revoked that part of his will which deals with Mrs Scott's provision, and might have given her an absolute gift, putting her in the same position as her sisters. The form he used was sufficient to create great doubt even on the face of the documents themselves, apart from the surrounding circumstances to which I have adverted, whether he did not make a separate provision for her.

On the whole of this question I entirely agree with the Sheriff-Substitute and the Sheriff.

LORD DEAS—In regard to the question whether Mr Scott intended to give a double portion to his daughter or not, there is a great deal of parole testimony bearing in both directions. I doubt the relevancy of some of it. But to my mind the terms of the formal written bond, as contrasted with the terms of the formal written will, are conclusive. It is quite clear, if we take the writings *ex facie*, that the one provision is not substituted for the other, but that they are quite separate provisions to separate and distinct parties. The provision in the will is limited to a liferent to Mrs Dewar; the fee is given to her children. By the bond the fee is vested in Mrs Dewar; it is payable to her and to no one else. It is no doubt quite possible that notwithstanding the difference in the terms of the two documents the intention may have been to satisfy the one provision by the other. But it is open to great dispute whether the second case can be said to be a fulfilment of the first, the investment being, as I have stated, for behoof of a different party altogether. While there may be some doubt with regard to the matter of fact, I am quite clearly of opinion that in point of law the two provisions must be held to be separate.

LORD MURE—I have had no difficulty in coming to the conclusion that the bond for £400 is not to be held as operating a discharge of the provision for £400 in favour of Mrs Dewar under the will. The sums in each are the same, but in other respects it appears to me that the terms of the two documents are very different. The provision in the will is declared to be for Mrs Dewar's liferent alimentary use allenarly, and there are certain other restrictive provisions, with a destination-over in favour of her children. The trustees under the settlement are to make over that single provision to other trustees who are nominated specially for the purpose of administering it; so that the terms of the settlement in dealing with this sum are most distinct and anxious. When we turn to the bond it is quite different. In these circumstances the presumption is rather against a person so acting as to give the sum in the bond in substitution of that under the will, and I am not disposed to take it that it was so intended by Mr Scott. There are other strong reasons for inducing me to hold that both provisions must receive effect. Mrs Dewar was in poor circumstances. It is clear that at the date of her husband's death, subsequent to the execution of the will in question, she was in great pecuniary difficulties, and would not have been able to provide for her children had it not been for her father. The provision in the bond was thus the more intelligible, and I think was quite distinct and separate from the other, and must not be held to be in substitution of it, or to prevent it from likewise receiving effect.

LORD SHAND—I have felt this question to be attended with considerable difficulty. One has to balance the considerations upon both sides in arriving at a conclusion upon the question of intention. It is not without some doubt that I have come to agree with your Lordships. On the one hand, the sums in the testamentary disposition and in the bond are the same. Secondly, there is this to be said against the theory of a double portion, that exactly the same sum has been bequeathed under the will to the other two daughters. In the third place, it is a little remarkable that although Mrs Dewar was living in the house with her father nothing was said by him as to the provision he had made for her, or proposed to make for her, when she agreed to give up her interest in her husband's estate. On the other hand, there was a distinct change in Mrs Dewar's circumstances in life after her husband's death. The other sisters were comfortably married and in a good position, pecuniarily and otherwise. Mrs Dewar had little or no means, and on her father's request had given up the claims she had on her husband's estate. In the second place, the sum in the bond was settled on Mrs Dewar herself, and not upon her children, as was the case in the testamentary disposition. In the third place, the difference in the form of making the two provisions is not to be left out of view, but I do not put so much strength upon that consideration as I think your Lordships are inclined to do. If the second provision had been contained in a codicil to the will, I am not sure that that would not have made a stronger case for the double provision than we have under present circumstances.

The Court found Mrs Milne entitled to the £400 under the bond as well as to the legacy of that amount under her father's will.

Counsel for Defender (Appellant)—J. G. Smith — J. A. Reid. Agents — Adamson & Gulland, W.S.

Counsel for Pursuer (Respondent) — Lord Advocate (M'Laren, Q.C.) — Dickson. Agent — John Gill, S.S.C.

Friday, November 19.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GUTHRIE AND ANOTHER *v.* SMITH.

Superior and Vassal—Feu-Duty—Assignation—Right of Third Party who tenders Payment of the Feu-Duty to Demand Assignation of Superior's Rights and Remedies—37 and 38 Vict. c. 94 (*Conveyancing (Scotland) Act*), *sec.* 4, *sub-sec.* 2.

