this contention is at variance both with principle and with the authorities referred to by the Lord Ordinary. The disponee on each transmission since the subjects fell into non-entry acquired only a base fee, as this was all that the successive disponers had to convey; but in the absence of any demand by a disponee that the disponer should enter or pay a composition, I think it must now be taken that each successive disponer, by conveying the base fee to his disponee, satisfied his obligation as disponer. It was argued for the pursuer that the disponer in such a case warrants that the fee is full, but I am not aware of any authority, nor do I see any principle, for holding that such a warranty is to be implied where it is not expressed. No doubt the agents for an intending purchaser usually examine the state of the title, and if they find that the seller has only a base fee they can stipulate that he shall enter or pay the entry-money which the purchaser would require to pay when he enters; but in the absence of any such stipulation I consider that after a conveyance of the estate as it stands in his person has been accepted, and the price has been paid, no such claim as that now put forward can be successfully preferred against the seller or his representatives. It is to be kept in view that all the transmissions of the subjects and the completions of the titles (in so far as they were completed) were prior to the passing of the Conveyancing Act 1874.

For these reasons I am of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD ADAM—I concur.

LORD M'LAREN—I have had doubts as to the legal principle applicable to this case, and they are founded on this consideration, that under an ordinary contract for the sale of heritage, when there is no expressed stipulation as to entry the right of the purchaser is to have a clear title and to be entered with the superior. Consequently I should say that it was an implied condition of the contract of sale that the purchaser should be entered. So far my mind is clear. But the really difficult question arises out of the fact that a special obligation has been introduced into the conveyance to warrant what would be implied by law. The question then is whether the obligation is not so connected with the subject of sale that, to use language with which we are familiar in such cases, it must be held to run with the lands. Having regard to the reasons given by your Lordship in the chair, I cannot say that I entertain the affirmative view so strongly as to induce me to dissent from the decision proposed. I have not been able to clear my mind of the difficulty to which I have given expression, although I do not desire to throw any doubt on the soundness of the result at which your Lordships have arrived.

LORD KINNEAR—I concur.

The Court adhered,

Counsel for the Pursuers — Campbell, K.C.—Grainger Stewart. Agents—A. & A. Campbell, W.S.

Counsel for the Defender—Clyde, K.C.—Horne. Agents—Webster, Will, & Company, S.S.C.

Saturday, July 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

RANKINE *v.* LOGIE DEN LAND COMPANY, LIMITED.

Superior and Vassal—Obligation ad factum præstandum — Personal Obligation to Erect Buildings—Transference of Feu after Obligation Prestable—Liability of Prior Vassal—Liability of Executrix of Deceased Vassal—Acquiescence.

The obligations of a vassal in a feu, which have become prestable, are not discharged by the entry of a new vassal; and damages for the failure of a former vassal to implement such obligations may be recovered from his personal representatives after his death.

Marshall v. *Callander Hydropathic Company, Limited*, July 18, 1895, 22 R. 954, 32 S.L.R. 693, *followed.*

Macrae v. *Mackenzie's Trustee*, November 20, 1891, 19 R. 138, 29 S.L.R. 127, *distinguished.*

A proprietor feued lands subject to an obligation (declared to be obligatory upon all persons afterwards deriving or acquiring right to the subjects) to erect thereon buildings of a certain value. This obligation was never fulfilled. The titles contained stipulations that the vassals should pay double feu-duty so long as they should fail to build. After certain transmissions, and after the obligation to build had become prestable, the feu became vested in A and M and the survivor as trustees for themselves. M having died, A, the survivor, thereafter disponed the subjects to the L. Company, Limited. Mrs M, the widow and executrix of M, never made up any title to the subjects. Thereafter, and twenty-four years after the creation of the feu-right, the superior, who had never until recently made any demand for the fulfilment of the obligation to build, and had accepted payment of the feu-duty without exacting the double feu-duty provided for in the title, brought an action against the L. Company, Limited, A, and Mrs M, as executrix of her husband. The conclusions of the action were against A and the L. Company for implement of the obligation to build, and failing implement, for damages, and against Mrs M. for damages in the event of the obligation to build not being implemented. Decree was granted against A and the L. Company, ordaining them to erect the buildings within

a specified time. On their failure to implement this decree, *held* that the superior was entitled to a proof before answer of his averments of damages against all three defenders, and that his right against M's executrix was not barred either (1) by acquiescence or implied discharge, or (2) by having taken decree against the existing vassal, or (3) by the fact that the executrix had never become a vassal.

