Friday, January 23.

FIRST DIVISION.

TOD (BERWICK'S EXECUTOR) *v.* TOD AND OTHERS.

Succession—Husband and Wife—Mutual Settlement—Joint Estate—Increase in Value—Accumulations of Income.

By mutual disposition and settlement spouses conveyed to each other the whole heritable and moveable estate then belonging or which should belong to either at the date of his or her death. After the death of both, and provided they or the survivor should have made no other distribution, the portion of the joint-estate which remained was to be divided in certain proportions, "declaring that notwithstanding of this contingent appropriation, we and the survivor of us shall have the full and free enjoyment of and absolute power of disposal upon the joint-estate, whether onerously or gratuitously." The husband predeceased, and during the survivance of the wife the estate increased by increase in value of investments and by accumulations of income. *Held* that the term "joint-estate" included these additions, and that the whole estate of the spouses as so increased fell, on the death of the wife without having exercised the power of disposal, to be divided according to the directions in the mutual settlement.

Succession—Conditio si sine liberis—*Implication*—Expressio unius exclusio alterius.

Spouses by a mutual settlement provided that after the survivor's death part of their joint-estate was to belong to the wife's, and part to the husband's relatives—the part going to the wife's relatives being divisible between her sister and her children, and her brothers and their children; the part going to the husband's relatives being divisible in certain proportions between his sister Jean, and his brothers David and George and their children. Jean predeceased her brother, the husband, leaving one child. *Held*, on a question arising after the death of the survivor of the spouses, till which period there was no vesting under the settlement, (1) that this child could not take what was destined to his mother, her children not being mentioned in the will, and the *conditio si sine liberis* being inapplicable; (2) that Jean's share fell into intestacy, and passed to the next-of-kin of the survivor of the spouses.

By mutual disposition and settlement executed by Henry Berwick and Catherine Todd Berwick, spouses, dated 19th March 1838, it was provided as follows, viz., "We, Henry Berwick and Catherine Todd, spouses, for the great love and affection we bear towards one another, have agreed to make the following settlement of our means and estate, that is to say, I, the said Henry Berwick, do hereby give, grant, assign, and dispone to and in favour of the said Catherine Todd, my beloved wife, and her heirs, executors, and successors," his whole estates, heritable and moveable, presently belonging or which should pertain to him at his death, and specially, and without prejudice to this generality, certain heritable subjects. "And in like manner, I, the said Catherine Todd, do hereby give, grant, assign, and dispone to and in favour of the said Henry Berwick, my husband," her whole estates, heritable and moveable, presently belonging or which should pertain to her at her death. "Further, we, the said Henry Berwick and Catherine Todd, mutually nominate the longest liver to be the executor of the first deceaser of us two, and it is our mutual wish that when both of us shall have died, and provided we or the survivor of us shall have made no other distribution, the portion of our joint-estate, if any, which may remain shall be divided thus—two-thirds shall be set aside for the relations of the said Catherine Todd after named, and the remaining third to those of the said Henry Berwick also after named, and of the relations on the side of the said Catherine Todd, her sister Mrs Scott and her children shall receive two-fifths of the sum set apart for them, and her brothers and their children the other three-fifths, and of the relations on the side of the said Henry Berwick, his sister Jean shall have two-fifths, and his brothers David and George and their children the other three-fifths. In neither case are children to participate while the parent is alive; declaring that notwithstanding of this contingent appropriation, we and the survivor of us shall have the full and free enjoyment of and absolute power of disposal upon the joint-estate, whether onerously or gratuitously, without the consent of any of the above-named parties or their children, it being our intention by the above distribution simply to provide for the possibility of our not living long enough to enjoy the estate ourselves, or not otherwise disposing of it, and not to create any vested interest in these relations or their children, or to confer any power on them to interfere in any manner of way with the survivor in his or her enjoyment or disposal of the joint-estate or remainder thereof, it being always competent to the survivor to alter the mode of distribution and bestow the remainder, if any, upon such of the relations on both sides as may appear to him or her to be most deserving."

