[*3d August* 1840.]

(No. 16.) INCORPORATION of TAILORS of ABERDEEN, Appellants.[1]

[*Lord Advocate* (*Rutherfurd*).]

ADAM COUTTS, Respondent.

[*John Stuart.*]

Personal or Real—Irritancy. — Held (affirming the judgment of the Court of Session) that certain obligations in a burgage disposition were of such a nature as to be binding upon singular successors, without being declared real burdens or being fenced with irritancies.

Process—Pleading—Irritancies, Declarator of. — Opinion expressed by Lord Brougham as to the form of a summons of declarator as to certain irritancies in a burgage disposition, and the findings to which the pursuers were, under the conclusions of the summons, in the circumstances, entitled.

1st DIVISION.

Lord Ordinary Corehouse.

Statement.

IN 1829 James Stevenson, then deacon, and John Dunn, then boxmaster, of the Tailors Incorporation of Aberdeen, raised an action of declarator implement, &c., in the Court of Session, against Adam Coutts, advocate in Aberdeen, to have it found and declared, that by the terms of the articles and conditions of roup, and of the feu charter and disposition, of a lot of the ground on which Bon Accord Square was built, and particularly mentioned in the summons, the whole obligations, stipulations, provisions, conditions, and declarations particularly set forth in the said summons, attached and

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[1] 13 S., D., & M., 226, and 2 Sh. & M'Le. 609.

applied to and were binding upon the said Adam Coutts, as disponee of George Nicol, therein mentioned, and that Coutts, and his heirs, executors, and successors, were bound to implement and fulfil the same in so far as not already implemented; and farther, to have it found and declared, that the said Adam Coutts was further and separately bound to implement and fulfil the whole of the said obligations, stipulations, provisions, conditions, and declarations, to the extent libelled, in consequence of having been clerk to and professional agent and legal adviser of the said incorporation in the transaction libelled, and in consequence of his having in these capacities prepared and framed, or revised and sanctioned, on the part of the said corporation, the articles of roup, feu-charter, and disposition libelled, and having actually represented to the said incorporation that the intention and understanding of the said incorporation, specified in the summons, had been legitimately carried into effect; and that accordingly the whole of said obligations, stipulations, provisions, conditions, and declarations did attach and apply and were binding upon heirs, disponees, assignees, singular successors, and successors of every description who might succeed to or acquire the piece of ground described in the summons, and houses built or to be built thereon or any part or portion thereof; and farther concluding that the said Adam Coutts should be ordained to implement the obligations and make payment of several sums of money, all particularly specified in the summons.

A record having been closed, the Lord Ordinary (11th January 1831) pronounced the following interlocutor:—"The Lord Ordinary, in respect it is averred "by the defender that the conveyance of the area in

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" question granted by the Corporation of Tailors to " George Nicol, which was prepared and executed by " him or under his direction, is exactly in the same " terms as those which have been granted by the cor- " poration for upwards of twenty years past, in cir- " cumstances the same as the present, in so far as this " action is concerned, and that both before and after " the corporation were aware that conveyances so " framed did not render many of the conditions of the " feu-right effectual against singular successors, the " omission being intentional, and expressly approved " by the corporation with a view to prevent the dis- " couragement of feuars, and that this averment is " denied by the pursuers; and farther, in respect it is " averred by the defender that after acquiring Nicol's " feu he disposed of part of it bonâ fide to his brother " before this action was raised, of which averment there " is no evidence hitherto produced; and in respect it is " averred by the pursuers that the defender in January " 1828, since he acquired right to the subjects in ques- " tion, did, under cloud of night and without consulting " the corporation, form a drain from those subjects " communicating with the common sewer, which he " has ever since used, and that this averment is denied " by the defender, by desire of parties, allows the " defender a proof of the said two averments made by " him, and to the pursuers a proof of the said aver- " ments made by them, and to both parties a conjunct " probation."

Thereafter his Lordship pronounced this interlocutor: —"(16th November 1832.)—The Lord Ordinary, hav- " ing considered the revised cases for the parties, with " the record, proof, productions, and whole process,

" finds that the burgage disposition by John Finlayson, " boxmaster of the Corporation of Tailors in Aberdeen, " in favour of George Nicol, on which Nicol was infeft, " superseded, by the consent of these parties, the feu " charter previously granted by the corporation to " Nicol: Finds, that the following obligations imposed " upon Nicol, the disponee, by that disposition, viz., an " obligation to grant a personal bond for the payment " of the ground rent, and performance of the conditions " in the articles of roup; the obligation to pay a pro- " portion of the expense of erecting the rail and wall " round the centre of Bon Accord Square; the obli- " gation to lay pavement on the east and west end of " the subjects conveyed, and the obligation to erect an " iron rail at the east end of the subjects fronting the " said square, not being protected by clauses of irri- " tancy, nor contained in Nicol's infeftment, are not " binding on his singular successors in the subjects: " Finds, that the pursuers have not proved their aver- " ment, that the defender, in drawing or revising the " feu charter and burgage disposition to Nicol, omitted " intentionally, and from corrupt and fraudulent mo- " tives, such clauses as were requisite to make these " obligations real burdens, or to render them effectual " against singular successors; and farther, that the pur- " suers have not proved their averment that the de- " fender had an interest, at the date of the said convey- " ances, to act corruptly or fraudulently in preparing " them: Finds the averment of the defender proved " that, during a long series of years, and in a number " of cases, before the date of the said conveyances to " Nicol, and in some instances afterwards, conveyances " were granted by the corporation to persons acquiring

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" lands from them under articles of roup, the same, in " so far as this question is concerned, with the articles " under which Nicol purchased; which conveyances " were in substance the same as his, or equally defec- " tive, and were prepared, some of them by the de- " fender, and some of them by other agents, and were " occasionally revised and approved of by the corpo- " ration or their legal-advisers: Finds that the defender " is not barred, personali exceptione, on the ground of " professional ignorance, negligence, or any other cause, " from availing himself of the rights and privileges " which would have been competent to any other sin- " gular successor to Nicol, and therefore assoilzies the " defender from the conclusions of the libel, in so far as " the above-mentioned obligations are concerned, and " decerns: Finds the averment of the pursuers proved, " that the defender, without the consent or knowledge " of the corporation, did clandestinely and under cloud " of night open a communication between his property " and the common sewer mentioned in the libel, and " used the said common sewer or took benefit by it, in " respect of which, and of drains conducted to the said " sewer by his author, Nicol, finds the defender liable " to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his " proportion of the expense of the said sewer, with " interest as libelled, and decerns: Finds the pursuers " liable to the defender in the expenses of process, in so " far as they relate to the conclusions from which the " defender is hereby assoilzied, and the defender liable " to the pursuers in the expenses of process, in so far " as they relate to the question concerning the common " sewer; and remits the accounts, when lodged, to the " auditor to tax and to report."

Against this interlocutor both parties reclaimed.

The reclaiming note for the pursuers prayed the Court "to recal the interlocutor, except in so far as it "finds and decerns against the defender, and to decern "and declare, quoad ultra, in terms of the conclusions "of the libel."

The reclaiming note for Coutts prayed their "Lord-"ships to alter the interlocutor, in so far as concerns "the findings and decerniture againt the defender, "applicable to the conclusion in the summons, for "27*l.* 14*s.* 2*d.*, as the proportion of the expense of the "common sewer, with the interest thereof, and for the "expenses corresponding to that branch of the discus-"sion; to assoilzie the defender from that conclusion, "as well as from all the other conclusions of the action "and to find him entitled to his expenses for that "branch of the discussion as well as for the rest of his "expenses."

Judgment of Court, 17th Feb. 1833.

Upon considering these reclaiming notes the following interlocutor was pronounced by their Lordships:—"(27th February 1833.)—The Lords having "advised the reclaiming notes for both parties, and "heard counsel for the parties, in respect that the "infeftment in favour of George Nicol does contain "the conditions relative to granting a personal bond, "the expense of erecting the rail and wall round the "centre of Bon Accord Square, the pavement and "the iron-rail fronting the square (which the Lord "Ordinary had been led to believe were not men-"tioned in that infeftment), before answer, recal the "interlocutor reclaimed against, and remit to the Lord "Ordinary to reconsider the cause, and proceed therein "as to him shall seem just."

