liamson, and was personally present when he made the statements complained of. But these facts do not import a wrong in themselves, nor do they imply that he took part with Williamson in the statements which he made, and nothing else is alleged against David Agnew individually."

The pursuer reclaimed, but before his reclaiming note came to be advised, his estates were sequestrated, and the trustee having, after intimation made to him, failed to sist himself as pursuer, the reclaiming note was refused.

Counsel for pursuer—Mr Watson. Agents—Graham & Johnston, W.S.

Counsel for defender Wallace—Mr Pattison and Mr Burnet. Agent—William Mason, S.S.C.

Counsel for the defenders Agnew—Mr Young and Mr Burnet. Agents—M'Ewan & Carment, W.S.

Counsel for defender Williamson—Mr Asher. Agents—Maconochie & Hare, W.S.

Friday, February 14.

HUNTER *v.* M'GREGOR.

Bill—Charge—Joint-Adventure—Signature of Firm. Charge on bill alleged to have been granted by a firm for money advanced to them for purposes of a joint-adventure, *suspended*, in respect of want of proof that the money was really so advanced.

This was a suspension by William Hunter junior, of a charge at the instance of John M'Gregor, on a bill dated 20th November 1865. The bill bore the signature of the firm of Hunter & Dick, of which firm it was said Hunter was a partner, and the charger alleged that it was granted to him by Dick in respect of advances made by the charger to the firm, in order to enable them to carry on a joint-adventure into which Hunter and Dick had entered. The suspender, on the contrary, alleged that the bill was not signed by him, or with his knowledge or consent, or for any debt contracted in reference to the joint-adventure.

The Lord Ordinary (Mure), after a proof, found it not proved that the money for which the bill was granted was applied for the purposes of the joint-adventure, and accordingly suspended, and found the charger liable in expenses.

The charger reclaimed.

Cattanach (Scott with him) for reclaimer.

Trayner, for respondent, was not called on.

Lord President—The question here is, whether the money was advanced for the purposes of the joint-adventure; the Lord Ordinary has found in the negative, and I think rightly. It seems to me that the evidence makes this perfectly clear, but it is enough that the charger has failed to prove the affirmation. The joint-adventure is said by the charger to have commenced in June 1865. On the other hand, the suspender says it was not till he removed the machine from Hillington Farm on 30th August. It is alleged by the charger that the two persons, Hunter and Dick, entered into an agreement by which they became to a certain extent partners in June, agreeing that they should be bound by the firm of Hunter & Dick. It is said by the suspender that this was not agreed on until November. It seems to me that the suspender is right and the charger wrong. Dick had been in this line of business before communicating with Hunter; and after the machine was bought from Robertson, with an engine ready to work, Dick took the use of the machine during August. During that time Dick used the form of receipts he had used formerly, and used it down to September, when a new form of receipt with "Hunter and Dick" was used, indicating the point of time when the change took place. During June, July, and August, Dick reaped the profits, paid the wages, kept the receipts, and did not communicate with Hunter as to the position of thecharger. I cannot say that the charger stands very favourably. His whole conduct shows that he knew he had no one to look to as his debtor but Dick, and that the signature of Dick to the bill was not an honest proceeding on his part. But it is not necessary to go much on that, for the real question here is, whether it is proved that the money was *in rem versum* of the joint-adventure? I think it was not, and therefore I am for adhering.

The other judges concurred.

Agent for Reclaimer—A. Wylie, S.S.C.

Agents for Respondent—Duncan & Dewar, W.S.

Friday, February 14.

SECOND DIVISION.

STEWART *v.* M'CALLUM.

Sale—Consignation—Condition. On a sale of certain lands, a sum of £1500 was consigned by the purchaser, pending the determination of some disputed points between the superior and vassal, and particularly a right of relief alleged against the former on account of augmentation of teinds, and was to be paid to the seller on his establishing that right. Circumstances in which *held* by a majority of the whole Court, that the condition of the contract of sale had been satisfied, and that the exposer was entitled to uplift the consigned money.

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 trans-

mitted 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 after mentioned, 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." The question now before the Court was, whether or not the pursuer has satisfied the condition upon which the consigned £1500 of the price was appointed to be paid to him? In order to satisfy that condition he instituted an action against the Duke of Montrose, concluding for decree of declarator that his Grace and his heirs and successors were bound to warrant the teinds to be free to Sir William, his heirs, assignees, and disponees, of the burdens set forth in the obligation of relief. The defender, Mr Kellie M'Callum, was a concurring party in that action. That action resulted in a decree of this Court, dated 15th February 1860, whereby it was found and decerned "that the defender, as superior of the lands and teinds libelled, is liable under the obligation libelled, contained in the feu-contract of 1st February 1705, to free and relieve the pursuer, as vassal in the lands libelled, and the concurring pursuer for his interest, of all stipend and augmentations of stipend imposed or to be imposed on the teinds of the lands libelled, subsequent to the date of the said feu-contract." The Duke of Montrose having appealed that judgment, it was affirmed by the House of Lords on 27th March 1863.

The Lord Ordinary (Ormidale) dismissed the action.