Mr Berwick died without issue on 24th May 1842 survived by his wife, who died on 24th February 1883, without having revoked or altered the mutual settlement. The value of the moveable estate at the date of Mr Berwick's death was £5529, 10s. 3d. In addition to this Mr Berwick was possessed of a dwelling-house in St Andrews, which was sold after Mrs Berwick's death for £885. Mrs Berwick left moveable estate amounting to £8158, 7s. 9d. The difference, amounting to £2628, 17s. 6d. or thereby, between the amount of the personal estate left by Mr Berwick and that left by Mrs Berwick, arose as follows, viz., (1) To the extent of £127 from increase in the value of certain shares belonging to Mr Berwick at the time of his death, and which Mrs Berwick continued to hold till her death; and (2) To the extent of £2501, 17s. 6d. from accumulations of the income of the estate during the period of Mrs Berwick's survivance.

This was a Special Case to decide as to the disposal of this increase in value of the shares belonging to the joint-estate and these accumulations of income. The first party to the case was James Tod, the elder brother and executor-dative *qua* next-of-

kin of Mrs Berwick. The second parties were the whole relations and representatives *ab intestato* of Mrs Berwick. The third parties were the representatives of Mr Berwick's two brothers David and George. The fourth party was the son of Mr Berwick's sister Jean. The parties of the second part maintained that the term "joint-estate," used in the mutual disposition and settlement applied only to the estate of the spouses as at the date of the death of the predeceaser, and that the increase in value and accumulations of revenue which had accrued thereon, amounting to the said sum of £2628, 17s. 6d., did not fall under the mutual settlement, but that they were to be divided among Mrs Berwick's personal representatives *ab intestato*. The parties of the third and fourth parts contended that the said increase in value and accumulations formed part of the "joint-estate," and that they were entitled to share therein in the proportions mentioned in the mutual settlement. They maintained that the terms of that deed contemplated the division of the residue, whatever sum it should amount to at the death of the surviving spouse (if neither of the spouses exercised the reserved power of altering the destination), among the relatives of both spouses in the respective proportions therein provided.

There was also a question as to the share of residue which was destined to Jean Berwick. At the date of the mutual settlement she was unmarried. In June 1839 she married Mr Hay, and on 8th August 1840 the only child of her marriage, John Hay, was born. He was the fourth party to the case. Jean Berwick or Hay died in 1880. She was Mr Berwick's only sister, and his only brothers were David and George. George Berwick was married at the date of the settlement, but David was not married until 1852.

The fourth party claimed the share which would have fallen to his mother Jean Berwick or Hay. The second parties contended that this share reverted to the residue of the joint-estate, and fell to be divided between the relatives of the spouses according to the terms of the mutual disposition and settlement. The third parties maintained that the share was divisible among themselves alone.

The following questions of law were submitted to the Court:—"(1) Does the whole estate of both spouses as at the death of the survivor, including the increase of value before referred to and the accumulations of income made by the surviving spouse, fall to be divided among the relations of both spouses in terms of the said mutual disposition and settlement? Or (2) To whom do the said increase in value and accumulations belong, and in what proportions? (3) Under the destination in the said settlement, is the party of the fourth part entitled to succeed to the share of the joint-estate provided to his mother Mrs Jean Berwick or Hay? Or (4) To whom does the said share fall to be paid?"

Argued for the respondents—The settlement only disposed of "joint-estate." The increase in value and the accumulations of income were not "joint-estate," and therefore *quoad* these Mrs Berwick died intestate—*Morris* v. *Anderson*, June 16, 1882, 9 R. 952. The settlement was Mrs Berwick's will, and therefore as the two-fifths destined to Jean Berwick were left undisposed of by the settlement Mrs Berwick's next-of-kin must take that share.

Argued for the third parties—The settlement was intended to convey the estate of both the spouses as at their respective deaths. The case of *Morris* v. *Anderson* did not apply, because the words of the deed there showed that the estate dealt with was the joint-estate as at the death of the predeceaser. Here it was the joint-estate as at the death of the survivor. Jean Berwick's share did not go to her son, nor did it fall into intestacy. The *conditio si sine liberis* did not apply, because as regarded his sister and her issue, Henry Berwick was not *in loco parentis*—*M'Call* v. *Dennistoun*, Dec. 22, 1871, 10 Macph. 281.—The beneficiaries here were called *nominatim*, and not as a class. The settlement was not a family settlement—*Blair's Executors* v. *Taylor*, Jan. 18, 1876, 3 R. 362; *Rhind's Trustees* v. *Leith and Others*, Dec. 5, 1866, 5 Macph. 104; *Wallace* v. *Wallaces*, Jan. 28, 1807, M. App. *voce* Clause, No. 6; *Christie* v. *Patersons*, July 5, 1822, 1 S. 498; *Hamilton* v. *Hamiltons*, Feb. 8, 1838, 16 S. 478; *Bogie's Trustees* v. *Christie*, Jan. 26, 1882, 9 R. 453.—The words of the deed made it impossible to raise the implication that Jean's children were to take their mother's share—*Fleming* v. *Martin*, June 6, 1798, F.C., M. 8111. Jean's two-fifths should go to the representatives of Mr Berwick's two brothers, David and George.

