Wednesday, June 4.

SECOND DIVISION.

[Sheriff of Lanarkshire.

PRUDENTIAL ASSURANCE COMPANY *v.* CHEYNE.

Superior and Vassal—Feu-Duty—Maills and Duties, Competency of Action of, by Superior against Vassal's Tenant.

Held (*diss.* Lord Young) that an action of maills and duties at the instance of a superior against the tenants of his vassal whose feu-duty is in arrear, to have them ordained to pay these rents to him in place of to the vassal, is not a remedy competent to a superior.

By feu-contract entered into between Robert Cassels, ironmaster in Glasgow, and others, proprietors of Dowanhill, of the first part, and Alexander M'Neill, builder in Glasgow, and others, of the second part, dated and recorded in May and June 1875, Cassels and others disponed to M'Neill and others, and their heirs and assignees whomsoever, heritably and irredeemably, for a yearly feu-duty of £262, 10s. 10d. a plot of ground at Dowanhill, Glasgow, of the extent of 5600 square yards. After various transmissions Henry Cheyne, W.S., trustee of the deceased Miss Falconer, became vested in the *dominium utile* of certain portions of that ground, one of which portions amounted to 1632 square yards, another to 120 square yards, and another to 157 square yards. He acquired these portions of the ground by disposition from the Scottish Heritable Security Co. His title was merely a security title, and the debt due to him was subsequently paid, leaving the whole beneficial interest in the Scottish Heritable Security Co. In November 1881 the feu-duty under the original feu having fallen more than two years into arrear, Cassels and others raised an action of declarator of irritancy of the feu in the Court of Session. To prevent forfeiture of the feu the Prudential Assurance Company (Limited), who had become interested in the subjects as mid-superiors between Cassels and Cheyne of the portion of the feu amounting to 1632 square yards, paid to Cassels as superior £1011, 8s. 8d. in satisfaction of arrears of feu-duty, expense of roadmaking imposed upon the vassals by the feu-contract, and expenses of the action of declarator of irritancy. Cassels and others, as superiors of the feu, then granted to the Prudential Assurance Company an assignation of all rights and claims competent to them for recovery from the persons or out of the lands liable therefor, of the sum of £1011, 8s. 8d. paid to them.

The Prudential Assurance Company then raised in the Sheriff Court of Lanarkshire the present action of maills and duties against Cheyne as principal debtor, and forty-six other persons, tenants or occupants of houses on those portions of the ground in which he was vested as trustee foresaid. The pursuers craved the Court "to grant a decree against the above-named defenders, other than the said Henry Cheyne, ordaining them to pay to the pursuers the rents, maills, and duties of their several possessions of the subjects hereinafter described, and that during their possession thereof respectively, with interest thereof at the rate of 5 per cent. per annum from and after the respective terms at which the same are or shall become due till payment" (here followed a list of the tenants and the amounts of their rents), "or at least so much of the said rents as will satisfy and pay the pursuers the value of £1011, 8s. 8d. paid by them," being the arrears of feu-duty payable for the whole plot of ground of 5600 square yards.

The pursuers averred—"(Cond. 5) The houses and shops mentioned in the prayer of the petition are erected upon the plots of ground vested in the defender Henry Cheyne as aforesaid, and are liable in payment of the sum paid by pursuers. (Cond. 6) The pursuers are now desirous of entering upon the possession of the said subjects."

They pleaded—"(1) The pursuers being in right of the superiors of said ground, in virtue of the aforesaid assignation, are entitled to decree of maills and duties for payment of the arrears of feu-duty, interest, and expenses."

The action was defended by Mr Cheyne only, none of the tenants entering appearance. The defender stated that he was the vassal of Cassels and others only in one portion of the subjects (that extendtng to 920 yards), and further, that the feu-duty applicable thereto had been allocated thereon by the superiors conform to a letter produced. He averred that the pursuers were the vassals of Cassels in the plot of 1632 yards, and he himself their vassal; further, that he and the Scottish Heritable Society Co., who had the real interest, had been always ready to pay the feu-duty effeiring to the 920 square yards, and the sub-feu-duty and proportion of the feu-duty payable to the pursuers as mid-superiors of the plot of 1632 square yards, but denied liability for the proportion of the original feu-duty applicable to the remainder of the original feu.