Held (*diss.* Lord Shand) that a third party tendering payment to a superior of the feu-duty due by his vassal was not entitled to demand an assignation of the superior's rights and remedies for recovery of the same, though he offered to insert a clause in the assignation reserving the superior's rights and remedies for recovering all other feu-duty due and to become due.

Opinion (*per* Lord Shand) that the third party was entitled to obtain the assignation unless the superior would be prejudiced by granting such a deed, which he had failed in this case to demonstrate.

By feu-contract dated 30th December 1875 and 15th January 1876 Mrs Susan Smith disponed to David Guthrie all and whole certain lands in the parish of Govan, in Lanarkshire, he being bound to pay a yearly feu-duty of £235, 5s. 6d., and to free and relieve the superior of all public and parochial burdens imposed or to be imposed on the lands so disponed. The said feu-contract, after certain stipulations as to the nature of the buildings to be erected on the ground feued, provided, that in case the vassal, or his heirs, assignees, or disponees, "shall sell or dispone parts or portions of the said piece of ground, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty after stipulated that the portion of ground so sold or disponed bears to the whole of said piece of ground hereby feued; . . . but providing and declaring that the said [superior] shall not be bound to admit of the said subdivision of the feu-duty until there shall be built on each separate portion of the said piece of ground sold, as well as upon that retained, buildings of the description above mentioned, and yielding a yearly rent equal to at least double of the feu-duty and augmented feu-duty effeiring to such portion of the said piece of ground sold and that retained." It was further declared that in the event of the vassal selling or disponing the subject feued, or part thereof, "the foregoing personal obligation for payment of the feu-duty, interest, and penalties shall only subsist against him and his heirs and executors until buildings shall be erected on the said piece of ground, or the part or parts thereof so sold or disponed, and on that retained, in terms of the obligation and conditions to that effect before written, any law or practice to the contrary notwithstanding."

By contract of ground-annual dated 10th May 1876 David Guthrie disponed to Peter Rae and John Clark, wrights, partners of the firm of Rae & Clark, a portion of the said piece of ground, under the real burden or ground-annual of £42, 3s. 10d. The proportion of feu-duty payable by them thereon was set forth in said contract as £140, 13s.

Rae & Clark were infeft, and proceeded to build on the land, and afterwards to grant two bonds and dispositions in security for £1300 each, and one for £600, over the tenements. The bondholders under the two former bonds entered into possession of the security subjects by decree of maills and duties. Rae & Clark having become insolvent, were unable to contribute their proportion of the feu-duty due at Whitsunday and Martinmas 1879, and the bondholders refused to do so. James M'Connachy, a joiner in Port-Glasgow, offered, with the consent of David Guthrie, to pay the superior the whole arrears of feu-duty due to her under the contract on behalf of the said David Guthrie, provided the superior would, at his expense, execute and deliver to him a deed of assignation in his favour, assigning to him all the remedies competent to said superior for recovery of feu-duties, to the effect of enabling him to recover payment of the amount of said arrears in so far as he was entitled to do so, but that always under reservation of, and without prejudice to, the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her. The superior declined to grant such an assignation or to receive payment of the feu-duty on these terms, and Guthrie was charged for payment of the full amount of the two half-yearly payments of the feu-duty. He and M'Connachy raised a suspension of the charge.

The suspenders pleaded—"(1) The charge ought to be suspended, in respect the complainer James M'Connachy has, with the consent and on behalf of the other complainer David Guthrie, offered to pay the sums charged for on getting an assignation to the same, together with the respondent's rights foresaid. (2) The charge ought to be suspended in respect the refusal of the respondent to execute such an assignation is unwarrantable, unreasonable, and illegal."

The respondent pleaded—"(1) The complainer M'Connachy has no title or interest to insist in the present application. (2) The averments of the complainers are not relevant or sufficient to support the prayer of the note. (3) The respondent not being bound to grant the assignation demanded by M'Connachy on payment of the feu-duties, she was and is entitled to reject the tender alleged."

