Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for the Appellant — Davey, Q.C.— Guthrie Smith. Agent — Andrew Beveridge, Solicitor.

Counsel for the Respondents--Kay, Q.C.— Gloag. Agents—Simson & Wakeford, Solicitors.

COURT OF SESSION.

Wednesday, February 18.

SECOND DIVISION.

[Sheriff of Argyllshire.

M'EACHAN *v.* MACDONALD.

Sheriff—Process — Expenses of Appeal where no Finding of Expenses in Sheriff-Principal's Interlocutor, and Judgment Affirmed by Court of Session.

In an action in the Sheriff Court of Argyllshire, the Sheriff-Substitute (GARDINER) after decerning in favour of the pursuer, found him entitled to expenses in the usual terms. The defender appealed to the Sheriff (FORBES IRVINE), who dismissed the appeal, and added, "Affirms the interlocutor appealed against, and decerns." The Second Division dismissed an appeal to them, and found the respondent "entitled to expenses from the date of the Sheriff's judgment," and remitted to the Auditor "to tax the same and also the expenses found due in the Sheriff Court."

The Auditor in his report drew the attention of the Court to the fact that the Sheriff Principal had made no finding of expenses in the pursuer's favour as regarded the appeal to him, and reserved the question whether he was to be found entitled to them for the consideration of the Court. Counsel for the appellant contended that the pursuer was not entitled to these expenses in respect they were not decerned for—*Gordon* v. *Walker*, March 5, 1872, 10 Macph. 520; Wilson's Sheriff Court Practice, 302. Counsel for the respondent stated that in point of fact an interlocutor in the terms of that of the Sheriff-Principal was understood and acted on in the Sheriff Court of Argyllshire as carrying expenses, and he produced a letter from the Sheriff-Clerk to that effect; further, that the First Division had held that such an interlocutor carried expenses.

The Court *disallowed* the expenses in question, observing that the practice followed in the Sheriff Court of Argyllshire was a bad one, and that it was preferable to follow the course taken in the Court of Session in a case where a Lord Ordinary had made no finding as to expenses.

Counsel for Pursuer (Respondent)—Baxter. Agents—A. J. & J. Dickson, W.S.

Counsel for Defender (Appellant)—J. C. Smith. Agent—John Macmillan, S.S.C.

Friday, February 20.

FIRST DIVISION.

M'NEILL *v.* CAMPBELL AND OTHERS (SIR JOHN CAMPBELL'S TRUSTEES).

Process—Proof—Competency—Diligence.

In an action for reduction of a settlement on the ground of facility and circumvention, the Court (following the case of *Livingstone* v. *Dinwoodie*, June 28, 1860, 22 D. 1333) *refused* a diligence at the instance of the defenders to recover a diary containing entries by a body-servant of the testator with regard to his master's health and state of mind.

Counsel for Pursuers—Asher—D. Robertson. Agents—M'Neill & Sime, W.S.

Counsel for Defenders—Balfour—Mackintosh. Agents—Waddell & M'Intosh, S.S.C.

Friday, February 20.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

TAYLOR AND OTHERS (TRUSTEES AND EXECUTORS OF THE MARQUIS OF TWEEDDALE) *v.* THE EARL OF HADDINGTON.

Real and Personal—Real Burden—Condition of Tenure—Singular Successor—Obligation to Relieve of Feu-duty.

Lands were feued by a disposition "under the burden of the payment of eight bolls of wheat and eight bolls of barley to the Crown annually, . . . and these for crop and year Eighteen hundred and nine, and in all time thereafter; and which burdens are hereby declared real liens and incumbrances affecting the said whole lands and others above disponed, and shall be engrossed in the instruments of seasin to follow hereon, and in all the future investitures and transmissions of the said lands and others, otherwise the same shall be void and null." The payment of a blench-duty was the only condition of the tenure of the feu.

In a personal action at the instance of a singular successor of the disponer against a singular successor of the disponee, *held* (*rev.* Lord Rutherfurd Clark, Ordinary) that the defender was liable in payment of the converted value of the 16 bolls of victual feu-duty for the crops of the years during which he had held the feu.

Opinion per Lord President (Inglis) and Lord Mure that although the annual payment of the 16 bolls was effectually constituted a real burden on the lands, no personal obligation had been transmitted as against singular successors, arising either from the terms of the original contract or from the principles of tenure, but that the pursuers

were entitled to decree, looking to the wide remedies competent to superiors for recovery of their feu-duties.

Opinion per Lord Deas and Lord Shand that the obligation constituted an inherent condition of the right of such a nature as to create a personal obligation on the vassal for the time in favour of the superior, differing therein from a real burden of a specific debt or sum of money.

Observations per Lord Deas as to the characteristics and essentials of a real burden.

Superior and Vassal—Feu-duty—Interest.

Held that interest does not run on feu-duties *ex lege*, apart from private paction or judicial demand.

Question (per Lord Deas) whether an extra judicial demand is sufficient to ground the currency of such interest.

The following narrative is taken from the Lord President's opinion:—

The summons in this case is raised by the trustees and executors of the late Marquis of Tweeddale, and concludes against the defender the Earl of Haddington for payment of the sum of £700 odds, being the amount of the converted values of victual feu-duties paid to the Crown by the said George late Marquis of Tweeddale for crops in years 1850 to 1876 inclusive for those portions of the lands of Westbarns, in the county of East Lothian, belonging to the defender; and the grounds in law on which this claim is maintained for a personal decerniture against the defender are, in the first place, "that the said proportion of the feu-duty payable to the Crown for the estate of Westbarns having been duly constituted a real burden on the lands belonging to the defender, he was bound to have relieved the late Marquis of Tweeddale thereof, and the pursuers as executors of the late Marquis are entitled to decree in terms of the conclusions of the libel." And the second is, that "the sums sued for being payments for which the defender and his predecessors, whom he represents, were ultimately liable, and of which they should have relieved the said Goorge Marquis of Tweeddale, the pursuers are entitled to decree for the amount, with interest, in terms of the libel." Now, the main defence against this action is embodied in the fifth plea-in-law of the defender, to this effect, that "the action cannot be maintained in respect there was no contract between the defender and the late Marquis, and no obligation was transmitted against the defender which will support the present action."

I understand that plea to be founded upon these two propositions, that there is no obligation arising here *ex contractu*, and no obligation laid upon the original sub-feuar, from whom the defender derived his right, which transmitted against his singular successor. The case is one of some difficulty and complication, arising a great deal from the condition of the title. It seems to me to be indispensable in the first place to understand precisely what the state and history of these titles are from the beginning of the present century. I shall therefore state what I understand to be their condition and history, and if in any matter of detail I should be led into error I hope the learned counsel will be good enough to correct me.

The *plenum dominium* of the estate of Westbarns was in 1804 held by Hamilton of Bangour of the Crown. He paid for that estate as Crown vassal a considerable quantity of victual feu-duty. Whether it was 80 bolls of victual or a larger amount does not appear upon the record, but it is a matter of no consequence. Hamilton of Bangour conveyed this estate to Robert Cathcart, Writer to the Signet, with a double manner of holding—the one to be held of himself in blench with an obligation to relieve from the duties payable by the disponer to his superior, and the other of the superior. This conveyance is a disposition dated 28th June 1805, and upon that disposition Cathcart was infeft, and in that condition of matters Cathcart of course was vassal to Hamilton of Bangour, and Hamilton of Bangour was the Crown vassal. Before this, on 15th April 1805, and in anticipation of obtaining that disposition, Cathcart conveyed to Thomas Allan, banker, who is afterwards called Thomas Allan of Westbarns, the same estate, with a double manner of holding, the one "to be holden of me and my heirs and successors in free blench for payment of a penny Scots in name of blench farm, at Whitsunday yearly, upon the ground of the said lands, if asked only, and freeing and relieving me and my foresaids of the victual feu-duty of 40 bolls of wheat and 40 bolls of barley, and relieving me of the other duties and services due to my superiors in the said subjects, and the other of the said infeftments to be holden from me of and under my immediate lawful superiors thereof, in the same manner that I, my predecessors and authors, held, hold, or might have holden the same." Under this disposition Allan held, being infeft upon it, holding base of Cathcart. But then in the same year, on 23d July 1805, Cathcart resigned his estate in the hands of the Crown, and obtained a Crown charter of resignation, which is dated 23d July 1805, but no infeftment followed upon that charter in favour of Cathcart. Then upon the 24th of July Cathcart disponed the superiority of Westbarns to Thomas Allan, the same person to whom he had already disponed the *dominium utile*, and gave him an assignation to the open precept in the Crown charter of resignation, and upon that open precept Allan took infeftment. Thereafter, therefore, Thomas Allan the banker, otherwise called Thomas Allan of Westbarns, held both the property and superiority of the estate of Westbarns by two different dispositions obtained from the same author, but he did not consolidate them. He held the two upon separate conveyances, and as regards the superiority he entered with the Crown by taking infeftment upon the open precept in Cathcart's Crown charter. Thomas Allan therefore remained with the title to the split estates of property and superiority given to him, and he had power to convey them to different persons without the necessity of any further proceeding, and this he did. He conveyed the superiority to Lord James Hay by disposition dated 28th May 1810, and Lord James Hay obtained a Crown charter dated 5th July of the same year. That is the foundation of the Marquis of Tweeddale's title to the superiority estate of Westbarns, which remained from that time in the Tweeddale family undisturbed. In the meantime, however, Thomas Allan of Westbarns had been dealing otherwise

with the *dominium utile*, not in the way of conveying the *dominium utile* as one undivided estate to any one disponee, but in the way of sub-feuing portions of it. The only sub-feu with which we are concerned is that which was created in favour of another Thomas Allan, who is distinguished as Thomas Allan of Linkhouse, although there were other sub-feus. On the 30th May 1808 Thomas Allan of Westbarns sub-feued a portion of the lands to Thomas Allan of Linkhouse, and in the conveyance there is but one manner of holding, viz., blench of the disponer. That disposition is the foundation of the title of the defender.

