query in the affirmative; and, of course, all the other queries in the negative.

The other Judges concurred.

Agents—Duncan, Dewar & Black, W.S.; D. B. Anderson, W.S.; Wm. Johnstone, S.S.C.; S. Greig, W.S.; Mackenzie, Innes & Logan, W.S.

Friday, May 20.

SECOND DIVISION.

MACINTOSH *v.* MACGILLIVRAY AND FRASER TYTLER.

Superior and Vassal—Reduction-Improbation—Non-Entry and Retour Duties—Wadset—Decree in Absence—Res inter alios acta. A proprietor of lands, in virtue of his superiority titles, brought an action of reduction-improbation and declarator of non-entry against A, the heir-male of the pursuer's last immediate vassal in the lands, and B, his sub-vassal, concluding for reduction of the defenders' titles. There were alternative conclusions for declarator of non-entry and payment of the retour duties up to the date of citation. A allowed decree in absence to go out against him, but B appeared and defended, and produced a progress of titles vesting him in the lands in question as sub-vassal of A. B also founded on a wadset right (which was unredeemed and had been made real by infeftment in his person) granted by a predecessor of the pursuer to one of B's ancestors. *Held* (affirming Lord Barcaple) (1) that the decree in absence obtained against A was *res inter alios acta* as against B, and could not prejudice his rights; (2) that the unredeemed wadset right, on which possession had followed, was a complete defence to the action in so far as it concluded for reduction of A's and B's titles, and for non-entry duties.

This was an action of reduction-improbation and declarator of non-entry brought by The Mackintosh of Mackintosh, as superior of the lands of Bochrubin, in the county of Inverness, against Mr MacGillivray of Dunmaglass, heir-male of the pursuer's last immediate vassal in the said lands, and Colonel Fraser Tytler of Aldourie, alleged sub-vassal of the said lands. The conclusions of the summons were in the usual form of such actions, concluding, in the first place, for reduction of the defender's titles as, forged and fabricated, so as to compel their production; and alternatively, for declarator of non-entry and payment of the retour duties up to the date of citation, and the full rents of the lands from that date till entry. The alternative, however, in the present case was so expressed as to make the conclusions for non-entry dependent upon the defender MacGillivray producing a good title to the lands.

The case coming into Court, decree in absence was allowed to pass against the defender MacGillivray, reducing his titles in terms of the reductive conclusions of the summons; but appearance was entered for Colonel Fraser Tytler, who produced a progress of titles vesting him in the lands in question as sub-vassal of MacGillivray, the immediate vassal. The defender Tytler also founded on a right of wadset granted by an ancestor of the pursuer to one of the defender's ancestors. In regard to that he made the following statement:—"After this purchase the said William Fraser, W.S., proposed to purchase the superiority of the said lands of Bochrubin and others from Æneas Mackintosh of Mackintosh, in whom the superiority had become vested. The Mackintosh agreed to sell the superiority to Mr Fraser, but only redeemably in the form of a wadset, and accordingly, by disposition and deed of wadset, dated 28th July 1768, the said Æneas Mackintosh of Mackintosh, on the narrative of the feu-contract of 1721, and sasine thereon, of the title made up by William MacGillivray in 1758, of the sale by William MacGillivray to the said William Fraser, W.S., by the disposition of 13th April 1768, and in consideration of the sum of one thousand merks Scots paid to the said Æneas Mackintosh by the said William Fraser, the said Æneas Mackintosh sold, wadsetted, and disponed to the said William Fraser and his heirs all and whole the said lands of Bochrubin and others, so far as respects the superiority thereof, with the feu-duty payable therefrom, and he assigned the feu-duty to the said William Fraser and his heirs, that the lands might be bruiked and enjoyed without any payment of feu-duty in time coming during the non-redemption. The right was specially declared redeemable by the said Æneas Mackintosh and his heirs-male succeeding, at any term of Whitsunday after the lapse of nineteen years from the term of Whitsunday 1768, by payment of the said sum of one thousand merks Scots after premonition of forty days as therein mentioned. The deed further bound the granter and his heirs to receive and enter the said William Fraser and his heirs gratis, in case they should wish to hold the *dominium utile* directly of The Mackintosh instead of blench of the said William MacGillivray. The deed of wadset is specially referred to. It was followed by possession. In virtue thereof the said William Fraser and his successors have ever since possessed the superiority of the said lands of Bochrubin and others, and have paid no feu-duty either to the pursuer and his predecessors, or to any one else. The defender has made up a title to this wadset by service and notarial instrument, and it constitutes a real right in his person." The question came to be—(1) whether the immediate vassal's titles having been set aside, the sub-vassal's did not fall along with them? and (2) whether in any view the defender Colonel Tytler was not liable to be decerned against under the alternative conclusions for non-entry?