The pursuer reclaimed.

Dundas and Shand for him,

Clark and Watson in answer,

The Court ordered written argument to be laid before the whole Court.

Of the consulted judges the Lord President, Lords Curriehill, Ardmillan, Jerviswoode, and Mure returned the following opinion. After a narrative of the case as above set forth, and referring to the judgments in the Court of Session and in the House of Lords, their Lordships say:—

Two things have been established by these judgments. One is, that the liability of the original superior to perform the obligation in question has been transmitted to his successor in the superiority. The other is, that the right of the original vassal to exact performance of that liability has been transmitted to the pursuer and the defender as his singular successors in the *dominium utile*.

Although the Duke of Montrose may be also the heir of the original obligant, the judgment would have been the same if he had been a singular successor. This is implied in the terms of the judgment. And the question as to the transference of such liability to singular successors of superiors to perform such conditions in feu-contracts was expressly decided in another case simultaneously with the judgment in question. And in that case also the judgment was pronounced in conformity with the opinions of a majority of all the judges. See *Pagan* v. *MacRae*, 15th February 1860, 22. D. p. 806. And in the subsequent case of *Hope* v. *Hope*, 20th February 1864, 2 Macph., 670, this doctrine was held to be quite settled.

But this obligation—although the liability to perform it and the right to exact performance of it have been found to be transferred to the successors of the original contractors—is a *personal* one; that is to say, it is one which, like other personal debts, is enforcible against the obligant by diligence against his person (except in so far as his person may be protected by peerage), and against all his estates and effects, heritable and moveable.

Such having been the legal character of the obligation of the superior in the feu-contract of 1705, the question now is, whether the pursuer by obtaining these final judgments as to the title not only of himself, but also of the defender, to enforce performance of it has implemented the second condition of the contract of 1853, upon which he is entitled to uplift the consigned £1500 of the price of Braco? We are of opinion that he has done so. What that second condition of the contract required him to do was to obtain *total or partial relief of the augmented stipend*. What he has done is to obtain a decree of relief of *all stipend and augmentations of "stipend imposed, or to be imposed,"* on the subjects in question since the date of the feu-contract, *"under the obligation libelled on contained in the feu-contract of 1st February* 1705." And having thus satisfied the requirement of that condition of the contract of sale, the pursuer is entitled in conformity therewith to have the consigned sum paid to him.

So far as we can follow the defender's argument we do not see that he maintains that the relief which the pursuer has thus established is not *tatal*. There is no part whatever of the augmented stipend of which the vassal is not entitled to be relieved under the obligation in the feu-contract. What the defender represents as a failure by the pursuer to perform the condition of the contract of 1853, is something quite different—viz., that the party who is found liable in performance of that relief is only the superior himself, and not also all other persons who now are, or who may in all future time come to be, in the position of being heirs of James Marquis of Montrose. This defence appears to be founded upon the words in the original contract, whereby the Marquis bound himself and *his heirs and successors* to perform this obligation. We are of opinion that, on two different grounds, this is not a tenable defence against the present action.

1. Supposing that, according to the true construction of these words, the granter of the obli-

gation had bound not only his heirs and successors *in the right of dominium directum* retained by him, but also all other persons who then were—or should afterwards come to be—in the position of being heirs to him; the defender, *on that supposition*, would have already a good title to enforce performance of such obligation from all of them. The defence proceeds on the assumption that, if the original superior, the Marquis of Montrose, had transferred the superiority to a third party subsequent to 1705, the liability for performance of this obligation, besides being transferred to his disponee as the superior, would likewise have continued to be incumbent upon the Marquis himself during his lifetime, and after his death upon all his heirs, whether descendants or collaterals, until the end of time. But if that assumption were correct the defender would now be entitled to enforce performance of that obligation from all the obligants therein: because the right of relief in its full extent, as it belonged to the original vassal, has been transferred *ipso jure*, along with the right to the *dominium utile*, to which it was attached, to the defender. The entire *jus crediti* under that obligation, as it existed in the original creditor or obligee, having been transmitted to and vested in the defender, he is as fully *in titulo* to enforce performance of it from all parties who have by law become the obligants therein, *qua* representatives of the original obligant, as if he himself had been the original obligee. It is true that, in the judgments of the Court and of the House of Lords, the existing superior of the subjects is alone mentioned as being now liable under the obligation of 1705 for the performance of it; and this fact is of importance in the other question, to which we are presently to advert, as to what is truly the meaning of the obligation. But at present, dealing with this question *on the defender's assumption* — that, according to the true meaning of this obligation, the Marquis bound all his heirs, whether or not they should succeed to the superiority, to perform this obligation—the liability of these parties would not be extinguished by the judgments of this Court and of the House of Lords; and the defender, as having now the full right to that obligation, would be *in titulo* to enforce it against *all* the obligants.