After 1810 no feudal change of any kind took place in the relation of these different properties and superiorities as far as I can see. Therefore the estates stood then, and stand now, as follows, viz.—(1) The Marquis of Tweeddale is Crown vassal in Westbarns for payment of 80 bolls of victual; (2) Thomas Allan of Westbarns held of Lord Tweeddale blench, but with an obligation to relieve in favour of Lord Tweeddale of the payment of 80 bolls of victual. That estate, I may here remark, is not at present represented by anybody, for the reason which will be apparent immediately. But (3) Thomas Allan of Linkhouse was vassal of Thomas Allan of Westbarns, and was thus sub-vassal in a part of the estate which Thomas of Westbarns held of the Marquis of Tweeddale, and he held that sub-feu for payment of a blench-duty, and it is alleged by the pursuer that he was also put under an obligation to relieve Thomas Allan of Westbarns of 16 out of the 80 bolls of victual, but that is disputed.

Now, the defender is in exactly the same position as Thomas Allan of Linkhouse was in the year 1810. The sub-feu has been transmitted through the superiority title till it was purchased by the predecessors of the present Earl of Haddington, and I understand the present Earl of Haddington stands in the same position as Thomas Allan of Linkhouse did under the disposition of 30th May 1808 to Thomas of Westbarns, of whom Thomas of Linkhouse held, and of whom the Earl of Haddington would now hold. Thomas of Westbarns has not been represented in that mid-superiority—in short, nobody is entered with the Marquis of Tweeddale as holding that mid-superiority. Now, it is in these circumstances that the present action has been raised by the Marquis of Tweeddale, not against his own immediate vassal, for that vassal's estate is in non-entry, but against his immediate vassal's sub-vassal in the portion of the lands held by his immediate vassal.

In order to understand exactly how the question arises upon the titles which I have thus explained, it is necessary to advert to the terms of two of them, and to two only. The first is the disposition which was made by Robert Cathcart to Thomas Allan of Westbarns of 15th April 1805, which for the sake of distinction is called the property title—that is to say, the disposition under which Thomas Allan held base of Robert Cathcart, who was then the Crown vassal. Now, in that disposition the lands of Westbarns are conveyed under certain burdens expressed in the dispositive clause. One of them is the burden of a large sum of money, £20,000, but there is also this burden—"under the burden of payment of 40 bolls of wheat and 40 bolls of barley as the proportion agreed upon of victual feu-duty payable to the Crown effeiring to the subjects hereby disponed," and also under a certain unimportant burden in the end of this dispositive clause. But then follows the obligation to infeft, embracing the tenendas and reddendo of the deed, "in which lands, teinds, and others above disponed I bind and oblige myself and my foresaids, but always with and under the burden of the said bond for the sum of £20,000 sterling, and interest and liquidate penalty in case of failure, payable to me in terms of the bond above mentioned, and the other burdens before expressed to infeft and sease the said Thomas Allan and his foresaids upon their own charges and expenses, and that by two several infeftments and manners of holding, one thereof to be holden of me, my heirs, and successors in free blench for payment of a penny Scots in name of blench farm at Whitsunday yearly upon the ground of the said lands, if asked only, and freeing and relieving me and my foresaids of the said victual feu-duty of 40 bolls of wheat and 40 bolls of barley, and relieving me of the other duties and services due to my superiors in said subjects and the other of said infeftments," &c. Then there is a warrandice and an exception from the warrandice of the burdens contained in the dispositive clause. Then there is another clause, which is not of very much consequence except for the purpose of showing that this payment of 80 bolls of victual was intended to be of the nature of a condition of the tenure of the lands—"And further, I hereby bind and oblige myself, my heirs and successors, to free and relieve the said Thomas Allan and his foresaids of the whole public and parochial burdens affecting the premises preceding Martinmas last, the said Thomas Allan being by his acceptation hereof bound to relieve me and my foresaids of 40 bolls of wheat and 40 bolls of barley of victual feu-duty payable to the Crown, and of a proportion of all the other burdens presently affecting the whole estate of Westbarns in the ratio of £27,300 to £29,700; and although the lands and others hereby disponed may be burdened with a greater feu-duty than 80 bolls of victual payable to the Crown as is above mentioned, I oblige myself and my foresaids to free and relieve the said Thomas Allan and his foresaids of the surplus feu-duty exceeding forty bolls of wheat and forty bolls of barley." It is only therefore of consequence as showing more clearly, if that were necessary, that the 80 bolls of victual is made a condition of the tenure—that is to say, it is as much a part of its condition as the penny of blench-duty. Such is the conveyance by which the estate of mid-superiority was created. That mid-superiority had come to be vested in Thomas Allan the banker, and which is now vacant.

The other disposition to which I think it is necessary to call attention is the title of the defender's predecessor Thomas Allan of Linkhouse, or, in other words, the creation of the sub-feu which is now held by the defender, and this deed is in many respects in contrast with the one which I have just read. The disposition appears to be granted for payment of a considerable price—a large sum of money. A portion of the lands and estate of Westbarns—only a small portion—is conveyed to Thomas of Linkhouse, and it is provided in the

dispositive clause "that the lands and others above described are disponed under the burden of the payment of the aforesaid sum of £4000 sterling, being the balance of the aforesaid price payable at and bearing interest from Martinmas 1808, which sum of £4000 sterling and interest falling due thereon after the said term of Martinmas 1808 is hereby declared to be a real lien and burden affecting the said lands aye and until payment thereof; as also under the burden of the payment of 8 bolls of wheat and 8 bolls of barley to the Crown annually, and of 6 bolls of oats, part of the present stipend payable from the said Thomas Allan's lands of Westbarns to the minister of Dunbar, and these for crop and year 1809, and in all time thereafter; and which burdens are hereby declared real liens and incumbrances affecting the said whole lands and others above disponed, and shall be engrossed in the instruments of sasine to follow hereon and in all the future investitures and transmissions of the said lands and others, otherwise the same shall be void and null." Now, this burden so created in the dispositive clause qualifies also the obligation to infeft; it is made an exception from the warrandice, and it enters the precept of sasine and all infeftments taken upon that deed, and it therefore constituted an effectual real burden upon the subjects. But the question is whether it did anything more, and it must be observed that in so far as this real burden of each of these portions of victual—that is, sixteen bolls in all—is concerned, it appears in no part of the deed except this clause, in which every real burden must appear in order to be effectual, but it does not appear in any clause connected with the tenure or reddendo. The tenure and reddendo are thus expressed—"To be holden immediately of and under me and my foresaids for the yearly payment of one shilling Scots money at the term of Whitsunday yearly, if required, and doubling the same at the entry of each heir or singular successor to the premises, to which duplication all entries are hereby restricted and taxed."

The Lord Ordinary (RUTHERFURD CLARK) on 17th March 1879 assoilzied the defender from the conclusions of the summons. His Lordship added this note:—

"*Note.*—George Marquis of Tweeddale was during the period between 1850 and 1876 the vassal of the Crown in the lands of Westbarns. He paid the Crown duties which during that period were exigible, and his trustees and executors seek to recover from the defender that share of them which effeirs to the portion of Westbarns, of which the defender is proprietor.

"The titles apart from the mere history of the deeds stand thus. The Marquis held the lands of Westbarns of the Crown, but he held a bare superiority only. These lands were held blench of the Marquis by Thomas Allan, banker in Edinburgh, 'for payment of a penny Scots in name of blench farm,' 'and freeing and relieving me and my foresaids of the victual feu-duty of forty bolls of wheat and forty bolls of barley,' being the feu-duties payable to the Crown. This last was declared to be a real burden. Again, Allan's right was a bare superiority, for he conveyed the lands of Westbarns in several parcels to be held of him; *inter alia*, he conveyed the lands which now belong to the defender, to be held of him for payment of one shilling Scots, and 'under the real burden of the payment of eight bolls wheat and eight bolls barley to the Crown annually,' being the proportion of the Crown feu-duties allocated to these lands.

"For the period to which this action relates the last-mentioned lands have been held on the tenure above stated by the late Earl of Haddington and the defender. The defender represents the late Earl, his father.

"Thomas Allan is dead. His heir never entered with the late Marquis, nor is he a party to this process.

"1. The pursuers first maintained that because the foresaid proportion of the feu-duty payable to the Crown was a real burden on the defender's lands, they were, as representing the late Marquis, entitled to exact from the defender the amount of the feu-duty which should have been paid by him during the period in question. In support of this plea they relied on the fact of the real burden alone, without any reference to the possession of the late and present Earls of Haddington. It is enough to say that in the opinion of the Lord Ordinary the plea fails, because the late Marquis of Tweeddale was not the creditor in the real burden constituted on the estate of the defenders. The creditors in that burden were Allan and his successors.

"2. The pursuers amended their record to the effect of alleging that the defender and his father held the lands in question during the period to which this action relates, and they pleaded that the Marquis of Tweeddale became their creditor because he paid to the Crown the proportion of the Crown duties which ultimately were payable by them. The Marquis as Crown vassal was the proper debtor in the feu-duties, and did no more than pay the debt which he owed to the Crown. To recover from the defender any parts of the payments so made is to sue on an obligation of relief. But the Marquis was not creditor in any such obligations as against the defender or his predecessor.

"The Lord Ordinary does not doubt that the proportion of the feu-duties with which the defender's lands are burdened must ultimately be paid by him, and it is strange that he and his predecessors have enjoyed so long an exemption. He decides no more than this, viz., that the pursuers have no personal action against the defender for debt. The pursuers not unnaturally resort to the present form of action in order to recover interest as well as capital. There is justice in their demand, but in the opinion of the Lord Ordinary it cannot be supported on legal right."

The pursuers reclaimed, and argued—The obligation of relief in Allan's title was created a real burden, but it was also something more. It was a condition of the tenure, and created a personal obligation which could be transmitted as against singular successors. Again, viewing the question as a purely feudal one, a superior's powers for recovering his feu-duty were very ample, and included personal action against vassals, sub-vassals, or singular successors in possession of the feu. In either view, the pursuers were entitled to succeed.

Answered for the defender—The obligation in question answered the definition of a real burden, and nothing more. It was not a condition of the

tenure. The £4000 was constituted a real burden in similar terms; yet admittedly no personal action was competent thereon against the defender. Even if the relation of superior and vassal made a difference, the obligation nevertheless was only a pure real burden. There was no privity of contract between the defender and the late Marquis, nor any obligation which could be transmitted as against a singular successor. There was thus no right of personal action against the defender. But the obvious reason why the pursuers did not use their proper remedy, *e.g.*, poinding of the ground, was that in so doing they could not claim interest.

