without that event having occurred, and in the face of the declaration they should have nothing, the pursuers raise this action.

I think that the pursuers' contention is extravagant. I know no proposition of law on which it is even arguable. I therefore concur with your Lordship. As to the motion for a proof, I agree with your Lordship as to that also. In a case in which proof was to be led as to the intelligence of a granter of a deed which was executed forty years ago, where the party has been allowed a proof, and then, because a motion for a commission was refused, abandoned his allegation and took a judgment on the case without it, and where the Lord Ordinary has decided that the new allowance of proof he asks ought not to be given, I am not for disturbing the procedure in the Outer House.

LORD CRAIGHILL—There are here three questions—(1) as to the import of the will, (2) whether the declaration executed by M'Culloch was sufficient to exclude the claim of this pursuer, and (3) whether proof ought yet to be allowed? As to the first and second of those questions, I have no difficulty in agreeing with your Lordships. The will is no doubt peculiar, but it is also plain. It is a conveyance of a general kind in favour of M'Culloch, and not merely from the character of the conveyance but from the language used in the subsequent part of the deed I think that the effect and the intention of it was that this was neither a liferent nor a trust, but that under it what had been the property of Andrew Inglis became the property of M'Culloch. The import and effect of the deed is—"You, Alexander M'Culloch, shall take the property I leave, but unless you exclude the claim of John's children by an explicit declaration in writing under your hand, then they shall have a claim on your estate at your death for the value of what you get from me." It would have been a claim of debt for the value of that succession. The pursuers do not so come forward. Their only claim would be a claim of that kind if not cut out by Alexander M'Culloch. But they were so cut out by his explicit declaration. Now, I think there is no conveyancing difficulty in the case. All that was required was a declaration by which M'Culloch's will should be expressed, and that there was. Therefore I concur with your Lordships.

As to the allowance of proof, even now there is more difficulty. I am not insensible to the consideration that thirty years have elapsed since the declaration was made. At the same time the facts are, that four weeks after proof was allowed no doubt, but still before the diet of proof arrived, a commission was asked which the Lord Ordinary refused, and he refused leave to reclaim against that interlocutor. In consequence, the pursuer a week before the diet fixed for the proof announced that she would not proceed to proof, the reason being that the witness for whose examination a commission was desired was essential to her case. I think there is no reason for refusing even now an opportunity for leading evidence. Whether or not the pursuer was ill-advised in not going on with the proof, it would be hard that on taking this, the first opportunity of again asking an allowance of proof, the pursuer should be held foreclosed, and dealt with as having abandoned her case on that point on which proof would be indispensable.

LORD YOUNG—I should like to add, with regard to the doubt which I understood your Lordship to express as to the efficacy of the will of Andrew Inglis to give to John's children a *jus crediti* on the estate of Alexander M'Culloch, in the case which did not occur of no declaration being made, that I share that doubt. I doubt exceedingly whether in that event John's children would have had any claim as creditors against M'Culloch's estate. I doubt the effect of such a provision as that which Inglis made to give any such right.

The Court adhered.

Counsel for Pursuer—R. V. Campbell. Agent—Thomas Hart, L.A.
Counsel for Defender—J. P. B. Robertson. Agents — Duncan, Archibald, & Cunningham, W.S.

Thursday, November 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ARNOTT'S TRUSTEES *v.* FORBES.

(Before the Lord Justice-Clerk, Lords Young and Adam.)

Superior and Vassal—Assignation — Rights of Security-Holder against Vassals of the Granter of the Security.

The holder of a bond and disposition in security over lands subsequently feued out by the granter of the bond, the feu-duties being assigned to the security-holder, and the granter's right to the superiority being declared to be subject to the security, has no claims or rights against the vassal except as in right of the superior, and a claim for retention of feu-duties which could be successfully pleaded against the superior may be pleaded against the holder of the security.

