therefore be found liable for the expenses of this application — *Robertson* v. *Park, Dobson & Company*, October 20, 1896, 24 R. 30, 34 S.L.R. 3.

Argued for the respondents—They had not acted unreasonably. They merely wished to retain their preference. They had offered to withdraw the arrestment on getting a guarantee but had been met with an obstinate refusal. In these circumstances the petitioner was not entitled to recover from the respondents the expenses of the petition—*Roy* v. *Turner*, March 18, 1891, 18 R. 717, 28 S.L.R. 509.

The Court pronounced this interlocutor—

"Recall the arrestments which have been used on the dependence of the summons mentioned in the petition: Prohibit and discharge any further arrestment from being used upon the dependence of the said summons: Find the petitioners entitled to the expenses incurred in the petition," &c.

Counsel for the Petitioners—Ure, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Respondents—Salvesen, K.C.—R. Scott Brown. Agents—Kelly, Paterson, & Company, S.S.C.

Saturday, February 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

NELSON'S TRUSTEES *v.* TOD.

Superior and Vassal — Feu-Duty — Sub-Vassal—Right of Recourse—Liability of Sub-Feuars for Cumulo Feu-Duty where Feu Sub-divided without Superior's Consent—Sub-Feuar's Right of Relief Prejudiced by Superior's Actings.

The owner of a feu granted in 1827 divided it into four lots, and allocated the feu-duty among them without the consent of the superior. Thereafter the lots passed into the possession of different sub-feuars.

In 1858 the superior granted a charter of confirmation to the sub-feuar of lot 2, which bore that the subjects were to be holden of the superior as immediate lawful superior for payment of the amount formerly allocated on the lot, "being a proportional part of the *cumulo* feu-duty." In the charter the rights of the superior and the right of all others concerned were reserved.

In 1892 the sub-feuar of lot 3 died, and his heir refused to make up a title to the feu, and the feu-duty ceased to be paid.

In 1902 the superior brought an action of poinding of the ground against the sub-feuar of lot 1 in order to recover from her the arrears of feu-duty due from lot 3.

Held that the pursuer by granting the charter of confirmation had deprived the defender of her right of recourse against the owner of lot 2 and against that lot itself, which would otherwise have been open to her, and therefore the defender *assoilzied.*

This action of poinding of the ground, brought for the purpose of poinding the effects on one of the sub-divisions of a feu for recovery of arrears of the *cumulo* feu-duty, was raised in the following circumstances:—By feu-charter dated 9th February 1827 Græme Reid Mercer of Mavisbank feued to John Hogg and Thomas Brown and their heirs and assignees whomsoever the lands known as Kevockmill Bank, Lasswade, extending to nearly six acres. Subinfeudation was expressly prohibited, and the yearly feu-duty was fixed at £69, 15s. 9d., of which the feuars obliged "themselves, their heirs, executors, and successors" to make payment

After Mr Mercer's death his trustees became the superiors of the above feu. In 1899 the superiority was acquired by the trustees of the deceased William Nelson in virtue of a decree under the Heritable Securities (Scotland) Act 1894.

After 1831 the vassals in the said feu divided it into four lots, and apportioned the *cumulo* feu-duty in these lots as follows:—£12 on each of the lots to the east, and £22, 17s. 10½d. on each of the lots to the west. The superiors never sanctioned this sub-division or apportionment.

The first or eastmost lot after various transmissions came into the possession of the late Colonel Pullan in 1882. In 1893 Miss Jean Tod as heritable creditor obtained decree in an action of maills and duties applicable to this lot, and in virtue of that decree uplifted the rents and profits of this portion of the feu. The tenant of this lot and the buildings thereon was A. W. Gordon.

The second lot was disponed in 1858 to W. J. Hitchcock. In the same year Mr Mercer's trustees, the superiors of the lands, granted in favour of Mr Hitchcock a charter of confirmation, which bore that the subjects were to be holden under the superiors as immediate lawful superiors "for payment of the sum of £12 sterling of yearly feu-duty" payable as therein stated with the casualties specified, which feu-duty of £12 was stated to be "a proportional part of the *cumulo* feu-duty" of £69, 15s. 9d. yearly "payable from the whole of the grounds feued by the said John Hogg and Thomas Brown from the said Græme Mercer, reserving always the bygone and current feu-duties, and our own right and the right of all others concerned as accords in law."

