before the Lord Ordinary (FRASER), and on 14th January 1887 he decerned against the defenders in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

The defenders reclaimed, and argued that the action should be dismissed as tender had been made of the sum sued for and expenses before the action came into Court. The pursuer was not entitled to the expenses of arrestment and dismantling. The diligence was used by him for his own security, and the expenses of it could form no part of the expenses of the present process—*Symington* v. *Symington*, June 11, 1874, 1 R. 1006; *Taylor* v. *Taylor*, January 25, 1820, F.C.; *M'Dowall* v. *Stewart*, December 1, 1871, 10 Macph. 193. No doubt in Admiralty actions there was a distinction between actions *in rem* and *in personam*—*Harmer* v. *Bell*, 7 Mor. P.C.R. 267; Smith on Maritime Practice, 31, 24. Here the action was *in personam*. It was a claim for stores furnished, not for seamen's wages, or on a bond of bottomry, or for anything connected with the ship itself—Smith, *ib.* 47; 2 Bell's Comm. 98. It was said that the warrant was part of every Admiralty summons. That only went to show that the Admiralty Court was in advance of the other Courts—*Clark* v. *Loos*, June 17, 1863, 15 D. 750; for until 1 and 2 Vict. cap. 114, sec. 16, a separate warrant was necessary in ordinary summonses.

Argued for the pursuer — That the expenses of arrestment and dismantling formed part of the expenses of the process. In *Symington* and *Taylor*, *supra*, the actions were ordinary actions. But the arresting of a ship forms part of the Admiralty practice. Now this action was truly an action *in rem*. The warrant of arrestment formed an integral part of the old Admiralty summons. It was then all one process, and the expenses attached *rei*—*i.e.*, to the ship. In England the marshall's fees—the marshal being the English counterpart of the Scottish messenger-at-arms—were included in the regular bill of costs—Williams and Bruce on Admiralty Practice, 236, 248, 832. Moreover, the expenses incurred were necessary; for the precept bore that the ship is to be brought to a safe anchorage. Had he not done so the master would have been liable in an action of damages —*Kennedy* v. *M'Kinnon and M'Leod*, December 13, 1821, 1 S. 198 (N.E.); *Paterson* v. *M'Lean and Hope and Hertz*, January 14, 1868, 6 Macph. 218.

At advising—

LORD PRESIDENT—This action is at the instance of Thomas Black, ship-chandler, Greenock, and it is defended by the owners of the ship "Huron." The account sued for is an account for ship-chandling goods, sails, and provisions, furnished while his ship was lying at Ardrossan. She is a foreign ship, and the owners are foreign owners. On the dependence of that action the ship was arrested, and afterwards dismantled, and the question is whether the expenses of arrestment and dismantling can be recovered as part of the expenses of process. The Lord Ordinary has found the pursuer entitled to expenses, but obviously he did not intend these to cover the expenses of arrestment and dismantling. Now, in the ordinary case it is fixed that the expenses of arrestment on the dependence cannot be recovered as part of the expenses of the process upon which the arrestment had been used. That had been settled by two cases, of which the last is the case of *Symington* v. *Symington*, June 11, 1874, 1 R. 1005. The rule there laid down is rested on the principle that "the using of diligence on the dependence, however necessary it may be to make a pursuer's decree effectual when obtained, has nothing to do with obtaining that decree, which is the sole object of the action." Now, the way in which the pursuer endeavours to obviate the application of that rule is by saying that in maritime causes the rule is different. But he has not been able to find an opposite rule laid down, nor has he undertaken to show an existing practice the other way. In these circumstances it seems to me that we must follow the ordinary rule.

LORDS MURE, SHAND, and ADAM concurred.

The Court altered the Lord Ordinary's interlocutor as regarded the finding of expenses accordingly.

Counsel for Defenders (Reclaimeers)—Rhind—Orr. Agent—William Officer, S.S.C.

Counsel for Pursuer (Respondent)—Jameson—M'Kechnie. Agent—William B. Glen, S.S.C.

Saturday, October 30, 1886.

OUTER HOUSE.

[Lord M'Laren.

MACINDOE'S TRUSTEES AND OTHERS *v.* POLLOCK.

Superior and Vassal—Co-Feuars—Charter of Confirmation—Feu-Duty—Relief.