The Lord Ordinary (Rutherfurd Clark) repelled the reasons of suspension, found the charge orderly proceeded, and decerned. His Lordship added this note—"*Note.*—The Lord Ordinary has already decided the question raised in this suspension in the case of *Hinshelwood* v. *Watson*, July 17, 1877. He refers to his note therein." The note thus referred to by his Lordship was in the following terms:—

"*Note.*—The question in this case is whether the defender, on paying the feu-duty which is in arrear, is entitled to an assignation of the pursuer's rights as superior, but on the footing that the rights of the assignee should be postponed to all rights competent to the cedent. The pursuers are willing to assign the personal debt, but they refuse to do anything more.

"In the opinion of the Lord Ordinary the pursuers are right. They are entitled to payment of the feu-duties, and if these were paid by the vassal they could not be required to do more than discharge them. If the vassal could not pay them, but found any other person who was willing to pay them for him, the result, it is thought, would be the same, except that the superiors might be bound to assign the personal debt. The pursuers could not, as the Lord Ordinary conceives, be required to allow the feu-duties to remain as a charge on the feu, which would be the consequence of assigning them. They are entitled to have the subject clear of all past duties. This, indeed, seems to be a consequence of their right to irritate the feu. If the duties are not paid, to allow them to remain as a burden on the feu, even under a declaration that the rights of the creditors are to be postponed to theirs, is not to clear the subject, and is not, in the opinion of the Lord Ordinary, equivalent to payment of the feu-duties; and however the assignation may be expressed, it might prejudicially affect the pursuers in recovering the feu-duties that might hereafter become due in any future action which they may

be forced to bring for tinsel of the feu. The superiors who are entitled to payment, which means that the feu is to be cleared of the *debitum fundi* created by the arrears of feu-duty, cannot, it is thought, be embarrassed by any question which might arise by allowing the burden to continue.

"The defender has an equitable right to purge the irritancy which has been incurred, but, for the reasons before stated, she cannot, in the opinion of the Lord Ordinary, require an assignation of the feu-duties.

"The defender endeavoured to assimilate the case to that of a cautioner who pays rent and who has right to an assignation of the landlord's hypothec. In the opinion of the Lord Ordinary the cases are not parallel. As a general rule the cautioner is entitled to an assignation of all the securities which the creditor holds for the debt, and in obtaining an assignation he obtains no more than an assignation to a security which the landlord would himself exhaust in recovering payment of the rent."

The suspenders reclaimed, and argued—They were entitled both by common law and under the provisions of the 1874 Act to the assignation they asked. A cautioner paying a tenant's rent for him was entitled to the landlord's right of hypothec. The superior was bound to grant the assignation, unless she could show that she would sustain injury by so doing. Here none would be sustained.

The respondent replied—If a person asked to grant the assignation was to be prejudiced by granting it, he was not bound to do so. The superior here would sustain prejudice by granting the assignation demanded, for if it were granted Guthrie would poind the ground and so affect the practical utility and value of the subject. The superior was entitled to have the subject clear of all diligences which might affect the ground. It was the superior's interest to keep up the real burden. The 1874 Act gave no new right; it merely dispensed with a deed. The cases on caution were not in point.

Authorities—Ersk. Inst. iii. 5, 11; *Fleming* v. *Burgess*, June 12, 1867, 5 Macph. 856; Hunter on Landlord and Tenant, ii. p. 159; *Gordon* v. *Graham*, March 9, 1842, 4 D. 903, 2 Rob. App. 251; *Steuart* v. *Ledingham*, July 9, 1878, 15 Scot. Law Rep. 689; The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94) sec. 4, sub-sec. 2.

At advising—

Lord President—The question raised in this suspension is one of some novelty and importance in the law of superior and vassal. The complainer Mr Guthrie has been charged to pay an arrear of feu-duty due by him as vassal under a feu-contract by which a certain urban subject was feued to him by the respondent Mrs Smith, and he has suspended on the ground that payment of the feu-duty has been tendered to the superior by a third party on his behalf, accompanied by a demand for an assignation in favour of the third party, not only of the personal debt, but also of the security and of the remedies which the superior has for recovering it. It is further proposed that the assignation should be under certain qualifications, to the effect that the superior's rights for making effectual and recovering all future feu-duties shall be preferred to those of the assignee. The superior refuses to grant the assignation or to receive payment of the feu-duty upon these conditions. Hence this suspension has been brought.

