Friday, December 4.

FIRST DIVISION.

[Lord Dundas, Ordinary.
[Sheriff Court at Edinburgh.

JOHNSTON *v.* THE STANDARD PROPERTY INVESTMENT COMPANY, LIMITED, AND OTHERS.

WEATHERHEAD *v.* JOHNSTON.

Heritable Security—Feu-Duty—Real Burden—Allocation—Right of Bondholder on Selling Security Subjects to Create Real Burden — Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 119, *as Re-enacted by the Titles to Land Consolidation Amendment (Scotland) Act* 1869 (32 *and* 33 *Vict. c.* 116), *sec.* 7.

A bondholder who sells the security subjects in lots has no power, in virtue of the Titles to Land Consolidation Act 1868, section 119, or otherwise, to create real burdens as between the different lots which he is selling.

A feu-duty of £37 was in terms of the feu-charter exigible from a certain piece of ground. There was no clause in the feu-charter binding the superior to allocate the feu-duty. The vassal having granted a bond and disposition in security of the ground, and having failed to repay the loan, the bondholder advertised the ground for sale in two lots, lot 1 as having a feu-duty of £37, and lot 2 as having no feu-duty. Lot 2 was sold, but lot 1 did not sell. The disposition of lot 2 contained this clause —"Declaring that the said subjects hereby disponed shall not be liable for payment of any part or portion of the feu-duty created by the foresaid feu-charter, . . . but the same shall be payable from" lot 1, "and in the event of our said disponees or his (*sic*) successors . . . having to pay the said feu-duty at any time hereafter they shall have right of relief against the proprietor for the time being of" lot 2 and lot 2 "itself, . . . and we bind ourselves to free and relieve our said disponees . . . of all feu-duties, casualties, and public burdens, and we bind ourselves and our successors in the remaining portions of the subjects . . . to allocate or apportion, in the disposition to be granted by us or our successors to the purchasers of the said remaining portion, the whole feu-duty of £37."

In an action against the bondholder and the debtor, who had meantime paid the debt and become retrocessed in the unsold portion, *held* that the purchaser of lot 2 was not entitled to declarator that the feu-duty of £37 formed a real burden upon lot 1, the unsold portion, to the effect of relieving lot 2 from liability as in a question with the owners for the time being of lot 1.

The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 119, as re-enacted by section 7 of the amending Act of 1869 (32 and 33 Vict. cap. 116), gives the import of the clauses in a bond and disposition in security in the form in the schedule to the Act; and it provides that the clause giving power of sale shall import that on the failure of the borrower to make payment it shall be in the power of the bondholder, after the requisite procedure, "to sell and dispose, in whole or in lots, of the said lands and others . . . and for that end to enter into articles of roup, to grant dispositions containing all usual and necessary clauses, and in particular a clause binding the grantor of the said bond and disposition in security in absolute warrandice of such dispositions, and obliging him to corroborate and confirm the same, and to grant all other deeds and securities requisite and necessary by the laws of Scotland for rendering such sale or sales effectual, in the same manner and as amply in every respect as the grantor could do himself, and as if it had been thereby further provided and declared that the said proceedings should all be valid and effectual, whether the debtor in the said bond and disposition in security for the time should be of full age or in pupilarity or minority, or although he should be subject to any legal incapacity, and that such sale or sales should be equally good to the purchaser or purchasers as if the grantor himself had made them . . .; and as if the grantor had bound and obliged himself to ratify, approve of, and confirm any sale or sales that should be made in consequence thereof, and to grant absolute and irredeemable dispositions of the lands and others so to be sold to the purchaser, and to execute and deliver all other deeds and writings necessary for rendering their rights complete."

Two cases dealing with the same subject-matter, viz., the liability for feu-duty of one of two lots of property, the two lots having been created by a bondholder out of a subject (undivided so far as the original feu-charter was concerned) disponed to him in a bond and disposition in security, were taken and decided together by the Court. The leading case, though not the earlier, was *Johnston* v. *The Standard Property Investment Company*, and the earlier case, *Weatherhead* v. *Johnston*. For a narrative of the facts out of which the cases arose see the first portion of the Lord President's opinion, *infra*.

I. *Weatherhead* v. *Johnston*—In October 1907 David Weatherhead, house factor, Edinburgh, raised an action in the Sheriff Court at Edinburgh against Charles Johnston, tea merchant, Edinburgh, in which he sought decree for £42, 19s. 6d. Pursuer averred that that sum was the just proportion of the feu-duty from Martinmas 1904 to Whitsunday 1907 effeiring to a certain piece of ground purchased by Johnston, being one out of two lots put up for sale by the Standard Property Investment Company, Limited, in virtue of a bond and disposition in their favour, and that he (Weatherhead) as owner of the other lot had paid the said sum to avoid an irritancy of the feu.

