agreement [narrated *infra*]. This agreement was not disclosed to the public, and in particular the appellant had no knowledge of it. *Third* and alternatively: As the 31st section of the Act 1 Vict. c. 41, provides that this Court may remit the cause to the Sheriff for 're-hearing generally,' and as there has here been a miscarriage of justice and incompetent procedure, this Court ought to sustain the appeal, and remit the cause to the Sheriff, with instructions to re-hear the same, and dispose thereof as may be just. The Sheriff-Substitute, in giving decree in favour of the respondent against the appellant for a debt which the appellant did not contract to the respondent, and in the face of a larger counter claim by the appellant against the said Edmund Mann, pursued an irregular and incompetent course, and this appeal should be sustained and the decree recalled."

The appellant therefore prayed the Court to sustain the appeal, to recal the decree complained of, to assoilzie the appellant from the conclusions of the summons, &c., or otherwise to order a re-hearing.

Argued for appellant—The Sheriff-Substitute had decided in the absence of any evidence of contract between the parties. The account disclosed none, and the appellant denied any. The case was one for re-hearing under sec. 31 of the Small Debt Act 1837.

Replied for respondent—The appellant had disclosed no relevant ground of appeal.

At advising—

Lord Justice-Clerk—This is a rather complicated matter. I do not want to express any opinion as to whether or not the proceedings were regular, for the real question at issue seems to be one of fact, namely, whether the counterclaim of the appellant, which could have been set off against the former account of Mann, can be set off against the subsequent account of Spence, who was no doubt acting with a view to keeping the old customers of the business, though I think he would have acted more prudently if he had omitted Mann's name from his circulars. But that brings the matter to a narrow issue. If the customer was not entitled to think he was dealing with Mann, he is not now entitled to set off his claim against Mann against Spence's account. But that is a question of fact on which we have no evidence, and without the determination of which we cannot decide the case. I think therefore that the proper course is to send the case back to the Sheriff in order that the truth may be ascertained in evidence before him.

Lord Young—I also think it would be satisfactory, and indeed necessary, to have evidence in this case. What is necessary to the decision of the case is evidence which will prove a contract or the absence of a contract between Bryce and Spence, and there is no such evidence here. The pursuer necessarily avers a contract between Bryce and himself. That is *prima facie* a question of fact, though it may now be a question of law. Bryce says he made no contract with Spence, but did make a contract with Mann. Now, the determination of the question whether the contract was with Mann or Spence is necessary to the decision of the case. The agreement of Spence and Mann is a singular one. I should say it was intended to invite customers to deal with Spence in the notion that they were dealing with Mann, and increased probability is given to that view of it by the circular issued by Spence. If that was issued by Spence, he putting forward Mann as a principal to invite contracts with himself, and a contract was made with Mann by a customer who knew nothing of Spence, I should say in a question with Spence that must be dealt with as a contract with Mann and not with Spence, whatever might be the term of the agreement between Mann and Spence, and if the customer had a good set-off as against Mann it would be good against the claim of Spence.

I therefore agree in the course suggested by your Lordship.

Lord M'Laren—I agree with your Lordships. The question on which the decision of the case depends is whether the appellant ordered the goods from Mann or Spence—in other words, whether he dealt with Mann as a principal or as the agent of Spence. In the ordinary case a person going to a shop and ordering goods is understood to deal with the master of the establishment, and cannot get off on an allegation that he gave the order to the principal salesman or other person in charge and understood he was dealing with him as a principal. But the peculiarity here is that Mann, who is apparently Spence's assistant, had his name on the brass plate on the shop door. If that was a circumstance fairly justifying the appellant in thinking that Mann was carrying on the business in his own name, and if the Court took that view, then his contract was made with Mann and not with Spence, and he would be entitled to plead his set-off. But we cannot entertain the question because we have no evidence.

The Court remitted the cause to the Sheriff-Substitute for re-hearing.

Counsel for Appellant—Brand. Agent—David Barclay, Solicitor.

Counsel for Respondent—Strachan. Agent—Peter Douglas, S.S.C.

HOUSE OF LORDS.

Monday, June 29.

(Before Earl of Selborne, Lord Watson, Lord Blackburn, Lord Fitzgerald).

SANDEMAN *v.* SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY AND LIQUIDATORS, AND OTHERS.

(*Ante*, vol. xx. p. 400, Feb. 21, 1883.)

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

Held (*rev.* judgment of Second Division) that when a feu right is irritated *ob non solutum canonem* (whether by virtue of an irritant clause in the feu right or under the Act 1597, c. 250) the right of a sub-vassal to whom the defaulting vassal has granted a sub-feu falls under the irritancy.

