

how the pursuer's claim, which is in itself liquid and undisputed, can be resisted or defended on the ground of compensation. Neither can the Lord Ordinary, having regard to the defender's obligation, in virtue of which the pursuer's claim arises, see how the defender can resist or oppose it on the ground of retention. By that obligation the defender expressly binds himself to pay the £500 in question to the pursuer, in cash, at a specified time, which was come and bygone before the present action was raised. There are, no doubt, other stipulations in the agreement, one being to the effect that the pursuer undertakes to pay to the defender a proportion of certain debts, but this undertaking is made dependent and contingent on circumstances about which the parties are not only not agreed, but are now in litigation with each other; and the defender does not say that the pursuer is bankrupt, or *vergens ad inopiam*, or that his circumstances and responsibility are different now from what they were when the agreement was entered into.

The result is, that according to the Lord Ordinary's reading of the agreement of the parties, the defender came under a direct and unqualified obligation to pay, within six months of its delivery to the pursuer, the £500 now sued for, irrespective of any disputes or questions that might arise in regard to the other stipulations on which the defender now founds. And it was not unreasonable that this should be so, as the defender came at once, in virtue of the agreement, into the full and exclusive possession of the copartnery business, with power to collect the copartnery debts. The Lord Ordinary, therefore, does not think that the terms of the agreement are sufficient in themselves to afford to the defender a right of compensation or retention. Nor does he think that the defender has made any allegations otherwise relevant and sufficient to found either of these rights."

The defenders reclaimed.

ASHER was heard for them.

MILLAR, Q.C., and BURNET, for the pursuer, were not called on.

The Court adhered; the pursuer to find caution as offered by him. It was observed by the Judges that it was of the utmost importance to the law to preserve the distinction betwixt liquid and illiquid claims. The only exception to the rule that a liquid claim could not be compensated by one which was illiquid was where the party suing for the liquid claim is *vergens ad inopiam*; but there was no room for saying so in this case, because the pursuer had offered to find caution.

Agent for Pursuer—William Mason, S.S.C.

Agent for Defenders—Alex. Duncan, S.S.C.

Wednesday, December 9.

#### ALLAN'S TRUSTEES v. DIXON'S TRUSTEES.

*Superior and Vassal—Feu-Disposition—Conditions as to Building.* Circumstances in which held that certain conditions in a feu-disposition were not merely for the benefit or protection of the superior, but of the body of the feuars also; and that the superior, having undertaken to insert them in every feu-charter, could not dispense with them at his own hand. But action reserved to superior to establish, in an action of declarator, that the enforcement of the conditions at the instance of a particular

feuair would be nimious, and therefore not binding on the superior.

The suspenders in this action are the trustees of the late James Allan, manager of Govan Colliery, Glasgow, and the respondents are the trustees of the late William Dixon of Govan Colliery, Glasgow. The suspenders make the following statements—

"(1) The late William Dixon, Esquire, of Govan Colliery, near Glasgow, by his trust-disposition, dated 10th and registered in the Books of Council and Session at Edinburgh the 16th days of October 1854, nominated and appointed William Johnston, agent at Glasgow for the Commercial Bank of Scotland, to be trustee for the ends, uses, and purposes therein specified; and as such trustee the said William Johnston stood heritably vested in All and Whole the lands of Corsehill or Crosshill, lying within the parish of Cathcart and sheriffdom of Renfrew.

(2) By disposition, dated 22d May 1855, the said William Johnston, as trustee foresaid, with the consent and concurrence of the committee of advice therein named (appointed by the said trust-disposition), and in consideration of the sum of £922, 17s. 6d. paid to him by the said deceased James Allan, thereby sold, alienated, and disposed, with consent and concurrence of said committee of advice, to and in favour of said deceased James Allan, and his heirs, assignees, and disponees whomsoever, heritably and irredeemably, All and Whole, . . . .