The disposition from the Standard Property Investment Company, Limited, to Johnston contained this clause—"Declaring that the said subjects hereby disponed shall not be liable for payment of any part or portion of the feu-duty created by the foresaid feu charter first above mentioned, but the same shall be payable from the tenement adjoining erected on the stance at the corner of Albion Road and Easter Road, and in the event of our said disponees or his successors in said subjects being called on or having to pay the said feu-duty at any time hereafter, they shall have right of relief against the proprietor for the time being of the said adjoining tenement and the said tenement itself: With entry at Whitsunday 1901: And we assign the writs conform to inventory thereof annexed and subscribed by us as relative hereto, but in respect the same relate to other subjects of greater value than those hereby disponed, the same are not delivered, but we hereby bind ourselves to make the same forthcoming to our said disponees and their foresaids on all necessary occasions upon a receipt and obligation to re-deliver the same within a reasonable time, and under a suitable penalty; and we hereby bind ourselves to take the party or parties to whom the same or any of them may be ultimately delivered, bound in a like manner and under a like penalty: And we assign to our said disponees all right competent to us to demand delivery of the prior writs: And we assign the feu and blench duties and casualties of superiority or duplicands of the feu-duties of the area or piece of ground second above described: And we also assign the rents of the *dominium utile* of the whole subjects hereby disponed: And we bind ourselves to free and relieve our said disponees and their foresaids of all feu-duties, casualties, and public burdens: And we bind ourselves and our successors in the remaining portion of the subjects first above described to allocate or apportion, in the disposition to be granted by us or our successors to the purchasers of the said remaining portion, the whole feu-duty of £37 and corresponding duplicands payable under said feu charter."

The defender pleaded, *inter alia*—"(3) In the circumstances set forth the defender's liability for the feu-duties sued for having been judicially negatived in proceedings which are *res judicata* in a question with the present pursuer, the defender should be assoilzied, with expenses. (4) The pursuer's averments being irrelevant to support the prayer of the petition the action should be dismissed, with expenses."

On 18th December 1907 the Sheriff-Substitute (GARDNER MILLAR) sustained the fourth plea-in-law for the defender.

The pursuer appealed.

II. *Johnston* v. *The Standard Property Investment Company, Limited*—On 29th January 1908 Charles Johnston raised an action against (1) the Standard Property Investment Company, Limited; (2) James Campbell Irons, S.S.C.; and (3) David Weatherhead, in which he sought declarator (1) of the contents of the articles and conditions of roup under which he had purchased his lot, and in particular that the lot was advertised as free of feu-duty; (2) of the contents of the disposition of said lot; (3) that the whole of the feu-duty, viz., £37, payable on the whole ground under the original feu-charter, formed a real burden upon the other lot; and (4) that the various defenders "are bound each in any disposition to be granted by them or him respectively to any purchaser, or singular successor of them or him in the said subjects hereinbefore described as forming Nos. 190, 192, and 194 Easter Road, and Nos. 1, 3, 5, and 7 Albion Road, Edinburgh, or of the ground on which said tenements are erected, or in any such disposition of said subjects to which they or he may be a party, to allocate or apportion in such disposition the whole of the said feu-duty of £37 sterling and corresponding duplications payable under the said feu-charter, in such manner that the whole of said feu-duty and duplications shall be allocated upon and payable out of and made a real burden upon the said subjects last mentioned, and that to the effect of freeing and relieving the subjects hereinbefore described as belonging to the pursuer from any liability, as in a question with the owners for the time being of the subjects upon which the said feu-duty and others fall to be allocated, for payment of any portion thereof." [In the action as originally laid, in the event of it appearing that Weatherhead, in respect of being a singular successor, was not bound to insert clauses to the effect aforesaid, and that the other defenders were unable to procure their insertion, damages were sought against the other defenders jointly and severally, or otherwise against the Standard Property Investment Company, Limited.]

On 17th July 1908 the Lord Ordinary (DUNDAS) found it unnecessary to dispose of the first and second conclusions of the summons, dismissed the same, and decerned: Found with regard to the third conclusion that the whole feu-duty of £37 did not form a real burden upon the subjects and others upon which had been erected that corner tenement of shops and dwelling-houses forming Nos. 190, 192, and 194 Easter Road, and Nos. 1, 3, 5, and 7 Albion Road, Edinburgh, described in said third conclusion of the summons, and dismissed the said conclusion and decerned: Found and declared and decerned in terms of the fourth conclusion of the summons and relative conclusion thereof for decerniture against the defenders James Campbell Irons and David Weatherhead, but dismissed it so far as regarded the Standard Property Investment Company, Limited; and also dismissed the conclusions for damages.

Opinion.—"The pursuer is proprietor of some tenement property in Albion Road, Edinburgh, which he purchased in 1901 from the defenders the Standard Property Investment Company, Limited. The company sold the subjects under the power of sale conferred upon them by a bond of cash