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—"Finds that the defender Henry Cheyne is heritable proprietor of the lots of ground condescended on, forming part of a piece of ground extending to 5600 square yards 8 square feet, described in the condescendence; and that the other defenders (who are hereby held as confessed in respect they have failed to lodge a notice of appearance) are tenants of shops and houses in the said lots of ground under the said Henry Cheyne: Finds that the pursuers are in right of the superiors of the said 5600 square yards 8 square feet, conform to assignation in their favour, and that they are also mid-superiors of the said Henry Cheyne in a plot of 1632 square yards, forming part of the said piece of ground: Finds that the feu-duties payable to the said superiors are in arrear to the extent condescended on: Finds . . . that the pursuers, as coming in right of the superiors, are entitled to payment out of the rents of the said lots of the feu-duties effeiring to the whole piece of ground of 5600 square yards, and to have a decree of maills and duties, as craved, &c. . . .

"*Note.*—It is desirable to dispose, first of all, of the questions of law which arise upon the titles and admitted facts. [*His Lordship here explained the grounds on which he held that the defenders' contention that there had been an allocation of feu-duty could not receive effect*].

"2. The next question is, whether the superior is entitled to recover his feu-duties by an action

of maills and duties? This contention is founded on the recent case of *Sandeman* v. *Scottish Property Investment Company*, June 8, 1881, 8 R. 790. All that that case decides is that an over-superior has not a direct personal action for the whole *cumulo* feu-duty against a sub-vassal holding a part of the feu to the effect of compelling him to employ his whole means, wherever situated, in satisfying the demands of the superior. It does not decide that the subaltern estates in the sub-divided feu can be made available to the superior only by an action of poinding of the ground. It is said that an action of maills and duties is a personal action, and therefore that such an action against a sub-vassal, for anything beyond the amount of his sub-feu-duty, is excluded by this decision. But I can find no sufficient ground for holding that such a doctrine was contemplated by the Court. Although the institutional writers have not treated largely of the petitory process of maills and duties as one of the superior's remedies for recovery of his feu-duties, it has always been recognised in practice as one of these, it is often more convenient and less oppressive than poinding of the ground, and though it may be in a sense a personal action, being directed against the landlord and tenants for payment of money, it is a diligence for making effectual a real right, and is not a mere personal action requiring to be put in execution by further diligence as arrestment or personal poinding. It is only in that sense that the decision referred to excludes or limits the over-superior's right of 'personal action' against a sub-feuar holding a part of the feu; and it cannot be gravely argued that it reverses the ordinary practice of Scotland in regard to the diligence of maills and duties."

By a subsequent interlocutor the Sheriff-Substitute found that the pursuers were infeft as vassals of the proprietors of Dowanhill, and were mid-superiors of the defender Cheyne in the plot of 1632 square yards, and that the rateable proportion of the *cumulo* feu-duty amounting thereto was £76, 10s. 2d.; that the defender Cheyne was bound to relieve them as mid-superiors to the extent of £44, 13s. 7d., which sum was allocated on the plot of 1632 square yards as between the pursuers as mid-superiors and him; that the pursuers were in right of an additional feu-duty of £77, 15s. out of the said 1632 square yards, and were bound to apply that additional feu-duty in payment of the arrears of feu-duties for which the action was raised.

