under, and be regulated by, these presents for the remainder of the contract, and for such farther period as the partners may agree upon; said nominee being bound in that case to allow the share and interest of his predecessor to remain in the concern." By article seven it was provided that the company should not be dissolved by the death of either of the partners; and by article eleven a power of alteration was reserved.

John Kerr Orr died on 4th October 1866, survived by a widow and two children. He left a trust-deed and settlement dated 21st September 1866, by which he conveyed to his wife, his brother Daniel Orr, and his son John Mackintosh Orr, his whole estates, heritable and moveable. By the third purpose he made the following declaration, "and in regard to the Glenside Distillery Company, in which I am a partner to the extent of two-third parts or shares, and the Jura distillery in which I am a partner to the extent of one-half, it is my wish that, on the death or second marriage of my said spouse, my son John Mackintosh Orr, whom failing, my son William Orr, shall have the option of succeeding me as a partner in said distilleries, and with that view I authorise my said trustees to sell my said shares and interests in the said distilleries to my said son John, whom failing to my said son William;" "and until the death or second marriage of my said spouse I authorise my said trustees, if they should deem it expedient, to allow my capital to remain in the said Glenside Distillery Company and Jura Distillery, and to carry on the said business of distilling as at present, and to apply the profits, or such portion thereof as they may deem necessary, for the support of my said spouse, and the upbringing of my said children."

Thomas Orr was manager of the Jura business at a salary of £80, and a creditor of it to the extent of £433, 7s. 9d.; and Dugald Campbell Macintyre was manager of the Glenside business at a salary of £100. By agreement dated 19th and 30th October 1867, entered into by John Kerr, Orr's trustees, Daniel Orr, D. C. Macintyre and Thomas Orr, it was agreed that Macintyre should become a partner of the Glenside and Jura firms, and Thomas Orr of the Jura firm. Each was to receive two-tenths of the profits, and to contribute to the capital of the firms, Macintyre £1500, and Thomas Orr the sum in which he was creditor of the firm. They were also to receive certain small commissions on the sales, according to the rates heretofore received by them. Mrs Orr and her son, with the concurrence of Macintyre, now sought to reduce this agreement. There were also various other conclusions not at present persisted in.

SOLICITOR-GENERAL and M'LAREN, for them, argued—The agreement of 1867 is *ultra vires* of all the parties thereto, and is reducible in so far as it supersedes or alters the contract of co-partnery of 1866, and substitutes for the two companies of the Glenside Distillery Company and J. K. and D. Orr, two new and different companies, composed of different partners, alters the risks of trade in respect of both concerns, defeats the right conferred by the trust-deed on John Mackintosh Orr and William Orr, the truster's sons, to acquire by purchase in succession the truster's share and interest in the stock and profits of both the Glenside Distillery Company and J. K. and D. Orr, and disposes of a part of the truster's shares and interests in the stock and profits of the Glenside Distillery Company, and in the stock and profits of J. K. and D. Orr respectively, by giving a part thereof to the assumed partners, all in contravention of the truster's deed of settlement, and in violation of the contract of co-partnery of 1866. The agreement is also reducible in so far as it authorises the payment of commission, or of an allowance for time and trouble to Messrs John K. and Daniel Orr of Glasgow, in respect that Daniel Orr, a partner of that firm, being a trustee, was personally disqualified from entering into a remunerative contract with the trust.

WATSON and BLACK, for Daniel and Thomas Orr, replied—The pursuers are barred *personali exceptione* from insisting in the action. The agreement was entered into with the knowledge and consent of the whole beneficiaries under the trust-deed. It has been homologated by the pursuers. The acting of the trustees was not *ultra vires*. Under the powers given to them it was quite competent to assume new partners with small shares as here. It is often prudent to give a manager a small share in the business.

LORD MURE reported the case.