Authorities—Bell's Prin., sec. 700; *Hyslop* v. *Shaw*, Mar. 13, 1863, 1 Macph. 535; *Tailors of Aberdeen* v. *Coutts*, Dec. 20, 1834, 13 S. 226; May 23, 1837, 2 S. and M. 609—Aug. 3, 1840, 1 Rob. Ap. 296; *Marquis of Arbroath* v. *Strachan's Trustees*, Jan. 28, 1842, 4 D. 538; *Stewart* v. *Duke of Montrose*, Feb. 15, 1860, 22 D. 755—*aff.* 27th March 1863, 4 Macq. 409; *Martin* v. *Paterson*, June, 22 1808, 3 Ross' L.C. 16; *Fraser* v. *Wilson*, April 15, 1824, 1 S. App. 162; *Royal Bank* v. *Gardyne*, Mar. 8, 1857, 13 D. 912 (H. of L.) 1853, 1 Macq. 358; *Marquis of Inverness* v. *Bell's Trustees*, Nov. 28, 1827, 6 S. 160; *Small* v. *Millar*, Feb. 3, 1849, 11 D. 495, 1 Macq. 345; *Peddie* v. *Gibson and Others*, Feb. 27, 1846, 8 D. 560; *Creditors of Eyemouth*, 1757, 5 B. S. 856.

At advising—

Lord President—[*After stating the facts ut supra*]—Now, it appears very clear to me that there is but one condition of the tenure of this sub-feu, and that is the blench-duty, and that the real burden which is imposed in the dispositive clause is not made a condition of the tenure. Can it then be a personal obligation transmissible against a singular successor? I do not inquire whether that may not be competently done independently altogether of the rules and principles of tenure, because I think it is very clear upon the face of this deed that there is no personal obligation to pay the 16 bolls of victual arising *ex contractu*. There are no words of personal obligation, nor anything that can be construed into a personal obligation on the face of this deed, and therefore, being a real burden and nothing but a real burden, I apprehend a singular successor in this sub-feu cannot be called upon personally to pay the 16 bolls of victual. The cases which occur upon the questions of real burdens generally arise in this way, that there is an undoubtedly good personal obligation, and the difficulty is to say whether that personal obligation has also been created a real burden. But the question with which we are here concerned is, whether as there has been an undoubtedly good real burden constituted, is there also a good personal obligation? The law is clearly stated by Lord Stair (ii. 3, 18) thus—"Generally all real burdens of lands contained in infeftments, though they give no present right to those in whose favour they are conceived, nor cannot give them any fee of the lands, yet they are real burdens passing with the lands to singular successors, though they bind them not personally; but the ground of the land by apprising, or adjudication, as if lands be disponed with the burden of an annual-rent furth thereof to such a person and his heirs, this will not constitute the annual-rent, but may be a ground of adjudging any annual-rent out of the lands." This general principle is, I think, illustrated in a very instructive way by the series of judgments pronounced by the House of Lords relating to the liability for payment of ground annuals. In the last of these cases, viz., *The Royal Bank* v. *Gardyne*, 1 Macqueen 358, Lord Cranworth expressed himself thus—"According to the decisions of your Lordships in *Miller* v. *Small*, it is clear that Gardyne did not lose his personal remedy against Duff when he made the disposition in favour of the Royal Bank. The principle of that decision also shows that here the bank never incurred any personal liability. When Gardyne sold to Duff, what he acquired was a personal right against Duff, and against Duff's representatives in all time, for the payment of the ground annual, and further a right against the lands into whosesoever hands it might come. But he acquired no personal right against purchasers from Duff. . . . There is here no personal obligation whatever arising from the mere tenure of land independently of contract. In the case of superior and vassal, the vassal for the time being is personally liable for the feu-duties; just as in the case of landlord and tenant, the tenant for the time being is personally bound to pay the rent. That is a liability resulting from principles of tenure."

Now, applying these principles to the dispositions in sub-feu by Thomas Allan of Westbarns to Thomas Allan of Linkhouse, I am of opinion that while the annual payment of sixteen bolls of victual is effectually made a real burden on the lands subfeued, there is no personal obligation for payment which can transmit against singular successors in the subjects—(1) because there is no such obligation constituted by contract in words sufficient to make a personal contract, and (2) because there is no liability arising from the principles of tenure, the condition of the tenure being expressly limited to payment of the blench-duty of one penny. Hence it follows that no personal action for the payment of the sixteen bolls of victual could be maintained by Thomas Allan of Westbarns against the singular successor of his sub-feuar Thomas Allan of Linkhouse. The main argument of the pursuer was, that because Thomas of Westbarns could have sued a personal action for the sixteen bolls of victual against the singular successor of the sub-feuar, the immediate superior of Thomas of Westbarns must be entitled to the same remedy for relief of a proportion of the victual feu-duty payable by him to the Crown, to the extent of the sixteen bolls constituted a real burden on the sub-feu, but, on the grounds which I have explained, the basis of that argument is displaced, because I hold that Thomas of Westbarns could not have sued such a personal action against himself.

It appears to me, however, that the pursuers may prevail in their demand on a somewhat different though similar ground. The immediate vassal of the Marquis of Tweeddale was, under the disposition of 15th April 1805, bound as a condition of his tenure to free and relieve the Marquis of eighty bolls of victual. In other words, the feu-duty payable to the Marquis by his vassal was eighty bolls of victual in addition to one penny, and Lord Haddington is the sub-vassal under the vassal who is bound for that feu-duty. Now, a superior has

very high rights and strong securities for payment of his feu-duty. Mr Bell in his Principles (§ 700) lays down the broad proposition, in which I entirely concur, that "personal action is competent at the superior's instance against the original vassal himself *ex contractu*, . . . or against singular successors entering as vassals for the feu-duties of their own time, or against sub-vassals, or against tenants in the lands while in possession, or intromitters with the fruits during their intromission." In short, the superior's remedy for recovery of his feu-duty is not confined to proceeding against the ground of the feu or against the original vassal, but extends against every person who as sub-vassal or in any other capacity, upon any title or no title, is for the time in the beneficial enjoyment of the lands of the feu or of any part of them. It is manifest that this supervenient right which arises out of the original constitution of the relation of superior and vassal, between the over-lord and his immediate vassal, cannot be defeated by the terms or conditions of any sub-feu granted by his vassal. It is sometimes loosely stated that the superior can recover from the sub-vassal so much of the duty payable by the immediate vassal as corresponds to the amount of the duty stipulated to be payable by the sub-vassal to the immediate vassal, and this is practically true where the vassal in the sub-feu apportions the feu-duty payable by him to his superior in such a ratio that each sub-feuar is burdened with such a proportion of the original feu-duty as corresponds to the proportion of the original lands of the feu acquired by him. But if a vassal sub-feus for a blench-duty, or a merely nominal feu-duty, that would not deprive the over-superior of his recourse against the sub-feuar who is not under his sub-feu right in the beneficial enjoyment of the whole or part of the original ground of the feu. If the whole ground of the original feu is sub-feued, the superior may poind the ground for the whole of his feu-duty, and he will also have a personal action against the sub-feuar for payment of the whole, even although the vassal may not have in the sub-feu right put the sub-feuar under any obligation or corresponding obligation either to himself or to the superior. If the subject of the original feu is divided into several sub-feus, and the vassal has not put his sub-vassals under any obligation for a reddendo, except for a merely nominal payment, the question then arises, What is the remedy of the superior against the several sub-feuars? and the answer is, I think, to be found in the case of the *Creditors of Eyemouth*, Feb. 8, 1757, 5 B. S. 856, where the question was raised "whether he (the superior) could not poind any part of the ground for the whole of the feu-duty," and the Lords unanimously found that he could, but that he could have no personal action against the several heritors who had been thus multiplied except in proportion to the parts of the feu which they held, and with the rents of which they had intromitted. Where there is a plurality of sub-vassals holding from one principal vassal, the measure of personal liability of each sub-vassal to the over-superior for his feu-duties is not what he is bound to pay to his immediate superior, but the proportion which the ground of the sub-feu bears to the entire original feu for which the duty is payable by the original vassal.

In the present case I think the proportion and the corresponding measure of personal liability by the Earl of Haddington to the Marquis of Tweeddale as over-superior may fairly be taken as fixed by the number of bolls of victual which were made a real burden on his sub-feu, and as the present Earl, the defender, represents his two immediate predecessors *titulo universali*, I come to the conclusion that he is answerable in terms of the libel. There may, however, be a question as to his liability for interest, on which counsel, if they desire it, may be heard.

Lord Deas—In this case the trustees and executors of the deceased George Marquis of Tweeddale seek to recover from the Earl of Haddington £700, 19s. 8½d., described in the summons as "the amount (less income-tax) of the converted values of victual feu-duties paid to the Crown by the said George late Marquis of Tweeddale, for crops and years 1850 to 1876 inclusive, for those portions of the lands of Westbarns in the county of East Lothian belonging to the defender."

The pursuers' first plea-in-law in the record was in these terms—"The said proportion of the feu-duty payable to the Crown for the estate of Westbarns having been duly constituted a real burden on the lands belonging to the defender, he was bound to have relieved the late Marquis of Tweeddale thereof, and the pursuers as executors of the late Marquis are entitled to decree in terms of the conclusions of the libel."

This plea was preceded in the record by certain statements of fact to the effect that in 1805 Robert Cathcart, W.S., had held the *plenum dominium* of the lands of Westbarns for payment of 40 bolls of wheat and 40 bolls of barley to the Crown, and that in subsequent transmissions or conveyances of portions of these lands part of the price had been occasionally declared a real burden, and in all of them part of the victual feu-duty had at sametime been declared a real burden, on the particular portion of the lands conveyed. Instances of this are to be found in the only three deeds which have been printed for us, the latest of which is dated in 1808. That deed bears that the portions of the lands of Westbarns therein described were disponed under the burden of £4000, being the balance of the price of the lands "payable at and bearing interest from Martinmas 1808, which sum of £4000 sterling, and interest falling due thereon after the said term of Martinmas 1808 is hereby declared to be a real lien and burden affecting the said lands aye and until payment thereof; as also under the burden of the payment of 8 bolls of wheat and 8 bolls of barley to the Crown annually, and of 6 bolls of oats, part of the present stipend payable from the said Thomas Allan's lands of Westbarns to the minister of Dunbar, and these for crop and year 1809 and in all time thereafter, and which burdens are hereby declared real liens and incumbrances affecting the said whole lands and others above disponed, and shall be engrossed in the instruments of sasine to follow hereon, and in all the future investitures and transmissions of the said lands and others, otherwise the same shall be void and null."

