No. 59. WILLIAM HARLEY, and Others, Appellants.

ARCHIBALD CAMPBELL, Esq. of Blythswood, Respondent.

Superior and Vassal—Clause.—The Court of Session having found, that a clause in a feu-contract, allowing subdivisions of the feu to be held of the superior, but declaring that all dispositions, conveyances, and infeftments, of the whole or any part of the lands, shall be made out by the superior's agent, otherwise the same shall be null and void, was available to the superior to entitle him to reduce any deed or conveyance not prepared by his agent, in terms of the original feu-contract, —the House of Lords remitted the case for review, and the opinion of all the Judges.

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1ST DIVISION.
Lord Meadowbank.

THE lands of Blythswood are held under a strict entail prohibiting alienation. From their immediate proximity to Glasgow, there was a prospect of feuing to advantage; and to accomplish that object, an Act of Parliament was obtained, vesting part of the estate in trustees. Harley, merchant in Glasgow, in 1804, feued a large area of the property from the trustees, with the object of subdividing and selling the ground in lots for building. By the feu-contract it was inter alia provided, 'that it 'shall not be lawful to, nor in the power of the said William 'Harley, or his foresaids, at any time hereafter, to sub-feu the 'foresaid lands or any part thereof, or absolutely to dispone the 'same, so as to be held of themselves, but whatever of the said 'lands shall be so feued or disponed, shall be held immediately 'of and under the said trustees, and their assigns or successors.' Then it was conditioned, that if the feuar dispone only part of the lands, the annual duty of such part or portions should bear such proportion to the total feu-duty, as the space so sold or disponed did to the whole space originally feued; but when, in consequence of the subdivision, the feu-duty of any particular portion came to be less than L. 10 sterling, there was a certain graduated scale of additional per-centage stipulated in favour of the superior, reaching as high as 25 per cent when the feu-duty for any portion fell below L. 2 sterling; and on these terms the trustees become obliged to receive and enter the disponees of Harley as vassals, and to admit of the subdivision of the feu-duties accordingly. It was next provided, 'that all the dispositions or other con- 'veyances of the whole, or of part and portions of the said lands, 'shall be recorded in the books of a competent Judge, within 'one month of the date thereof, which shall contain warrant to 'the said trustees or their foresaids to raise letters of horning, and 'all other necessary execution, against the said disponees or their 'foresaids, for recovery of the feu-duty or feu-duties which may

'become due and resting for the said lands from and after their entry thereto;' declaring, that 'the said dispositions or other conveyances of the whole, or of parts and portions of the said lands, 'with the infeftments to follow thereon, shall be made out and 'extended by the agent of the said trustees, or their foresaids, for 'the time being, and that at the proper charges of the disponees 'of the said lands, or of the disponees or their foresaids, otherwise the same shall be void and null. Declaring also, that all 'sales, dispositions, or other conveyances, of the whole or of 'parts and portions of the said lands, upon terms in violation of, 'or inconsistent with these provisions, shall be ipso facto void 'and null, with all that has followed or may follow thereon, to 'the disponees thereof.'

Harley having become bankrupt, he executed a general trust-deed of his whole property, in favour of trustees for behoof of his creditors. Dun, Wright, and M'Gregor, purchased from Harley's trustees a piece of the ground, originally feued by him from Blythswood, for an annual feu-duty of L.31. 3s. 8d. and a purchase price of L.900; and they accordingly received a disposition from Harley, with consent of his trustees, on which infeftment followed. The disposition and infeftment were in exact concordance with the original feu-contract, except that neither were made out by the agent of the superior. The vassals presented their feu-disposition for confirmation, which was refused in respect of the condition in the original charter. Upon this refusal the vassals intimated, that 'they would hold the superior liable in all loss, damage, and expenses, which the disponees in said disposition may sustain or be subjected to 'by the want of such charter of confirmation.' In order to ascertain the precise nature and extent of his rights, Blythswood raised an action of reduction, calling for production of the disposition in favour of the vassals, with subsequent infeftment, alleging, as the ground of reduction, that the disposition and sasine 'had been made out and extended by agents different 'from the agent of the superior, and have been granted in complete violation of the clause above quoted;' and concluding, that the disposition and sasine 'ought and should be reduced, re-'treated, rescinded, cassed, annulled, decerned, and declared, to 'have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, or effect in 'judgment, or outwith the same, and the pursuer reponed and 'restored thereagainst in integrum; and the said writs being so 'reduced and set aside, it ought and should be found and declared, by decree foresaid, that the said William Harley, and his

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'trustees, are liable to the pursuers for the whole feu-duties due, 'and to become payable out of the foresaid subjects disponed by 'them as aforesaid, and in performance of the prestations of 'the feu, and that in terms of the feu-contract above mentioned.'