credit and disposition in security in their favour, which, though it was in fact granted by one Slater, was treated in the argument as having been for the purposes of this case truly granted by the defender Mr Irons, for whose behoof Slater admittedly held the property. At and prior to the date of this sale Mr Irons (or Slater on his behalf) was vested in the radical right of the said subjects, and also of certain adjoining property in Easter Road and Albion Road, which was included in the security subjects conveyed by the bond. The title to the last-mentioned subjects is now in the defender Mr Weatherhead, conform to disposition by Mr Irons in his favour; but it is conceded that the case must be decided as if Mr Irons himself still stood vested in them. The said bond was granted in April 1899 in security of an advance by the Standard Company not exceeding £11,000. About January 1900 Mr Irons became bankrupt and his estates were sequestrated. The company accordingly proceeded to call up their bond by the necessary forms of notarial intimation, requisition, and protest, and advertised the security subjects for sale. The subjects were burdened with a *cumulo* feu-duty of £37. The advertisement bore that they would be sold by public roup in two specified lots, the first of which was stated to be under burden of a feu-duty of £37, while of the second it was announced 'there is no feu-duty.' The articles of roup contained, *inter alia*, clause (*septimo*), which provides that lot 1 was to be sold subject to a feu-duty of £37, but that the exposers were not to be bound to obtain any allocation from the superiors. The security subjects were exposed for sale, when the company failed to sell lot 1, but lot 2 was purchased by the pursuer, and the price applied by the company in reduction *pro tanto* of the debt due to them by Mr Irons under the bond. The disposition of lot 2 by the company to the pursuer, dated 15th and recorded 16th May 1901, contained, *inter alia*, a declaration to the effect that the subjects disponed should not be liable for payment of any part of the feu-duty created by the feu charter of 1899 therein referred to, but the same should be payable from the tenement adjoining, *i.e.*, lot 1, and that in the event of the disponee or his successors in lot 2 being called on or having to pay the said feu-duty at any time thereafter, they should have right of relief against the proprietor for the time being of lot 1 and the tenement itself. The disponers assigned the writs conform to inventory annexed, and bound themselves to make the same forthcoming to the disponee and his successors on all necessary occasions; and they bound themselves and their successors in lot 1 to allocate or apportion in the disposition to be granted by them or their successor to the purchaser thereof the whole feu-duty of £37. The Standard Company, so long as they remained in possession of lot 1, paid the whole feu-duty to the superior. In 1902 Mr Irons came to an arrangement with his creditors which, *inter alia*, provided that he should be reinvested in the unrealised portion of his estate. He obtained from the trustee in Slater's sequestration a conveyance of, *inter alia*, the subjects contained in the said cash-credit bond and disposition in security, excepting therefrom such parts as the company might have sold in virtue of their powers of sale. Mr Irons paid the company the balance of his debt and received from them a discharge dated 23rd April 1904, by which they declared, *inter alia*, lot 1 to be redeemed and disburdened of the said bond and infeftment following thereon. In 1905 Mr Irons brought a petitory action in this Court against the present pursuer for payment of a sum said to represent the proportion effeiring to lot 2 of the feu-duty which Mr Irons had had to pay the superiors. On 21st November 1905 I dismissed the action, holding that Mr Irons had no title to sue, and finding it unnecessary to decide whether, as his counsel argued, the imposition of the whole feu-duty upon lot 1 was *ultra vires* of the Standard Company. I refer to the opinion I delivered when pronouncing my interlocutor, which has long since become final.

"The present action was raised on 29th January 1908 by Mr Johnston, the disponee of lot 2, against the Standard Company, Mr Irons, and Mr Weatherhead. The summons is bulky, but its gist may be summarised as follows—The first two declaratory conclusions are, I think, really ancillary to the succeeding ones and need not be separately considered. The third conclusion asks for declarator that the whole feu-duty of £37 is payable out of and forms a real burden upon lot 1. The fourth conclusion is alternative to the third, and craves declarator that the defenders are bound each in any disposition to be granted by them or him respectively to any purchaser or singular successor in lot 1 to allocate or apportion in such disposition the whole feu-duty of £37 in such manner that it shall be allocated upon and payable out of and made a real burden upon lot 1, so as to free and relieve lot 2 from any liability in respect thereof, and also to take their or his disponees bound to make the writs enumerated in the inventory annexed to the disposition of lot 2 by the Standard Company to the pursuer forthcoming to him and his foresaids on all necessary occasions; and a conclusion for decerniture follows. There are also two conclusions for damages, but the first of these was given up at the debate in consequence of the admission that Mr Weatherhead is not truly a singular successor of Mr Irons, and the second, directed against the Standard Company alone, appears to me to be irrelevant.

"As already observed, I think the first and second conclusions may be dismissed, in respect it is not necessary to dispose of them specifically. The third conclusion in my judgment fails. I do not think that, as matters stand, the whole feu-duty is a real burden on lot 1 in a question with the proprietor of lot 2. The disposition of lot 2 to the pursuer does not effect that result; and there is nothing in the titles of lot 1 that can do so. The fourth conclusion

raises a point of more difficulty. At the root of it lies the question, which was argued but not decided in the action by Mr Irons against the present pursuer, whether or not it was *ultra vires* of the Standard Company to allocate the whole feu-duty upon lot 1, as in a question between the owners of the two lots. I formerly indicated an impression to a negative effect, and further argument confirms me in that view. The property embraced in the bond being subject to a *cumulo* feu-duty, and the bondholders having statutory power to sell in lots, it seems to me to follow, as a matter of practical necessity from an ordinary business point of view, that the sellers must have some power to allocate the shares in which the lots should bear the burden *inter se*. I know of no legal principle or authority to bind the bondholder in making such allocation to have regard to the proportionate areas or values of the lots respectively; and I see nothing to prevent him from making the allocation as he thinks best with a view to good marketing of the security subject. Of course, if he proposed to allocate in a capricious or unbusinesslike manner, the granter of the bond could apply for interdict; but nothing of that sort is suggested in the present case. If, then, the Standard Company had followed up their disposition of lot 2 to the pursuer by disponing to someone else lot 1 burdened with the whole feu-duty, as contemplated by the articles of roup, I think the two transactions would have been *intra vires* and effectual. If I am right in so thinking, I cannot regard the first of them, standing by itself, as *ultra vires*. In my opinion, the declaration in the pursuer's disposition, though ineffectual to constitute the whole feu-duty a real burden on lot 1, was quite a competent term of the contract of sale between the Standard Company and him. The obligation undertaken by the company never actually came into play, for there has been no subsequent sale or purchase of lot 1. If they had sold that lot to a third party, and omitted to allocate the whole feu-duty upon it, a different position would have arisen, and they might well have been liable in damages for their failure to do so. But Mr Irons is really still in possession of lot 1,—for Mr Weatherhead is not a singular successor,—and he is, in my judgment, bound by the contract of sale by the bondholders to the pursuer of lot 2, and to grant any other deeds or writings necessary to render the latter's rights complete. The concluding words of section 119 of the Titles to Land Consolidation (Scotland) Act, 1868, as re-enacted by section 7 of the amending Act of 1869, seem to me to be in terms applicable to the present case. The obligation thus, in my view, imposed upon Slater, the actual granter of the bond, passed to his trustee in bankruptcy, and from him to Mr Irons. The result is that the pursuer is, in my opinion, entitled to decree substantially in terms of the fourth declaratory conclusion of the summons and the relative conclusion for decerniture against Mr Irons and Mr Weatherhead, but not against the Standard Company, who are by force of circumstances unable to grant further writings or to deliver writs as craved. The conclusions for damages will be dismissed."