The defender appealed to the Court of Session, and argued—The action was incompetent. Maills and duties was not, in the practice of the law of Scotland, a remedy which a superior could put in force for non-payment of feu-duty against his vassal, or, still less, against his vassal's tenant. Only two writers on the law of Scotland gave it as a competent remedy for a superior—Hunter on Landlord and Tenant, ii., 350; Mackay's Practice, ii., 308. Stair (iv., 22, 7) enumerates the cases where maills and duties are competent, and this was not among them. So also Erskine (iv. 1, 49); *Scottish Heritable Security Company* v. *Allan, Campbell, & Company*, Jan. 14, 1876, 3 R. 333. The superior had granted away all his possessory rights in the ground, reserving only his right to feu-duty, which was indisputable, and for which he had ample remedy apart from this action. He had the remedy of poinding the ground, but he could not resort to a form of action which was one of displacing the proprietor and himself entering into and continuing in possession—rights which he had granted away and could not resume. No form of an action of maills and duties at the instance of a superior was to be found in any book of styles which showed that it was not recognised as a competent form. Neither was it mentioned by Stair or Erskine when they dealt with the subject of superiors' remedies—(Stair, *ut sup.*, and ii., iv., 12; Ersk., *ut sup.*, and ii., 5, 42; Ross Lect., ii., 439. If, as pursuer contended, he had a personal action against the vassal and tenants as intromitters, he had not chosen that form of action, and could not argue that in this case, and even if he could, the tenants could not be made liable as intromitters for arrears of feu-duties which fell due before they came into possession—Stair, ii., 4, 7, and iv. 3, 45; Ersk. ii. 5, 2; Bankton, ii. 4, 12; *Rollo* v. *Murray*, 1629, M. 4185; *Cockburn* v. *Trotters*, 1639, M. 4187; *Biggar* v. *Scott*, 1738, M. 4191; *Sandeman* v. *Scottish Property Investment Company*, June 8, 1881, 8 R. 790.

The pursuers replied—The action was competent because it was suitable and analogous to other remedies of the superior, and further, there was direct authority for it. The superior had really two grounds of action here—(1) a real right, and (2) a personal action. He had a real right to enforce the obligation for his feu-duty, which was a real burden on the land, at any link of the chain below him. He might sue any vassal or vassal's tenant, libelling his superiority—Duff's Feudal Law, 85; *Hyslop* v. *Shaw*, March 13, 1863, 1 Macph. 535; *Sandeman*, *ut sup.*, *per* Lord President, 794; *Henderson* v. *Wallace*, Jan. 7, 1875, 2 R. 272; *M. of Tweeddale's Trs.* v. *E. of Haddington*, Feb. 25, 1880, 7 R. 620; Moncrieff, 1630; M. 4185; Ersk. iv. 1, 10; Bell's Lect. 634. No doubt the pursuer had the remedy of poinding, but the one now sought was much simpler and more fitted to the present state of land tenure. There was no doubt of the personal action—Bell's Prin. 700. The tenants were here sued as intromitters authorised to intromit under their contract of lease with the vassal. No objection could be taken to the form of the action, for every action of maills and duties was at once both real and personal.

At advising—

Lord Craighill—This appeal brings up from the Sheriff Court of Glasgow an action of maills and duties, in which the Prudential Assurance Company are pursuers. The only defender who has appeared is Mr Cheyne, the vassal in one of the feus referred to on the record. The purpose of the action is to recover from the other defenders, the tenants of the subjects, the sums of rent specified in the prayer of the petition, the rents current when it was raised, and those thereafter to become due in satisfaction of feu-duties which were in arrears.

Several pleas in defence have been urged against the action, but that with which we are now concerned, as it is the only one on which parties have yet been heard, is the alleged incompetency of the action. The pursuers are the assignees of the superior of the feu; they plead in his right; and the defenders' contention is