My present purpose in quoting the deed of 1808 is simply to make more intelligible what I may call my preliminary observation, that in the Outer House a misapprehension occurred in assuming that because the annual payments of victual feu-duty and stipend were declared in that

deed and in subsequent deeds, real burdens in precisely the same terms with the capital sum which formed the unpaid balance of the price of the lands, it followed that the annual payments were effectually made real burdens in the same sense and of the same class with the capital sum. If this had been the legal result of the deeds, the Lord Ordinary would have been quite right in holding, as he did, that the annual payments could not, any more than the capital sum, be recovered in a personal action like the present, but only by adjudication or poinding of the ground.

The plea of real burden founded on before the Lord Ordinary was not, it will be observed, a plea that by law feu-duty is a real burden in favour of a superior, but a plea that by the special terms of the deeds of transmission the burden, or rather a right of relief from the burden, had been constituted a real burden, on which footing the same principles would have been equally applicable to any other annual burden or right of relief as to a feu-duty. That this, indeed, and not any peculiarity in the nature of a feu-duty, was the footing on which the conveyancer had proceeded is clear enough from the fact that the burden of the stipend payable to the minister of the parish is declared a real burden in the very same words with the victual feu-duty.

When we come to the disposition in favour of Thomas Earl of Haddington in 1849, we shall see that the same portions of the lands of Westbarns which were conveyed by the one Thomas Allan to the other by the deed of 1808, were, *inter alia*, conveyed to the said Earl Thomas in 1849, and that the same quantities of victual payable to the Crown and the minister respectively are declared by the disposition in his favour to be real burdens on these portions of the lands in precisely the same terms as they are in the deed of 1808, and that a further portion of the lands added by a subsequent step of the progress in 1811 are likewise conveyed to the Earl under the burden (also declared a real burden) of 2 bolls wheat and 2 bolls barley—making 10 bolls wheat and 10 bolls barley on the Earl's lands in all. The Lord Ordinary says in his note that he "does not doubt that the proportion of the feu-duties with which the defender's lands are burdened must ultimately be paid by him, and it is strange that he and his predecessors have enjoyed so long an exemption." He decides no more than this, viz., that the pursuers have no personal action against the defender for debt.

Now, if the Lord Ordinary had been dealing with a proper real burden for debt—such as the £4000 in the deed of 1808—he would have been quite right in this decision. The miscarriage arose from assuming that the burden of an annual payment, or rather in this case relief from an annual payment, with no data for converting it into a capital sum, could be, and had been, effectually created a real burden for debt so as to have the advantages and disadvantages of that peculiar form of heritable security. Now, there is no doubt a sense in which all burdens which directly affect the land, or, to use the English phraseology, "run with the land," are real burdens. For instance, an inherent condition of the right is often called a real burden even in the deed by which it is constituted, in order to mark its immediate connection with the land, but that sort of real burden is totally different in respect of the rights and remedies it confers, from the real burden of a specific debt or sum of money, which last is usually what our writers mean by a real burden when treating of our different forms of heritable security.

Effectually to create a real burden of this last-mentioned class (namely, a real security for a specific debt), it is not enough to call it a real burden, and declare it to be so in the appropriate clauses of the deed of transmission and sasine (which may be held to have been sufficiently done as regards the victual duty and stipend here), but the burden must have certain qualities which make it fit to be created a real burden of that particular class. This is to be gathered alike from our institutional writers and from our books of practice—for instance, from Stair, iv. 35, 24, and Mr Menzies in his Lectures, 601–602. Thus also Mr Brodie in one of his able notes upon Stair (ii. 3, 55) says (p. 259)—"But in order to constitute a real burden, it is not merely necessary that it shall be expressly declared a real lien or burden on the feudal subject; the specific amount and the name of the creditor must be distinctly stated, and both be regularly inserted into the disponee's investiture or infeftment, it being a principle that no perpetual unknown incumbrance can remain on land." The essential qualities of such a real burden are also specified by Mr Bell in his Principles, sec. 919 (4th ed.), and in his Commentaries, vol. i, p. 689 (5th ed.). There being no confliction of authority on the subject, I shall quote from the Commentaries only. Mr Bell there says—"The burden must be specific in the amount, and in the creditor's name. This requisite has two objects—first, that creditors know the precise amount of the burden, and second, that they may know whether it be paid or extinguished." He refers to a case, then unreported, which he calls *Place* v. *M'Nab's Trustees*, but which is now to be found in Hume's decisions, p. 544, under the name of *Macdonald & Lawson* v. *Place*, 24th February 1821, where the total amount of the debts declared a real burden was specified, and every other requisite complied with except that the name of each individual creditor and the precise amount of each individual debt were not given, so that, as was successfully argued, the lieges were not provided with the means of learning who were the creditors, and whether they had or had not been paid off (p. 546). Mr Bell obviously points to a burden which is either a capital sum or capable, on known data, of being converted into a capital sum and paid off, and not to an annual burden, such as a quantity of victual, some years of one value and some years of another, and which cannot be paid off without the consent of the owner of the land.

The judgments of the House of Lords as to real burdens created by deed or contract have always inferred the same necessity for precision; and that necessity is indeed obvious from the very nature of the security. For a security so constituted is a prior and preferable burden on the estate transferred. It may be created in favour of the transferring party or of anyone else. It rests upon and qualifies the deed of transmission and infeftment thereon so long as not paid off or extinguished. This is well explained by Mr Brodie in the succeeding paragraph of the same note already quoted. It is essential to a real burden of this class that it shall be specific in its total

amount, and that the name (including of course the designation) of the creditor shall be specified. Thus constituted, it has this great advantage over all other forms of voluntary security, that no burden created and no security granted by the party whose infeftment is burdened with it can come into competition with it; and no rights or remedies competent to the creditors of that party, whether by sequestration or otherwise, can affect it. But, on the other hand, it has this material disadvantage, that it imports no personal obligation, and can only be made effectual against the lands themselves by the roundabout and expensive process of adjudication or poinding of the ground, unless a separate personal obligation be undertaken for it, to which the doctrine of *Peddie* v. *Soot's Trustees*, Feb. 27, 1846, 8 D. 560, and other cases of that class, would then be applicable—but I need hardly say we have nothing of that kind here.

The burden in question in the present case had not the qualities essential to its being created a real burden of the same class with the burden of a capital sum. Compliance with the requisites and objects stated by Mr Bell was in regard to it impracticable. It could not be made specific in the sense and to the effect of enabling creditors to know its total amount. It could not be paid off without the consent of the owner of the land. The name of the creditor was not attempted to be specified. In short, if it was contemplated by the conveyancer that the use of the same phraseology in the deeds as to the annual burdens and as to the capital sums would make all these burdens real burdens of the same class, the attempt was necessarily a failure, and the pleas and arguments on both sides, founded on the erroneous assumption of the practicability and success of that attempt, fall simply to be eliminated from the case, and the question then comes to be, whether the burden has any, and if so what, *other* character in respect of which it can be vindicated in a personal action for payment?

In order to deal with that question it appears to me to be unnecessary to go further back than the immediate title of Earl Thomas, which has now passed to his successors, and which includes James Hamilton's sasine recorded on 20th December 1837, by force of the express reference made to that instrument in the disposition and sasine in favour of the Earl himself.

The Earl's immediate title stands thus—By disposition dated 1st December 1849 James Hamilton of Ninewar (formerly of Bangour) sold and disponed to Earl Thomas, his heirs and successors, certain portions of the lands of Westbarns and a variety of other lands, all described under five different heads. But the portions of victual feu-duty now sought to be recovered extend only to 10 bolls of wheat and 10 bolls of barley, being the portions affecting lots *quarto* and *quinto* in that disposition. Consequently it is not with the whole lands conveyed by that disposition, nor even with the whole portions of Westbarns thereby conveyed, that we have now to do, but only with the portions of Westbarns described under the two heads *quarto* and *quinto*, those applicable to the other portions of Westbarns conveyed under the heads *secundo* and *tertio* having been, I presume, in some way already settled for, and those conveyed under *primo* being portions of a different estate. The two lots *quarto* and *quinto* consist of the lands which had been conveyed by the one Thomas Allan to the other Thomas Allan by the printed deed of 1808, burdened with 8 bolls wheat and 8 bolls barley payable to the Crown, and of two fields added by the disposition dated 2d October 1811 (No. 15 of the inventory) granted by Thomas Allan, banker, to Thomas Allan of Linkhouse, burdened with 2 bolls wheat and 2 bolls barley for these two fields—thus making up the total annual quantity of 10 bolls wheat and 10 bolls barley sued for, conform to the state printed in the pursuers' appendix, and forming No. 61 of process.

What may have induced the one Thomas Allan to reconvey to the other in 1811 the lands which the other had conveyed to him in 1808, with the addition of two fields, and why the holding in all the deeds from 1808 inclusive to 1849 was made free blench for payment of a nominal duty, may probably be accounted for by the object of the transmissions having generally been the creation of votes, which seems to have gone on in those days as vigorously as it does now, although on a scale of greater magnitude as regarded the estates transferred. Be this as it may, however, we must of course deal with the titles as we find them, without regard to any conjectures or considerations of that kind.

The important thing is that with reference to lots *quarto* and *quinto* respectively of the lands conveyed by James Hamilton to Earl Thomas there occurs, in immediate connection with the description of the lands and others conveyed, a clause as to burdens, which under *quarto* is thus expressed—"But always with and under the burdens, conditions, and obligations specified in an instrument of sasine in, *inter alia*, the said lands and others *quarto* hereby conveyed in favour of me the said James Hamilton, recorded in the Particular Register of Sasines at Edinburgh the 20th day of December 1837."