James Campbell Irons reclaimed.

Both Cases — Argued for Irons and Weatherhead — A bondholder who was selling the subjects bonded could only sell them as they were, whether he sold them as a whole or in lots. He had no authority to create new burdens or to arrange the imposition of existing burdens between the parts, if sold in lots, even so as to be binding on the lots or the owners of the lots *inter se*. His mandate, if mandate it could be called, was peculiar, in that it followed the bond through the hands of successive holders and was limited to a power of selling the security subjects. The obligation in section 119 of the 1868 Act on the proprietor to "grant all other deeds . . . necessary for rendering such sale effectual" did not here help the purchaser, for it presupposed that the sale was of the subjects as existing. (2) As to the argument that the proprietor not having objected to the conditions of the sale and having benefited thereby must abide by them: If the purchaser thought the selling bondholder had power to allocate a burden and was by the disposition allocating or burdening, and in consequence paid an enhanced price, that was his own fault. At most the bondholders bound themselves to "allocate" amongst themselves only.

Argued for Charles Johnston—The seller under a bond was really a mandatary of the owner and sold as his agent, the power to sell being of the nature of a commission from the debtor, Juridical Styles, vol. i, 1826 edition, p. 309-310. The only ground on which an owner could interdict a sale, not *ultra vires*, was where the sale was being carried out in such a way that the security subjects would sell for too low a price—*Howard & Wyndham* v. *Richmond's Trustees*, June 20, 1890, 17 R. 990, 27 S.L.R. 800—but otherwise the bondholders had the same power of sale as the proprietor, who was bound to grant all deeds necessary for rendering the sale effectual. The sale here was not *ultra vires*. The rights of bondholders were regulated by sections 119 and 121 of the Titles to Land Consolidation Act 1868, and were considered in *Nicholson's Trustees* v. *M'Laughlin*, November 4, 1891, 19 R. 49, 29 S.L.R. 68 (Lord M'Laren's opinion). They had the power to sell in lots, and this necessarily involved the power to allocate, not in its strict sense as binding the superior, but as amongst the purchasers *inter se*. Forms applicable to such allocations were to be found in Burns, Conveyancing Practice, p. 250, 251, 253. (2) Assuming that the allocation was not binding on the owner, he should have interdicted the sale if he repudiated its conditions which were intimated to him, but while the disposition stood and he retained the benefit of the enhanced price paid because of the supposed freedom from feu-duty he could not repudiate the allocation. (3) In any case

as regards the appeal the matter was *res judicata*, as the dismissal of the first action by Lord Dundas sustaining the plea of no title to sue was really an absolvitor.

Counsel for the Standard Property Investment Company, Limited, intimated that as the conclusions for damages against these defenders had been withdrawn they were merely watching the case.

At advising—

LORD PRESIDENT—In 1899 the Lord Provost, Magistrates, and Councillors of the City of Edinburgh, as representing the Trinity Hospital, feued a certain piece of ground to Thomas Anderson, and in the same year Thomas Anderson disponed the same piece of ground to James Slater. By the original feu-charter by the Lord Provost and Magistrates the ground in question was burdened with a feu-duty of £37. James Slater borrowed a sum of money from the Standard Property Investment Company and granted them a bond and disposition in security in ordinary form. James Slater was really the hand in this matter of James Campbell Irons, and as a matter of fact at a subsequent period he executed a declaration of trust setting forth that he really held this land for Mr Campbell Irons. The sum of the loan by the Standard Property Investment Company was not paid, and accordingly the Standard Property Investment Company gave the usual premonition and proceeded to sell the subjects. Of course at this time the property was still feudally vested in Slater, although it was quite well known that the real party interested was Campbell Irons. Accordingly the property was proposed to be brought to sale in the ordinary way in 1901. The usual advertisement, which was necessary before the sale, was inserted, and the advertisement said that the property was to be sold by public roup in two lots—lots 1 and 2—and it then went on to say that the feu-duty of lot 1 was £37, and as regards lot 2 there was no feu-duty. Of course that statement was, from what I have already said, contrary to the fact, because there was a feu-duty of £37 which was exigible from the whole ground. In the articles and conditions of roup the lots are described and the upset prices are given, and then article *Septimo* of the articles of roup, which is a very peculiar one, is in these terms—"Upon payment of the price, with interest as before mentioned and penalty if incurred, the exposers shall execute and deliver dispositions to the respective purchasers and their heirs or assignees of the respective lots of said subjects and others, with entry as at the term of Whitsunday 1901, in which dispositions the said lots shall be disponed to the respective purchasers and their foresaids according to the description thereof in the title-deeds and in these articles, and with and under, as regards lot 1, a feu-duty of £37 and relative duplicand, but which feu-duty the exposers shall not be bound to obtain an allocation thereof from the superiors, nor shall they be bound as regards lot 2 to obtain such allocation or to produce or procure from the superiors any deed showing lot 2 free of feu-duty."