Moreover, there is not in the contract of sale any condition that the pursuer should obtain and deliver to the defender such additional or separate obligation by all the heirs of the Marquis, other than his successors in the superiority. No such obligation is expressed in the contract. And no such obligation can be held to have been implied in it; first, because it would plainly be impracticable for the pursuer to obtain any such new engagement from all the other heirs of the Marquis (whether descendants or collaterals), and, secondly, because at the date of the contract of sale no such question had been agitated. The only question which was then in the contemplation of parties, and which was referred to in the contract of sale (as appears from the statements of both parties in the record in the present action), was that relating to the transference to the pursuer and defender of the right of relief under the contract of feu.

2. The demand of the defender is founded upon a misinterpretation of the terms of the obligation in the original feu-contract. According to its true meaning, the Marquis of Montrose, by that obligation, bound only himself *and his heirs and successors in the right of dominium directum of the subjects*, to relieve the vassal and his *heirs and assignees in the dominium utile*, of the burden of augmentations of stipend, &c. That is the true meaning of such obligations in that class of mutual contracts by which an owner of heritable property grants a subordinate right in that property to another party, to be held by him of and under the granter. Contracts of feu-farm are the most important variety of that class of contracts. By such a contract of feu, the *jus dominii* of the subject thereof is disintegrated; the radical right, or *dominium directum*, being retained by the superior, and the inferior right or *dominium utile* being disponed to the vassal; and both rights are transferable by the owners thereof to their respective heirs and singular successors. And such transferences have two consequences—one is, that when obligations, which are imposed upon either of the parties, are in their nature conditions of the right of the obligant, these obligations are also transferred *ipso jure* with the right of the party to which they are attached. Thus the obligation of the vassal to pay feu-duties, or to perform certain services to the superior, are held to be conditions of his right to the *dominium utile;* and when that right is transferred to a third party, whether he be an heir or a singular successor, the liability to perform that obligation is also transferred to that third party. And, on the other hand, as in such cases the right to exact performance of such an obligation is an integral part of the superior's retained right of superiority, so if his right be transferred to another party, whether an heir or a singular successor, the right to exact performance of the obligation passes along therewith to such transferee. The same is the case as to those obligations undertaken by the superior, which are inherent conditions of his reserved right in the *dominium directum*. The liability to perform these conditions passes along with the right itself to transferees, whether these be heirs or singular superiors; and, on the other hand, the right to enforce performance thereof passes along with the *dominium utile*, of which they are integral parts, to heirs and singular successors of the vassal.

The transference *ipso jure* of the liability for the performance of such obligations by the superior to his singular successors in the superiority, is exemplified by the cases of *Pagan* v. *MacRae*, and of *Hope* v. *Hope*, already mentioned. And the judgment in the action at the pursuers' instance against the Duke of Montrose proceeded upon the same principle,—inasmuch as, although his Grace may have been the heir of the original superior, it was expressly in the character,—not of heir of the original obligant—but of *the existing superior of the subjects*, the liability to perform the obligation was held to have become incumbent upon him.

By the judgments in that case it was farther settled that the obligation in question did fall within the category of those, of which both the liability for their performance, and the title to exact performance of them, passed *ipso jure* to transferees with the obligations and rights to which they were attached by the original contract.

The other consequence to which we have referred, of such conditions being attached to rights contained in feu-contracts, is that, on such transferences taking place, and being completed by the transferred right being fully vested in the transferee, not only does the liability to perform the obligation, which is annexed to the transferred right, become incumbent upon the transferee, but *the liability of the former owner of that right is extinguished*. The meaning of such contracts is,—not

that at each successive transference, either of the superiority or of the property, there shall be an *additional obligant* for the performance of the conditions attached to that right,—but that the liability of the transferee shall be *substituted* for that of the former owner. In cases of this class the principle of *delegation* comes into operation. A large proportion of the heritable property in Scotland has for generations been held under such contracts of feu-farm; and in most of the cases the rights of the original superiors, and of the original vassals, have been often transferred to other parties; but the liability of the granters of these transfers has become extinct whenever the transferred rights have been completely vested in the transferees, and the liability of the latter for the performance of them has thereby been fixed. This principle was recently elucidated in the opinions of the judges of this Court in the case of *Hyslop* v. *Shaw*, 13th March 1863, 1 Macph. 535. The question there was, whether or not, in order to extinguish *delegatione* such obligations by vassals in a feu-contract, it was necessary that their disponees should be not only infeft in the *dominium utile*, but also actually entered with the superior? The opinion of the whole Court was taken on the subject; and while a minority of the judges held that the delegation operated even when the disponee was infeft, and the majority held that an entry of the disponee with the superior was requisite for that purpose, they were unanimously of opinion that, on a transfer being fully completed by the disponees being entered with the superior, the liability of the disponee was extinguished *delegatione*. The consulted judges stated (p. 550) that "in the case of superior and vassal, the vassal for the time being is personally liable for the feu-duties. The substitution of a new vassal makes a new liability, *and extinguishes the old one;* but it seems to follow on principle, that if the liability is changed by the change of the tenure from one vassal to another, the liability does not cease in any one vassal until his tenure has been feudally extinguished." And they add (p. 551), "Where there is a change of vassal, *there is a change of liability or a delegation of the debt.*" Thus the meaning of parties, when in feu-contracts they bind themselves and *their heirs and successors* to perform such obligations, is, that it is only their heirs and successors *in the rights to which these obligations are attached* who are to be so bound.