A minute of admissions for both parties was put in in the following terms:—"(1) That the pursuer and his authors have stood infeft in the lands in question conform to the infeftments produced; (2) that the pursuer and his authors, apart from their infeftments, have never been, since the original feu-contract of 10th May 1721, by themselves or their tenants, in the actual possession of the lands; (3) that the pursuer's author received feu-duty from the date of the original feu-contract till 1768, when the wadset, No. 12 of process, was granted, but that no feu-duty had been paid since that date; (4) that, since 1768, the defender Colonel Fraser Tytler and his authors have been, by themselves and their tenants, in the actual possession of the lands; and (5) that the pursuer is the heir-male of Æneas Mackintosh of Mackintosh, the granter of the wadset of 1768; and *quoad ultra* both parties renounce probation."

The Lord Ordinary (Barcaple) pronounced the following interlocutor:—

"*Edinburgh, 21st December* 1869.—The Lord Or-

dinary having heard counsel for the pursuer and for the defenders, Colonel Fraser Tytler and John Ross, and considered the Closed Record, with the Joint-Minute for the parties, No. 48 of process, productions, and whole process—Finds that the pursuer is not, merely in respect of the decree in absence obtained by him against the defender MacGillivray in this action, entitled to decree against the present defenders in terms of the conclusions of the libel, or any part thereof: Finds that the defender Colonel Fraser Tytler has produced in answer to the call in this action a valid and sufficient progress of titles in his person to the lands in question, and that no valid objection is stated by the pursuer to the validity of these writs, or any of them: Finds, *separatim*, that the pursuer is barred by the wadset granted by his ancestor Æneas Mackintosh to William Fraser, the ancestor of the defender Colonel Fraser Tytler, No. 12 of process, to which wadset said defender is now in right, being infeft thereon, from insisting in the conclusions of the action as against the said Colonel Fraser Tytler and the defender Ross as his tenant: Assoilzies the said defenders Colonel Fraser Tytler and John Ross from the whole conclusions of the action, and decerns: Finds the pursuer liable to the said defenders in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and report.

"*Note.*—This is an action of reduction-improbation, and of declarator of the pursuer's right to the lands, and of declarator of non-entry, libelled in the usual form of such actions. The only plea originally stated in support of the reductive conclusions is the usual formal reason, that the titles founded on by the defender being either not executed, or being false, forged, and fabricated, the pursuer is entitled to decree of reduction-improbation. The action is directed against Neil John MacGillivray of Dunmaglass, presently in Canada, heir-male of the last immediate vassal to the pursuer in the lands in question, and also against Colonel William Fraser Tytler as alleged subvassal of said lands, and the defender Ross as his tenant. Before any other step was taken in the cause, the pursuer took decree of certification against the defender MacGillivray in absence, and finding and declaring against him conform to the other conclusions of the libel, that is, as the Lord Ordinary understands, conform to the first declaratory conclusion, to have it found and declared that the pursuer has the only good and undoubted right to the lands, and to possess the same, and uplift the rents and duties thereof. Decree in terms of the conclusions for declarator of non-entry could only be pronounced in the event of the defender MacGillivray producing good rights to the property of the lands in favour of any of his predecessors holden by them of the pursuer, or his predecessors or authors. Decree of declarator of non-entry would be entirely inconsistent with the decree reducing the whole writs called for, being the titles real or pretended creating the relation of superior and vassal between the pursuer and the defender MacGillivray. It is proper to keep the precise nature of this decree in absence against MacGillivray in view, as the pursuer makes it the main ground of his argument in support of his case against the other defenders.

"The conclusion for reduction-improbation in such an action is merely a means of forcing the vassal to produce the writs called for. In the present case both defenders are called to produce the writs specified in the summons, as also all and sundry dispositions, *et cetera*, and all other writs, concerning the lands granted by the pursuer, or any of his ancestors, in favour of the defender MacGillivray, his predecessors or authors, as vassals therein, or by the defender MacGillivray, or William Fraser, an ancestor of the other defender, or their respective predecessors or authors, in favour of the defender Fraser Tytler, his predecessors or authors. The writs specially called for include a feu-disposition of the lands granted in 1768 in favour of William Fraser, the ancestor of Colonel Fraser Tytler, and also an instrument of sasine in the lands, expede by the father of Colonel Fraser Tytler. The defender MacGillivray, as already seen, has allowed decree in absence to go out against him. But Colonel Fraser Tytler, as called upon to do in the summons, has produced the writs specially called for, and also other writs going to complete his title to the lands as held by him and his predecessors under the sub-feu of 1768.