Argued for the fourth party—The *conditio si sine liberis* applied here, or otherwise the terms of the deed were sufficient to raise the implication that Jean Berwick's children were intended to take under it—*Dickson* v. *Brown*, June 10, 1836, 14 S. 938, *aff.* 2 Rob. App. 1; *Thomson's Trustees* v. *Robb*, July 10, 1851, 13 D. 1326; *MacGowan's Trustees* v. *Robertson*, Dec. 17, 1869, 8 Macph. 356; *Gauld's Trustees* v. *Duncan*, &c., Mar. 20, 1877, 4 R. 691.

At advising—

Lord President—The questions for determination here arise upon the construction of the mutual settlement executed by the late Mr and Mrs Berwick on 19th March 1838. By its terms each spouse conveyed to the other "All and sundry estates, real and personal, heritable and moveable, goods, gear, debts, effects, and sums of money, of whatever description and howsoever constituted, presently belonging or which shall pertain to me at my death." There can be no doubt that the effect of this conveyance is to vest, on the death of the predeceaser, the joint-estate of the spouses in the survivor. Then it is provided that the joint-estate, on the death of the last survivor, is to descend in a certain way, as follows, viz.:—"It is our mutual wish that when both of us shall have died, and provided we or the survivor of us shall have made no other distribution, the portion of our joint-estate, if any, which may remain shall be divided thus—two-thirds shall be set aside for the relations of the said Catherine Todd after named, and the remaining third to those of the said Henry Berwick, also after named." That is the first partition of the estate. Then as regards the relations of the wife, it is provided that "her sister Mrs Scott and her children shall receive two-fifths of the sum set apart for them, and her brothers and their children the other three-fifths;" and as regards the relations of the husband, "his sister Jean shall have two-fifths, and his brothers David and George and their children the other three-fifths." But then there are certain further provi-

sions which are intended to secure, and do secure, that the interests of these relations were to have no effect so long as either spouse survives. There was no vested interest given them by the deed till then, and the survivor was by its terms to have absolute dominion over the joint-estate in the way of disponing, spending, and gifting it, either *inter vivos* or by testamentary deed. Nothing could more fully express the power of an absolute owner than the clause which provides for the position of the survivor with regard to the joint-estate.

Now, Mr Berwick died on 24th May 1842, and was survived by his wife, who did not die for a long time afterwards—on 24th February 1883—so that for a period of more than forty years Mrs Berwick enjoyed the entire joint-estate. It must also be kept in view that as the spouses had no children the only testamentary provisions were in favour of collaterals.

In the course of the forty years during which Mrs Berwick survived, the joint-estate increased from £5529, 10s. 3d., which was its amount in 1842, to £8158, 7s. 9d., which was its value as she left it. The difference is made up thus—There was an increase in the value of the shares in which the money was invested to the extent of £127, which is a very small item, and the whole remainder, viz., £2501, 17s. 6d., arose from accumulations of the income of the estate during Mrs Berwick's survivance.

The first question is, whether the whole estate of both as at the date of the death of the survivor, including the increase of value and the accumulations of income, falls to be divided among the relations of both spouses. Mrs Berwick, the surviving spouse, made no will, and therefore the testamentary arrangement in the mutual settlement comes into effect on Mrs Berwick's death. It appears to me that according to the intention of the spouses the joint-estate was first to go to the survivor and then to the relations of the two spouses in the proportions mentioned, and that the whole of the joint-estate was intended so to pass. The estate which fell to Mrs Berwick on the death of her husband was not divisible; it was an indivisible sum, amounting to upwards of £5000. That estate she might dispose of as she pleased, or leave it to follow the division provided by the mutual settlement. If she made savings, or if the estate increased, that just augmented the value of the said joint-estate; it did not form any separate estate, because the joint-estate was as absolutely hers as any savings. The two things are indistinguishable, and whether the estate she had came from the husband or was her own, whether it was increase in value or accumulations of the income of the joint-estate, it was all equally her property, and she had the same absolute right over it. It appears to me therefore that there is no need to distinguish between one part of the joint-estate and the other, or to say that the accumulations of income fall to her next-of-kin because she had made a settlement along with her husband.