In another variety of such contracts,—viz., assignable leases of heritable property,—the same principles are exemplified, both as to transferability of the obligations of the contractors along with the rights of which these obligations are conditions; and also as to the effect of such transferences in extinguishing *delegatione* the liability of the prior obligants for the future prestations arising under such obligations. (See Arbuthnot, 5th Feb. 1772. Mor., p. 10,424.) The defender, in his printed pleading, founding upon a *dictum* in Erskine and Bankton, demurs to this doctrine. But that *dictum* was erroneous, and at variance with the practice of the country; and it was accordingly corrected and exploded by the judgment in the case of *Skene* v. *Greenhill*, 20th May 1825, 4 S. and D. 25, where this principle of extinction of liability for such obligations by delegation was expressly affirmed. And accordingly, in the case of *Hyslop* v. *Shaw* above-mentioned, the consulted judges concluded their opinion in these terms:—"*But we cannot refrain from emphatically expressing our opinion that the decision now referred to* (*Skene* v. *Greenhill*)*—a decision which was well considered at the time, and which has regulated the practice of Scotland ever since—appears to us to be a sound adjudication founded on strong legal principle, and one which it would be extremely dangerous to interfere with.*"

The same doctrine may farther be illustrated by what takes place when such rights have descended only to *heirs* of the contracting parties. Thus, on the death of a lessee, or a vassal, of course his representatives, both heirs and executors, and all his own estate and effects heritable and moveable, are liable for payment of all *bygone* rents or feu-duties. But when the heir of the lessee, or of the vassal, enters with the landlord or the superior, and by so completing his right, becomes liable *qua* tenant or vassal for the *future* rents or feu-duties, the liability of the defunct and of his executors, and of all his other heirs and successors, for these *future* instalments, is extinguished *delegatione*. (See *Duke of Gordon* v. *Leslie*, 8th March 1791, Macph. 5444.)

To prevent misapprehension, it is proper to state that such transferences operate only under contracts of the character we have mentioned, and not in cases where parties are connected merely as *debtors and creditors in obligations for payment of money* (whether the debts be slump sums, or annuities, or ground-annuals), although such debts should be secured as real burdens upon land. This distinction was pointed out by Lord Chancellor Cranworth in deciding the case of *The Royal Bank of Scotland* v. *Gardyne*, 13th May 1853, 1 Macq., p. 360, as to a *debt* in the form of a ground-annual secured over burgage property. His Lordship said, "In the case of superior and vassal, the vassal for the time being is personally liable for the feu-duties; just as in the case of landlord and tenant, the tenant for the time being is personally bound to pay the rents. That is a liability arising from *the principle of tenure.* In both of these cases the personal liability arises by reason of what in this country is called privity of estate. *But that doctrine has no application to a case like the present, where there is no such relation subsisting.*"

According to these established principles, the liability to perform the obligation in question having been effectually tranferred to the existing superior of Braco, as the successor of the original obligant in the superiority, and the defender's right to enforce performance of that obligation having been judicially established, the consigned sum of £1500 ought not to be longer withheld from the pursuer.

It only remains to advert to the dread which the defender appears to entertain that, in certain contingencies, he would be exposed to the risk of being left without any obligant whom he could compel to perform this obligation of relief. We do not see how the defender's case differs in this respect from the case of all other vassals holding ther lands under contracts of feu-farm. We do not think that his being exposed to risks common to all vassals holding under that tenure affords him a defence against the present action. But in our opinion these alleged risks are quite imaginary.

1. One of these contingencies is that the Duke of Montrose may transfer the *dominium directum* to a singular successor. Suppose he should do so, the liability of his Grace to perform the obligation would remain entire until that transference in favour of his successor should be completed. And on its being completed, the liability which had previously been incumbent on his Grace would thenceforth be incumbent on his successor.

2. Another of these contingencies is that of

his Grace dying, and of his heir abstaining from making up a title to the superiority. Supposing that event to happen, such heir, as otherways representing the Duke, would be liable *passive* to perform all the obligations which had been incumbent on his predecessor, and among others the obligation in question. All the other estates and effects left by the last obligant would also be attachable for payment of the debt. The obligation would not be extinguished *delegatione* so long as the right to which the obligation is attached is not actually transferred to and vested in a third party according to the principle of *Hyslop* v. *Shaw*. The heir of a deceased obligant would not escape from liability to perform his ancestor's obligation by merely allowing the right to which it is attached to remain in *heriditate jacente* of that ancestor.