"The pursuer asks for reduction of the whole of these titles against Colonel Fraser Tytler, upon the ground, as the Lord Ordinary understands his argument, that the titles of the MacGillivrays, as his immediate vassals, which constitute the essential basis of the sub-feu, have been set aside by the decree in absence against the defender MacGillivray. The Lord Ordinary thinks that there are several obvious and effectual answers to this demand. The defender Colonel Fraser Tytler is entitled, as indeed he is expressly called upon by the pursuer in the summons to do, to produce and support his titles. The Lord Ordinary has no idea that his right to do so can be taken away by a decree in absence against the other defender, which was *res inter alios acta*, and which he had no opportunity to resist. It is for after inquiry what may be the effect, if any, of this decree as to the other conclusions of the action, but the Lord Ordinary thinks it is clear that it cannot in any way interfere with the defender's right to resist the conclusions for reduction and for declarator of the pursuer's right to the lands, which is seriously insisted in. There are no reasons of reduction set forth, as regards the titles of the feu held by the MacGillivrays as immediate vassals of the pursuer and his predecessors, which it can be alleged are or can be substantiated now that they are produced. The pursuer has only libelled against them the formal reasons already noticed, which he does not now offer, and cannot offer to support. The Lord Ordinary is of opinion that these titles cannot be reduced as against the present defender on the mere ground of the decree in absence against MacGillivray. Several of the writs specially called for, and others which are produced under the general call, are the titles to the sub-feu, which the defender MacGillivray had no interest or title to support.

"The general reason of style is equally incapable of being supported as a ground for reducing these titles. But the pursuer, in his fourth plea in law, maintains that the titles in favour of MacGillivray having been reduced, the disposition of 1768 in favour of William Fraser, constituting the sub-feu, is null and void, as proceeding *a non habente potestatem*,—that is to say, he maintains that the titles of the MacGillivrays having been set aside by decree of certification in absence in this action, the whole titles to the feu derived from them in 1768 are *funditus* null and void. The Lord Ordinary is of opinion that that is a groundless contention

and that, if these titles are to be reduced, or declared null and void as against the present defender, it must be upon grounds of defect in themselves sufficient for that purpose, and substantiated *in foro* against him.

"When the progress of titles produced by the present defender is examined, it does not appear to the Lord Ordinary that it is liable to any well grounded objection. William Fraser, who obtained the original feu from MacGillivray, included the lands in a deed of entail executed by him in 1775. He was never infeft; but his eldest daughter, Ann Fraser, the institute in the entail, took infeftment on the deed of entail in 1776. That infeftment was of course invalid at its date as regards the lands now in question. But she continued to possess the whole entailed estate in virtue of her sasine taken on the deed of entail till her death in 1837. She thus acquired a prescriptive title, which is not affected by the fact that her father never having been infeft in the lands in question, the conveyance of them in the entail flowed *a non habente potestatem.* On her death, her son, the late Mr William Fraser Tytler, expede in 1837 a general service to his grandfather, the entailer, and took infeftment upon the feu-disposition of 1768, thereby establishing in his person a feudal title to the lands, independently of his mother's prescriptive title, which appears still to remain in her *hæreditas jacens,* and may be taken up at any time. His eldest son, the present defender, has obtained decree of special and general service to his father, which was recorded in the Register of Sasines on 8th July 1869, since the present action was raised. The Lord Ordinary does not understand it to be disputed that there is thus a valid feudal progress of titles brought into his person; and, at all events, he is of opinion that the pursuer has not adduced any well-founded objection to it. On these grounds he is of opinion that the pursuer is not entitled to decree of reduction-improbation against the present defender, or to have it found that any portion of the progress of titles is null and void, in terms of his fourth plea in law.

