Carter, C.A., was appointed judicial factor on the estate, and managed and administered the trust in terms of the truster's directions.

This was a petition presented by the Rev. Hugh Munro, who was entitled to the estate under the tailzied destination, and by the judicial factor, and it set forth that there was now no provision of the trust-deed to be carried out except those already mentioned in favour of Miss Macarthur. She was now seventy years old, and the petitioners asked the Court to grant warrant to the judicial factor to divest himself of the lands, and to reconvey them to Mr Munro and the heirs of entail pointed out in the trust-disposition and deed of entail. But the conveyance was to be subject to the real burden in favour of the judicial factor of the provisions conceived in favour of Susan Macarthur and her children contained in the trust-disposition. The prayer then asked the Court to recal the appointment of the judicial factor so far as regarded the lands in question, "except the real burden of the foresaid provisions therein, and to discharge him of his whole actings and intromissions as judicial factor in regard to the lands, except as aforesaid."

Miss Susan Macarthur lodged answers to the petition, in which she stated that if the Court thought a conveyance in the terms asked would carry out the truster's instructions and also not prejudice present rights, she, while not consenting thereto, would not press objections.

A draft of the proposed deed of entail was lodged with the reporter to whom the Lord Ordinary (Adam) had remitted to inquire into the facts of the petition. It was in terms of a minute subsequently lodged for the petitioners, in which it was stated that the proposal was that the factor was to have lodged in his hands a sum of £200 for payment of (1) legacy duty on the £200 legacy, (2) succession duty payable by the heir of entail upon the falling in of the annuity of £10, and (3) expenses of eventually winding-up the factory.

Under the deed these provisions were "to be payable to and prestable by" the judicial factor, "by and against the heir in possession of the said lands and others, and that for behoof of the parties beneficially interested therein out of the rents and yearly profits of the said lands," and they were constituted real burdens.

A clause was added to the deed at the instance of the Lord Ordinary, securing Miss Macarthur in a dwelling-house in the possible event that the one she had was destroyed by fire or otherwise.

The petitioners submitted that in this way the provisions would be as well secured as under the trust-deed, and as the factor was made responsible for the payment the difficulty felt by the Court in the case of *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786, did not exist.

The Lord Ordinary (Adam), after it had been reported that the disposition and deed of entail had been duly recorded, pronounced an interlocutor approving of it, and interponing authority thereto.

Miss Macarthur reclaimed.

At advising—

Lord President—I am for adhering. I do not think that I thereby interfere with our decision in the case of *White's Trustees* v. *Whyte*, 4 R. 786, where the annuitant it was proposed should discharge the trustees, and so put an end to the only means provided by the truster for her protection. I think the present case falls under the rule which I ventured to state in that case, that "wherever there is left only one special interest to be provided for, for which alone it is necessary that the trust should be kept up, and that interest is of a partial kind, and may be provided for just as effectually in some other way, and thus the estate be liberated from the trust and set free, so as to be conveyed directly to the residuary legatee or heir at law, this may competently be done." The only question here is, Whether the annuity is "provided for just as effectually in some other way." It appears to me that the petitioner and the heir of entail have succeeded in devising with considerable ingenuity just as good a provision for the annuitant as she had under the original deed.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Petitioners (Respondents)—Balfour—Lorimer. Agents—Macbrair & Keith, S.S.C.
Counsel for Respondent (Reclaimer)—Thoms. Agents—M'Neill & Sime, W.S.

# HOUSE OF LORDS.

*Tuesday, November* 12.

(Before Lord Chancellor (Cairns), Lord Penzance, Lord O'Hagan, and Lord Selborne).

## MAGISTRATES AND TOWN COUNCIL OF EDINBURGH *v.* THE EDINBURGH ROPERIE AND SAILCLOTH COMPANY.

(*Ante*, July 10, 1877, vol. xiv. p. 644, 4 R. 1032).

*Superior and Vassal—Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15—*Casualty—Entry—Composition.*

*Held* (*aff.* judgment of First Division) that a vassal who had purchased a part of a feu, and was entered with the superior by virtue of the provisions of the 2d subsection of section 4 of the Conveyancing Act 1874, was entitled under section 15 of that Act to redeem the casualties applicable to his portion of the feu on payment of one year's rent effeiring to it; and objection by the superior that he must pay the casualties applicable to the whole original feu, *repelled*.