Two co-feuars held of a mid-superior whose mid-superiority was valueless, and who had not made up a title. One of these co-feuars had for a series of years made payment of the whole feu-duty applicable to his own and his co-feuars' lands in order to avoid real diligence at the hands of the over-superior. *Held* that his remedy was not against the mid-superior, and that he was entitled to relief against his co-feuar for payments made in respect of his lands.

This was an action for payment of £53, 18s. 7d. raised by the trustees of the late George Park Macindoe of Boquhanran against John James Pollock of Auchengrie. The pursuers and the defender respectively held the lands of Boquhanran and Auchengrie of Mr Monteith of Carstairs, as immediate lawful superior. The superiority was originally constituted by a feu-disposition by Sir Archibald Edmonstone of Duntreath in favour of his son Charles (afterwards Sir Charles) Edmonstone dated 17th May 1806. The feu-duty thereby stipulated to be paid was illusory. The *dominium utile* of Boquhanran was vested for some time prior to 1825 in the said Sir Charles Edmonstone. On his death it passed by various transmissions into the hands of the pursuers, Macindoe's trustees. The lands of Boquhanran and Auchengrie were held by Mr Monteith subject to the payment to Lord Blantyre as over-superior of the money and victual specified in a precept of *clare constat* granted

by the commissioner of William, Lord Blantyre, of date 1st August 1771, in favour of Archibald (afterwards Sir Archibald) Edmonstone of Duntreath, as follows—"The said lands and others before mentioned are holden immediately of and under the said William, Lord Blantyre, in feu-farm and heritage for payment to him and his heirs and successors of the feu-duties after-mentioned, videlicet—For the said ten merk lands of Boquhanran of the sum of ten merks usual money of Scotland at the two ordinary terms in the year, Whitsunday and Martimas, by equal portions in name of feu-farm, and for the said lands of Auchengrie twenty-six shillings and eight pennies money foresaid, in name of feu-farm and on account of the augmentation of the old rental of the said lands the sum of three merks money foresaid, more than the said lands formerly paid, extending in whole to the sum of £10 money foresaid, payable yearly at the said terms and by equal proportions, and doubling the said money feu-duty, the first year of the entry of each heir to the said lands as use is of feu-farm, and paying yearly to the said William, Lord Blantyre, and his foresaids four bolls oatmeal and two bolls sufficient barley for the multures of the said lands of Boquhanran and Auchengrie according to use and wont." The said feu-duty and victual payable to Lord Blantyre was divisible between Boquhanran and Auchengrie in the proportion of five-sixths to the former and one-sixth to the latter, which were also the proportions of their old extents.

The *dominium utile* of the lands of Auchengrie was also vested in the said Sir Charles Edmonstone, and was sold by him by disposition dated June 1815 to George Wilson. By charter of confirmation dated the 27th December 1827 Henry Monteith of Carstairs, the superior of the said lands of Auchengrie, confirmed the said disposition and instrument of sasine in favour of George Wilson. The *tenendas* clause of the charter of confirmation was in these terms—"To be holden and to hold the foresaid lands and others with the pertinents by the said George Wilson and his foresaids, of me, the said Henry Monteith, and my heirs and successors, immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever, by all the righteous meiths and marches thereof, paying therefor yearly to me and my foresaids the said George Wilson and his above-written the sum of £4 Scots money in name of feu-duty at the term of Martinmas yearly, being the whole *cumulo* feu-duty payable for the ten merk land of Boquhanran, the said two merk land of Auchengrie, and the £4 land of Braidfield . . . And the said George Wilson also relieving me and my foresaids, and the feu-duty above-mentioned of all cesses, taxations, public burdens, and other burdens and impositions whatsoever that are or shall happen to be imposed by law upon the said lands and others, with the pertinents and feu-duties above mentioned, both bye-gone and in time coming. . . . Reserving relief always to the said George Wilson and his foresaids against the vassal in possession of the said ten merk land of old extent of Boquhanran and £4 land of old extent of Braidfield, lying in the foresaid parish of Old Kilpatrick and Sheriffdom of Dumbarton, of a proportion of the foresaid feu-duty as accords."

The lands of Auchengrie were purchased from the successors of George Wilson by John Pollock, on whose death they passed to his son the defender. Charters of confirmation subsequent to the last mentioned contained a *tenendas* clause in similar terms to that above quoted.