The Lord Ordinary reduced, declared, and decerned in terms of the libel; and on advising petition and answers,

Lord Hermand observed,*—It appears to me that the respondent was under the necessity of bringing this action. Indeed I think, if he has not some check on these conveyances, he will be most materially injured. He is required to grant either a charter of confirmation or to pay damages. Did not this necessitate him to bring this action? Therefore he has that strong interest which every man has to avoid a claim of damages. But farther than this, he has already about ninety feuars, and he may have as many more,—the feu-duties are thus all subdivided, and of course he has a direct interest to see that they are so subdivided as to secure himself. This is a clause very favourable to vassals, allowing them to divide their feus; but who is to attend to the subdivision of the feu-duties but the superior or his agent? It is not uncommon to prohibit subfeudations altogether, but here they are allowed; but all infeftments must be presented for confirmation within twelve months from their date, and must be recorded within one month; but there is an exception, even in that case, of marriage-contracts and private deeds, which are good without confirmation at all. This is another indulgence to the vassal. This appears to me to be a very simple case. The respondent would have no security for his feus, unless the agent was to prepare the deeds who would draw the charter of confirmation. It is not known by every person, that this is always done by the agent of the superior. But by the law of the land the respondent could not be compelled to confirm any disposition at all, much less a disposition expressly contrary to the conditions of the feu. The respondent, however, does not object to give a charter of confirmation, but it must be on the conditions of the original feu-contract. This appears to me to be for the benefit of the vassal. The superior's agent cannot put in what clauses he chooses. It proceeds upon a mutual conference, and will be in terms of the original rights. Adhere.

Lord Balgray.—It strikes me very much in the same light. When I look into the summons, I consider it to be really a process of declarator, for the purpose of declaring the right of the superior to enforce the conditions of his feu-charter. It con-

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* These are the opinions which were laid before the House of Lords.

tains no conclusion against the original feuars, and therefore, if these deeds are reduced, the right would revert back to Mr Harley. I look upon this case upon general principles of law. I always understood, that a person might put any lawful stipulation he chose into a feu-contract; and whatever was contained in the dispositive clause of the feu-contract, either reserving the right of the superior, or containing restrictions, conditions, or prohibitions, in so far as these are legal, and not contra bonos mores, the whole of them are effectual on the principles of contract. The principles of feudal law have really nothing to do with this case. The superior must take care that these restrictions or reservations are put into such place in the feu-right as that they may be published to the whole world. When I look at the feu-charter here, I see that the express condition is, that the vassal shall be bound to engross all the conditions, restrictions, and limitations in the body of his infeftment. They are therefore sufficiently published to the whole world, and third parties who contract upon these conditions have nothing to complain of. The question of real burdens has nothing to do with this question. This is a question entirely between superior and vassal; and if it is admitted that the superior is entitled to make such stipulations and conditions as he chooses, if the right is accepted of under these conditions, then the feudal right goes down burdened with these conditions, and must be effectual against all the world, and against any party who chooses to take the right so burdened. He sees this obligation, and is bound to fulfil it, and therefore this question comes to be decided on general principles of law. A superior may put into the dispositive clause whatever conditions, limitations, or restrictions he chooses, and, if these are not contra bonos mores, they are effectual against the whole world. Now to come to this clause, we have only to consider whether it is contra bonos mores. I certainly agree with what has been thrown out, that this is a very dangerous clause for the superior; for if there is any error in the charter, or a delay in granting it, he may be subjected in damages. But there is a quid pro quo here. When the parties come to demand a confirmation, which in common law he cannot be compelled to give, he says, I waive any common law right; I agree to give you a charter of confirmation; but it is upon the condition that the disposition and relative deeds shall be prepared by me,—for I consider the superior and his agent as the same here; and he is entitled to say, that I will not confirm your right unless upon this condition, that I may be satisfied

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that all the conditions and limitations of the original feu are engrossed in the subsequent deeds; and therefore, as I see nothing in this condition that is illegal, I think the party has a right to enforce it. Whether it is a prudent or a wise thing for him to do so, is a question which we cannot enter upon.

Lord Succoth.—I am now of the same opinion. On reading the petition, I was impressed with the belief that Mr Campbell had really no interest to bring the action in which he now insists, —that his interest was such that I doubted if it was sufficient to entitle him to insist in the action. But on reading the answers I came to be of a very different opinion. It appears to me that this condition is not one of mere caprice or whim on the part of Mr Campbell. If it were so, perhaps it would not be right in us to give effect to it. But I think there is a strong interest qualified in the different statements given in these answers. Some of them have been already adverted to; but what strikes me most is this, that Mr Campbell is entitled to an advance of feu on these sub-feus. He might be disappointed of these additional feu-duties if the deeds were not prepared by his agents, in consequence of which he might not know of these subfeu-duties; and I can easily imagine that he might thus lose his additional subfeu-duties; therefore I think there is a strong interest to insist on this clause being complied with. There are a variety of stipulations mentioned in the original feu-contract, which it is necessary for Mr Campbell to see are properly engrossed in the subsequent sub-feus; and being thus satisfied of the interest which Mr Campbell has to insist in this action, I think the greatest difficulty of this case is got over. It is a condition upon which the feu is granted; and that being a condition of the feu, I do not see that any person is entitled to insist on its being dispensed with. I agree in the opinion which has been delivered, that a superior is not bound to confirm at common law; and therefore, when the respondent agrees to a clause by which he passes from that, he is entitled to annex any condition which he pleases as a condition for this concession on his part. Therefore I think the interlocutor well-founded in general. Whether it is sufficiently worded so as to make the reduction only effectual quoad the superior, I am not so sure. Probably it should be made more specific.