Cassels v. *Lamb*, March 6, 1885, *ante*, p. 477, and 12 R. 722, *approved.*

This case is reported in Court of Session *ante* vol. xx. p. 400, and 10 R. 614.

The pursuer Mr Sandeman appealed.

At the argument their Lordships had before them together with the Cases for the parties the opinions of the whole Judges of the Court of Session in *Cassels* v. *Lamb*, cited *supra.*

At delivering judgment—

Lord Watson—My Lords, in disposing of this appeal from the Second Division of the Court of Session, your Lordships have had the advantage of considering the opinions delivered in the subsequent case of *Cassels* v. *Lamb* (12 Sess. Cas. 4th Series, p. 722), which was decided by the First Division after consultation with the whole Court upon the 6th of March 1885. All the Judges were of opinion—and it does not appear to me to admit of doubt—that the point arising for decision in the two cases was precisely the same. In this case the Lord Ordinary (Lee) and three of the Judges of the Second Division—Lord Rutherfurd Clark dissenting—rejected the pleas urged by the appellant; and in *Cassels* v. *Lamb* they adhered to their former opinions, with the concurrence of Lords Deas and Fraser, whilst three of the Judges of the First Division and three Lords Ordinary agreed with Lord Rutherfurd Clark that the present case was not well decided, there being thus a majority of one in favour of the argument which has been addressed to your Lordships for the appellant. Accordingly the First Division in *Cassels* v. *Lamb* pronounced a judgment which is in direct conflict with the interlocutors under appeal, and it is for your Lordships to determine which of these decisions is right.

Since the passing of the 20th George II., chapter 50, all lands in Scotland (save burgage holdings and a few allodial possessions) have been held in feu-farm from the Crown or from subject-superiors. That Act abolished the military tenure of ward, converting ward into feu holdings, and substituting in the case of land held of the Crown a blench duty, and in the case of lands held of subject-superiors an annual rent or feu-duty, to be modified, failing agreement, by the Court, for the prestations and casualties peculiar to ward holding. In the opinions of some of the Judges composing the minority in *Cassels* v. *Lamb* there is much learned discussion regarding the origin and early history of feu rights, their resemblance to the Roman contract of *emphyteusis*, and other cognate matters; and it seems not to be doubtful that these rights were not, strictly speaking, part of the old feudal system, although they had a recognised existence in the law of Scotland for centuries before the final abolition of military tenure. These investigations are of great antiquarian interest, but they do not in my opinion throw much, if any, light upon the present state of the law.

The effect of progressive legislation upon the position and interests of a superior of lands in Scotland is thus concisely stated by the late Mr Duff, one of the most accurate of recent writers on conveyancing—"The *dominium directum* or superiority which in the ages of personal military service was the more eminent right is now in substance reduced to a mere security over the lands for a yearly payment by the vassal, and a fine or grassum on the renewal of the investiture, fortified by an express or implied irritancy" (Duff's Feudal Conveyancing, section 39). All the institutional writers, from Lord Stair downwards, are agreed that the annual *reddendo* payable by the feuar is a *debitum fundi*, or, in other words, a debt in which the superior is creditor, forming a charge upon the *ipsa corpora* of the lands feued. That debt is not in any proper sense a burden upon the feuar's right; it represents the estate or real interest of the superior in the lands, and it stands upon his own sasine and not upon his vassal's infeftment. The feu-charter by virtue of which the vassal becomes vested in the *dominium utile* does not constitute but limits the estate of the superior; and consequently the superior's *reddendo*, which is in substance a real right reserved to the superiority out of the lands feued, is a heritable estate or interest in the lands paramount to the estate of the vassal.

In the case of modern feus the annual rent or feu-duty reserved by the superior almost invariably represents the whole or a portion of the price in consideration of which he dispones the *dominium utile* to his feuar. The appellant in the present case, by a contract of feu dated and recorded in February 1876, disponed in feu-farm to Stiven and Gibson, five or thereby acres of building land in Dundee, with an annual *reddendo* of £480 sterling, which at 22½ years' purchase, the ordinary rate of conversion, was equivalent to a capital sum of £11,800. At the time when the appellant brought his action the feu-duties payable to him were in arrear to the extent of £2088, or upwards of four years' annual payments.