The feu-contract, amongst other provisions, declares that the feuar and his foresaids "shall be bound and obliged to erect, along the whole extent of the north-east, south, and west building lines of the piece of ground hereby feued, tenements of dwelling-houses" of a certain specified design; and then comes a declaration that in case the feuar or his foresaids "shall sell or dispone parts or portions of the said piece of ground, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty after stipulated that the portion of ground so sold or disponed bears to the whole of said piece of ground hereby feued." Further on there is this declaration—that "in the event of the second party hereto, or his heirs, selling or disponing the piece of ground above disponed, or any part or portion thereof, the foregoing personal obligation for payment of the feu-duty, interest, and penalties, shall only subsist against him and his heirs and executors until buildings shall be erected on the said piece of ground, or the part or parts thereof so sold or disponed, and on that retained, in terms of the obligation and conditions to that effect before written, any law or practice to the contrary notwithstanding."

The effect of these provisions taken together seems to me to be simply this, that if the feuar sells off a portion of the ground, then he is to have the feu-duty apportioned by the superior, so that each portion shall bear its own share of the feu-duty. But that is to be subject to this condition, that it is not to take effect until buildings shall be erected of the requisite value and character, not only on the part sold off, but also on the part retained by the feuar. It is admitted that on the part retained by the feuar no such buildings have been erected as are provided for in the feu-contract; and consequently, in terms of the deed, Mr Guthrie is not relieved from the personal obligation to pay the feu-duty applicable to the whole subjects feued.

In these circumstances we must look at the complainer's averments as to what has taken place. He states that he has sold a portion of this feu, being 5626 square yards out of 9411 square yards, to Messrs Rae & Clark, and has taken them bound to pay a certain proportion of the feu-duty. Rae & Clark having obtained this title, subsequently granted a bond in favour of the trustees of the Glasgow Police Friendly Society for £1300, giving them in security a tenement which they had erected on the ground so purchased from the complainer. They afterwards granted another bond for £1300 over another tenement on the same ground, and also a third for £600. And then it is averred that "Messrs Rae & Clark, who are insolvent, have failed to contribute their said proportion of feu-duty due at the terms of Whitsunday and Martinmas 1879. The said David Guthrie has also been unable to obtain payment from the said heritable creditors. With reference to the answer, it is explained, that before any of the feu-duty now demanded began to run, the respondent was well aware of the said sale having taken place.

Admitted that Rae & Clark were some time ago, prior to the said sale, Mr Guthrie's principal foremen. Admitted that Mr Guthrie has not built on the ground which he has retained, the state of trade having been such that it would have been injudicious to do so; but over and above the feu-duties which he has paid he has expended between £400 and £500 thereon in the formation of streets," &c.

That being the state of the fact so far, the complainer then goes on to aver that the other complainer James M'Connachy, "Notwithstanding the failure of Messrs Rae & Clark to contribute their share of the said feu-duty, is, and has all along been, ready and willing, and has several times offered, with the consent and on behalf of the other complainer, the said David Guthrie, to pay to the respondent as superior the whole of the arrears of feu-duty and others due to her under the foresaid feu-contract (being the sums now charged for), provided the said respondent will, at his expense, execute and deliver to him a deed of assignation in his favour, in order that he may operate such relief as is competent to him, namely, a deed assigning to the complainer James M'Connachy all the remedies competent to the respondent as superior for recovery of feu-duties, to the effect of enabling the said complainer James M'Connachy to recover payment of the amount of said arrears and others, in so far as he is entitled so to recover payment thereof; but that always under reservation of, and without prejudice to, the said respondent's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her. The said David Guthrie is willing to be a party to such an assignation in token of his consent thereto. The respondent, however, without any just cause, refuses to execute such an assignation, and the present proceedings have thus been rendered necessary."

Now, the question is, whether the complainers are entitled to make a demand for such an assignation? A distinction was at first attempted to be made between the case of M'Connachy and that of Guthrie, but I rather understood that it was abandoned at the close of the discussion, and that the case is to be taken in such a way as if the vassal alone were making the demand, upon the conditions stated above. I cannot understand how a person in the position of M'Connachy can be situated more favourably than the vassal himself in a question of this sort. The effect of the assignation undoubtedly would be, that in so far as regards the amount of the feu-duties paid to the superior they would continue a *debitum fundi* upon the subjects instead of being discharged and extinguished; that would be the inevitable consequence.

