rule of law that no indefinite or unknown burden can be created on land.

"On this question I am of opinion that the defenders' plea is not well founded. An obligation to assign a definite proportion of the National Debt is not, in my judgment, an indefinite obligation in the sense of the rule upon which they rely. I do not think that the cases cited of *Stein's Creditors* and *Tod* v. *Dunlop* are apposite, But even if it were to be held that an obligation to transfer the specified amount of Government stock when required to do so is too indefinite to be well secured on land, the same objection would not apply to the obligation which is immediately prestable to pay annuities equal to the interests payable in respect of such stock. It is said that the undertaking to pay interest is merely accessory, and that the validity of the security must depend upon the character of the principal obligation alone. But the amount of the interest is in no way affected by the considerations which are said to make the principal obligation uncertain. It is not the interest upon an indefinite or variable capital sum that is to be paid, but a sum equal to the interest which the Government pays upon £5000 or £3500 of 3 per cent. consolidated annuities. In other words, it is an annuity equal to 3 per cent. upon each of these specified sums. The obligation to pay such annuities is perfectly definite, and there appears to be no reason why it should not be made a burden upon land."

The defenders reclaimed, and argued—(1) As to the capital sums. The obligation here sought to be imposed was really an obligation to pay money, but not a definite sum, and owing to its indefinite nature it could not be made the subject of a good and valid burden upon land. Suppose the obligation were held to be an *ad factum præstandum* obligation, there was no instance of an *ad factum præstandum* obligation not being *inter naturalia* of the right of possession being held to be validly imposed as a real burden upon land. (2) As to the interest. This was merely an accessory obligation to the payment of the capital sums, and if the principal obligation were not validly imposed upon the lands neither was the accessory. It was also not an obligation of a continuing nature, but merely lasted so long as the capital should be unpaid, whether such payment were made by the heir or the executor —Bell's Comm. (7th edition) i. 730 (5th edition, i. 690); *Newnham* (*Stien's Creditors*) v. *Stewart* March 25, 1791, and March 10, 1794, 3 Pat. App. 345; *Magistrates of Edinburgh* v. *Begg*, December 20, 1883, 11 R. 352; *Coutts* v. *Tailors of Aberdeen*, December 20, 1834, 13 S. 226; *Tod* v. *Dunlop*, December 13, 1838, 1 D. 231.

The respondents were not called on.

At advising—

Lord President—In this cause the Lord Ordinary has not disposed of all the conclusions of the summons. He has found "that the bonds and dispositions in security libelled in the summons create good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees of Henry Thomas Lumsden take the said lands under burden of the said securities without relief against his executors."

Now, the view I take of the matter depends on simple principles. There are two obligations here quite distinct from one another. The one is an obligation *ad factum præstandum;* the other an obligation to pay a certain sum of money. The obligation *ad factum præstandum* is of this kind—"To purchase and transfer, or procure to be transferred . . . the capital stock or sum of £5000 three pound per centum Consolidated Bank Annuities, and that upon or within the day or time to be specified in the notice to be given to or left for me in manner after mentioned." That certainly is not *de plano* an obligation to pay money, though it may involve the debtor in an *ad factum præstandum* obligation which he may not be able to perform without the expenditure of money. But what the debtor in an *ad factum præstandum* obligation has to do is to perform certain acts, and the act here required of him is to put his creditor in a certain position as the owner or transferee of

£5000 of 3 per cent. Consolidated Bank Annuities. In doing so he may have to expend more or less than that sum of money, but the obligation is a definite one, namely, to replace the marriage trustees in the same position as they occupied before they transferred the stock—to make them owners or transferees of so much consolidated stock.

The other obligation is to pay interest on £5000 3 per cent. stock. That is an obligation to pay money, and a perfectly definite and ascertained amount. The objections which have been taken may be answered in that way. It was objected that the obligations sought to be secured were indefinite. I think they are both perfectly definite. One is an obligation to perform an act which can be done only in one way. The other is to pay interest on a certain sum. I agree therefore with the view taken by the Lord Ordinary.

