Wednesday, February 17.

OUTER HOUSE.

[Lord Wellwood.

WINGATE AND OTHERS (WINGATE'S TRUSTEES) *v.* WINGATE AND ANOTHER.

Property — Ground-Annual — Clause of Irritancy — Right to Sue for Arrears after Irritancy of Contract.

The creditors in a contract of ground-annual, which contained a clause of irritancy declaring that in the event of the ground-annual falling two years into arrear the contract and all that had followed thereon should in the option of the creditors be void and null, and the subjects be forfeited and revert to and become the absolute property of the creditors—obtained a decree of declarator of irritancy under this clause, and thereafter sued the debtors in the contract for the arrears. *Held* that they were not entitled to succeed.

The pursuers in this action, Thomas Wingate, Viewfield, Partick, and others, the trustees of the late Thomas Wingate, were creditors in two contracts of ground-annual over subjects in Whiteinch, near Glasgow—(1) a contract dated 20th, 22nd, and 25th, and recorded 27th March 1875, between them and Andrew Wingate, Paterson Wingate, and Wilson Wingate, as trustees for their firm of Thomas Wingate & Company, engineers and shipbuilders at Whiteinch, the ground-annual being £500, payable half-yearly; and (2) a contract dated 2nd and 5th and recorded 7th April 1875, between Thomas Wingate and Andrew Wingate, Paterson Wingate and Wilson Wingate, as trustees for their firm, the ground-annual being £300, payable half-yearly, to which contract the pursuers acquired right by various transmissions. Both contracts contained a clause of irritancy declaring that if two years' payment of the ground-annuals should remain outstanding at one time "these presents and all that shall have followed them shall, in the option of the first party and their foresaids, be void and null, and the said subjects and others erected thereon shall be forfeited and shall revert to and become the absolute property of the first party or their foresaids." Thomas Wingate & Company suspended payment on 14th July 1876, and executed a trust-deed for creditors on 24th July 1876. The trustee, along with Andrew, Paterson, and Wilson Wingate, by a disposition and assignation dated 11th September 1876, conveyed the subjects aforesaid to one Charles Maclean in consideration of £87,000, of which £55,000 was a loan by the Heritable Securities Investment Association to the said firm continued over the subjects. Charles Maclean and Wilson Wingate carried on the firm of Thomas Wingate & Company till 1879, when they were sequestrated. The Heritable Securities Investment Association then entered into possession under an *ex facie* absolute disposition in their favour, and possessed them till January 1890, when the pursuers, in respect that the ground-annuals had fallen into arrears for two years from Martinmas 1887 till Martinmas 1889, and from Candlemas 1888 to Candlemas 1890 respectively, obtained in absence decree of declarator of irritancy against the Investment Association, and thereafter sold the subjects for £18,500. In November 1891 they brought this action against Andrew Wingate and Paterson Wingate concluding for payment of the foresaid arrears of ground-annuals.

They pleaded—"(1) In respect of the obligations undertaken by them in the said contracts of ground-annual, the defenders are liable in payment of the sums concluded for, being the arrears of ground-annual payable under the said deeds. (2) The defenders being justly indebted and resting-owing to the pursuers the sums sued for, decree ought to be pronounced as libelled. (3) The defenders' statements are irrelevant and insufficient to support their pleas."

The defenders pleaded—"(1) The pursuers having operated payment of the arrears now sued for out of the security subjects, are not entitled to decree against the defenders. (2) In the circumstances, the pursuers are barred from now enforcing their claim for the said arrears."

The Lord Ordinary (WELLWOOD) on 17th February 1892 assoilzied the defenders.

"*Opinion.*—The question of law raised in this process is whether the creditor in a contract of ground-annual which contains a clause of irritancy to meet the event of two years' payment of the ground-annual remaining unpaid and outstanding, is entitled both to enforce the irritancy and also to sue the debtors on their personal obligation for the arrears in respect of which decree of declarator of irritancy was obtained. I have been referred to no legal decision or authority directly bearing upon the point, and therefore the question must be determined on consideration of the legal nature and characteristics of the contract of ground-annual, any analogies which may be found in other heritable rights of property security, and lastly, what in absence of decision is of the greatest importance, practice.