This was an appeal from a decision of the First Division of the Court affirming a judgment of the Lord Ordinary (Young). A feu now held by the Edinburgh Roperie and Sailcloth Company had originally formed part of a larger feu given out by the Magistrates and Town Council of Edinburgh in the last century. Part of the feus had been sold off, and a portion had become the property of the Leith Roperie Company. That Company's trustees were in 1862 entered with the superiors by writ of confirmation, and there was an express proviso that the subjects should

not be in non-entry again till the death of George Ritchie, one of the trustees. The entry of singular successors was untaxed. The Leith Roperie Company afterwards in 1876 disponed part of their subjects to the Edinburgh Roperie Company and retained the rest in their own hands. The disponees recorded their disposition in the Register of Sasines, and so became the entered vassals of the city in their part of the subjects. They then asked the superiors to redeem the whole casualties of superiority affecting their land, and tendered payment of the sums calculated according to the rule laid down by the 15th section of the Conveyancing Act, 1874. But the Magistrates and Town Council of Edinburgh, the superiors of the ground as above stated, demanded that the respondents should pay not only the casualty applicable to their own feu, but the casualty applicable to the whole original feu, of which it once formed part, or at least that part which was granted in one lot in 1851. This made a considerable difference in the whole amount payable. The Edinburgh Roperie Company then brought this action to have their rights determined. The Lord Ordinary (YOUNG) and the First Division unanimously held that there was no foundation for the contention of the city (*ante*, July 10, 1877, vol. xiv. p. 664, 4 R. 1032).

At the conclusion of the argument on behalf of the appellants their Lordships delivered judgment as follows:—

LORD CHANCELLOR—My Lords, in this case your Lordships are asked to adopt a construction of the Scotch Conveyancing Act of 1874 different from that placed upon it by the unanimous judgment of the Court of Session, pronounced in the first instance by the Lord Ordinary, and afterwards by the First Division. My Lords, I own that after hearing the argument for the appellants it appears to me to be perfectly clear that the conclusion arrived at by the Court of Session was a correct conclusion. The effect of the Scotch Conveyancing Act was this—By the 4th section it provided that "It shall not, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing of this Act, or in any deed, instrument, or writing, whether dated before or after the passing of this Act, be necessary in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress; and it shall not be competent for the superior in any case to grant any such charter, precept, or other writ by progress," &c.

Now, your Lordships are well aware that by the course of conveyancing in Scotland before this Act, where there was an alienation of a feu or of a part of a feu, it was necessary for the disponee to go through a somewhat complicated course of conveyancing, in order to be formally entered by his superior; and by a custom which had its origin at the time that feus were inalienable in Scotland, and which relaxed that inalienability upon certain terms — the principal term being the right to exact a recompense for permitting alienation—this course of conveyancing was accompanied by that which was a very material consideration to the superior, namely, a right to exact from the disponee a payment in the nature of a remuneration for permitting the alienation. The Statute of 1874 has stepped in and has swept away that course of conveyancing, and upon an alienation has allowed the disponee on the conclusion of his purchase to be in the same position as if he had under the former course of conveyancing been formally entered by his superior as the owner of the feu.

The present respondents, the Edinburgh Roperie Company, having made a purchase of a portion of a feu which was in existence when the Act of 1874 was passed, and being thus the entered proprietors of that feu by virtue of the statute, claim the benefit of the 15th section of the statute. That 15th section provides that "the casualties incident to any feu created prior to the commencement of this Act," (I have no doubt that the feu in this case as regards a portion of the land in which the respondents are infeft was a feu created before the commencement of this Act) "shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable, and failing agreement all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu in respect of which the same are payable, on the following terms, viz.—In cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent." That is the case which has occurred here, the highest casualty as applicable to the present case being the amount of a year's rental.

Upon that state of things the Lord President observes:—"The 4th section of the statute in the second sub-section provides that infeftment shall imply entry with the superior, and therefore when Mr Hay, on behalf of the Edinburgh Roperie Company, took infeftment in that part of the subject which he had bought from the Leith Roperie Company's Trustees, he became thereby the entered vassal of the defenders. No doubt the effect of that entry was somewhat different from what would have been the effect of his taking an entry before the statute. He did not require to take an entry according to the old law when he bought this subject from the trustees of the Leith Roperie Company, because there was an entered vassal, viz., Mr Ritchie. But the statute implies the entry at once, and it provides also for what is to be the effect of that implied entry as regards the rights and obligations of superior and vassal. The third sub-section of the same section (fourth) provides, that it is not to affect the rights of the superior as regards duties or casualties. In short, it provides that as regards the casualties of superiority, they shall not be payable at any other time or on any other conditions than they would have been if this Act had not been passed. So that the effect is, that while Mr Hay was made the entered vassal as soon as he took infeftment by force of the statute, he did not require to pay a composition on that entry, his liability to pay the composition being postponed until the death of the last entered vassal, and the right of the superior to demand a casualty being

in like manner postponed. The pursuers being the entered vassals of the defenders, and seeking to have the casualty redeemed under the terms of the 15th section of the statute, it appears to me quite unreasonable, and beyond all intelligible construction of this statute, to say that this party, who is entered with the superior and is now the superior's vassal in this particular part of the original feu as distinguished from the other, is to pay anything more by way of composition than one year's rent of that subject in which he is the vassal of the superior."