Lord Gillies.—The opinion which I have formed in this case differs from those which have been delivered; and I confess the opinion which I have formed has been arrived at with considerable doubt. I confess I am no friend to this clause. I do not think it is calculated to do good to any human being. I think

it likely to be attended with very inconvenient and evil consequences to all the vassals; and with regard to Mr Campbell himself, I consider it attended with most dangerous consequences, by which he makes himself responsible for the accuracy of his agents; and I should be sorry to see any gentleman put into such a situation. I think this consideration goes so far into the case, that I can see no real interest which he has to enforce this clause. The only ground is, that in this way he may be better able to enforce the other clauses in the feu-contract; but for this he has all the aids which the law can give him; and I know no set of persons who have so many engines of the law to make their rights effectual as superiors; and therefore I can see no sufficient interest which the superior has to enforce such a stipulation, which is attended with such very inconvenient consequences to the vassal. In addition to this, it certainly appears to me that it is contra utilitatem publicam, and may be attended with the greatest inconvenience, and in some cases with the most dangerous consequences. Put the case that two conveyances are granted, the one written by Mr Campbell's agent, and the other not, although bearing to be so; am I not in bona fide to contract with the person whose right appears to have been prepared by the superior's agent? I go to the superior to be confirmed; he refuses it on the force of this clause in the original feu-contract; while he is obliged ex concessis to confirm the other conveyance, which has been prepared by his agent, although posterior to mine. Is not this then a condition which may be attended with the most pernicious consequences to bona fide purchasers, and most serious consequences to the pursuer himself?

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I must own I have heard some things stated to-day that I am not prepared to go along with. It is said, that a purchaser has no right to demand confirmation from the superior. I did not know this. I considered that he was bound to confirm. I may be mistaken; but I still think, that at common law Mr Campbell is bound to confirm. But it is said that this is not a real right, but only a personal right. If so, there are only two ways it could be made effectual, either by a charge ad factum præstandum, or by a claim of damages. But neither of these would be effectual. I cannot understand how any thing but a real right can entitle a superior to challenge and irritate a contract entered into with third parties; yet it is said not to be a real right. But this is an irritancy declared of one right, although the other is not resolved. In the case of an entail, you must irritate the

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granter's right also. But here it is said that this deed is only to be reduced quoad the superior, and that the right will remain good quoad third parties, against whom it may be effectual. I think this is a point of some importance in this case; and to me it appears in a different light from what has been hinted from the Bar; for if it is not a good right against the superior, it may ultimately not be a good right against third parties. For, take the case which I formerly mentioned of double conveyances, where the right which is last granted is confirmed, while the prior right remains unconfirmed on account of the conveyances not having been prepared by the superior's agent, although they may bear ex facie to be so,—in this case, has not this clause the effect of setting aside this prior right entered into bona fide, and giving effect to a posterior right in preference? and therefore this clause is effectual not only against the superior, but against all the world, the posterior conveyance being confirmed. This completely and effectually irritates the prior conveyance, not merely against the superior, but against all the world. Therefore, whether the superior is bound at common law to confirm or not in this case, he was bound to do so by his charter; but if effect is given to this clause, that obligation may be reckoned quite nugatory. Alter.

Lord President.—I consider this a case of some difficulty, and some nicety. It is the first case which has come before us where I have seen a condition of this kind. The first question is as to the interest of the respondent to enforce this condition. I think his interest consists in this, that it is the machinery which he has himself invented for enforcing the other clauses in the feu-charter. I am afraid it is a very dangerous machinery for Mr Campbell himself. It is like a cannon overcharged, which may explode to his own utter ruin and destruction; and one day or other I fear he will find that it will do so. But that is his affair. There are certain beneficial conditions in this contract which he has an interest to see enforced; and he has invented this clause to enforce these conditions; and the vassal has consented to this machinery. Whether it is beneficial or not, it is not for me to enter upon. That is their affair, not ours. They must have looked to that, and must abide by it. I do not think we are to look to this as a matter of public convenience or inconvenience. It is a matter of private contract, and, as a matter of private contract, I think the interest of the respondent to insist in this action is quite clear. It is the machinery which he has invented in order to carry into effect certain other