In this case the pursuers were the accepting and acting trustees of the late James Arnott, Esq., of Leithfield, W.S., Edinburgh, under his trust-deed and settlement dated July 7, 1866. In the course of their management of the trust-funds they, in June 1873, advanced on loan to John Renton, accountant, Glasgow, the sum of £750 sterling, which sum the latter, by bond and disposition in security dated June 13, 1873, bound himself to repay to them at the term of Martinmas 1873, with a fifth part more of liquidate penalty in case of failure, and interest at the rate of £5 per cent. per annum by equal proportions at the terms of Whitsunday and Martinmas in each year, and a fifth part more of said interest in case of failure in the punctual payment thereof. In security of the personal obligations contained in the said bond and disposition in security, John Renton disponed to the pursuers, in the first place, a plot of ground, part of the lands of Craigton, lying in the parish of Govan and county of Lanark, and containing 2 roods 14 poles and 28-100th parts of a pole or thereby imperial standard measure; and, in the second

place, another plot of ground, also part of the said lands of Craigton.

By the said bond and disposition in security, which contained an assignation to writs and rents, it was declared that notwithstanding the therein written conveyance it should be competent to the said John Renton, his heirs, executors, and representatives, to dispone in feu-farm, to be holden of him and his foresaids, the subjects contained in the said bond and disposition in security, and that in such manner as he should deem most eligible, but so that no grassum, price, or other consideration should be taken other than an annual feu-duty or ground rent, and which for the plot of ground disponed in the first place should in no case be less than £50 sterling per annum, nor less than £56 for the plot disponed in the second place. And it was further declared that it should not be in the power of the said John Renton to make or consent to any conditions or stipulations whereby any right competent by law to him or his foresaids as superiors of any part of said subjects for security or recovery of the said feu-duties, ground rents, or casualties might be in any way prejudiced or injured. It was also further provided and declared that the superiority of the said subjects so to be feued, or any part thereof, and the feu-duties, ground rents, and casualties of superiority thereof, and every other right, title, and interest in or to the said subjects which might belong to or be reserved by the said John Renton and his foresaids as superiors, should be subject to the real security created by the said bond and disposition in security, and to the payment of the sums of money therein contained.

By feu-contract, dated June 19, 1873, John Renton feued the said plot of ground, containing 2 roods 14 poles and 28-100th parts of a pole or thereby, to David Cooke, builder in Govan, for a a feu-duty of £50 a-year, but under reservations, burdens, conditions, and limitations. which were, *inter alia*, as follows:—. . . . "(2) The second party and his foresaids shall be bound to build at or before the term of Martinmas 1873, and thereafter to maintain and uphold in good repair, on the plot of ground above disponed, houses or villas not exceeding two square storeys in height, which shall yield or be capable of yielding a free yearly rent equal to at least double the amount of the feu-duty after mentioned. (3) He shall be bound to open and form streets of 45 feet wide, on which the said houses are built, and keep them in good repair in all time coming. (4) He shall be bound to form, and thereafter maintain and uphold in good order and repair, all such drains and pipes as may be necessary to conduct the drainage and sewage of the said plot of ground and houses to be built thereon to the common sewer or main drain to be formed by the said John Renton; Declaring always that such drains and pipes shall be formed and made for the drainage of the said plot of ground and houses thereon in such places and at such times as the said John Renton and his foresaids, or his or their superiors, may consider necessary; and that the same when made and renewed from time to time shall be formed and constructed of such dimensions and materials, and shall be placed in such lines and at such depth and levels below the surface of the ground, as shall be fixed and determined from time to time by the said John Renton's superiors or their successors, or a surveyor to be appointed by them; And providing, without prejudice to what is above written, that the second party and his foresaids shall be bound to pay and free and relieve the said first party of one-half of the expense of forming and maintaining in all time coming a common sewer leading through the centre of said street of 60 feet in breadth, and that in the proportion which the frontage of the said plot of ground bears to the said street of 60 feet wide, and which common sewer is to be formed by the said first party, and that at such depth and level below the surface as may be approved of by his superiors or their successors, or any surveyor appointed by them. (5) In the event of two years' feu-duty of the plot of ground, or of any part thereof, remaining at any time unpaid, the said plot of ground, with all the buildings that may have been erected thereon, shall *eo ipso* revert and belong to the said John Renton and his foresaids, and these presents, with all that may have followed thereon, shall *eo ipso* become void and null without prejudice to the claim of the said John Renton and his foresaids for payment of the byegone feu-duties, which claim shall remain entire."