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The Lord Ordinary thereafter pronounced this interlocutor, to which he added an explanatory note[1]:—"(19th November 1833.)—The Lord Ordinary having "considered the remit from the Court, and the whole "cause, and having again heard counsel for the parties, "Finds, that the defender is not bound to grant to the "pursuer for behoof of the corporation, a personal "obligation for payment of the yearly duties or ground "rents specified in the libel, or for performance of the "clauses and conditions contained in the articles of "roup, or in the burgage disposition granted by John "Finlayson, boxmaster of the corporation, in favour of "George Nicol: Finds, that the defender is not liable "to pay to the pursuers or their successors in office, "the sum of 16*l.* 6*s.* 6¾*d.* with interest, as part of the "expense of erecting the metal railing and dwarf wall "round the centre of Bon Accord Square: Finds, "that the defender is bound to lay the foot pavement "opposite to, and along the sides of the subjects dis-"poned to George Nicol, and to erect an iron railing "at the east end of the said subjects, in conformity "with the provisions in the burgage disposition, and "within the time therein mentioned: Finds that the "defender is not bound to lay the pavement at the west "end of the subjects fronting Bon Accord Terrace, "there being no obligation to that effect in the dis-"position to Nicol: Finds that the defender is liable "to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his "proportion of the expense of erecting a common "sewer, of which he has taken benefit since his pur-"chase from Nicol; assoilzies the defender from all the

[1] See note in 2 S. & M'L. 642.

" other conclusions of the libel, and decerns: Finds " the pursuers liable to the defender in expenses of " process, except in so far as the discussion and proof " regarding the common sewer is concerned: Finds " the defender liable to the pursuers in the expense of " the said discussion and proof, and remits the accounts " thereof, when given in, to the auditor to tax, and to " report."

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Both parties reclaimed, and the Lords pronounced the following interlocutor on the note for the pursuers:—" (18th December 1834.)—The Lords having advised " this case, and heard counsel, find the pursuers entitled " to interest as libelled, on the sum found due by the " defender for the common sewer. Quoad ultra, refuse " the desire of this reclaiming note, and adhere to the " interlocutor reclaimed against; find the pursuers " liable in additional expenses to the defender in the " proportion specified in the interlocutor reclaimed " against, and when the account shall be given in, " remit to the auditor to tax the same and to " report."

Judgment of Court, 18th Dec. 1834.

Of the same date, their Lordships pronounced the following interlocutor on the reclaiming note for Coutts:—" The Lords having advised this cause, and " heard counsel, refuse the desire of this reclaiming " note, and adhere to the interlocutor reclaimed " against: Find the defender, Adam Coutts, liable to " the pursuers in additional expenses, in the propor- " tion specified in the interlocutor reclaimed against, " and remit the account when given in, to the auditor " to tax the same, and to report."

The incorporation appealed against the interlocutors

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of the Lord Ordinary, of 11th January 1831 and 19th November 1833, and the interlocutor of the Court of 18th December 1834 in so far as unfavourable to them.

The defender also presented a cross appeal to the House of Lords against the Lord Ordinary's interlocutor of 19th November 1833, and the above interlocutors of the Court of 18th December 1834, in so far as they found him liable in 27*l.* 14*s.* 2*d.* and interest, on account of the common sewer, and in the expense of that branch of the discussion.

The House, after considering both appeals, and hearing counsel at great length, pronounced a judgment, upon the 23d May 1837, which, with the opinion then expressed by Lord Brougham on the cause, will be found in the report, in 2 Shaw and M'Lean, p. 609.

The judgment was in these terms:—"It is ordered "by the Lords Spiritual and Temporal in parliament "assembled, That the said cause be remitted back to the "First Division of the Court of Session in Scotland, to "consider and state to this House their opinion upon "the following questions:—

"1st. Are any of the obligations in the feu-charter, "and which of them, of such a nature that they are "binding upon singular successors, without either being "declared real burdens or being fenced by irritancies?

"2d, If any one of the obligations is such that it may "be a real burden without being so declared, is an "irritancy necessary to make it binding upon singular "successors?

"3d. Are any of the obligations, and which of them,

" of such a nature that an irritancy would not make " them binding upon singular successors as real bur- " dens, without words declaring them real burdens?

" 4th, Is there any difference, and what, between the " effect of an irritancy which forfeits the right of the " singular successor only, and one which sends the feu " back to the superior, in making the obligation to " which it is annexed binding upon singular successors?

" And the said First Division of the Court is hereby " required to take the opinion of the Judges of the " other Division of the Court and of the permanent " Lords Ordinary upon these questions, and for this " purpose to direct the printed papers in the cause, " including the printed cases laid before this House, to " be laid before the Judges of the other Division and " the permanent Lords Ordinary, for their opinions in " writing thereupon; and this House does not think " fit to pronounce any judgment upon the said appeals, " until after the whole Judges of the Court of Session, " including the Lords Ordinary, shall have given their " opinion upon the questions hereby referred to their " consideration, according to the directions of this " order."

In terms of the above judgment the papers in the cause were laid before the whole Judges, and thereafter the following opinions were returned.

Lords Gillies, M'Kenzie, Corehouse, and *Jeffrey*:—

This case has been remitted by the House of Lords for the purpose of obtaining the opinion of the Court in answer to four questions:—(repeating the questions ad longum).

Before answering these questions, some preliminary

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observations may be useful to explain the grounds of our opinion.

It will be kept in view that the rights of parties in this case do not depend upon a feu-charter, but upon a burgage disposition. It is true that a feu-charter was granted by the Corporation of Tailors to Nicol on the 22d of April 1824, and that he took infeftment upon it on the 29th of May following. But as it was soon discovered that the subject was holden by the corporation in burgage, and that the charter and infeftment were therefore inept, they were superseded, with the consent of parties, by a burgage disposition dated the 9th of September 1825, on which sasine followed. The feu-charter and infeftment have been referred to, not as imposing obligations on the respondent, for in that respect they were unavailing, but as documents to prove that as clerk of the corporation he was acquainted with the intentions of his constituents, and was bound to carry them into effect. If the first investiture had been valid the corporation would have been the superior, and Nicol, the respondent's author, the vassal. Under the second investiture the crown is the superior, and whatever may be the reserved rights of the corporation it is the crown only who can give an entry to vassals, either as heirs or singular successors. The effect of this distinction in some instances will appear in the sequel.

To constitute a real burden or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and those words must be inserted in the sasine which follows on the conveyance, and of conse-

quence appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land, or create a monopoly. The superior, or the party in whose favour it is conceived, must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified.

If these requisites concur, it is not essential that any voces signatæ or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is a debitum fundi, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolutive clauses; which last are peculiar to a strict entail,—a settlement depending, as will afterwards be explained, upon a different principle altogether.

What has now been stated rests on the authority of Stair, book ii. 3. 54. and 55., book iv. 35. 24., and on that of Bankton, book ii. 5. 25., confirmed by a numerous train of decisions.

Thus, with regard to the form of expression, we may refer to the case of Martin v. Paterson [1], where the Court held, "that without requiring any technical form of

[1] 22d June 1808, Fac. Coll.

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"expression for the constitution of a real lien, it is "necessary that the intention to impose a burden on "land by reservation should be expressed in the most "explicit, precise, and perspicuous manner." At the same time, as just observed, the construction of the words employed will be affected by the nature of the grant. If the condition is one usually attaching to the lands in a feudal or burgage holding,—in particular if it has a tractus futuri temporis, or is of a continuous nature, which cannot be performed and so extinguished by one act of the disponee or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money once for all in terms of a family settlement.