My Lords, I entirely agree with that view of the statute—that it would be unreasonable in the greatest degree, and that nothing but the clearest words could lead any Court to put such a construction upon the statute as would make the disponee of a portion of a feu, who by virtue of the statute is to be taken or entered as vassal of that portion of the feu, lie under an obligation of redeeming the casualties by a payment made with reference to the value of the whole feu, in a part of which only he is the vassal. My Lords, I think that that is not the true construction of the statute, and that the construction adopted by the Court below is perfectly right.

I therefore propose to your Lordships that the appeal be dismissed with costs.

LORD PENZANCE and LORD O'HAGAN concurred.

LORD SELBORNE—My Lords, I am of the same opinion, and I will only add a few words to the opinions given by your Lordships.

In *Wemyss* v. *Thompson*, January 19, 1836, 14 S. 233, the case relied upon by the appellants, the superior was held to be entitled to retain, as against the purchaser of part of the feu, his remedy for the entirety of the feu-duty, and of the duplicand of the feu-duty, which was the casualty on the entry of an heir—both those being conventional liabilities of the feuar and having in themselves no distributable quality according to which they could be apportioned over different parts of the lands. But in the same case no similar claim was either made by the superior or recognised by the Court as to the casualty for the entry of singular successors, which was not taxed, and which (in the language of the Statute of 1669) was due, "by statute and the constant practice of the kingdom," according to the measure of one year's rent (that is, one year's annual value to be let) of the lands of which the superior was bound to grant entry. It is impossible, in my opinion, to extend this obligation in any case to one year's value of any other lands than those to which entry might be claimed; and therefore when entry could be claimed to part only of the lands included in the original feu, this casualty would only be one year's value to let of that part of the lands.

In the present case the Statute of 1874 has given the same right with the same liabilities to the respondents as if before that enactment they had been actually entered and confirmed as vassals by the superior as to the particular lands purchased by them, and not as to any other lands. This being so, the 15th section of the same Act entitled them to redeem this casualty upon the terms which the Court of Session has allowed; and the 16th section, and the form of discharge there referred to, make that right additionally clear.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—Kay, Q.C.—M'Laren. Agents—J. & J. Graham, Solicitors.

Counsel for Respondents—Southgate, Q.C.—Thorburn. Agent—

# COURT OF SESSION.

*Saturday, November 23.*

## SECOND DIVISION.

[Sheriff of Forfarshire.

NICOLL *v.* REID.

(*Ante*, vol. xv. p. 89.)

*Proof—Parole Evidence—Bank Cheque.*

Where payment of an account has been made by cheque, parole evidence is competent to show under what circumstances the cheque was given.

*Observations (per curiam)* on the case of *Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537.

This was an appeal from the Sheriff Court of Forfarshire. James Nicoll sued William Reid for £66, 8s. 10d., the amount said to be due for joiner work done by the workmen of the firm of Nicoll & Reid to the defender's house. A preliminary objection to the title to sue was repelled by the Court (Nov. 15, 1877, 5 R. 137, 15 Scot. Law Rep. 89).

William Reid, the defender, had employed his son Alexander Reid, in July 1875, to execute the work of which the price was in dispute. The son was then a partner of the firm of Nicoll & Reid, joiners in Kirriemuir, the work being performed by their workmen.

On 31st December 1875 the partnership was dissolved, and the work in question was at that time valued as part of the firm assets in a settlement of the accounts between the partners. Alexander Reid, the son, died in July 1876. In October 1876 the pursuer had first demanded payment for the work. The defence to this action, on the merits, was that the work had been done by Alexander Reid as an individual, and that payment had been made to him before his death, and four cheques were produced in evidence of the payment of £42. The other circumstances of the case, so far as material, will sufficiently appear from the note to the Sheriff-Substitute's interlocutor and from the opinions of the Court.

The Sheriff-Substitute (ROBERTSON) gave decree for £24, 8s. 10d., the balance, thereby allowing the defender credit for the payment which he instructed by the cheques. He added this note:—

"*Note.*—It is inconceivable that the defender was ignorant of a partnership which was well known in the district. When he employed his son as a joiner, he employed his son's partner as well. It is possible for one member of a firm to have private contracts in which his partner has no concern; but very special proof would be required that both employer and employed clearly understood this position, otherwise the usual rules follow