This lot was thereafter acquired by John Kolbe Milne.

The third lot was after various transmissions acquired by the North British Railway Company.

The fourth or westmost lot was in 1879 disponed to Dr William Jameson, who was infeft in the subjects. It was bequeathed by Dr Jameson on his death in 1892 to his widow, but both she and his heir-at-law renounced the feu, and the feu-duty of £22, 17s. 10½d. thereafter ceased to be paid.

After William Nelson's trustees acquired the superiority in 1899 they demanded from Miss Jean Tod not only the feu-duty of £12 exigible from the first or eastmost lot which was in her possession, but also the feu-duty of £22, 17s. 10½d. applicable to the fourth or westmost lot renounced by Dr Jameson's widow and heir-at-law. As Miss Tod refused to pay anything but the £12 exigible from her own lot, William Nelson's trustees raised the present action of poinding of the ground, concluding for letters authorising poinding of the effects on the eastmost lot, and for payment of £113, 19s., being the arrears of feu-duty payable since 1899 from the eastmost and westmost lots. There were called as defenders (1) Henry Alexander Seaton Pullan, the heir-at-law of Colonel Pullan, (2) Miss Tod, and (3) A. W. Gordon for his interest as the tenant of the eastmost lot, and also (*a*) Colonel Pullan's executor-dative, (*b*) the North British Railway Company, (*c*) J. K. Milne, (*d*) Dr Jameson's widow, and (*e*) Dr Jameson's heir-at-law.

Miss Tod lodged defences, and pleaded, *inter alia*—"(6) The pursuers are barred from insisting in the present action in respect that they are unable to give this defender a valid right of relief against the other feuars in the event of her paying more than the £12 due in respect of the said subjects (the eastmost lot)."

On 22nd July 1903 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the pursuers by granting the charter of confirmation dated 10th, 11th, and 15th June 1858 in favour of Mr Milne have deprived the defender of her right of recourse against Mr Milne and the portion of the feu in question possessed by him, which would otherwise have been open to her: Therefore assoilzies the defenders from the conclusions of the summons, and decerns," &c.

Note.—"This has seemed to me a case of great difficulty. The question is whether in the special circumstances a superior of a feu which has been sub-divided can execute a poinding on one of the sub-divisions for recovery of arrears of the *cumulo* feu-duty? The question seems novel, and there is not much authority which gives material assistance. A proof was not asked, and does not seem to be necessary, and I think the case may be decided on the elaborate debate which took place in the Procedure Roll. I cannot say that I think the record clearly or satisfactorily expressed, and although the debate was anxious and able, I have felt on studying the case that some points might perhaps have been more fully explained.

"The facts are as follows—By feu-contract dated in 1827 Mr Mercer of Mavisbank feued to John Hogg and Thomas Brown and their heirs and assignees whomsoever the subjects in question called Kevockmill Bank extending to nearly six acres. The feu was granted under the condition that neither the feuars nor their foresaids should be at liberty to sub-feu. The feu-duty was £69, 15s. 9d., of which the feuars obliged 'themselves, their heirs, executors, and successors' to make payment. The pursuers acquired the superiority in the manner stated on record.

"The feu was afterwards divided by Brown and Hogg into four parts. The eastmost part was disponed to Hogg in 1831; it came into the possession of Dr Jameson about 1875, and he in or about 1882 conveyed it to Colonel Pullan now deceased. The portion next it was disponed in or about 1858 to one Hitchcock, who at a date not given conveyed it to Mr John Kolbe Milne, now the proprietor. The next portion was conveyed at a date not given to some person not named, from whom it passed to the North British Railway Company; and the western part was conveyed by Hogg and Brown to Mrs Jameson, from whom it passed to Dr Jameson, who was infeft in 1879. I think that all the disponees were infeft.