It has not been disputed, either by the Bench or at the bar, that had Stiven and Gibson retained the land thus feued to them in their own hands, the security of the appellant for these arrears as well as for future duties would have extended to each and every part of the *corpus* of the land, and that the appellant would have had his remedy against the land either by poinding of the ground or by declarator of irritancy *ob non solutum canonem.* But Stiven and Gibson made two sub-feus of portions of the five acres, one of 22 poles 18¾ yards, for an annual *reddendo* of £22, 12s. 4d., and another of 32·73 poles for a *reddendo* of £32, 14s. 7d., the *reddendo* being in both cases at a somewhat higher rate per square yard than the feu-duty reserved in the original feu-contract with the appellant. The respondents in this appeal are now in right of these two sub-feus; and their contention (to which effect has been given in the interlocutors of the Lord Ordinary and the Second Division) is that the appellant's remedy by declarator of irritancy can no longer have effect against the portions of land sub-feued, but must be confined to the two mid-superiorities created by his immediate vassals.

The legal propositions for which the respondents argued appear to me to amount in substance to this, that the character of the superior's reserved right undergoes a radical change whenever the vassal, instead of disponing, sub-feus the land without the superior's consent; that the superior's right of irritancy for non-payment of his *reddendo* then ceases to attach to the lands which he feued, and attaches only to the mid-superiority created in the person of his vassal;

and consequently that the superior cannot, in satisfaction of arrears of feu-duty, recover the lands themselves, but must content himself with annulling the mid-superiority, and so becoming the immediate superior of the sub-feuar, with a right to the *reddendo* stipulated in the title of the sub-feu. No doubt these propositions were qualified by the condition that the sub-feu in order to be effectual against the prime superior must be for "a competent avail." But what is "a competent avail?" As I understand the words, they signify an annual rent or duty fairly representing the value of the land at the date of the sub-feu. But it is obvious that owing to a fall in the market or to local causes the land may be of less value at the date of the sub-feu-right than when it was originally feued, and in that case the "competent avail" payable by the sub-feuar will be less than the original *reddendo*. Moreover, there being no privity of contract between the prime superior and the sub-feuar, the latter may pay to the mid-superior, although the *reddendo* due by him to the overlord is still unpaid, so that practically the overlord might lose all real security for his arrears. If Stiven and Gibson had, immediately after they obtained their feu-right in 1876, sub-feued the whole five acres to A, with a *reddendo* of £480 per annum (which would then have been a competent avail), and A had made regular payment to his superiors, the appellant would, according to the judgment in this case, have had no real security for the £2088 of arrears due to him—at least a decree of declarator of irritancy *ob non solutum canonem* would only have given him a future right to receive £480 per annum from A instead of his original vassal whose right of mid-superiority was annulled, his claim for arrears being thereby extinguished.

I have been unable to find in the law of Scotland either principle or authority upon which these propositions can be supported. It is conceded by the Judges who decided this case, and those who in *Cassels* v. *Lamb* agreed with them in opinion, that there is no express authority for holding that a superior insisting for a decree of irritancy must take back the lands which he feued out, subject to all base rights granted by his vassal, to which he was not a consenting party. In affirming that to be the law, it humbly appears to me that their Lordships have ignored the true character of the superior's right as a preferable right affecting the lands, as well as the true nature of his remedy by declarator of irritancy.

The character and extent of the superior's right of preference is thus accurately defined by Mr Bell:—"The superior has, by means of his real right in the lands, a preference over purchasers and creditors in voluntary and judicial sales and in rankings of creditors. It extends over the whole lands feued, though divided in sub-feuing or on sale, each owner or sub-feuar having relief against the others for excessive payment" (Bell's Principles, sec. 697). In my opinion it is settled law, and it has not in this case been controverted, that in the event of a sale of the *dominium utile* by the creditors of a sub-feuar, the appellant would have been entitled to rank preferably upon the price realised for the full amount of the arrears due to him, leaving the selling creditors to seek their relief against their debtor's immediate superior, or against the other sub-feuars or disponees. That does not necessarily establish the right of the appellant to annul the sub-feu-rights when an irritancy has been incurred by his own vassal, but it does show conclusively that notwithstanding the granting of sub-feus the appellant's *cumulo* feu-duty continued as before to be a first charge upon the land itself, and not merely a charge upon the mid-superiorities.