3. The remaining contingency which the defender appears to dread is that of an heir of the Duke of Montrose remaining unentered, even when a successor of the defender himself might require an entry in the *dominium utile*, and might consequently find it necessary to obtain a declarator of tinsel of the superiority in order to obtain his entry from the Crown, or from such other party as might be the over-superior, in conformity with the Statute 1474, c. 58. Suppose such a contingency were to happen, still the heir of his Grace, the last-entered vassal, would remain liable *passive* as before to perform the obligation in question. In that case the obligation which was incumbent on the deceased superior, and which his heir would be liable *passive* to perform, would not be extinguished *delegatione;* because the effect of such a proceeding would not be to transfer that right of mid-superiority to which this obligation is attached to such over-superior, or to take it out of the *hereditas jacens* of the immediate superior. That is merely a statutory mode which the Legislature has provided to enable a vassal to obtain himself infeft in the *dominium utile* when his immediate superior fails to perform his duty in that respect, by empowering an *over-superior* to perform that function on that occasion *in vice* of the immediate one. In other respects the obligation to the vassal of the unentered heir of the immediate superior vassal remains entire; insomuch that the future feu-duties continue to belong to the unentered heir of the superior, even while the vassal is possessing under an entry so obtained from an over-superior; see Erskine 3, 8, 80, and *Wallace* v. *Earl of Eglinton*, 26th February 1835, Shaw, 13, p. 564, and *Wallace* v. *Crawford's Executors*, 4th December 1838, 1 D. 262. The main effect on the unentered heir of the immediate superior allowing himself to fall into such a predicament is that, while he must indemnify the vassal of the skaith which such proceedings may occasion to him, and must remain liable *passive* to perform the obligations of his predecessor, he by an express provision of the Statute 1474 *forfeits his right to the casualty of a year's rent of the subjects during his own lifetime*, a provision which may make the defender confident that heirs succeeding to the superiority of Braco will not allow themselves to fall into a position in which they might incur such a serious loss.

It should be mentioned that although the immediate superiority itself might be forfeited if in such a predicament a successor of the defender were to resort to a different remedy, which is provided by the Statute 10 and 11 Vict., c. 48; yet that could happen only from his own choice, that remedy not superseding the original one under the Statute 1474, but leaving it quite entire.

In these circumstances, our opinion is, that the pursuer has performed the condition of the contract of sale, and ought now to receive the consigned balance of the price; and that the Lord Ordinary's interlocutor should be altered.

The following opinion was returned by Lord Deas—

This dispute has arisen out of cases already decided, with which we are familiar.

The Marquis of Montrose, in 1705, entered into a feu-contract by which he conveyed the lands of Braco, with the teinds thereof, to Mr David Graham in liferent, and his son James Graham and his heirs, &c., in fee, to be held of the Marquis, his heirs and successors, in feu-farm, for payment of an annual feu-duty of £46, 13s. 4d. Scots, and £6 Scots yearly in lieu of personal service—a duplicate of the feu-duty being payable for the entry of heirs, and the entry of singular successors being untaxed. The feu-contract bore that "the said James Marquis of Montrose binds and obliges himself and his foresaids to warrant the said teinds, parsonage, and vicarage above disponed to be free, safe, and sure to the said Mr David Graham and his foresaids from all minister's stipend, future augmentations, annuities, and other burdens imposed, or to be imposed, upon the said teinds, except allenarlie the minister's stipends and schoolmaster's fees aftermentioned"—viz., certain specified sums then payable.

The superiority of Braco came by succession into the person of the present Duke of Montrose, and it does not seem to be disputed that the Duke succeeded also to the other estates of the Marquis, his great-grandfather, and is his general heir and representative.

Augmentations of the stipend, payable from Braco, were from time to time awarded, and these were paid annually or termly by the Duke, as they had been by his predecessors, up to 1846. In that year, however, the Duke declined to pay longer, being advised, no doubt, that the judgment then just pronounced by the House of Lords in the case of *Sinclair* v. *Marquis of Breadalbane* afforded a precedent for holding that the proprietor of Braco had no sufficient title to enforce against the Duke the obligation of relief contained in the feu-contract of 1705.

The obligation of relief in the case of *Sinclair* v. *Breadalbane* was, as here, in the form of a clause of warrandice in a feu-contract. The superior had been called as a defender in the action of relief at the instance of the proprietor of the *dominium utile*, but at an early stage of the cause, the action, as against the superior, had been allowed to be dismissed; and, as in a question with the general heirs and representatives of the granter of the feu-right, it was found by the House of Lords that, without a special assignation to the obligation of relief, the proprietor of the *dominium utile*, who was a singular successor of the original feuar, had no title to enforce that obligation. It is not surprising that this judgment, following upon that of the same high tribunal in *Maitland* v. *Horne*, should have encouraged the Duke's advisers to think that the Duke might get rid of what had become a highly burdensome obligation, and consequently to recommend him to discontinue, as he did, the payments he had previously been in the habit of making.

So stood matters in 1853, when Sir William Drummond Stewart, the proprietor of the *dominium utile* of Draco, advertised the lands and teinds of

that estate to be sold by public route. By this time the augmented stipends payable from Braco amounted to more than £100 per annum in excess of the annual feu-duty; and unless the seller had undertaken to get the purchaser relieved from the burden of these augmented stipends it is obvious that the estate could only have been sold for a proportionally less price. Accordingly, in the articles of roup a clause was inserted bearing that "in respect of the undecided questions as to augmented stipend," £1500 of the price should be consigned "until these questions have been finally determined," the seller agreeing to "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 the same to a final determination."