In July 1873 David Cooke conveyed to the Scottish Heritable Security Company (Limited) a portion of the said piece of ground, containing 1 rood 6 poles and 50-100th parts of a pole, under the reservations, burdens, and others contained, *inter alia*, in the feu-contract between John Renton and David Cooke, and to be holden *a se vel de se* for payment to the superiors thereof of £25 a-year, being the proportion bearing to be thereby allocated by David Cooke on the subjects so disponed of the *cumulo* feu-duty of £50, and which allocation was confirmed by memorandum by John Renton as superior of the property.

By disposition dated December 3, 1875, the Heritable Security Company conveyed this latter piece of ground to Thomas Forbes, builder, Govan, the defender, who thereby became heritable proprietor of the same. Renton and Cooke thereafter became insolvent. The pursuers presented this petition in the Sheriff Court of Lanarkshire to have the defender ordained to pay them the sum of £474, 9s. 9d. sterling, with interest at 5 per cent. from date of citation till payment. This sum, they averred, formed the payments due to them since Martinmas 1873 in respect of the feu-duty of £50 sterling before mentioned contained in the feu-contract between Mr Renton and Mr Cooke, and which had not yet been paid. They further averred that the sum of £750 contained in the bond and disposition in security from Mr Renton was also still unpaid.

They pleaded—"(1) The pursuers being heritably vested in the superiority of the subjects owned by defender, and the feu-duty being unpaid as aforesaid, decree should be pronounced as craved. (2) The foresaid arrears of feu-duty, interest, and liquidate penalties being due by the defender, and the pursuers being entitled to payment thereof under and in virtue of the foresaid bond and disposition in security, decree should be pronounced as craved."

The defender, on the other hand, averred that Mr Renton, as superior, had failed to implement the obligations he undertook in the feu-contract

of June 19, 1873, to make certain streets, houses, and sewers therein mentioned, although he had been repeatedly required to do so. That in consequence the defender and his authors had not been able to enjoy the proper use of the said ground so feued to him. He further averred that the feu-contract granted by Mr Renton to David Cooke was granted in terms of and within the powers contained in the pursuer's bond and disposition in security, and that they had never in any way repudiated the conditions therein specified. He was perfectly willing to pay any feu-duty due by him as soon as the pursuers should adopt and fulfil the obligations and conditions undertaken by their author Mr Renton.

He pleaded—"(4) As the pursuers had no higher claim than their author Mr Renton, and as, while claiming under the feu-contract, they refused to adopt and implement the obligations incumbent on the superior, the defender ought to be assoilzied, with expenses. (5) The obligations incumbent upon the superior, and which he was bound to fulfil as a condition of his getting the feu-duty, being still unimplemented, the defender was not bound to pay any feu-duty or any portion of the sum sued for. (6) In any case, the pursuers were bound to recognise the allocation of the said John Renton, whereby the feu-duty of the defender's plot was only £25 per annum. (8) In any case, the pursuer was not entitled to claim any arrears prior to the date of entering into possession in ordinary form, and he had not as yet taken any such step in regard to the subjects in question. (9) The defender having suffered loss and damage through the failure of the pursuers and their author Mr Renton to implement the obligations incumbent on them, and to an extent greatly in excess of any feu-duty exigible from him, he was entitled to absolvitor, with expenses."