"Now, thus far nothing is said to have been done or to have happened which could affect the superior's rights. If when matters stood in that position the feu-duty had fallen into arrear there is no doubt that the superior could have recovered it by poinding of any part of the feu by whomever possessed. He had nothing to do with the divisions of the feu. He was still superior of the undivided feu, and if he had had occasion to bring a poinding of the ground there was no reason why he should distinguish between one part and another, Further, he stood in no legal relation to any of the disponees. He was not a party to any contract with any of them.

"It is averred that the *cumulo* feu-duty was apportioned on the various lots, £12 being apportioned on the eastmost, Pullan's lot; £12 on Mr Milne's lot; and £22, 17s. 10½d. on each of the other lots. That allocation, however, was not made by the superior. These apportionments are said to have been rateable, and it does not seem to me that the fact that there were such apportionments is of material consequence. The superior had nothing to do with them, at least directly. He could not have raised any action against any of the allottees for payment of any of the portions of the allotted feu-duties. The allottees were not his debtors. So far no question has been raised.

"But there were two other things which happened, and the defence is based on these and these only. In the first place, the superiors granted in favour of Mr Milne's predecessor a charter of confirmation dated 10th, 11th, and 15th June 1858, which bore that the subjects were to be holden under the superiors as immediate lawful superiors 'for payment of the sum of £12 sterling of yearly feu-duty,' payable as therein stated with the casualties specified, which feu-duty of £12 was stated to be 'a proportional part of the *cumulo* feu-duty' of £69, 15s. 9d. yearly, 'payable for the whole of the grounds feued by the said John Hogg and Thomas Brown from the said Graeme Mercer, reserving always the byegone and current feu-duties, and our own right, and the right of all others concerned, as accords of law.'

"The other circumstance that happened was that Dr Jameson died unentered (the defenders say in 1892), and his heir-at-law refused to make up a title to the subjects, and the feu-duties allocated on that lot ceased to be paid. It was said at the debate that no buildings had been erected on it, and I suppose that the feu-duty allocated on it could not be recovered out of it. There do not seem to have been any arrears due to the superiors except the arrears of the feu-duty allocated on that lot, because although arrears of the duty allocated on Pullan's feu are included in the sum mentioned in the summons it did not appear to me that these were really in arrear.

"In these circumstances this action of poinding of the ground has been raised, and it concludes for letters authorising poinding of the effects on the ground of the eastmost lot, *i.e.*, Pullan's lot, belonging (as I understand) to the proprietor, the tenant, and the present defender as an heritable creditor in possession. The action does not conclude for poinding of Milne's lot, or of that belonging to the Railway Company, or of that which had belonged to Dr Jameson. If Henry Pullan and Mr Gordon be left out of view, as in this question they may, the conclusion is for poinding of the effects of Miss Tod.

"The true object of the action is to extract from Pullan's lot and Miss Tod's effects the feu-duty which had been allocated on Jameson's lot. Considering that the superior knew all about the sub-division of the feu, that result seems decidedly inequitable.

"None of the owners of the several lots have lodged defences. The only defence is by Miss Tod, who avers that she holds a bond and disposition in security granted by Colonel Pullan, and that she has obtained a decreet of maills and duties of the subjects, that is, of Pullan's lot.

"It is averred that as heritable creditor in possession the defender has intromitted with rents in excess of the sums specified in the summons. That averment seems to be irrelevant and to add nothing to the pursuers' case, and there is no corresponding plea, because there is no conclusion against Miss Tod for payment of money. There is no petitory conclusion at all The only conclusion is for poinding of the ground. She, however, has lodged defences and has stated various pleas in defence. But it may be noticed that she has not pleaded that her right under the decree of maills and duties excludes or competes with the pursuers' poinding.

"No objection has been taken to her right to defend. I do not think I have information enough to enable me to judge how that stands. Her right has been tacitly admitted, and I therefore assume, without expressing any judicial opinion on the subject, that the case is the same as if the defence had been stated for Colonel Pullan or his representatives.

"The pursuers' plea is simple; it is that as superiors they had a right to poind the effects on any and every part of the feu in order to recover their feu-duty.