LORD MURE—I agree with the opinion expressed by the Lord Ordinary in his note. The question he had to decide was whether an obligation *ad factum præstandum* could or could not be made the subject of a good heritable security. I agree with him that the only question is whether the obligation is sufficiently definite to satisfy the rule of law that no indefinite burden can be created on land. Now, the terms of the bond put it beyond all question that the lands were disponed in security of £5000 consols. No doubt the value of that stock may vary in amount, but the granter is bound to make good the security for that amount. That is a definite obligation, and may be made a burden upon land.

LORD SHAND—If it could be maintained that an *ad factum præstandum* obligation could not be made a real burden upon land, there would have been some ground for the argument we have listened to. There is, however, no doubt, as the Lord Ordinary says, that such obligations may be made real burdens. In this case the obligation to transfer stock is an obligation *ad factum præstandum*, and is of quite a definite nature, and consequently I have no doubt that it can validly be made a real burden upon land.

The second obligation is simply an obligation to pay a sum of money—the interest on a certain amount of three per cent. stock. There is nothing indefinite in that. I am therefore of opinion that the argument on both points fails.

LORD ADAM concurred.

The Court adhered.

Counsel for Defenders and Reclaimers—Sir Charles Pearson—Low. Agents—Mackenzie & Kermack, W.S.

Counsel for Pursuers and Respondents—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Wednesday, October 17.

SECOND DIVISION.

[Sheriff of Caithness.

TOD (SUTHERLAND'S TRUSTEE) *v.* GEDDES (MILLER'S TRUSTEE).

Landlord and Tenant—Lease—Tacit Relocation—Rei interventus—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 28.

Previous to the term of Martinmas 1884 the tenant of certain farms under a lease which expired at Whitsunday following, arranged verbally with his landlord the terms of a new lease at a reduced rent. The landlord handed to the tenant a letter to his factor of 1st December 1884, directing the latter to prepare a formal lease embodying the terms of the new arrangement. The landlord executed a trust-deed for behoof of his creditors, and no formal lease was executed. The tenant continued in possession of the farms, but paid no rent after Whitsunday 1885. *Held* that an action at the instance of the trustee for the rent payable under the old lease as having been continued by tacit relocation fell to be dismissed, in respect that since Whitsunday 1885 the tenant had not possessed by tacit relocation, but under the new arrangement.

Observations on the question whether a tenant abstaining from giving a notice to leave his holding required by the Agricultural Holdings (Scotland) Act 1883, and continuing to possess, could be held to validate *rei interventu* an uncompleted arrangement for a new lease at a different rent.

John Miller, a fishcurer and farmer, occupied certain lands on the estate of Forse, in the county of Caithness, on a lease which expired at Whitsunday 1885. The term of Whitsunday 1885 was the termination of a two years' lease of the subjects between the defender and Mr Sutherland, and accordingly it was necessary, under section 28 of the Agricultural Holdings (Scotland) Act 1883, that the defender, in order to prevent tacit relocation and to secure his right to remove, should have given notice of removal to Mr Sutherland at Martinmas 1884. Upon 8th November 1884, however, Miller had an interview with the proprietor Mr Sutherland of Forse, and the agreement entered into between them was expressed in the following letter, written by the proprietor to his factor and law-agent Mr Nimmo, writer, Wick:—"1*st December* 1884.—Dear Sir,—On the 8th of last month I arranged with John Miller, Boulglass, for a new lease to him from Whitsunday next of the farms and lots he now holds, at a yearly rent of fifty-three pounds (£53) and road-money. Duration of lease fifteen years, with breaks in his favour at the end of five and ten years. All improvements to be made solely at his own expenses, without any compensation to be paid therefor at the termination of the lease—wire fences excepted. As to the valuation he is now entitled to for the wood, flags, &c., on his houses, I have agreed that a sum of three hundred pounds (£300)—minus £2 per annum during the currency of the lease—is to be paid to him at his outgoing in lieu of all expenses and other