In *Cassels* v. *Lamb* (12 Session Cases, 4th series, p. 748) the Lord Justice-Clerk (Moncreiff) said—"I have only to repeat that the question now considered leaves the superior's ordinary feudal remedies for recovering his feu-duties out of the whole territory of the original grant entirely untouched. No such matter is involved in the present demand, nor indeed could be." The noble and learned Lord rightly states that no other remedy than tinsel of the feu could be demanded by the appellant in this action; because it has long been matter of express judicial decision that a superior who takes a decree of irritancy thereby passes from all claim for arrears of feu-duty. But it may be useful to consider what means the superior may, according to the law of Scotland, use for recovery of this feu-duty out of the territory of the original grant when it has been in whole or part sub-feued.

According to Lord Stair, "the superiority carrieth a right to the duty of the *reddendo* really against the ground of the fee, for which he hath action of poinding of the ground against the vassal and all successors to him whereby he may apprise the goods upon the ground, or the ground right and property of the lands, the said duties being liquidate, upon repayment whereof the lands are redeemable as in other apprisings" (Stair's Institutes, book ii, title 4, sec. 8). By obtaining a decree of poinding for the arrears in question the appellant could have swept away all moveables belonging to the respondents which might at any time have been upon their land; and if any part of their sub-feu, whether consisting of lands or houses, had been let to tenants, then he could by his attachment of their moveables have recovered the full amount of the rents payable by the tenants to the respondents until his arrears were fully paid. In early times a summons of poinding of the ground contained a conclusion "for apprising the ground-right and property of such portion of said lands as is equivalent unto the said resting feu-duties" (Stair's Institutes, book iv., title 23, sec. 10). The competency of using that remedy after the Act 1672, chap. 19, had introduced adjudications in place of apprisings was doubted by Lord Stair (Inst., book iv., title 23, sec. 8), and it has long fallen into disuse; but I see no reason to doubt that a superior instead of apprising may now adjudge the land for payment of arrears of feu-duty, because an adjudication of the land which is affected by it may be led upon every debt which is a *debitum fundi*. Mr Duff states expressly that "adjudication of the *dominium utile* is competent for arrears of feu-duties" (Feud. Conveyancing, sec. 56, 5); and Mr Bell in his Commentaries (5th ed. vol. i., pp. 715, 716) makes the same statement of the law.

The superior has another, and what has hitherto been considered his most effectual remedy for non-payment of his feu-duties, in the action of irritancy *ob non solutum canonem*. Mr Erskine (Institutes, book ii., tit. 5, sec. 13) speaks of this irritancy as "the only casualty, or

rather forfeiture, proper to feu-holdings," but it is in no sense a feudal casualty, and is more correctly described by Mr Bell (Prin., sec. 697) as one of the means the superior has of compelling payment of his feu-duties. The legality of a stipulation to the effect that the vassal should forfeit his feu to the superior by failure to pay his feu-duty appears to have been recognised from the earliest period, and the Act 1597, chap. 250, provided that the vassal shall lose the feu of his lands by his failing to pay the feu-duty for two years together in like manner as if an irritant clause to that effect had been inserted in his infeftment of feu-farm. I am inclined to think that the Act must have been declaratory of the law from its own terms, and also because, so early as the year 1525, it had been decided by the Court in the case of an ecclesiastical feu that if the feuars, or any of their heirs or successors, ceased by the space of two years to make payment of any part of the feu-duty contained in their charter and infeftment, they were liable to have their feu-right reduced at the instance of the superior, "albeit na sic special provision be made thereanent in the chartour or infeftment." —*Abbot of Cambuskenneth* v. *Ramsay*, Morison's Dictionary, p. 7179.

In this case the original feu-right granted by the appellant to Stiven and Gibson contains an express declaration "that in case at any time two years' feu-duty shall be fully resting-owing and unpaid together, then this present feu-right, and all that may follow hereon, shall, in the option of the superior, become void and null." If that condition had been less severe than the irritancy, which is made an implied condition of feu-rights by the Act of 1597, it would have superseded the statutory condition, as was decided in *Lady Barholm* v. *Dalrymple* (27th November 1750, Morison's Dictionary, 7187). But I am of opinion that the irritancy stipulated in the feu-contract of February 1876 is in substance and effect the same as the irritancy provided by 1597, chap. 250. I do not think that the words "and all that may follow thereon" add to the scope and force of the irritancy. On the contrary, they appear to me to leave it to the law to determine how far rights derived from the immediate vassal by singular successors including sub-feuars are involved in the extinction of his feu-right, and I am accordingly of opinion that the present case must be dealt with and decided as if the appellant was seeking to have an irritancy declared under the provisions of the Act of 1597.