To illustrate this distinction, some of the more ordinary feudal prestations in a charter, even though not clearly expressed, are held to be implied in a question with singular successors; and so far is this carried that there is a series of cases in which the Court found that certain urban servitudes with regard to the height and form of buildings, and restrictions as to the ground to be left vacant, were implied conditions of the grant, merely in consequence of the exhibition of the building plan by the superior to his feuars when the feu contracts were entered into: Shultze v. Campbell, 26th November 1813; Young and Co. v. Dewar, 17th November 1814; and many others. It is true that those cases were disregarded by the House of Lords in Gordon v. the New Club, 11th March 1815; but they were so on the principle, that implied restrictions of that nature will not affect singular successors unless they appear on the record. If they enter the investiture, it was ad-

mitted on all hands that they would be effectual as conditions of the grant against all, whether purchasers or creditors, into whose hands the subject might come: accordingly it has been so decided in many subsequent cases. Thus, in a suspension and interdict against a singular successor, Brown v. Burns, 14th May 1823, where there was a condition in the feu right "restraining the "feuar from dealing in trade and merchandize, goods "or vivers, and from baking or brewing for sale, and "the occupation of any handicraft," it was held "that "a superior may introduce conditions which are legal, "and cannot be dispensed with but by his consent." So in Pollock v. Turnbull, 16th January 1827, the Court found that a singular successor in an urban tenement might raise his house by adding a fourth story, because he was a singular successor, and the restriction was not inserted in his charter. When the restriction does appear in the investiture, the Court has uniformly enforced it against singular successors, and that not only in a question with the superior who had granted the right, but with third parties who had obtained a jus quæsitum under it; for example, persons in the same street who had entered into feu contracts on the faith that the restrictions laid upon the other feuars in the street were effectual. It was so decided with regard to a servitude altius non tollendi, Cockburn and others v. Wallace, &c., 1st July 1825.

The same rule holds with regard to all the prædial servitudes, as pasturage, fueling, aqueduct, thirlage, &c. Indeed, those conditions being so frequent and so intimately connected with the nature of a feudal grant, they may be constituted by a writing not entering the investiture, but followed by clear and unequivocal possession.

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Other conditions of a less frequent nature and which do not fall under the description of servitudes, are equally effectual if they appear on the face of the investiture and in the record. Thus an obligation on the vassal in a feu charter, "upon his own proper charges and expenses to keep and uphold a boat of six oars, and to provide the same with six rowers and a steersman, and all things necessary for the usage of the superior and his family, in terms of the former feu charters thereof, and also to keep the mansion-house now built upon the estate wind and water tight," was enforced in a question with the creditors of the vassal.[1] That was not a servitude known in the law of Scotland; indeed it was not a servitude at all, because it consisted in faciendo, not in patiendo, which, with some exceptions, is the criterion of that species of right.

Similar obligations occur in feu-charters, such as the carriage of fuel or of millstones, furnishing poultry, &c., all which being in the investiture attach to singular successors; and a great many others were usual in charters before the 1st of Geo. 1. s. 2. c. 54., which declared personal services illegal, for the preservation of the peace of the country, and with a view to diminish the influence of the Highland chieftains. But all such obligations not struck at by that statute or by the common law, and being consistent with the interest of the community, qualify feudal grants, into whose hands soever the subject comes, either in a question with the superior or the parties for whose benefit the obligation is imposed, or those who have a jus quæsitum under it.

But there is another class of cases, as already men-

[1] Duke of Argyle v. Tarbert's Creditors, 5th Feb. 1762, Mor. 14,495.

tioned, where the words must be much more precise and specific to make the obligation binding on singular successors. Thus, where the disponee is burdened with the payment of a sum of money, whether it be reserved to the superior himself or made payable to a third party, if the amount of the sum is not exactly specified in the investiture, it is unavailing, for the law of Scotland does not admit any indefinite burden attaching to lands. In support of that familiar and long established rule it is unnecessary to refer to authorities. Thus also, if the obligation is to be performed, and so extinguished, by a single act, the presumption is that the granter of the feu-right meant to impose it on the grantee and his heirs exclusively, and not to extend it against singular successors; the case being the reverse of those where the obligation has a continuance and is, comparatively, of little use unless it remains attached to the subject.

Prior to the decision in the House of Lords, Lord Lovat against Lady Lovat, &c., 1st April 1721 [1], which appears to be the leading case on the subject, the Courts in Scotland treated an obligation to pay a sum of money much in the same way as other conditions in a feudal grant, without reference to the distinction alluded to. Since that time, and after some contradictory judgments, it has now been settled that the most specific and precise words are necessary to extend a burden of this nature against singular successors. Voces signatæ need not be employed, but the intention must be as clearly expressed as if it were a condition of a strict entail. In evidence of this we may refer to the case Martin v. Paterson, already cited, in which, although the lands were dis-

[1] D. Robertson, App. p. 355.

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poned "under burden of a sum" distinctly specified, and the sasine was taken "with and under the burdens "before mentioned," it was found that this was a personal and not a real burden. A similar decision had been pronounced in Stewart v. Home, 18th May 1792, and it was repeated in M'Intyre v. Masterton, 3d February 1824. Much more precision, therefore, is requisite in cases of this nature than when the condition is plainly meant to attach to the subject as servitudes or prestations which may from time to time fall due.

At one period it was made a question, whether obligations in feudal grants could be made effectual against singular successors without the protection of an irritant clause; but it is now settled law that no irritant clause is necessary. Lord Stair, as Mr. Bell remarks, entertained no doubt of the efficacy of a clause of pre-emption, or the more sweeping clause de non alienando sine consensu superioris by force of the provision merely. On strict feudal principles they are effectual as conditions of the grant, without a compliance with which the superior is not bound to give an entry to the heir of the vassal. Lord Bankton is equally clear, and almost all the cases which have been referred to are instances in which conditions have been enforced without the aid of irritancies. Mr. Erskine's doctrine to the contrary rests entirely on the case of Stirling v. Johnston, 29th December 1756, to which he refers, but it is believed there is not a case reported in the books so objectionable in every particular. It was a clause of pre-emption in favour of the superior occurring in the charter but not in the infeftment of the vassal. Lord Kames, the Ordinary, annulled the right of a purchaser in contravention of this clause on the ground of mala fides on his

part, because it was admitted that he knew of the condition, but, as Kilkerran remarks, "the answer to this "was, that as he knew of the condition, so he also "knew that it was ineffectual in law." The Court altered the Ordinary's interlocutor, and supported the right of the purchaser, not on the clear and unanswerable ground that the condition was not in the investiture, which was the only legal certioration to the purchaser, for they held, that being in the charter it was in eodem corpore juris with the infeftment, forgetting entirely that the charter does not enter the record, while the infeftment does. The ground they took was, that the condition was not fenced with an irritant clause, a ground for which not a single authority or decision in the law of Scotland can be quoted; and they confounded the case with that of an absolute prohibition to alienate in a strict entail, to enforce which not only an irritant but a resolutive clause is necessary under the statute 1685. Mr. Erskine, misled by this single decision, cannot be considered as an authority upon the point; and this is the opinion of Mr. Ivory in his note on the passage, and of Mr. Bell in his commentaries. They are fully confirmed by what fell from the Court in Sir Robert Preston against Lord Dundonald's Creditors[1], and what was then stated to have been the opinions of the Lord Justice Clerks Miller and M'Queen.

It may be proper here to advert to the distinction between an irritancy fencing the condition of a feudal grant, and the irritant and resolutive clauses necessary to enforce the prohibitions of a strict entail. This is well explained by Lord Stair:—"It is much debated

[1] 6th March 1805, Fac. Coll.

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" among the feudalists about clauses de non alienando, " with an irritancy or resolutive clause, or that the fiars " should contract no debt by which the fee might be " alienated or the tailzie changed, and they are gene- " rally for the negative, that clauses prohibiting con- " tracting of debt, or simply not to alienate, are incon- " sistent with property, albeit they may be effectual if " so qualified that no alienation be made or debt con- " tracted to affect the fee or alter the succession, with- " out the consent of the superior or such other persons; " but that being absolute, they cannot be effectual " against singular successors; whereas those limited " prohibitions resolve but in interdictions, and being " contained in the seisins registrate they are equivalent " to interdictions published and registrate."

The principle is this: both by the civil and feudal law the power of disposal is considered as of the very essence of the right of dominion, and no person being proprietor can be prohibited absolutely from alienating his property or contracting debt to affect it. To recon- cile this doctrine with the anxiety of proprietors in Scot- land to perpetuate their estates in their families, irritant and resolutive clauses were invented or adopted about the commencement of the seventeenth century, and were considered at the time a very astute and subtle device to attain the object in view. The ground on which they proceed is, that the act of alienation infers a forfeiture of the proprietor's right, and the forfeiture is feigned to operate retro, so that he ceased to be proprietor before the act was consummated, and therefore it was null, as flowing a non habente potestatem. Perhaps there was never a more clumsy fiction introduced into law, one which has produced more anomalous and inconsistent

decisions, or given rise to such interminable litigation. But, as Lord Stair observes in the passage quoted, those irritant and resolutive clauses apply only to the case of an absolute prohibition to alienate. Where the prohibition is qualified, it may be enforced as a legitimate condition of the feudal grant by the ordinary legal remedies. Thus the clause de non alienando sine consensu superioris, which was very frequent in his time, took effect without an irritancy, as already observed; and so the law was held to be settled till the 1st of Geo. 2., by which that prohibition was rendered illegal. This subject is more fully treated by Mr. Bell, and by Mr. Brodie in his note on the passage of Stair above quoted.

