second plea until the facts are ascertained, although this does not imply any undue appreciation of its importance on averment.

LORD ADAM—I agree with the Sheriff that this case depends solely upon the construction of the agreement contained in the letter of 9th September 1891, by which the pursuers were appointed sole chartering brokers for the "Arethusa," and the question is whether that agreement could be determined by the defenders on reasonable notice, or on reasonable cause only. Now, it will be observed that the pursuers paid for the appointment of sole charterer's brokers, and the consideration was their taking and paying for £500 shares in the company—which it is not disputed they did. I have great difficulty in holding that an agreement for which consideration had been thus given could be terminated at will by the other contracting party.

I observe that the Sheriff says this:—"There is however one consideration which is, as it seems to me, fatal to the view presented by the pursuers, and it is this—as I read the letter—the pursuers are not put under any obligation to exert themselves in the way of procuring charters for the vessel." I think the Sheriff is wrong in this—because the agreement bears to be entered into "on the understanding" that the pursuers are able to do as well as any other brokers regarding rates and terms. I suppose the pursuers could not do as well as any other brokers unless they exerted themselves to get charters, and that is equivalent to saying that if the pursuers do not exert themselves in procuring good charters for the vessel the defenders would be entitled to put an end to the agreement.

On the whole, I am of opinion that the agreement was not terminable at the will of the defenders, but only on cause shown.

LORD M'LAREN and LORD KINNEAR concurred.

The Court sustained the appeal, repelled the first and third of the defender's pleas, and remitted to the Sheriff to allow a proof and proceed.

Counsel for the Pursuers—Ure—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Balfour, Q.C. —Salvesen. Agent—William B. Rainnie, S.S.C.

Thursday, July 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

NELSON'S TRUSTEES *v.* TOD.

Superior and Vassal—Maills and Duties—Holder of Bond over Superiority.

Held (following Prudential Assurance Company, Limited v. *Cheyne, &c.*, June 4, 1884, 11 R. 871)—*diss.* Lord Young—that the creditor in a bond and disposition in security over a superiority, with an assignation to feu-duties and casualties, has no title to pursue an action of maills and duties against the vassals of his debtor.

This was an action of maills and duties brought by the trustees of the deceased William Nelson, printer and publisher in Edinburgh, as creditors in a certain bond and disposition in security in their favour dated and recorded 25th May 1891.

Included in the subjects first disponed in security by the said bond and disposition in security, was the superiority of a piece of land known as Kevockmill Bank, which formed part of the lands of Kevockmill. The present action was brought against (1) Mrs Isabella Currie or Jameson or Galbraith, widow, sole disponee and universal legatory of the late Dr Jameson, who was at his death vassal in a portion of this piece of land, as herself vassal in or proprietor of said portion and as representing Dr Jameson; and (2) Miss Jean Tod, heritable creditor in possession of another portion of said piece of land, in virtue of a decree of maills and duties in her favour. The action concluded that these defenders should be ordained conjunctly and severally to pay to the pursuers the maills and duties payable by them in respect of their possession of said lands, *videlicit*, the feu-duties payable in respect of their feus, at least so much thereof as would satisfy and pay the balance of principal and the interest and penalties due under the bond and disposition in security in favour of the pursuers.

The bond and disposition in security contained a clause assigning rents and feu-duties and casualties.

The debtors in the bond, who were the superiors of the piece of ground above referred to, had been sequestrated, and a sum of £6000 of principal due under the bond still remained unpaid, and also the interest due thereon since the term of Whitsunday 1894, up to which term the interest had been duly paid.