stipulations which he has introduced into his feu-contract. For example, suppose I feu part of an estate, and reserve a road for the benefit of another part of the estate which goes through other feus or lands; and I stipulate that all the locks and keys on the gates of that reserved road shall be made by my own blacksmith; there is surely nothing wrong in that. The reason of it may be, that if I trust the locks to be made by another smith, he may forget to give me a key; and when I come with my carriage, I may not be able to get through this reserved road. This is just the machine which I have invented to enforce the use of the road; and in the same way in this case: this is the machine invented by the respondent to enforce the other stipulations of the feu. It is sufficient to render this condition effectual between superior and vassal, if it is so defined and published as to be made known to third parties. This is a feu-right inserted in all the deeds upon record; and therefore it is effectual against all the world. There is nothing illegal in this condition. It may be ruinous on the one hand, and it may have been foolish on the other, to agree to it. But they agreed to this condition. Why did the feuars agree to it? It is said that this is against the Jurisdiction Act; but the Jurisdiction Act does not speak of confirmations. It speaks of resignations, but not of confirmations. This is a voluntary act, for which he was not bound at common law. Again, it is said the clause may be void, because the superior's agent may not be found at the time, or able to prepare the deeds. This is a dangerous consequence to the superior; but it is a condition which he himself has entered into. Lord Gillies has pointed out this in the strongest terms. There is here a reservation in the case of private contracts, where the party is allowed to prepare the deeds by his own agent, and confirmation and publication are dispensed with. Therefore, as I see nothing contrary to law, and as the public are sufficiently protected by the publication of the conditions upon the record, which must enter into all future conveyances, I rather think the interlocutor is right.

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The Court adhered. On advising reclaiming petition and answers, Lords Hermand, Balgray, and Succoth, expressed their opinions very shortly in terms of the opinions formerly delivered.

Lord Gillies.—I am extremely sorry that I differ in my opinion from so many of your Lordships. I do so with great reluctance; but after paying every attention in my power to this case, I feel myself bound to say, that I consider the interlocutor wrong, and as carrying with it most fatal consequences to the law

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of this country. I have formerly stated my opinion at considerable length, and I shall now state the grounds of my opinion as shortly as possible to your Lordships.

This is an action by Mr Campbell against the disponees to a certain feu granted by him, not against the party who entered into any contract with that gentleman, for this is not alleged; it is not pretended that there was any direct contract between Blythswood and the present petitioner; but the action is brought against a purchaser—and the object of the action is to set aside the disposition granted to a third party, with whom the pursuer never directly contracted. The action is brought upon the ground that the deed is liable to reduction, not because it is at variance with the terms of the original feu-right; for this is not pretended, there is not the least insinuation of that kind—but the only ground on which the pursuer objects to this deed is, that it is not prepared by his own agent. In defence against this action it is pleaded, 1st, That the pursuer has no title or interest to pursue this action; 2d, That it is not the proper action for obtaining the remedy which he wants; and, 3d, That the burden here is not a real burden upon the lands; and therefore cannot be made effectual against the possessor.

I should have been disposed to have stated these defences in the reverse order—to have considered the last defence first, from its general importance, and as conclusive of the present case. But in order to be more distinct in the few observations I mean to offer, I shall follow the order of these defences as stated by the party. First, What is the interest alleged by the pursuer? for I take it to be granted that he must shew an interest. It will not do to say merely, that he wishes to get out of the Court of Session; for here I cannot agree with my brother, Lord Hermand. It appears somewhat strange to say, that his interest is to keep out of this Court, and to attain that object he brings his action in this Court. This will not do; it is impossible for a person to pretend that he has an interest to keep out of this Court, by bringing an action here for that purpose. But it is said, that this clause was necessary or expedient for enforcing the other clauses in the deed. In the clause per se, there is no apparent interest in Mr Campbell at all. It is true, his agent may have an interest, but Mr Campbell himself has none. He says, however, it is necessary for enforcing the other clauses. That plea, however, can never apply here; for, in the present case, it is not alleged that there has been any deviation whatever from the terms of the feu-rights; therefore

there can be no necessity in this case for enforcing the other clauses, all of which are contained in the disposition under reduction. But it is said, that he is threatened with an action to compel him to grant a charter of confirmation; and in order to avoid that action, he has brought this action. June 29. 1825.

Now, as to the first interest stated for the pursuer, you will observe, that every one of the stipulations are inserted in this deed, and every one of them are enforced by irritancies, each applicable to the different stipulations. Why is it necessary to guard, by a separate clause, a clause already sufficiently protected by irritancies? But it is said, that the sales might be concealed but for this clause; but is this clause calculated to prevent, that concealment, or can it do so? Can a sale be concealed, which is completed by disposition and infeftment which enters the record? This stipulation affords no protection whatever; because there is nothing to prevent a party from concluding a bargain by minutes of sale, and entering into possession. But it is said, a great number of inquiries must be made among the agents; but why not? Will that circumstance give any interest to reduce a title? But this point is so very ably argued in the petition, that I need not dwell upon it.