The Court assoilzied the defenders. The arrangement entered into by the trustees was only voidable, not void; and if set aside it must be at the instance of parties interested. There was, however, no ground for setting aside what they had done. Their right to assume a new partner was a question of circumstances; and under the powers given to them by the truster they were quite entitled to do so. Had he been alive no one could have disputed his title to do as they had done, and they had just come in his place. It was a most prudent step on the part of the trustees to give the managers some interest in the business; and the allowing commission on sale was only fixing a right which they as managers had already possessed.

Agents for Pursuers—J. A. Campbell & Lamond, C.S.

Agent for Defenders—P. S. Malloch, S.S.C.

HOUSE OF LORDS.

Thursday, February 17.

STEWART *v.* M'CALLUM.

(*Ante*, v, 256.)

Sale — Condition — Consignation — Relief. On the sale of certain lands a sum of £1500 was consigned by the purchaser, on the stipulation that the seller should "take all necessary proceedings for effectuating a claim of relief" of certain burdens granted in the warrandice clause of the original titles; and that the seller should receive payment of this sum in proportion to the amount of relief effected. *Held* (*affirming* Court of Session) that he was entitled to uplift the whole sum on fixing the liability for relief on the superior *qua* superior, and was not bound to try to fix the liability on the superior personally.

By a feu-contract in 1705, between James Marquis of Montrose and David Graham, the Marquis conveyed the lands of Braco, and the teinds thereof, to Mr Graham in liferent, and his son James Graham, and his heirs therein set forth. The

Marquis thereby bound himself, his heirs and successors, to warrant the teinds to be free to the vassals "from all ministers' stipends, future augmentations, annuities, and other burdens imposed, or to be imposed, upon the said teinds," beyond those then payable. The superiority or *dominium directum* of the subjects has descended through the representatives of the Marquis to the present Duke of Montrose. The *dominium utile* has passed through a series of heirs and singular successors to the pursuer, and from him to the defender. In the year 1846, when the pursuer Sir W. D. Stewart was the vassal, the superior, the Duke of Montrose, for the first time raised the question whether the right to enforce performance of the obligation of relief had passed to him as a singular successor of the original vassal? In that year a new augmentation of stipend was given to the minister of the parish, and it fell to be localled upon the teinds. The Duke from that time declined to perform the obligation of relief to the vassal, alleging that, although the liability to perform it was still incumbent on him as superior of the subjects, the right to exact performance of it had not been transmitted to the singular successors of the original vassal along with the right of property. On the other hand, Sir William maintained that that right had been transmitted to him, if not by conventional assignations in the conveyances of the property, at all events as being an integral part of the right to the *dominium utile* itself. In the year 1853, Sir William sold the *dominium utile* to the defender, Mr Kellie M'Callum, for the price of £37,000; and, as the questions which the superior had raised as to the transmission to the pursuer of the right to exact performance of the obligation of relief were still undecided, it was made a condition of the contract of sale "that in respect of *the undecided questions as to augmented stipend*, which on an average of the last three years amounted to £100, 10s. 11d., a sum of £1500 out of the price shall be consigned in such bank as the parties may agree upon, in the joint names of the exposer and purchaser, or of their agents, which sum shall remain consigned, except the interest accruing thereon, as aftermentioned, until *those questions have been finally determined*, and shall be *then disposed of as follows:—First*, The exposer (pursuer) shall take all necessary proceedings for effectuating the claims of relief under the original feu-disposition and titles of the lands, or in the existing locality or otherwise, and shall follow out the same to a final determination. *Second*, In the event that the exposer shall succeed in obtaining total or partial relief of the augmented stipend, the consigned sum shall be payable to him either wholly or in such proportion as shall correspond to the amount of the relief effected. *Thirdly*, In the event that the exposer shall fail in effecting relief to any extent, then the consigned sum shall be payable to the purchaser, the purchaser taking on himself the burden of the augmented stipend in all time thereafter." In pursuance of this agreement, the respondent raised an action against the Duke of Montrose, his superior in the lands of Braco, and the result was that the House of Lords, in an appeal, found that the Duke as superior was liable, under the obligation in the original feu-contract, to free and relieve the respondent as vassal of all stipend and augmentation imposed on the teinds of the lands of Braco since the date of the feu-contract of 1705. The respondent, therefore, claimed to uplift the above sum of £1500, because he had succeeded in his action. The appellant, however, resisted this, on the ground that the action did not establish an absolute liability of the Duke and his heirs to relieve the lands of Braco, but only established the liability of the Duke as superior of the lands. The whole Court, by a majority, held that the respondent had substantially succeeded according to the meaning of the condition of sale, and done all that he had engaged to do in order to acquire the money.