"The pursuers, who are the trustees of the deceased Thomas Wingate senior, sue the defenders Andrew Wingate and Paterson Wingate for arrears of ground-annual under two contracts of ground-annual. The first is a contract of ground-annual entered into between the trustees of Thomas Wingate senior and his sons Andrew Wingate, Wilson Wingate, and Paterson Wingate, as trustees for the firm of Thomas Wingate & Company. The deed proceeds on the narrative that in 1865 an arrangement had been made between Thomas Wingate and his sons, by which in consideration of a ground-annual of £500 he agreed to convey to them certain works at Whiteinch, including the whole ground and

buildings described in the deed; that the firm had regularly paid the ground-annual, but that Thomas Wingate had died without executing a conveyance, and that the firm had subsequently acquired other heritable subjects besides those agreed to be disponed. It was then set forth that with a view to securing the ground-annual over the whole of the subjects mentioned, the company had conveyed the subjects last mentioned to Thomas Wingate's trustees. The trustees then proceed to dispone the whole of the three lots or subjects to Andrew Wingate, Wilson Wingate, and Paterson Wingate, in consideration of a ground-annual of £500. Then follows an irritant clause in the following terms—'Declaring, as it is hereby specially provided and declared, that if two years' payments of the said ground-annual or yearly ground rent shall remain due and outstanding at one time, then and in that case these presents, and all that shall have followed thereon, shall in the option of the first party or their foresaids be void and null, and the said subjects and others erected thereon shall be forfeited, and shall revert to and become the absolute property of the first party or their foresaids.'

"On the other part, the second parties bound and obliged themselves and their respective heirs, executors, and successors, and the funds and estate of the company, to pay the said ground-annual in all time coming. Lastly, in the usual form they re-conveyed in security of the ground-annual the whole of the subjects in question.

"The other contract of ground-annual sued on is between Thomas Wingate junior, who had agreed in 1875 to retire from the business, and the other partners, his brothers Andrew, Wilson, and Paterson Wingate. The object of that contract was to secure him in a ground-annual of £300 over the same subjects, and in order that this might be done the subjects were conveyed to him and then re-conveyed to his brothers as trustees for the firm under burden of the ground-annual of £300.

"The ground-annuals in question fell into arrears for two years, from Martinmas 1887 till Martinmas 1889, and from Candlemas 1888 till Candlemas 1890 respectively.

"In the beginning of 1890 the pursuers sued for and obtained decree of declarator of irritancy under both contracts, against the Heritable Securities Investment Association, who were in possession of the subjects under an *ex facie* absolute disposition until January 1890. It is admitted that the pursuers have since sold the subjects at the price of £18,500, a sum sufficiently large to cover not merely the capital value of the ground-annual at 20 years' purchase, but also to repay to the pursuers the arrears of ground-annual. Notwithstanding this, the pursuers now sue Andrew Wingate and Paterson Wingate on the personal obligations contained in the contracts of ground-annual, for payment of the arrears in question. The question which I have to decide is whether the pursuers are entitled to this double remedy.

"Here we have a particular condition fenced with an irritant clause, and we must discover from the terms of the deed what was the true intention of parties. *Prima facie* the words of the irritant clause favour the defenders' contention. The creditor has an option; he may adopt one of two alternative courses. He may annul the contract, or he may rest content with other remedies open to him and recover the arrears by poinding the ground or suing the debtors on their personal obligation.

"Again, if the creditor resolves to enforce the irritancy, the clause provides, 'these presents and all that shall have followed thereon shall be void and null'—that is, the whole contract shall be annulled *ab initio* with all the rights and claims outstanding which depend upon it, and the personal obligation being merely necessary to the real burden will fall with it. Construed literally, that would seem to be the meaning and effect of the clause.

"Two analogies were referred to in the couse of the argument, a feu-right and a lease. Much depends upon which of the two a contract of ground-annual most resembles. It is settled law that a superior cannot claim arrears of feu-duties if he irritates the feu *ob non solutum canonem*. It is argued by the pursuers that this is a peculiarity confined to feu-rights and dependent on principles of feudal law, but I do not think that this is so. Craig classes irritant clauses not *inter naturalia* but *inter accidentalia feudorum* (Craig, i. 9, 28, p. 63), and they must be construed on that footing. I think it will be found that the rule which has been recognised by decision and practice—*MacVicar* v. *Cochrane*, 1748, M. 15,095; *Magistrates of Edinburgh* v. *Horsburgh*, 1834, 12 Sh. 593—rests upon equitable considerations arising from the character and effect of the forfeiture and the usual relative values of the estate forfeited and the feu-duties unpaid. The Act of 1597, which simply reads into feu-rights the irritancy *ob non solutum canonem*, which was usually specially inserted, does not contain one word about the superior's right to claim arrears in addition. We are therefore thrown back upon the effect of a conventional irritancy. I think the reason why it is fixed that a superior cannot both irritate the feu and claim arrears is not because the feudal relation between him and his vassal is annihilated—theoretically as if it had never existed—by declarator of irritancy, but because the two remedies are considered alternative, the irritancy being held specially to cover, and if enforced, to be substituted for the claim for arrears. Mr Bell states the reason concisely thus—'This irritancy is provided by statute and sometimes enforced by conventional stipulation. But in all cases it requires a declarator, the forfeiture being purgeable at the bar before decree of declarator is extracted. As the remedy proceeds on the principle of forfeiture, the superior cannot both insist on the forfeiture and demand arrears'—Bell's Pr. section 701.