It may therefore be considered as undoubted law, that if a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors. If it is clearly personal, or exposed to objections, an irritant clause will not support it.

But an irritancy is often found adjected to those conditions for various reasons. It gives a readier and more powerful remedy in case of contravention. Thus, in the present grant there is an obligation on the vassal to erect houses of a certain description on the subject. In case of failure a penalty of 100*l.* is stipulated, and that condition might be enforced in an ordinary action. But as the pursuers of the action might be involved in a question as to the amount of damages which they sustained by the failure, penalties being restricted in a court of equity to the actual loss sustained, a clause of irritancy, as in this case, is added, providing that the vassal, besides the penalty, "shall also lose all right and

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"title to said piece of ground, which in that event shall "revert to and become the property of said trade." This is more stringent and effectual, for it could not be evaded except by purging before decree of declarator.

The statute 1597, c. 246. enacted, that all vassals by feu farm, failing to pay their feu duty for two years together, shall lose their right in the same manner as if an irritant clause had been specially engrossed in their charters. Notwithstanding this irritancy by statute, it was the practice to introduce an irritant clause in the charter; with the view of preventing the vassal from purging before declarator: for it was held, that although legal irritancies might be purged, conventional irritancies could not. The same practice continues still, although the distinction between legal and conventional irritancies no longer obtains, and when there is therefore no use for the provision. In the present case the irritant clause in the event of the duties not being paid is extremely proper; for the statute 1597 expressly applies only to vassals by feu farm, and it is very doubtful whether it could be extended to the duties here, which are not feu duties, but ground annuals only, not payable to the superior, but to the granter of the burgage right.

Clauses irritant, therefore, though not necessary to enforce real conditions against singular successors, are sometimes useful for the reason mentioned, and on that account retained. Occasionally they serve another purpose, for, although they will not make a condition real which by its own nature is not so, they may afford the means of construing a condition, the import of which would otherwise be doubtful. If the granter fences a condition with an irritant clause, it is one reason for pre-

suming that he meant it not only to apply to the grantee and his heirs, but to singular successors also: A clause of irritancy, in the case of Martin v. Paterson above quoted, would not have rendered the burden real, because it was of a personal character, and the words used were plainly defective. But cases may be figured, in which the presumption arising from such a clause might be material in judging of the question, personal or real.

It has been said, that the condition in a feudal grant must not only appear from clear expression or plain inference to have been intended by the parties to be real, but it also must be such as the law will support. It must not fall under any express prohibition introduced by statute or consuetudinary law. It must not be contra bonos mores; and it must not be contrary to public policy. It was an early condition in feudal grants, that all the vassals should grind their corn at the superior's mill, and pay a certain rate of multure for that service; or where the thirlage was strict, they were bound to pay not only for all the corn ground, but for all the corn grown upon their feu, seed and horse corn excepted. That custom, which was introduced when the erection of machinery was difficult, and therefore for the benefit of the district, has been perpetuated long after the reason ceased, and thirlage still subsists as one of the known and legal servitudes in the law of Scotland. Two centuries ago there were other restrictions of a similar nature. Thus, it was often a condition in a feu charter that the vassal should bring all his malt to the superior's brewery to be made into ale, and to have all his iron-work manufactured at the superior's smithy. These conditions have fallen into

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disuse, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy; for it would be a plain injury to the community, if the proprietor of a piece of land could not employ the brewer or the smith most convenient for himself, or whose work he most approved. Such a restriction, while it was of little advantage to the superior, would greatly diminish the value of the lands. Accordingly in the case of Yeaman v. Crauford[1], in which the sheriff "sustained the astriction of certain lands to the smithy "of the barony for the manufacture of the iron-work "belonging to their husbandry," the Court passed a bill of advocation; and it is believed the case was carried no farther.

An important case of this nature is mentioned in the speech of the noble and learned Lord who moved the judgment in the House of Lords. It is that of Campbell v. Harley[2], where the superior feued the subject under a condition that all dispositions of the lands, with the infeftments upon them, should be prepared by his own agent; otherwise to be null and void. In a reduction by the superior of a disposition made by the vassal in contravention of this clause, the Court were much divided. The majority held that the condition was neither prohibited by law nor contra bonos mores, that it was not inconvenient for the public, and might be useful to the superior, and therefore they supported the condition, and reduced the disposition. The minority, on the other hand, observed, that the estate was feued under act of parliament, which required the highest feu duty to be

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[1] 18th Dec. 1770, Mor. 14,537.

[2] 1 W. & S. 690.

received, and yet this condition had a direct tendency to lower the value of the subject feued, and of course the feu duty; and that it is a clause unnecessary to the superior's protection, dangerous and prejudicial, and therefore vexatious, and also illegal by 1592, c. 140. as against law, equity, and reason; and that it is inconsistent with the 20 Geo. 2. c. 50. They said that this condition was of the same nature as if it had been stipulated that the vassal should always come to Glasgow by a particular coach, or should employ a butcher, tailor, baker, or doctor, to be named by the superior. If the vassal was obliged to employ the superior's agent in framing all conveyances and other titles relative to the property, he might, on the same footing, be bound to employ the superior's counsel in all lawsuits relating to it. Monopolies of this nature are quite inconsistent with the policy of the law, and it is the duty of the Court not to enforce them. Reference might have been made to the case of Yeaman, already cited, where, notwithstanding an ancient usage of astricting the vassals to the superior's smithy, the Court refused to confirm a judgment of the sheriff giving effect to that condition. If the vassal cannot be bound to employ the superior's smith, why should he be bound to employ the superior's law agent? The cause never came to a judgment after a remit from the House of Lords; and it is believed the superior discovered that the condition was exceedingly injurious to himself, and of no advantage to any one but his agent.

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This case has been stated at length, because, if the condition was neither illegal nor contrary to public policy, and if the superior had an interest to enforce it, no judge, it is thought, would have entertained a doubt

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that it was in terms sufficient to constitute a real right, and that the clause of irritancy annexed to it was unnecessary to give it effect. The opinion of the minority proceeded entirely on the ground that the condition was of a nature which the superior was not entitled to introduce into his charter. In particular we are authorized to state, that the opinion of Lord Gillies, who voted with the minority, did not rest upon the ground that a resolutive clause was wanting, such a clause being quite inapplicable to a grant of this description.

We have said that one of the requisites to make conditions in feudal grants effectual is an interest on the part of the superior that they shall be enforced. This is illustrated by the case of Campbell v. Harley, just quoted; and the objection appears in a more simple form in Brown v. Burns.[1] In that case, as formerly mentioned, there was a condition in the feu right, "restraining the feuar from dealing in trade, in mer-"chandize, goods or vivers, and from baking or brew-"ing for sale, and the occupation of any handicraft." It was held, "that in enforcing such clauses there must "be an interest, and no emulatio vicini; and here the "street being full of shops there is no interest."

There are two clauses not unfrequent in feu charters, to which it may be proper to advert, though neither of them occurs in this case. One is the clause of pre-emption; that is an obligation on the vassal, if he sells the lands, to prefer the superior to others who do not offer a higher price. It is not yet fixed in our law whether that clause falls under the statute 1st Geo. 2., which prohibits the superior to stipulate that lands shall

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[1] Supra, p. 309.

not be sold without his consent. In Stirling v. Johnston[1], it seems to have been taken for granted, though there was no decision on that point, that the clause was illegal. In the next case, Irving v. the Marquis of Annandale[2], the reverse was held. Some stress was laid in that case, in the pleadings at the bar, on the presence of a resolutive clause; but the decision did not turn on that point, and it was plainly immaterial. Afterwards, in Farquharson v. Keay[3], the clause of pre-emption was found ineffectual, exclusively on the statute. In Preston v. Dundonald's creditors, 6th March 1805, the question came under consideration again; but the judgment turned on a specialty, namely, that the vassal was not infeft, and the interlocutor contained an express declaration that it was unnecessary to decide the general point. The validity of a clause of pre-emption, therefore, still remains matter of doubt; but if it be valid and aptly expressed, it will unquestionably be good against singular successors, and no irritant clause will be necessary to enforce it. In a feu charter the simplest and best mode of proceeding for that purpose, is by the superior refusing an entry to the purchaser. But that method could not have been followed, if there had been a clause of pre-emption in this case in favour of the appellants, for they are not the respondent's superiors, and have no right to give or withhold an entry to him or his disponees. A clause of irritancy, therefore, would probably have been resorted to.

