on the reclaiming-note for the pursuers against Lord Lee's interlocutor of 28th February 1881, Recal the said interlocutor: Find that the defenders are bound to pay, and accordingly ordain them to pay, to the pursuers (First) the sum of £643, 8s. 7d., being the balance due as at 11th November 1880 on the bond for £3500 mentioned in the record, after deducting the sums realised from the subjects at Harthill, all as brought out in the account or state, with interest on the said sum of £643, 8s. 7d. at the rate of four and one-half per cent. per annum from said 11th November 1880 till the date of this interlocutor, and thereafter at the rate of five per cent. per annum till paid; and (Second) the sum of £120, 12s. 3d., being the cumulo amount of the sums disbursed by the pursuers for advertising and other charges connected with the realising the said subjects at Harthill, as set forth in the said account or state, with interest on the said sum of £120, 12s. 3d. at the rate of five per cent. per annum from said 11th November 1880 till paid: Further, find the defender liable in payment to the pursuers of the account incurred to Messrs J. L. Hill & Company, W.S., relative to said subjects, as the same may be taxed by the Auditor of Court, and remit the same to him for taxation as between agent and client in relation to such business: Lastly, find the pursuers entitled to expenses," &c.

Counsel for Pursuers (Reclaimers) — Trayner —Dickson. Agents—J. L. Hill & Co., W.S.
Counsel for Defenders (Respondent)—Asher — Pearson — Guthrie. Agent — Thomas White, S.S.C.

Wednesday, June 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

SANDEMAN *v.* MACDONALD AND THE SCOTTISH PROPERTY INVESTMENT COMPANY.

Personal Action—Superior and Sub-Vassal.

Held that a superior has not a direct personal action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part.

By feu-contract dated February 1876 the pursuer Mr Frank Sandeman disponed to William Stiven and Henry Gibson five acres of building ground in Dundee at a yearly feu-duty of £480. In the same month a sub-feu was granted by Stiven and Gibson in favour of Alexander M'Culloch, the sub-feu-duty being £32, 12s. 4d. a-year. The ground thus sub-feued was afterward disponed by M'Culloch to the Heritable Securities Investment Association, and the said association disponed the same to the defenders, the Scottish Property Investment Company Building Society.

Although the original feu-contract was granted in favour of Stiven and Gibson, yet the subject of it was held by them truly in trust for themselves and a third party, the defender David Macdonald. It was afterwards arranged by Stiven, Gibson, and Macdonald to divide and allocate the ground, and accordingly in December 1876 they executed three separate dispositions, whereby Stiven and Gibson, as *ex facie* proprietors, and with consent of Macdonald, disponed to each of them a portion of the ground. The portion disponed to Gibson included the ground which had been sub-feued to M'Culloch.

Since Martinmas 1877 no part of the principal feu-duty had been paid, and at the date of the action there was due to the pursuer six half-years' feu-duty of £240 each, amounting in all to £1440. Stiven and Gibson were both sequestrated in February 1879.

The pursuer frequently demanded payment of the arrears from Macdonald, and also from the Scottish Property Investment Company, but without any result. He accordingly raised the present action. Decree in absence was taken out against Macdonald. As against the other defender, the pursuer pleaded, that having been owner infeft in part of the lands contained in the said feu-contract during the whole period for which the feu-duties claimed are payable they were liable therefor. The defenders pleaded, that being sub-vassals of the pursuer in a small portion only of the lands feued out by him, they could not be called on to pay the feu-duties effeiring to the whole lands.

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having considered the cause, Assoilzies the defenders, the Scottish Property Investment Co. Building Society, from the conclusions of the summons, and decerns; reserving to the pursuer all claim competent to him for sub-feu-duty: Finds the pursuer liable in expenses," &c.

He added this note:—"The question in this case is whether a superior has a direct petitory action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part?

"It is conceded by the superior that the opinion of the Lord President in the case of the *Marquis of Tweeddale*, 7 R. 620, and of the majority of the Judges in the case of *Hyslop*, 1 M. 535, is against him. But he says that this opinion is expressed *obiter*, is inconsistent with the older authorities, and is contrary to the decision of the Court in *Wemyss*, 14 S. 233, and *Moncreiff*, M. 4185. But it appears to the Lord Ordinary to be so direct and authoritative as to be binding on him. He has given judgment accordingly.

"The said defenders do not dispute their liability for the sub-feu-duty in so far as in arrear. The pursuer contended that he was entitled to exact the sub-feu-duty even though it had been paid. But as this question is not raised in the record, the Lord Ordinary did not think it proper to decide it."

The pursuer reclaimed to the First Division.

Argued for pursuer—Where a superior has not consented to an allocation of the feu-duties among disponees of the vassal or among sub-vassals of his, each of the disponees or sub-vassals is personally liable for the whole feu-duty exigible under the original feu-contract. The opinions

of the Judges in the case of *Hyslop*, quoted by the Lord Ordinary, do not lay down any limits to the sub-vassal's liability, and the opinion of the Lord President in the *Marquis of Tweeddale*, although distinct, is expressed *obiter*, as the conclusion in that case was only for a portion of the duties.