In ordinary circumstances a vassal is not entitled to demand anything beyond a simple discharge of such a debt. The vassal in this case has placed himself in a different situation from the ordinary case, because he has sold off portions of his feu in such circumstances as prevent him from obtaining any appointment between the portion retained and the portion sold. That is because of his own failure to build. The consequence is that his disponees having burdened the subjects with heritable securities, and having become insolvent, the vassal cannot obtain relief from his insolvent disponees, or their heritable creditors, of any portion of the entire feu-duty which he is bound to pay to the superior. But it does not appear that the embarrassment which thus arises can be visited upon the superior, who is not bound to give effect to the stipulation to have the feu-duty apportioned until the other conditions have been implemented. There is no fault on the part of the superior. The fault is on the part of the vassal. It is in these circumstances that he makes the anomalous and utterly unprecedented demand that the superior should grant an assignation of his rights and remedies as a superior as against the land. The answer made by the superior, which carries conviction to my mind, is that it is an obvious disadvantage to him that there should be any *debitum fundi* resting on the ground except his own. There have been various speculations by the parties as to how that would work in the future. The complainer proposes that a clause should be inserted in the assignation that it was granted only under reservation of, and without prejudice to, the superior's remedies and securities for making effectual and recovering all other feu-duties due or to become due; but the superior says, and I think with great cogency and force:—'I have this feu-contract, which is the origin of the rights between the superior and vassal, and that, and that only, regulates these, and fixes that the only *debitum fundi* shall be that belonging to the superior; and so I refuse to consent to the creation of others or to the reservation of a *debitum fundi*, in so far as the feu-duties have been paid in terms of the discharge which is asked for them."

I think that is a good answer on the part of the superior. No doubt a third party paying a debt is entitled to ask from the creditor an assignation of his rights and remedies against the debtor, provided no prejudice is to be done thereby to the creditor. But it lies on the other side to prove that there will be no such prejudice. That they have failed to do here.

Lord Deas—I do not think it necessary to go further than this, that I hold it to be settled law that a superior getting payment of his feu-duty is not bound to grant an assignation; and I derive that law from my early reading of feudal principles and feudal law, more than fifty years ago. I do not intend to go back on it now, though perhaps there is no express decision on the subject, and the case may never have been decided. It may not be sufficient for others, but it is sufficient for me, and I concur in the result your Lordship has arrived at. I hold it as matter of law, and it is not necessary to inquire into the reason of it; it is enough that it is the law, and I have no hesitation in applying it to the circumstances of this case.

Lord Mure—I think the Lord Ordinary has taken a sound view of this case. The grounds of his Lordship's judgment are not fully explained, but parties are referred to his interlocutor in another case in which he decided the same question in June 1877. His Lordship then stated his grounds of judgment as follows:—"The pursuers could not, as the Lord Ordinary conceives, be required to allow the feu-duties to remain as a charge on the feu, which would be the consequence of assigning them. They are entitled to have the subject clear of all past

duties. This, indeed, seems to be a consequence of their right to irritate the feu. If the duties are not paid, to allow them to remain as a burden on the feu, even under the declaration that the rights of the creditors are to be postponed to theirs, is not to clear the subject, and is not, in the opinion of the Lord Ordinary, equivalent to payment of the feu-duties; and however the assignation may be expressed, it might prejudicially affect the pursuers in recovering the feu-duties that might hereafter become due in any future action which they may be forced to bring for tinsel of the feu. The superiors who are entitled to payment, which means that the feu is to be cleared of the *debitum fundi* created by the arrears of feu-duty, cannot, it is thought, be embarrassed by any question which might arise by allowing the burden to continue."

That reasoning is based on the law as laid down in the Institutional works and in decided cases, for Ersk. (iii. 5. 11) says that "No creditor can be compelled to assign a right to his own prejudice." That doctrine is applicable to this present case. We have only to consider whether there is any hazard to the superior in doing what he is asked to do, and the Lord Ordinary explains that by so doing he might bring in another creditor in competition with himself in a question of recovering future feu-duties. That view seems to have been applied in many cases, though, as Lord Deas has remarked, there is no actual judgment on the point. But there have been cases of a third party paying rent to a landlord and claiming an assignation. In 1744 we have an old A against B case, reported in M. 6228, which decided that a landlord was not bound to assign; and in the case of *Gordon* v. *Graham* (March 9, 1842, 4 D. 903) the Judges of this Court held it settled by the decision of the House of Lords in the previous year that a landlord could not be called on to assign a sequestration of his tenant's crop and stock to a third party paying the rent. I therefore concur with the views your Lordships have expressed.