In like manner, in immediate connection with the description of the lands and others conveyed under *quinto*, there occurs a relative clause, which is thus expressed—"But always with and under the burdens, conditions, and obligations specified in the said instrument of sasine in, *inter alia*, the said lands and others *quinto* hereby conveyed in favour of me the said James Hamilton, recorded in the Particular Register of Sasines at Edinburgh the 20th day of December 1837."

When we turn to the instrument of sasine of 20th December 1837 thus referred to, we find that it bears—"Declaring always, as it is by the said disposition" (meaning the disposition on which the sasine proceeds) "expressly provided and declared, that the lands and others second above described were disponed under the burden of the payment of 8 bolls of wheat and 8 bolls of barley to the Crown annually, and of 6 bolls of oats, part of the stipend payable from the said Thomas Allan of Westbarns' lands of Westbarns to the minister of Dunbar, and which were by the said disposition declared real liens and incumbrances affecting the lands and others second above described, and appointed to be engrossed in the instrument of sasine to follow thereon and in all the future investitures and transmissions of the said lands and others above described, otherwise the same should be void and null; as also, that the lands and others third above described were disponed under the burden of the payment of 2

bolls of wheat and 2 bolls of barley for the fields numbers 23, 24, and 25, also before mentioned, of which Mr John Hume is or was sometime superior, payable to the Crown annually, and which burdens were by the said disposition declared real liens and incumbrances affecting the lands and others third above described, and appointed to be engrossed in the instrument of sasine to follow thereon, and in all the future investitures and transmissions of the said lands and others third above disponed, otherwise the same should be void and null."

I need not say that in the above quotation the words "second and third above described" mean second and third described in the disposition in favour of James Hamilton—the lands so described being, however, the same with the lands forming lots *quarto* and *quinto* conveyed by James Hamilton to the Earl.

On the precept contained in the disposition thus obtained from James Hamilton, Thomas Earl of Haddington was infeft, conform to instrument of sasine in his favour duly recorded on 5th December 1849. The clauses above quoted from James Hamilton's sasine of December 1837 are engrossed *ad longum* in the sasine in favour of the Earl, along with the precept upon which the Earl's sasine itself proceeds. That precept directed sasine to be given to the Earl of the lands and others disponed, "but always with and under the burdens, conditions, and obligations before referred to," and sasine was given to him in these terms accordingly.

It was the title thus obtained and completed by Earl Thomas in December 1849 which enabled him to execute the entail dated 22d April 1851, and recorded in the register of tailzies 8th March 1859, on which entail his successors since his death on 25th June 1870 have possessed and continue to possess the lands.

In these circumstances the burden of payment of the portions of the victual feu-duty payable to the Crown, applicable to lots *quarto* and *quinto* of the lands conveyed to Earl Thomas, is so clearly and unequivocally laid upon the Earl that it seems impossible to doubt that by accepting and acting upon that title he undertook and became liable to discharge that burden either by specific implement or by payment of the converted values, which last is a mode of settlement not proposed to be objected to.

Neither can I see any doubt that the burden thus imposed on Earl Thomas was an inherent condition of the right conveyed to him, his heirs and successors, and consequently ran with the land, in accordance with the authority of the case of *Coutts* v. *The Tailors of Aberdeen*, decided in the House of Lords 3d August 1840 (1 Robinson's Apps. 296), and the case of *Stewart* v. *The Duke of Montrose*, decided in this Court 15th February 1860 (22 D. 755), and affirmed in the House of Lords 27th March 1863 (4 Macq. 499).

The obligation imported from James Hamilton's sasine of 1837, and laid upon Earl Thomas, his heirs and successors, by the disposition in his own favour, has all the qualities of permanency, immediate connection with the estate, and natural relation to the objects of the deed, which in the case of *Coutts*, and again in the case of *Stewart* v. *The Duke of Montrose*, were held characteristic of an inherent condition of the right. The words I have just now used to describe these qualities are the same words I used as descriptive of the qualities of an inherent condition of the right in the case of *Stewart*, explaining at the same time in the close of my opinion, that as it had become by that time apparent that my vote must cast the balance upon a question so important to the law and practice, I had thought it right "to lay open to remark the leading grounds of my opinion, that these may be corrected elsewhere if they are wrong, and the law placed on the footing on which it ought to rest." If the description I then gave of an inherent condition of the right and its legal effects had not been accepted as sound by the House of Lords, the judgment of this Court, pronounced by a majority of one, could not possibly have been affirmed; for the preliminary question of title to pursue, decided in the pursuer's favour by the same narrow majority, simply enabled the pursuer to reach and to plead the inherent condition of the right, the nature and legal effects of which condition thus formed the whole merits of the case, so that nothing could be more direct and authoritative than the judgment which followed in favour of the pursuer in establishing what the nature and legal effects of an inherent condition of the right really are.

These had indeed been authoritatively decided long previously by the House of Lords in the case of *Coutts* v. *The Tailors of Aberdeen*, otherwise I could not have been warranted in describing them as I did.

The property in that case being burgage, there neither was nor could be any question involved in it between superior and vassal. The burdens which were there held inherent conditions of the right were imposed in an ordinary disposition by the Corporation of Tailors of Aberdeen in favour of George Nicol of a lot of ground in Aberdeen on which Bon-Accord Square was built. Nicol after being infeft had sold the subjects to Coutts, so that the question arose with a singular successor. The burdens imposed by the disposition had chiefly reference to the amenity of the square and the buildings upon it, and those of them which were reasonable in themselves and had the qualities of permanency and natural connection with the subject were held to run with the land, and consequently to be enforceable against singular successors.

It follows from what I have said, on the strength of the authorities in a previous part of this opinion, that a properly constituted real burden for debt gives an absolutely indefeasible preference to the creditor named which is not conferred by an inherent condition of the right. On the other hand, an inherent condition of the right has the advantage of being enforceable by personal action against the proprietor or proprietors for the time being at the instance of whosoever has an interest to enforce it, whether named in the deed or not. For instance, there could be no doubt that when the houses in Bon-Accord Square came to be the property of different individuals, any one proprietor interested might enforce against any other proprietor or proprietors the conditions forming inherent conditions of the right, either by insisting on specific implement or the application of money as the universal solvent.

This distinction between the two classes of burdens is obviously recognised, as well as the difference in the formalities necessary for their constitution, in the opinions of those of the con-

sulted Judges in the case of *Coutts*, who concurred in the opinion prepared by Lord Corehouse, which was subsequently characterised in the House of Lords as one of the ablest opinions that ever came to that House.

It may be satisfactory here to quote the following passages from that opinion (1 Rob.'s Apps. 306)—After stating that the rights of parties in the case did "not depend upon a feu-charter, but upon a burgage disposition," the opinion bears—"To constitute a real burden or condition either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and those words must be inserted in the sasine which follows on the conveyance, and of consequence appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy—for example, by tending to impede the commerce of land or create a monopoly. The superior or party in whose favour it is conceived must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified. If these requisites concur, it is not essential that any *voces signatæ* or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is a *debitum fundi*, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolutive clauses, which last are peculiar to a strict entail—a settlement depending (as will afterwards be explained) upon a different principle altogether. What has now been stated rests on the authority of Stair, book ii. 3, 54, and 55; book iv. 35, 24; and on that of Bankton, ii. 5, 25, confirmed by a numerous train of decisions."

The opinion afterwards bears (p. 308)—"If the condition is one usually attaching to the lands in a feudal or burgage holding—in particular, if it has a *tractus futuri temporis*, or is of a continuous nature, which cannot be performed and so extinguished by one act of the disponee or his heir—words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money once for all in terms of a family settlement."

A variety of burdens, such as the carriage of millstones, furnishing poultry, &c., are afterwards noticed, and the opinion then bears that all such obligations not struck at by the "statute 1 Geo. I, sec. 2, c. 54," "or by the common law, and being consistent with the interest of the community, qualify feudal grants, into whose hands soever the subject comes, either in a question with the superior or the parties for whose benefit the obligation is imposed, or those who have a *jus quæsitum* under it" (p. 310).

On analysing the passages now quoted, it will be observed that although the object of the opinion was not to define the difference between a real burden for a capital sum of debt as contrasted with an inherent condition of the right, that difference is throughout distinctly recognised, the real burden for payment of a sum of money being spoken of as a burden in favour of some one named, who may be either the granter of the deed or a third party, and it being expressly laid down (p. 311) that if the burden consists in the payment of a sum of money, whether it is reserved to the superior himself or made payable to a third party, "if the amount of the sum is not exactly specified in the investiture it is unavailing, for the law of Scotland does not admit any indefinite burden attaching to lands"—that is to say, if the burden does not consist of a specified sum capable of being paid off, it will be unavailing as a real burden of the class which may be created for debt, which is precisely the ground on which I have already laid it down that any attempt, if such was intended, to create a real burden of that particular class for the annual payments here stipulated, whether of victual or of stipend, was, to use the words of the above opinion, simply "unavailing."

At the same time, in contradistinction to a real burden of that class, an inherent condition of the right is represented in the opinion as a condition the pecuniary value of which may be quite indefinite, to the enforcement of which it is not essential that there should be a *nominatim* creditor, and which, on the contrary, may be enforced by any "parties for whose benefit it was imposed, or those who have a *jus quæsitum* under it," against all who are in right for the time being of the subjects to which the condition is attached. The import of what is thus said about the title I take to be, that anyone who has a legitimate interest to enforce the condition is to be held to have a title to do so.

Applying this doctrine to the case before us, the Marquis of Tweeddale has paid to the Crown a debt which as immediate vassal of the Crown he was compellable to pay; the debt so paid was a debt of the Earl of Haddington, the burden of paying it direct to the Crown being by his own immediate title laid upon him as an inherent condition of his right to the lands; nothing more appears to me to be necessary to sustain a personal action at the instance of the Marquis or his successors for relief of that debt against the proper debtor.

Your Lordship in the chair has, however, suggested another and different ground of judgment leading to the same result, namely, that the action may be supported on the well-known principle that a superior who has feued out his lands at a cumulo feu-duty, and has not consented to an allocation thereof among his vassals or subvassals *inter se*, may go against anyone of them for the whole feu-duty. That ground of action was not pleaded at the bar on behalf of the pursuers, and consequently has not been argued; I should have great difficulty in adopting it in the state of the titles, which is very peculiar.