But the second reason is, that he brings this action to avoid another action with which he is threatened, to compel him to grant a charter of confirmation. You will find it admitted in the answers, p. 17. that the obligation to confirm at common law would not entitle him to bring this action. 'It may be true, that 'if the feu-rights had been silent in that particular, the respondent 'would have no title to reduce. He must have been contented 'with refusing the confirmation, if he thought proper. But the 'present action is brought precisely because the feu-rights are not 'silent.' Therefore it is admitted, that at common law the obligation to confirm would not entitle him to bring this action. On this point, it is proper that your Lordships should turn to the disposition, (see Appendix to first Petition). There is nothing here which appears to me as binding him to confirm. But it is sufficient for my present view of the case, that the matter is doubtful,—that it is questionable whether he is bound to confirm or not. Here you are called upon to reduce this title, because there is such a condition, before it is ascertained whether there is such a condition or not. Supposing, in a proper action for that purpose, your Lordships should find that he is not bound to confirm, are you not in this case anticipating the judgment you might pronounce in that case? It is true there

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is another clause in the deed, but that appears to me just as doubtful as this one is.

But I apprehend there is a different objection, which may be stated to the title to insist, which it would be right for both parties to consider. Your Lordships will attend to the Act of Parliament authorizing those feus, 'As to such parts or part of 'the lands aforesaid as shall be feued, it shall not be lawful to, 'nor in the power of the said trustees, nor any of them, to accept or take any fine, premium, grassum, or consideration 'whatever, for granting the same; but such feus shall be granted 'at, and for payment of, the highest feu-duty or feu-duties that 'can be got or procured for the same.' These are to be granted for the highest feu-duties. Now, will any person tell me, that under this strange stipulation any person will give the same price that he would have done otherwise? This clause necessarily exposes the vassal to an additional expense. This is indeed admitted in the answers. Is it no additional expense for a man to pay a set of agents? This is a circumstance which must be in the view of parties. The pursuer seems to consider this as a matter of very little importance; but he admits the fact that this does diminish the feu-duty. Turn to the 22d page of the Answers:—'If it shall be held that these 'emoluments are derived from the vassals, and that the expense 'of employing the respondent's agent in drawing the deeds is, 'to a certain extent, an addition to what would have been neces-'sary if they had employed their own agents, where is the hard-'ship? In that case it just resolves into a species of tax upon 'each transference, which, from the terms of the original feu-'contract, they must have seen they were bound to pay. But 'if, in another view, and which the respondent rather takes to 'be the true one, this circumstance, like every other burden, was 'taken into consideration by each vassal in fixing the feu-duty 'which he was bound to pay, then the lucrative office is in truth 'one of which the emoluments are defrayed by the superior him-'self, in the shape of a diminution from that feu-duty which he 'would otherwise have drawn.' Here it is expressly admitted, that the feu-duty has been diminished. Another consideration, therefore, than the feu-duty, has been taken into account here; and I think it is the interest of both parties to look how this agrees with the terms of the Act of Parliament. I shall not say more, but I think it must be the opinion of every impartial person, that Mr Campbell exposes himself to a very great risk by inserting such a stipulation in his feu-rights, and therefore he

cannot be a gainer by it. Your Lordships will recollect, just the other day, the case of Brown, respecting some feus in George's-square.* It was an action to enforce a stipulation in a feu-charter; but your Lordships refused action to the superior, because he had really no interest to enforce the stipulation. Certainly the plea here cannot rest on any interest which Mr Campbell himself has, but for the interest which he has in his agent, who is to reap all the benefit. It is making him like a town-clerk,—and I believe the office of town-clerk of Edinburgh has cost from L. 3000 to L. 4000,—but that will not do. I apprehend he must shew that he himself has interest, in order to entitle him to insist in this action. June 29. 1825.

The second defence is, that this is not the proper action. I conceive that it ought not to have been a reduction, but a declaratory action. By the law of this country, (and I believe it is peculiar to this country), any person who apprehends that a claim is to be made against him, may bring forward his action to have that put an end to, before the claim is actually made; and therefore, where a claim is apprehended, the proper remedy is a declaratory action. A reduction may no doubt be competent, where both the pursuer and defender are parties to the deed sought to be reduced. Thus, a tenant may reduce a tack, where the landlord is going to make a claim against him which he thinks the tack does not warrant; but if a claim is made against the tenant, will the tenant be entitled to bring a reduction, not of the tack, but of the landlord's title to the estate? This is the case here, for Blythswood is not a party to this deed; but he says, he must either confirm or bring this action. But when he states that he must reduce, he says, there are other cases where the rights have not been prepared in terms of the original feu stipulations. Why then does he select this party, who is innocent of any deviation from the feu-contract? I shall not detain your Lordships longer on these two points, but proceed to what I consider the most important in a general point of view, viz. whether this is a real burden or not. I apprehend clearly it is not; and in pages 40. and 41. of the petition, you have this doctrine extremely well explained and supported by the authorities of our first writers on the law of Scotland, (his Lordship read them).

You will look to those clauses which are on page 7. of the petition, (his Lordship read them). If you leave out the irritant clause, there is not one word here enforcing the obligation. Is this clause expressed, as Erskine says, in the words proper

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* See 2. Shaw and Dunlop, No. 277.