The following joint minute of admissions was put into process by the parties:—"(1) That the feu-duty sued for had not been paid since the term of Whitsunday 1873. (2) That the principal sum of £750 contained in pursuers' bond and disposition in security is unpaid, and no interest has been paid thereon since the term of Whitsunday 1874. (3) That the feu-duty to the superiors of John Renton, who is superior of the defender, £50 per annum, had not been paid since Whitsunday 1875."

The Sheriff-Substitute (GUTHRIE) found "that the defender was heritable proprietor of 1 rood 6 poles and 50-100th parts of a pole, part of the lands of Craigton, lying in the parish of Govan and county of Lanark, conform to disposition by the Scottish Heritable Security Company (Limited), dated 3d, and recorded December 8, 1875, said ground being one-half of the feu marked No. 1 on the plan of feus at Craigton: Found that the immediate superior of said subjects was John Renton, who by feu-contract dated 19th, and recorded July 21, 1873, feued the whole of the said feu No. 1 for a feu-duty of £50 a-year to David Cooke, by whom the said one-half thereof was conveyed to the said Scottish Heritable Security Company (Limited), under the reservations, burdens, and others contained, *inter alia*, in the said feu-contract between John Renton and David Cooke, and to be holden *a se vel de se* for payment to the superiors thereof of £25 a-year, being the proportion bearing to be thereby allocated by the said David Cooke on the subjects so disponed of the *cumulo* feu-duty of £50: Found that by bond and disposition in security dated 13th, and recorded June 17, 1873, the said John Renton, in security of a loan of £750, had disponed to the pursuers the said feu marked No. 1, along with a similar adjacent piece of ground, which is No. 2 on said plan: Found that the memorandum of allocation was ineffectual to prejudice the rights of the pursuers as creditors under the said bond and disposition in security in their favour, and repelled the defender's sixth plea: Found that by the feu-contract between Renton and the defender's author, the former became bound to make certain streets and sewers therein specified, and that he had failed to do so, to the great loss and injury of the defender: Found that Mr Renton as superior was entitled, by the terms of the conveyance in security in favour of the pursuers, to feu the subjects thereby conveyed in such manner as he might deem most eligible, subject to certain conditions, none of which conditions were violated or infringed by his said obligation to make streets and sewers: Found therefore that the pursuers, as in his right, were not entitled to insist for payment of the feu-duties due by the defender from the date of his purchase until they or their author should have implemented said obligation: Sustained the defender's fifth plea, and assoilzied them from the prayer of the petition, and decerned."

He added this note:—"A number of questions have been raised in the discussion of this case, all of which it is not necessary to decide.

"1. The pursuers' title to sue is not impugned on the record, and under the case of *Home* v. *Smith*, 1794, Mor. 15,077, appears to be clear—Bell's Conveyancing, 747-8 and 1150; Duff, Feu-Con., sec. 204, 275. In this case the heritable creditor is very distinctly invested with the superior's rights for the recovery of the feu-duty.

"2. Mr Renton's memorandum of allocation cannot have any effect against his creditors. There is not much law either in the text-books or in decisions with regard to the superior's power and obligation to allocate feu-duties. It seems, however, that both by common law and statute an allocation of feu-duties cannot affect the rights of heritable creditors who are not parties to it—See 37 and 38 Vict., c. 94, sec. 8. And in the present case, the prior recorded disposition to the pursuers distinctly excludes by its terms, as I read them, Mr Renton's power to allocate so as to prejudice them; for in giving him the power to feu referred to in the interlocutor it provides that the feu-duty of the plot of ground in question, No. 1, shall in no case be less than £50 a-year, and that it shall not be 'competent for Mr Renton to make or consent to any conditions or stipulations whereby any right competent by law to him, as superior of any part of said subjects, for security or recovery of the feu-duty may be in any way prejudiced or injured.' Now, one of the superior's rights for security and recovery of his feu-duties is, that it affects every part of the ground feued, and that the vassal, in subdividing the feu, cannot, without his consent, relieve any part of the ground from that burden. What Mr Renton does by his memorandum of allocation subsequent to the pursuers' recorded

right is to relieve part of the ground from the burden of the feu-duty, the very thing that is prohibited in the clause quoted. Clearly, therefore, in a question with the pursuers, that allocation is ineffectual.