It was attempted in argument to liken this case to the case of *Morris* v. *Anderson*, but I think that the distinction is very manifest, and brings out clearly the ground of judgment here. There was in that case a mutual settlement, but the survivor was entitled only to a liferent of the entire estate, with a power of revocation as regarded the destination in the mutual deed to the extent of one-half only, on which authority to test was given. That is very different from the present case, because the liferent that the survivor there enjoyed was a separate estate, independent of the fee of the joint-estate contributed by the two spouses, and the survivor there had not the power of disposal which the survivor here has. Therefore, what the liferenter saved out of her liferent did not fall into the joint-estate but formed a separate piece of property, and never could have formed part of the joint-estate, because those savings were validly disposed of by the survivor. Here the estate is one and indivisible, belonging absolutely to the survivor; there the estate was separate and separable. Therefore I think that the first question should be answered in the affirmative.

Another question, however, arises as to the rights of the fourth party, who is the only child of Jean Berwick, the sister of the husband Mr Berwick. That question arises on the testamentary part of the deed, which says—"The portion of our joint-estate, if any, which may remain shall be divided thus—two-thirds shall be set aside for the relations of the said Catherine Todd after named, and the remaining third to those of the said Henry Berwick, also after named: And of the relations on the side of the said Catharine Todd, her sister Mrs Scott and her children shall receive two-fifths of the sum set apart for them, and her brothers and their children the other three-fifths." As regards therefore the relations of Mrs Berwick, the destination is, two-fifths to Mrs Scott and her children, and three-fifths to her brothers and their children. But the part of the clause which applies to Mr Berwick's relations says—"His sister Jean shall have two-fifths, and his brothers David and George and their children the other three-fifths." There is thus not only a distinction between the way in which the provisions are made to the husband's relations and the wife's, but also a marked distinction in the way in which the provisions are given to Jean Berwick, his sister, and to his brothers David and George, because in the case of Jean there is no mention of children, whereas in the case of David and George their children are expressly called. Now, the natural and necessary effect of those words is, that Jean having predeceased, her legacy lapsed according to the ordinary rule which applies whether to the case of a special legacy or the share of an estate.

An attempt was made to argue that by implication from certain parts of the deed Jean's children were intended to be called. I have looked at those clauses with a strong desire to give effect to that contention. It is provided that in neither case—that is to say, in neither the case of the relations of the husband or of the relations of the wife—are the children to participate while their parents are alive. Now, if in the case of relations other than Jean their children had not been called, then the implication might be raised from that provision, but it is only in Jean's case that there is the peculiarity. In all the other cases children are mentioned, and therefore the terms of that proviso are satisfied. In like manner it is provided further down that the survivor shall have the absolute power of disposal of the joint-estate "without the consent of any of the above-named parties or their children." Those words again are satisfied by applying them to the children that

are called, and there is another similar provision in the deed. Now, the words in all these clauses are satisfied by taking the deed according to its literal meaning. And therefore when one finds that Jean's children are markedly omitted, I think we are bound to come to the conclusion that it was not intended that they should take the two-fifths destined to their mother. This may seem unnatural, and that all the more because by the deed she was to receive a larger share than her brothers. It was suggested that perhaps the omission might be accounted for by her being unmarried at the date of the deed, but it turns out that one of her brothers also was unmarried then, and yet his children are called. Then the circumstance that Jean was to receive a larger portion of Henry Berwick's estate than her brothers may be the very reason why her children are not called. So that when we come to speculate as to the motives of the makers of this deed we are lost in a field of conjecture, and therefore we cannot make a settlement or supplement the one which has been made, but must just take it as it stands.

If, however, Jean's predecease caused the legacy destined to her to lapse, then it is hopeless to argue that the *conditio si sine liberis* applies, for it is excluded by the words of the settlement, and in such a case it cannot be applied even when it is plain that the testator put himself in the relation of a parent to the legatee. I do not think in the present case that Henry Berwick did put himself *in loco parentis* to his brothers and sisters. By a person putting himself *in loco parentis* to another I do not mean being very kind and good to that other, or showing him great affection, but putting himself in that position in his will. Now, there is no appearance of that here, and therefore I am of opinion that Mr Hay, the fourth party, has no claim to the share of the joint-estate destined to his mother.