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to constitute a real burden? If the burden is not real, can it be enforced by an irritancy against third parties? The respondent seems to concede that this is not a real burden; but he has found out a middle kind of burden, neither real nor personal, but partaking of the qualities of both; and you are gravely told, that every condition which is lawful in itself may be made real, and may be enforced by annexing an irritancy to it. This is said upon the authority of Mr Bell; but if my memory does not deceive me, that learned gentleman says, that a burden cannot be made real unless it is real in its own nature. If this stipulation is good, I do not know of any stipulation that can be bad, for it is purely a personal obligation. A superior may tie down his vassal to employ his shoemaker, his tailor, and his surgeon. It is clear that the superior may have an interest in doing so, for the encouragement of those persons who are his vassals and residing on his property; but if the superior is to name my agent, he may, with equal propriety, and certainly with much greater safety, name my shoemaker also. If he can name my agent, he can also stipulate the rate at which that agent must be paid. He may make it five, or he may make it fifty per cent. But it is quite impossible to hold such a burden as real. I conceive it cannot be real, for many reasons:—1. It is a feudal burden; 2. It is not in words made a burden on the lands; 3. The record does not shew the name of the individual who is to be employed; and, 4. This may be executed abroad. If it is not a real burden, it cannot be enforced by an irritant clause. The great division of rights, in our law, is into real and personal. If you will look into Erskine, in the chapter upon contracts and obligations in general, you will see what he states on this subject. At the very commencement of the title he says, the great division is real and personal rights, and, to point out the difference between these, the personal rights can be enforced against the debtor and his representatives only, but real rights can be enforced against the possessor; (his Lordship then read the passage from Erskine). Now, how does the matter stand? A real right gives action against the possessor, but I deny that the pursuer can have any right of action against the petitioner, to enforce an obligation which is not real. The pursuer never contracted with the petitioner. He is merely a disponee of the lands, and it is only as such that he has any connexion with him. Therefore, unless this stipulation affects the lands, it cannot affect the petitioner. The pursuer may enforce the clause against his proper debtor, the party with whom he contracted.

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Nothing can evince more clearly the strangeness of this action, than the admission that a claim for total reduction is not here. It is admitted that this disposition is good against all except the superior, when it is admitted that the object of this action is merely to reduce this deed quoad the superior. I apprehend, that the plea of the pursuer is hostile to every principle. It is quite an anomaly in our law, that a deed should be reduced as to one party, and should be good against all the world beside. (Here Lord President hinted as to a reduction on the bankrupt statutes).

The reductions under the bankrupt statutes are total reductions. The deeds are completely set aside—no doubt the debt may still subsist, but the deeds themselves are null for ever. Take the case of an indorsation of a bill. You may reduce that indorsation, and the rest of the bill may be good. But every indorsation is a bill itself. All the actions on the Act 1696 and 1621 are to reduce and set aside the deed in toto. The pursuer gives various examples of this in the answers, p. 14. The most favourable example is that of a freeholder to reduce a decree of the commissioners. But who can doubt this? No doubt it may still continue to be the rule of payment although reduced, because there is no other rule of payment. Just like a lease; a lease may be reduced and set aside, but if the tenant continue in possession without any stipulation or bargain, that reduced lease will still continue to be the rule of payment, just because there is no other rule. But you will attend to this. This deed is a disposition and infeftment,—a real recorded right. When a disposition and infeftment are reduced by the proper party, the record is kept correct by the insertion of a new investiture. But here the record is still to remain. As it is only to be reduced quoad the superior, this infeftment must continue in the record. The petitioner is, and will continue to be, the feudal proprietor of the feu. Mr Campbell cannot touch it. So here you have a decree of the Court, declaring an infeftment null and void, and yet this infeftment stands on the record a proper investiture. What is to be the state of the records of this country if this is to be the case, that you have a recorded infeftment which you cannot touch, and a recorded judgment reducing that infeftment? No doubt it is said, that a new disposition may be granted, and if that is written by Blythswood's agent, he is bound to confirm it. But how could he confirm such a conveyance, knowing, as he does, that the feu is another person's? All this shews how extremely difficult and dangerous it is to deviate in the least degree

June 29. 1825. from those great principles of our feudal law, and from that security in our records, which has been long and justly considered as the safeguard of our landed interest. If these are to be infringed upon, I know not to what extent it may go; and perhaps it would be better that we had not any such records, as to subject them to the hazard to which such a decision would expose them.

Lord President.—I delivered my opinion very fully on this case before; and, after considering these papers, I remain of the same opinion still, notwithstanding the very able opinion that has just been delivered. With regard to the interest of the pursuer, I have not the least doubt of it. This clause is just part of the machinery by which the other clauses are to be enforced. It is just a contract, the exact implement of which I am entitled to demand. Suppose I make a contract, that a person is to furnish me with a pair of bay horses, and he brings me a pair of black ones, perhaps superior in strength and beauty, and fitter for my work; yet they are not the kind contracted for, and I am entitled to object to them. Or if I contract to get my carriage painted a dark colour, and it is sent home to me painted yellow; it is not enough to say to me that the colour I had fixed on was a bad one, and would cast in a few months, whereas this patent yellow with varnish would be much more durable. My contract was for a particular colour, and I am entitled to insist upon it, although I should be a loser. There is an interest existing in fancy; and in this case there is an indirect interest, by which the clause may be necessary to enforce other clauses in the feu-contract. My brother's mistake is, that he always supposes this to be a stipulation by Blythswood, but it will be recollected this is a mutual contract; and who can say but it may have been a stipulation proposed by the feuars?