The pursuers averred — The pursuers and defender are co-feuars in exactly the same position, but the pursuers are the largest feuars and have paid the whole feu-duty, which is a *cumulo* one, to Lord Blantyre in the belief that they were legally bound to pay the same. The said money and victual both for Boquhanran and Auchengrie have been paid to Lord Blantyre by the pursuers since they acquired the lands of Boquhanran. Before the pursuers acquired the said lands of Boquhanran in 1860 it had been paid, it is believed, by their predecessors therein, Alexander and William Dunn. The pursuers are entitled to relief from the defender for the payments so made by them to Lord Blantyre in so far as they are in respect of the lands of Auchengrie, conform to account herewith produced, and amounting with interest to £53, 18s. 7d. The pursuers are also entitled to be relieved for the future from the payment of the said feu-duty and victual payable to Lord Blantyre so far as the same are payable in respect of said lands of Auchengrie.

The defender averred—"In terms of his title-deeds as above set forth, the defender holds the said lands of Auchengrie of and under Mr Monteith of Carstairs, subject to the prestations set forth in the charters of confirmation above mentioned. The defender's title-deeds do not impose upon the proprietors of the *dominium utile* of the lands of Auchengrie any obligation to relieve the proprietors of the lands of Boquhanran of payments of feu-duties made by them to Lord Blantyre. Lord Blantyre has no claim against the proprietors of the *dominium utile* of the lands of Auchengrie as individuals for payment of feu-duties, and they have never in point of fact made payment of feu-duties to his Lordship, their immediate superior being Mr Monteith of Carstairs."

The pursuers pleaded—"The pursuers having paid the feu-duties effeiring to the lands of Auchengrie belonging to the defender John James Pollock, are entitled to be reimbursed therefor, and to declarator of immunity for the future."

The defender pleaded—"(1) The pursuers' statements are irrelevant and insufficient to support their plea. (2) The defender not being by virtue of his titles liable in payment of feu-duty to Lord Blantyre in respect of the lands of Auchengrie, is not bound to relieve the pursuers of the payments of feu-duty alleged to have been made by them on his behalf to Lord Blantyre. (3) The lands of Auchengrie being held by the defender by virtue of his titles of and under Mr Monteith of Carstairs, as immediate lawful superior, and not of and under Lord Blantyre, and no obligation for payment of feu-duty or for relief of payment of feu-duty to Lord Blantyre being imposed upon the defender by his titles, he is entitled to absolvitor with expenses. (4) Lord Blantyre never having had a claim for payment of said feu-duties against the defender, but only right of recourse against, *inter alia*, the defender's lands, and the said feu-duties having

been discharged, the pursuers can only claim relief from Lord Blantyre's debtor, the mid-superior."

The pursuers amended their record, adding averments to the effect (1) that Monteith had not completed a title, and (2) that the pursuers paid the sums mentioned to avoid diligence.

Argued for defender—They were not liable in relief of the feu-duty paid by the pursuers to Lord Blantyre. They held of Lord Blantyre's vassal Monteith, and there was no obligation to relieve him of feu-duties due by him to Lord Blantyre. Consequently the claim of relief lay against Monteith. It was nothing to the purpose that Lord Blantyre might have used personal diligence against their lands—*Guthrie* v. *Smith*, November 19, 1880, 8 R. 107.

Argued for pursuers—The over-superior has a direct action for feu-duty—*Marquis of Tweeddale's Trustees* v. *Earl of Haddington*, February 25, 1880, 7 R. 620; *Beveridge* v. *Moffat*, June 9, 1842, 4 D. 1381; first case of *Sandeman*, June 8, 1881, 8 R. 790.

The Lord Ordinary pronounced this interlocutor:—"Allows the pursuers to amend the record as proposed: Finds that in the circumstances set forth on record the defender is liable to relieve the pursuers of his proportion of the *cumulo* feu-duty paid by the pursuers to Lord Blantyre the superior: Therefore decerns in favour of the pursuers for the sum of £27, 6s. 6d., sterling, being the amount brought out in the amended state, but without interest: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—The pursuers and the defender are respectively proprietors of the lands of Boquhauran and Auchengrie. Those lands were originally one estate, and were held of Lord Blantyre's predecessors for payment of feu-duties amounting to £10 sterling yearly. In consequence of the constitution of a mid-superiority under the circumstances explained in the record the lands are now held of the heir or representative of Henry Monteith of Carstairs (who it is said has not made up a title), who again holds of Lord Blantyre. The feu-duty payable by the pursuers and defender to Monteith is fifteen merks Scots, and was treated in the argument as a nominal or illusory consideration. The pursuers have been required by Lord Blantyre to make payment of the feu-duty of £10, and have done so for a series of years in order, as they explain in an amendment to the record, to avoid real diligence, or such other proceedings as the over-superior might lawfully institute against them as tenants of the feu. In this action they claim relief against the defender of the proportion of the feu-duties so paid which is applicable to the defender's lands of Auchengrie. It is admitted that the feu-duty of £10 is exigible from the lands of Auchengrie to the extent of one-sixth—that is to say, the *reddendo* is divisible between Boquhanran and Auchengrie in the proportion of five-sixths to the former, and one-sixth to the latter estate (Cond. and Ans. 4).