"Now, a contract of ground-annual is the nearest approach to a feu-right, and is substitituted for it where subinfeudation is forbidden or the lands are held burgage.

It is usually adopted when it is desired that as in feu-holdings part of the price should remain a burden on the land conveyed. The main difference between the two rights is that under a contract of ground-annual the relations of the two parties are purely contractual, while in feu-holdings the reciprocal obligations of superior and vassal depend on tenure or 'privity of estate.' But when a superior or a creditor under a contract of ground-annual enforces an irritancy of *ob non solutum canonem* the same result is reached although perhaps on a different principle. In the one case the tenure which bound the superior and vassal is destroyed; in the other the contract is annulled, and the contractual relationship dissolved. But the result is the same; there is no reason why the forfeiture should be more severe in the one case than in the other. In both cases the seller or ostensible seller gets back his land with all that is on it; and there seems to be no reason why the vassal should be free from all demands for arrears and the debtor in a ground-annual be subjected to such a demand in addition to forfeiture of his land. Take as an illustration the second contract of ground-annual in favour of Thomas Wingate junior. The land did not belong to him; it was only conveyed to him for the purpose of creating the ground-annual; and the ground-annual payable to him bore a comparatively small relation in value to the value of the ground. And yet the effect of the decree of declarator of irritancy was that the whole of the subjects with buildings and machinery thereon out of which the ground-annual was payable became his absolute property.

"It seems to me, therefore, that the irritant clauses in the deeds under consideration are framed on the model of such clauses inserted or read into feu-rights by force of statute, and that they should receive the same effect. This view is strongly confirmed, not only by the absence of any authority or practice to the contrary, but also by the evidence of practice in accordance with it to be found in the recognised styles of deeds and writs. For instance, the recognised styles of contract of ground-annual do not contain any provision for payment of arrears in the event of the irritancy being enforced—See 1 Juridical Styles (5th ed.) pp. 136-7—and in the styles of summonses of declarator of irritancy on a contract of ground-annual there is no conclusion for payment of arrears—3 Juridical Styles, 5th ed. pp. 66-7.

"The practice in the case of leases is different whether the irritancy be conventional or under the Act of Sederunt of 1756. I do not know that the reasons given for this difference are altogether satisfactory. The irritancy of a lease is simply a forfeiture of the tenant's estate, and the condition imported into leases is borrowed from the irritancy of a feu-right, and therefore at first sight it would seem that the same rule should be applied as in the case of feu-rights. But there is no doubt that in various respects an irritancy in a lease is more strictly construed against the tenant than an irritancy in a feu-right against a vassal. This is sometimes explained on the ground that a tack is not considered to be a property, but a kind of burden or servitude on property—2 Ross's Lec. 498; and sometimes on the ground that the rent in the case of a lease represents the full annual value of the land, while in the case of a feu the feu-duty is usually of comparatively small value. Whatever the reason may be, the practice has been that a landlord is allowed both to irritate the lease, and also to sue for arrears in respect of which the irritancy was incurred. Mr Hunter states this expressly—'Procedure may be had either before the Court of Session or before the Sheriff Court if no declarator is necessary. When before the former the process is a summons of declarator of irritancy by reason of not-payment of the rent, and it contains a conclusion for payment of arrears. An amendment of the libel was allowed in a removing to the effect of adding a conclusion for payment of bygone rents'—2 Hunter (4th ed.) p. 136. The case which he quotes—*Wamphray* v. *Irvine*, 1693, 4 B.S. 49, shows that this practice is of very old standing. In 2 Bell on Leases, pp. 306 *et seq.*, will be found examples of two summonses of declarator of irritancy for non-payment of tack-duty, one proceeding on an irritant clause in the lease, and the other on an irritancy under the Act of Sederunt of 1756. In both forms the pursuer concludes, not only for declarator of irritancy, but also for payment of arrears.

"It is also not immaterial to notice that at least in modern leases the irritant clause differs materially from that in a contract of ground-annual or a contract of feu. Looking, for instance, at some of the forms given in 1 Juridical Styles (5th ed.) I find at pp. 578-9 a clause in those terms—"And in case the tenant and his foresaids shall at any time during this lease become bankrupt or be sequestrated or shall voluntarily divest themselves of their estate or effects by trust-deed for behoof of creditors or otherwise, or shall allow one term's rent to remain unpaid when the next term's rent shall become due, then and in any of these events it shall be in the power of the proprietor to put an end to this lease without any declarator or process of law to be used for that effect, and that without prejudice to the proprietor's claim for past-due or current rents.' I find the same clause at pp. 558-9 and 603-4. Again in a form of mineral lease I find at p. 675 an irritant clause expressed in somewhat stronger terms to the effect that the lease shall become *ispo facto* void and null, but it is added that the landlord shall be entitled to enter on possession of the subjects 'as if this lease had come to its natural termination, but declaring that the fact of such irritancy having been incurred and of the landlord having entered on possession of the said subjects shall not be held to infer a discharge of any rents or royalties due by the tenants at the date thereof of any of their obligations under

those presents which may not have been implemented by them.'