I am quite clear that this is a condition essential to the feu.

The Court adhered. *

Harley and Others appealed.

Appellant.—The respondent has not shewn any interest to enforce the clause in question. It confers on him no pecuniary or patrimonial advantage whatever. Indeed, his interest is directly opposite. He has no title to reduce the conveyance in question. His title as superior enables him to claim what is due to him as

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* 2. Shaw and Dunlop, No. 326.

superior, but not to call for title-deeds to which he is no party until after confirmation. If he had both interest and title, still he has instituted an incompetent action. His object is, that he shall not be bound to confirm; but he concludes for absolute reduction. The action ought to have been declaratory. The stipulation is illegal—is pactum illicitum—is inconsistent with the 20. Geo. II. c. 20. &c.—is not made a real burden on the lands themselves, but a condition personal to the individuals. Even if not considered as a real burden, it is one of the naturalia feudi, arising out of the proper relation between superior and vassal; and is besides full of uncertainty, and dangerous to purchasers. The only light in which the provision can be viewed, is that of a prohibition, endeavoured to be made effectual by an irritancy or declarator of nullity in case of contravention. But an irritancy founded on a mere prohibition cannot be enforced against third parties, except by means of a strict entail: it can be made effectual only against the vassals themselves who are parties to the contract with the superior. At common law the superior has no right to require that the vassal shall employ his agent to make out the deeds connected with his feu. Every view of policy or expediency is against it. The contract is unequal, for it is a very questionable proposition, whether a substitute heir of entail can be liable for the misconduct of the agent nominated by a preceding heir of entail.

Respondent.—The clause in the feu-rights stipulating, under the pain of nullity, that the dispositions granted by the vassals shall be written by the superior's agent, creates a legal interest in its observance, which the respondent is entitled to protect by an action in the proper form. This interest is obvious on looking to the other clauses of the contract. The form of action adopted is the proper form for ascertaining and defending that interest. Besides, every rescissory action is truly declaratory. The clause is, both in its nature and form, binding on singular successors; and the objection, that the obligation is not made a real burden on the land, rests on a misapplication of the principle which rules the point. It is a condition of, and burden inseparably attached to the feu-right, and valid in its nature and operation. The contract contains nothing inconsistent with the 20. Geo. III., and the whole statement of the inexpediency and dangerous complexion of the clause in question, is mere declamation. This is a deliberate bilateral contract, which, as there is nothing illegal in its construction, must be fairly and fully implemented. And this remarkable feature attends this discus-

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The House of Lords ordered, 'that the cause be remitted back 'to the Court of Session to review the interlocutors complained 'of; and it is further ordered, that the Court to which this remit 'is made, do require the opinions of the Judges of the other Di- 'vision in the matters and questions of law in this case in writing, 'which Judges of the other Division are to give and communicate 'the same; and after so reviewing the interlocutors complained 'of, the said Court do and decern in this cause as may be just.'*

Lord Gifford.—The only other case remaining for judgment, is that of Harley against Campbell. This case arises out of certain feus granted by the trustees appointed under an Act of Parliament for the purpose of selling or feuing the property, out of which the question arises: And, my Lords, they thought fit, in the feus which were granted, to insert various provisions; amongst others, a provision enabling the party to whom the lands were feued, to grant, or dispone, or subfeu the lands, so as that the said lands which shall be so feued or disponed, shall be held immediately of and under the said William Macdowall, Allan Maconochie, and James Walker, the parliamentary trustees; and then it provides, that if the property was subdivided by the feuar, not at the rent reserved, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty mentioned in the deed, that the space thereof so sold or disponed bears to the whole space of the lands hereby feued; but in case, by this proportion, the original annual feu-duty of the part or portion of the said lands so sold or disponed, shall come to be less than L. 10 sterling, but more than L. 5 sterling per annum, that it was to be augmented 10 per cent; if it was L. 5 or less, but more than L. 2, then it was to be augmented by an addition equal to 15 per cent; and if it should fall as low as L. 2 sterling, or less than that sum, it was to be augmented to 25 per cent. Then there is a declaration, that all the dispositions or other conveyances of the whole, or of parts or portions of the said lands, shall be recorded in the books of a competent Court, within one month after the date thereof; and then follows this provision—'Declaring also, that the said dispositions or other convey- 'ances of the whole, or of parts and portions of the said lands, with 'the infeftments to follow thereon, shall be made out and extended by 'the agent of the said trustees, or their foresaids, for the time being, 'and that at the proper charges of the disponees of the said lands, or 'of the said disponees or their foresaids; otherwise the same shall be

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* See, for the result of the remit, 6. Shaw and Dunlop, p. 679. No. 245.