"The defender does not dispute that the annual feu-duty of £10 might have been recovered by Lord Blantyre from his lands. But in that event they say he would have had recourse against their immediate superior Monteith of Carstairs, who is the true debtor in the obligation to the over-superior. As Lord Blantyre has chosen to exact the feu-duty from the pursuers, it is contended that they also ought to seek their remedy against Monteith's representative, and that in any view there is no such community of obligation between the pursuers and defender or their respective estates as will give rise to a claim of contribution by the debtor who has paid against the debtor who has not been required to pay.

"The pursuers reply that they are not in a position to enforce payment against the mid-superiority, which is valueless, and is not claimed by anyone, and I may say that it has not been shown to my satisfaction that the debt can be so recovered. I am therefore under the necessity of considering whether the claim of contribution is well-founded in law.

"The first point to be considered is, whether Lord Blantyre could have maintained a personal action against the pursuers, as 'sub-feuars,' for the entire yearly sum of £10, which Monteith's representatives ought to have paid? This question I conceive ought to be answered in the negative. The first case of *Sandeman* (8 R. 790) is an authority directly in point. If the pursuers and the defender were bound to Monteith for substantial feu-duties, then (by an extension of the principle of the superior's right to levy maills and duties) a personal action would lie against each of the sub-feuars, limited to the amount of their respective feu-duties. Out of such an action a claim of contribution might arise, if, for example, the over-superior were to recover his £10 from one of the parties, taking no steps against the other.

"But in the present case the sub-feu-duties are illusory, or at least very much less than the duty exigible by the over-superior, and it is a question whether in such a case the superior's right of personal action can be extended.

"My opinion is that the superior's personal claim against a sub-feuar can in no case exceed the amount of the sub-feu-duty even where that is a nominal sum, and for this reason, that the personal action against the sub-vassal is merely a species of diligence against the principal vassal—a mode of recovering payment from him by compelling his tenant to pay to the over-superior the amount in which they stand indebted to their immediate superior. I am aware that opinions of great weight have been expressed in a contrary sense, but it appears to me that the recognition of a right on the part of an over-superior to sue a sub-vassal by personal action for a sum in excess of his *reddendo* would be establishing between the over-superior and the sub-vassal a contract which the parties have in fact not made. Nor is such an action necessary for the protection of the over-superior's rights. Every form of real diligence is open to him; and more than this, he has the remedy of forfeiture of the estate of his immediate vassal, which carries with it (as decided in the second case of *Sandeman*) the forfeiture of the sub-feu.

"But for a reason which I shall state I think that this point (which was much discussed in the arguments of counsel) does not arise. No one has suggested that the personal action against the sub-feuar should extend to anything more than the recovery of that sub-feuar's rateable share of the sum due to the over-superior. Now, the pay-

ment by the pursuers of their rateable share—that is, five-sixths of the annual duty of £10 payable to Lord Blantyre—would not give rise to a claim of contribution against the defender, because the defender would be liable to Lord Blantyre for the remaining one-sixth, and would not be liable in any further payment whatever.

"I think therefore that it must be taken that the pursuers in making periodical payment of the full feu-duty of £10 did so not in avoidance of a personal action, but to avoid real diligence or the forfeiture of their feu.

