tion; and the husband having been sisted, sustained the pursuer's title to sue.

Agent for the Pursuer—William Mason, S.S.C.
Agents for the Defender—Fyfe, Miller, & Fyfe, S.S.C.

Thursday, June 22.

FIRST DIVISION.

HON. CAROLINE GEORGIANA HOPE AND OTHERS *v.* STAMFORD ROBERT LUMSDAINE.

Superior and Vassal—Public Burdens—Relief—Retention. Circumstances in which it was *held* that a vassal, whose superior was bound to relieve him of all public burdens, was entitled to retain from arrears of feu-duties due the poor-rates of byegone years, not only of those for which the arrears of feu-duties were claimed but also of previous years, the feu-duties of which had been paid and settled long before.

The pursuers in this action were the trustees under the trust-disposition and settlement of the late George William Hope of Luffness, Waughton, Craighall, and Rankeillor, who had been in possession, as heir of entail, of these estates from the year 1838 to the date of his death, on 18th October 1863. The defender Stamford Robert Lumsdaine of Lathallan was the youngest son and heir of provision of the deceased James Lumsdaine, and heir of line of the deceased William Lindesay Lumsdaine of Lathallan, his eldest son. He also represented generally the said William Lindesay Lumsdaine. The defender and his predecessors were vassals of the said George William Hope in the lands of Bonnybank, part of the lands of Southern Callange, and also in the lands of Norther Callange, all included in the Barony of Craighall. The reddendo for these lands of Bonnybank and Norther Callange, payable to the superior, was a certain sum of money, a quantity of victual, together with certain kain hens and carriages, which had all been in use to be commuted for a money payment, though the superior and vassal were not exactly agreed about the rate of commutation.

For the years 1856 to 1858, while the lands were in possession of William Lindesay Lumsdaine, and for the years 1859 and 1860, while they were in possession of his trustees, and also for the years 1861 to 1863, while they were in possession of the defender, the pursuers, as trustees of the said George William Hope, the superior, claimed arrears of feu-duties, amounting in all to about £260. The defender met this demand by a claim of retention of the sums paid by himself and his predecessors for poor-rates out the said lands from the year 1844 to the year 1863, amounting in all to about £220. He founded upon the following clause contained in the reddendo of his titles—"And it is hereby provided that the said Archibald Christie and his spouse (the original vassals in the lands) and their foresaids shall be bound and obliged to paie the whole cess and public burdens, they always having allowance thereof in the first end of the foresaid feu-duty yearly at clearing." This clause was continued throughout the whole progress.

The point practically at issue between the parties was in regard to the defender's claim of retention. The pursuers, while admitting that poor-rates were to be considered among the public burdens covered by the clause of retention in the charter, contended that the defender's right only extended to the retention of each year's poor-rates out of that year's feu-duty, and that there could be no claim for the poor-rates of back years, the feu-duties of which had been paid; and consequently, that though the defender had a right of retention of the poor-rates for the years 1856 to 1863 out of the feu-duties for those years, arrears of which were sued for, he had no claim of retention for the poor-rates of the years 1844 to 1855, the feu-duties of which had been paid.

The defender maintained that he was not only entitled to retain for the years 1856 to 1863, but also for the years 1844 to 1855.

The Lord Ordinary (JERVISWOODE) pronounced an interlocutor, of which the following part applied to this point—"Finds first, as respects the claim made by the defender for allowance and repetition from pursuers, as trustees and executors of the superior, the deceased Mr George William Hope, of poor-rates stated to have been paid by the defender's predecessors, as owners of the lands of Norther Callange, for the years 1844 to 1855 inclusive, but not demanded by or allowed to them by Mr Hope at the dates of settlement of the feu-duties for these years, and still remaining unpaid—that the said claim is not barred by prescription or otherwise, and that the defender is entitled, on instructing the amount thereof by production of sufficient vouchers of payment, to retain the same from such balance as may be found to be due by him in the present action; but finds, in respect of the failure on the part of the defender's predecessors to claim allowance for said poor-rates annually on settling the feu-duties as provided by the titles, that he is not entitled to interest upon the amount of said poor-rates prior to the date of citation in the present action, from which date finds him entitled to interest thereupon."

Against this finding of the Lord Ordinary the pursuers reclaimed.

ADAM for them.
MARSHALL for the respondents.
At advising—

LORD PRESIDENT—This action is raised for the recovery of arrears of feu-duty against the vassa in the lands of Norther and Souther Callange, and these arrears extend from 1856 to 1863. The action is met by several defences, with none of which however have we anything to do at present, except one. That defence is a claim of retention or compensation, for I am somewhat doubtful as to the proper technical term to be applied. The defender alleges that he and his predecessor in the feu, whom he represents not merely in the feu but also universally, were entitled to retain from the feu-duties all cess and public burdens, and among others poor-rates. It is not disputed by the superior that this is a good claim in general, and he is willing to allow retention from the feu-duty of each year of the poor-rates applicable to that year; but he denies the right of the defender to retain from the feu-duty of any year the poor-rates or other public burdens applicable to other years, for which he is claiming no arrears of feu-duty, they having been paid and settled long ago. The question in fact is, whether the defender is entitled to retain from the arrears of feu-duties for the years 1856 to 1863 the poor-rates, not for those years only, but also for the years 1844 to 1855.