Authorities—Bell's Prin. secs. 697 and 700; Duff's Feudal Conveyancing, 80, 85; Menzies' Conveyancing, 819 (3d ed.); *Rollo* v. *Murray* and *Moncrieff* v. *Balnagown*, both reported in M. 4185; *Wemyss*, Jan. 19, 1836, 14 S. 233; *Clark*, June 20, 1850, 12 D. 1047, and 1 Macq. 688.

Argued for defenders—The only direct authority for pursuer is the case of *Moncrieff*, of which there is no satisfactory report. The case of *Wemyss* was very special, as there the vassal was prohibited from sub-feuing or from selling except on condition of putting his disponee under the same liability as himself.

Authorities—Stair, ii., 4, 7; Bankton, i., 621; Erskine, ii., 5, 2; *Creditors of Eyemouth*, 5 Br. Sup. 856; *Hyslop* v. *Shaw*, March 13, 1863, 1 Macph. 535; *Marquis of Tweeddale*, Feb. 25, 1880, 7 R. 621.

At advising—

Lord President—In this case the original feu-contract was granted by Frank Stewart Sandeman to William Stiven and Henry Gibson, and was dated February 1876. The subject conveyed was of considerable extent and the feu-duty £480 a-year. In the same month a sub-feu was granted by Stiven and Gibson to Alexander M'Culloch. There was no prohibition against subinfeudation, and indeed there could not have been, because by the Act of 1876 all such prohibitions are declared illegal. M'Culloch is the author of the defender. The sub-feu-duty is only £22, 12s. 4d., which shows that the portion given out to M'Culloch is very small as compared with the whole. Stiven and Gibson have both become bankrupt, and according to the fifth article of the condescendence are considerably in arrear of their duty—£1440 in all, and that is the sum concluded for in this summons. So that the result of this action would be to compel a sub-vassal to pay £1440 who undertook to pay only £22, 12s. 4d. In these circumstances has arisen the question, as stated by the Lord Ordinary:—"Whether a superior has a direct petitory action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part?" Now, there is no doubt that the creator of the feu-right remains *dominus* of the estate, and therefore being creditor in an obligation for payment of an annual sum which is *debitum fundi*, he is entitled to enforce his right by real diligence, and, in particular, he is entitled to poind any portion of the ground, in whosoever's hands he may find it. All that is perfectly clear in so far as real diligence is concerned. But this is a question of personal liability—Is the sub-vassal liable to pay, it may be, his whole means and substance to satisfy the over-superior? Now, in the case of *Hyslop* I concurred with several of the consulted Judges in giving an opinion that the liability could not be maintained to that extent, and I repeated the same statement of the law in the *Marquis of Tweeddale*. I have, however, reconsidered the whole matter, but I confess the result of my study has been to confirm my confidence in the views I formerly maintained. If the liability claimed here existed, I think we would find some distinct statement to that effect in our institutional writers. In the writings neither of Craig nor of Ross is there any mention of this right. Stair and Erskine are silent on the subject, and Bankton expresses an opinion on a somewhat analogous case from which I infer that he would not have admitted the claim. In vol. i., p. 621, he says—"When the fee devolves upon heirs-portioners . . . . and the duty consists in money, or other fungible, which is divisible, each heir is only liable for his own proportion, but till the fee is divided the superior may poind any part of the ground or distrain the goods thereon for the whole feu-duty." Now, in that case his opinion is, that each of the heirs-portioners is personally liable only for a share. It is quite true that in some modern books of practice the rule has been stated as the pursuer contends, and I do not undervalue the authority either of Menzies or of Duff. But I do not think that they are borne out by the cases to which they refer. The first is that of *Moncrieff* v. *Balnagown*. Now, it is at once apparent that the report of that case is not distinct or satisfactory. That there is a *debitum fundi* is indisputable, and I am led to consider whether, after all, the case may not have been a poinding of the ground. But, at all events, a case of that time reported so imperfectly can hardly make law where there are other considerations so strong against it. The other case to which the conveyancing writers refer is that of *Wemyss*, and most certainly that does not decide the point. It is certainly not laid down there as a general rule that every sub-vassal, however small his portion, is liable for the whole duty in the original contract of feu. The point that arose there regarded the condition under which the superior was bound to receive purchasers of portions of the original feu. But that does not decide this question. I therefore retain the opinion I have more than once expressed.

Lord Deas—Your Lordship has correctly stated the nature of this case, and I am of opinion that the superior might perhaps attain the same end by a poinding of the ground, but he has no personal action against sub-vassals except for the feu-duty due by themselves. For the reasons your Lordship has stated I am clearly of that opinion.

Lord Mure—I concur. No doubt the whole feu-duty might be secured from the portion of the ground belonging to the defender by poinding of the ground or adjudication. But on the question here I agree that there is no direct authority for the pursuer's claim in any of the institutional writers, and my opinion rather is, that from their silence on the point the opposite may be implied.