The properties were put up to sale, and lot 2, that is to say, the one that had been advertised as having no feu-duty, sold, but lot 1 did not. It was re-exposed several times but failed to find a purchaser. Lot 2 was sold to Charles Johnston, who is the present pursuer in this case, and a disposition was granted in May 1901 by the Standard Property Investment Company. The disposition narrates the bond and then proceeds to dispone the ground under, of course, the whole of the burdens imposed upon it by the feu charter, and then goes on as follows—"Declaring that the said subjects hereby disponed shall not be liable for payment of any part or portion of the feu-duty created by the foresaid feu charter first above mentioned, but the same shall be payable from the tenement adjoining erected on the stance at the corner of Albion Road and Easter Road." I pause there and merely say that of course that sentence, as it is, represents a conveyancing impossibility, because it is a contradiction in fact and in terms of what has just been said. The ground is disponed in the only way in which it could be under such burdens as were put upon it by the original feu-charter from which the whole title flows, and one of the burdens was a feu-duty of £37 to be taken from any portion of the ground, so to go on and say that it should not be liable for any part of the feu-duty is simply, if I may put it so, to talk nonsense, and is of course absolutely of no effect as in a question with the only person who could exact a feu-duty, namely, the superior. The clause continues—"and in the event of our said disponees or his successors in said subjects being called on or having to pay the said feu-duty at any time hereafter"—even the conveyancer who wrote that wonderful sentence had a sort of inkling that perhaps it would not have any effect, and he proceeds—"they shall have right of relief against the proprietor for the time being of the said adjoining tenement and the said tenement itself." Here is another extraordinary piece of conveyancing. How you can, by mere declaration in one person's title, create a right of relief as against the proprietor of an adjoining piece of ground, there being no privity of tenure between them and no contract so far as yet seen, is a thing which I confess my mind does not grasp. But then the disposition also contains this clause, and here at least we come to something which at any rate has a meaning—"And we bind ourselves and our successors in the remaining portion of the subjects first above described to allocate or apportion, in the disposition to be granted by us or our successors to the purchasers of the said remaining portion, the whole feu-duty of £37, and corresponding duplicates payable under said feu-charter." This, however, is not very much better than the other, because the language used is quite inaccurate. Allocation is a well-known term, but it

represents an operation which can be performed by a superior alone. Apportionment is just a synonym for it, and therefore how the vassal in the portion of the land which was left could perform an allocation is also one of these things which one is perfectly unable to understand, or rather, to put it more plainly, it is a conveyancing impossibility. Still from these words there might perhaps be spelled out as a meaning an intention to bind themselves in some way or other to create a burden upon the remaining portion of the ground, with the effect of freeing the first portion of the ground from the feu-duty which, *ex hypothesi*, is exigible from it by the superior. At any rate Mr Johnston was, I suppose, satisfied because he took the subjects with this marvellous deed, and since then he has possessed them.

Taking up the history of the portion that was left, what happened was this. Mr Campbell Irons had become bankrupt, but his bankruptcy was brought to an end by a deed of arrangement. Accordingly, of course, as soon as that deed of arrangement was completed, Mr Campbell Irons was reinvested in his estate. Mr Slater in the meantime had also become bankrupt, but his feudal holding of this ground, as I have already mentioned, being merely a trust holding, it did not fall into his bankruptcy. So a disposition of the subjects was executed by Mr Robertson Durham, who was Mr Slater's trustee, in favour of Mr Campbell Irons—that is to say, reinstating, or rather giving for the first time to Mr Campbell Irons the ground which had been held by Slater, but which had all along really belonged to Mr Campbell Irons. At the same time Mr Campbell Irons executed a bond of corroboration in favour of the Standard Property Investment Company, taking over upon himself the personal obligation for the money which had been borrowed on security of this land by Slater. The next thing was that Mr Campbell Irons paid the rest of the debt due to the Standard Property Investment Company, and the Standard Property Investment Company there and then executed a discharge. By that means, of course, the whole of the bond was brought to an end, and Mr Campbell Irons became the unburdened proprietor of the land so far as it had not been sold to the present pursuer under the proceedings by the Standard Property Investment Company.