Now, in one reading of the original feu-right it would be very difficult to admit this claim on the

part of the defender, because he undertakes in the first place to pay the whole public burdens, and all he has by way of relief is contained in the following words:—"he always having allowance thereof in the first end of the foresaid feu-duty yearly at clearing." Now these words occur in that part of the charter which provides for the *reddendo*. There are several items of *reddendo* in this charter, consisting of money payments, victual, kain, carriages, &c.; and all these are said to be due in name of feu-duty. Then occurs the obligation on the vassals to pay the public burdens, and the clause winds up, "they always having allowance thereof in the first end of the foresaid feu-duty yearly at clearing." Reading that clause strictly, the only right competent to the vassal is to deduct from each year's feu-duty the amount of public burdens paid for that year. But it is to be borne in mind that the burdens here undertaken by the defender were truly burdens on himself, as proprietor of the *dominium utile* of the lands, and not upon the superiors. The undertaking was only to pay what was properly his own debt; and the right he had secured to him, on the other hand, was a right of relief against the superior, who undertook to relieve him in the end of these payments. That is a very different sort of right. It is very difficult to understand how the vassal could have this right unless there was a corresponding debt incumbent on the superior. It is said that the vassal is only entitled to deduct from the first end of each feu-duty—that that is the measure of his right. I think, on the contrary, that these words are only added as a farther privilege, to enable him to operate his own relief, in terms of the obligation which the superior has undertaken. I think therefore that this clause is to be construed by implication, as an ordinary general obligation on the superior to relieve his vassal of all public burdens.

This practically puts an end to the whole case. It resolves into a question of debt between the superior and vassal. There is no prescription to cut off this debt, and the debt accordingly subsists. There being no technical objection raised to the form which the action has taken, and to the absence of certain parties, there is no reason why we should not give effect to it, when pleaded in compensation. I therefore think that the Lord Ordinary has done quite right in finding that this claim of retention is not cut off; but I also think he has done quite right in refusing interest upon these sums claimed to be retained, because it was the fault of the vassal that his right was not made effectual sooner.

There might have been something in the last argument submitted to us by the pursuers, viz., that the accepting of a charter of confirmation by the defender in 1855, cut off all claims previous to that year. If this charter of confirmation were in the ordinary form, it might have been inferred that all claims on the part of the superior had been settled, and in consequence it might have been contended that all counter claims on the part of the vassal for bygone poor-rates had been departed from. But unfortunately the terms of the charter itself negatives this, for it contains an express reservation of all claims of the superior to arrears of feu-duties. This therefore does not alter the question.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The Court adhered.

Agents for the Pursuers—Hope & Mackay, W.S.
Agents for the Defender — Tods, Murray, & Jamieson, W.S.

Friday, June 23.

BEVERIDGE'S TRUSTEES *v.* BEVERIDGE.

Partnership—Process—Relevancy. Averments *held* not relevant or sufficient to support an action invoking the interference of the Court in the affairs of a copartnery.

This was an action by the trustees of the late Erskine Beveridge against James Adamson Beveridge, manufacturer, Dunfermline. On the 24th October 1864 the truster, shortly before his death, entered into a contract of copartnery with his son, the present defender, to endure from 1st July 1865 to 19th March 1874. It was provided that in the event of Mr Erskine Beveridge's death during the subsistence of the contract the copartnery should continue, notwithstanding, as between his representatives or trustees on the one hand, and James A. Beveridge on the other. The contract contained the following clause:—"The books of the company, which shall contain all and every part of the affairs and transactions of the joint trade, shall be brought to a just and true balance at least once in every twelve months, and that at the 23d day of December in each year, and the profits or loss arising in the previous year's trade shall be shared by the parties in the proportions after mentioned."

The averments of the pursuers, and the conclusions of their summons, will sufficiently appear from the Lord President's opinion.

The Lord Ordinary (ORMIDALE) found that no relevant or sufficient grounds had been laid by the pursuers entitling them to insist in the present action, and accordingly dismissed the action.

The pursuers reclaimed.

The SOLICITOR-GENERAL and WATSON for them.

SCOTT for the defender.

At advising—

LORD PRESIDENT—The Lord Ordinary has dismissed the action in respect that no relevant or sufficient grounds have been laid by the pursuers entitling them to insist in the present action. The ground alleged by the pursuers is that they have been in partnership with the defender under a contract of copartnery dated 24th October 1864. In obedience to a clause in the deed, balance-sheets were made up for 1865 and the following years. The rest of the condescendence, in so far as it alleges any grounds of fact, is to be found in Article 9—"The said balance-sheets exhibit just and true balances of the affairs of the said copartnery of Erskine Beveridge & Company. The concern has been exceedingly prosperous, and large annual profits have been realised since 1st July 1865. The defender has from time to time drawn out of the business large sums to account of his fourth share of profits. But although he has been regularly furnished with the balance-sheets, the defender has hitherto declined to aid the trustees, or concur with them, in adjusting the same, according to the terms of the contract of copartnery, in order to fix and ascertain the amount of profits due respectively to him and to his father's trust, in consequence whereof it has become necessary to raise the present action." It is not alleged that the defender has drawn any sums to account not justified by the balance-sheets. It is not alleged