By feu-disposition dated 5th May 1874, William Macbean Rankine, proprietor of the estate of Dudhope, near Dundee, disponed to Robert Battis, merchant in Dundee, and his heirs and assignees whomsoever, certain lands amounting to 56 poles 22 yards. The disposition contained, *inter alia*, the following clauses:—"The said Robert Battis and his foresaids shall be bound and obliged within eighteen months from the date hereof to erect and thereafter maintain in good repair a dwelling-house or land of dwelling-houses upon the said piece of ground hereby disponed of the value of £300 sterling at least, with suitable offices, which dwelling-houses and all other buildings which may be erected on said piece of ground hereby disponed shall be built according to a plan to be first submitted to and approved of by the said William Macbean Rankine or any architect or surveyor appointed by him . . . and the said piece of ground is hereby disponed with and under the express burden of the declarations, provisions, restrictions, stipulations, and clauses irritant and resolutive above written, which are hereby declared to be real burdens and conditions upon and affecting the piece of ground hereby disponed, and shall be personally binding and obligatory upon those hereafter deriving or acquiring right thereto, and shall be engrossed or validly referred to in all future deeds, writs, and instruments of transmission and investiture of or in the said piece of ground . . . and in case he or his foresaids shall fail to erect buildings of the value foresaid within the period above specified, they shall be bound to pay double the feu-duty above specified so long as they shall fail to implement the said obligations or either of them after the expiry of the said respective periods; but which additional penalty shall noways prejudice any of the other rights or remedies herein conferred on or competent by law to the superior in the event of such respective failures."

By feu-contract dated in 1875 Rankine disponed to James Salmond and others another piece of ground, the disposition containing a similar obligation to erect and maintain buildings of the value of £1000 within two years from the date thereof. He also in 1876 disponed another piece of ground to James Gentle, Dundee, the feu-disposition containing an obligation to erect buildings of the value of £4000 within three years from Martinmas 1877, Clauses in terms similar to those quoted above from the feu-disposition to Robert Battis were inserted in the feu-contract with Salmond and others and the feu-disposition to Gentle.

After sundry transmissions the subjects disponed to Battis, to Salmond and others, and to Gentle, in 1890 were disponed to the said James Gentle, George Lloyd Alison, wine merchant, Dundee, and the late William Moir, banker there, and the survivor, who were infeft therein as trustees for themselves equally.

No buildings were ever erected on any of the subjects.

Gentle died on 5th October 1890, and his estates were subsequently sequestrated; Moir died in 1898, and his widow, Mrs Margaret Stewart Erskine or Moir, was decerned as his executrix. By disposition, dated 18th August 1899, the said George Lloyd Alison, in consideration of Mrs Moir discharging him of a sum of £586, 18s. 7d., agreed to accept a conveyance to him of the subjects above mentioned, and to relieve her of all liability for feu-duties effeiring to the said subjects from the term of Whitsunday 1899, and of the obligation for the erection and maintenance of buildings. Mrs Moir never made up a title to the said subjects.

Of the same date Alison disponed the subjects to himself as trustee for his children, and by disposition dated 31st August 1899 he, as such trustee, disponed them to the Logie Den Land Company, Limited.

On 28th June 1900 Walter Lorne Campbell Rankine of Dudhope, the superior, brought the present action against the Logie Den Land Company, Limited, the said George Lloyd Alison as an individual, as trustee for himself, as trustee for the said James Gentle and William Moir, and as trustee for his children, and Mrs Moir as executrix of the late William Moir.