that a process of maills and duties is not a remedy to which for the recovery of his feu-duties a superior, or a party suing on the rights of a superior, may resort. The Sheriff-Substitute by his interlocutor of 30th June 1883, which is the first of the judgments submitted to review, "Finds that the pursuers, as coming in right of the superior, are entitled to have payment out of the rents of the said lots of the feu-duties effeiring to the whole piece of ground of 5600 square yards, and to have a decree of maills and duties as craved." Both parts of this finding are appealed against, but the question of title to sue a maills and duties, as already explained, is the only matter now before us for determination. At the debate the counsel for the pursuers, anxious to escape, if he could, from the difficulties of this question, endeavoured to show that though the action had the form and bore the name of a process of maills and duties, it was in reality nothing but a suit for sundry sums of money. The policy of this course was plain enough. The ground of an action of maills and duties is—(using the words of Walter Ross in his Lectures on Conveyancing and Legal Diligence) —a right of "constant possession" of the subjects of which the tenants whose rents are sued for are in the natural occupation; but if all that is asked be only decree for a specified sum, assumed to be due as by a debtor to a creditor, such a basis, it may be said, is not required for the action. Whether the pursuers could or could not maintain their suit upon this footing is not a matter upon which I have sought to form any opinion, because the question appears to me of no interest on this occasion. The present is an action of maills and duties only; and its competency must be judged of by reference to that consideration.

The Sheriff-Substitute in the note to his interlocutor says that the process of maills and duties "has always been recognised in practice as one of the superior's remedies for recovery of his feu-duties." This statement came upon me as a surprise, for my experience, such as it is, would have led me to an opposite result. On this subject it is not immaterial to observe that there is not in the books any style, so far as I know, for such an action. In Dallas there are eight styles for summonses of maills and duties—one at the instance of a heritor, one at the instance of a liferenter, one at the instance of an appriser, two on adjudications, one at the instance of a person infeft in lands for security of money, and not by way of annual rent out of the lands, and lastly, one at the instance of a person infeft for relief of a cautionary. If in the times when these were compiled, such a thing as an action of maills and duties by a superior for arrears of feu-duty had, using the language of the Sheriff-Substitute, been "recognised in practice," the form of such a writ would certainly not have been omitted. Nor is there a style of a summons of maills and duties at the instance of a superior among the forms to be found in Mr Bell's Work on Deeds, or in the Juridical Styles. And it may be added that superiors are not included by M'Glashan in his forms of process in the Sheriff Court as those by whom a maills and duties may be sued—*vide* pp. 144–145 of the edition edited by Mr Barclay. From all which it may be concluded that such a form of process has not always been recognised, but, on the contrary, has never been recognised in practice as one of the superior's remedies for the recovery of his feu-duties. But this is not all which may be said upon this part of the case; for it remains to be added that there is not in any decision which has been cited to us, or which I have found in the books, any trace of an action of maills and duties at the instance of a superior, or of a pursuer pleading upon his right, which at any time had been brought into this Court.

That a superior has the remedy of maills and duties seems to me to be inconsistent with the ground of an action of maills and duties, which is, as already mentioned, right or title to constant possession of the subjects of which the tenants sued are in the natural occupation. A superior is not owner of the feu, nor has he a title on which he can oust the vassal and in his room enter into possession. The estate of the superior is one, and that of the vassal is another. The former when he feus surrenders possession, and there is neither right nor power reserved upon which, while the right of the vassal continues, possession against the will or without the authority of the vassal may be resumed. Were it otherwise, the disposition of the feuar would not be a title upon which his possession could be maintained till a forfeiture had been declared. The superior, whatever feu-duties are in arrear, remains outside, and cannot while the right of the vassal exists enter, without authority derived directly or indirectly from the vassal, upon possession of the feu. He has another remedy, and that he has because he is not in possession. He may poind the ground, which one in possession cannot do, and this—not an action of maills and duties—is, on the authorities, his remedy. So Erskine says (Prin. ii, 5, 1), his words being—"The duty payable by the vassal is a *debitum fundi, i.e.*, it is revocable, not only by a personal action against himself, but by a real action against the lands," in other words, by a poinding of the ground. Neither Erskine nor Stair include superiors among those to whom an action of maills and duties is competent. The former (Prin. iv. 1, 25, Inst. iv. 1, 49) explains that such a process is "competent, not only to a proprietor whose right is perfected by seisin, but to a simple disponee, for a disposition of lands includes a right to maills and duties, and consequently to an adjudger, for an adjudication is a judicial disposition." The relative passage in Stair, iv. 22, 7, is similarly expressed, and the full value of the omission of a superior from the specification of those to whom maills and duties is competent becomes the more significant when we remember that in specifying those who have real actions against the ground, superiors are always brought forward. Erskine says (iv. 1, 3) —"Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is therefore competent to an annual renter for interest due upon his right, to a superior for his feu-duties or non-entry duties before citation in a declarator, and in general to all creditors in debts which make a real burden on lands." The words of Stair are these (iv. 23, 5)—"Secondly, poinding of the ground is competent for all feu-duties, for which the ground of the lands (where these feu-duties are in the reddendo) may be apprised for all the bye-gone feu-duties unpaid." And in section 10 of the same title he gives the tenor of a summons for poinding of the ground for feu-duties.