"I did not understand the defender to dispute that proposition as generally stated, but she maintained that there were particulars in this case which negatived the pursuers' right. She did not dispute that the superiors' right to poind was not affected by the division of the feu, or by the allocation of the feu-duty, but she argued that it was affected, and indeed wholly lost, (1) by the charter of confirmation to Milne, and (2) by Dr Jameson's renunciation of his feu.

"The defence was rested mainly on the case of *Wemyss* v. *Thomson*, January 19, 1836, 14 S. 233. That case related to a feu-right in which subinfeudation was prohibited, and the question was as to the terms of the charters to be granted to persons who had acquired portions of the original feu. The interlocutor bore that 'the pursuers, as superiors, are entitled to insist on the defenders taking charters containing an obligation for payment of the whole *cumulo* feu-duty, and of the relief on the entry of heirs; but that the defenders, as vassals, are entitled to have inserted in said charters an obligation by the superiors to grant to them whenever required, at the defender's expense, an assignation to the effect of enabling the defenders to recover from the co-feuars whatever sum or sums may at any time be exacted from them beyond their own just proportion of the said *cumulo* feu-duty and relief.' . . .

"I do not understand that it was there decided that the disponees were bound to enter, or that the superiors were bound to receive them, although they may have been. I rather think the judgment merely determined what the terms of the charters should be if the disponees voluntarily entered. This case is referred to by Professor Menzies (Lectures, 3rd ed., p. 819). 'While the vassal,' he says, 'is at liberty to subdivide his feu, that does not infringe upon the right of the superior to have his returns and casualties adequately secured. Although therefore the feu-duty and composition may be apportioned among different disponees, the superior is entitled to have everyone of them made ultimately liable for the *cumulo* feu-duties and casualties, he being bound, on the other hand, to grant upon payment an assignation of the claim, in order to enable the feuar who pays to operate his relief against the others for their proportions. The terms of a clause for giving effect to this arrangement were carefully adjusted in the case of *Wemyss* v. *Thomson*.' I read that case as referring to the relations between superiors and entered vassals, and not to the relation between superiors and disponees of a portion of the feu who have not been entered. If, in the present case, after the *cumulo* feu-duty had been allocated on the various disponees, these disponees had obtained charters from the superiors, these charters, on the principle of *Wemyss*' case, would probably have borne an obligation by each feuar for the *cumulo* duty, but also they would have borne an assignation by the superior, which would enable him to recover from

the other vassals any overpayments which he might be called on to make.

"Professor Menzies proceeds, after the passage quoted, to say, 'When the superior, however, has consented to an apportionment of the feu-duty, the reservation of his recourse for the full amount against the proprietor of each of the subdivided parts, although sufficient to enable him to recover arrears due by other portioners, is not sufficient to authorise a declarator of irritancy *ob non solutum canonem*—*Knight* v. *Cargill*, 2nd July 1846, 8 D. 991.' But it will be observed that in that case the right to recover the full feu-duty was specially reserved by the superior.

"In this case the defender maintains that the effect of the charter of confirmation to Milne was to relieve him and his feu from all connection with or burden under the original feu-contract for the *cumulo* feu-duty, and to put it out of the power of the superior to grant any assignation by which relief could be enforced against Milne or against his lot. I think his portion ceased to be part of the original feu, and that the feu-duty allocated on it was not part of the *cumulo* feu-duty.

"The defender therefore maintains that the superior has innovated on and diminished her right of relief in the event of more than the amount allocated on Pullan's lot being exacted from her. That is, she maintains that prior to that charter she would have had a right of recourse on Milne's lot, whereas now her recourse is limited to the lots of the railway company and of Dr Jameson.

"The questions therefore seem to come to these—Would the defender, in the event of the pursuers recovering payment of the arrears of the *cumulo* feu-duty from her, have been entitled to relief against Milne, as being proprietor of a portion of the original feu, if the charter of confirmation had not been granted? If the answer be in the affirmative, it does not much matter how that relief would be effected, whether by an ordinary action of relief or by an action of poinding of the ground as the pursuer's assignee. I think that question should be answered in the affirmative, although the point seems a difficult one. The second question is—Will such a right be open to the defender in present circumstances? and the answer must be in the negative, because the superior has relieved Milne and his lot from obligation for the *cumulo* feu-duty. If these answers be correct, this case must, I think, be decided for the defender on the ground that the superior cannot recover the arrears of feu-duty from the defender when he has materially reduced her right of relief.