"3. The superior's right to sue a personal action for the whole of his feu-duty against a subvassal or intromitter with the fruits is equally clear, and is alike unaffected by the subdivision of the feu—Bell's Prin., 700, and cases cited there. The pursuers, however, cannot in any view be allowed to recover in such an action the feu-duties due before the defender's possession of the ground—*i.e.*, before December 3, 1875. This seems to have been law for more than two centuries—*Rollo* v. *Murray*, 1629, Mor. 4185; *Cockburn* v. *Trotters*, 1639, Mor. 4187; *Hamilton* v. *Burleigh*, 1712, Mor. 4189; *Biggar* v. *Scott*, 1738, Mor. 4191; Ersk. Inst., ii., 5, 2, and notes. This, however, appears to be the only recognised exception to the personal liability of the 'intermeddler,' as Erskine calls him; and it does not seem ever to have been suggested that this, any more than the superior's other remedies, is affected by subdivision of the feu not recognised by him.

"4. In the view which I take of the case, it is unnecessary to consider whether the fact that the feu-duty due by the pursuers' author to the over-superiors is unpaid affords a good defence, more especially as that plea has not been fully argued, and it might probably be obviated by arrangement.

"5. The proof clearly shows that the defender has been prevented from obtaining anything like full enjoyment of his feu-right by the superior's entire failure to provide him with roads and sewers in implement of his obligation in the feu-contract. It was the superior, not the feuar, who was to put these feus in communication with the outer world; and in consequence of his unexplained neglect to do so, the defender has undoubtedly failed to derive from them the benefit to which he was entitled, and which was naturally in the contemplation of parties when the feu-right was constituted. The pursuers stand upon the right of the superior to his feu-duty; but they must take that as it stands written in the feu-contract, so far as that feu-contract is within the powers belonging to the superior at common law, and under the rights reserved to him in their own prior heritable security. In obliging himself to make these roads and sewers, it is not and cannot be contended that Mr Renton undertook any unusual or extraordinary burden in the circumstances, or one that the pursuers, who took their security over ground intended for feuing, did not quite intend and foresee. Upon the principle, then, of the cases referred to in Bell's Prin., 702, and Shaw's Bell's Comm., 735, the defender is entitled to retain his feu-duties until he receives implement of the counter prestations stipulated in the feu-contract."

The pursuers appealed, and argued—They were quite entitled to proceed against the defender for vindication of the feu-duties due by him to the superiority. The obligation put forward by him as incumbent on them to build sewers, &c., was no direct obligation on them at all. It was merely an obligation on Cooke with reference to his over-superior Renton, and further, was posterior to the bond and disposition in security, which was the measure of the pursuers' title. The defender therefore had no right of retention against them—*Drybrough* v. *Drybrough*, May 21, 1874, 1 R. 909. The obligation was not of such a kind as could be put against a liquidate feu-duty. The cases cited by defender were cases of landlord and tenant, and had no application here.

The defender replied—The vassal was entitled to retain the feu-duties in respect of the failure of his superior to perform the obligations incumbent on him with reference to the building of houses, streets, and sewers—*Guthrie* v. *Shearer*, November 13, 1873, 1 R. 181; *Davie* v. *Stark*, July, 18, 1876, 3 R. 1114; *Ainslie* v. *Magistrates of Edinburgh*, November 19, 1839, 2 D. 64, also reported February 9, 1842, 4 D. 639; *Kilmarnock Gas Light Co.* v. *Smith*, November 9, 1872, 11 Macph. 58. The pursuers had abstained from claiming their feu-duties for eight years.