Lord Shand—I take a different view of this question, and feel myself unable to agree with your Lordships and the Lord Ordinary in the decision arrived at. I think that in the circumstances in which the vassal Mr Guthrie was placed he was entitled to the assignation he asked, guarded as it was by the offer to accept it "always under reservation of, and without preference to, the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her."

It is admitted that the complainer M'Connachy interposed merely as a friend or nominee of the complainer Guthrie. It was explained that M'Connachy's name was put forward as that of a third party by way of precaution, in case a payment by Guthrie in his own name on an assignation by the superior might operate as a total extinction of the debt *confusione*, so that no part of it could be recovered from Guthrie's disponees, or by diligence against the rents due to them. This view appears to be quite unsound; and I take the case on the footing on which it has been presented and argued by the suspenders' counsel, viz., that while the complainer Guthrie is willing to pay the total feu-duty of £235, 5s. 6d., thereby discharging the debt in a question with the respondent, he maintains his right to an assignation of the superior's rights and remedies for recovery of the sum of £140, 13s., being the proportion of the *cumulo* feu-duty for which his disponees are liable, and which is properly chargeable against the property belonging to them.

The matter in dispute is one of some general importance, for although in this case the controversy arises under the special provisions of the deed, the same question may frequently arise in cases where an original feuar, having no express power to allocate a feu-duty, has conveyed away part of the property, and is afterwards obliged to pay the total feu-duty, or, in other cases, where a feuar having for a time failed to avail himself of the provisions of section 8 of the Conveyancing Act of 1874, has been required to pay the total feu-duty to the superior.

The complainer Guthrie has an obvious and material interest to obtain the assignation he demands. His disponees are bankrupt, and a mere personal claim for payment of the feu-duty is of little value. The property is in the possession of heritable creditors, who have obtained decree of maills and duties in virtue of heritable securities granted by the bankrupts. The right of the superior to the feu-duty is of course preferable to the heritable securities granted by the bankrupts, and should the complainer obtain the assignation he claims, he may by diligence secure payment out of the first rents. If, however, the assignation be not granted, the complainer will not only be deprived of the means of making his claim for relief of the feu-duty effectual, but the benefit will accrue to the heritable creditors, who will draw the rents of the property, getting rid of the feu-duty to the superior, which in ordinary circumstances is a charge prior to all other securities, and which in this instance they must have known to be a burden to be met in ordinary course before the rents could be available to them, and payment of which could be enforced by the superior by means of diligence against the subjects.

The original feu-disposition granted in this case was one for building purposes, and in its terms recognised the right of the vassal, in the execution of these purposes, to grant rights by conveyances to others, who by virtue of the Conveyancing Act of 1874 must, by the act of registering the conveyance in their favour in the register of sasines, become entered vassals of the superior. There is a provision in the original feu-right directly to the effect, that in case the feuar shall sell parts or portions of the ground, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty stipulated that the portion of ground sold bears to the whole of the ground thereby feued. It is admitted that in the conveyance which the vassal Guthrie granted in favour of the parties now bankrupt the correct proportion of feu-duty was allocated on the part of the property conveyed. The total feu-duty being £235 odds, the feu-duty on the part conveyed was fixed at £140, leaving the original vassal debtor, so far as his own property was concerned, in £94 only. It is quite true that the original vassal, in a question between him and the superior, still remains liable for the whole feu-duty, and will do so until he erects buildings on