The preamble of the Act, which sets forth the damage which His Majesty and the lieges of the realm sustained through "evill and untimous payment of the feu dewties of their lands," plainly shows that it was the purpose of the Legislature to secure to superiors a stringent remedy for non-payment of these duties. Then it is enacted that the defaulting vassal is to amit and tyne his feu "conform to the civill and canon law." The remedy given to the overlord against the "conductor" or "emphyteuta" by the civil law in the event of his failing for three years, and by the canon law in the event of his failing for two years, to pay his annual tribute, was a right of re-entry upon the lands. In these events the civil law (Cod. lib. iv., tit. 66, sec. 2) authorised the overlord "eum a prædiis emphyteuticariis repellere," and by the canon law ecclesiastical houses were empowered (Nov. 120, cap. 8) "et antiquam statum locatæ sive emphyteuticæ rei exigere, et ejicere de emphyteusi, sive de locatione, non valentem de emponematis actionem aliquam contra venerabiles domos movere." And it may not be out of place to observe here that by the civil as well as by the canon law the "conductor" or "emphyteuta" could always protect himself against forfeiture of his right *ob non solutum canonem*, and maintain his possession under it by making prompt payment of all arrears due by him.

In my opinion, the remedy which a superior has by virtue of an irritancy implied in terms of 1579 c. 250, or a conventional irritancy of the same import, is a right to annul the charter and infeftment of his feuar, and all that has followed thereon, to the effect of resuming the full beneficial possession of the lands feued, unless the arrears of his feu-duty are at once paid to him, either by the feuar himself or someone deriving such right from the feuar as gives him a legitimate interest to purge. I may refer to Montgomery Bell's Lectures on Conveyancing (vol. ii, page 585) as illustrating the opinion entertained by those who were conversant with the practice followed in these matters. He says, "The object of the statute is to give him (*i.e.*, the superior) back the lands in case the vassal shall fail to pay the feu-duty, that is, to fulfil the conditions on which he holds them." The appellant would only have been using the remedy competent to an ordinary creditor in a *debitum fundi* if he had proceeded to adjudge the whole five acres upon which his feu-duty is preferably charged for the arrears due to him. In that case he would, after obtaining and recording his decree of adjudication, have entered into possession of the subjects, and would have applied the balance, if any, of the rents and profits remaining after payment of preferable yearly burdens, including his own feu-duty of £480, in reduction of his debt of £2088. At the end of ten years, if his debt were not then satisfied, he could have converted his recorded decrees of adjudication into an absolute and irredeemable title of property, by taking a decree of declarator of expiry of the legal. Until that decree was pronounced, his right would remain subject to redemption. Now, it humbly appears to me that the legal effect of the statutory or any similar irritancy is simply to give the superior, who is a preferable creditor for a *debitum fundi*, an absolute right to the lands upon which it is secured, if the debt be not paid before decree of tinsel, instead of leaving him to follow the remedy which any creditor for a preferable *debitum fundi* though not a superior might have obtained by means of an apprising or adjudication. As Lord Balgray said, in the *Magistrates of Edinburgh* v. *Horsburgh* (12 Shaw, page 597), an action of declarator of tinsel of the *feu ob non solutum canonem* is "just an irredeemable adjudication of the feu in favour of the superior."

I can discover no satisfactory principle for holding that any of the superior's remedies for the recovery of his *cumulo* feu-duty out of the entirety of the original feu are impaired by the fact of sub-feus having been created, to which he was not a consenting party, and which he has not confirmed. The superior can poind the ground, he can adjudge, he has a first claim on

the price of the land, whether arising from voluntary or judicial sales, and that without the least regard to the existence or to the interests of the sub-feuars. The considerations in respect of which these remedies against the land upon which his feu-duty is charged are permitted to the superior seem to me to apply with equal force to his remedy by declarator of irritancy. The sub-feuar is liable to eviction by these means, because the paramount interest of the superior entitles him to attach the lands for payment of his feu-duties in preference to the original vassal, and all who derive rights from him, and I can find no authority for holding that the right of the superior must be subordinated to that of the sub-feuar when he seeks to adjudge the land irredeemably by means of a declarator of tinsel. The sub-feuar can in all cases protect himself from eviction by paying the superior's preferable debt, and when he does pay for his own protection, he has a claim of relief *pro rata* against all other owners of the land upon which that debt is charged, as well as against his own immediate superior.