Now all this took up to about the year 1905. During that time, as a matter of fact, the Standard Property Investment Company, while it was in possession, and Mr Campbell Irons after he was retrocessed, had been paying the whole of the £37 to the superiors the Trinity Hospital, and therefore no question had arisen. But in 1905, after he was retrocessed, Mr Campbell Irons raised an action against Mr Johnston for relief of a proportion of the £37. Of course, assuming that there were no complications, that was simple enough. It is trite law that if there is a *cumulo* feu-duty over a piece of ground which has been split up between different proprietors of the *dominium utile*, and if one of them is distressed for the whole of the feu-duty, as he is always liable to be, he has an equitable relief against the other for a proportional share of it, and accordingly but for the specialities here there would have been no defence to that action. But Mr Johnston, conceiving that he had a good answer upon the terms of the advertisement and upon the terms of the disposition which I have recited, defended the action, and it was dismissed by Lord Dundas upon the plea that the pursuer had no title to sue. That interlocutor was taken to the Inner House, but the reclaiming note was abandoned—that is to say, it was refused of consent, and the interlocutor of Lord Dundas became final.

Mr Irons then disponed the ground to a Mr Weatherhead, and Mr Weatherhead raised in the Sheriff Court against Mr Johnston an action of precisely the same class. In that action it became apparent that the disposition by Mr Campbell Irons to Mr Weatherhead was a purely gratuitous disposition, and that Mr Weatherhead was not a singular successor in the proper sense of the term at all, and accordingly the Sheriff-Substitute of Midlothian—once he held it proved, what really is not denied, that Mr Weatherhead was Mr Campbell Irons under another name, very naturally followed that decision of Lord Dundas, which he conceived bound him, and dismissed that action; and one of the cases before your Lordships this morning is an appeal from that judgment.

But in the meantime, while this was going on, Mr Johnston being, I suppose, rather uncomfortable—and I do not wonder—as to the efficacy of these clauses in his disposition, raised an action against Mr Weatherhead, who by this time was the person *ex facie* proprietor of the subjects, Mr Campbell Irons, whom he knew was the real proprietor behind Mr Weatherhead, and the Standard Property Investment Company—an action which has a good many declaratory conclusions, and that is the action in which the Lord Ordinary has given decree to a certain extent, and which is now the subject of the present reclaiming note. Now, the conclusions of that action are, first, for a declarator of the contents of the articles and conditions of roup, because it really merely seeks an echo of what the articles and conditions of roup say—and in particular that his feu was advertised as being free of feu-duty. Then he has a declarator of the contents of the disposition; then he has a declarator that the whole of the feu-duty is a real burden upon the subjects still remaining in the possession of Mr Campbell Irons, although *ex facie* in possession of Mr Weatherhead; and then, in the fourth place, he has a declarator that it should be found and declared that the various defenders. . . . (*quotes fourth conclusion of summons in Johnston* v. *Standard Property Investment Company, Limited, sup.*). . . .

Now, the Lord Ordinary has held that the first two conclusions are quite unnecessary, that they are really simply just a

re-echo first of all of the articles of roup and then of the deed. The third he has negatived, because he has held that no one could say upon the title that the £37 was a real burden upon that title. But he has given decree in regard to the fouth conclusion. What his Lordship says is this— "As already observed, I think the first and second conclusions may be dismissed, in respect it is not necessary to dispose of them specifically. The third conclusion in my judgment fails. I do not think that, as matters stand, the whole feu-duty is a real burden on lot 1 in a question with the proprietor of lot 2. The disposition of lot 2 to the pursuer does not effect that result; and there is nothing in the titles of lot 1 that can do so." Up to that point I agree with the Lord Ordinary. "The fourth conclusion," his Lordship continues, "raises a point of more difficulty. At the root of it lies the question, which was argued but not decided in the action by Mr Irons against the present pursuer, whether or not it was *ultra vires* of the Standard Company to allocate the whole feu-duty upon lot 1, as in a question between the owners of the two lots. I formerly indicated an impression to a negative effect, and further argument confirms me in that view. The property embraced in the bond being subject to a *cumulo* feu-duty, and the bondholders having statutory power to sell in lots, it seems to me to follow, as a matter of practical necessity from an ordinary business point of view, that the sellers must have some power to allocate the shares in which the lots should bear the burden *inter se*. I know of no legal principle or authority to bind the bondholder in making such allocation to have regard to the proportionate areas or values of the lots respectively."

Here, I am afraid, I part company with the Lord Ordinary altogether, because it seems to me that his Lordship is really supposing something that, so far as I know, has never yet happened, and which is contrary, so far as I can understand, to all legal principles. Just let me see what it means. He says—"The bondholders having statutory power to sell in lots, it seems to me to follow, as a matter of practical necessity from an ordinary business point of view, that the sellers must have some power to allocate the shares in which the lots should bear the burden *inter se*." If one is going to use "allocate" in the strict sense it is quite obvious that the sellers have no such power. Nobody supposes that anybody could allocate except the superior. The superior has nothing to do with all these things. He does not know whether his vassal, who has got his ground burdened with his feu-duty, chooses to split that piece of ground into other bits and give it to more people than one. He has no concern with whether the vassal burdens that ground with a class of security which allows a creditor, if not paid, to bring the ground to sale. All that is absolutely nothing to the superior. He alone stays the master of the situation so far as the feu-duty is concerned, and although he may be willing, the ground having been split up, to grant an allocation, nobody can compel him to do so, and consequently it not being in the power of the vassal himself to compel him, how can the vassal's creditor, bringing the vassal's property to sale by means of the power of sale under statutory solemnities, how can he have any more power than the vassal himself? The answer is obvious. I need not remind your Lordships that it is very common indeed—and the form will be found in the Juridical Styles— it is very common when a superior is feuing out ground which his vassal means to use for building purposes, to put in the original charter a clause which binds him to make an allocation when purchasers come forward and ask for it. But when there is no clause—and there is no clause here—the only person who can grant an allocation is the superior, and therefore it is out of the question to say that anybody else has any power to grant it. I almost apologise for going into what appears to be the A B C of the subject, but this is one of those cases where the forgetting of the A B C has led to the whole trouble.

