HOUSE OF LORDS.

Friday, April 4.

(Before Lord Buckmaster, Lord Finlay, Lord Dunedin, and Lord Atkinson.)

COMMERCIAL UNION ASSURANCE COMPANY, LIMITED *v.* WADDELL AND ANOTHER.

(In the Court of Session June 22, 1917, 54 S.L.R. 497, and 1917 S.C. 585.)

Superior and Vassal—Casualties—"Duplicand"—"And Further"—Feu-Contract—Taxed Casualty—Duplicand of Feu-Duty Referred to Elsewhere in Deed as a "Duplication" and a "Composition."

The reddendo of a feu-contract by which certain areas of building ground were conveyed stipulated for a feu-duty payable at two terms in the year, Whitsunday and Martinmas, commencing the first payment at a certain date, and then provided—"And further, to pay . . . a duplicand of the said . . . feu-duty at the termination of every period of twenty years," and it was declared that when sufficient buildings were erected to adequately secure "the cumulo feu-duty and composition" the vassals should be entitled to allocate "the cumulo feu-duty and duplication thereof" with the approval of the superiors. *Held* (*dis.* Lords Finlay and Atkinson) that the sum payable to the superior in every twentieth year as duplicand was twice the amount of the feu-duty for that year in addition to the feu-duty for that year.

Authorities examined.

The case is reported *ante ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

LORD BUCKMASTER—By a feu-contract, dated the 20th August 1880, certain property was disponed in feu-farm by the predecessors in title of the respondents to and in favour of the predecessors in title of the appellants, subject to an obligation to build and to the payment of the feu-duties, duplicands thereof, and interest and penalties as therein mentioned.

The said deed contained an obligation on the part of the disponees to pay to the superiors a feu-duty for the first two years from Whitsunday 1878 at the rate of £95, 16s. 4d. yearly, at two terms on Whitsunday and Martinmas, and thereafter at the rate of £175, 13s. 4d. sterling in equal sums on the same day in each year, with penalties in the event of failure in the punctual payment. The instrument then proceeded in the following terms—"And further to pay to the said Umpherston & Company, Limited, or their assignees a duplicand of the said maximum feu-duty at the termination of every period of twenty years counting from the term of Whitsunday Eighteen hundred and seventy-eight."

Power was granted to the disponees, after the erection of buildings sufficient to secure the cumulo feu-duty and composition, to dispose of any part of the buildings and to allocate the cumulo feu-duty and duplication thereof, and under a declaration that on all the duties being allocated to the superiors they should be bound to collect the allocated feu-duties and duplication from the individual proprietor. It is unnecessary to examine the further facts associated with this dispute, for the determination of this appeal depends upon the proper meaning to be attached to the word "a duplicand" in the clause above set out. On behalf of the appellants it is contended that it means no more than a duplicate or replica of the feu-duty, or if it is to be construed as meaning twice the feu-duty, it embraces the fixed feu-duty itself so that no more than a total of twice the feu-duty is exigible in any twentieth year. The respondents assert, and in this assertion they are supported by the Lord Ordinary and by the Judges of the Inner House with the exception of Lord Johnston, that the duplicand is twice the feu-duty and must be paid in addition thereto.

The determination of the question thus raised is not free from embarrassment, due to the ambiguous nature of the language and to the decisions given upon similar words. The history of the added payment known as "a duplicand" goes back a long way in the annals of Scottish law. Before 1874 a feu-disposition which contained no taxation of entries left the disponee liable to the payment of casualties of relief on entry of the heir, and also of a payment called composition, not strictly a casualty in its origin but often so called, on entry of each singular successor. The first was limited to the equivalent of the feu-duty, the latter to the equivalent of a year's rent. In order to avoid the uncertainty of the incidence of these periodic payments it became the custom to insert a provision in the feu-contract for the payment at definite and stated intervals of a further sum, measured in terms of the feu-duty and accepted as a composition of such casualties, and this, by the use of the Latin phrase in which the obligation was originally expressed, became known as a duplicand.

The actual words of the reddendo as shown in the case of *The Magistrates of Inverness* v. *Duff*, Mor. Dict. p. 15,059, were these—"Reddendo inde annuatim prefatus . . . heredes sui et assignati antedicti nobis nostrisque successoribus summam . . . ad duos anni terminos necnon duplicando dictam feudifirmam primo anno introitus cujuslibet hæredis aut assignati ad dictas terras aliaque præscripta prout usus est feudifirmæ duplicatæ pro omni alio onere."

The effect of this was simply to provide payment of a double rent, but none the less the phrase became ambiguous. It might either mean a double sum, half of which was the original feu-duty and the other half the composition; or it might mean, as in the Latin charter it would appear to mean, an added sum the equal of the feu-duty, to be paid in addition thereto, the obligation

to pay the current annual duty being left untouched, and an independent concurrent obligation being introduced to pay its equal at the stated times. In either case the same result was reached, and the reservation of a duplicand with nothing more involved the disponee in no liability beyond that of a total payment of twice the feu-duty.

The next step in the history of this matter was the decision in the *Earl of Zetland's* case, 1841, 3 D. 1124, and much of the controversy in the present appeal has ranged round the question of the true meaning of this authority.

The facts were these—In a feu-disposition, after the imposition of the annual duty, there was a provision that in every twenty-fifth year there should be paid a duplicand over and above the feu-duty, couched in these words—"and paying a duplicand of the said feu-duty at the end of every twenty-five years; upon payment of which duplicand, over and above the feu-duty of the year in which it falls due." It was held both by the Lord Ordinary and by the Inner House that this imposed the obligation of paying a sum equal to three times the feu-duty at the given and stated periods.

The reasoning that led to the conclusion was this—That if in a feu-disposition a provision had been found that on a certain day a duplicand should be paid, that would without more create a liability of paying a sum equal to twice the feu-duty, and that therefore a duplicand was measured as twice the feu-duty. If therefore the feu-duty be added it would make the payment three times. If fault be found with this reasoning it is because the hypothesis that has been made involves the conclusion. If in a feu-disposition there were found words that provided that at certain periods a payment should be made that was not the feu-duty described as a duplicand, and this payment could be fairly interpreted as being a payment in substitution for the feu-duty, it would follow that it would in amount be double the original feu-duty. Half of it would be equivalent to the feu-duty, and the other the agreed composition.

It is on this assumption that the judgment proceeds, and so proceeding this conclusion is only open to the objection that the hypothesis might not be sound since it ignored the possibility that although twice the feu-duty was to be paid this was not necessarily due to the words having the fixed meaning of twice the original sum. However, whether the hypothesis was well or ill warranted this decision is now over 70 years old. Its application has found its way into law treatises, and there can be no doubt that it has influenced the form of many transactions. Land has been acquired and payment has been made upon documents framed in accordance with its directions; and it would be in the last degree unwise to disturb its authority at the present time. What it decided was that the use of the word "duplicand" in connection with the words "over and above the feu-duty," or with their equivalent, creates an obligation to pay three times the feu-duty, and equally that if the word be used without such explanation it means that only twice the feu-duty can be demanded.

Before this decision it was at least open to argument that a "duplicand" like the word "double" might mean one of two things. A double is in one sense an exact replica or reproduction of the original. In that sense one is a double of one. But two is also a double of one, and so also a duplicand; but since this decision the word a duplicand must in feu-contracts be construed as *prima facie* equivalent to twice the fixed duty. It still remains to determine the effect of this construction in any particular document, and the difficulty of this apparently simple problem is witnessed by the cases in which this question has been discussed.

In the case of the *Magistrates of Dundee* v. *Duncan*, 11 R. 145, 21 S.L.R. 107, there was an obligation to pay the yearly feu-duty at two terms in the year, "and besides" a duplication of the said duty at the expiration of every twenty-fifth year; and it was then decided that the provision for payment of the added duty was intended to cover the claim for casualties on the entry of singular successors. It is obvious that from this decision there is little guidance to be obtained in the present case.