(3) The foresaid disposition was granted under the following conditions, provisions, and declarations, viz:—'But these presents are granted and accepted, and the subjects hereby conveyed are disposed, with and under the following conditions, provisions, and obligations, viz:—That the said James Allan and foresaids shall be bound to erect upon the said piece of ground a neat dwelling-house or separate dwelling-houses or villas or cottages, which shall cost at least £300 each, exclusive of the ground; that each dwelling-house or cottage shall have stone fronts, to be polished or droved, or otherwise tastefully finished, and shall be built with lime and covered with slates, I and my successors having the option to allow the fronts of the said houses or villas to be erected to be of fire-bricks, but in the event of such consent being given, to make the fronts of fire-bricks of the best quality only; that no buildings shall be erected nearer the side of any of the said two roads or streets of 50 feet in breadth before mentioned than 25 feet; that the inclosures in the fronts of the said houses or cottages shall be of brick or stone dwarf-walls, with a cope and railing; that I, as trustee foresaid, and my successors, shall be bound and obliged, so soon as required by the said James Allan or his foresaids, to cut and form the said two roads or streets of 50 feet in breadth on the south and north, so far as the plot or piece of ground hereby disposed is thereby bounded; that the said James Allan shall be bound and obliged, as soon as the said roads or streets are cut and formed as aforesaid, to make and complete the said roads or streets; that the said James Allan and his foresaids shall also form and make in the said two roads or streets, so far as surrounding the plot or piece of ground hereby disposed, common sewers to carry off the water from the ground hereby disposed, and to bear the expense of carrying such sewers across the turnpike road and join the same with sewer in lands belonging to me as trustee foresaid; that the said James Allan, by acceptance hereof, binds and obliges himself and his foresaids to maintain and uphold the said two roads or streets, so far as surrounding the piece of

ground hereby disposed, and common sewers, so far as passing through the same, when so formed and made, in all time thereafter, but with relief to them as accords of law against the proprietors on the opposite sides of these two roads or streets, who shall be bound to contribute to the upkeep of the roads or streets and sewers, according to the length of their frontage along the roads or streets; and that I, the said William Johnston, as trustee foresaid, and my foresaids, shall be bound and obliged to take the whole feuars or purchasers of the remaining portions of Crosshill lands bound in similar terms, and to insert in their feu-rights, dispositions, or other conveyances, the like clauses with reference to the erection of buildings, and formation and keeping up of the same (under the foresaid reservations as to fire-brick fronts), and of the streets and sewers therein, as are thereinbefore inserted; which conditions, provisions, and obligations are appointed to be inserted in the infestment to follow hereon, and thereafter validly referred to in all future conveyances and investitures of the said plot or piece of ground.

(4) Sometime before the said William Johnston granted the foresaid disposition in favour of the said deceased James Allan, he had resolved to layout and to feu or sell the said lands of Corsehill or Crosshill for the erection of villas, to be placed at the distance of 25 feet back from the side of the roads or streets proposed to be formed and made through the said lands; and accordingly, for several years after the date of the disposition to the said James Allan, the dispositions and feu-contracts in favour of the other purchasers or feuars, were granted under the same conditions, provisions, and stipulations as are expressed in the disposition in favour of Mr Allan in terms of the obligation undertaken by him to the said James Allan in the foresaid disposition in his favour. (5) For some time past, however, the respondents, who are now heritably vested in the said lands of Crosshill as trustees of the said William Dixon, who is now deceased, in virtue of his trust-disposition and deed of settlement, codicils, deed of nomination, assumption, and disposition, and assignation—all dated and recorded as before-mentioned—and titles made up thereunder, have thought proper to violate the conditions under which the said deceased James Allan acquired the portion before described of the lands of Crosshill. In several of the dispositions and feu-contracts granted and entered into by the said William Johnston, as trustee foresaid, and, since he ceased to hold that office, by the respondents as trustees foresaid, the disponees or feuars are merely taken bound 'to erect and complete on the said plot or area of ground durable and substantial dwelling-houses, fronting the roads therein mentioned; and that the dwelling-houses so to be erected shall be built of stone and lime, and covered with slates; and that the front to the roads shall be of ashlar work;' also, 'to erect and have ready for occupation, within three years from the said term of'