If, then, one dismisses as a perfectly impossible operation allocation in the proper sense of the word, what does the Lord Ordinary's statement mean? It must mean this, that if for purposes of sale the selling creditor or bondholder thinks that one bit of the land would sell better if it did not have to bear in the long run its proper proportion of feu-duty, it is in his power to burden the remaining portion with that feu-duty — burden it, of course, not directly as it is burdened already, but burden it as in a question of relief. I am bound to say that even as a matter of conveyancing by the proprietor himself, although I do not wish actually to say that the thing is quite impossible, I think that the operation would be uncommonly difficult. I am quite certain it is not done, not even nearly done, in the disposition which we have got here. But, as I have said, if there was power I think it would be uncommonly difficult. The hypothesis of the whole transaction, it must be borne in mind, is that there is going to be no privity of tenure between these portions of land. Accordingly you cannot make it a condition of the feu in the same sense in which a superior can make a condition of the feu as in a question between him and the vassal. Well, then, when you come into the question of real burdens without privity of tenure, you of course are under the regulations of law which have been laid down long ago in the classical case of the *Tailors of Aberdeen* against *Coutts*, 1 Rob. 296. Applying the canons of that case to what has been attempted here, it is clear it cannot be achieved by creating a burden for payment of a sum of money certain. I will call the lot first disponed, which is intended to be free of feu-duty, No. 1—*quomodo constat* that the superior is to exact the whole of the feu-duty out of lot No. 1? Consequently if the burden is payment of a sum of money, that under the canon of the

Tailors of Aberdeen against *Coutts* must be a sum certain and not a sum fluctuating, and therefore you cannot manage it in that way. Let me suppose it is not to be a sum of money certain, but that it is to be conceived in the form of an obligation of relief. I do not know whether an obligation of relief of such a character exists; I can only say I have never come across it in the books—an obligation to relieve, not the grantor and his heirs, but the proprietor for the time being of a certain piece of ground. It may be that it is possible to create such an obligation. All I can say is that I have never seen it, and I cannot charge my memory with any case where such a thing has happened. On the contrary, these obligations are governed by the well-known cases of *Horne and Sinclair* v. *Breadalbane*—*Horne* v. *Breadalbane*, 1 Bell's App. 1; *Sinclair* v. *Breadalbane*, 5 Bell's App. 353—the point being that that class of obligation needs a special assignation. Consequently, if you take this obligation of relief, although no doubt it might free Mr Johnston, because he would be named in it, it would not effectuate what we are seeking for, namely, the freeing and relieving of one bit of ground, because there is no doubt that under the law of these cases if Mr Johnston disponed the land and did not give a special assignation of the right of relief the right of relief would not pass.

But I do not think it is necessary to do anything more than mention this. The real consideration seems to me to be this, that whatever may be said as to the proprietor the bondholder has no power. A bondholder may sell because he is given the power to sell, but who gave him the power to burden? Where would the thing stop? For instance, if there is to be a right to grant an obligation to relieve of feu-duty, why not an obligation to relieve of public burdens? Or again, suppose that this bondholder had this power to burden, it is trite law that notwithstanding the bond the original radical proprietor may burden as much as he likes. He cannot, of course, burden in such a way as to affect the burdens in front of him, but otherwise he may burden his property as much as he chooses. Supposing the original proprietor had granted a bond and that bond had been registered, what is the position of the bondholder's power? Who ever heard of property which two people with antagonistic interests were both able to burden at once? If it is really necessary to slay the slain, there is this further consideration, that after all a heritable bond is nothing more or less than a pledge, and who ever heard of a person who had a pledge being allowed to give that pledge back again in a different condition from that in which he got it?

I think I have said enough to show that this idea of a bondholder, as a matter of practical business, being able either to meddle with a feu-duty or to create real burdens as between the different portions which he is selling under his bond, is out of the question. The 119th section of the 1868 Act, and the amending section of the 1869 Act, explaining the forms in the schedule, provides that it shall be in the power of the exposer, the bondholder, "to enter into articles of roup, to grant dispositions containing the usual and necessary clauses, and in particular a clause binding the grantor of the said bond and disposition in security under absolute warrandice of such dispositions and obliging him to corroborate and confirm the same and to grant all other deeds and securities requisite and necessary by the laws of Scotland for rendering such sale or sales effectual in the same manner as the grantor could do himself." That clause would never help, because it is merely arguing in a circle. It only means that the radical owner is bound to grant every deed to make the sale effectual, but of course only such a sale as the bondholder is entitled to make, and to say that that means that the bondholder may put in any and every condition in the articles of roup which the proprietor might put in, and then by virtue of that clause bind the radical owner to carry it out, is again entirely to forget the nature of the whole transaction.

The result of this is, of course, that the whole action is perfectly incompetent. So far as it seeks for declarator of the existence of a real burden I have shown that the title creates nothing of the sort. It has one or two unmeaning phrases in it, but so far as supporting any action to force the proprietor to grant what is sought here it entirely fails, because there is no power in the bondholder to subject the proprietor to any such condition. Accordingly I think that in the leading action the interlocutor of the Lord Ordinary must be recalled and the defenders must be assoilzied.