There is often a prohibition in feu rights against subinfeudation. It would be incompetent and inept in a

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[1] Supra, p. 312. [2] 6th March 1767, Mor. 2343.
[3] 2d Dec. 1800, Mor. App. 1, vo. Clause, no. 3.

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burgage holding, such as this. The common mode of enforcing it, as in the preceding case, is by withholding an entry; but we have no doubt that it might also be the ground of an action of reduction, if the superior could show an interest (which it would be difficult for him to do) to proceed in that manner.

We now proceed to answer the questions in their order.

I. We are required to say, "Are any of the obliga-" tions of the feu-charter, and which of them, of such a " nature that they are binding upon singular succes-" sors, without being declared real burdens, or being " fenced with irritancies?" It has been mentioned that there is no feu-charter here. The obligations are contained in a burgage disposition. It is proper farther to observe, that the question is not whether these obligations, in the circumstances of this case, and under the present summons and record, can be enforced against the respondent, but whether they are of such a nature that they are binding upon singular successors, without being declared real burdens or fenced with irritancies. Considering them, therefore, abstractedly as conditions inserted in a feudal grant, we shall examine them in their order.

1. It is a condition of the grant that the disponee and his heirs and assignees shall, within a certain time, erect houses upon the subject of a certain description, and the condition is fenced with a penalty and an irritant clause. There is no doubt that this obligation is of such a nature as to be binding upon singular successors, although it is not declared in express terms to be a real burden, and although it had not been fenced with an irritancy. It is a condition extremely common in feu-

rights, granted for the purpose of building; its validity was never doubted, and it is daily enforced. We may observe, in passing, that the irritancy with which it is fenced to a certain extent is not valid, and would be ineffectual both against the first vassal and his singular successors; for it is stipulated that the appellant shall have power to use and dispose of the subject in the event of failure, without raising any process to that effect, that is, without process of declarator of irritancy, for that is not consistent with law as at present settled. The irritancy, in so far as it is legal, is beneficial to the granters, but the want of it would not affect the reality of the burden.

2. There is an obligation on the disponee to erect an iron railing eight feet from the houses, an obligation to carry off the eaves-drop, servitudes tigni immittendi et oneris ferendi in favour of the adjoining feuars, and an obligation to lay a foot pavement opposite to and along the sides of the feu. All these are manifestly, from their nature, real burdens, though neither declared to be so in express terms nor fenced with irritancies, having all the requisites mentioned above to render them effectual as such.

3. There is a condition that the vassal shall pay a proportion of two third parts of the expense of forming and enclosing the area in the middle of the square, and of upholding it in complete repair. That is not a real burden, for it is an obligation to pay an indefinite sum of money, which cannot be imposed by the law of Scotland. On this point it may be proper to explain, that an obligation ad factum præstandum may be enforced, and is so every day, though indirectly and practically it

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may resolve into payment of an indefinite sum. Thus it is one of the usual mill services, that the vassals of the sucken shall bring home mill-stones when required, and clear out the aqueduct when it becomes filled with mud and rubbish. This, in general, can only be done by hiring labourers to perform the work, whose wages the vassals pay, in proportion to the extent of their feus or the nature of their thirlage. But these obligations are unquestionably real burdens, because the fact to be performed is in itself specific, whatever means the vassal may resort to for his own convenience in accomplishing it. There is accordingly a finding in the interlocutor proceeding on that familiar distinction. An obligation to pay a proportion of the expense of keeping certain wells in repair is of the same nature.

4. There is a prohibition to tan leather, to refine tallow, to make candles, to slaughter cattle, and various other nuisances, which, laying out of view the circumstances of this particular case, are all of a nature to bind singular successors, without being declared in express terms to be real burdens, or fenced with irritancies, because they are lawful conditions of the grant.

5. The next obligation is to pay 18*l.* 2*s.* 6*d.* per annum as ground-rent, which, though not a feu-duty, is in some respects of the same nature; and it is properly fenced with an irritancy, which would have been useless in a feu-right, because it may not have the benefit of the statute 1597, this being a burgage-holding. There is a declaration that the ground rents shall be real burdens, affecting the ground and the houses built upon it. That, however, is not for the purpose of transmitting the obligation against singular successors,

but to explain that the disponee shall have the benefit of real diligence against the tenants and possessors of the subject for his own relief.

The last condition is of more doubtful effect than any of the rest. It is provided, "that the said George "Nicol, and all succeeding heirs and singular successors "to him in said piece of ground, shall be obliged, "within six months after their acquiring right thereto, "to grant, upon their own expenses, personal obliga- "tions for payment of said duties or ground-rents, and "performance of the whole clauses and conditions pre- "stable by them therein contained, and that without "prejudice of the real right competent to the said John "Finlason and his foresaids in virtue of said disposition, "and of this infeftment thereon." There is no doubt that parties intended this to be a real burden, and to attach upon singular successors, for so it is expressly declared, but whether the law will sanction such a burden is a different question. Certainly, as is admitted, it could not oblige singular successors to grant a personal bond for the performance of conditions which were not or could not be made real burdens in the grant. In the next place, it rather appears to be a condition inconsistent with public policy, vexatious to the vassal, and an obstacle to the free commerce of land, because it ousts him of many advantages which he would otherwise enjoy at common law. When real burdens are enforced against him in the ordinary manner,—for example, if he is required to build a house, to lay a pavement, to inclose an area, and so forth, within a limited time,—and if he fails to do so within the time specified, the irritancy cannot be declared until the ordinary induciæ of a summons have run, and until

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defences have been stated, and decree of declarator obtained and extracted. But if he has granted a personal bond to do these things, he may be charged on letters of horning at six days date, and could not obtain suspension without finding caution perhaps to a great amount. Keeping this in view, and also that such clauses are extremely rare, and, as far as it appears, have neither authority nor decision in their support, we doubt whether they might not be considered in the same light as the clause in Campbell of Blythwood's charters[1] was by the minority of the Court; an opinion which received countenance in the House of Lords, both when the remit was made, and when the judgment in this case was moved. If it be a legal and warrantable condition in any case, it seems to be so in regard to feu-duties or ground-rents, the precise amount of which is liquidated in the charter or disposition, and for withholding payment of which there can scarcely even be an excuse.

II. The second question is, "If any one of the obli-
"gations is such as to be a real burden, without being
"so declared, is the irritancy necessary to make it
"binding upon singular successors?"

This question appears to involve its own answer. If an obligation in a feu or burgage right is real, it binds singular successors; if it does not bind them it is not real, but personal. An irritancy is often a convenient mode of enforcing a real burden, but not necessary to constitute it, except, as has been explained, in the case of strict tailzies, with which at present we have nothing to do.

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[1] Campbell v. Harley, supra, 318.

III. The third question is, "Are any of the obliga-
" tions, and which of them, of such a nature that the
" irritancy would not make them binding upon singular
" successors as real burdens, without words declaring
" them real burdens?"

An irritancy will not make a personal burden real, although, when the words are otherwise not sufficiently precise, it may be of use to explain the intention of parties. For example, in the case of Martin v. Paterson, no irritancy would have made the payment of the sum mentioned in the infeftment a burden upon singular successors, the Court holding the words employed not sufficiently clear: but they might have taken it into view in construing those words. Thus, in Cumming v. Johnston, or Canham v. Adamson [1], a case mentioned when the judgment was moved, the disponee of a burgage tenement was burdened with the payment of a specific sum to a creditor of the disponer, and the Court at first found that the creditor had only a personal right. There was an irritant clause in the disposition, but it was not repeated in the infeftment, and therefore absolutely unavailing against singular successors. But as the burden itself, though without the irritancy, appeared in the infeftment, they afterwards sustained it as real. This judgment perhaps went too far, according to our present notions of the law, and it can only be justified by giving the irritant clause the effect which has among other circumstances been mentioned, that of being an element of construction.