On the question what is to become of that share, it seems to me that when Mr Berwick died, leaving this deed behind, Mrs Berwick succeeded to everything he possessed in terms of the conveyance in the deed. She got everything, and there was no vested right or *jus crediti* in anyone else; the whole estate was conveyed to her absolutely. But then she also succeeded to a will, and if she did not alter it it became her will. It became her will exclusively for the disposal of what was then her absolute property, and if there was any part of that property which the will did not dispose of, then as regards it she died intestate, and her next-of-kin will take it. There can be no doubt that if all the legatees had failed, then the joint-estate which was Mrs Berwick's property would have gone to her next-of-kin. I therefore think that this share must go to Mrs Berwick's next-of-kin.

Lord Mure—On the first question in this case, as to the difference in value of the joint-estate, I think that on a fair construction of this deed the expression joint-estate is so used as to cover everything which was in the hands of the survivor at the date of her death. I therefore come to the same conclusion, and on the same grounds as your Lordship, with regard to the meaning of the deed.

On the second question I should have been glad to have been able to come to the conclusion that the fourth party was entitled to take his mother's share. But the words of the clause are very express, and having regard to the omission of the words "and her children" after Jean Berwick's name, I do not feel warranted in construing the clause as including those children.

I also agree with your Lordship in thinking that Jean Berwick's share is undisposed of by the will, and therefore falls into intestacy.

Lord Shand—I am of the same opinion as your Lordships on both points.

It appears to me that the element of importance in deciding the first question is that to which your Lordships have alluded, that the joint-estate as it came to be possessed by the survivor was entirely at her own disposal. The deed says that the survivor may dispose of it "onerously or gratuitously," and it thus appears that this lady had the power of making a will to a different effect. But while the survivor had this power to deal with the joint-estate, the deed appoints the estate to be divided in a certain manner, "provided we or the survivor of us shall have made no other distribution." Therefore as no other distribution has been made, I cannot read the deed as other than the will of the survivor.

With regard to the second question I am constrained to concur with your Lordships that as Jean Berwick died without leaving issue her share lapsed. It is a striking circumstance that the settlement in the same clause gives to Jean two-fifths of the estate, and to her brothers and their children three-fifths; moreover, one of those brothers was unmarried at the date of the settlement, so that the contrast is very striking. It may be that the omission was on the part of the conveyancer, and one is inclined to think so because of the larger share that was given to Jean. But we must take the deed as we find it, and that being so, I concur with your Lordships that the fourth party is not entitled to take what was destined to his mother.

On the last question it is to be observed that the first part of the settlement conveys the whole joint-estate to the survivor, and that the survivor has left her property to be disposed of according to the terms of the joint-deed. Therefore if the joint-deed has not disposed of a part of the property it must fall into intestacy, and this, I think, must be the case with regard to Jean Berwick's share.

Lord Deas was absent.

The Court pronounced this interlocutor:—

"Find and declare that the whole estate of Mr and Mrs Berwick as at the death of the survivor, including the increase of value and the accumulations of income made by the surviving spouse, falls to be divided among the relations of both spouses in terms of their mutual disposition and settlement: Find and declare that under the destination in the said settlement the party of the fourth part is not entitled to succeed to the share of the joint-estate provided to his mother Mrs Jean Berwick or Hay, and that the said share belongs to the next-of-kin of Mrs Berwick as part of her estate undisposed of by her will, and decern."

Counsel for First and Second Parties—Pearson—G. Wardlaw Burnet. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Third Parties—Low. Agents—W. & J. Cook, W.S.

Counsel for Fourth Party—Shaw. Agents—Curror & Cowper, S.S.C.

Friday, January 23.

FIRST DIVISION.

[Lord Adam, Ordinary.

THE SCOTTISH HERITAGES COMPANY (LIMITED) *v.* MILLER AND OTHERS.

Superior and Vassal—Arrears of Feu-Duty—Poinding of the Ground—Title to Poind the Ground after Parting with Superiority.

Held (*diss.* Lord Shand) that a person who had been formerly superior of certain lands but had parted with the superiority, was not entitled by means of poinding the ground to recover feu-duties which had fallen into arrear while he held the superiority.