It is said, however, that there is not a single example in the books of a demand being made by a superior for the irritancy of a sub-feu-right because of the failure in payment of his immediate vassal. The fact that there has been no judicial decision or even controversy upon such a point appears to me to indicate that the law has all along been understood to be settled one way or another; but I do not agree with the observation of the Lord Justice-Clerk that "we may assume that the absence of precedent implies the absence of right in such a matter" (see this case, 10 Session Cases, 4th series, p. 622). My reasons for rejecting that inference are mainly these,—that the prime superior's feu-duty is a real debt preferable to the right of the sub-feuar; and that there is no authority whatever to be found for the proposition that the superior cannot reach the land in the possession of a sub-feuar by means of a declarator of irritancy, although he can do so by poinding or adjudication; whilst on the other hand there are expressions of judicial opinion to the effect that the superior's remedies for recovery of a *cumulo* duty cannot be affected by his vassal dividing the feu or sub-feuing portions of it; and lastly, that the power of the prime superior to irritate their rights because of the default of his vassal and their author appears to me to have been conceded without dispute by sub-feuars.

In *Wemyss* v. *Thompson*, January 29, 1836, 14 S. p. 233) a superior feued out a block of building ground, prohibiting subinfeudation, and stipulating that his vassal's disponees should hold of himself, but without coming under an obligation to allocate the feu-duty. The vassal built houses, and conveyed them to different proprietors, with a declaration that each should hold of his superior for a yearly sum, being a proportion of his original feu-duty. Upon these proprietors taking out charters the superior inserted in each an obligation for payment of the whole feu-duty. To this the disponees objected, but the Court held that the superior had the right to do so, but that they were entitled to have a clause inserted in their feu-charters binding the superior to grant an assignation at their expense to the effect of enabling them to recover from their co-feuars whatever sum might be exacted from them beyond their own just proportion of his *cumulo* feu-duty. Lord Glenlee said—"The possessions in question are portions of an entire subject not separated by any act of the superior, and I can see no solid difference between buildings such as this and lands. The Crown has the right to claim against anyone who has part of the tenement, who is entitled to recover from his co-vassals, and a subject-superior must have the same right."

Again, in *Gilmour* v. *Balfour*, June, 22, 1839, 1 D. 403, a vassal subfeued various portions of his feu, and thereafter granted two separate heritable securities covering the whole feu, one of which included all the sub-feus. The only question before the Court related to the proportions in which the heritable creditors who had entered into possession ought to pay the *cumulo* feu-duty prestable to the superior. In dealing with that question Lord Jeffrey said—"The right of the superior is not here in question, but is admitted to be catholic, universal, and overruling against all the present parties. He takes no cognisance of any division which may have been made of the subject for which he has stipulated a *cumulo* feu-duty, and never can be affected by any such division. He can come for the whole upon the holder of the smallest portion."

The subsequent case of *Beveridge* v. *Moffat* (June 9, 1842, 4 D. 1381) appears to me to have a very important bearing upon the point which your Lordships have to decide. There the vassal, who held for a *reddendo* of £120, sub-feued the whole property to different individuals for feu-duties amounting in the aggregate to the original *reddendo*, and thereafter became bankrupt, being at the time in arrear to his superior to the extent of six years' feu-duties. With the view of saving their own and the other sub-feus from threatened forfeiture, two of the sub-feuars paid up these arrears to the prime superior, and also purchased the mid-superiority from the trustee in the vassal's sequestration, and the action was brought by them against Beveridge, who had acquired one of the sub-feus, for the purpose of compelling him to contribute his proportion along with the other sub-feuars. The case was ultimately decided on the ground that Beveridge had acquiesced in and adopted the steps taken by the sub-feuars for the common behoof; but it must be observed that whilst Beveridge denied acquiescence and disputed his personal responsibility, he did not dispute that his sub-feu might have been evicted by the prime superior or his assignees. The Lord Ordinary (Cunninghame) in his note says—"When the prime superior's claim against the sub-feuars and their properties emerged in 1829 on the bankruptcy of Grant (the mid-superior) it was clearly their interest to save their properties from forfeiture. The prime superior could undoubtedly have instituted an action for irritancy *ob non solutum canonem* against all the sub-feuars without regard to their settlement with the mid-superior, and Moffat and Grant (sub-feuars), as assignees of Gavin (the prime superior), could have taken a similar step. But the defender superseded such a process by specially agreeing to pay his proportion of the arrears." Lord Medwyn also speaks of the steps taken by the sub-feuars to satisfy the prime superior's claim for arrears as "agreed upon to save the forfeiture of their feu-rights." None of

the other Judges refer to the subject of forfeiture, but it is hardly conceivable that they would have permitted the language of the Lord Ordinary to pass without observation if they had thought that it would have been contrary to law and practice to permit the superior to annul these sub-feu-rights, and they all deal with the arrangements for payment of the arrears due to the prime superior as having been prudently made for the general behoof.