"The question remains as to the conclusions for non-entry. The Lord Ordinary does not think that an over-superior can, by merely obtaining a decree in absence in an action of reduction-improbation and non-entry against his immediate vassal, invalidate the rights of a sub-feuar, and take the lands to himself, as the pursuer here proposes to do, or even enter to possession of the rents of the lands sub-feued, to the exclusion of the vassal in the *dominium utile.* There has long been a course of procedure by which a sub-vassal could compel his immediate superior to enter with the over-superior, and give him an entry, and if the immediate superior failed to do so, could obtain an entry from the over-superior. The Lord Ordinary does not think that the rights of the vassal in this respect can be defeated by a decree in absence obtained by the over-superior against his immediate vassal. Recent legislation has greatly facilitated the procedure for a vassal thus obtaining an entry from his immediate superior, or the over-superior. —Titles to Land Consolidation (Scotland) Act, 31 and 32 Vict., c. 101, sects. 9, 97, and 104, schedules (X) (AA). The Lord Ordinary thinks that the defender would in any event be entitled to follow out the course of procedure pointed out in the statute, notwithstanding the decree in absence obtained against his immediate superior, and the dependence of the present action against himself.

"But there is further a very important specialty in the present case to which the Lord Ordinary has not hitherto adverted. It arises out of the existence of a wadset right granted by Æneas Mackintosh of Mackintosh, a predecessor of the pursuer, to William Fraser, who obtained the sub-feu on 30th April 1768. The wadset is dated 28th July of the same year. The original right granted by Mackintosh to MacGillivray in 1721 was a feu-right for payment of a feu-duty of fifty merks Scots. The right granted by MacGillivray to Fraser in 1768 was granted for payment of a blench duty of one penny Scots, "and also relieving the said William MacGillivray and his heirs, at the hands of Æneas Mackintosh of that ilk and his heirs, of the sum of fifty merks Scots money of feu-duty yearly, payable out of the said lands, to him as the immediate lawful superior of the same." It was with reference to this state of the holdings by MacGillivray under Mackintosh, and by Fraser under MacGillivray, that within a few months after Fraser had acquired the *dominium utile* of the lands from MacGillivray for payment of a blench duty and relief to MacGillivray of the feu-duty of fifty merks payable to Mackintosh, the over-superior, he also acquired from the latter the wadset right in question. The sum for which the wadset was granted, 1000 merks, was just twenty years' purchase of the feu-duty. It is a proper wadset, proceeding on the narrative of the feu-right granted by Mackintosh to MacGillivray in 1721, and the right granted by MacGillivray to Fraser in 1768, and on the consideration of 1000 merks Scots advanced and paid to the granter by Fraser. While it gives to the reverser the power to redeem at any term of Whitsunday without limitation, after the lapse of nineteen years, it does not give to the wadsetter the power of requiring repayment of the 1000 merks for which the wadset was granted.

"The defender maintained that this wadset right, which is unredeemed, and has recently been made real by infeftment in his person, entirely takes away the title of the pursuer to the superiority of the feu held by MacGillivray, and to sue this action, or exercise any other of the rights of superiority. The Lord Ordinary cannot adopt this view to its full extent. The deed bears in its inductive clause that Fraser has advanced and paid to Mackintosh the sum of 1000 merks, 'for my granting to him the disposition and wadset right underwritten, of the said feu-duty payable to me yearly out of the said lands.' The dispositive clause sells, wadsets, and dispones the lands, 'so far as respects my right of superiority of the same, together with the said fifty merks Scots of feu-duty.' The granter assigns to Fraser the feu-duty of fifty merks during the not redemption of the wadset, 'to the end he may bruick and enjoy the said lands without any yearly payment of the said feu-duty in time coming.' The precept of sasine bears to be granted 'to the end the said William Fraser may be duly infeft in the said lands, for security to him of the present wadset, so far as respects my right of superiority and right to the said feu-duty of fifty merks of Scots money yearly,' and sasine is directed to be given of the lands, 'and that so far as concerns my right of superiority and the said feu-duty.' The deed is not very accurately or consistently expressed with regard to the precise nature and extent of the right which was intended to be conveyed. But having regard to its whole tenor, the Lord Ordinary thinks that it must be construed as merely giving right to the superiority

to the effect of entitling the wadsetter to the feu-duty of fifty merks payable to Mackintosh the granter, so long as the wadset should not be redeemed. He does not think it can be held to have been intended to constitute the wadsetter in any proper sense the superior of MacGillivray, so as to entitle him to the casualties of superiority, or enable him to enter the heirs of MacGillivray as his vassals.

But it appears to the Lord Ordinary that the wadset right affords a complete defence to Colonel Fraser Tytler against the action, in so far as it concludes for reduction of the titles of MacGillivray and the defender, and for non-entry duties. By that onerous deed, containing absolute warrandice on which exclusive possession has followed since 1768, the granter did in the most express manner recognise the base right held by Fraser; and upon the least extensive construction that can be given to it, he made over to him, so long as the wadset should be unredeemed, the right to the feu-duty of fifty merks, payable by his immediate superior MacGillivray, and disponed the lands, with precept on which infeftment has been taken, to the effect of making that a real right. It seems out of the question that, in that state of matters, he can be heard to contend that he is entitled, in respect of his superiority rights, to carry off the property by a reduction of his immediate vassal's title, or to defeat his grant of the feu-duty to Fraser. This would just be to bring the wadset, to which no objection can be taken, and on which there has been exclusive possession for a century, to an end without repayment of the sum for which it was granted.