LORD ADVOCATE and ANDERSON, Q.C., for the appellant, argued—The appellant, according to the bargain in the conditions of sale, never intended merely an obligation of relief against the Duke of Montrose as superior of the land. What he bargained for was an absolute relief against the Duke and his heirs, as general representatives of his ancestor the Duke who entered into the contract of 1705. It was for that absolute relief that so large a sum as £1500 had been reserved in the condition of sale. All that had been hitherto settled was, that so long as the Duke was superior, he was bound to relieve the appellant as vassal. But the Duke might to-morrow sell the superiority to a man of straw, and the relief being so transferred might turn out illusory. Nothing had taken place in the course of the action to show that the appellant intended to restrict his claims of relief to the narrow ground on which the action was decided. He never acquiesced in that ground of decision. Nobody could suppose that all the appellant had bargained for was not what was valued as between the parties at £1500, but was only the kind of relief which he has obtained, and which the Duke could get rid of at once and for ever, and so that no solvent successor can be put in his place. What the appellant is entitled to is, that this money shall remain in the bank as a security until the respondent shall raise an action and settle that the Duke is or is not liable out and out, whether he continues superior or not of the lands of Braco. It could be only after that question was finally settled that this sum could be uplifted out of the bank, and disposed of between the parties.

SIR R. PALMER and MELLISH, Q.C., for the respondent, were not called on.

At advising—

LORD CHANCELLOR—This is an appeal from two judgments of the Court of Session, by which it is in effect decided that Sir W. Stewart was entitled to uplift a sum of £1500 deposited in the Royal Bank of Scotland under these circumstances:—Sir William Stewart had in 1853 exposed the estate of Braco, in Perthshire, for sale by public roup; and in one of the articles of roup, he had bound himself to free and relieve the buyer of all stipends and augmentations and other burdens on the lands, except certain which were specified. This clause in these articles was introduced on account of a dispute which then existed between him and the Duke of Montrose, who was superior of the lands, as to the liability of the latter to free and relieve Sir William of these burdens. James Graham, the ancestor of the Duke, had bound himself by a feu-contract in 1705 to relieve the proprietors of the *dominium utile* of Braco of the payment of these possible stipends, and his descendants had paid them until 1846, when certain decisions in the House of Lords led to a discontinuance of the payment. Sir William Stewart therefore, in exposing the estate for sale, bound himself,

" in respect of the undecided questions," to deposit £1500 out of the purchase-money, in the joint name of exposer and purchaser, until they were decided. He was, in the words of the articles of roup, " to take all necessary proceedings for effectuating the claims of relief under the original feu-contract and titles of the lands." But there was no provision that he should take any proceedings for making the Duke *personally* liable under any special contract which existed between him and the Duke. The lands were sold to Mr M'Callum for £37,000, and the sum of £1500 was deposited in terms of the articles of roup. Sir William then, with the concurrence of Mr M'Callum, the purchaser, prosecuted an action against the Duke of Montrose, and obtained a judgment in the Court of Session and the House of Lords, by which it was decided that the Duke was liable to continue this payment as superior of the lands of Braco. Mr M'Callum, the purchaser, however, contends that Sir William is bound to take proceedings against the Duke, with a view of making him personally liable to free him (Mr M'Callum) of this payment of stipends, and accordingly he objected to give his sanction to the uplifting of the £1500 till this is done. He contends that the Duke or his successors might possibly be unable to fulfil his obligations, and therefore demands this security. But this is no argument, because where personal liability is intended, it is always a subject of express stipulation. There is no such stipulation in the original feu-contract of 1705, and therefore Sir William Stewart has fulfilled the terms of his contract under the articles of roup, and exacted from the Duke all the obligations which his ancestor came under by that deed. I therefore advise your Lordships to affirm these judgments, with costs.