The conclusions of the action were (1), (2), and (3) that the defenders the Logie Den Land Company, Limited, and Alison should be ordained jointly and severally or severally, or in such other way or manner as shall seem just in the process to follow hereon, to erect the buildings on the three subjects above mentioned. Then followed these conclusions:—"And further, in the event of buildings not being erected as aforesaid, or otherwise, the defenders the said Logie Den Land Company, Limited, and George Lloyd Alison, in all or any one or more of his capacities foresaid, and also the defender the said Margaret Stewart Erskine or Moir, as executrix foresaid, ought and should be decerned and ordained, conjunctly and severally or severally, or in such other way or manner as shall seem just in the process to follow hereon, by decree of our said Lords, to make payment to the pursuer of the sum of £7500 sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation to follow hereon until payment; or otherwise, the defenders the said Logie Den Land Company, Limited, ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £2500 sterling, with interest thereon, at the rate of 5 per centum per annum from the date of citation to follow hereon until payment; and the defender

the said George Lloyd Alison, in all or any one or more of his capacities foresaid, ought and should be decerned by decree foresaid to make payment to the pursuer of the sum of £2500 sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation to follow hereon until payment; and the defender the said Margaret Stewart Erskine or Moir, as executrix foresaid, ought and should be decerned by decree foresaid to make payment to the pursuer of the sum of £2500 sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation to follow hereon until payment."

After narrating the facts narrated *supra*, the pursuer made the following averments:—"That the Logie Den Land Company, Limited, is not a company of any substance; that the shareholders of said Company are the said George Lloyd Alison and his family; that the Company was formed for the purpose of trying to free the said George Lloyd Alison of his obligations under the said feu-rights, and that the transmission of the subjects to said Company was nothing but a device to try to evade the pursuer's rights and remedies for payment of the feu-duty and other prestations due to him; and that no feu-duty has been received by the pursuer since the term of Whitsunday 1899, although payment thereof has been frequently demanded by him. The pursuer has repeatedly called on the defenders the said Logie Den Land Company, Limited, and George Lloyd Alison, to erect buildings in terms of said feu-disposition recorded 11th May 1874, said feu-contract recorded 30th April 1875, and said feu-disposition recorded 6th January 1876. They refuse or delay to do so. In the event of failure to erect said buildings the pursuer will suffer loss, injury, and damage to an extent of not less than £7500. If said buildings had been erected the pursuer would have had security for the due payment of the stipulated feu-duties, and if they are yet erected he will have such security. At the present time he has no such security, and has not had such security within the time stipulated in the different feu-rights for the erection of the different buildings. The pursuer avers that not less than £7500 will be required to erect the said buildings and to put said feus in such a condition as they would have been if the building obligations in the feu-rights had been duly implemented."

Defences were lodged for Alison and Mrs Moir.

In her defences Mrs Moir, besides denying the pursuer's averment of damage, made the following statement—(Ans. 9) "Explained that the said William Moir was never called upon to erect the said buildings. Explained that at the date of the disposition of May 1890 fifteen years or thereby had elapsed since the granting of the feu-rights founded on. During the whole of that period, and during the subsequent period down to 2nd March 1900, the pursuer and his predecessors in the superiority were well aware that the buildings in question had not been erected, and neither the pursuer nor his foresaids ever called on the said William Moir or any of the vassals for the time to erect the said buildings or any of them, or communicated with any of the said vassals regarding them, but on the contrary acquiesced in their non-erection, and prorogated the time allowed for their erection until a specific demand therefor should be made. Explained and averred that each of the said feu-contracts and feu-dispositions founded on provided that the vassals should pay double the stipulated feu-duty so long as they should fail to implement the obligations to erect the said buildings. The said duplicand feu-duty was the damages fixed by the feu-contract for breach of the obligation to erect, but it has never been demanded by or paid to the superior, who has, on the contrary, granted discharges for the full feu-duty due to him." The defender Alison (Ans. 9) made similar averments as to acquiescence and discharge on payment of the ordinary feu-duty.