No doubt in the disposition of the *dominium utile* by Robert Cathcart (who held the *plenum dominium*) in favour of Thomas Allan, banker, on 15th April 1805, Cathcart bound himself to infeft Allan and his foresaids "by two several infeftments and manners of holding, one thereof to be holden of me, my heirs and successors, in

free blench, for payment of a penny Scots upon the ground of the said lands, if asked only, and freeing and relieving me and my foresaids of the said victual feu-duty of 40 bolls of wheat and 40 bolls of barley, and relieving me of the other duties and services due to my superiors in said subjects." By that deed therefore the obligation of relief of the victual feu-duty was made part of the reddendo under the blench holding. But in the sub-feu disposition of 30th May 1808, by Thomas Allan of Westbarns, and in everyone of the numerous conveyances which followed, whether of mid-superiority or property, down to and inclusive of the conveyance to James Hamilton of Bangour, the immediate author of Earl Thomas, the obligation to pay the stipulated quantities of victual, although continued as a (so called) real burden on the lands, never again occurs in the tenendas clause so as to form part of the reddendo, which in all of them is limited to a nominal sum of Scots money; and the same limitation is embodied in the charter of confirmation and precept of *clare constat* by the Marquis of Tweeddale himself, through his commissioner, on 9th May 1835, in favour of the now deceased Robert Allan, banker, the last entered vassal, whose heir is not called as a party to this process. In this state of matters, it seems to me very difficult to hold the position of the Marquis of Tweeddale, who has no assignation from the Crown, to be that of a superior suing for his feu-duties upon the feudal principle referred to. I think he is here, as I have said, in the character and position of one vassal who has paid the debt of another, upon whom the burden of that debt had been laid as an inherent condition of his right, and from whom, consequently, he is entitled to relief. For the vindication of that right of relief it is no more necessary in this case to go beyond the disposition granted by James Hamilton in 1849, and his sasine of 1837, which is imported by reference into that disposition, than it was in the case of *Coutts* to go beyond the disposition granted to Nicol by the ancient corporation of Tailors of Aberdeen. There is nothing, however, in the titles of 1805 and 1808, or in any of the intermediate titles, to qualify or weaken the right of relief competent to the Marquis if they were to be gone into. On the contrary, relying as I do upon the inherent condition of the Earl's right as the sound and safe substratum on which to rest the case, the bearing of the older titles, and any inference to be drawn from them, would only afford additional reasons, if such were required (which I think they are not), for holding that the Marquis is *in titulo* to enforce that condition.

On these grounds I am of opinion that the interlocutor of the Lord Ordinary falls to be recalled, and decree given for the principal sums libelled; but before pronouncing that decree it will be right to hear parties on the question of interest, which has not yet been argued.

Lord Mure—The Lord Ordinary has held that a personal action cannot be maintained in this case for payment either of the feu-duties which became due and fell into arrear prior to the date of the defender's succession to the property in question, or for the feu-duties which have become due since the defender became the proprietor. And he has done so, as I understand the note to his interlocutor, on the ground (1) that the Marquis of Tweeddale was not the creditor of the defender in the real burden constituted upon his estate; and (2) that his Lordship was not a creditor in any obligation of relief as against the defender and his predecessor. But while the Lord Ordinary has so decided, he intimates a pretty clear opinion that by other process than that of a personal action for payment, the feu-duties in question may be recovered out of the property belonging to the defender. For he added—the Lord Ordinary does not doubt that the "proportion of the feu-duties with which the defender's lands are burdened must ultimately be paid by him, and it is strange that he and his predecessors have enjoyed so long an exemption. He decides no more than this, viz., that the pursuers have no personal action against the defender for debt. The pursuers not unnaturally resort to the present form of action in order to recover interest as well as capital. There is justice in their demand, but in the opinion of the Lord Ordinary it cannot be supported on legal right."

Now, it is not, I think, desirable, when a claim is substantially well founded, and admits of being made good by poinding of the ground or by adjudication, to hold that a personal action such as that here in question, which is a cheaper and simpler proceeding, will not be, if that can be avoided consistently with the law laid down as applicable to such matters. The question therefore which we have now to dispose of is, Whether there is any decided case or any rule of law which can be held to preclude a superior from so recovering feu-duties from a vassal in possession of the lands feued or any part thereof; and I agree with your Lordships that there is not. During the argument addressed to us, as I understood it, there was no dispute between the parties as to the payment of these feu-duties having been duly created a real burden upon the property of the defender. But the question on which they were at issue was, as to whether the payment was also made an inherent condition of the right. If it was, the defender admitted that a personal action would be. But he contended that it was not so constituted, and that the view taken by the Lord Ordinary was consequently well founded. The pursuers, on the other hand, maintained, that as the payment, if not a condition of the right, was in any view a real burden and obligation for the payment of feu-duties, it was one which might be made good by a personal action, even for arrears against the possession of the lands. No distinction was taken in argument by either party between the recovery of the arrears which were incurred before the defender succeeded to the estate, and the recovery of the feu-duties which thereafter became due. But it rather appears to me that there may be a distinction on the ordinary case in the above respects, to which I will afterwards advert.

In dealing with the main question your Lordship and Lord Deas, though coming to the same conclusion, have done so on somewhat different grounds. In my opinion, that taken by your Lordship is the safer ground of judgment, and the one which I am on that account disposed to adopt. Because, while I am not, as at present advised, prepared actually to dissent from the views explained by Lord Deas, I should not wish

to rest my opinion on those grounds alone. For it has always appeared to me, from the time I first heard the question argued, that Lord Cranworth's opinion in the case of *Gardyne*, which your Lordship has read from the chair, lays down some rules which make it difficult to hold that this demand is one which necessarily transmits as a personal claim against singular successors in the lands. But while Lord Cranworth so expresses himself as regards that case, which was one relating to the payment of ground annuals, not of feu-duties, his Lordship seems to leave the question as to the competency of the personal action open in any question which might arise between a superior seeking to recover feu-duties and the vassal in possession of the lands, even when that vassal was a singular successor. For his Lordship says that in such a case the "vassal for the time being is personally liable for feu-duties."

The matter therefore being open, in so far as the decisions in the cases relied on by the defender are concerned, the question arises whether there is authority in the law of Scotland for giving effect to the pursuers' claim? I am of opinion with your Lordship in the chair that there is, in the passage in Mr Bell's Principles, and in the case to which your Lordship has referred. But there are earlier cases in which it appears to me the question here raised has been decided, viz., in those of *Rollo*, March 26, 1629, M. 4185; *Moncrieff* v. *Balnagown*, July 21, 1630, M. 4185; *Hamilton* v. *Burleigh*, Jan. 22, 1712, M. 4189; and in the later case of *The Magistrates of Inverness* v. *Bell's Trustees*, November 28, 1827, 6 S. 160. Applying the rules laid down and given effect to in those cases, the pursuers are, I think, here entitled to prevail. The decision in the case of *Moncrieff* in particular appears to be very much in point; for there one of the questions raised was as to the competency of a demand made against a subvassal in part of the original feu, which is the position of the defender. In that case the question appears to have been raised between the sub-vassal and a party claiming as in right of the Crown, while Lord Tweeddale was subject-superior. That, however, does not, in my opinion, make any difference, for the right of a subject-superior in a question between himself and his vassals and any sub-vassals who may be in possession of the lands, must in a matter of this sort, I apprehend, be regulated by the same rules as those applied in a question with the Crown.

As subject-superior Lord Tweeddale, or rather his predecessor in the superiority, feued or sold to Allan of Westbarns in 1805, who in turn granted a sub-feu to Allan of Linkhouse in 1808, of that portion of the original feu which now belongs to the defender. In these circumstances the pursuers, as representing the late Lord Tweeddale, are, I think, entitled, on the principle laid down in the above cases, to proceed against the defenders, the vassal or sub-vassal in possession, at all events for the feu-duties which have become payable during the period of possession of the property. To that extent I have no doubt of the pursuer's right to recover under the present action. But I think it proper to add that I should have felt considerable difficulty, as the case was originally laid in the record, in carrying the rules further; and in applying it to that portion of the pursuer's claim which relates to the arrears which fell due before the defender's succession to the entailed estate. But as it is now admitted that the defender is in the position of being the representative not only of his father the last Earl of Haddington, but through him of Earl Thomas, the maker of the disposition and deed of entail under which the property is held, and who were representing the parties in possession of the estate during the time the arrears of feu-duty were incurred, the difficulties I should otherwise have felt as to that part of the pursuers' claim have been removed.

Lord Shand—I agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be recalled, and that the defender, as proprietor of the lands in question since 1870, and as representing his father and grandfather, the previous proprietors of the lands, is personally liable for the repayment of the capital sums that are sued for.

Your Lordship has given a very distinct statement of the involved title with which we have to deal in this case, and I have merely to add to what your Lordship has said on that subject that I observe that on 9th May 1835, Thomas Allan, banker, having been dead by that time, his son Robert Allan obtained from George Marquis of Tweeddale an entry to the estate of mid-superiority conform to charter of confirmation and precept of clare constat of that date; but that does not make any difference in the state of the question, because Robert Allan who obtained that charter appears to have died after that date, and his heir-at-law Thomas Hunter Allan, now a merchant in Madras, apparently represents him, but the mid-superiority has not been taken up.