At advising—

Lord Justice-Clerk—This case of *Arnott* v. *Forbes* raises some difficult and troublesome questions, or, at all events, might raise them, were not the facts precisely as they are in this individual litigation.

This is an action by a security-holder claiming under a conveyance or disposition of these lands (part of the lands of Crighton lying in the parish of Govan and county of Lanark) granted by the superior, and the action is for the vindication of the feu-duty due by the vassal to his cedent or disponer or author. The kind of right which the creditor took in that case is peculiar and unusual. It is not merely an heritable bond over land belonging to his debtor, but there are also adjected to the security certain other provisions. There is reserved to the party who creates the security a right to sub-feu his lands, and he creates in favour of his assignee or disponee a right to claim the feu-duty from the vassals to be created, and gives the creditors the same rights in respect of his superiority which he himself possessed. Or, as the pursuers put it, —"It was declared that, notwithstanding the therein written conveyance, it should be competent to the said John Renton" (who was the debtor to whom the money was advanced by the pursuers), "his heirs, executors, and representatives, to dispone in feu-farm, to be holden of him and his foresaids, the subjects contained in the said bond and disposition in security. . . . And it was further declared that it should not be in the power of the said John Renton to make or consent to any conditions or stipulations whereby any right competent by law to him or his foresaids, as superiors of any part of the said subjects, for security or recovery of the said feu-duties, ground rents, or casualties, might be in any way prejudiced or injured. It was also further provided and declared that the superiority of the said subjects so to be feued, or any part thereof, and the feu-duties, ground rents, and casualties of superiority thereof, and every other right, title, or interest in or to the said subjects which might belong to or be reserved by the said John Renton and his foresaids as superiors should be subject to the real security created by the said bond and disposition in security, and to the payment of the sums of money therein contained."

Now, there are many views of a security of that kind to show that it is peculiar and unusual, and in some respects I think circumstances might arise in which it might not be available at all. But in the meantime, having granted that right in security to the creditor, the debtor feus out part of his lands. I need not go into the history of the rights of that kind which he granted, because we are only dealing with one of them here. He feus out his land and takes his vassal bound to pay a certain amount and portion of feu-duty, and comes under obligations arising out of the nature of the ground in question, which had been acquired by himself for building purposes, and which he now feus out for building purposes to other vassals. In the feu-right which is now in question he becomes bound, when the buildings to be erected by his vassal shall require it, to be at the expense of making, or rather to make, a certain main sewer and to lay out certain streets. He had himself become bound in similar obligations to the party from whom he purchased or feued the land, and this is a transference of the obligations. He undertakes that obligation in a question with his vassal. That is a mere outline of the position which the parties hold. Now, I think the feuar took possession in 1875. No feu-duty, except one term's feu-duty, has been paid at all, and no demand—at all events no official demand—has been made for the execution of these works. But the vassal has retained the feu-duty in his hand, and the creditor has made no demand for it until the present action.

Meanwhile the mid-superior who granted these rights has become bankrupt and is sequestrated. The precise date of the sequestration we have not, but I imagine it was about 1876, or the year subsequent to the entry of the vassal. Now, the vassal says, I am not bound to pay my feu-duty, because the superior has not implemented his own obligation. The plea is—"The obligations incumbent upon the superior, and which he was bound to fulfil as a condition of his getting the feu-duty, being still unimplemented, the defender is not bound to pay any feu-duty, or any portion of the sum sued for." The answer is, That obligation about the construction of the sewers is not one under which I am individually bound at all. In the second place, it is said it is not liquid, or at all events you are not entitled to retain your feu-duty to compel fulfilment of that obligation. And the real question—indeed the only question that arises here, so far as it seems to me—is, Whether that be or be not a good answer to the claim of the creditor?