In *Alexander's Trustees* v. *Muir*, 5 F. 406, 40 S.L.R. 316, the obligation is expressed in these words—"As also to pay every nineteenth year" an amount which was expressed in figures and was the double of the yearly feu-duty. It was held that the double included the feu-duty, the words "as also" being interpreted merely as the commencement of a new step in the provisions of the deed, but both the Lord Justice-Clerk and Lord Moncreiff accept the meaning of the word "duplicand" as interpreted in *Zetland's* case, Lord Moncreiff stating "there was no doubt of the meaning of the word 'duplicand'; it meant double the feu-duty." But he added that in his view the decision in *Zetland's* case depended on the use of the words over and above the feu-duties of the year. By this the learned Judge cannot have intended to mean that the words "over and above" have any technical meaning, but merely that words must be used showing that the duplicand is a cumulative payment of more than twice the duty which is to be paid. So regarded the case decides no more than that for reasons not easy to follow the words in the deed there under consideration had not this effect. This case was succeeded by the decision in the *Governors of Heriot's Trust* v. *Falconer and Others*, 1912 S.C. 875, 49 S.L.R. 561, where the feu-contract contained a provision for paying a fixed duty, "as also paying a double," and it was then held that "as also" showed that the payment was to be a double in addition to the feu-duty.

In *Adam* v. *Finlay*, 1917 S.C. 464, 54 S.L.R. 388, the obligation was expressed in these words—"And paying a duplicand of the said feu-duties at the term of Whitsunday 1930, and at the same term in every 19th year thereafter, in lieu of casualties." The matter was then referred for the opinion of Seven Judges, and they were with the exception of Lord Johnston in agreement that the

double payment was a double payment in addition to the feu-duty. But the views of the learned Judges differed as to the true meaning of a duplicand. The Lord President regarded it as having the two meanings to which I have already referred, while Lord Cullen and the Lord Justice-Clerk regarded it as necessarily importing a double payment.

In the present case this decision was again followed, but in the case of *Murray* v. *Bruce*, 1917 S.C. 623, 54 S.L.R. 525, a case not of a feu-contract but of a ground annual, the phrase "a duplication" was held not to compel the double payment.

The result of these decisions is to show that the Courts in Scotland have adopted *Zetland's* case, and the question therefore in this case, and the only question, is whether the form of the provision for payment of a duplicand is such as to show that it is in addition to, over and above, or a further payment to the annual feu-duty; and this again resolves itself into whether the words "and further" in the document in which they are found are equivalent to something over the feu-duty, or merely, as was said in *Alexander's* case, introduce a new obligation.

The appellants contend that this latter construction is the proper interpretation, and that this view is fortified by the reference in the later part of the document to the words "a duplication," which gives them the protection and help of the most recent case of *Murray* v. *Bruce*.

Simple as the question seems to be, it is by no means easy to determine. But it is my opinion that the words "and further" are equivalent to "and as a further payment," and that the "further" means something further and beyond the annual feu-duty. If this be so, the subsequent references to duplication are not of much assistance. Since, again, a duplication may mean a double, and if the double is something further and beyond the original payment, the reference to the duplicand under this phrase will not materially assist the appellant's case.

I think too that there is some assistance to be gained by the circumstances pointed out by Lord Dunedin in *Heriot's* case, *e.g.*, that the duplicand is a payment for the particular year and is paid under the terms of the deed in one lump sum, but the feu-duty is payable half-yearly, and if the duplicand included the feu-duty it would follow that for no obvious reason on the periods appointed for payment of the duplicand the feu-duty was payable in one sum instead of in two, and further, that while no interest is reserved on the duplicand in the event of non-punctual payment it is payable on the feu-duty, with the result that if the duplicand includes the feu-duty either the liability for interest for the year when the duplicand is payable is abrogated, or it is necessary to resort to a covenant for its payment which is attached to an independent obligation, and would leave half the duplicand free from interest and the other half liable, while the whole payment is treated as one entire sum. I think therefore that this appeal fails, and I feel confirmed in this opinion by the fact that it appears to me to be in agreement with that held by so many and such learned Judges in the Scotch Courts, from whose views on such a question it would be impossible to differ without both uneasiness and regret.

LORD FINLAY—Under a feu-contract dated 18th August 1880 the appellants' authors took certain land from the respondents' authors comprising the four plots now in question. The land was expressed to be holden for payment of the feu-duty and duplicands as after stipulated. By the reddendo clause the feu-duty was fixed at £175, 13s. 4d. yearly, payable half-yearly, and the feuars were "further to pay" a duplicand of the feu-duty every twenty years. The appellants have been called on under the Feudal Casualties (Scotland) Act 1914 to redeem the casualties payable in respect of the plots. The amount to be paid is based on the highest casualty payable. The respondents contend that this is a sum equal to twice the feu-duty over and above the feu-duty for the year, while the appellants contend that the sum payable is merely a sum equal to twice the feu-duty.

The contentions of each side are very clearly stated in the cases filed by the appellants and by the respondents. The appellants give as their first two reasons for reversal the following:—"1. Because the expression 'a duplicand' of the feu-duty means one additional feu-duty and not two. 2. Because even if 'a duplicand' of the feu-duty denotes twice the feu-duty, the payment of twice the feu-duty every twentieth year represents as to one-half the ordinary single feu-duty for that year, and as to the other half the taxed casualty." The respondents' contention is expressed in their first two reasons, which are as follows:—"1. Because the term 'duplicand' means in Scots Conveyancing a sum double the amount of the yearly feu-duty. 2. Because on the true construction of said feu-contract the 'duplicand' to be paid every twentieth year is to be paid in addition to the feu-duty for the year."

The question is one of the construction of the language of the contract, but it is necessary to look at some authorities to ascertain the meaning of the term "duplicand," and to see whether there is any rule or presumption as to the second question raised by both parties. The clause on which this question arises begins in the old Latin charters with the words "*necnon duplicando.*" The amount to be paid was sometimes termed "the duplicando" from the governing word in the clause, and the abbreviated form "duplicand" gradually came into use from 1777 onwards. In *Mackenzie's* case (Mor. App. Part 1, p. 2) both terms are used—"duplicand" in the argument and "duplicando" in the formal judgment. In the Institutes (book ii, title v, sec. 49) Erskine expresses himself as follows as to the amount of relief—"It is agreed by all lawyers that the relief in blanch and feu-holdings, at least where the charter expresses that casualty, is estimated to the double of the blanch or feu-duties. But this is not to be so understood as if

double of the reddendo were paid properly in name of relief, for one year's reddendo goes to the superior as the constant yearly feu-duty payable out of the lands; it is the other only that is paid as an acknowledgment to him for relieving the feu out of his hands."