the part of the property he retains, and it may be also till he records a memorandum of allocation in terms of section 8 of the statute. But while he is primary obligant for the whole, he has a right of relief for the greater part of the feu-duty against those who have taken a disposition from him, and who are now to all effects the owners of that part of the property conveyed. The superior has a co-obligant for his feu-duty. He has the original vassal bound to him for the whole, and he has also the disponees who took the conveyance bound for the whole feu-duty, or at least for the annual sum of £140, for immediately upon infeftment being taken on the conveyance there was an entry creating the relation of superior and vassal between these parties. He is entitled to make good his feu-duty from the rents of any part of the property feued That being so, it appears to me that the case is one in which the complainer Guthrie has right, on payment of the whole feu-duty, to an assignation of the superior's remedies for recovery of that part of the feu-duty which is the proper burden of the part of the property no longer belonging to him, provided always, I quite admit, that the superior shall not be thereby prejudiced. It has been said that the law is that a superior is never bound to assign his feu-duty. I know of no authority to warrant that statement, and I do not agree in the opinion that the practice of granting assignations in circumstances like the present has not been followed. In the ordinary case, where a vassal simply pays his own debt, without having a right of relief of a proportion of the feu-duty, I agree that an assignation cannot be demanded, and that, as in the case of a sequestration for rent, even if a third party should interpose and pay the debt, the superior is not bound to grant an assignation which would keep up the real security on the property. In such cases I agree also there could be no practice of granting assignations. But on a principle of general application I think the case is different, and the rule is different, where, as here, the debtor has a right of relief and is one of two obligants liable for the debt. There is nothing in the position of a superior which places him in an exceptional position, and exempts him from the operation of the ordinary rules of law which apply between creditors and their debtors, bound as co-obligants or as principal and surety. The ordinary rule is stated in Bell's Principles, sec. 558—"Payments made by one interested in his debt (as co-obligant or surety) will take away the right of the creditor, but will not extinguish the debt of the principal obligant. The person so paying is entitled to an assignation to the effect of operating his relief." The right to an assignation which will carry the creditor's rights and remedies is based on equity, but is effectual and has always been recognised by the law. The creditor getting payment of his debt has no further interest, while the surety or co-obligant may be in the position, as in the present case, that unless he acquires the creditor's rights and remedies his right of relief would be of little or no value. The right is always qualified by this (as stated by Bell, sec. 557), that the assignation demanded shall not prejudice the creditor, or, as it is expressed by Professor Bell, that it "shall not interfere with any other interest of the creditor."

I take it, therefore, that the respondent as superior is bound to grant the assignation in this case, unless it can be shown that this deed, qualified by the broad reservation proposed as part of it, would in some way be to her prejudice; and indeed I rather understand that your Lordships, or at least a majority of your Lordships, do not differ from this view.

Now, for my part, I see no possible prejudice the superior can suffer by this assignation, and this is my ground of judgment. What is the prejudice? It is said to be that the assignation, which is asked only to the extent of the portion of the feu-duty payable by the disponees of the original vassal, may prejudicially affect the superior in the recovery of feu-duties to become due hereafter. It is explained, on the other hand, that this assignation is simply to enable the complainer, by real diligence, which shall be preferable to the bondholders in possession, to obtain relief of the amount due by the vassal's disponee, and that no such diligence would be competent or could be used which it could be shown would in any way compete with the superior in following out his remedies for payment of future feu-duties. It is said that unless this feu-duty is entirely extinguished, the part of it assigned will remain as a *debitum fundi*. I fail to understand what prejudice the superior will suffer, for while a *debitum fundi* in a question between the complainer and his disponees, it will not remain a *debitum fundi* in a question with the superior. If it can be represented as remaining a *debitum fundi* at all in a question with the superior it must be in name only and not in substance, for the assignation asked is always under reservation and without prejudice to the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her. The effect of this provision certainly is, that if diligence of any kind done by authority of the assignation should in any way come into competition with proceedings by the superior for recovery of future feu-duty, it must undoubtedly be stopped.

The Lord Ordinary has explained what appears to him would be the prejudice which the superior would suffer. He says—"However the assignation may be expressed, it might prejudicially affect the pursuers in recovering the feu-duties that might hereafter become due in any future action which they may be forced to bring for tinsel of the feu." It appears to me that that is not so. If any future action were brought for tinsel of the feu, it would be because the future feu-duties had got into arrear for two years. In such an action the superior would be entitled to decree of forfeiture of the feu, which would be the remedy he asked, unless payment of the arrears were at once made, and the proposed assignation could not in any way interfere with that remedy. The other real diligence to which the superior might resort is to enter on possession by an action of mails and duties, and there again the assignation could not possibly be a bar to the superior's diligence. The only other remedy would be by personal action against the disponees, and it cannot be disputed that even without the assignation the complainer had the same remedy for recovery of the part of the feu-duty for which these disponees are liable. The Lord Ordinary says further, after the passage I have already read:—"The superiors who are entitled to payment, which means that the feu is to

be cleared of the *debitum fundi* created by the arrears of feu-duty, cannot, it is thought, be embarrassed by any question which might arise by allowing the burden to continue." As I have already said, the *debitum fundi* would have no real existence in a question with the superior; and as to any embarrassment which might arise, I can only say that I do not understand what is here referred to. I do not see what embarrassment could arise with an assignation in the terms asked, and the counsel for the respondent were, I think, unable to suggest any embarrassment which could arise to the prejudice of their client. It therefore appears to me that the complainer Mr Guthrie, on payment of the total feu-duty, is entitled to have an assignation in the terms asked.