The first question in the case is, whether the pursuer is entitled to succeed because of the terms of the sub-feu of 1808, and I am of opinion with my brother Lord Deas that the stipulations in that deed in regard to the payment of the victual feu-duty which are in the same terms substantially as those contained in the deed of 1811, mentioned in article 8 of the condescendence, constitute an inherent condition of the right, of such a nature as to create a personal obligation on the vassal for the time in favor of the superior, and which may therefore be enforced, as it is sought to be enforced in this action, by the over-superior. It appears to me to be the result of the cases of *Coutts* v. *The Tailors of Aberdeen* and *Stewart* v *The Duke of Montrose* that the question what is such an inherent condition of the right as creates a personal obligation upon the owner of the property, and so what is therefore the condition of the tenure, is not dependent upon the use of technical expressions, but upon the nature of the condition or stipulation itself, and if the stipulation or condition has the qualities to which Lord Deas has referred, viz., permanency, immediate connection with the estate, and natural connection with the object of the deed, then it is an inherent condition of the tenure. I understand that there would be no difference of opinion if in the clause of tenendas in the deed of 1868, after the words "for the yearly payment of 1s. Scots money at the term of Whitsunday yearly if required," the conveyance had contained the words "and freeing and relieving me and my foresaids of the said quantity of victual feu-duty payable to the Crown,

my superior." But because of the absence of these or similar words, I understand your Lordship to hold that the stipulation is not made an inherent condition of the feu. I do not doubt that it would have been more careful and correct conveyancing to insert such words as I have mentioned in the tenendas clause, but although this has not been done, I am of opinion that, taking the deed as a whole, the obligation has been effectually imposed on the vassal. It must not be forgotten that when this deed was granted the granter was himself under obligation to his superior, the Crown, for 40 bolls of wheat and 40 bolls of barley. He was giving off a substantial portion of the property which he held, and which was liable for that feu-duty, and in the narrative of this deed the terms of the contract of sale are stated. One of the conditions is thus expressed in the narrative of the deed itself, "and he [that is, the sub-feuar or purchaser] thereby further bound and obliged himself and his foresaids to pay the feu-duties and others therein and after specified for crop and year 1809, and for all succeeding crops and years, as the said contract of sale in itself at greater length more fully bears"—a distinct narrative or statement of what one would naturally expect to find in a deed giving off a portion of a feu, viz., a stipulation that as between mid-superior and sub-vassal the latter should bear a fair proportion of the feu-duty, the amount of which was defined and fixed by agreement of the parties.

Then follows the clause of conveyance, and in that clause, after a portion of the price has been declared to be a real lien and burden on the lands of the particular kind to which Lord Deas has so fully referred—a proper real burden, the right to which would not necessarily go with the superiority, but which would require a separate conveyance—the clause goes on to deal with three separate matters, these being, I must observe, *ejusdem generis*. They are (1) the allocation of the feu-duty between the disponer and disponee; (2) the allocation of stipend between the disponer and disponee, fixing that as a certain stipend was payable from the estate, so a portion of it should thereafter be borne by the part of the estate sub-feued; and (3) providing for division or allocation of the public and parochial burdens on the estate. Although none of these matters were noticed in the tenendas, they are nevertheless, in my opinion, from their nature, of that class of conditions which infer personal obligations on the part of anyone acquiring the property, and therefore conditions of the feu. I shall say no more of the burdens of stipend and public and parochial burdens except that from their nature it is obvious that the purpose of the reference to these was to define the obligations of the vassal for the time in a question with the mid-superior, and I think that although there is an absence of words of direct personal obligation, yet from the nature of the subjects such an obligation is directly to be inferred

As to the burden of feu-duty, it has all the characteristics necessary to make it a condition of the right. In the first place, an obligation for relief of a share of feu-duty is of a continuous nature, referring to a tract of future time. It contemplates and provides for a division for all time coming, not with reference to the individual who is the first disponee or feuar, but as between superior and vassal in all time coming. The feu-duty is expressly made a burden on the lands, and creates, as I think, an obligation against anyone taking the lands. Again, this obligation could only subsist and be performed as between the superior and vassal. It would not be necessary, as in the case of a proper real burden, to have a special conveyance or assignation of the right to this stipulation of relief in order to give the person in right of the superiority the right to enforce payment or relief of the victual feu-duty. The arrangement is for relief of part of the cumulo feu-duty, and surely a mere conveyance of the mid-superiority would give a sufficient title to enforce the payment. It is of no value to anyone but the superior for the time, and necessarily runs with lands. And so as there can be no other creditor than the superior for the time, I think there is a corresponding obligation on the feuar for the time. And, again, the stipulation here has obviously a natural relation to the object of the deed, for one would expect as a matter of ordinary stipulation that the claim for feu-duty of the over-superior, and the allocation of that feu-duty, should be provided for. I am therefore of opinion that the stipulation for payment, or rather relief, of the victual feu-duty is an inherent condition of the right, giving right to a personal action by the superior for the time, and giving rise to a personal obligation on the vassal. The declaration in regard to feu-duty and stipend, making them real burdens on the land, does not make them such burdens in any other sense than all feu-duties are real burdens. All feu-duties are *debita fundi*, but nevertheless payable by the vassal in possession for the time, and the declaration that they are real burdens cannot, in my view, prejudice or affect their character as inherent conditions of the tenure. I should like to put this case—Suppose that in the absence of any notice in the tenendas of the clause of relief there had been a clause to this effect, viz., that whereas the property now feued is part of a larger subject, for which the disponer has to pay a total feu-duty of 80 bolls, it is hereby declared that the proportion of that feu-duty payable furth of the lands now feued shall be 8 bolls—it appears to me that would create a condition of the tenure enforceable by the vassal in a question with his immediate superior, and enforceable also against the vassal. A condition or declaration so expressed would run with the lands, and would not be affected by a further declaration that the feu-duties were made real burdens.

On these grounds I agree with Lord Deas in opinion, and I have only to add that the case of *Gardyne* does not in any way affect the view which I hold. The Lord Chancellor, in the careful opinion which his Lordship gave, precisely puts the case which we have here, and distinguishes between the case of ground annuals with which he was dealing and the case of superior and vassal which we have here. His Lordship says—"It is a liability resulting from principles of tenure. In both these cases the personal liability arises by reason of what in this country is called privity of estate. But that doctrine has no application to a case like the present, where there is no such relation subsisting."

There remains the question whether there is not a second ground by which the same result would be arrived at even assuming that the con-

dition of relief in regard to this feu-duty is not held to be of such a nature as to create a personal obligation on the vassal. I agree with your Lordship and with Lord Mure in opinion that the over-superior, by virtue of the deed granted by him, is entitled to succeed in his claim for the capital sums sued for. By the deed of 15th April 1805, Cathcart, the predecessor of Lord Tweeddale, effectually bound his vassal for total relief of 80 bolls. That deed did what your Lordship desiderates in the tenendas of the deed of 1808. It contained the words "freeing and relieving me and my foresaids from the said victual feu-duty of 80 bolls." That deed conveyed the whole of the estate of Westbarns, and the vassal was undoubtedly bound for the whole of the feu-duty. But the vassal has conveyed part of these lands of Westbarns to be held of himself, and even assuming that he has not imposed a personal obligation on his vassal and his successors which he could enforce, still I think the over-superior is not to be prejudiced thereby. The over-superior has done nothing to relinquish the right which he has, under the deed granted by him, to relief of 80 bolls of victual from any part of the lands he conveyed; and I agree with your Lordship as to the supereminent rights of the superior in such circumstances. The lands in question are part of the lands of Westbarns, all of which are liable to pay the superior 80 bolls of wheat and barley, and it appears to me that if not indeed entitled to maintain a claim to the full extent of 80 bolls, the superior is entitled to succeed to the extent of a fair allocation of the feu-duty in respect of the terms of the original feu-charter. I shall only add with reference to the case of the *Creditors of Eyemouth*, that while it appears the superior's right there was restricted to a proportion of his original feu-duty, I am not satisfied that the principles of that case would limit the superior's rights here, because in that case the different vassals had not only obtained charters, but they were entered with the Crown, the over-superior. This case is in a different position. The Marquis of Tweeddale has done nothing to recognise the sub-division of this property in any way, but whether his right might not extend to the full victual duty of 80 bolls it is unnecessary to determine. I think the superior has clearly right to enforce payment of the amount of feu-duty actually allocated by the deed of 1808.

On 25th February the case was put out for hearing on the question of interest. The summons concluded for payment of £700, 19s. 8½d., "as also of the sum of £503, 8s. 5½d., the amount of progressive interest at the rate of £5 per centum per annum upon the several sums so paid, from the respective terms at which the same were paid until 25th November 1878," with additional interest from that date till payment.

A printed correspondence between the parties' agents was produced, the material parts of which are set forth in the Lord President's opinion.

The pursuers argued—They were entitled to payment of interest on the ground that the late Marquis had paid a debt for which the defender was ultimately liable. The amount on which interest was claimed was not feu-duty in the proper sense. As between Lord Tweeddale and the Crown it was so; but as between Lord Tweeddale and the defender there was simply an obligation of relief; and Lord Tweeddale would not be fully relieved unless interest as well as principal were paid him. A cautionary obligation was analogous.

The defender replied—The general rule of law was that interest did not run *ex lege* on feu-duties, the only exceptions being private paction and a judicial demand. Neither of these exceptions being here present, interest was not due.

Authorities—1 Bell's Comm. (5th ed.) 647 (M'L.'s ed. 692); Stair, i. 13, 10; Menzies' Conveyancing, 552; Montgom. Bell's Conveyancing, i. 627; *Rosslyn* v. *Strathmore's Trustees*, Nov. 17, 1843, 6 D. 90; *Drummond* v. *Lady Montgomerie*, Dec. 7, 1842, 5 D. 277; *Napier* v. *Spiers' Trustees*, May 31, 1831, 9 S. 655; *Wallace* v. *Eglinton*, Feb. 26, 1835, 13 S. 564; *Moncrieff* v. *Dundas*, Nov. 24, 1835, 14 S. 61; *Tweeddale* v. *Aytoun*, March 2, 1842, 4 D. 862.

At advising—

Lord President—I do not think it is necessary to hear more in this case. I cannot deal with the demand which is to be enforced by our judgment in this action as anything else than a demand by a superior for feu-duty. No doubt it is made against a sub-vassal, but what he is made liable for under this judgment is just what is payable to Lord Tweeddale as superior, and whether the demand is against a vassal or a sub-vassal, that is still feu-duty. That being so, the question before us now is this—Can interest be claimed on arrears of feu-duty? I adopt the rule laid down in the *Marquis of Tweeddale* v. *Aytoun*. It is there stated by Lord Mackenzie (with the concurrence of the other Judges) in these terms—"The general rule of law is that arrears of feu-duties do not bear interest unless there be an express stipulation to that effect, or unless there has been a judicial demand for them." That is stated by Lord Mackenzie as a general rule, but not an absolute or inflexible one; and I am aware of no authority for saying that it is absolute or inflexible, though it is somewhat remarkable that no case has been found in which the rule has been relaxed. But I should be sorry to lay it down that circumstances may not occur to modify the application of the rule, and if the conduct of the debtor in the feu-duty were unreasonable, I do not say a case might not be made out for demanding interest even on arrears of feu-duty. But there is no such difficulty here.