The leading case upon this subject is *Earl of Zetland* v. *Carron Company* (1841, 3 D. 1124). That case appears to me to have settled what in Scottish law is the *prima facie* meaning of the expression "duplicand," and what is the ordinary effect of such a clause in a charter in the absence of express words to modify it. The facts of that case were as follows:—In 1814 Lord Dundas, the grandfather of the pursuer, had granted in feu to the defenders and their assigns and disponees a piece of ground adjoining the canal at Grangemouth for a yearly payment of £95 of feu-duty at Martinmas in each year. The disposition then proceeded—"And paying a duplicand of the said duty at the end of every 25 years; upon payment of which duplicand over and above the feu-duty of the year in which it falls due, Lord Dundas and his foresaids shall be obliged to enter the said Carron Company or their disponees as vassals in the said piece of ground." The said twenty-five years expired at Martinmas 1839. The superior, the Earl of Zetland, raised an action against the Carron Company claiming a sum equivalent to twice the amount of the feu-duty over and above the feu-duty for the year. He alleged that this had uniformly been paid as a composition on the entry of heirs and singular successors on feus of land within the barony. The defenders on the other hand averred that the word "duplicand" imported merely the payment of one year's feu-duty as a casualty over and above another year's feu-duty as the ordinary reddendo of the land. Lord Jeffrey, the Lord Ordinary, said that the defenders' construction would be fair enough if the words had been merely "paying a duplicando at the end of every 25 years," but that there followed in this charter the important words "over and above the feu-duty of the year in which it falls due," to which words that construction would give no effect whatever. He said that where there is nothing more than a stipulation for the duplicand or double of the feu-duty on the entry of an heir, it is only one of these yearly duties that should be considered as the relief, and went on—"But surely it is not the less true that the duplicand or double that is to be actually paid is not one but two years such duties, and if there had been an express and additional stipulation that this duplicand or double amount is to be over and above the current feu-duty for the year, there really seems no room for doubt that the total sum to be paid must be the amount not of two but of three years' feu-duties." On appeal, Boyle, L.J.-C. said—"I am unable to find any ground for differing from the Lord Ordinary or for saying that 'duplicand' is anything but double the feu-duty." Lord Moncreiff said—"There is no room for doubt. We are in a question of common law and of contract. Must not payment of a duplicand be payment of double of the feu-duty?" And the Court adhered, finding the defenders liable to expenses which the Lord Ordinary had not given. It seems clear that the Second Division agreed not only with the Lord Ordinary's conclusion but with the grounds upon which he rested it. This decision is of high authority. I can see no reason for doubting its correctness, and even if any doubt were possible I apprehend that your Lordships would not overrule a decision of this sort given nearly 80 years ago, which must have been acted upon in a number of cases since 1841. On all grounds I think that the *Zetland* case must be treated as binding.

The *Zetland* case decides that duplicand means a sum equal to two years' feu-duty, and that if this duplicand is to be paid "over and above the feu-duty of the year in which it falls due" this sum equal to two years' feu-duty must be paid in addition to the year's feu-duty, making a sum equal to three years' feu-duty. I think it must therefore be accepted that duplicand denotes a sum equal to two years' feu-duty. It is true that so high an authority as Lord President Inglis speaks of duplicand as meaning one year's feu-duty, or, in the Scottish sense of the word, the double of the feu-duty. He did so when Lord Justice-Clerk in *Buchanan's Trustees* v. *Pagan* (1868, 7 Macph. p. 3, 6 S.L.R. 1), and again as Lord President in *Magistrates of Inverkeithing* v. *Ross* (1874, 2 R. 48, 12 S.L.R. 21). These observations, however, may have had reference merely to the fact that, as stated by Erskine in the passage which I have already quoted, only one year's reddendo is regarded as paid for the relief.

In the *Magistrates of Dundee* v. *Duncan* (1883, 11 R. 145, 21 S.L.R. 107) the clause in the charter was as follows:—"That besides making payment of the said yearly feu-duty at the terms after mentioned, the said Peter Rattray or his foresaids shall be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year from the 1st day of April 1864." Lord Young in giving judgment said that in his opinion the feu-contract showed a bargain excluding the right to casualty on sale or on succession as heir, and treated the provision as being one "to pay 'besides' the feu-duty a sum of money equal in amount to the feu-duty of two years," regarding the word "duplication" as having the same sense as that given to "duplicand" in the *Zetland* case. On the other hand, in *Murray* v. *Bruce* (1917 S.C. 623, 54 S.L.R. 525) it was held that the term "duplication" meant a duplica or replica, and therefore a sum equal to the ground rent. The clause, after stipulating for a ground rent, proceeded to stipulate for "the payment of a duplication of the said ground rent or ground annual in respect of the said subjects in name of grassum therefor at the expiry of every nineteenth year from and after the term

of Martinmas 1877 over and above the ground rent or ground annual." The First Division, affirming the Lord Ordinary, held the sum payable every nineteenth year as grassum was the sum equal to one year's ground annual in addition to the ground annual for the year. Lord Skerrington said—"It is for the pursuer to show that in the deed under construction the word 'duplication' was used in the larger and more onerous sense of 'duplicand,' and in my opinion he has failed to do so."

The second point decided in the *Zetland* case was that while in the absence of special words the duplicand would be taken to be made up of feu duty for the year in question and of the relief or composition, yet if there are words in the charter which express that the duplicand is to be over and above the feu duty for the year, the result will be that a sum equal to three years' feu duty has to be paid. The question always must be whether the words used are equivalent to those in the *Zetland* case, and in each case the question is as to the proper construction of the terms used—*per* Lord Dundas in *Adam* v. *Finlay*, 1917 S.C. p. 469, 54 S.L.R. 388. I therefore proceed to consider the terms of the contract in the present case. The feu-contract is dated the 18th August, 1880, and by it *Umpherston & Company, Limited*, in consideration of the feu-duty and other prestations after specified, disponed the subjects to the Messrs Waddell, who undertook an obligation to erect substantial buildings thereon, sufficient permanently to secure due payment of the feu-duty, duplicands thereof, and interest and penalty. The ground is expressed as to be holden on feu-farm, fee, and heritage for ever for payment of the feu-duty and the duplicands as after stipulated. Then follows the clause in question—"For which causes and on the other part the said Andrew Waddell and Son, and Andrew Waddell and William Waddell as partners and trustees foresaid and as individuals, bind and oblige themselves and their heirs and successors whomsoever in the said subjects and others to make payment to the said Umpherston and Company, Limited, and their assignees of a feu-duty for the first two years from Whitsunday Eighteen hundred and seventy eight at the rate of ninety five pounds sixteen shillings and fourpence sterling yearly, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof of forty seven pounds eighteen shillings and twopence at the term of Martinmas Eighteen hundred and seventy eight for the half-year immediately preceding, and the like sum of forty seven pounds eighteen shillings and twopence at each of the terms of Whitsunday Eighteen hundred and seventy-nine, Martinmas Eighteen hundred and seventy nine, and Whitsunday Eighteen hundred and eighty, for the half-years immediately preceding these respective terms; and thereafter and in all time coming feu-duty at the rate of one hundred and seventy five pounds thirteen shillings and fourpence sterling yearly in name of feu-duty for the said subjects and others, payable in equal portions at the said two terms in the year, beginning the first term's payment of the sum of eighty seven pounds sixteen shillings and eightpence at the term of Martinmas Eighteen hundred and eighty for the half-year immediately preceding, and the next term's payment thereof at the term of Whitsunday thereafter, and so forth at the said two terms in the year in all time thereafter, with one fifth part more of each term's payment of liquidate penalty for each term's failure in the punctual payment thereof, and interest at the rate of five per centum per annum of each term's payment of the said feu-duty or restricted feu-duty from the terms at which the same falls due during the not-payment thereof, *and further to pay to the said Umpherston and Company Limited or their assignees a duplicand of the said maximum feu-duty at the termination of every period of twenty years counting from the term of Whitsunday Eighteen hundred and seventy-eight:* Declaring that it shall be in the power of the said disponees or their foresaids as soon as the grounds are all built upon or sufficiently built upon to carry and adequately secure the cumulo feu-duty and composition to dispose of any part of the buildings to be erected on the pieces of ground hereby disponed and to allocate or apportion the cumulo feu-duty and duplication thereof before mentioned among the different purchasers in such shares or proportions as may be approved of by the superiors, but in no case the allocation to be on buildings which will not adequately secure the feu-duty and corresponding composition, and such allocation shall not be in less sums than twenty-four pounds and corresponding composition: Declaring however that the first party shall not be bound to recognise any allocation unless there shall be sufficient buildings on the remaining or unallocated ground to adequately secure the balance of feu-duty and composition; and declaring farther that on the cumulo feu-duty being all allocated, and on intimation of the respective sales being given to the said superiors in terms of law, they shall be bound to collect the allocated feu-duties and duplications from the individual proprietors, who shall thereafter be liable only for the sums so allocated on the subjects belonging to them." I have italicised the most material words in this extract. I am unable to read the words here used with regard to duplicand as having the same effect as was ascribed to those used in the *Zetland* case. The words "and further" merely denote the commencement of a new limb of the clause and are in marked contrast to the words of the *Zetland* charter "over and above the feu-duty." The question is one merely of the construction of a not very complicated clause, and I cannot read the words otherwise than as having an effect quite different from that of the words used in the *Zetland* case. They seem to me to give two years not three years of the feu-duty.

