Court should regulate the use of the water as between the upper and the lower heritors, there is a case which has some bearing on this point. In the case of *Abercorn* v. *Jamieson* (Hume, 510) it appeared that the upper heritor had formed several fish-ponds and artificial pieces of water in his grounds, and had made bulwarks and sluices thereat, whereby the water was detained from the lower heritor, and the Court found that the upper heritor 'in forming fish-ponds in the course of the said stream, or making use of the said fish-ponds, must not do anything to prejudice Mr Jamieson's' (the lower heritor's) 'use of the said stream, and therefore must be subjected to proper regulations to prevent damage to Mr Jamieson, by shutting or opening the sluices of the said ponds at improper times or in an improper manner, and remit to the Lord Ordinary to proceed accordingly, and to do further as he shall see cause.' How the Lord Ordinary regulated the matter does not appear. In this case there was a complaint that besides detaining the water the upper heritor often suddenly opened the sluices, so that the water came down in a torrent, to the injury and the disturbance of the lands and the mills below. The distinction between that case and the present one is, that the person detaining the water was not an upper miller storing it for the purposes of his trade, but a person who retarded it and let it out according to his notions as to the proper management of fish-ponds. To subject such an upper heritor to some restraint in his mode of dealing with the water was reasonable and practicable, but cannot be cited as a precedent for adopting the same course in regard to the case of two millers.

"To attempt in any way to adjust the rights of parties in the present case by means of interdict or by regulations laid down by the Court would be inconsistent with the rights of the Keithick miller and with the proved facts of this case, which are to the effect that there is no unreasonable detention. To what extent could an interdict be granted? The defender has a right to a mill-dam, and he has consequently a right to use that dam according to the exigencies of his trade. He could not be interdicted from working his mill during any specified hours of the day. He is entitled to the free use of his mill—entitled to work it when he pleases and at times when he has water in his dam to carry on the work. Nor could he be prevented from working during the night twice a month, or every night, if he had business warranting such continuous labour; nor could the Court by any regulations adjust and determine how much water he is to store, when he is to let it off, whether he is to give notice to the miller below that the water is coming. Nothing of the kind has ever been attempted with the Keithick Burn since mills were put upon its banks. The evidence of usage and practice of the millers upon this stream was admitted by the Lord Ordinary as being a useful element in determining the rights of parties. This kind of evidence, the Lord Ordinary observes, is admitted in the American Courts —*Dumont* v. *Kellog*, 18 Am. Rep. 102; Washburn on the Law of Easements, 351.

"If the facts of the case had supported the pursuer's complaint of unreasonable detention, the mode of redress open to the pursuer is not a demand for interdict, or for permanent regulations to be made by the Court, but for damages for such unreasonable detention. The mode in which this matter is left to the juries is brought out in an American case very clearly. The complainer in that case averred that the upper heritor withheld the water three, four, and five days, and at one time thirteen days, and that at times he discharged the water in such quantities as to flood the mill of the lower heritor. The charge given to the jury in that case by the Judge, which was upheld by the Court, was as follows:—'The defendant had a right to use the water as it passed through his land. If he detained it no longer than was necessary for his proper enjoyment of it the plaintiff cannot recover; whether, if you believe from the evidence that he did detain the water three days at times, at other times five days, and at one time thirteen days in his own dam, to the injury of the plaintiff's mill, this was longer than was necessary for the defendant's proper enjoyment of the water at his mill as it passed through his land, is left to your determination. If you believe it was, you will find for the plaintiff. If you believe it was not, you will find for the defendant, unless you believe that the defendant did vexatiously or wantonly detain the water, or that there was some degree of malevolence in the time or quantity of water discharged, to the injury of the plaintiff's mill; for if you believe this your verdict should be for the plaintiff'—*Hetrich* v. *Deachler*, 6 Barr (Penn.) R. 32.

"Of course the remedy of an action of damages is one which is only applicable to a particular case, and in no way lays down a regulation for the future management of the water supply. This is the necessary result of the respective rights of the parties."

The pursuer reclaimed but subsequently withdrew the reclaiming-note and acquiesced in the judgment of the Lord Ordinary.

Counsel for Pursuer—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders—Jamieson. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, March 4, 1885.

SECOND DIVISION.

[Sheriff of Lothian and Peebles.

COCKBURN *v.* CLARK.

Agent and Client—Fitted Account—Taxation—Right of Client to have Account Taxed.

In an action by a person against his former agent, in which the pursuer claimed to have the defender's accounts taxed, the defence was that seven months before raising the action the pursuer had adjusted and fitted the defender's whole accounts with him, including both a cash account and those under challenge, and had granted a receipt (which was produced) for the balance brought out. *Held* that, assuming this to be so, a client and agent do not in such a matter meet on an equal footing, and that the pursuer was still entitled to have the account taxed.