'as many dwelling-houses of the description hereinbefore stipulated as will yield a rental exceeding the double of the foresaid feu-duty, and to keep the dwelling-houses to be erected on the said plot or area of ground in such repair as will make them yield a yearly rental exceeding the double of the foresaid feu-duty in all time coming.' These deeds are in direct violation of the conditions and stipulations which the said William Johnston, as trustee foresaid, bound himself to observe in feuing or selling the remaining portions of the said lands of Crosshill; and instead of separate

houses, or villas, or cottages, which were alone to be erected on the lands, various tenements of several stories high, entering by common stairs, and occupied by six or eight families, and several of them within ten feet of the street, have lately been built, and at a cost considerably under £300, exclusive of the ground; and instead of having 'stone fronts, polished or drowed, or otherwise tastefully finished,' some of them have fronts of common rubble work, with a coating of cement." The suspender then states that upon said piece of ground an elegant villa has been erected, and that, in consequence of the violation by the respondents of the conditions under which their author purchased, the property has deteriorated in value.

The prayer of the Note of Suspension was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents, as trustees foresaid, from feuing, selling, or disposing of the lands of Corsehill or Crosshill, of which they are superiors, lying within the parish of Cathcart and sheriffdom of Renfrew, so far as not already feued or sold, without taking the whole feuars or purchasers thereof bound in similar terms, and to insert in their feu-rights, dispositions, or other conveyances, the like clauses with reference to the erection of buildings, and formation and upkeep of the same, and of the streets and sewers therein, as are expressed in the disposition granted by said William Johnston, agent at Glasgow for the Bank of Scotland, trustee appointed by the said William Dixon by trust-disposition executed by him on the 10th, and recorded in the Books of Council and Session at Edinburgh the 16th days of October 1854, and as such trustee heritably vested in the lands thereby disposed in favour of the said deceased James Allan, dated the 22d day of May 1855, and in the instrument of sasine following thereon, recorded in the Particular Register of Sasines kept at Glasgow for Renfrewshire, &c., on the 13th day of June 1855; and particularly to interdict, prohibit, and discharge the respondents, as trustees foresaid, from feuing, selling, or disposing of the said lands of Corsehill or Crosshill, so far as not already feued or sold, excepting for the purpose of the erection thereon of separate or detached houses, villas, or cottages, of the value of not less than £300 each, exclusive of the ground and not nearer the side of the streets or roads formed, or to be formed, and made in the said lands, than 25 feet; and to find the respondents liable in expenses; or to do otherwise in the premises as to your Lordships shall seem proper."

The respondents maintained the following pleas:—(1) The conditions and stipulations in the feu-disposition of May 1855, founded on by the suspenders, not being validly imposed on the lands, nor enforceable against the suspenders, the note should be refused, and the interdict recalled. (2) Said conditions and stipulations not extending to nor including the acts sought to be interdicted, the note should be refused, and interdict recalled. (3) The suspenders' author having been aware that all the other feus of said lands (with the exception mentioned in record), were arranged and entered into without the feu-rights containing the conditions and provisions in question, and having acquiesced therein, the suspenders are barred from now insisting that the respondents shall insert said conditions and provisions in the future feu-rights of said lands. (4) The respondents not having violated the said conditions and stipula-

tions, are entitled to have the note refused, and the interdict recalled."

In this suspension the Lord Ordinary officiating on the Bills (having previously granted interim interdict as craved), on 15th October 1867 passed the note on caution, and continued the interdict. Against this judgment the respondents reclaimed to the Inner-House; and after hearing parties, their Lordships of the Second Division of the Court pronounced the following interlocutor:—"The Lords having heard counsel on the reclaiming note for Dixon's trustees, remit to the Lord Ordinary to recall the interlocutor reclaimed against in so far as, in terms of the latter part of the note of suspension, it interdicts from feuing or selling except for certain purposes; but to continue the interdict in so far as, in terms of the first part of the prayer, it prohibits from feuing, selling, or disposing of the lands of Crosshill, so far as not already feued or sold, without taking the whole feuurs or purchasers thereof bound in similar terms, and to insert in their conveyances the like clauses with reference to the erection of buildings, and formation and upkeeping of the same, and of the streets and sewers therein, as are expressed in the disposition granted by William Johnston in favour of the deceased James Allan, manager of Govan Colliery in October 1854, and seisin following thereon, recorded in the Particular Register of Seisins at Glasgow, for Renfrewshire, on the 13th June 1855; and that upon caution found in common form." The Lord Ordinary on the Bills applied the remit, recalled his interlocutor of 15th October 1867 reclaimed against; in so far as it interdicted the respondents from feuing or selling except for certain purposes, but on caution continued the interdict as directed by the judgment of the Second Division above quoted. The respondents restricted their crave for interdict under this suspension to the effect of asking interdict against the respondents in the terms in or to the effect which it was continued by the Lord Ordinary, as directed by the Court.