"On this assumption I am of opinion that the pursuers' claim of relief is well-founded. Although in all questions of the superior's rights and legal remedies his feu-duties are to be treated as part of his reserve estate, yet in questions between the tenants, who are each in their several degrees responsible to him, I apprehend that his position is that of a creditor, and that the debtor who discharges the obligation has all the equities which the general law of the country accords to an obligant who is bound along with others. He has at least the 'benefit of division.' This, I think is implied, if not expressly found, in the opinions delivered in the case of *Guthrie* v. *Smith*, 8 R. 107. Because in that case, while a majority of the Judges held that the feuar who paid was not entitled to an assignation of the superior's real diligence, the decision is rested in the Lord President's opinion on the circumstance that such an assignation might be prejudicial to the superior's security for current feu-duties, and it is there plainly stated that the right of relief does not necessarily and in all circumstances carry with it the *jus cedendarum actionum*. Unless it had been clearly understood that the feuar who paid had a personal claim of relief, I do not think that it would have been at all necessary to consider whether the derived claim to an assignation of diligence ought to be allowed in the particular case."

Counsel for Pursuers—A. S. D. Thomson. Agent—Walter R. Patrick, Solicitor.

Counsel for Defender—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, November 6, 1886.

OUTER HOUSE.

[Lord M'Laren.

WATSON *v.* THE SCHOOL BOARD OF THE PARISH OF AVONDALE.

School—Parochial Side School—Wrongous Dismissal — Compensation — Arrears — Mora — *Parochial and Burgh Schools (Scotland) Act* 1861 (24 *and* 25 *Vict. c.* 107), *secs.* 4 *and* 6—*Education (Scotland) Act* 1872 (35 *and* 36 *Vict. c.* 62), *secs.* 38 *and* 55.

In 1861 the heritors of a parish, acting under the Parochial and Burgh Schools (Scotland) Act 1861 (24 and 25 Vict. c. 107), advertised for a teacher for a certain named school "recently constituted a parochial side school." An applicant was appointed in January 1862, and continued to hold office until 1875, when he was dismissed by the School Board, in spite of remonstrance made by him at the time. In an action at his instance against the School Board raised in 1886, *held* (1) that the pursuer was not barred by *mora* from prosecuting the action to the effect of obtaining, if he had been wrongously dismissed, an allowance to run from the date of the action; (2) that the pursuer was a parochial schoolmaster entitled to the privileges as regarded tenure and emoluments of a principal parish schoolmaster; (3) that he had been wrongously dismissed; and (4) that in the circumstances of the case, and in view of the provisions of the Acts of 1861 and 1872, compensation must take the form of damages.

By notice dated 29th September 1861 a meeting of the heritors of the parish of Avondale was called for the purpose, "on due consideration of the circumstances of this parish in respect of extent, population, and valued rent, of fixing the salary of the schoolmaster, and otherwise determining what may be deemed necessary for the parish under the Act 24 and 25 Vict. cap. 107, subject always to the appeal provided in the Act 43 Geo. III. cap. 54." The meeting was duly held, and it was agreed that the teacher of the East Strathaven School should in future receive a salary of £20 per annum, and the clerk was instructed to advertise for a teacher. The advertisement was in the following terms—"Wanted a teacher for the East Strathaven School, recently constituted a parochial side school, who must be qualified to teach all the branches of education usually taught in first-class parish schools, and also to provide competent instruction in sewing and knitting, &c. In addition to school fees, &c., a salary of £20 a-year, with comfortable house and garden, is provided." James Cumming Watson applied for the office, and after some communication, by letter dated 20th January 1862 intimated his acceptance thereof, and entered on his duties on the 5th February of that year. By minute of the heritors of 8th February 1862, £25 per annum was allocated as salary to the teacher of the said school. He had also Government grant, allowance for pupil-teachers, school fees (amounting to about £50 annually), and house and garden.

Under the School Board the emoluments were commuted for £95, and in addition the use of the house and garden as formerly. In 1875 the Board, on the footing that the pursuer was not an old parochial teacher, but held office at their pleasure only, and thinking the school inefficiently conducted, dismissed him by resolution of 28th October 1875.

In February 1886 he raised this action against the School Board to have it declared that he was at the passing of the Education (Scotland) Act 1872, and had for several years prior thereto, been teacher of the East Strathaven School, Avondale, and as such entitled to the tenure thereof, and to the emoluments and retiring allowance pertaining thereto, as the same were by law, contract, or usage secured to or enjoyed by him, and that the Board were not entitled to dismiss him without securing him in these emoluments and retiring allowance; further, for decree for £110 a-year, payable half-yearly, during his lifetime, and beginning at Martinmas 1875, in which year he was dismissed by the Board; or otherwise, for an annual payment equal to the retiring allowance to which he had