IV. Fourthly, it is asked, "Is there any difference,
" and what, between the effect of an irritancy which

[1] 7th Nov. 1666, Mor. 10234 & 2727.

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" forfeits the right of the singular successor only, and " one which gives the feu back to the superior, in " making the obligation to which it is annexed binding " upon singular successors?"

An irritancy cannot be declared against a singular successor without giving back the subject to some person. In feu rights the subject reverts to the superior or his heirs. In burgage holdings it reverts not to the superior, who is the sovereign, but to the granter of the burgage disposition. In strict entails, when an irritancy is declared the contravener is struck out of the destination, and the fee descends to the heirs of his body, if the forfeiture is not directed against them, and if so, to the next heir in the destination after the contravener. We are of opinion that there is no difference between the fee returning to the superior in a feu or to the disponer in burgage, in making the obligation to which it is annexed binding upon singular successors. If there was a condition either in a feu or burgage right, of which we never saw an example, that the subject, when the right of the granter is irritated, should go to some third party otherwise unconnected with the feudal or burgage contract, we cannot see how this should affect the quality of the right in the person of the singular successor. A fee forfeited, and reverting to nobody, is altogether anomalous.

With a view to save further expense, in a case which has already cost the parties much more than the value of the matter in dispute, two further explanations may be given.

1. The first interlocutor of the Ordinary, which, on a remit, he saw cause to alter, proceeded upon this ground. There were specialties in the case which seemed of im-

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portance. Some of the conditions were protected by clauses of irritancy, and others, where it would have been equally useful, were not so protected. Again, there was an obligation to engross all the conditions in Nicol the first vassal's infeftment, but there was no obligation to engross them in any future conveyance or investiture. This singular omission appeared to raise the presumption, that parties intended that one set of the conditions at least should be personal, binding Nicol and his heirs exclusively. But, upon reconsideration, as the words employed expressed conditions naturally attaching to land, and were such as usually occur in urban tenements, he came to be of opinion that the presumption arising from these specialties, in not a very skilful conveyance, ought to be disregarded.

2. Many of the conditions, which from their nature appeared to be real, are not enforced in consequence of the shape of the summons and the proceedings of the parties. The summons contains five petitory conclusions only, and one declaratory conclusion.[1] With regard to the petitory conclusions referring to five conditions, four are sufficiently precise, and the grounds upon which they rest are set forth in explicit terms. They have therefore been articulately disposed of by the interlocutor. There are no petitory conclusions with regard to the remaining conditions of the grant. On the contrary, the pursuers have pleaded, "that they have no "occasion in the present action to enforce them." The declaratory conclusion, however, stands in a different situation. It bears, that the Court should find and declare, that "the whole foresaid obligations, stipula-

[1] See conclusions of the summons, 2 Sh. & M'Le., 635-637.

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"tions, provisions, conditions, and declarations con-
"tained in the said articles of roup, and in the said
"feu charter granted by the said John Keith, and in
"the said disposition granted by the said John Fin-
"lason, both in favour of the said George Nicol and
"above quoted, attach and apply to and are binding
"upon the said Adam Coutts, as disponee of the said
"George Nicol, and upon his heirs and successors."
This sweeping conclusion rested and could rest solely on the ground, that the respondent being clerk to the corporation had acted fraudulently, or from gross and culpable negligence, in omitting to render all the conditions contained in these documents binding upon singular successors, and therefore that he was barred personali exceptione from pleading that they were not binding. When the charge of fraud and negligence was repelled, the declaratory conclusion in that shape fell to the ground. In the character merely of a singular successor, the respondent had no concern whatever with the conditions in the articles of roup, or in the inept feu charter, or those which had not been engrossed in Nicol's investiture, all of which, however, were libelled upon. If the pursuers, giving up that medium concludendi altogether, had wished a decree to declare the reality of the conditions inserted in the burgage disposition and sasine alone, independently of the plea of fraud and negligence, they should have set forth specifically those conditions, and rested their plea upon the burgage disposition. Further, they should have excepted from that part of their libel all the conditions which had been previously implemented, and those as to which waiver was alleged, or at least they should have made that restriction in their condescendence.

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Thus, with regard to the condition about nuisances, waiver was expressly pleaded; for the respondent averred, that "the trade had previously admitted 'nuisances in the case of Dempster and many others, in "feus close adjoining." That was held a relevant defence in the case of Brown v. Burns[1]; but in this case it was neither admitted nor denied by the pursuers with sufficient precision, nor did they join issue with the defender, or take any proof upon the subject, although a proof in very general terms was allowed. But under the judicature act, 6 Geo. 4. c. 120., it is provided, that "the pursuer or pursuers shall in the summons set "forth in explicit terms the nature, extent, and grounds "of the complaint or cause of action, and the conclu-"sions which, according to the form of the particular "action, the said pursuer or pursuers shall by the law "and practice of Scotland be entitled to deduce there-"from." This provision was not complied with, and it was supposed to be the duty of the judge to pick out some one or other condition from the multitude of the conditions libelled, and to support it on some one or other of the various grounds upon which the action was laid. In the same manner, in the first petitory conclusion, the defender is required to grant a personal obligation for the ground rents, and for performance of the whole clauses and conditions contained in the articles of roup, feu charter, and burgage disposition. That might have been a good conclusion on the medium of the respondent's fraud or negligence; but if the appellants proceeded on a different medium, namely, the reality of the condition, they should have restricted this

[1] Supra, p. 30.

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conclusion to the burdens contained in the burgage disposition alone, to such of those burdens as had entered the infeftment, to such as by their nature were real, and to such as had not been implemented or waived, or the restriction should have been made in the condescendence, and a proof demanded of the facts, if disputed. This conclusion, therefore, as it stands, was defective in form under the judicature act, and the defect was not afterwards remedied in the condescendence. It was upon these grounds that there was an absolvitor from the declaratory and the first petitory conclusion. If the appellants had required it, a reservation would have been inserted to enable them to sue in a more correct form. But no such reservation was asked from the Lord Ordinary, neither was it asked when his interlocutor was reviewed by the Court. It may still be inserted in the House of Lords, if desired by the appellants.

Lord Moncreiff.—I think that the whole matter embraced by the remit of the House of Lords is well explained in the above opinion, and I concur therein.

Lord Medwyn.—I concur in this opinion, with this explanation, that I do not think the principle which prevents the obligation in a disposition to a real subject to pay an indefinite sum of money, being more than personal, or binding on a singular successor, applies to the obligation in a burgage disposition or building fen-charter, to pay two thirds of the expense of forming and inclosing the area of the square, and of repairing and keeping it up. The expense is indeed indefinite, but it is as precise as its nature will admit, and it is not unlimited; it never can exceed the limited proportion of the actual expense, and it is a natural obligation in such a deed, as

much as building according to a plan or any other facta præstanda connected with such a feu; it is, in fact, the equivalent or commutation for an obligation ad factum præstandum, and in this respect is quite different from a condition which converts the feu-charter or burgage holding into a security for a loan of money, which is not one of the naturalia of the right. An obligation to pay the stipend belonging to other lands, although the amount cannot be specified, (Johnston v. Ramsay, 20th November 1824,) has been sustained against a singular successor, when properly constituted a real burden; and I think this obligation as to the expense of keeping up the area of the square will always affect the purchaser of the house, and that the superior or other proprietors will have no occasion to look after the heirs of the original feuar, who may have ceased to have any concern with the subject, and claim the amount from them.

The Lord President and *Lord Cockburn* agreed with Lord Medwyn.

Lord Meadowbank.—I concur in the opinion of the other Judges and the preceding addition.

The Lord Justice Clerk.—I concur also in this opinion, but have the same doubt as that expressed by Lord Medwyn, and am disposed to hold that the stipulation as to payment of two-thirds of the expense attending the enclosure of the area of the square is effectual.