Things being so presented, it seems to me not to be doubtful that an action of maills and duties is not a remedy competent to a superior for his feu-duties. The reason why is manifest. A poinding of the ground may be resorted to by the superior because he is not owner and is not possessor of the feu, but for this very reason, as a title to constant possession is the foundation of the action, a maills and duties is not within his competency. Walter Ross in his Lectures, ii, 439, treating of this subject, presents both the result and the principle in a passage from which the following is a quotation—"The distinctions, then, between a decree of maills and duties and a decree of poinding of the ground are these—the former is a title of constant possession; it is the compulsitor of the possessor against the tenants, who are thereby personally decreed to pay their rents to their master for the time yet to come of their possession. The poinding of the ground is the diligence of a proprietor not in the possession." This, which is the *ratio* as well as the application of what has been cited from the earlier authorities, seems to me to be decisive.

For these reasons I am of opinion that this appeal must be sustained, and the action dismissed as incompetent.

Lord Young—This is an important kind of question, and has, I think, been dealt with very sensibly by the Sheriff. The result—for that I take to be the opinion of the Court—of our sustaining this appeal is a very undesirable and inconvenient one. I, of course, take the case as a general question, Whether an action against a vassal's tenant for payment of rent is a remedy open to a superior for the recovery of unpaid feu-duty? That is the simple question of the case, and we are dealing with it as if the superior himself, instead of merely his assignee, were here. He—the superior—sues his immediate debtor—his vassal—and in the same action he sues also his vassal's tenants, concluding for payment of their rent to him instead of to their landlord, his vassal, to the effect of paying his feu-duty. That is the action. The tenants admit that so much rent is due by them to the vassal, and the vassal admits that he is due so much feu-duty to the superior. The important feudal question is, Can the tenant be ordained to pay his rent directly to the superior as to his own landlord, or must the superior be left to some other remedy? Now, the other remedy of the superior is that he should go to the tenant's house and poind his furniture, and get payment in that way. But this is still more inconvenient than the method pursuers here contend for; poinding is a ponderous operation, and if there are many tenants, as there are here, then the superior, instead of raising an action like this calling the vassal's tenants, must go and seize their beds and tables and chairs. That is the other remedy. "Maills and duties" is a big phrase, but an action of maills and duties is just an action for rent. I find, on referring, to refresh my memory, to Erskine, in the index, "Maill or rent, see rent." Maill is just another name for rent. "Maill," is a coin, I believe, etymologically the same as "medal." "Maills and duties" is the Scotch name for rent, and an action of maills and duties is just the old name for an action for rent against the occupier of a house or land. It is always competent to a landlord or his representative. Other people besides the landlord are also entitled to recover rent from the occupier—for example, a heritable creditor unpaid; he is entitled to recover enough from the occupier to pay the debt due to him by the landlord, with interest. But that right does not give him a title of constant possession, for as soon as his debt is satisfied the rents cease to be paid to him. It is a convenient remedy to him to secure without circuity of action what is his own, and without an injustice done to anyone. When a debt is owing by the proprietor of a house, it is a convenient remedy to the creditor to sue his debtor's tenant to pay to him direct. The style of conclusion in all such actions of maills and duties is that the tenant shall not only pay past but future rents to the pursuer, but this continuing conclusion gives no title of constant possession. It is only to have the tenant ordained to pay so long as the circumstances remain the same. The question here, then, is simply, whether the superior, who is certainly infeft, and is a real creditor with only too many ponderous and harsh remedies, can sue his vassal's tenant along with his vassal, that the latter shall pay his rent to him to the extinction of his claim for feu-duty? That is the question, and no other. The rent is admittedly due, and so is the feu-duty. There is nothing to be said against this action, except that it is an action of "maills and duties," and that is a mode of entering into possession. But the remedy is so simple, natural, just, and obvious, and undoubtedly, as the Sheriff-Substitute says, "more convenient and less oppressive than poinding of the ground," that one wonders it had never been tried before. If there had been a trace of it in Dallas' time—if it had occurred to our wise predecessors how simple and natural the remedy was—we should have a style for it in the books. Should not we now, perceiving the advantage of it, sustain such a conclusion in preference to the more ponderous remedy of poinding? That is the only question we are asked to decide. The rent has been already paid; it is in the hands of a receiver waiting our order to whom it is to be paid. There is nothing incompetent in our ordering it to be paid in a way which will satisfy the just claims of all parties, and nothing but convenience can attend it. I am therefore for refusing the appeal, and am compelled to dissent from the opinion of the majority of the Court.