The pursuer pleaded—"(1) On a sound construction of said feu-rights, the pursuer is entitled to decree ordaining the two first named defenders, or at least one or other of them, to erect buildings, all as concluded for. (2) In the event of the buildings not being erected as aforesaid, the pursuer is entitled to reparation for the loss, injury, and damage thereby sustained by him, and the sum sued for in name of reparation being reasonable in amount, the pursuer is entitled to decree therefor, with expenses."

The defender Alison pleaded, *inter alia*—"(1) All parties not called. (2) The action is incompetent as laid. (3) The statements of the pursuer are irrelevant and insufficient to support the conclusions of the summons. (4) The pursuer's statements, so far as material, being unfounded in fact, this defender should be assoilzied both as an individual and as trustee foresaid. (5) In respect of the acquiescence of the pursuer and his predecessors in the non-erection of the buildings in question, as set forth in Answer 9, the pursuer is not entitled to insist in his present demands against this defender."

The defender Mrs Moir pleaded, *inter alia*—"(1) All parties not called. (2) The action is incompetent. (3) The statements of the pursuer are irrelevant. (4) The defender Mrs Moir, not representing the deceased William Moir as trustee foresaid, should be assoilzied, with expenses. (5) The pursuer having acquiesced in the alleged breach of contract by the said deceased William Moir, is barred from insisting in the present claim against this defender. (8) The pursuer having discharged his claim for damages against the said William Moir, the defender is entitled to absolvitor."

On 15th February 1901 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Repels the first and second pleas-in-law stated for the defenders: Finds that the averments of the defender Alison are not relevant or sufficient to support his fifth plea: Therefore repels also said plea, and before further answer decerns against the defenders the Logie

Den Land Company, Limited, and George Lloyd Alison, in terms of the first, second, and third conclusions of the summons, declaring that the period allowed for implement of the said decerniture shall be six months from this date."

Thereafter, no buildings having been erected, the case was again enrolled, and on 8th March 1902 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Repels the fifth and eighth pleas-in-law stated by the defender Mrs. Moir, and also the fourth plea-in law, which was not insisted in, *quoad ultra* before answer allows the pursuer a proof of his averment of damage, and the defenders a conjunct probation."

Opinion. — "This is an action by a superior to enforce certain building obligations contained in three feu-rights, which obligations have been for a long time in default. It is directed (1) against the present vassal — a limited company; (2) against a previous vassal, who is still alive; and (3) against the representative of a previous vassal who is now dead. As against the first two defenders there is a conclusion for implement, and failing implement for damages. As against the third defender there is only a conclusion for damages. The theory of the action is (1) that the obligations in question became prestable and were in default before the transmission to the first defender by the second defender, and before the death of the author of the third defender; (2) that accordingly, upon the principle established in the case of the *Callander Hydropathic Company*, there is a conjunct and several liability against all three defenders; but (3) that inasmuch as the representative of the deceased vassal, not having taken up the feu-rights, cannot be made liable *ad factum præstandum*, the liability of that representative is confined to damages—damages for the default or breach of contract which the deceased committed during his life.

"The three feu-rights were, it appears, granted respectively in the years 1874, 1875, and 1876. They related to three lots of building ground on the estate of Dudhope, in the suburbs of Dundee. They are all substantially in the same terms. Each imposes a personal obligation upon the vassal (which it was declared shall be personally obligatory upon all those afterwards deriving or acquiring right to the ground) to erect buildings of a certain value upon the ground, and these buildings were to be erected respectively within eighteen months, two years, and three years from the date of the feu. There were several transmissions which are for the present purpose unimportant, the vassals being either bankrupt or having been divested before there was any default. But in the end, in the year 1890, the whole three feus came to be vested in three persons who constituted among them a joint adventure, viz., (1) James Gentle, who died bankrupt in the same year; (2) the defender George Lloyd Alison, who is still alive; and (3) William Moir, banker in Dundee, who died in 1898, and who was the author of the third defender. Thereafter, viz., in 1899, Alison being the surviving joint-adventurer, and as such vested with the title, disponed to himself as trustee for his children, and later on in the same year he as such trustee disponed to the first defenders the Logie Den Company. The obligations being still unimplemented, the present action was brought in June 1900. These, I think, are all the material facts.