Lord Glenlee.—I concur in the foregoing opinion, but at the same time I think what is stated by Lord Medwyn deserves great attention. I am not aware of any precise judgment hitherto pronounced on the point stated by his Lordship, and I do not think it quite clear that the considerations which led the Court, after various contradictory decisions, to establish the general rule, that

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where the burden consists in payment of a sum of money the sum must be exactly and precisely specified, necessarily apply to the case in question.

Lords Fullerton and *Cuninghame*.—While we entirely concur in the exposition given in Lord Corehouse's opinion[1], of the general principles by which questions similar to the present are to be determined, we must be permitted to doubt how far the application of those principles does in some particulars warrant the special conclusions there arrived at.

In the first place, we agree with Lord Medwyn, that the obligation to pay a certain "proportion of the "expense of inclosing the area," &c. does constitute a burden effectual against singular successors in the title of an urban property like the present. It seems to us merely the pecuniary commutation of an obligation, which, if expressed in the form of an obligation ad factum præstandum, would have been perfectly good, agreeably to those general principles on which various others have been supported. It would be difficult to distinguish it from the obligations to erect an iron railway or to lay a foot pavement, except in the immaterial circumstance that the latter are imposed on the disponee singly, while the former is imposed on him jointly with the other burgage tenants.

Still less does it differ from such an obligation as that which was sustained in the case of the Duke of Argyle against the creditors of Tarbert[1], "to keep and uphold a "boat with six oars," &c.

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[1] The opinion of Lord Gillies and others, understood to have been drawn by Lord Corehouse.

[2] Supra, p. 310.

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Secondly, we have great difficulty in holding that the obligation on George Nicol, his heirs and singular successors, to grant personal obligations, for the performance of such of the clauses and conditions as are in themselves real burdens, is objectionable and ineffective. It is framed in terms which seem to be sufficient to render it real, and it does not appear to us to involve any thing either inconsistent with public policy or even prejudicial to the private interest of the parties. It does no more than bind each singular successor to undertake, in the form of a personal obligation, that which ex hypothesi is already a real burden, and of which consequently he has, by taking the lands, contemplated the performance; and its only effect is to place the singular successors in the same situation as the original acquirer of the right.

The stipulation is certainly unusual, and we therefore give this opinion with some diffidence; but, advised as we are at present, we are not prepared to hold it to be ineffectual.

The foregoing opinions having been laid before the House, their Lordships appointed the cause to be argued by one counsel of a side as to their import; and, after argument, judgment was deferred.

Ld. Brougham's Speech.

LORD BROUGHAM.—My Lords. In this case your Lordships have had the very great assistance of the learned judges in the Court below; for the answers which they have given to the questions put by your Lordships three years ago, certainly are most able, learned, and elaborate, and are calculated to give the greatest assistance to your Lordships in the disposing

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of this cause. I shall certainly recommend to your Lordships to take further time in considering their answers, as they raise some very important questions, not only with respect to those matters sent down originally, but also a new question, not only highly material in this case, but which must be of great importance also in general practice.

Judgment deferred.

Lord Brougham.—It is first necessary to dispose of the objection raised upon the pleadings; and when examined this appears to be untenable to the extent at least to which it is pushed. There are two declaratory conclusions, one applicable to the respondent in his capacity of agent or clerk of the corporation, and the other applicable to him merely as a singular successor. These are kept separate and distinct in express terms both in the subsumption and in the conclusions of the summons. "That the said A. Coutts is further and "separately bound to implement in consequence of "having been clerk and professional agent," is the language of the subsumption; and the conclusion follows it, desiring to have it further declared "that A. Coutts "is further and separately bound to implement in "consequence of having been clerk and professional "agent."

This averment in the one part of the summons and the demand in the other immediately follow the averment and demand relating to A. Coutts as disponee of G. Nicol. It is true they do not ask to have each of the obligations declared burdens, nor do they ask that the whole or some should be so declared, but they ask that the whole should be declared; and it cannot be

contended that this does not entitle them to a declaration in part, though they have not said "the whole "or some part thereof." If, indeed, there had only been one conclusion, and that resting solely, as the opinion in the Court below seems to assume, on the personal liability of the party in respect of his employment as agent,—if that ground were disallowed as to one, it must fail as to all; consequently no declaration could be given upon the burdens which might affect him as singular successor.

But in another view, also taken below, though inconveniently mixed up with the former, there is a serious objection to the frame of the declaratory conclusion: it has no particularity whatever. The whole conditions are libelled equally and in a mass, as well those which had been engrossed in G. Nicol's investiture, as those with which a singular successor had nothing to do; for example, the articles of roup and the inept feu charter, as well those which had been implemented as those which remained unperformed. And although the conclusion only asks a declaration upon the latter (those not implemented), yet it was the duty of the party to specify what these were, and not leave the Court (as the learned judges observe) to pick out from the multitude some one capable of supporting the conclusions. The judicature act, 6 Geo. 4. c. 120. s. 2., expressly requires "that the nature, extent, and "grounds of the complaint or cause of action be set "forth in explicit terms in the summons, and the con-"clusions to be deduced therefrom." In strictness, perhaps, we should require each conclusion to be applied to the ground on which it is rested; but it may be admitted that if in the subsumption there is a specified

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statement of different grounds, declaratory and petitory conclusions may be applied to those grounds severally. Thus, although it will not do to recite the whole set of instruments containing many obligations, — some applicable to the party charged, and some inapplicable, some on which the pursuer proceeds, others on which he makes no claim,—and then to demand a declaration on the whole so far as they may be unperformed, yet he may select those on which he claims both declaratory findings and decretal orders (answering to his declaratory and petitory conclusions); and if his declaratory conclusion be good in other respects, it will entitle him to a declaratory finding, although it does not in terms ask it upon the particular matter, but only upon the whole, and although it does not distinguish which of the two declaratory conclusions is applicable to the several obligations, but asks for a declaration against the defender in both capacities as to the whole obligations.

The demand, on the whole, here must fairly be taken to mean either the whole of the preceding particulars or part of them. Certainly, unless some authority is shown for holding the rule more tight, for imposing a more strict construction upon the requisition of the statute, we cannot safely require greater precision. If we did, it would only drive the pleader to repeat each condition or obligation in the subsumption and in each conclusion, where, as here, there are more than one; and thus little would be gained, unless indeed we were to hold, as the Court below seems to do, that where the whole is asked, and any one fails, the whole must fail; in which, as already observed, it seems impossible to agree.

It may also be remarked, that the learned judges

themselves regarded the provisions of the statute as not excluding a somewhat lax interpretation, for, although "summons" only is mentioned in the second section, they assume that the defect of generality in the summons might have been cured by the greater particularity of the condescendence. I therefore am of opinion, that there is nothing in the frame of this summons to prevent the pursuers' having a declaratory finding upon any of the conclusions which are specially averred in the subsumption to be binding on the defender, without specifying in what capacity; but that they have no right to a declaratory finding upon any of the other obligations not specified as binding in any part of the summons, and being referred to in the mass of disputed articles of roup and feu charter.

The question of pleading, therefore, being disposed of, the merits remain to be considered as now before your Lordships on the remit; and the doubts raised on these by the opinions of the learned judges refer, first, to the payment of the two thirds of making and repairing the square, and, secondly, to the granting personal obligations for paying the duties and performing the clauses and conditions. On the last of these points I think it would not be right to deviate from what appears to be the opinion of nearly the whole of the learned judges, and what is consistent with the view taken both in the Blytheswood case [1] when it was before your Lordships and in 1837, when the present case was sent back; namely, that such an obligation is ineffectual, although intended by the words of the conveyance to be made a real burden. On the former I have much more hesi-

[1] Campbell v. Harley, ut sup. 318.

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tation, but I have come to the opinion of those who hold it not to affect the party. Here the conveyance does not declare it a real burden; there is nothing to show (in the words of the learned judges) "that the "subject itself is meant to be affected," and it is not one of the necessary or natural burdens of such rights. It is not "ad factum præstandum," at least not directly or immediately, but only to pay a proportion of the expense occasioned by a certain fact, if done. It is an obligation to bear an unascertained expense, that is, an unascertained sum of money, which it is on all hands agreed cannot be imposed; and it by no means follows, that because the property might have been burdened with the whole inclosures and repairs of the square, therefore it may be burdened with relieving those who shall inclose and repair,—relieving them to a certain extent of the sums required for that purpose. On the contrary, such an obligation would really be converting the feu charter, and in this case the burgage holding, into a security for an amount,—and an undefined amount of money.