Lord Rutherfurd Clark—This is an action of maills and duties brought by the pursuers as the assignees of the superior, for the recovery of feu-duties in arrear. The feu-duties were due at and prior to Martinmas 1882. The action was raised on May 12, 1883. It is directed against the vassal and his tenants, and the purpose of the pursuers in bringing it is expressed in these words—Cond. 6—"The pursuers are now desirous of entering upon possession of the said subjects"—that is to say, of the subjects held in feu by the defender from the pursuers' cedent, the superior.

A superior has several remedies for the recovery of his feu-duties. But I do not think that an action of maills and duties is among them. Though one of the most common actions in relation to real property, it is not mentioned by any institutional writer, or any writer of authority, as an action which is competent to a superior.

Nor has any instance been given of a superior resorting to it in order to the recovery of his feu-duties.

An action of maills and duties is an action through which the pursuer seeks to enter into possession of an heritable subject, by having the tenants decerned to pay their rents to him. He desires to exercise the rights of the proprietor, so that the rents may be paid to him as such. This is a remedy competent to an heritable creditor, because he holds a disposition to the lands and an assignation to the rents. By obtaining decree in such an action he displaces his debtor in the possession of the subjects, and draws the rents as proprietor until his debt is paid.

The question is, Can the superior enter into the possession of the feu which he has given out? In certain circumstances he may. If the feu is in non-entry he enters into possession by a declarator of non-entry. If the feu-duties are two years in arrear, he may irritate the feu, and so merge it in his own title as if it had never been granted. In the one case there is for the time no vassal, in the other the feu-right ceases to exist. In both the superior may enter into possession, because in neither is there anyone to exclude him. But I know of no other case in which the superior can take possession of the feu, or of any in which he can displace the vassal from the possession of the subjects which he has given out in feu.

A feu is a permanent right. The vassal is the sole proprietor; so long as the feu-right exists, and the fee is full, nothing more is reserved to the superior than the feu-duties. He has ceased to be the proprietor of the feu, and has no right as proprietor. No doubt his infeftment remains; but the infeftment of the vassal excludes him from possession. The heritable creditor can enter into possession by virtue of the disposition which he holds from the proprietor. The superior has no such title. By the very terms of his grant he guarantees to his vassal the right to possess the feu. To displace the vassal from his possession would be a violation of the feu-charter.