The defender became purchaser of the estate under these articles of roup at the price of £37,000, of which £1500 was consigned as agreed upon. An action for relief of the augmented stipends was then brought at the pursuer's instance, with the defender's concurrence, against the Duke of Montrose, concluding against him both as a superior and as heir and representative of his great-grandfather the Marquis, by whom the estate had been feued out in 1705. It had, however, as the correspondence produced shows, been expressly agreed between the parties that, although the defender concurred in that action he was not to be understood as in any event limiting his rights under the original obligation, but that he should be entitled to require the pursuer to follow out such farther proceedings as might be necessary for carrying out that obligation.

The result of the action thus brought was a judgment of this Court, affirmed by the House of Lords, finding the Duke liable in relief as superior. Nothing was said in the judgments as to the Duke's liability as heir and representative of his great-grandfather; and accordingly the pursuer's minute of debate in the present case bears—"It is not contended by the pursuer that the judgments which have been pronounced find that the vassal is entitled to enforce the obligation against the general representatives of the granter."

Nevertheless, the pursuer contends that he has done all which was incumbent on him by the articles of roup to entitle him to uplift the consigned sum of £1500, and he has brought this action, with conclusions to that effect, accordingly.

Two questions in particular consequently arise—1st, What was the obligation of relief contemplated by the parties at the time of the sale and purchase in 1853, the effectuating of which relief was to entitle the seller to uplift the £1500? 2d, Has a title to enforce the obligation of relief so contemplated been fully established in the person of the purchaser?

With reference to the first of these questions, I cannot doubt that the relief which the parties had in view in 1853 was relief against the general heirs and successors of the Marquis of Montrose according to the literal reading of the obligation in the feu-contract of 1705, and not merely relief against his heirs and successors in the superiority.

It was not then doubted that the Marquis had bound himself and his general heirs and successors to afford the stipulated relief. It had been assumed upon all hands in this Court and in the House of Lords, throughout the long litigation in the case of *Sinclair* v. *Marquis of Breadalbane*, that such was the effect of a clause of relief so worded in a feu-contract. There would have been no meaning otherwise, in the distinction judicially relied on in that case between personal and collateral obligations and obligations which, to use the English phraseology, "run with the lands." No doubt had been then suggested that the original feuar could have enforced the obligation against the general heirs and successors of the granter of the feu-right although the granter or his heirs had sold and been denuded of the superiority. The only question agitated had been whether and under what circumstances the title so to enforce that obligation was to be held to have been transmitted from the original feuar to his singular successor in the feu-right.

The superior had been dropped out of the case of *Sinclair* v. *Breadalbane* as not being interested in its result, before any of the conflicting judicial opinions on the disputed question of title had been delivered. It was not disputed throughout that action that, if the pursuer had obtained from the original feuar a special assignation of the obligation of relief, he could have enforced the obligation against the general heirs and successors of the granter, just as the original feuar himself could have done. The singular successor, however, maintained (1) that a special assignation was not necessary: and (2) that, at all events, he had in his title-deeds what was equivalent to such an assignation. The ultimate judgment was against him on both points; and it appears to me that what the parties to the articles of roup of the estate of Braco contemplated, as the event which would entitle the seller to uplift the £1500, was his eventual success in overcoming, in one or other of two ways, the difficulty arising from the judgment in *Sinclair* v. *Breadalbane;* viz., either (1) by making out that there was no such break or want of continuity in the series of assignations contained in his title-deeds as had proved fatal to the title of the pursuer of that action; or (2) by obtaining a special assignation from, or in lieu thereof, adjudging in implement against the heir of the original feuar.

Accordingly, it will be seen that, throughout the elaborate note appended to the interlocutor of Lord Mackenzie, Ordinary, there is no allusion to its having been pleaded before him, that there might be a title to enforce the obligation against the granter's successors in the superiority, although not to enforce it against the granter's heirs and successors generally. As the Duke of Montrose happened to possess both characters, he had been naturally enough concluded against in both. But the argument relied on in the Outer-house obviously was, that the proprietor of Braco had throughout his title-deeds what was equivalent to a special assignation, and consequently had a title to enforce the obligation of relief against the general heirs and successors of the granter of that obligation. Accordingly, if Lord Mackenzie's interlocutor, negativing that title, had been adhered to, the seller was apparently at that time prepared to have resorted to his second alternative, by procuring a special assignation or adjudging from the heir of the original vassal.

This appears from the correspondence printed in the joint-appendix. On 24th November 1857, the purchaser's agents wrote pointing out that, as Lord Mackenzie had held that, under the feu-contract, James Graham, the original vassal, "was vested with the obligation of relief against future augmentations," the formal title to it, if not transmitted, must still be in James Graham's *hereditas jacens;* and, as the substantial right to that obliga-

tion was in the pursuers, "they may get from the heir of James Graham an express assignation of it; or, if the heir decline, they may adjudge, and so complete the title which alone is wanting."