There has been nothing unreasonable in the conduct of the debtor in this case (I am speaking, not of his defences to the action, but of his conduct out of Court), and I think the superior has really himself to blame that he was not paid his feu-duties long ago. When this correspondence began, the agents on both sides appear to have been acting pretty much in the dark. Lord Haddington's agent asks for a note of the feu-duty payable for the crop 1850, which was the first Lord Haddington was obliged to pay after his acquisition of the lands. This demand was not immediately answered, but on 30th June 1851 Lord Tweeddale's agents enclose a note of the feu-duty as then understood. That forms the subject of a correspondence, which shows (especially the letter of 26th Dec. 1851) that both parties were in a state of considerable confusion as to the amount of

feu-duty really payable. But on 1st January 1852 we have at length an important letter, and though this was not printed, we know that it tendered to Lord Tweeddale, on the part of Lord Haddington, in payment from the lands of Westbarns, 10 bolls of wheat and 10 bolls of barley old measure, which amounted when converted to a certain sum. This tender was rejected. The only answer is the letter of 26th February 1852, in which Lord Tweeddale's agents say they are satisfied the whole feu-duty which they claimed was due, and express a desire to see Lord Haddington's titles. Then down to the 24th July 1862, when a note of the feu-duties claimed is again sent by Lord Tweeddale's agents, there is an entire cessation of correspondence. Thus we have a rejection of the payment of the 10 bolls wheat and 10 bolls barley in which Lord Haddington is now to be found liable, and a demand for more, including interest, as explained in the letter of 24th July. That being so, it appears to me that up to that time there is no doubt as to the application of the general rule, to the effect that interest was not due. The case was simply one where the feu-duties had not been demanded and not paid, and to that case the rule appears directly to apply.

There was then a cessation of correspondence till 7th August 1862, and then there is a repetition by Lord Haddington's agent of the same tender, which he had made 10 years before, applicable to and including crop 1861. The agent says that "10 bolls wheat and 10 bolls barley, old measure, which, converted from the quantities in your third note and the amount in this note for crops 1850 and 1861, and intervening years, being p. £311, 19s. 1d., we are prepared to pay. We must decline, however, to pay any interest, as we have all along been ready to pay." Now, it appears to me that they were justified in declining to pay interest on the ground there stated. They had offered ten years before to pay the feu-duties without interest, and the answer was a rejection of their tender.

From this point onwards the parties take up antagonistic positions on the question whether interest is payable or not. The rest of the correspondence is not important. It appears to me that Lord Haddington's agent was willing to do all that he was bound to do during the period between the year 1851 and the date of the raising of this action; and even assuming that something short of a judicial demand may be sufficient to ground a claim for the currency of interest, I think there is a total absence of any such ground in this case.

Lord Deas—If the judgment of the Court had rested exclusively on the grounds on which my opinion proceeded, the claim for interest would have been different and much stronger than it is. Those grounds were, that Lord Haddington by acceptance of the disposition from James Hamilton of Bangour, had undertaken for himself and his successors to pay these bolls direct to the Crown (the obligation to that effect had been made an inherent condition of his right to the lands). But the judgment of the Court cannot be held to have rested on these grounds, two of your Lordships having been of opinion that the claim by the Marquis of Tweeddale against Lord Haddington was a claim by a superior for his feu-duty, and that this was sufficient for the judgment. If this was so, the general rule was applicable, that arrears of feu-duty in the ordinary case do not bear interest. In my view, the claim was not properly a claim for feu-duty at all, none being due to or exigible by the Marquis, but a claim by one vassal who had paid the debt of another for relief of the debt he had so paid. And Lord Shand, while he concurred in my grounds of judgment, has concurred also in the ground of judgment adopted by your Lordships. In this state of the opinions I do not find myself authorised to introduce into this question of interest the equitable grounds which might have been applicable to a claim of relief. As to whether a judicial demand for payment would be essential to found a claim for interest on feu-duty, that is too important a question to be decided till it arises. The correspondence here can in no view be construed into such a definite demand as would be necessary to raise a question of that kind, and I do not therefore go into it at all.

Lord Mure—Under the summons in this action this is a simple claim for payment of feu-duties, and our decision has been pronounced giving effect to that claim. There was difference as to the grounds for giving effect to it, but in my view that is unimportant on this matter. Substantially this is a claim for feu-duty, and the question now raised is, whether the pursuers are entitled to interest thereon? I concur with your Lordships in thinking that they are not. The ordinary rule, as laid down in a variety of cases (such as *Marquis of Tweeddale* v. *Aytoun*), is that no interest on arrears of feu-duties is exigible apart from paction or judicial demand. Now there is nothing of that sort here, and I agree with your Lordships that there is nothing in the correspondence showing any special circumstances to take this case out of the general rule.

Lord Shand—I am of the same opinion. Nothing is better settled than that feu-duties do not bear interest *ex lege*. If the rule were to be laid down now for the first time, I confess I should have difficulty in fixing it as has been done, for feu-duty being not merely a burden on the land, but creating also a personal obligation on the vassal, I think it appears to me there is no sound principle which should prevent the running of interest on this as on any other claim which is founded on obligation. But that is not now the question.

The first point is, Whether this is not a claim for feu-duty, or substantially so? I think that in either view of the ground of our former decision it is substantially a claim for feu-duty. I am unable to say, though the obligation is in form an obligation of relief, that it is different from the case of a feu-duty payable to the superior. It is not like the case of a cautionary obligation, as Mr Kinnear argued. That might lead to very different results. A cautioner having paid the money becomes creditor in a debt of a different character from this. The sums in question seem to me to fall under the rule of law applicable to feu-duties.

That being so, the next question is, Whether the demand here made is such as to entitle the pursuer to interest? I agree with Lord Deas in refraining from the expression of any opinion as

to the necessity of a judicial demand. There may be exceptional cases where an extra-judicial demand might ground a claim for payment of interest as well as of principal. But there is no such case here. The demand was made at considerable intervals of time, but the answer was given at once—"We are ready to pay the principal sum, but no more."

Accordingly, I am for holding the pursuers entitled to the principal, but not to interest.

The Court accordingly recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuers for the sum of £700, 19s. 8½d. as sued for; found the defender entitled to expenses of the debate on the question of interest; and *quoad ultra* found the pursuers entitled to expenses.

Counsel for Pursuers (Reclaimers)—Kinnear—Rutherfurd. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defender (Respondent)—Balfour—Pearson. Agent—John Hope, W.S.

Saturday, February 21.

FIRST DIVISION.

[Exchequer Cause.

NICOL CAMPBELL *v.* THE INLAND REVENUE.

Revenue—Inhabited-House-Duty Act (48 *Geo. III. c.* 55), *Sched. B, Rule* 6 *and Rule* 14—*Hotel and Club-house Adjoining, with Door of Intercommunication.*

The proprietor of a hotel erected an adjoining building, the ground-floor of which was appropriated for a Yacht Club-house, and the upper stories as an extension of the hotel. A private door of communication led from the club billiard-room to the hotel dining-room, which was on the first floor of the new addition. Members of the club had right to use the hotel dining-room, but they alone had right of access thence to the club premises. *Held* that the proprietor was liable as landlord in house-duty on the whole building, the club-house and hotel not being "distinct properties" in the sense of rule 14, but forming one "house" in the sense of rule 6 of Schedule B of the Inhabited-House-Duty Act (48 Geo. III. c. 55), which provided that "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to, the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties."

Observation (*per* Lord Shand) that his opinion proceeded independently of the existence of the door of intercommunication.

Mr Nicol Campbell appealed to the Commissioners for the district of Bute against an assessment of £410 made upon him for inhabited-house-duty at the rate of 6d. per £, for 1879-80, as proprietor of the buildings of which the following account was given in the Case subsequently stated on appeal:—"A few years ago the appellant became by succession the owner of the Queen's Hotel, in the West Bay, Rothesay; and being animated with a desire to benefit the town, he proposed to erect an entirely new building adjacent, which should be occupied as the headquarters of the Royal Northern Yacht Club, and in part as an extension of the hotel. . . . On the street floor in the new addition the club occupy a reading-room, a committee-room, steward's service and store-rooms, and lavatory. From the entrance-hall leading to these rooms a stair leads to a billiard-room, also occupied by the club, in a wing behind the new addition (the wing being part of the new addition). From this stair, by a landing, and by an ordinary two-leaved door with the usual lock and fastenings, entrance to the dining-room, called in the printed memorandum the dining-hall, on the first floor, is obtained. This is the dining-room of the hotel, which the members of the club are entitled to use, and entrance to it from the hotel is had by an ordinary door opening from the lobby of the hotel. This room is entirely in the new addition, and occupies nearly the whole space of the first floor of such addition. There are bedrooms connected with the hotel in the floor immediately above the dining-hall. The club-house is open during the whole year for the use of the members. The hotel consists of the whole of the old building, the second flat of the new building, containing dining-room, &c., and the third flat of the new building, containing bedrooms; and the Yacht Club part consists of the ground-floor in the new building, occupied as before mentioned, and billiard-room in wing. The door by which there is internal communication between the portion of the building let to the club and the hotel has bolts, and was not opened at all when members were absent, which was generally the whole winter. The hotel-keeper has nothing to do with the taking care of and cleaning the club premises, that duty being attended to throughout the whole year by a resident steward in the employment of the club."

In the lease by the appellant to Mr W. M. Whyte, for thirteen years from Whitsunday 1876, of the hotel and the dining-hall and bedrooms before mentioned in the new building adjoining, at an annual rent till 1883 of £270, it was declared that the tenant of the hotel should, as far as incumbent on him, implement article 6 of the articles of agreement of lease of the club-house after mentioned; and that the dining-hall should be used in connection with the hotel alone, "and that while the members of the Yacht Club may have access thereto from their own premises, they shall not be entitled to use it otherwise than as the dining-hall of the hotel;" and by the articles of agreement of lease by the appellant to the Yacht Club, for fifteen years from 1st April 1877, of the rooms of the club, together with the use of the dining-hall, to which, as stipulated by the agreement, the club were to have a private access, at an annual rent for the first seven years of £140, it was provided (article 6) "that the tenant of the hotel or his servants, or