"There has been a good deal of procedure, and I regret to say a good deal of delay. The defenders first proponed various technical pleas. In particular, they pleaded that the action was incompetent, and that all parties were not called. After an amendment by the pursuer I repelled those pleas. I also repelled a plea by the defender Alison founded on alleged acquiescence by the superior, which I held to be unsupported by relevant averments. And before further answer I decerned against the Logie Den Company and the defender Alison conjunctly and severally to erect the required buildings, and to do so within six months from 15th February 1901, the date of the interlocutor. This period having expired, and no buildings having been erected, the case was restored to the procedure roll, and was heard the other day. The pursuer asked a proof as to damages. The defender Mrs Moir (resuming her former argument) maintained as formerly (1) that her husband having died, and she not having taken up his share of the feu-rights, she was not liable either in implement or damages; (2) that the pursuer was put to his election as between the present and the former vassals, and having taken judgment against the present vassal, is now barred from proceeding further; and (3) that in any event she was entitled to a proof of her averments of acquiescence and implied discharge.

"The argument on the first of these points was rested on a certain decision—*Macrae* v. *Mackenzie's Trustees*, 19 R. 138; but it appears to me that decision affirmed nothing inconsistent with the subsequent decision of the same Court (affirmed of consent in the House of Lords after argument) in the case of the *Callander Hydropathic Company*, 22 R. 954. In other words, it decided nothing adverse to the proposition that Alison and Moir, so soon as they accepted their disposition, became conjunctly and severally liable either to perform the building obligations imposed by the feu-rights or to pay damages, and that this liability being once prestable, they could not free themselves from it by disponing to a third party, the only effect of their doing so being to give the superior an additional debtor bound conjunctly and severally with themselves. Neither did the case of *Macrae* decide anything against the further proposition which seems to follow, viz., that the vassal Moir being thus liable at the time of his death (failing implement by himself or his co-debtors) to pay damages, that liability, contingent it might be but still operative, transmitted

as against his executor. It is true that in *Macrae's* case the Court held that the action as against the executor could not be sustained even as an action of damages, but that, as I read the judgment, was in respect only of the structure of the summons.

"The pursuer's second point—that upon election—was supported by a citation of numerous cases whose authority I fully acknowledge. But all I can say is that I have not been able to understand the application of the doctrine of election to a joint and several liability constituted by contract, and involving no application of the doctrine of bar or estoppel. The position of Mrs Moir, if I at all understand the matter, is just this—Mr Moir might at any time after 1890 and before his death have been sued by the superior for damages for breach of contract. He might have been so sued either alone (his co-debtors being duly called) or conjunctly and severally with his co-debtors. And being clearly in breach, he could have had no defence to such action unless perhaps by offering by himself or his co-debtors to build immediately. Now that, as it seems to me, is exactly Mrs Moir's position now. She is liable in the damages for which her husband was liable, just as she would be for any other breach of contract which he committed, and I see no reason why the pursuer should not have his proof of damages equally against her as against the others.

"As to her pleas of discharge and acquiescence, I do not find that these pleas are supported by averments at all different from those which I formerly held irrelevant as proponed by Alison. The two sets of averments are in fact almost nearly word for word the same, and that being so, I propose, having considered the minute for the pursuer and heard counsel, to repel the fifth and sixth pleas stated for Mrs Moir, and also her fourth plea (which was given up); *quoad ultra* to allow the pursuer a proof of his averments of damage, and to the defenders a conjunct probation, the proof to proceed on a day to be afterwards fixed."