Accordingly the appropriate remedy for the superior is an action of poinding of the ground, which he sues as a creditor in a *debitum fundi*. An heritable creditor has the same right, and by consequence the same remedy. It has been decided in *Henderson*, Jan. 7, 1875, 2 R. 272, that he may poind the ground though he has entered into possession under a maills and duties. There is no inconsistency. He has entered into possession merely to the effect of recovering the rents which are due by tenants. He may poind the ground, which is the natural possession of the owner, and there may be moveables on the lands let to tenants which do not belong to them, and which may be attached by that diligence. The case may even go so far as to decide that the goods of tenants who have not paid their rents may be poinded. But it does not bear on the point with which we are dealing, except by way of contrast. An heritable creditor has the double remedy because he has a double title. He is a creditor in a *debitum fundi*, and has a right to enter into possession. The superior cannot have both remedies, because he has not the latter right.

But the pursuers contend that though they may have no title to sue an action of maills and duties, they have, as assignees of the superior, a personal action against the tenants for the rents which are due by them, and on this view they seek decree for the rents due at Whitsunday 1883 as in a petitory action. I greatly doubt whether this action can be regarded as in any sense a petitory action; but I am willing to consider the pursuers' case as if it were.

Some *dicta* of high authority have been cited to us in support of the view that a superior has a right of action against a sub-vassal for the sub-feu-duties, and against a tenant of the vassal or sub-vassal for the rent payable under his lease. I confess that, in my opinion, no such action can lie. The sub-feu-duties are due either under the tenure on which the sub-vassal holds, or *ex contractu* by the sub-feu-contract. The rents are due under the contract of lease. To that tenure and to these contracts the superior is a stranger. He cannot connect himself with them in any way, and therefore I cannot sustain his title to sue either for sub-feu-duties or for rents.

Stair, whose authority on this subject is of the highest, does not indicate that the superior has any such right. He says—ii. 4, 7—that the superior may recover his feu-duty, "not only personally against the vassal upon any personal obligation or contract in writ"—that is to say, as I understand the passage, on any obligation or contract to which he is a party—"but also by virtue of the interruption or meddling with the fruits and profits of the lands, for all such intromitters may be pursued and distressed personally for the duties contained in the reddendo, which, being granted to masters of the ground for their tack-duty against tenants and all intromitters with the rents, is much more competent to the superior for his feu-duty." Again, Erskine, ii. 5, 2, while he lays it down that a superior has an action of poinding of the ground for the recovery of his feu-duty, adds that this is "no bar to a personal action for recovering them against such as have come under an obligation to pay them, or have intermeddled with the rents of the lands, out of which they are due." Here, again, the obligation on which the superior can sue is, as I take it, an obligation undertaken to him. Thus, while they point out that the superior has an action on any contract between him and the vassal, both authors assign intromission with the rents or fruits as the only ground on which anyone other than the vassal can be personally liable to the superior. They give no countenance to the notion that a superior can enforce obligations undertaken to the vassal, whether these obligations depend on tenure or on contract.

The pursuers appeal to the authority of Bell, (section 700), who says that the superior has a personal action against "tenants in the lands while in possession, or intromitters with their fruits during their intromission." The paragraph is not expressed with Mr Bell's usual precision. But it is to be remarked that he does not say that the superior has an action against tenants for their rent. He says no more than that the superior has a personal action against them. No doubt he has, for they are intromitters, but his action must, I think, be founded on the intromission, not on the contract of lease. So also with sub-vassals.

I am therefore of opinion that the pursuers cannot sue for rent *eo nomine*, or, in other words, that they cannot enforce the contract of lease between the vassal and his tenants.

Considering, however, that the liability of the sub-vassal and the tenants as intromitters is limited to the amount of the sub-feu-duties and the rent respectively, it may be thought immaterial whether they are sued for the sub-feu-duty or their rent, or on their intromissions to the amount of the sub-feu-duty or of the rent. In money there is no difference; but when it is fixed that the tenants are liable as intromitters only, it not only follows that they cannot be sued for rent, but that as intromitters they are not liable under this action. For it has been decided in a series of cases—*Rollo*, M. 4685; *Cockburn*, M. 4187; *Biggar*, M. 4191—that an intromitter cannot be made liable for feu-duties which have accrued due prior to the time when he entered into possession. Now, the feu-duties sued for were due at Martinmas 1882. It is not averred that any of the tenants who are called as defenders were in possession of the subjects let to them prior to that date, or for any part of the period for which the feu-duties were payable. Hence the action, even if it were laid on intromission, necessarily fails.