Now, I must say I do not concur in many of the views that are stated by the Sheriff-Substitute. I do not think that they touch the real question or point of this case. The question is, Whether that particular obligation which is contained in the feu-rights is one the non-fulfilment or performance of which is a good defence against the payment of feu-duty when demanded by the superior?

Now, I am of opinion, in the first place, that a heritable creditor has no rights of superiority, as between him and the vassal, apart from the right of the superior from whom he derives his title. In other words, he is nothing but the superior's assignee, as far as the feu-duty is concerned, and everything that could be pleaded against the superior could be pleaded against him. Thus the question is, whether the defence stated would have been a good defence to the superior himself? And my opinion shortly upon that matter is this:—Whether an obligation of this kind—to do certain works *ad factum præstandum*—to make repairs, lay out streets or roads, or make sewers—whether an obligation of that kind in a building feu is of a nature that can be set against liquidate feu-duty, is a matter of some difficulty and nicety, and in the view that I take upon this whole matter, I do not think it necessary to give any opinion on that question. It is perfectly plain that under the feu-right, when possession was first taken, the two obligations to pay the feu-duty on the one hand, and to make the road and sewer on the other, are not at all coincident, because it would depend on the nature of the buildings, and the state of forwardness in which they were, and also the condition in which they stood, whether that obligation on the part of the superior ever became prestable; and if the superior had remained solvent, I think that would have been a very difficult question, but it is not necessary that we should resolve it. It might be quite well maintained, on the one hand, that this was part of the subject of the feu, and therefore that position of the whole of it was necessary before feu-duty was demandable. But, on the other hand, it is plain that this obligation admits of being performed, fulfilled, or satisfied in a great variety of ways which would not be applicable in the least to the payment of feu-duty.

But in this case I have come to the same result as the Sheriff-Substitute, on this simple ground, that as the heritable creditor has no better right than the superior, and has no direct right against the vassal save as in the right of the superior, the superior being bankrupt, and his bankruptcy having made it impossible for him to fulfil the obligations of the feu-right, the vassal is entitled to retain his feu-duty. I go no further than that, but I say the fact of the superior being incapacitated by reason of bankruptcy from fulfilling the obligation, the vassal can hold his hand until some one will undertake to fulfil the obligations under which the superior came. It is a right of retention—a clear right of retention; because it might have been a case, if parties had remained solvent, of requiring the vassal to fulfil his part of the contract when it was quite plain that, whether a *de præsenti* or *de futuro* obligation, it could not be fulfilled.

On that short ground I think the judgment of the Sheriff-Substitute ought to be affirmed.

Lord Young—I am of the same opinion, and have very little to add. There is only one thing I desire to say, and that is not on the ground of judgment which your Lordship has indicated, and with which I entirely concur, but on the note of the Sheriff-Substitute, some remarks in which I rather think were in your Lordship's view when you observed that you could not concur in all that the Sheriff-Substitute had said. I notice it particularly in order to prevent any future misapprehension that this Court was giving any countenance to the view upon which the Sheriff-Substitute has proceeded when he says that "Clearly, therefore, in a question with the pursuers"—that is, the creditors and bond-

holders—"that allocation is ineffectual." Perhaps it is the less necessary that I should notice it—although I am noticing it for the reason I have indicated—seeing that the counsel for the appellants abandoned it as altogether untenable. But the Sheriff-Substitute seems to have proceeded upon the view that this action was directed against the ground. It has nothing to do with the ground. The Sheriff-Substitute says—"One of the superior's rights for security and recovery of his feu-duties is, that it affects every part of the ground feued, and that the vassal in sub-dividing the feu cannot without his consent relieve any part of the ground from that burden. What Mr Renton does by his memorandum of allocation subsequent to the pursuers' recorded right is to relieve part of the ground from the burden of the feu-duty—the very thing that is prohibited in the clause quoted—"Clearly, therefore, in a question with the pursuers, that allocation is ineffectual." Now, as I have said, we have nothing to do with the ground. The action is laid on the personal obligation which the defender undertook to pay the feu-duty. The remedies against the ground, if he fails to implement his personal obligation, are not here at all, and could not be brought here at the instance of the present pursuer, who has no title enabling him to do so. I have only thought it necessary in making these remarks to guard against the notion of that view meeting with any countenance or approbation, because in all that your Lordship has said, and in the grounds of your Lordship's opinion, I entirely concur.