In a matter confessedly of some nicety, and on which I have had great doubts, it seems the safe course to consider this obligation as it directly and apparently is,—an obligation to pay an indefinite sum, unconnected with the naturalia of the right. The obligation to pay the expense or any proportion of the expense of repairing, immediately connected with the subject granted, would clearly stand in a different predicament. In the case referred to below, Johnstone v. Ramsay, 20th May 1824[1], the obligation was a warrandice of teinds against

[1] 3 S. & D. 33.

stipend expressly declared to be a real burden in the seisin; and the learned judges have not said in the present case that an obligation, such as the present, can be effectual against singular successors when not declared a real burden, and when the obligation is not to a feudal superior, but to the grantor of the right, when there is no feu holding.

The course which I in the outset showed, must be taken, as the objection to the pleadings confines the pursuers' right to a declaratory finding within the limits of the obligation specified as binding on the defender in the subsumption, where alone (except in the repetition of the petitory conclusions) there is in this case any specification. And, from what has now been said on the merits, it likewise appears that only one declaratory finding for the pursuer respecting those specified obligations remains to be added to the interlocutor; that, namely, which relates to the foot pavement and iron railing at the east end of the premises. To this declaration it seems clear that they are entitled, although in all probability the mere finding in the interlocutor, with the decerniture against the defender, would be sufficient for the purpose; and it is material, with a view to the question of costs, that we should bear in mind how very trifling this alteration of the interlocutor is. The only difference made is, that the interlocutor found the defender bound to do the thing in question; and to this we now add a declaration, that it is a real burden upon the property binding on him as a singular successor.

As this House does not itself declare rights, a remit pro formâ will be necessary to decern and declare in terms of the findings against the respondent, and the judgment will then stand thus: — That so much of the

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interlocutor of the 19th November 1833, appealed against, as finds that the defender is not bound to grant to the pursuer, for behoof of the corporation, a personal obligation for payment of the yearly dues or ground rents specified in the libel, or for the performance of the clauses and conditions contained in the articles of roup, or in the burgage disposition granted by John Finlayson, boxmaster of the corporation, in favour of George Nicol; and so much as finds that the defender is not liable to pay to the pursuers or their successors in office the sum of 16*l.* 6*s.* 6¾*d.* with interest, as part of the expense of erecting the metal railing and dwarf wall round the centre of Bon Accord Square; and so much as finds that the defender is bound to lay the foot pavement opposite to and along the sides of the subjects disponed to George Nicol, and to erect an iron railing at the east end of the said subjects in conformity with the provisions in the burgage disposition, and within the time therein mentioned; and so much as finds that the defender is not bound to lay the pavement at the west end of the subjects fronting Bon Accord Terrace, there being no obligation to that effect in the disposition to Nicol; and so much as finds that the defender is liable to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his proportion of erecting a common sewer, of which he has taken benefit since the purchase from Nicol; be and the same is hereby affirmed: And as to so much of the said interlocutor as assoilzies the defender from all the other conclusions of the libel, remit to the Court of Session, with the direction* that in respect of the decla-

* This reference to the first declaratory conclusion will be sufficient to affirm the finding below, that A. Coutts is not barred personali exceptione.

ratory conclusion of the summons against the defender as a singular successor, disponee of G. Nicol, the said Court do decern and declare in terms of the said interlocutor, that the obligation of the defender to lay the foot pavement opposite to and along the sides of the subjects disponed to Nicol, and to erect an iron railing at the east end of the said subjects in conformity with the burgage disposition and within the time therein mentioned *, is a real burden upon the property in question, and is binding on the defender; and that the said Court do of new assoilzie the defender from all the other conclusions of the libel, and that they do decern accordingly; and that they do further find the pursuers liable to the defender in all expenses of process in the Court below, down to the termination of the proceedings, except in so far as the discussion and proof regarding the common sewer is concerned, but the defender liable to the pursuers in the expenses of the said discussion and proof; and that they do remit the accounts of the said expenses, when given in, to the auditor to tax and report.

The alteration made in the interlocutor is far too slight to make any difference in the portion of that interlocutor ordering the pursuers to pay the defender's expenses below.

Considering the attacks made upon his character, and from which the pursuers were driven, he clearly must have his expenses throughout the whole proceeding there, notwithstanding the finding against him, now

* Namely, that it does not go all round. The finding excludes the west end; so that the clause in the disposition is to be read:—"Along the sides of the said piece of ground, "in front of the said square and street, eight feet broad."

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added to the former finding against him, but added, as has already been observed, in little more than form.

As to the costs here, those of the cross appeal must be paid by the respondent, but the clerk will take care to ascertain whether or not it was necessary for the appellants to present a separate case, which the respondent did not. It is extremely to be regretted that the costs of the principal appeal cannot be given against the appellants after the attacks made on the respondent in the Court below; but it has been a thing unavoidable to alter the interlocutor; and it was, even in the matters which stand against the appellants, a question involving much doubt; so that after the abandonment below of all attacks on the respondent's character, the appeal could not be considered so vexatious as to justify giving costs where, to a certain, though small extent, it has succeeded.

It remains to add, that although the litigation has unfortunately cost a great deal more than the value of the matter in dispute, the discussion which the question has undergone possibly will prevent,—most certainly it ought to prevent, any further dispute respecting the rights of the parties under the burgage disposition in question. It is true that the judgment now for the most part affirmed has not declared how far many of the obligations are real burdens on the property, as the obligation to build, and others mentioned in the opinions of the learned judges on the remit. But this was owing to a defect in the pleadings; and there can be no doubt whatever, that had the summons been properly framed the pursuers would have had declaratory findings on all those matters on which the opinions of the learned judges have been unanimously pronounced in their favour.

The House of Lords ordered and adjudged, That so much of the said interlocutor of the Lord Ordinary of the 19th of November 1833, appealed against in the said appeals, as finds that the defender is not bound to grant to the pursuer, for behoof of the corporation, a personal obligation for payment of the yearly dues or ground rents specified in the libel, or for the performance of the clauses and conditions contained in the articles of roup or the burgage disposition granted by John Finlason, boxmaster of the corporation, in favour of George Nicol; and so much as finds that the defender is not liable to pay to the pursuers or their successors in office the sum of 16*l.* 6*s.* 6¾*d.*, with interest, as part of the expense of erecting the metal railing and dwarf wall round the centre of Bon Accord Square; and so much as finds that the defender is bound to lay the foot pavement opposite to and along the sides of the subjects disponed to George Nicol, and to erect an iron railing at the east end of the said subjects, in conformity with the provisions in the burgage disposition, and within the time therein mentioned; and so much as finds that the defender is not bound to lay the pavement at the west end of the subjects fronting Bon Accord terrace, there being no obligation to that effect in the disposition to George Nicol; and so much as finds that the defender is liable to the pursuer in the sum of 27*l.* 14*s.* 2*d.*, being his proportion of erecting a common sewer, of which he has taken benefit since his purchase from George Nicol, with interest, as libelled, — be and the same is hereby affirmed. And it is further ordered, That as to so much of the said interlocutor as assoilzies the defender from all the other conclusions of the libel, it be remitted to the Court of Session, with this direction, that in respect of the declaratory conclusion of the summons against the defender as a singular successor disponee of George Nicol, the said Court do decern and declare, in terms of the said interlocutor, that the obligation of the defender to lay the foot pavement opposite to and along the sides of the subjects disponed to George Nicol, and to erect an iron railing at the east end of the said subjects, in conformity with the burgage disposition, and within the time therein mentioned, is a real burden upon the property in question, and is binding on the

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defender; and that the said Court do of new assoilzie the defender from all the other conclusions of the libel, and that they do decern accordingly; and that they do further find the pursuers liable to the defender in all expenses of process in the Court below, down to the termination of the proceedings, except in so far as the discussion and proof regarding the common sewer is concerned, but find the said Adam Coutts the defender liable to the pursuers in the expense of the said discussion and proof; and that they do remit the accounts of the said expenses, when given in, to the auditor, to tax and to report: And it is further ordered, That the said Adam Coutts, the respondent in the said original appeal, do pay or cause to be paid to the said appellants the costs incurred by them in respect of the said cross appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

A. DOBIE — RICHARDSON and CONNELL, Solicitors.