"In the view which the Lord Ordinary takes of the case, it does not appear to him that there is room, as there usually is in a declarator of non-entry, for Colonel Fraser Tytler offering to take an entry from the pursuer, or that he is called upon to do so in this action. The pursuer maintains that the defender is not his vassal, and is not entitled to an entry, and that the fee held by him is absolutely sopite, and brought to an end by the effect of the decree against MacGillivray. The conclusion for non-entry is directed against MacGillivray alone, and the other defender is only involved in it with reference to the demand for bypast retoured duties, and for the rents of the land from the date of citation, as being due to the pursuer in consequence of MacGillivray's failure to enter. That is not, indeed, the case now persisted in by the pursuer, who claims the lands absolutely in respect of his own superiority titles, and the reduction of the titles of the MacGillivrays. But if it were so, there is still no call on the present defender to enter, and no conclusion against him in respect of his lying out unentered. The Lord Ordinary is therefore of opinion, upon the whole matter, that the present defenders are entitled to absolvitor from the whole conclusions of the summons, without further procedure in regard to any claim which Colonel Fraser Tytler may have to an entry from the pursuer, or the terms on which, if he is entitled to an entry, it must be given."

The pursuer reclaimed.

SOLICITOR-GENERAL and J. MARSHALL for him.

WATSON and KINNEAR in answer.

The argument in the Inner House was confined to the second question. To-day the Court adhered, adopting the reasoning of the Lord Ordinary. The Court held (1) that it was probably enough for the decision that the pursuer's summons was so framed as to be exhausted by the decree of reduction following upon the failure of MacGillivray to produce his titles; (2) that, supposing that difficulty overcome, the pursuer's right of superiority, on which his action was based, was, at the time the action was brought, substantially vested in the defender Colonel Tytler in virtue of the wadset right founded on; (3) that although it was stated that that wadset was in course of being redeemed, and had in fact been redeemed at the recent term of Whitsunday, the rights of parties under this action could not be affected by anything which took place *pendente percessu.*

Agents for Pursuer—Tods, Murray & Jamieson, W.S.

Agent for Defenders—James Tytler, W.S.

Saturday, May 21.

FIRST DIVISION.

SIMLA BANKING CORPORATION *v.* HOME.

Mandatory—Defender leaving Country—Service of the Queen—Discretion of Court. An officer in Her Majesty's service having become bound to an Indian Bank by a bond executed in India, eighteen months after the bond has become payable, obtains leave of absence. During his temporary residence in Scotland the bank raise an action on the bond. His leave having expired, he proceeds to India. Motion by the pursuer that the defender should be ordained to sist a mandatory *refused,* in respect that it was a matter for the discretion of the Court, and the circumstances were such as to justify the Court in exercising that discretion in favour of the defender.

On 30th June 1863 the defender Home became bound, jointly and severally with two others, in a bond and disposition to the Simla Bank Corporation for the sum of 3000 rupees, which they thereby bound themselves to repay with interest of 12 per cent. on 30th June 1866. Home was the cautioner for the others, who, as well as himself were English officers serving in India. The principals failed to repay the borrowed money when due, and in the end of the year 1867 Home left India for Scotland on leave of absence. He remained in Scotland until December 1869, and in June of that year the present action was raised against him by the Bank, for repayment of the sum borrowed, with interest. In March 1870, three months after the defender had left for India, his leave having expired, the pursuers moved the Lord Ordinary to ordain him to sist a mandatory.

The Lord Ordinary granted the motion.

The defender reclaimed.

J. M. GIBSON for him, argued that the rule which required a party leaving the country during the progress of a suit to sist a mandatory, was not peremptory, but that the Court had a discretion to make or refuse such order. In the present case the defender had left the country on Her Majesty's service, and on the authority of *Steel* v. *Steel,* 4 S., 527, and Shand's Practice, p. 156, it was not necessary for him to sist a mandatory.

MARSHALL in answer.

At advising—

LORD DEAS—I understand the general rule of law upon these cases to be, that the pursuer of an action, if he leaves the country must sist a mandatory if it be required by the defender, unless he