A good deal of light is thrown upon such clauses by the decision in *Alexander* v. *Muir*, 1903, 5 F. 406, 40 S.L.R. 316. By the feu-disposition in that case the vassal was

taken bound to pay a feu-duty of £248, 18s. 2d. "yearly at the said term of Whitsunday, as also to pay to me," the superior, "and my foresaids at the term of Whitsunday 1824 the sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the said whole subjects, and also to pay to me and my foresaids every nineteenth year (counting from the said term of Whitsunday 1824) the said sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year counting from Whitsunday 1824, but that only for each nineteenth year as the same comes round." The feu-disposition further bound the superior to enter as vassals the heirs, disponees, or singular successors of the vassal without demanding or being entitled to exact any composition whatever "in regard that the foresaid feu-duty together with the double thereof in every nineteenth year are the agreed and fixed consideration hereby accepted of in lieu of all compositions for the entries of heirs, disponees, and singular successors in the aforesaid lands and others." It was held, reversing the judgment of Lord Stormonth Darling, that the sum £497, 16s. 4d. due every nineteenth year was not in addition to the yearly feu-duty for the year, but included that feu-duty. The Lord Justice-Clerk said, p. 413—"The pursuers in this case maintain that the expressions used in the feu-disposition granted by their author mean, and must be read as meaning, that in each nineteenth year the vassal was to pay the feu-duty, and in addition to the feu-duty a further sum equal to twice the amount of the feu-duty. I do not so read the words of the deed. It appears to me to be quite a natural reading that the feu-duty was to be paid, and that every nineteenth year it was to be paid twice over. And I do not read the words 'as also' as meaning 'in addition.' These words are, as I read them, merely the commencement of an additional stipulation as if it had been said 'and it is further stipulated.'" Lord Young concurred. Lord Trayner said that he entertained no doubt that where a feu-charter merely stipulates that a double or a duplicand of the feu-duty should be paid every nineteenth year, such a stipulation entitles the superior to an additional feu-duty in that year and to nothing more. "Of course the charter may contain words which indicate clearly that the superior is to receive more, and of this there is an example in the case of the *Earl of Zetland*." Lord Trayner proceeds—"I cannot so read the charter. The words 'as also' indicate nothing more than the commencement of a new clause, and are in effect the same as if the clause had commenced with 'further' or 'and it is further provided.' But there are no words to indicate that the double to be paid every nineteenth year shall be over and above or in addition to the feu-duty for that year." Lord Moncreiff arrived at the same conclusion. He quoted Lord Jeffrey's judgment in the *Zetland* case and said—"Thus the judgment proceeded entirely on the words 'over and above the feu-duty for the year.' There was no doubt of the meaning of the word 'duplicand'; it meant double the feu-duty. The only question was whether, used in the connection in which it appeared, it did or did not include the feu-duty for the year." The decision and the reasons in *Alexander* v. *Muir* appear to be very much in point in the present case, and to affirm the conclusion which I have already indicated as that naturally arising upon the words of the clause itself.

There remain for consideration two other cases—*Heriot's Trust* v. *Lawrie's Trustees*, 1912 S.C. 875, 49 S.L.R. 561, and *Adam* v. *Finlay*, 1917 S.C. 464, 54 S.L.R. 388. In the first of these cases, that of the *Heriot Trust*, the subjects were disponed to be holden of the Heriot Trust, paying therefor yearly in name of feu-duty certain sums at Whitsunday and Martinmas by equal portions, "As also paying to the said The Governors of George Heriot's Trust and their foresaids a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years." The feuars undertook to make payment of the feu-duties, "as also to make payment to the said The Governors of George Heriot's Trust and their foresaids of a double of the respective feu-duties before mentioned of composition, and that at the terms and with interest as aforesaid." The Lord President said that the whole question was whether the feuars are to pay as composition a sum equal to twice the yearly feu-duty as well as paying a feu-duty for the year, or whether they are to pay in all only two feu-duties—one ordinary feu-duty and another feu-duty as composition. He referred to the *Zetland* case, to *Cheyne* v. *Phillips* (1897, 5 S.L.T. 27), and to *Alexander's* case. The Lord President observed (p. 878) with reference to the case before him—"Here you have done with the clause dealing with the feu-duty, and then the deed goes on to say 'as also you shall pay a double of the feu-duty every twenty-second year as a composition.' There is another matter, which is this, that the composition is to be paid at a different term from the feu-duty. The feu-duty is to be paid at two terms in the year, and this composition is to be paid at the term of Whitsunday at the expiration of every twenty-two years." On these grounds he arrived at the conclusion that there was to be paid a sum equal to double the annual feu-duty over and above the feu-duty itself. The first of these two grounds proceeds on the construction of the clause. I confess that I should have been unable to arrive at this conclusion as to the effect of the words there used. I cannot see in the words anything which imports that the payment of an amount equal to two years' feu-duty shall be in addition to the amount of the feu-duty itself. The second ground relates to the different dates for payment of the composition and the feu-duty, the former being payable at Whitsunday and the latter at two terms in the year. I regret that I am unable to agree that this is a material circumstance. While the other judges concurred with the Lord President, Lord Johnston doubted the propriety of the

conclusion arrived at, on the ground that he thought that a "double of" meant a replica of the feu-duty, a sum of the same amount.

The second of the two cases which I have mentioned above, *Adam* v. *Finlay* (1917 S.C. 464, 54 S.L.R. 388), was heard by Seven Judges. The feu-charter providing for an annual feu-duty payable at Whitsunday and Martinmas bound the vassal to pay the feu-duty and to pay "a duplicand of the said feu-duties" at the term of Whitsunday in every nineteenth year "in lieu of casualties." It was held, Lord Johnston dissenting, that the sum payable every nineteenth year was a sum equal to twice the amount of the annual feu-duties in addition to the feu-duties for the year. The provision as to duplicand occurred at the end of the reddendo clause, and was as follows—"And paying a duplicand of the said feu-duties of £24, £24, and £28 at the term of Whitsunday 1930 and at the same term in every nineteenth year thereafter in lieu of casualties, with interest and penalties in case of failure if incurred as provided with respect to said feu-duties." The majority of the Court held first that the duplicand meant an amount equal to twice the feu-duty, and second that the duplicand was payable in addition to the ordinary feu-duty. Lord Johnston dissented on the first point, holding that the duplicand meant an amount equal to the feu-duty and not twice this amount.

The majority of the Judges gave their reasons at some length for holding that duplicand means twice the feu-duty, citing the *Zetland* case. With the decision on this point I entirely concur. But the reasons given by the Court for their conclusion under the second head appear to be less satisfactory. As Lord Dundas said, "Each case of the kind must be decided upon a construction of the particular language used." In the present case I think that a sum equal to the amount of the feu-duty must be taken to include the payment of the feu-duty, and not to be in addition. I have given my reasons for this conclusion in discussing the terms of the charter in the present case, and there is not in my opinion any such consensus of authority as obliges us to give the words of this charter any meaning other than that which they naturally bear. The conclusion at which I have arrived appears to me to be in harmony with the principles laid down in the *Zetland* case in 1841, and any other conclusion would, in my opinion, be at variance with the principles of construction followed by the Court which decided *Alexander* v. *Muir* in 1903.