The principle which runs through these authorities is, that neither the security of the superior for his *cumulo* feu-duty nor his remedies for its recovery can be impaired by the act of his vassal. That principle can of course have no application in cases where the superior himself has either been a consenting party to subinfeudations by his vassal or has subsequently confirmed the base rights of the sub-feuars. He cannot repudiate his own act although he is not affected by the mere act of his vassal. According to Erskine (Inst. book ii. tit. 7, sec. 8) the confirmation of a base right by the prime superior effectually secures the sub-vassal against all casualties "which entirely exhaust the property," although it cannot be explained into a renunciation of those casualties which infer only a temporary right to the rents. The appellant's counsel did not argue, and I do not think it could be reasonably maintained, that a superior who has been a party to or has confirmed a charter of sub-feu granted by his vassal is not thereby barred *personali exceptione* from annulling the sub-feuar's right by declarator of tinsel in respect of his immediate vassal's failure to pay his *reddendo* for two years together.

The majority of the learned Judges who decided this case in the Inner House seem to have been of opinion that the appellant must be held to have consented to the sub-feu-rights now vested in the respondents. Although a plea to that effect is stated for the respondents in their defences and also in their cases, it was not very seriously insisted in by their counsel, and I do not think any of your Lordships were of opinion that it was in the circumstances of this case maintainable. All that the appellant did was to stipulate in his original charter to Stiven and Gibson that certain conditions therein expressed should constitute real burdens, not only upon their right, but upon the rights of their assignees, and should for that purpose be inserted or validly referred to in all transmissions or investitures of the piece of ground hereby disponed. The respondent's feu-rights, to which the appellant was not in any sense a party, derive their validity, not from any consent of his, but from the law, and the Act of 1874 (37 and 38 Vict. c. 94, sec. 4), which confers upon the respondents certain privileges as to the completion of their title, expressly reserves to all superiors the rights and remedies previously competent to them for recovering their feu-duties and for irritating the feu *ob non solutum canonem*.

The opinions of the learned Judges who in this case and in *Cassels* v. *Lamb* favour the contention of the respondents are to a great extent rested upon the supposed analogy of irritancy *ob non solutum canonem* to forfeiture of a feu for treason, and to the superior's claim for a year's rent by way of composition for the entry of a singular successor. The authorities in regard to forfeiture for treason, which is not purgeable, when carefully examined do not appear to me to yield any inference favourable to the respondents, and in my opinion the principle upon which a *reddendo* fairly representing the value of a sub-feu at the time when it was given off was held in *Cockburn Ross* v. *Heriot's Hospital* (6th June 1815, F.C., *aff.* 2 Bligh 709) to be the rent at which the land has been set for the purpose of estimating the year's maill payable to the superior, in terms of 1469, chapter 12, has no bearing whatever upon the question now before the House. But it is quite unnecessary to explain in detail the considerations which have led me to that conclusion, because these are fully expressed in the opinion delivered by Lord Rutherfurd Clark in this case and in *Cassels* v. *Lamb*, and by Lords Kinnear and M'Laren in *Cassels* v. *Lamb*.

I desire to say, however, that I have not been able to appreciate certain difficulties, said to arise from feudal principle, which seem to have been strongly felt by Lords Rutherfurd Clark and Kinnear. Had the appellant been barred *personali exceptione* from resorting to any remedy which would have the effect of exhausting the property of the respondents, he would have been bound as regards their sub-feus to limit the conclusions of his action to his vassals' mid-superiorities. The effect of that would have been that the mid-superiorities being irritated, or, in other words, adjudged irredeemably to the appellant, he could either have held them as separate estates or consolidated them with his own superiority, and in either case he could only have demanded from the respondents the feu-duties stipulated in their charters. Such a result does not appear to me to do violence to any feudal principle, and I apprehend that precisely the same result would have followed if it could have been shown that the respondents' sub-feu-rights are by law as effectually protected against his right of irritancy as if he had expressly consented to or confirmed them.

I am accordingly of opinion that the interlocutors appealed from ought to be reversed and the case remitted to the Court of Session, with a declaration that the appellant is entitled to have decree in terms of the conclusions of his summons against the respondents. In my opinion the respondents ought to pay to the appellant the expenses incurred by him in the Court below, since the 10th March 1882, as well as his costs of this appeal, and I move accordingly.