Lord Chelmsford concurred. The real meaning of the clause in the articles of roup was that Sir William Stewart was to take care that the Duke should do what his ancestor had bound himself to do under the original feu-contract. That contract bound the Marquis and his heirs and successors only as proprietors of the *dominium directum* of the lands of Braco. It is an obligation which belongs specially to the owner of the superiority, and to him in the capacity of superior. It would, therefore, be unjust to demand that Sir William Stewart should be held bound under his articles of roup to procure for the purchaser of the lands a personal obligation which was not contained in the titles, for this would be nothing less than asking him to procure a new and a wider title.

Lord Westbury concurred.

Lord Colonsay said, that as the obligation as to relief occurred in a feu-contract, it could be continued only as between superior and vassal, and between each of these in his capacity of superior and vassal. It was clear, therefore, that no such personal obligation as had been contended for could exist in such a contract unless specially provided for.

Agents for Appellant—Gillespie & Bell, W.S., and Grahames & Wardlaw, Westminster.

Agents for Respondent—Dundas & Wilson, C.S., and Loch & Maclaurin, Westminster.

COURT OF SESSION.

Thursday, February 17.

FIRST DIVISION.

WYLIE & LOCHEAD *v.* MONCREIFF MITCHELL.

Common Property — Accession — Bankruptcy — Contract. Hutton contracted to construct a hearse for W. & Co. at a price of £95, according to specifications to be furnished by them; and the mouldings, carvings, &c., and part of the workmanship, to a value greater than the hearse, were also to be supplied by them. Before the hearse was completed Hutton became bankrupt, and the trustee refused to deliver it to W. & Co. on their tendering payment of the balance due on the current account, according to the alleged custom of the parties. *Held* the hearse was common property, in which each had right according to the value of the materials contributed; and that W. & Co. were entitled to the hearse on payment of the £95.

By missive letters, in August 1867, Robert Hutton, coachbuilder in Glasgow, agreed to construct a hearse for the appellants at a price of £95. The hearse was to be made according to certain specifications, and the appellants were to supply certain portions of the material. According to Hutton's statement, the parties had dealings with one another, and the debtor on the current account between them paid the balance at the settling of their accounts every six months. Before the hearse was completed Hutton's estates were sequestrated, on 21st August 1868, and Mr Moncreiff Mitchell, accountant in Glasgow, was elected trustee. The appellants asserted that they had paid £75, 16s. 6½d. to account of the hearse, and they tendered payment of the balance, £19, 3s. 5½d., and demanded delivery of the hearse. The trustee refused to deliver the hearse on payment of this alleged balance. Eventually the sum of £95 was consigned in the joint names of the parties, and the hearse delivered to the appellants. The action, therefore, turned on who was entitled to uplift the deposit of £95. The Sheriff-Substitute (Galbraith) gave decree in favour of the respondent; and, on 13th July 1869, the Sheriff (Glassford Bell) adhered.

Wylie & Lochead appealed.

Solicitor-General and Shand for them.

Moncrieff and Balfour in answer.

At advising—

Lord President—In the month of August 1867 the appellants and Robert Hutton, coachbuilder, Glasgow, made a contract, embodied in three letters, dated respectively the 13th, 26th, and 29th of that month, by which Hutton undertook to construct a hearse for the appellants according to a design furnished by them. Hutton was to provide the materials for the body, under carriage and wheels, to paint and varnish the outside, to furnish the inside with glue and canvass, and cover the top outside with moleskin. The appellants were to furnish all the carvings, turnings, and working mouldings, to supply the wood for such carvings, turnings, and mouldings as are " planted on," and to saw all the shaped work except the under rail of the frame. Hutton was to prepare the wood for the carvers, and dress the wood for shaped work. The hearse was to be delivered complete on or before