The defenders Alison and Mrs Moir reclaimed. For the defender Alison it was argued that the obligation to build could only be enforced against him while he was a vassal. By the Logie Den Land Company taking infeftment on his disposition to them he had ceased to be a vassal. On this point—*Marshall* v. *Callander Hydropathic Company*, July 18, 1895, 22 R. 954, 32 S.L.R. 693, was distinguishable, because there the obligation was to rebuild buildings already erected, and the transfer to the new vassal took place after the fulfilment of the obligation had been demanded.

Argued for the defender Mrs Moir—(1) The action as laid was incompetent, because the conclusions would lead to a joint and several decree against her and Alison for different wrongs—*Sinclair* v. *Caithness Flagstone Company, Limited*, March 4, 1898, 25 R. 703, 35 S.L.R. 541. (2) The executrix was not liable in damages even on the assumption that Moir would have been liable if he had failed to build on being required to do so. No such requisition had been made upon him, and therefore no damages had become due at his death. There was no breach of an obligation until performance was demanded — *Napier* v. *Spier's Trustees*, May 31, 1831, 9 S. 655; *Magistrates of Glasgow* v. *Hay*, February 23, 1883, 10 R. 635, 20 S.L.R. 419, *per* Lord Adam, Ordinary. This was a feudal obligation acting on the same principles as the obligation to pay feu-duty. An executor was not liable in the obligations of the feu which the representative in heritage did not take up—*Aiton* v. *Russell's Executors*, March 19, 1889, 16 R. 625, 26 S.L.R. 478—unless the obligation was expressly joint and several — *Police Commissioners of Dundee* v. *Straton*, February 22, 1884, 11 R. 586, 21 S.L.R. 410. If no claim of damages had vested at Moir's death his executrix was not liable. She was not a vassal. That was settled by *Macrae* v. *Mackenzie's Trustee*, November 20, 1891, 19 R. 138, 29 S.L.R. 127. (3) Mrs Moir could not be found liable under the conclusions of the present action. Assuming she was liable for the damages due as at Moir's death, that was not what was sued for. The only damage claimed was that suffered by the superior from the absence of the buildings now, not the damage suffered from their absence at the date of Moir's death. The damage therefor asked for arose now, and only the existing vassal could be liable for it. (4) If the superior had a right to sue either the existing or former vassals, he was put to his election between them, and here having taken decree against the existing vassal, the Logie Den Land Company, Limited, he could not now sue the former vassal or his representative. (5) The superior was barred from insisting on his present claim by acquiescence, especially in view of the fact that he never demanded the duplicand feu-duty stipulated for in the event of failure to build, and a proof of the defender's averments on this point should be allowed. Acquiescence in the breach of an obligation was a bar to any claim of damages, though it might not infer any right to refuse performance in the future—*Carron Company* v. *Henderson's Trustees*, July 15, 1896, 23 R. 1042, 33 S.L.R. 736. Claims of damages might easily be held to have been waived —*Hunter* v. *Broadwood*, February 2, 1854, 16 D. 441; *Broadwood* v. *Hunter*, February 2, 1855, 17 D. 340; *Emslie* v. *Young's Trustees*, March 16, 1894, 21 R. 710, 31 S.L.R. 559; *Eliott's Trustees* v. *Eliott*, June 7, 1894, 21 R. 858, 31 S.L.R. 753.

Argued for the pursuer and respondent—The case against Alison was clear. The only answer he could make was that he had parted with the subjects, but on that point *Marshall* v. *Callander Hydropathic Company*, July 18, 1895, 22 R. 954, 32 S.L.R. 693, was a direct authority and conclusive against him. The case against Mrs Moir was equally good. Moir died subject to a potential claim of damages—that is, to a claim of damages if his successors in the feu, when called upon, failed to erect the buildings. That claim transmitted against

his executrix. *Macrae* v. *Mackenzie's Trustee*, November 20, 1891, 19 R. 138, 29 S.L.R. 127, was decided on the form of the action. The conclusions there were to have the executrix decerned to perform the obligations of the feu, and failing performance to pay damages. The action failed because the executrix was not liable to fulfil the obligations of the feu, not being a vassal, and could not be liable in damages for failure in an obligation in which she was not liable. The facts here did not amount to acquiescence, a plea which was rarely if ever sustained without the element of personal bar—*Cowan* v. *Kinnaird*, 1865, 4 Macph. 236. The superior was not bound to insist upon the fulfilment of the obligation to build until he chose to do so. No case of election had been made out, as the superior was entitled to sue both the existing and the former vassal. That was expressly decided in *Marshall* v. *Callander Hydropathic Company, supra.*