Earl of Selborne—My Lords, the conclusion at which I have arrived, at the end of the arguments in this case, was the same with that of my noble and learned friend, and I agree with the reasons for the judgment which has just been delivered.

On principle, and in the absence of positive law or authority to the contrary, it would have appeared to me to follow, from the very nature of a subordinate right like the feu in question, that it must be subject to the conditions on which the principal feu out of which it was derived was created. There is no positive law and no authority to the contrary.

Nor does it appear to me that any real hardship or injustice to the sub-feuar results from this

doctrine. He took his title with notice of the terms on which the principal feu was created, and he might have redeemed if he had thought fit to do so by payment of the arrear of feu-duties due to the superior. If he does not consider this for his interest, that cannot be a reason why the superior should suffer.

LORD BLACKBURN—My Lords, I listened during the learned arguments upon a subject with which I am not quite familiar, and I have read with great attention the judgments on the opposite sides. At the end of this I have come to exactly the same conclusion as has just been expressed by the two noble and learned Lords who have spoken before me. I do not think that there would be any benefit derived from my attempting to state in my own language the arguments which have been stated by those who are so much more conversant with the subject than I am, and therefore I content myself with saying that I agree in the motion which has been made by the noble and learned Lord near me (Lord Watson).

LORD FITZGERALD—My Lords, the very able and exhaustive reasons of my noble and learned friend (Lord Watson) for reversing the interlocutor of the Court of Session are to me full and convincing, and I do not propose to add a word save to express my satisfaction that the conclusion arrived at in this action of declaration of irritancy *ob non solutum canonem* indicates that in this respect the principles of Scotch law are in substantial accord with the law of England. For example, if in England or Ireland a grant had been made in perpetuity reserving a rent with condition of re-entry on non-payment, an action of ejectment at common law might be maintained on non-payment for condition broken, and be followed by results substantially similar to those in the present case. I concur in the judgment proposed.

The House reversed the interlocutor of the Second Division, and remitted the cause to the Court of Session, with a declaration that the appellant (pursuer) should have decree in terms of the conclusions of the summons.

Counsel for Pursuer (Appellant)—Asher, Q.C. —H. Johnston—C. Neish. Agents—Neish & Howell—Henderson & Clark, W.S.

Counsel for Defender (Respondent)—Davey, Q.C.—Strachan. Agents—Faithfull & Owen—Davidson & Syme, W.S.

COURT OF SESSION.

Friday, July 10.

FIRST DIVISION.

[Sheriff of Argyllshire.

COMMISSIONERS OF SUPPLY OF ARGYLLSHIRE *v.* CAMPBELL.

Property—Building Restrictions—Reservation in Feu-Disposition of Rights of Adjoining Feuars —Servitude of Light—Interdict.

In 1863 a feu-charter was granted of a piece of ground which was described as bounded by a lane on the north. It was an express condition of the feu that within three years from the date of entry certain buildings were to be erected on the ground, the plans for which were to be submitted to and approved of by the superior. The buildings were erected according to plans approved of by the superior, which provided not only an entrance from the main street, but also a door of access from the lane, and a window looking into the lane. In 1877 a feu-disposition was granted of the ground to the north, in which it was declared that the boundary on the south was the ground conveyed by the feu-charter of 1863. The subjects disponed included therefore the *solum* of the lane. This feu-disposition contained the following reservation—"But specially excepting and reserving the rights of the public, and reserving also to the adjoining feuars their right of access by the lanes and the whole rights and privileges which they at present possess in connection with the subjects above disponed." The clause of warrandice declared that "this warrandice shall apply to the *solum* of the lanes passing through the said subjects only in so far as the rights of the said public and of the adjoining feuars shall not be thereby predjudiced, which rights are specially reserved." The feuar to the north having proposed to build over the lane, leaving a pend under the buildings, the feuar to the south presented a note of suspension and interdict to have him restrained from doing so. *Held* that the door from the lane, and the window looking into the lane, were privileges reserved to the adjoining feuar in the title of 1877, that the proposed operations were an invasion of his rights, and interdict *granted.*

Question reserved, whether when a subject is described as bounded by a lane, that necessarily implies that a right of access to and from the subjects by the lane is thereby given?

By feu-charter dated 22d December 1863, Robert Macfie, Esq. of Airds and Oban, feued to the Commissioners of Supply of the County of Argyll a piece of ground in Argyll Street, Oban, measuring 60 feet or thereby in front of the street, and 53 feet in depth from west to east, bounded as follows, viz., "by the said street on the west, by a lane leading from the said street to the North Bridge on the north, and by the unfeued ground