I have nothing more to add.

LORD ADAM concurred.

The Court therefore dismissed the appeal.

Counsel for Appellants—D.-F. Kinnear, Q.C.—Keir. Agents—Crombie & Bell, W.S.

Counsel for Respondent—Mackintosh—Dickson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, November 3.

SECOND DIVISION.

[Lord Adam, Ordinary.

MUIR *v.* MORE NISBETT AND ANOTHER.

Sheriff—Process—Sheriff Court Act 1876, *sec.* 8—*Dispensing with* Inducíæ.

Circumstances in which the Court sustained the appointment of a judicial factor under the provisions of the Sheriff Court Act 1876, sec. 8, made *de plano* without service or intimation.

William Muir brought an action against Mr More Nisbett, his landlord, concluding for reduction of an interlocutor of the Sheriff-Substitute of Lanarkshire at Airdrie (MAIR) in a petition at Mr More Nisbett's instance, under the Sheriff Court Act 1876, to have a factor appointed to take charge of the farm of Moss-side, of which the pursuer was tenant. In that process it was averred by Mr More Nisbett that the pursuer had deserted his farm and was absent without leaving anyone in charge and without having left information as to his whereabouts. On these statements, and on the day the petition was presented, the Sheriff-Substitute, without ordering any service of the petition, appointed William Robb judicial factor on the farm. Robb was called in the present action for his interest. The Sheriff Court Act 1876 (39 and 40 Vict. cap. 70) provides by sec. 8 that the *inducíæ* in all petitions where the defender is within Scotland shall be seven days, and fourteen days where he is furth of Scotland. By sub-sec. 2 it is provided that the Sheriff may "shorten the warning or *inducíæ* as he shall see fit in any case which he considers to require special despatch." The Act of Sederunt anent removings of 14th December 1756 provides by the 5th section for the removing of a tenant "who . . . shall desert his possession or leave it unlaboured at the usual time of labouring." The pursuer maintained that the statements of the defender in the petition above referred to were unfounded in fact, and that he had not deserted his farm, and that in any case the proceedings in the petition were incompetent in respect that there had been no intimation of its being presented, and no inquiry into the necessity of making the appointment.

The facts disclosed on a proof taken by the Lord Ordinary were that the pursuer had left the county to avoid his creditors, and had when he left no intention of returning at any particular time, but was looking out for a suitable opening in America. Further, it was proved that no damage had resulted from the appointment of the factor, and that his appointment had been made with the approval of the tenant's wife, who had been left upon the farm without money to carry it on or to meet the rent.

The Court in these circumstances refused to entertain the objections to the competency of the petition, and assoilzied the defenders.

Counsel for Pursuer—Scott—Lang. Agent—William Paterson, L.A.

Counsel for Defenders—Dundas. Agents—Dundas & Wilson, C.S.

Friday, November 4.

SECOND DIVISION.

[Sheriff-Substitute of Midlothian.

NORTH BRITISH RAILWAY COMPANY *v.* WHITE AND OTHERS

Process—Multiplepoinding—Competency.

Creditors of S., who was notour bankrupt, and who was alleged to have made a pretended sale of his household furniture to R., his brother-in-law, who resided in Dublin, arrested the furniture in the hands of a railway company with whom the brother-in-law had placed it for conveyance to his address in Dublin. The creditors having raised a multiplepoinding in the Sheriff Court to have the right to the furniture determined, R.