I am fortified in the view I take of the question in dispute by the provisions of sub-section 2 of section 4 of the Conveyancing Act of 1874. By that sub-section it is provided that if a party in right of a property held in fee conveys the property to another, the disponee by taking infeftment upon his disposition becomes liable for the feu-duty payable for the property. But there is a provision at the same time that until the original vassal gives notice of the conveyance to the superior he shall remain liable also for the feu-duty. That is substantially the position of the parties in this case. The statute provides that the superior's remedies against the former vassal shall be "without prejudice to the superior having all his remedies against the entered proprietor under the entry implied by this Act; and without prejudice also to the right of the proprietor last entered in the lands, and his foresaids, to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered in the lands, or his foresaids, may have had to pay in consequence of any failure or omission to give such notice;" and for this purpose "All the remedies competent to the superior for recovery of the feu-duties shall by virtue of this Act be held to be assigned to the proprietor last entered in the lands and his foresaids, to the effect of enabling them to recover payment of any sums so paid by them as aforesaid, but that always under reservation of, and without prejudice to, the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to him." Now, it appears to me that the statute recognises the existence of a right in equity to an assignation such as is here demanded in circumstances substantially the same. It not only recognises that right, but gives effect to it in a remarkable way, for it renders any deed of assignation by the superior unnecessary. Assuming the existence of the right to an assignation in circumstances like those which occur in this case, by the force of the statute an assignation is implied in favour of the party paying the feu-duty which will enable him to use all the superior's remedies, but that under reservation of, and without prejudice to, the superior's rights and remedies for future feu-duties, in the very terms proposed by the complainer in this case. This provision appears to me simply to give effect to the principles of common law, with this difference only, that it provides that a deed of assignation shall not be necessary now, as the statute itself operates as an assignation.

I have only to add that the case of *Gordon* v. *Graham*, and the other authorities of that class referred to, appear to me to have no application, because there the payment was offered, not by a co-obligant or surety having a right of relief giving him an equitable right to an assignation. The only object for which the assignation was asked in the case of *Gordon* v. *Graham* was to keep up the whole debt, so that it might still come into competition with the landlord's future claims and diligence, and there was no reservation offered, as in this case, which would secure the landlord against injury or prejudice.

The Court adhered.

Counsel for Suspenders (Reclaimers)—Solicitor-General (Balfour, Q.C.)—Black. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent — Kinnear — Keir. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, November 19.

FIRST DIVISION.

SPECIAL CASE—RITCHIE AND OTHERS.

Succession — Legacy — Substitution — Informal Letter, whether Testamentary or not.

An old lady died leaving a trust-disposition and settlement and five holograph codicils. By a codicil of 22d March 1879 she left to "E. W., son of my cousin Mrs M. B. W., wife of Col. W., £500." By a codicil of 1st Dec. 1879 she declared:—"I, Mrs Catharine Anderson or Hutchison, before designed, do hereby evoke the legacy of fife hundred pounds to my cousin Mrs ~~Edward~~ Whish, wife of Colonel Whish, and bequeathe to her in place thereof the sum of four hundred pounds; and I bequeathe the hundred pounds to Thomas Hutchison, my late husband's nephew, the sum of one hundred pounds, residing at Kirkcaldy, and with this alteration I confirm my name at 40 Palmerston Place." Mrs Whish was E. W.'s mother. The testatrix's moveable estate, of which a holograph memorandum was found in her repositories, was almost exactly exhausted by payment of the legacies left, on the footing of paying £500 to E. W., or alternatively of paying £400 to Mrs W. and £100 to T. H. A letter written on 12th Dec. by the deceased to Mrs W. was produced by her, in which she wrote that E. W. "is still to be my chief legatee, but not for so large a sum as I intended," and then made certain specific legacies to various persons. *Held* that the above letter was of a testamentary character, and must be considered by the Court in construing the intention of the testatrix, and that that intention was to revoke the legacy of £500 to E. W. to the extent of £100, and to give a bequest of £100 to T. H.

Mrs Catharine Anderson or Hutchison died on 31st Dec. 1879 leaving a trust-disposition and settlement dated 22d March 1879, by which she disponed certain lands that belonged to her, as therein mentioned, and assigned and disponed