In answer to this letter the seller's agent, although reserving the question of legal obligation, wrote, on 27th November 1857, "We must await the decision by the Inner-house upon the present case, and should Lord Mackenzie's judgment be adhered to, I have no doubt but that Sir William will endeavour to find out the heir of James Graham, and get him to serve and assign the obligation, should counsel be of opinion that such a course is advisable."

It was only after the cause came into the Inner-house that the attention of parties was specially called to the question whether there might not be a title to enforce the obligation of relief against the superior, although not against the general heirs and successors of the granter of the obligation. The Court, *ex proprio motu*, ordered cases upon that question, and the result, as already noticed, was a final judgment affirmative of that proposition.

Now, it may be that the defender, the purchaser of Braco, shall ultimately be held bound to accept of this obligation of relief as all that can be obtained for him. But that, I think, will be an unequitable result if he is at the same time deprived of all interest in or benefit from the security afforded by the £1500; and I do not think that, in any view, the pursuer is at present in a position to insist upon that result.

The relief which has been effectuated is not, in my opinion, the relief which was in view of the parties in 1853, nor is it equivalent to that relief. The clause in the articles of roup which embodies the agreement of parties, proceeded, I think, upon the same assumption on which the case of *Sinclair* v. *Breadalbane* had proceeded—viz., that a permanent obligation of relief had been undertaken by the Marquis of Montrose for himself and his general heirs and successors, of which they could not denude themselves—whereas the obligation in respect of the mere character of superior is obviously an obligation which passes by delegation from one superior to another, so that if the Duke of Montrose were to convey the superiority to a singular successor, the entry of that singular successor with the Crown, however irresponsible in a pecuniary point of view the new vassal so entered might be, would effectually transfer to him the burden of the obligation in dispute, and relieve the Duke of that obligation *de futuro*, so far as it had attached to his Grace in the mere character of superior. It is, however, in the Duke's character of superior, and in that character only, that any judgment hitherto pronounced has held the defender, as purchaser of Braco, to be *in titulo*, to enforce the obligation of relief against the Duke. Had the action been directed against a singular successor in the superiority, the judgment would have been precisely the same against him as it was against the Duke, and that singular successor would have ceased to be any longer under the obligation so soon as the superiority had been transferred to and feudally vested in another singular successor. The obligation would, no doubt, have been enforceable against each superior personally while he was superior, but, so soon as he ceased to be superior, he would have ceased to be under the obligation.

Now, it may very well be that the defender, as purchaser of Braco, would have been contented to accept the responsibility of the successors in the estates generally of the noble family of Montrose, although not to accept the responsibility of any man of straw to whom the Duke of Montrose might be advised to convey the superiority when its value was found to be £100 or £120 a-year less than nothing. That mode of attempting to get rid of a burdensome obligation of this kind is not unprecedented; and, however unlikely it may be that the Duke of Montrose would resort of it, I do not think it was contemplated in 1853 that the defender was to take the risk of that contingency.

If it be thought that the Duke could really not so defeat the defender's title to enforce against him the liability he is at present under as superior, let the pursuer judicially establish that by a judgment against the Duke; or let him, in any way, judicially establish, as in a question with the Duke, that the defender has an indefeasible title to enforce against his Grace and his heirs (whether they remain superiors or not) the obligation of relief in dispute, and then I shall have no difficulty in holding the pursuer entitled to uplift the £1500.

But, in place of proposing to supplement the defender's title, as was proposed in 1857, so that the question of permanent obligation may be tried with the Duke, the pursuer's main contention now seems to be (contrary to all his former argument) that all such steps would be useless, because there neither is, nor ever was, any personal or collateral obligation of relief undertaken by the granter of the feu-right for himself and his heirs—but simply an obligation in the character of superior, of which he could divest himself, at any time, by divesting himself of the superiority.

Now, while I am not at present prepared to negative that doctrine, neither do I think myself entitled, in this incidental shape, to affirm it, after all that has been assumed to the contrary—particularly in the House of Lords—in the case of *Sinclair* v. *Breadalbane*, and coming, as that doctrine now does, from a party who transacted, as I think the pursuer did, upon an opposite footing, and undertook to allow the £1500 to remain consigned till he should establish a title in the defender's person to enforce the obligation in its terms. The question is an important one. It cannot be decided in this process, to which the Duke is no party; and I think the least the pursuer can do is to get a decision upon it, in an action against the Duke, after obtaining the necessary title, without which the question cannot be tried.

If the existence of the alleged personal and collateral obligation in the feu-contract were to be assumed, I certainly could not hold that the defender has already a sufficient title to enforce it. That, I think, would be directly contrary to the authority of the judgment of the House of Lords in *Sinclair* v. *Breadalbane*. There is no incompatibility in the existence of the two obligations (whether they really co-exist in the feu-contract in this case or not)—the one prestable against heirs, and the other attaching to and passing with the superiority. A title to enforce the latter does not necessarily imply a title to enforce the former; and the pursuer, accordingly, admits that the judgment already obtained against the Duke, while it establishes the one title, does not establish the other.