'null and void;' so that the agent of the trustees was to prepare all the conveyances. June 29. 1825.

My Lords,—Mr Harley, who had taken part of this property upon feu, granted it over in various proportions to Mr John More, as cashier of the Royal Bank. The disposition he has made was not prepared by the agent for Mr Campbell; and Mr Campbell brought an action of reduction against Mr Harley and the disponee, to reduce and set aside all those deeds that had been so executed, upon the ground that this provision in the feu to Mr Harley was binding upon Mr Harley, and those who claim under him; that the disposition should have been prepared by Mr Campbell's agent; and next, that not being so prepared, he has a right to set it aside in toto.

My Lords,—The action came before the Court of Session, and there were various discussions upon it. First, they said that Mr Campbell had no interest to enforce the clause in question; and next it was said, that, if he had an interest, still this was an illegal stipulation; that it was contrary to Act of Parliament mentioned in the papers, and contrary to the public polity; that the Act only authorized the taking of the highest feu-duty that could be obtained. I do not exactly follow the argument of one of the learned Judges in that respect. And then it was said, that the form of the action was bad, because, by reducing, you deprive these parties of the estate. Mr Campbell said, I have an interest to pursue this action, because it is very important to me to see in these sub-feus what the amount of the feu-rent is. They answer, You may see that by the disposition. Lord Gillies is of opinion the form of the action was bad; that it ought to have been an action of declarator, and not an action of reduction to set aside this disposition altogether; he doubted whether it was a real burden, or that Mr Campbell could go against a third person. The other Judges were of opinion that Mr Campbell had an interest to pursue, and that the form of action was right; although, I observe, one of the Judges says he considers it really a process of declarator, it was not in that form—it was an action of reduction: and as to his right to pursue, I should state, that Mr Campbell had been applied to, to confirm those dispositions, and had refused, and had proceeded against the parties for a reduction. He came to the Court, therefore, for his own protection, to get a declaration as to what his rights were.

This question is one of very great importance. I understand that the amount of these feus is very large, and the question is, Whether this comes within the maxim, 'Lex neminem cogit ad impossibilia;' or whether this is such a real burden that it can be enforced by Mr Campbell against the disponees, to deprive them of the rights they have received from Mr Harley?

My Lords,—Though I am very reluctant, in any of these cases, to delay the parties; still, considering this is a very important case as to property in general, where property of this sort by the law of Scotland can be introduced into a disposition, to bind for all time; and when I

June 29. 1825. consider, too, that the Judges who have decided in favour of Mr Campbell consider it a nice question as to his title to pursue,—I should in this case propose to your Lordships to remit it to the Court below, to have the opinion of the other Judges upon the subject. If it had been a simple case, and of no value in point of importance, I would, notwithstanding the difficulty of the case, have decided it, rather than delay the parties; but in this case, where I see the property is large, and the extent of the principle to be applied to it, it does appear to me to be a very important case; and therefore, although I have formed an opinion, it would be improper for me to say what it is; yet I think, upon the whole, should the case ever come back to your Lordships, which most probably it will not, if I should be called upon to assist your Lordships in the determination of it, I shall come to the determination of it with much more satisfaction if I knew the opinion of all the Judges of the Court of Scotland upon the subject. In this part of the island we are most grateful for all the assistance that can be derived from Scotland upon all questions affecting property of every kind in Scotland; and, therefore, I do express my feeling individually, that I would come to the decision of this case with much greater satisfaction, if I knew the opinion of the collective body of the Judges in Scotland; more especially when I find there is a difference of opinion existing amongst them, and when I find it is a case of a novel description.—Therefore, in this case, I should propose to remit this case generally to the Division of the Court of Session to review their decision, and with a request that they would take the opinion of the other Division of the Court upon the subject,—upon the effect of the law,—and the effect of this disposition, whether it can be enforced against these disponees. They have reduced the deed altogether, the effect of which was what I have stated against these parties. However, whether it be so or not, the Court will have an opportunity, if they adhere to the opinion they have formed, of so deciding upon it. I think I should have been satisfied with the decision of all the Judges of the Court; and if it should come back before your Lordships, your Lordships will have the benefit of the opinion of the collective body of the Court of Session in Scotland.

Appellants' Authorities.—Kames' Elucidations, p. 214.; Kerr, Feb. 10. 1630, (3779.); Shaw, March 8. 1759, (7845.); 2. Stair, 3. 54.; Henderson, Aug. 7. 1760, (10,179.); Hill, July 5. 1774, (10,180.); Creditors of Ross, June 3. 1714, (ib.); Lovat, House of Lords, April 1. 1721; Calderwood's Creditors, July 1730, (10,245.); Allan, July 10. 1780, (10,265.); Stewart, May 18. 1792, (10,232.)

Respondent's Authorities.—4. Stair, 18. 1. 2. 9.; 4. ib. 20. 5.; Sir R. Preston, March 6. 1805, (2. App. Real and Personal); 1. Bell, 30. Note; 1. Bell, 27.

J. CAMPBELL—J. RICHARDSON,—Solicitors.