"The practice standing thus, I think a marked distinction has been observed between feu-rights and contracts of ground-annual on the one hand and leases on the other, although I fully appreciate the argument that in some respects a contract of ground-annual resembles a contract of lease more than it resembles a feu-right. I think that the balance of consideration is in favour of giving an irritant clause in a contract of ground-annual the same effect as it would receive in a contract of feu.

"I therefore think that the defenders must be assoilzied because the pursuers have elected to irritate the contract and regained and sold the lands. I agree with the pursuers that the defenders have no concern with the price which the pursuers obtained for the forfeited subjects. But on the other hand they have chosen their remedy and must be content with it, and it is satisfactory to know that they have fully repaid themselves."

Counsel for the Pursuers—D.-F. Balfour, Q.C.—Ure. Agents — Campbell & Smith, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Kennedy. Agent—Alexander Campbell.

Wednesday, February 17.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THORNELOE *v.* M'DONALD & COMPANY.

Contract—Breach of Contract—Compensation—Defence.

T. entered into a contract with M. & Company to supply them with watches to the value of £849 at certain specified prices, the watches to be delivered as they were ready, and paid by bills at four months from delivery. After a number of watches had been delivered in terms of the contract, T. wrote on 26th November 1889, intimating that he would no longer supply watches at the agreed-on prices. On 30th November T. sent M. & Company bills for the price of watches delivered prior to 26th November, but M. & Company refused to accept these bills in consequence of the intimation contained in T.'s letter of the 26th, and they met an action at his instance for the price of the watches with a counter-claim of damage on account of the pursuer's refusal to go on with the contract. *Held* (1) that the pursuer's threat that he would not go on with the contract did not justify the defenders in refusing to pay for goods delivered under the contract; and (2) that their refusal was a breach of contract which excluded any claim of damages on their part against the pursuer.

This was an action brought in the Sheriff Court at Glasgow by Richard Thorneloe, wholesale watch manufacturer, Coventry, against M'Donald & Company, 68 Trongate, Glasgow, for payment of £67, 17s. 6d., as the price of watches supplied by the pursuer to the defenders on 14th, 16th, and 23d November 1889.

In answer to the pursuer's claim the defenders stated—"In consequence of representations made by pursuer and Mr Pearson, his agent in Glasgow, that if a large order was given he could deliver watches more quickly and more regularly than in smaller quantities, and that pursuer anticipated an advance in price, the defenders gave an order, in December 1888 and January 1889, to Mr Pearson, the agent in Glasgow, to make and supply watches at the prices then fixed, to the value of £848, and which watches were to be delivered as they were ready, and paid by bills at four months from delivery, with power always to the defenders to delay delivery on intimating same to pursuer." They admitted that the watches which were the subject of the action had been delivered to them, but averred that they had been delivered under the contract above set forth; and that on November 5, 1889, the defender had by letter intimated to them that he would deliver no more watches at the contract prices, and had thus violated the contract, with the result that they had suffered loss to the amount of £204.

The pursuer denied that the defenders had power under the contract to delay delivery of the watches, or that he had broken the contract. He explained that the defenders had declined to accept delivery of watches forwarded in terms of the contract; that while declining to cancel the orders he had endeavoured to meet the defenders' convenience, but that they had delayed deliveries to such an extent that, owing to a material rise in wages and the cost of manufacture, it had ultimately become impossible for him to continue to supply watches at the old prices.

Proof was allowed. It appeared that on 4th February 1889 the defenders wrote to the pursuer—"Please send no more watches at present until we get our stock reduced." . . . The pursuer, however, was unwilling to delay delivering the watches, because wages were rising, and the cost of manufacture increasing, and on 16th March he forwarded a parcel of watches of the value of £43. These watches the defender at first declined to accept, but ultimately accepted on the pursuer's refusal to take them back. After the month of March the pursuer, in consequence of the defenders' unwillingness to accept them, forwarded the watches much more slowly.

On 24th April the defenders wrote—"Please send no watches of any kind until we write requesting you to send them. If you cannot hold over the order given to Mr Pearson, at the former prices, and send them as we ask for them, please cancel all orders, and we will give the orders as we require them, at the advanced price of 1s. on each watch."