Robert Cockburn, aerated water manufacturer in Edinburgh, employed, in 1882, Andrew Clark, S.S.C., Leith, to act as law-agent and man of business for himself and his wife. In that capacity Mr Clark received (1) a sum of £50, less the amount of a *contra* account by the debtor of £10, 8s. 6d.; and (2) a sum of £370, 0s. 8d. due to Mrs Cockburn. He rendered a cash account in which these sums were stated and accounted for, and in which he took credit for various payments made by him for the Cockburns, and for two accounts for various pieces of business done for them by him. These business accounts respectively amounted to £43, 4s. 6d. and £19, 4s. 8d. The cash account showed a balance due to Cockburn of £23, 10s., which was paid to Cockburn, and for which he granted a receipt on 30th April 1883. Cockburn thereafter employed another agent. On 28th November 1883 this new agent, by Cockburn's instructions, wrote to Mr Clark saying that the business accounts were overcharged, and that some of the items were for business not authorised and not necessary. He claimed that a balance was still due to him, and offered to accept £30 in full thereof. Clark declined to re-open accounts with him, and Cockburn then raised this action of count and reckoning, concluding for £30 as the balance due by the defender as agent for him and his wife.

Mr Clark stated in defence—"(Stat. 2) Upon the 30th April 1883 the pursuer called upon the defender with the view to a settlement. They went over the accounts together, and the pursuer asked and the defender consented to pay him £2 by way of abatement from his business accounts. The defender offered to submit his accounts to the Auditor for taxation if the pursuer desired it, but the pursuer said it was quite unnecessary, as he was perfectly satisfied, and he then waived his right to have said accounts taxed, and expressed himself perfectly satisfied with the balance then brought out, and both parties discharged each other."

He pleaded, *inter alia*—"(3) The defender's business accounts having been duly rendered, adjusted, and settled, and the pursuer and defender having mutually discharged each other, the pursuer is barred from calling on the defender to account."

The Sheriff-Substitute (Rutherfurd) found in point of law that the pursuer by accepting payment of the balance of £23, 10s., and granting the receipt therefor, was not barred from insisting for taxation of the defender's business accounts; therefore remitted the defender's accounts to the Auditor, with instructions to tax the same as between agent and client, and to report, and continued the cause.

"*Note.*—[*After pointing out that though the action was one of count and reckoning and payment, it was admitted that the defender had accounted for the cash received by him, and that the only question was as to the alleged right of the pursuer to insist for taxation of the account*]—The defender alleges (Statement of Facts, article 2) that 'on the 30th April 1883 he offered to submit his accounts to the Auditor for taxation if the pursuer desired it, but the pursuer said it was quite unnecessary, as he was perfectly satisfied, and he then waived his right to have said accounts taxed, and expressed himself perfectly satisfied with the balance then brought out, and both parties discharged each other.' The defender also alleges that he was subsequently employed on different matters by the pursuer, who does not seem to have taken any objection to the defender's accounts until the month of November 1883.

"In these circumstances the defender maintains that the pursuer is now precluded from having the accounts in question taxed, but the Sheriff-Substitute is of a contrary opinion, for even taking for granted all that the defender alleges upon record, it comes to no more than this, that the pursuer, when he received payment of the sum of £23, 10s. on the 30th of April, and granted his acknowledgment for that amount, considered it unnecessary to have the defender's accounts taxed, and raised no question until the end of November, after he had consulted another agent. But, as Lord Deas observed in the case of *M'Laren* v. *Manson*, 1857, 20 D. 218, 'The waiver of a client's rights to have business accounts taxed must appear in explicit terms before it can be pleaded against him by the agent, and the law is extremely jealous of any settlement of accounts between an agent and his client, as the parties do not meet upon equal terms—*Mackenzie* v. *Mackenzie's Trs*, 1831, 9 S. 730, per Lord Corehouse, 731; *Colvil* v. *Jamieson*, 1839, 1 D. 526, per Lord Medwyn, 528.'

"Holding these views, the Sheriff-Substitute does not think that the defender's averments are sufficient to entitle him to a proof. He states that at his meeting with the pursuer on 30th April 1883 he offered to submit his accounts to taxation, and if they are, as he alleges, fairly charged, it is difficult to see why he should now oppose this."

On appeal the Sheriff (Davidson) dismissed the appeal, but before answer recalled the remit to the Auditor of the Sheriff Court and remitted the defender's accounts to the Auditor of the Court of Session.

The Auditor taxed off the accounts as overcharged £10, 15s. 10d.

The Sheriff-Substitute giving effect to this taxation, and also disallowing certain charges in the accounts as being unnecessary (and the question as to which the Auditor had reserved), decerned against the defender for £19, 17s. 4d., with interest from 30th April 1883; *quoad ultra* he assoilized the defender. He found the pursuer entitled to expenses.

On appeal the Sheriff adhered.

The defender appealed, and argued—The account between him and the pursuer was settled, payment of the balance had been made by him, and the pursuer had granted his receipt therefor on 30th April 1883. The pursuer was not entitled seven months afterwards to demand that the business accounts of his law-agent should be taxed. He was entitled to a proof that the pursuer had waived his right to taxation.

The Court did not call upon counsel for the pursuer.