But when I come to the other action—although if matters were entire the opinion I have just given would lead to decree—the result is entirely different, because there is here a clear plea of *res judicata*. Mr Irons raised precisely this action before Lord Dundas and the action was dismissed, but it was dismissed upon the merits of the question. A decree of dismissal may be just as good *res judicata* as absolvitor. It comes to the Inner House and the interlocutor is adhered to. It seems to me that this is clearly *res judicata* as between this pursuer and this defender, and once it is admitted that Weatherhead is truly Irons it is between the same pursuer and defender, although, of course, I look upon the decree given as wrong on the merits.

Accordingly I think that the appeal must also be refused, although the actual plea to be sustained is not the plea of no title but the plea of *res judicata*.

LORD KINNEAR and LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court pronounced these interlocutors:—

"The Lords having considered the reclaiming note for James Campbell

Irons and David Weatherhead, defenders, against the interlocutor of Lord Dundas dated 17th July 1908, and heard counsel for the parties, Recal the said interlocutor: Assoilzie the said defenders from the conclusions of the summons: Of new dismiss the action so far as directed against the defenders the Standard Property Investment Company, Limited, and decern."

"The Lords having considered the appeal, record, and whole process, and heard counsel for the parties, Vary the interlocutor of the Sheriff-Substitute dated 18th December 1908, by deleting the word 'fourth' and inserting the word 'third': With this variation affirm the said interlocutor: Of new dismiss the action and decern."

Counsel for James Campbell Irons and David Weatherhead—Clyde, K.C.—Maitland. Agent—James Campbell Irons, S.S.C.

Counsel for Charles Johnston—Dean of Faculty (Dickson, K.C.)—J. R. Christie. Agent—Edward Webster, Solicitor.

Counsel for the Standard Property Investment Company, Limited—Crole, K.C.—W. T. Watson. Agents—Duncan Smith & M'Laren, S.S.C.

Friday, December 4.

FIRST DIVISION.

[Lord Dundas, Ordinary.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY *v.* SCOTTISH NATIONAL INSURANCE COMPANY, LIMITED.

Trade Name — Similarity — Deception — Company.

The Scottish Union and National Insurance Company, which was formed in 1878 by the amalgamation of the Scottish Union Insurance Company and the Scottish National Insurance Company, craved interdict against another company, formed in 1907, from carrying on insurance business under the name of the Scottish National Insurance Company, Limited. At the date of the application the business actually being carried on by the respondents was that of marine insurance, while that of the complainers was fire and life assurance. In their articles of association, however, the respondents had power to carry on, *inter alia*, fire insurance.

Held that as the complainers had failed to show that the name chosen by the respondents had occasioned or was likely to occasion any deception, they were not entitled to interdict, and note *refused*.

On 27th June 1907 the Scottish Union and National Insurance Company, 35 St Andrew Square, Edinburgh, brought a note of suspension and interdict against the Scottish National Insurance Company, Limited, 134 St Vincent Street, Glasgow, in which they sought to interdict the respondents from carrying on the business of an insurance company under the name or style of the Scottish National Insurance Company, Limited, and in particular from carrying on under that name the business of marine insurance, fire insurance, accident insurance, and generally all or any kind of insurance business.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DUNDAS), who on 3rd June 1908 refused the note.

Opinion.—"The complainers' Insurance Company was formed in 1878 by the amalgamation and incorporation, under their Act of Parliament 41 and 42 Vict. c. 53, of two insurance companies previously incorporated by Acts of Parliament and carrying on business under the names respectively of the Scottish Union Insurance Company and the Scottish National Insurance Company. These two companies were dissolved by the Amalgamating Act, and their respective property and undertakings vested in the complainers' company. By section 18 of the said Act it was provided that a separate account should be kept in the complainers' books of the life policies of the Scottish National Company and their annuity transactions as existing at 15th May 1876; and this account has been regularly kept. There are now in existence 1993 life policies of the Scottish National Insurance Company (under which, of course, the complainers are liable) and three bonds of annuity, as well as 1169 fire policies. By their amending Act of 1906 the complainers have power, when their net liability on the said separate account shall be reduced to a specified amount (which event has not yet arrived), to close the account and to merge the life funds and liabilities of the Scottish National Company in the general life funds and liabilities of the Scottish Union and National Company. The complainers carry on an extensive business. Their powers are summarised in Stat. 3 upon the record. They include 'making and effecting insurance against loss or damage to ships, goods, and property of every description on the high seas, or elsewhere,' and 'generally carrying on all business usually known as . . . marine insurance, and of underwriters, ...' The evidence, however, discloses that the complainers do not in fact engage in marine insurance in the sense of insuring the hulls or the cargoes of vessels, though they have within the last two years undertaken (to the extent shown in the statement) the insurance of specie and securities, passengers' effects and baggage, &c., crossing the ocean.

"On 28th May 1907 the respondents were incorporated under the Companies Acts, 1862 to 1900, by the name of the Scottish National Insurance Company, Limited, with a capital of £100,000. Their powers, as contained in their memorandum of association, extend to and include all those of the complainers except life insurance and insurance against fatal accidents; but the evidence shows that their business is in fact confined solely to marine insurance.