For these reasons, in my opinion, the present appeal ought to succeed.

LORD DUNEDIN—The argument of the appellants was alternative. They said either that the proper technical and invariable meaning of duplicand was a replica, or that if it meant a double in the sense of twice the amount, then one half was attributable to and paid in solution of the annual feu-duty.

As regards the first contention I am of opinion that the point is clearly settled by the case of *Zetland*. I will examine the case in a moment, but I should first like to say that it seems to me clear that the language of Erskine which the appellants held to favour their interpretation is really against them. I take his words—"It is agreed by all lawyers that the relief in feu holdings, at least where the charter expresses that casualty, is estimated to be the double of the feu-duties. But this is not to be so understood as if double of the reddendo were paid properly in name of relief, for one year's reddendo goes to the superior as the constant yearly feu-duty payable out of the lands; it is the other only that is paid as an acknowledgment to him for relieving the feu out of his hands." Now if the "double" of the feu-duties—double and duplicand being obviously synonymous—were merely a replica, what need of the appended caution?

I turn to *Zetland*. The Lord Advocate did not shrink from saying that *Zetland* was ill decided, and urged your Lordships to overrule it as technically you are entitled to do. I look on that as a very bold proposal. I have often had occasion to say in the Court of Session, and I repeat it here, that there is no man living who can pretend to the familiar knowledge of feudal conveyancing possessed by the Judges of an older generation when feudal questions formed the bulk of the cases before the Court and when the forms had not yet been altered by modern legislation. *Zetland's* case was a unanimous judgment of the Second Division affirming the judgment of the Lord Ordinary. The Judges of the Second Division were Lord Justice-Clerk Boyle, the first Lord Moncreiff, Lords Meadowbank and Medwyn. The judgment seems to have been pronounced without any hesitation. And besides all that, it has been regarded as settling the law by generations of conveyancers, who in their turn have taught the profession. Montgomery Bell, Menzies, and in more modern times Wood, all taught their students that *Zetland* was good law; many deeds must have been framed on the faith of it; the case is more than seventy years old; and I think your Lordships would hesitate indeed before you decided to overrule it. Now what did it decide? It decided first that duplicand did not necessarily mean replica, but that on the contrary its natural meaning was double. On that decision not a doubt has been cast except by Lord Johnston, who is in a minority of one with seven Judges against him.

I now turn to the second point, which in my opinion is the real point of the case. I might again take *Zetland* as a starting point, but I prefer to begin by troubling your Lordships with some more general observations, because I think the matter should be approached from a historical point of view. Feu-grants, it has often been observed, were originally grants of a personal nature, but at a very early period came to be considered as grants in favour of the grantee's heirs after his death. When the original grantee died the proper casualty which emerged was that of non-entry, but non-entry could be put an end to if the heir was willing to enter. This entry the superior,

on the assumption that the grant was to heirs, was bound to give, but at a very early period he asked and obtained a payment which was known by the name of relief, and as such came to be acknowledged as a casualty. That the amount of the payment in name of relief was fixed by custom cannot, I think, be doubted. Even the expression used when the casualty was stipulated for points to such an origin. "Duplicando feudifirmam, etc., prout usus est in feudifirmis." It is worthy of notice that in two early cases the Court of Session in 1610 and 1736 held that where no casualty of relief was expressed in the charter the heir was entitled to an entry free. Yet notwithstanding that fact custom was so strong and secure that these decisions were never followed, were repudiated by the institutional writers, and have never ruled practice since their dates. It is settled law that if nothing is said relief will become due on the entry of an heir, and relief is fixed by custom to amount to one year's additional feu-duty. This had an additional result. It was only natural that if a clause was put in, it would, unless clearly of different import, be held to mean what the law would give without the clause, for there never was any custom that the superior should get more than one year's additional feu-duty, and a further exaction would not have been looked on with favour by the Court. Accordingly when the clause ran duplicando dictam feudifirmam, etc., the result was as stated by Erskine.

But the moment you come to deal not with an heir but with a singular successor the question assumes a different aspect. Certainly long after the time when grants had come to be understood as in favour of heirs, singular successors were still excluded. But as land gradually came to be looked on as an article of commerce, and as grants to be held in feu-farm took their place among grants held in the more proper form of ward, singular successors came to be admitted to an entry. Yet they could not demand such an entry as of right. Their first method of so doing depended not on legislation which dealt with and favoured them as such, but which was designed to make land available in payment of the debts of its owner—a proceeding which so far as actual transference of the land was concerned the common law did not give. This was done by the Act of 1469, which dealt with apprisings—a diligence that had been previously introduced. In order to give the holder of a decree of apprising the benefit of a public entry instead of having only the precarious position of holding base, the Act ordained that the superior should be bound to enter the appriser on payment of a year's maill as the land was set. Some time after the same privilege was extended to adjudgers, adjudication having superseded apprising. Now the moment this was so it became possible for a purchaser to force an entry by means of a simulate bond and an apprising or adjudication. The payment made was known by the name of composition. It has been sometimes said that the origin of composition is purely statutory. I do not think this is quite accurate. For indubitably there were conveyances to singular successors before 1469 followed by entries granted voluntarily by superiors and payments made to them. Many instances will be found in Mr Fraser's family books, including one which is of interest to me, as in the Book of Lennox there is a charter in favour of one of my *atavi* in 1417. Some of these are accompanied by separate bonds for a payment in respect of the promise to enter. And after 1469 indubitably there were many entries given without recourse having been had to the circuitous process of an apprising or adjudication when by custom the payment made was equiparated to what would have been paid if these diligences had been led—see Ersk. ii, 7, 7. On this subject I would refer to the historical retrospect given by Lord Kinnear, than whom no modern judge was better versed in feudal law, in the case of *Earl of Home*, 2 F. 1218, 37 S.L.R. 990. It is true that the judgment was reversed in this House—5 F. (H.L.) 13, 40 S.L.R. 607—but the reversal did not in my opinion throw any doubt on the accuracy of the historical retrospect, nor do I accept one or two *obiter dicta* of Lords Davey and Robertson as having that effect or as intended to have it. Finally, no doubt by 20 Geo. II, cap. 50, composition did become purely statutory, and after that custom had no place so far as subject-superiors were concerned.

Accordingly the position of a superior after the Act of Geo. II was, if nothing was said, quite simple. On the entry of an heir he got one extra year's feu-duty; on the entry of a singular successor he got a full year's rent. It is obvious that when you proceed to the taxation of all entries the question is quite different from when you have merely to construe words which express the payment due on the entry of an heir. It becomes a question of bargain, and the only point to determine is what the bargain is. No better illustration of this can be given than the case of *Magistrates of Inverness* v. *Duff*, which the appellants thought so greatly in their favour. The reddendo read—"Duplicando dictam feudifirmam, &c., pro introitu cujuslibet hæredis aut assignati pro omni alio onere"; yet so repugnant was the idea that a mere doubling of the feu-duty should suffice that it was decided that assignati were assignees before entry and the composition due on the entry of singular successors remained untaxed.