At advising—

Lord Young—[*After narrating the Sheriff-Substitute's findings in fact*]—I think the Sheriff is altogether right. I do not think, in dealing between agent and client, that the client is precluded by anything of the character which occurred here from asking that the agent's ac-

count should be taxed, and I must express some surprise that any practitioner before this Court should even after the lapse of seven months resist the request that his accounts should be taxed. But the doctrine of settled account is one with which we are familiar. It has a head in the Dictionary and in the Digest, and there are many cases illustrating it. And the Court is certainly slow to open up a settlement which has taken place between parties—*i.e.*, parties who are upon an even footing with one another. But a client meeting with law-agents is in a peculiar position altogether. The client and the law-agent are not upon even terms. The agent knows the proper charges, but the client does not, and trusts entirely to his agent; and if afterwards he is advised that the account is overcharged, most agents would assent to have the account subjected to the usual test. Apart from that, I am of opinion as a matter of law that it is the client's right if the account is overcharged to have it reduced. The agent personally knew what it should be, and the client did not. As I have said, they were not meeting on an equal footing, as Lord Corehouse pointed out in one of the cases referred to by the Sheriff-Substitute. That is one of the exceptions to the doctrine of settled account, not that it is an absolute or universal exception, but consideration of the relation of agent and client is in truth one which leads to the conclusion which I have stated here, and which I think is in conformity with the opinion of Lord Corehouse. I propose therefore that we should simply dismiss the appeal, affirming the judgment, and with expenses.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant — Campbell Smith — Rhind. Agent—Andrew Clark, S.S.C.

Counsel for Respondent—Baxter. Agent—A. Nivison, S.S.C.

Friday, March 6.

FIRST DIVISION.

(Whole Court.)

[Lord Adam, Ordinary.

CASSELS AND OTHERS *v.* LAMB AND THE SCOTTISH HERITABLE SECURITY COMPANY (LIMITED) AND LIQUIDATOR.

Superior and Vassal—Sub-Vassal—Irritancy ob non solutum canonem — *Conventional Irritancy—Act* 1597, *c.* 250.

Held by a majority of the Whole Court (*diss.* Lord Justice-Clerk, Lord Deas, Lord Young, Lord Craighill, Lord Lee, and Lord Fraser) that when a feu-right is irritated *ob non solutum canonem*, whether by virtue of an irritant clause in the feu-right, or of the Act 1597, c. 250, the right of a sub-vassal, holding of the defaulting vassal, falls under the forfeiture.

Sandeman v. *Scottish Property Investment Co.*, Feb. 16, 1883, 20 S. L. R. 400, and 10 R. 614, *overruled.*

By feu-contract dated 17th May, and 3d and 5th June 1875, Robert Cassels, John Cassels, Robert Cassels junior, and T. L. Paterson, as trustees under a declaration of trust executed by them in 1874, of the first part, feued to Alexander M'Neill, James M'Meekin, and William Reith, and their heirs and assignees, of the second part, a plot of ground at Dowanhill, Glasgow, and containing in all about 8383 square yards 8 square feet. The plot of ground was disponed under the conditions specified in the feu-contract, and, *inter alia*, "*second*, the second party and their foresaids shall, within three years from the term of Whitsunday 1875, erect and finish, and in all time coming maintain, on said plot of ground tenements of dwelling-houses, or of shops and dwelling-houses," of a certain character and description "which tenements shall be capable of yielding and shall yield in all time coming a free yearly rental equal to at least double of the feu-duty hereby payable." Then followed provisions for the securing that the tenement should be of a superior class and of a certain description of architecture. Then followed a clause by which it was "expressly provided and declared that the second party or their foresaids on contravening or not implementing all or any of the conditions, provisions, and others before written, or allowing two years' feu-duty at any time to remain unpaid, shall, in the option of the first party and their foresaids, amit, lose, and tyne all right and title in and to the said lands, or the part thereof in respect of which such contravention or non-implement shall occur, and the same shall revert and return to the first party or their foresaids free and disburdened of the said feu-right and all following thereon, without the necessity of any declarator or process of law for that effect: All which exceptions, reservations, declarations, conditions, servitudes, and others before written, are hereby declared to be essential qualifications of this feu-right, and real liens and burdens and servitudes upon the said plot of ground before disponed, and the proprietors thereof for the time being, and are appointed to be engrossed *ad longum* in the Register of Sasines at the registration of these presents, or in any instrument of sasine or notarial instrument to follow hereon or in any respect hereof, and to be engrossed or validly referred to in all subsequent conveyances, transmissions, and investitures of the premises, otherwise these presents and said deeds and writings and all following thereon shall, in the option of the first party and their foresaids, be void and null."

Entry was to be as at 15th March 1875.

The feu-contract further stipulated that the ground thereby disponed was to be held by the second party and their foresaids of and under the first party as immediate lawful superiors thereof in feu-farm, fee, and heritage forever for the yearly payment to them of £366, 15s. 11d. sterling of yearly feu-duty, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said feu-duty at the term of Whitsunday 1877 for the half-year preceding that term (no feu-duty being payable for the period prior to