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, continues the interdict formerly granted by Lord Mure, in terms of his interlocutor dated 29th November last (1867), and declares the same perpetual, and to that effect and extent sustains the reasons of suspension; suspends, interdicts, prohibits, and discharges, in terms of the prayer of the note of suspension and interdict. *Quoad ultra*, repels the reasons of suspension, refuses the interdict, and decerns. Finds the complainers entitled to expenses, allows them to lodge an account thereof, and remits it, when lodged, to the Auditor to tax and report.

"*Note*.—The complainers did not ask any more extensive interdict than that which was granted by Lord Mure in conformity with the remit to him from the Second Division of the Court, and the present Lord Ordinary has had difficulty in holding that the complainers are entitled to have that interdict continued. The sole ground on which the respondents resisted the interdict was that the obligation in question must be held to be one exclusively for the protection and benefit of the granter of the disposition referred to, which, therefore, he, and the respondents as now in his place, were and are entitled to disregard at pleasure. The Lord Ordinary cannot adopt this view, which he thinks is quite inconsistent with the terms

of the disposition, as well as the object of the parties. The disposition expressly bears that it was 'granted and accepted' with and under certain provisions and conditions, including the obligation in question, and it is too plain to require to be dwelt upon, that the disponee, and the complainers who now stand in his place had and have a material interest to enforce it. Were the respondents permitted to feu out and dispose of the remainder of Crosshill lands without inserting in the dispositions the conditions and restrictions referred to in the obligation in question, the disponees would not be held to be bound by them, as exemplified in the case of *Pollock v. Turnbull*, 16th January 1827, 5 Sh. 195, and consequently, the amenity and value of the complainers' subjects might be seriously affected. While, on the other hand, the insertion of the conditions and restrictions in question in the dispositions of the remainder of the lands of Crosshill, would make them binding and operative against the disponees, and give the complainers, or the parties in their place for the time, a right to enforce them, as exemplified in the cases of *Davidson v. Mercer*, 18th December 1823, 2 Sh. 697, and *The Magistrates of Edinburgh and Others v. Macfarlane*, 2d December 1857, 20 D. 156.

"The Lord Ordinary does not think that the statement in answer to Reason 5 affords any relevant or sufficient ground for refusing the interdict asked by the complainers, and he has not thought it right to allow a proof of that statement, which, in his view of it, would only have the effect of protracting the litigation, and involving the parties in unavailing trouble and expense."

Dixon's trustees reclaimed.

YOUNG, Q.C., and A. MONCRIEFF for them.

DEAN OF FACULTY and MACLEAN in answer.

The Court held that the conditions were not merely for the benefit of the superior, but of the body of feuurs; that therefore the superior, having undertaken to insert it in every feu-charter or disposition, could not dispense with it at his own hand; and that, although cases might arise where the enforcement of the condition by a particular feuwar would be nimious and emulous, yet it was for the pursuer to establish that by an action of declarator.

Agent for Suspender—John Galletly, S.S.C.

Agents for Respondents—Melville & Lindsay, W.S.

Wednesday, December 9.

SINCLAIR v. MACBEATH.

*Landlord and Tenant—Lease—Obligation—Interest—Draft Minute—Rei interventus*. 1. Held that a draft minute does not belong to that class of documents that can be validated *rei interventus*. 2. Circumstances in which held that an obligation to pay "interest" under a lease imported interest merely, in the ordinary acceptation of the term.

This was an action brought by Mr Sinclair of Forss against his tenant in the lands of Mains of Brims, for the purpose of enforcing payment of interest, at the rate of £6, 14s. 1d. per annum, upon certain sums expended by the pursuer in draining and fencing the said lands of Brims, and borrowed by the pursuer for that purpose from the Scottish Drainage and Improvement Company.

The action was founded, in the first place, upon