Taxation of composition proper was not a very usual proceeding in early deeds. I cannot say when it became common, but there are some considerations of a general nature which are probably not far from the truth. In the first place, it has no place in ward holdings, so that you would not expect it to be rife before the abolition of ward holdings after the '45. In the second place, it would obviously be much more likely to be suggested when there came to be granted building feus. Now building feus are not very old. The old town building was done in territory held in burgage and not in feu. It was only when the burghs began to extend beyond their royal-

ties that building feus became common. The new town of Edinburgh began to be built in the last decades of the eighteenth century, and Glasgow grew rapidly in the beginning of the nineteenth. I have no doubt that as these extensions went on taxation of composition became a common thing. So it is with no surprise that I find from the table which is printed in the report of *Zetland's* case giving the experience of what had been done in the principal building estates of Edinburgh — estates which now form the bulk of the higher class of residential property in the new town—that superiors had asked and obtained as a taxation for composition when estimated in terms of feu-duty more than the minimum which they would have received on the entry of an heir. Lord Young speaks of it as "a familiar practice" in *Magistrates of Dundee* v. *Duncan*, 11 R. 14, 21 S.L.R. 107. None the less, as already said, the question must be one of construction of the particular deed. And so it is treated in *Zetland's* case. I have already pointed out that that case settles that a duplicand means twice the feu-duty, but whether that twice includes the yearly feu-duty or is in addition to it depends on the particular deed. In *Zetland's* case the words "over and above" made the meaning clear to the Court. In *Heriot's* case the words were "as also to pay."

I have reconsidered *Heriot's* case with, I hope, a mind entirely open to be convinced that I was wrong. But after the best consideration I can give I remain of my former opinion. I then said that it was a question of construction of the particular deed, but that in this deed you had done with the clause relating to the feu-duty, and then came to a fresh undertaking to make another payment. In other words I thought the fair meaning of the words "as also" was to make an additional payment. That opinion was concurred in by Lords Kinnear, Mackenzie, and Johnston, the last-mentioned learned Judge doubting not on the point that I have put but on the true meaning of the word duplicand.

The case of *Heriot* was followed by the case of *Finlay* v. *Adam*, 1917 S.C. 464, 54 S.L.R. 388. It was sent to a Court of Seven Judges. That was only done in order to give the Court the means of reconsidering the judgment in *Heriot*—a Court of Seven Judges having the power as your Lordships are aware to overrule a decision of a Division. *Heriot* was unanimously affirmed and followed on this point, Lord Johnston, who dissented, basing his dissent entirely on the meaning of duplicand. Indeed on the other point he is most emphatic; he says—"It may save confusion if I at once say that, although it is not in express terms provided that this further payment of a duplicand is to be over and above the feu-duties for the year, a provision on which great weight has been put in the decision of some previous cases, the clause in question makes it abundantly clear that that is the intention of the clause as if it were expressed in terms." The actual words in that case were "and paying"—certainly a weaker form of expression than "as also." I therefore take it to be the unanimous opinion of eight Scottish Judges that the decision in *Heriot's* case was right. In short, the point is, Are you dealing with a new clause imposing new obligations? And further, for the historical reason which I have explained, there is when you are taxing composition no presumption as there is when you are dealing with relief alone that the payment at stated periods includes the feu-duty for the year. It is this idea of presumption which is the foundation of the opinion of my noble and learned friends who are for overturning the opinion of eight Scottish Judges on a question in a system of conveyancing with which they may be presumed to be familiar. With deference I think that the notion of there being a presumption from the use of the word duplicand as suggested by the Lord Advocate is entirely erroneous. I agree that when you take a word of technical significance and introduce it into new surroundings it must be held to carry its old meaning with it. So it is here. Duplicand meant twice, and still does. But the presumption that one half of the duplicand is attributed to the feu-duty of the year arises not from the use of the word duplicand but from the fact that you are dealing with relief. After all a presumption is always founded on something. This presumption is founded on the fact that one extra feu-duty was all that the law would give in name of relief. I have never seen a charter—I doubt if one exists—where the superior ever got more. But when you deal with composition you deal with another state of affairs. To apply the presumption there as it is sought to do is not to leave it as the law would leave it, but to entirely obliterate the right to composition at all.

I now come to the deed of the present case. I think it is truly indistinguishable from the deed in *Heriot's* case; "and further" seems to me the same as "as also;" the structure of the clause in general is the same. There is further the point as to the stipulation as to interest, as to which I agree with what has been said by my noble and learned friend on the Woolsack. Perhaps I ought to mention the cases of *Alexander*, 1903, 5 F. 406, 40 S.L.R. 316, and *Murray* v. *Bruce*, 1917 S.C. 623, 54 S.L.R. 525, as they were cited. I gave my reasons in *Heriot's* case for distinguishing *Alexander's* case and I need not repeat them. I would only add that I do not suppose that Lord Young who took part in the judgment thought that he was overturning his view in *Magistrates of Dundee*, 1883, 11 R. 145, 21 S.L.R. 107, where he said exactly what was subsequently said in *Heriot's* case. The case of *Murray* v. *Bruce* can have little bearing on the question, for it was a case of a ground annual—that is to say, the relation of superior and vassal did not exist between the contracting parties, and no casualties were due which could be compounded. I think that the appeal should be dismissed.

LORD ATKINSON—The question for decision in this case is primarily the determination of the amount of the highest casualty,

within the meaning of 4 and 5 Geo. V, cap. 48, section 5, which the appellants as vassals are for the purposes of redemption bound to pay to the respondents as their immediate superiors of four plots of ground in the city of Edinburgh. The answer to that question admittedly depends upon the true construction of a certain feu-contract, dated the 18th of August 1880, entered into between the predecessors in title of the respondents, the parties to it of the first part, and the predecessors in title of the appellants, the parties to it of the second part. By that contract the former parties, "in consideration of the feu-duty and the other prestations" therein specified, disponed in feu-farm the said four plots to the parties to it of the second part and the survivors of them and the heirs of the survivor. The appellants contend that the highest casualty within the meaning of this statute is for the purpose of its redemption thereby authorised a sum equal to twice the annual feu-duty. The respondents contend that it is a sum equal to three times that duty. The difference between the two claims is therefore one year's feu-duty. The authorities cited appear to me to establish this proposition, that in the payment of relief on the succession of an heir the word duplicand in its primary meaning denotes a sum amounting to double the annual feu-duty, one-half of which is presumed to be applied to the payment of the feu-duty for the year in which the succession takes place. The relief which the superior receives is in effect the other half of it and no more.

When a term like duplicand properly applicable to cases of relief is applied to cases of composition it must, I think, be held to retain, as far as the changed subject-matter will permit, its original quality and characteristics. I think that this is *prima facie* good law as well as common sense, and whatever may be the history of the term duplicand, in my opinion the authorities I am about to cite, from the case of the *Earl of Zetland* v. *Carron & Company*, 3 Dunlop 1124, decided in the year 1841, downwards, establish that it has the same meaning when applied to the case of a singular successor as it has where applied to the case of relief on the succession of an heir. Neither in the *Zetland* case, where it is applied to the case of a singular successor, nor in any other in which it is similarly applied, can I find the slightest suggestion that the changed subject-matter necessitates a change in the meaning of this technical term. If I am right in this, then in my view the question for decision in this as in all other cases resolves itself into this—Does the language of the context in the instrument in which the word duplicand is found rebut the presumption that half of it is to be applied to discharge the feu-duty for the year in which the succession occurs? I did not think that this was disputed by the respondents. During the progress of the arguments of the respondents' counsel I put to him more than once the question, did he admit this proposition or did he dispute it, and I understood him to answer distinctly on each occasion that he admitted it, that he adopted it, and proceeded to argue his case on the assumption that it was sound. It is possible that he misunderstood my questions, though I should certainly be surprised to hear that he did. It is more probable that I misunderstood him, though at the time I was confident I did not. But however that may be, I am of opinion that the authorities I am about to refer to establish that in all cases the word duplicand primarily means a sum equal to twice the annual feu-duty. Where the presumption I have mentioned is not rebutted, the casualty which the successor will have to pay will be a sum equal to twice the annual feu-duty; where it is rebutted, the casualty will be three times the annual feu-duty, inasmuch as he will have to pay the feu-duty for the current year and also the duplicand, no portion of which is to be applied to discharge any portion of the annual feu-duty.