At advising—

LORD KINNEAR—I agree with the Lord Ordinary in this case. I think that his Lordship's judgment is founded upon exactly right grounds, and I have very little to add to what he has said. Each of the feu-rights in question imposes upon the vassal an obligation to erect buildings of a certain value within a certain time. In the year 1890 the feus came to be vested in James Gentle, George Alison, and William Moir, the title being taken to these three persons and the survivor as trustees for themselves equally. There can be no question that by accepting a title in these terms these persons became liable jointly and severally for performance of the obligation to build, because in obligations *ad factum præstandum* each is always bound for the whole, and it follows that they were equally liable in damages for breach of the obligation if it was not performed. Gentle and Moir died without performing their obligation. It is said that Gentle died bankrupt, and I presume it is for that reason that no claim is made against his representatives. After the death of Moir, Alison, the survivor of the three persons, transferred the estate to the Logie Den Land Company, Limited, and the present action is brought against the present vassals of the subjects, and against Alison, and Mrs Moir, the executrix of the deceased William Moir. Now as Moir died without having performed his obligation, and was clearly in breach of contract at the date of his death, his consequent liability for damages was transmitted, like other personal liabilities, against his executrix. It is nothing to the purpose to say that William Moir's executrix is not his successor in the feus, because the liability it is proposed to enforce against her does not arise from her own obligation but from the contract of her husband whom she represents. Nor is it material that she, being no longer in possession of the subjects, cannot perform the obligation to build without the consent of the present owners, because the impossibility of giving specific implement would have been no excuse to the obligant himself for the failure to perform an absolute and unconditional contract, and can just as little afford a defence to his executrix against whom his liability is transmitted. The only difficulty, if it is a difficulty, arises from the vassal's failure to perform his obligation during his lifetime, but that does not extinguish the obligation, and if it cannot now be performed specifically the only consequence is that the obligation is converted into a liability for damages.

The next question is whether the vassals are relieved by the sale of the subjects to the Logie Den Land Company, Limited, and that is decided against them by the case of *Marshall* v. *The Callander Hydropathic Company*, 22 R. 954, 23 R. (H.L.) 55.

A further question, however, was raised as to whether the defenders could be made liable jointly and severally for the same sum in name of damages. I would be sorry to say anything against the rule laid down in *Sinclair* v. *The Caithness Flagstone Company*, 25 R. 703, that two or more persons cannot be made liable jointly and severally for disconnected breaches of contract. But in the first place the defenders are sued for breach of one and the same obligation, and in the second place the summons contains conclusions which, for all we can see at present, may turn out to be perfectly apt and sufficient for working out and supporting liability against each or any of the defenders; and since what the Lord Ordinary has done is to allow a proof of damages before answer, I think it would be quite premature to express an opinion as to their respective liabilities if there is any question as to that matter, because that will remain for consideration when the proof has been taken. All that is necessary to decide is as to the correctness of the Lord Ordinary's judgment in repelling the pleas and allowing a proof to the pursuer and to the defenders a conjunct probation.

I only add that I quite agree with the Lord Ordinary that the decision in *Macrae* v. *Mackenzie's Trustees*, 19 R. 138, has no direct application to the present case.

I am therefore for adhering to the decision of the Lord Ordinary.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Pursuer and Respondent—Dundas, K.C. — Craigie. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for the Defender and Reclaimer Mrs Moir — Campbell, K.C. — Sandeman. Agent—Thomas Henderson, W.S.

Counsel for the Defender Alison—Lees, K.C.—Cullen. Agent—James S. Sturrock, W.S.