In November 1876 the Scottish Heritages Company (Limited) by feu-contract conveyed to John Wright, builder, who was erecting buildings thereon, certain subjects at Abbeyhill, Edinburgh. The feu-duty payable to them as superiors was £47, 17s. yearly. Of the same date as the feu-contract (14th Nov. 1876), Wright conveyed the subjects to the North British Property Investment Company (Limited), who by disposition, dated and recorded in November 1877, conveyed them to James Miller, under the burdens and conditions of the feu-contract, and particularly under burden of the feu-duty therein contained. Wright had erected certain buildings on the subjects.

The Scottish Heritages Company (Limited) were from Whitsunday 1876 to Whitsunday 1880 superiors of the subjects.

The Scottish Heritages Company conveyed the superiority to the Scottish Imperial Insurance Company, who were infeft therein on 26th November 1880. It was admitted in this action that the feu-duty payable at Martinmas 1878, Whitsunday and Martinmas 1879, and Whitsunday 1880 had not been paid. The amount of arrears at the last date was £95, 14s.

This was an action of poinding the ground at the instance of the Scottish Heritages Company against Miller, the proprietor of the subjects, and against various heritable creditors therein, including the North British Property Investment Company, the only defenders who appeared. The pursuers sought by poinding the ground to recover the £95, 14s. of arrears of feu-duty. The action was also one of maills and duties against Miller and the tenants of the subjects.

The pursuers pleaded that the arrears of feu-duty being due and unpaid, they were entitled to decree of poinding the ground and of maills and duties.

The North British Property Investment Company pleaded — "(1) No title to sue. (3) In respect that the pursuers are neither superiors of the subjects condescended on, nor heritable creditors with a title preferable to the defenders, the action is incompetent, and should be dismissed with expenses."

On 27th March 1884 the Lord Ordinary (ADAM) assoilzied the defenders from the conclusions of the action.

"*Note.*—This is an action of poinding the ground, and of maills and duties, brought at the instance of the Scottish Heritages Company against James Miller, the proprietor of certain subjects at Abbeyhill, Edinburgh, and also against the tenants of the said subjects and certain heritable creditors infeft therein. The North British Property Investment Company, who are the only defenders who have appeared and lodged defences, are heritable creditors.

"The pursuers were superiors of the subjects in question prior to Whitsunday 1880. They then sold the superiority to the Scottish Imperial Insurance Company, conform to disposition and assignation dated 16th, and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh 26th November 1880. The pursuers now propose to poind the moveable effects of the proprietor and tenants of the subjects for payment of four sums of £23, 18s. 6d. each, being the half-year's feu-duty payable for the said subjects at the terms of Martinmas 1878, Whitsunday and Martinmas 1879, and Whitsunday 1880, and to have the tenants ordained to make payment to them of the maills and duties due for the term current at the date of raising the action, and to become due at Martinmas 1883—that is to say, the pursuers seek to attach the moveables now on the ground, and the rents now due to the proprietor, for payment of arrears of feu-duty alleged to be due to them for the period during which they were superiors of the subjects.

"It appears to the Lord Ordinary that the pursuers have no title to insist in this action. An action of poinding the ground and maills and duties is a real action, and can only be insisted in by a person who has a real right to the subjects. It appears to the Lord Ordinary that when the pursuers sold the subjects and the superiority to the Scottish Insurance Company, and that Company took infeftment therein, the pursuers ceased to have any proper connection with the subjects. They then became completely divested of the subjects, and can have no right to attach the rents now becoming due, or the moveable effects now thereon. It was maintained by the pursuers that their disponees were the only parties who could maintain this plea; but it appears to the Lord Ordinary that the defenders, who are heritable creditors infeft in the subjects, have a title and interest to see that the rents of the subjects shall not be carried off by persons who have no title to them, but shall be available for payment of their debt.

"The Lord Ordinary was referred to the cases of *Jeffrey*, 21 D. 492; *Lyons*, Oct. 21, 1880, 8 R. 24; and *Walker*, 5 D. 453; but he was not referred to any case where such an action as this was sustained."

The pursuers reclaimed, and argued—It was admitted that the pursuers' claim was for *debita fundi*, and that it was unpaid. No one else was in a position to recover these arrears. In parting with the superiority the pursuers did not part with the right to recover arrears. The defenders were only postponed bondholders; they had not even the position of the present superior. Superiority and a right to feu-duties were separable; see Bell's Prin. secs. 687, 688, 703, 875, and Duff's