In the *Earl of Zetland* v. *The Carron Company*, which was the case of a singular successor (the defender company), it was decided that the following clause—"And paying a duplicand of the said feu-duty at the end of every twenty-five years; upon payment of which duplicand over and above the feu-duty of the year in which it falls due"—was adequate and sufficient to rebut the presumption I have mentioned. It was not contended that this decision was erroneous. It was admitted on behalf of the respondent that even if erroneous it had been so long followed and acted upon in dealings with real property that it should not be disturbed. The inclination of my own opinion is that the case was rightly decided. The above-mentioned clause provides in my mind as clearly as language well could that no part of the duplicand was to be applied to pay the feu-duty of the year in which the duplicand became payable, and therefore the presumption I have mentioned was effectually rebutted.

The case of the *Magistrates of Dundee* v. *Duncan*, 1883, 11 R. 145, 21 S.L.R. 107, does not afford very much aid upon this point, as the successor in one case was the heir and in the other a singular successor. The feu-contracts were made in the years 1865 and 1866. They were therefore untouched by the Act of 1874. The second contract, which was practically identical with the first, contained in the descriptive clause a stipulation "that besides making payment of the said yearly feu-duty at the terms after mentioned, the said Peter Rattray (the disponee) or his foresaids shall be bound to pay a duplication of the said feu-duty at the expiry of every twenty-fifth year, commencing," &c., &c. The reddendo clause contained a stipulation for the payment of the feu-duty only, and at "two terms in the year." That is as in the present case half-yearly, and there also as in the present case the lots disponed were building lots. Rattray, the vassal, who died in 1874, sold the lands. The appellant claimed from the singular successors, the heirs of the persons named, the legal casualties, and the question for decision was whether they were entitled to the legal casualties in addition to the duplication. It was held that according to the presumed intention of the parties the duplication was

to take the place of the legal casualties, and that they were not so entitled. The word duplication was apparently treated as having the same meaning in both cases.

The case of *Alexander's Trustees* v. *Muir*, 5 F. 406, 40 S.L.R. 316, which was like the first a case in which the successor was a singular successor, not an heir, has a direct and most instructive bearing on the present case. There the feu-disposition bound the vassal to pay a feu-duty of £248, 18s. 2d. sterling yearly at Whitsunday in each year—"As also to pay (the superior and his foresaids) at the term of Whitsunday 1824 the sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the said whole subjects, and also to pay to (the superior and his foresaids) every nineteenth year (counting from the said term of Whitsunday 1824) the said sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned." The feu-disposition contained in addition the following clause—"And in regard that the foresaid feu-duty, together with the double thereof in every nineteenth year, and also the obligation as to the teind meal relief of the public and parish burdens and performance of the other stipulations all after specified, are the agreed and fixed consideration hereby accepted of in lieu of all compositions for the entries of heirs, disponees, and singular successors." The pursuers claimed that the vassal was bound to pay them every nineteen years from Whitsunday 1824 a sum equal to three times the annual feu-duty. The defenders contended that they were only bound to pay a sum equal to twice that duty. I must say that it appears to me that the provisions of the feu-disposition which I have extracted support the claim for triple duty much more strongly than do the provisions in the three cases decided in the years 1912 and 1917, to which I shall presently refer, but the Court decided unanimously against the pursuers' claim and in favour of the defenders' contention. The Lord Justice-Clerk in delivering judgment said—"It appears to me to be quite a natural reading that the feu-duty was to be paid and that every nineteenth year it has to be paid twice over. And I do not read the words 'as also' as meaning 'in addition.' These words are, as I read them, merely the commencement of an additional stipulation, as if it had been said 'and it is further stipulated.'" Lord Trayner said—"The words 'as also' indicate nothing more than the commencement of a new clause, and are in effect the same as if the clause had commenced with 'further' or 'it is further provided.' This new clause introduces a new obligation, the obligation, namely, for a periodical duplicand, and reading both clauses together I take them to mean this—the vassal is to pay for the lands a certain sum annually, but that is not all, he shall also pay every nineteenth year a duplicand or double of that sum."

Lord Moncreiff said—"In deciding between the two interpretations, both of which I think are open, I have been influenced in favour of the latter by two considerations. The first is that in most if not in all the cases of which I am aware, where it has been intended that the vassal should pay every nineteenth year a double feu-duty in addition to the feu-duty for the year, the words 'over and above the feu-duty for the year' or equivalent words invariably occur." Further in his judgment he said that the judgment in the case of the *Earl of Zetland* v. *Carron Company* depended entirely on the words "over and above the feu-duty for the year." And further, that there was no doubt about the meaning of the word duplicand. It means double the feu-duty. I think this decision has a direct and important bearing upon the present case. First, it decides that the words "as also" are equivalent to "further" or "it is further agreed" or "stipulated," but "and further" are the very words used in the present case; second, that the provisions introduced by these words providing for the payment of a sum double the yearly feu-duty have not the like effect of the words "over and above"; and third, that the words "as also" or their equivalent "further" have not such disjunctive force and effect that the clause introduced by them is to be construed as something entirely separate and apart from what has gone before, as if it was a new and independent covenant or provision unlinked with anything preceding it, instead of being one amongst several stipulations contained in the same composite covenant or provision. Moreover, it would certainly appear to me that the provision that the lands were to be freed from all composition by the payment of this double of the annual feu-duty would if anything furnish an argument for giving to that provision the meaning most favourable to the superior rather than the meaning least favourable to him, yet the latter meaning was given to them.

In the case of the *Governors of George Heriot's Trust* v. *Falconer and Others* (*Charles Lawrie's Trustees*), 1912 S.C. 875, 49 S.L.R. 561, by the feu-contract certain building lots were feued by the Governors of George Heriot's Trust as superiors to the vassals Charles Lawrie's trustees, the singular successor. The case came up for decision on a special case. The feu-contract provided that an annual feu-duty of the amount stated should be paid in respect of each lot by half-yearly payments of equal amounts at Whitsunday and Martinmas in each year. The reddendo clause as to each of the several lots ran thus:—"Paying therefor yearly in name of feu-duty (the sum named by two equal half-yearly payments), with a fifth part more of each term's payment of the said respective feu-duties of liquidate penalty in case of failure, and interest at the rate of 5 per cent. per annum of each term's feu-duty from the respective terms of payment until the actual payment thereof." After the word "thereof" one finds a colon, not a full stop. The next sentence begins with a capital letter and runs thus—"As also paying . . . a double of the said respective feu-duties before mentioned in name

of composition at the expiration of every twenty-two years from the following terms, videlicet." The term in each case is Whitsunday in the year specifically named in reference to each lot, with a declaration that each of the said lots with the buildings thereon "shall be *liable only in the feu-duty and composition* payable therefor as above mentioned." By the covenant or contractual obligation of the disponees they bound themselves to pay "the foresaid sums of feu-duties at the respective terms of payment before mentioned with penalty and interest as aforesaid." After the word "interest" one finds a colon, and then begins a new sentence with a capital letter running as follows:—"As also to make payment to the said The Governors of George Heriot's Trust and their foresaids of a double of the respective feu-duties before mentioned of composition, and that at the terms and with interest as aforesaid." The pursuers contended that on the proper construction of the feu-contract the composition of twice the annual feu-duty was payable over and above the annual feu-duty of the year on which the composition became payable. The defenders contended that that composition was one year's feu-duty in addition to the annual feu-duty of the year in which the composition became payable. The question of law for the opinion of the Court was which of these two contentions was right. The word "duplicand" is not used in the contract. And I do not find that the fact that the lots disponed were building lots was ever mentioned or alluded to as a guide to the intention of the contracting parties as to the amount payable under the name of composition. The Lord President, then my noble and learned friend Lord Dunedin, in delivering judgment, after criticising the cases of the *Earl of Zetland, Cheyne* v. *Phillips* (5 S.L.T. 27), and *Alexander's Trustees* v. *Muir* (5 F. 406, 40 S.L.R. 316), is at p. 878 of the report represented to have expressed himself thus—"I think as a matter of construction clearly here a composition is meant to be paid over and above the feu-duty. Although the words 'as also' were used in *Alexander's* case there was there a form of expression which showed that there was to be a doubling of the feu-duty every nineteenth year, and that in respect of that doubling the lands were to remain free of composition. There is no such expression here. *Here you have done with the clause dealing with the feu-duty and then the deed goes on* to say 'as also *you shall pay* a double of the *feu-duty every* twenty-second year as a *composition.*' There is another matter, which is this, the composition is to be paid at a different term from the feu-duty. The feu-duty is to be paid at two terms in the year, and this composition is to be paid at the term of Whitsunday at the expiration of every twenty-two years. Upon the whole matter, therefore, I come to the conclusion that as matter of construction the composition is to be paid by paying a sum equivalent to double of the annual feu-duty over and above the feu-duty which falls to be paid at that particular term, that is to say, the half-year's feu-duty then due." The italics are mine.