I think the defender, before parting with his hold over the £1500, is fairly entitled to be placed, with respect to title, in the shoes of the original feuar; and that it is not in the mouth of the pursuer to say, without getting the question decided with the Duke of Montrose, that such a title would be use-

less, because, however good the title, no liability could be established against the Duke as the heir of the Marquis. If that were to be held to be law, I should not be prepared to say that the pursuer would be entitled to uplift the consigned money; because, as I construe the agreement of 1853, the relief to be effectuated as a condition of uplifting the consigned money was not relief which might be terminated at any time by the heirs of the granter of the obligation denuding of the worthless superiority, but relief to be permanently afforded by these heirs themselves of a burden which, in its nature, is permanent.

In any view, I am of opinion that the pursuer, on whom the *onus* rests, has not established that he is now entitled at once to uplift the consigned money; and that is the only question which can be decided under this summons. By allowing the money to remain consigned as a security against the contingency of a singular successor in the superiority being unable to afford relief, the pursuer is in no worse position than the owner of warrandice lands—the annual proceeds being enjoyed by him in the meantime so long as that contingency has not occurred. Whereas, if the money were uplifted and the contingency meant to be provided against should then occur, the defender would be in the position of having paid £1500 for relief from a permanent burden of which he was no longer to be relieved at all.

My opinion, upon the whole, is that, in the most favourable view for the pursuer, his action is premature; and that, as he does not ask to have it sisted with a view to further proceedings against the Duke, it ought to be dismissed.

Lord Barcaple and Lord Kinloch returned opinions concurring in effect with the opinions of the consulted judges.

At advising—

Lord Justice-Clerk, Lord Cowan, and Lord Benholme concurred with the majority.

Lord Neaves concurred with Lord Deas and Lord Ormidale, holding (1) that upon a fair construction of the obligation of relief, it held good against the heirs as well as the successors of the granter; (2) that that being so, the defender was entitled under his bargain to hold the consigned fund as a security unless it appeared that he was in a position to get relief as well from the heirs as from the singular successors of the granter; and (3) that the debt was not and could not be put in that position now, because an obligation of this sort did not pass *ipso jure* with the *dominium utile*, but required a special assignation from the original grantee or his heirs, which was not tendered, and which indeed could not be got in the present case.

The Lord Ordinary's interlocutor was recalled in conformity with the opinions of the majority of the Court, and decree was granted for the amount —the consigned fund, together with the differences of interest between bank-rates and five per cent., from the date when the defender was called upon to refund and concur in getting up the money.

Agents for Pursuer—Dundas & Wilson, C.S.
Agent for Defender—John Gillespie, W.S.

Saturday, February 15.

FIRST DIVISION.

ADAMSON'S TRUSTEES *v.* SCOTTISH PROVINCIAL ASSURANCE COMPANY.

Insurance—Life Policy—False Declaration—Material Concealment — Suicide — Issue. In an action for recovery of sums contained in policies on life of deceased, counter issues adjusted by the Court to try questions of false statement in the declarations by the deceased, and wrongful failure on his part to disclose facts material to the risk undertaken by the defenders.

Adamson's trustees sued the defenders for payment of certain sums contained in two policies of insurance effected with the defenders on the life of the late Mr Adamson. The defenders pleaded in defence (1) that the policies libelled on were void, and insufficient to constitute any legal claim against the defenders, in respect that the matters set forth in the relative declarations by the deceased Mr Adamson were not truly and fairly stated; *et separatim*, in respect that information materially affecting the assurances thereby effected was unduly withheld from the defenders by the deceased: And (2) that pursuers were not entitled to recover under the policies in question, in respect that the assured died by suicide, in the sense of the policies libelled.

The averments upon which these pleas in defence were founded were to the following effect:—It was alleged that Mr Adamson, with a view to obtaining the said policies, subscribed and delivered to the defenders declarations containing, or professing to contain, particular information in regard to his age, health, habits, and other matters. In these declarations Mr Adamson set forth that he had not withheld or concealed any circumstance tending to render an assurance on his life more than usually hazardous, and he agreed that said declarations should be the basis of contract between him and the defenders, "and that, if any untrue averment is contained in this declaration, all sums which shall have been paid to the said company upon account of the assurance made in consequence thereof shall be forfeited, and the assurance shall be absolutely null and void." In like manner, by the terms of the policies it was expressly declared that what was set forth in the said declarations or otherwise in regard to the assurance should be the basis of the contract; and that "if it shall hereafter appear that any material information has been withheld, or that any of the matter set forth have not been truly and fairly stated, then all the monies which shall have been paid on account of this assurance shall be forfeited, and the assurance shall be void." It was also by the said policies provided that the assurances thereby effected should at all times and under all circumstances, be expressly subject to the several conditions printed on the back thereof. By the third of these conditions it was, *inter alia*, provided that "policies granted to persons on their own lives become void if they die by suicide, duelling, or by the hands of justice; this, however, does not extend to policies which have been *bona fide* assigned to third parties for onerous causes, and of which assignment notice shall have been given to the office previous to the death, nor does it extend to assurances effected by one person on the life of another." The deceased, also, in said declarations, stated and represented that his ordinary medical