I have said that this is an action of maills and duties in ordinary form. To convert it into an action for the recovery of rents or for an account of intromissions would not, in my opinion, be legitimate. But I have regarded it in both of these aspects, and in both I am of opinion that it is not well founded.

I may add that I have considered the case as if the superior himself had been the pursuer. Exceptions might have been taken to the title of the pursuers as the mere assignees of the superior. But as the defender did not press them, or perhaps even state them, it is not necessary to enter into this matter.

Lord Justice-Clerk—No doubt there is a good deal of technical strictness about the argument which the majority of your Lordships propose to sustain. That is the inevitable result of applying the strict principles of the feudal law to the great sub-division of feus in modern times, and the difficulty of such application has been found in many cases. I should have been happy to agree with Lord Young on the ground of convenience on which he bases his opinion, but it is clear that if we are to decide this action on principles of law hitherto acted upon it cannot be sustained. I regard this case solely as an action of maills and duties and therefore as an action of entering into possession. The prayer of the petition is—"To grant a decree against the above named defenders, other than the said Henry Cheyne, ordaining them to pay to the pursuers the rents, maills, and duties of their several possessions of the subjects hereinafter described, and that during their possession thereof, with interest from and after the respective terms at which the same are or shall became due, until payment," followed by an enumeration of the tenants and their rents. In so far as the action may be regarded as a personal action, I do not think that it follows that because a man is a creditor of another he is a creditor of his debtor's debtor, unless he has acquired the rights of his debtor against the latter's debtor. The tenants here are due sums on personal contract with the vassal, and the superior seeks to put himself in the vassal's place to recover these sums. I do not think the superior can put himself in that position merely in virtue of his superiority—not until he has established a direct right, as by assignation of his vassal's rights, against the tenants. I therefore agree with Lord Craighill that the pursuers here have no title to sue.

The Court pronounced this interlocutor:—

"Find that the pursuers have no title to sue this action: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; dismiss the action, and decern," &c.

Counsel for Pursuers (Respondents)—J. P. B. Robertson—Graham Murray. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders (Appellants)—Mackintosh—Rankine. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, June 5.

SECOND DIVISION.

[Sheriff of Elginshire.

MILNE *v.* CRUIKSHANK AND OTHERS (GRANT'S EXECUTORS).

Succession—Donation—Donatio mortis causa—*Legacy—Mandate—Cheque.*

A person when in good health delivered to his housekeeper a bank cheque, which, as filled up by him, ran as follows:—"£100 stg. *Elgin*, 188 . The North of Scotland Banking Company, Elgin, Pay to me or Bearer, One hundred pounds, when am dead, sterling, on account of . (Signed) John Grant." He died some months afterwards, having a large balance at his credit in the bank to which the cheque was addressed. After the giving of the cheque he had made a will disposing of his whole estate. In an action by the housekeeper against his executors for payment of the sum in the cheque—*held* (1) that there was no *inter vivos* donation of the sum in the cheque, because it was made payable after the deceased's death, and he dispossessed himself of nothing by it; nor (2) was there a *donatio mortis causa*, because it was given when deceased was in good health, and nothing was immediately transferred by it; (3) that the cheque was not habile to constitute a legacy, and had it been so would have been revoked by the subsequent will.

Christina Milne presented a petition in the Sheriff Court at Elgin against Robert Cruikshank and others as executors under the will of the deceased John Grant, formerly a farmer, and latterly residing in Elgin, for payment of £100. She stated in her condescendence that for more than six years prior to Martinmas 1881 she had been in the deceased's service as housekeeper and general servant; that in consequence of her trustworthiness and attention to the deceased, who was then in infirm health, he had expressed to her and other of his friends his intention to leave her a sum of money after his death as a mark of his approval of her conduct and as a reward for her services;