In *Adam* v. *Finlay*, 1917 S.C. 465, 54 S.L.R. 388, the defender was the grantee under the feu-charter. The reddendo clause, after providing for the payment of the annual feu-duty named for each of the building lots disponed by two equal half-yearly payments at Whitsuntide and Martinmas in each year, proceeded without any break in the sentence save by a semicolon, thus, "and paying a duplicand of the said feu-duties of twenty-four pounds, twenty-four pounds, and twenty-eight pounds at the term of Whitsunday 1930, and at the same term in every nineteenth year thereafter in lieu of casualties, with interest and penalties in case of failure if incurred, all as provided with respect to said feu-duties." The case was heard finally by Seven Judges. They held, following apparently the decision in *Heriot's Trust*, that this clause requiring the payment of the two feu-duties did not include the feu-duties of the year in which the duplicand became payable.

The Lord President in delivering his judgment appears to have treated the two clauses, the one dealing with the annual feu-duties, and the other dealing with the duplicand, as separate and distinct the one from the other, and he distinguishes these clauses from the imaginary clause which Lord Jeffrey in the *Earl of Zetland's* case, in the note at p. 1125 of the report of that case, considered would not have been sufficient to rebut the presumption I have mentioned. This imaginary clause would, according to the Lord President, have run thus—"For the yearly payment . . . of the sum of £95 of feu-duty at the term of Martinmas yearly, beginning the first year's payment thereof at Martinmas 1815 for the year preceding, and so forth yearly thereafter, and paying a duplicand of the said feu-duty at the end of every twenty-five years." The duplicand thus received, according to Lord Cullen, a distinctive character differentiating it from the ordinary feu-duties. But a duplicand is always a casualty. With the most unfeigned respect for the Lord President and the learned Judges who concurred with him, I think that even with this addition the difference between the above extracted clause and this imaginary one is, to my mind at least, in substance so slight as to be almost imperceptible. The other matter relied upon apparently was the fact that the feu-duty was payable half-yearly, the duplicand only at Whitsuntide. I shall deal with this point hereafter.

In the case of the *Commercial Union Assurance Co. Ltd.* v. *Waddell* (1917 S.C. 585, 54 S.L.R. 497) it is stated that the disponees Andrew Waddell and William Waddell were trustees, but it does not clearly appear in what right the defendants claimed from them. The decision is to the same effect as in the last-mentioned case, with this addition, however, that the word duplicand is treated as synonymous with the word duplication.

In *Murray* v. *Bruce* (1917 S.C. 623, 54 S.L.R. 525) the words "over and above" were used as in the *Earl of Zetland's* case.

In none of these cases can I find a single suggestion that the word duplicand bears *prima facie* a different meaning when used in reference to succession by an heir from that which it bears when applied to the succession by a singular successor. The struggle in each case was to show that the context established that the word as used in the document meant a sum inclusive or exclusive, as the case might be, of the feu-duty for the year in which the succession took place.

In the present case it is declared that the subjects are disponed to be held from the superiors in feu-farm, fee, and heritage for ever for payment of the feu-duty and duplicands as after stipulated, but always under the burdens and conditions and provisions before specified. The parties to the contract then enter into what, for convenience, I may style a composite covenant, dealing with many things. First, with the payment of a feu-duty for the first two years from Whitsuntide 1878 at the rate of £96, 16s. 4d. sterling yearly by two equal payments at Whitsuntide and Martinmas in each year. Second, with the payment thereafter and at all times coming of a feu-duty of £175, 13s. 4d. sterling yearly, payable in equal portions at Martinmas and Whitsuntide in each year. Third, with the payment of one-fifth part more of each term's payment of liquidate penalty for each term's failure in the punctual payment thereof. Fourth, with the payment of interest at 5 per cent. per annum of each term's payment of feu-duty or restricted feu-duty from the terms at which the same falls due. Sixth, with the payment to the parties to the contract of the first part or their assignees of a duplicand of the said maximum feu-duty at the termination of every twenty years counting from the term of Whitsuntide 1878. This is followed by a declaration that it shall be in the power of the disponees in certain events to split up the ground disponed into separate lots and apportion the feu-duties and duplicands. In my view this sixth head, although it begins with the words "And further" does not amount to a separate and independent covenant. It is one of the six limbs of the general composite covenant dealing with the duplicand as it dealt with each of the five other matters. It contains no provision as to how the duplicand is to be applied. There is no express provision that the word is to have a meaning other than its ordinary meaning, nor do I think that there is any provision in the covenant from which that can be implied. I think the composite covenant must be considered as a whole, and that the fact that the clause or stipulation dealing with the duplicand is the last clause in it, and begins with the words "And further," does not give to that stipulation a meaning and effect similar to that of the words "over and above," so as to rebut the presumption where the word duplicand is used simpliciter that half of it is to be applied to discharge the feu-duty for the year in which the duplicand becomes payable. As to the point so much relied upon that the yearly feu-duty is paid by equal instalments half-yearly at Whitsuntide and Martinmas in each year, and the duplicand only payable at Whitsuntide, much as I dislike to differ from the learned Lords who in Scotland have dealt with this point I cannot persuade myself that this circumstance has the force and cogency attributed to it in the case of *Heriot's Trust* and the cases which have followed it. Half of the duplicand is in the ordinary case applicable to the payment of the entire feu-duty for the year in which the duplicand becomes payable, but if the ancestor whom an heir succeeds, or the vassal from whom a singular successor has acquired the property, has already paid half the annual feu-duty, of course the heir or successor would only be bound to pay the duplicand less the amount already paid in part discharge of the year's feu-duty. That presents no practical difficulty. It does no violence to the language to be construed, and does not in my view lead in any way to the inference that the duplicand has to be paid in addition to the annual feu-duty.

I think this view accords with the decision in the *Earl of Zetland's* case and in *Alexander* v. *Muir*. It may not be quite in harmony with the decision in *Heriot's Trust* and the cases which have followed it, but in each case the decision must of course depend upon the true construction of the particular documents which fall to be construed in the suit. According to the best construction I can give the feu-contract in this present case, I think the appellants are right and the appeal should succeed. I think the decision in *Heriot's Trust* is of too recent date to require that a practice founded upon it should not be disturbed. I do not feel that in coming to this conclusion I am differing from the Scottish Judges on any rule or principle of the conveyancing law of Scotland. I should be most reluctant to attempt to do anything of the kind. The only difference between us is as to the question whether according to the true construction of the feu-contract which falls to be construed in the present case its language is sufficient to rebut the presumption that when the word duplicand is used one half of it is to be applied to pay the annual feu-duty of the year in which it becomes payable.

Their Lordships being equally divided affirmed the judgment of the Court of Session and dismissed the appeal, but without costs.

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