"The result is at anyrate equitable, and accords with the principle of judgment in *Wemyss* v. *Thomson*, although no doubt the cases are different.

"There is not much authority on the point. Reference was made by the defender to *North Albion Property Investment Company* v. *Wilson*, 14th November 1893, 21 R. 90, 31 S.L.R. 58; and *M'Kirdy* v. *Webster's Trustees*, 1st February 1895, 22 R. 340, 32 S.L.R. 252. It appears to me that the result is not inconsistent with *Guthrie & M'Connachy* v. *Smith*, 19th November 1880, 8 R. 107, 18 S.L.R. 75. I think that judgment comes to little more than this—that when a feu-duty is paid by or for a feuar the superior is bound only to give a discharge and not an assignation.

"The defender further maintained that the renunciation of Dr Jameson formed a bar to the pursuer's action. No authority bearing on that point was referred to, and I would not be prepared to sustain the defence on that ground; but I have, after much difficulty, come to the conclusion that the pursuers' action is barred by the charter of confirmation in favour of Mr Milne.

"The defender states that the pursuers have been twice unsuccessful in their claims against the defender, and she has produced two records in the actions before Lord Stormonth Darling and Lord Low. But there was little use in producing these records unless I was informed of the judgments of the Lords Ordinary, which I have not been. I can only assume, therefore, that these judgments had no bearing on the questions discussed before me."

The pursuer reclaimed, and argued—If a superior had not consented to the original feu being subdivided he was entitled to recover the *cumulo* feu-duty out of any part of the original feu. The sub-feuar could in all cases protect himself by paying the superior's preferable claim, and when he did so he had a right of relief *pro rata* against the owners of the other sub-feus—*Sandeman* v. *Scottish Property Investment Company*, June 29, 1885, 12 R. (H.L.) 67, *per* Lord Watson, at p. 73, 22 S.L.R.854. The sub-feuar did not require an assignation from the superior in order to enable him to recover the proportions of the feu-duty applicable to the other parts of the original feus from their various owners, and the superior was not bound to give such an assignation—*Guthrie & M'Connachy* v. *Smith*, November 19, 1880, 8 R. 107, 18 S.L.R. 75. The superior had not interfered in any way with the rights of the defender by granting the charter of confirmation to Hitchcock, the feuar of the second lot. In that charter the rights of all others were reserved, and Miss Tod would be quite entitled after paying the duty on the westmost lot to seek relief against Milne, the proprietor of the second lot, for a proportion of such payment. The granting of the charter of confirmation did not extinguish the liability of the other sub-feuars for the whole of the original feu-duty, the recourse against Milne not being prejudiced—*Muir* v. *Crawford*, May 4, 1875, 2 R. 148. Even if it was held that the granting of the charter of confirmation prevented the defender Miss Tod having recourse against Milne, decree of absolvitor should not be granted. The proper course was to deduct the proportion of the feu-duty which would have been payable by Milne's lot, and grant decree for the remainder against the defenders.

Argued for the compearing defender and respondent—The superiors proposed to pick out a particular sub-feuar and poind the effects on that sub-feu, in order to recover a portion of the feu-duty. Such a right had never been recognised. A superior might poind for the whole *cumulo* feu-duty, which was a *debitum fundi* and a *unum quid*. If the owner of part of the original feu paid the *cumulo* feu-duty, the superior was bound to give an assignation of the claim in order that she might recover a just proportion from the owners of the other parts—Menzies' Conveyancing (Sturrock's edition) 833; *Wemyss* v. *Thomson*, January 19, 1836, 14 S. 233. But it was impossible for the superior to do so in the present case on account of his having recognised the allocation of the feu-duty on Milne's lot by the charter of confirmation to Hitchcock. The relief of co-feuars was of two kinds—(1) personal action, or (2) relief against the ground of the other feuars. But by having granted the charter of confirmation the superior had prevented himself and the other sub-feuars from proceeding against the feu which had been recognised by the superior—*Knight* v. *Cargill*, July 2, 1846, 8 D. 991. The superiors had thus prejudiced the rights of the sub-feuars, and the defender should be assoilzied. Absolvitor was the proper decree, because the superior had refused to give over an assignation of his rights with regard to any of the other sub-feuars. The case of *Guthrie* had nothing to do with the present case. It was a case between a superior and his vassal. The present case was one between a superior and a sub-feuar, and a superior had no direct personal action for the *cumulo* feu-duty against a sub-vassal holding part of the feu—*Sandeman* v. *Scottish Investment Company Building Society, Limited*, June 8, 1881, 8 R. 790, 18 S.L.R. 559.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has in his note so fully and clearly stated the facts in this case that I do not consider it necessary to recapitulate them.