Lord Shand—As I read the opinion I delivered in the *Marquis of Tweeddale*, I think I reserved my opinion on the question raised in this case. Having considered it now, I concur in the opinion of your Lordship. If the question here were one of real diligence, in which the superior was seeking to make his feu-duty good against land held by sub-vassals, there can be no doubt of his right. The principle is quite obvious that the superior

has made his feu-duty a *debitum fundi* against every portion of the ground he has feued. The superior has stipulated as a condition of parting with his land that it shall be liable for his feu-duty. But this is a question of a totally different kind. It is clear that no obligation to the over-superior has been undertaken by the defenders themselves—that is limited to the duty payable to their own superior. Then if there be no personal obligation undertaken by the sub-vassal under his contract, how is it said that the obligation arises? It can only be from the relation existing between superior and vassal. But I confess I see nothing in that relation to create a personal action against a sub-vassal. It may be reasonable that the superior should get any benefit of any personal obligation which the sub-vassal may have undertaken to his superior. I do not think there is any authority that goes further than that, and I am not disposed to stretch the law upon that. I think it goes far enough already. *Wemyss* is plainly distinguishable from the present case. In it sub-feuing was positively prohibited—purchasers had to become vassals of the original superior, and beyond that it was provided that the original vassals had to bind over purchasers from them in the same stipulations for which they were liable. That does not appear to me to touch in the least on a case like the present. Then there is the case of 1630—*Moncrieff*—which I concur with your Lordship in thinking most unsatisfactorily reported. I have only further to say, as regards that case, that everything would turn upon the particular clauses of the deed before the Court. Moreover, even if it is correctly reported, I cannot follow the reasoning of it, viz., that because there is a *debitum fundi* therefore there is a personal action.

The Lords adhered.

Counsel for Pursuer (Reclaimer)—Kinnear—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Counsel for Defender (Respondent)—Keir—Moody Stuart. Agents—Auld & Macdonald, W.S.

Saturday, June 11.

SECOND DIVISION.

[Dean of Guild, Glasgow.

PARLANE *v.* DUNCAN AND GRAHAM

Property—Common Property—Building Restrictions.

Terms of deeds *held* to confer upon the feuars in a street a right of common property in the whole of a piece of pleasure-ground to be laid out by them in accordance with the burdens imposed by their common author, from the date of their acquiring their respective properties, and warrant refused to one proprietor who had not yet erected any house on the steading disponed to him to erect temporary shops on that portion of the ground intended to be pleasure-ground which was *ex adverso* of the place at which his house when he came to build required to be built.

In the year 1849, William Nicol and Others, with advice and consent of certain other parties, disponed to James Graham, wright and builder in Glasgow, a piece of ground forming part of the lands of Clairmont, Glasgow, and containing 3204 square yards, and bounded on the north by a meuse lane, on the east by the centre of a street named Clifton Street, on the west by the rest of the lands of Clairmont still unbuilt upon, and on the south by the Sauchiehall Road. After a declaration as to the thickness of the gable wall erected or to be erected on the western boundary of the ground disponed (which gable wall was to be mean or common to the proprietors on each side of it), the disposition proceeded—"And whereas certain tenements and offices are in course of being erected, or about to be erected, and a sunk area formed by the said James Graham on the lot or steading of ground before disponed (forming part of a compartment which is to be called Clifton Place), of the dimensions and in the architectural style, elevation and height of roofs delineated on a plan made out by the said John Baird, and docqueted and subscribed by the parties as relative hereto, it is hereby provided and declared that the said tenements and others shall be kept of the same dimensions and architectural style, elevation and height of roof foresaid by our said disponee and his foresaids in all time coming, we and our successors in the remainder of the said compartment being bound and obliged to observe and maintain the same architectural style, dimensions, and elevation and height of roof when we or they come to build thereon: Providing always that it shall be in the power of us and our foresaids to erect on the said remaining steadings of said compartment self-contained houses or lodgings instead of houses in flats, and to make such alterations in the said plans and elevations as shall be necessary for that purpose, without interfering with the general style and architectural effect of the compartment." Then followed a provision with regard to the height of certain offices which were to be permitted to be built on the back-ground of the steading, which provision was declared to be a real burden on the property. Then followed a "nuisance clause" in ordinary terms. Then followed the words—"Declaring also as it is hereby provided and declared, that the said James Graham and his foresaids, and we and our successors in the remaining steadings foresaid, when we or they come to build thereon, shall be obliged to form and thereafter to maintain and uphold in front of the said houses erected or to be erected in the said compartment," a pavement of a certain quality, and to form and maintain a street of a certain width to be called Clifton Street, "and the space to the south of said streets and between the same and the Sandyford or Sauchiehall Road shall remain at all times open and unbuilt upon as a pleasure-ground and shrubbery, and shall be the common property and for the common use of the whole proprietors in said compartment, and shall be used and preserved exclusively for that purpose in all time coming; and the said shrubbery or pleasure-ground shall be enclosed from Sandyford or Sauchiehall Road by a handsome parapet-wall surmounted by a neat iron railing, and the said street or carriage-drive in front of the shrubbery, parapet and railing, shall be kept up and maintained by the proprietors