The ordinary right of a superior to poind any part of a feu that he has given off for any arrears of duty there may be due from it is undoubted. The superior in this case was not in any way affected as regards his rights by any subdivision of the feu that may have been made by Brown and Hogg. He was still superior of the undivided feu, and was not in contractual relation at all with any of the disponees to whom Brown and Hogg had made over portions of the feu. But the superior in 1858, as regards one of the four portions into which the lands had been divided, granted a charter of confirmation by which the subjects were to be held under the superiors as immediate lawful superiors for a yearly feu-duty of £12, which was described as "a proportional part of the *cumulo* feu-duty of £69, 15s. 9d.," which was the duty payable for the whole grownd. In these circumstances the attempt of the superior to poind the ground of another portion of the feu for arrears due for still other portions is resisted on the ground that the superior by granting a charter of confirmation on Milne's lot has deprived Miss Todd of her recourse against that lot for relief for what might be exacted from her over and above her proportion by the poinding executed upon that portion by the superior. I hold with the Lord Ordinary that this contention is well founded, the superior having by the confirmation relieved Milne's portion from obligation for the *cumulo* feu-duty for the whole.

I therefore would move your Lordships to affirm the interlocutor under review.

LORD TRAYNER—I agree with the Lord Ordinary, and have nothing to add to what his Lordship has said,

LORD MONCREIFF—I agree with the Lord Ordinary that this case is not presented in a very satisfactory shape, but take the facts to be as the Lord Ordinary, without contradiction, has taken them, that the pursuers seek to make the defender Miss Tod, who represents the eastmost lot, responsible for the whole of the arrears of the original *cumulo* feu-duty, and that although Miss Tod is ready and willing to pay the feu-duty of £12 allocated on the eastmost feu. In point of fact the only arrears which exist are those effeiring to the westmost lot, which was Dr Jameson's, and which has been renounced by his heirs. Neither the North British Railway Company, the proprietors of the second lot from the west, nor the proprietors of Milne's lot, the second from the east, are called as defenders. The pursuers' reason for not calling the proprietors of Milne's lot is apparent, because they now hold directly of the pursuers, and their feu-duty is limited to £12. Why the North British Railway Company have not been called as defenders we can only surmise. They are in precisely the same position as the proprietors of the eastmost feu.

I understand, however, that both parties desire to have the question decided—What is the effect on the pursuers' present demand of the superior having granted a charter of confirmation to W. J. Hitchcock in 1858 of Milne's lot and restricted the feu-duty exigible from that lot to £12 yearly?

The reason why a superior is entitled to recover arrears of *cumulo* feu-duty from any part of a feu which he has granted is because the feu, and equally the *cumulo* feu-duty, is regarded as being a *unum quid*. The superior has only to deal with his own vassal, and has no concern with the arrangements which his vassal may choose to make in subdividing the feu and allocating the feu-duty amongst the parties to whom he dispones the subdivisions. The superior may therefore proceed against any one lot to recover payment of the whole of the *cumulo* feu-duty if in arrear, but if payment is exacted the proprietor who is obliged to pay has his relief *pro rata* against all the other proprietors of the original feu on the footing that he has assigned to him the superior's right to recover from those

parties. And therefore if before the charter of confirmation was granted in favour of Hitchcock in 1858 the superior had proceeded against and recovered payment from the proprietor of the eastmost lot, that proprietor would have been entitled to relief from the proprietor of the remaining three lots to the west.

But the superior by restricting the feu-duty of Milne's lot to £12 altered the conditions. Thereafter the feu-duty was no longer the full amount of the original *cumulo* feu-duty, because Hitchcock held directly of the superior and was liable for no more than his £12, and I apprehend that it was no longer competent for the superior to poind Hitchcock's ground in respect of arrears due from the remainder of the original feu.

If in this state of matters the superior had poinded the eastmost lot (as the pursuers have done) he would have had nothing to assign to the proprietor of the eastmost lot as against Milne's lot, provided always that the proprietor of Milne's lot had paid up his £12. Thus the right of relief of the proprietor of the eastmost lot would have been confined to the two westmost lots, and would thus have been impaired.

In short, in the case supposed (which is the present case) the superior by his own act would have precluded himself from asserting a right which he would otherwise have possessed.

That is the view which the Lord Ordinary has taken, and although there are some theoretical difficulties in the way of accepting it, I have come to be of opinion that in the circumstances it is the sounder, as it certainly is the more equitable, view of the case.

A superior who grants a feu in the knowledge that it is to be divided and sold for building purposes may be within his rights in ignoring his vassal's allocation of the *cumulo* feu-duty and exacting it from the proprietor of one lot. But the enforcement of the superior's rights in such a case must sometimes be attended with hardship, because it is not always easy for the sub-feuar or disponee who has been compelled to pay the whole of the *cumulo* feu-duty to operate his relief. The present case is a good example. Miss Tod if obliged to pay could probably recover nothing from Jameson's lot, and the proprietor of Milne's lot would certainly dispute his liability for more than the allocated feu-duty.

If, then, the superior by his own actings has done anything to prejudice, or anything which may prejudice, the right of relief of the subvassal or disponee whom he elects to pursue, the Court is not, in my opinion, bound to strain the law in order to assist the superior to enforce what at least is a hard claim.

The LORD JUSTICE-CLERK intimated that LORD YOUNG (who was present at the hearing but absent at the advising) concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers —Campbell, K.C. — Craigie. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Defender and Respondent (Miss Jean Tod)—H. Johnston, K.C. —Macphail. Agents—H. & H. Tod, W.S.

Thursday, February 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CRICHTON *v.* TRUSTEES OF THE DALRY MYRTLE LODGE OF FREE GARDENERS.

Jurisdiction—Provident Society—Reference Clause—Dispute as to Decision that Membership had Lapsed—Friendly Societies Act 1896 (59 *and* 60 *Vict. c.* 25), *sec.* 68 (1).

The Friendly Societies Act 1896 provides (sec. 68 (1)) that every dispute arising between a member of a friendly society and the society, or a branch thereof, shall be settled in accordance with the rules of the society. The rules of a friendly society provided that disputes between a member and a lodge should be decided either by arbitration or by an appeal to the executive of the society. A member being dissatisfied with a resolution of his lodge's executive regarding the medical certificate to be from time to time obtained by him for a continuance of his sick allowance, appealed, in accordance with the regulations to the District Executive, and therefrom to the Grand Executive, but his appeal was dismissed. Having failed to observe the requirements of the resolution he ceased to receive sick allowance, and as the subscription to the society was in use to be deducted from such allowances before payment he fell into arrear with his subscription, When he was seven months in arrear the lodge resolved that his membership had lapsed. He then brought an action of reduction of this decision and of the preceding resolutions, and maintained that as the question was as to his right to be a member of the society, the society's rules as to the methods of settling disputes did not apply. *Held*, that the case fell within the rules of the society, and that the jurisdiction of the Court was thereby excluded.

Symington v. *Galashiels Co-operative Store Company, Limited*, January 13, 1894, 21 R. 371, 31 S.L.R. 253, *distinguished.*

George Logan Crichton, residing at 20 Fowler Terrace, Edinburgh, had been initiated on the 28th June 1889 a member of the Dalry Myrtle Lodge (No. 190) of the East of Scotland District of the British Order of Ancient Free Gardeners Friendly Society, which was registered as a friendly society, and had for some years thereafter contributed to the funds of the society. He brought an action against the trustees