The piece of land in question was originally feued out in 1827, subinfeudation being expressly prohibited, and the yearly feu-duty was fixed at £69, 15s. 9d. It had ultimately come to be divided into four parts, of which the first belonged to the late Dr Jameson, the second to the late Colonel Pullan (being the portion possessed by Miss Jean Tod as heritable creditor in possession), the third to the North British

Railway Company, and the fourth to John Kolbe Milne. No allocation of the *cumulo* feu-duty of £69, 15s. 9d. had ever been made among these portions with the exception of the portion belonging to John Kolbe Milne, but the other feuars had only been in use to pay a sum proportionate to the part owned by each, which sums, together with that payable for Mr Milne's portion, made up the amount of the *cumulo* feu-duty. Decree of maills and duties had already been obtained by the pursuers against the North British Railway Company and Mr Milne.

Mrs Galbraith and the heir of Dr Jameson had both renounced the portion of the piece of land which had belonged to him. The pursuers restricted the conclusions of the summons, so far as directed against Mrs Galbraith, to the conclusions against her as representing her deceased husband Dr Jameson, and did not ask any decree against her personally as vassal in or proprietor of the land at Kevock, and Mrs Jameson allowed decree to pass against her as restricted.

The pursuers pleaded, *inter alia*—"(1) The said balance of £6000 of the principal sum contained in the foresaid bond and disposition in security, with interest and penalty as condescended on, being justly due and resting-owing to the pursuers, they are entitled to enter into possession of the said lands and others described in the said bond and disposition in security, and to draw the rents and duties thereof. The defenders Mrs Isabella Currie or Jameson or Galbraith and Jean Tod being vassals in or proprietors of feus of portions of the said lands or others, or representing such vassals or proprietors, the pursuers are entitled to decree against them respectively for the maills and duties payable by them."

Defences were lodged for Miss Jean Tod. She pleaded, *inter alia*—(1) No title to sue; and (2) The action is incompetent and ought to be dismissed.

On 27th May 1896 the Lord Ordinary (STORMONTH DARLING), after a hearing in the Procedure Roll, issued an interlocutor by which he found that the pursuers had no title to sue the action, and therefore dismissed the action and decerned. He added the following opinion:—

Opinion.—"I am of opinion that this case is governed by the case of *Prudential Insurance Company* v. *Cheyne*, 11 R. 871, which decided that neither a superior nor his assignee has any title to pursue an action of maills and duties for recovery of feu-duty. The *ratio decidendi* was that an action of maills and duties is one by which the pursuer seeks to enter into possession of a heritable subject, and that a superior is not entitled to possession so long as the feu subsists. He may irritate the feu, or he may have recourse to the action provided by the Act of 1874 as a substitute for a declarator of non-entry, but he cannot take possession by an action of maills and duties.

"The distinctions which the pursuer attempts to draw between that case and the present are—(1) That he is not the superior or the assignee of the superior, but a heritable creditor of the superior; and (2) that he is claiming not the rents of the subjects payable by tenants, but merely the feu-duty payable by the vassal. It does not seem to me that these are distinctions which affect the principle of the *Prudential* case.

"It is true that the heritable creditor of a proprietor may have a right of action not competent to the proprietor himself. Thus a creditor under a bond and disposition in security may bring an action of maills and duties while his author, the owner of the *dominium utile*, cannot. But that is because the latter does not require such an action to give him a title of possession. In the case of *Scottish Heritable Security Company* v. *Allan*, 3 R. 333, the late Lord President, at page 340, speaking of the pursuers in that case, who were disponees under an *ex facie* absolute disposition, said—'They required no process of law to enable them to enter into possession, as it is called, and if they had proposed an action of maills and duties, for example, for the purpose of enabling them to uplift the rents, it would have been an idle formality, and, indeed, incompetent, because it is only an incumbrancer that requires to use a process of maills and duties in order to give him a title in a question with the tenant to uplift the rents.' Now, if the *ratio decidendi* in the *Prudential* case had been that a superior required no process of law to give him possession, I could have understood the analogy. But the *ratio* was that he had surrendered possession and could not resume it, standing the feu-right.

"Neither can it matter that the pursuer, so far as his petitory conclusions go, asks only for the feu-duty and not for rents. Equally he claims (as in his first plea-in-law) that he is 'entitled to enter into possession,' and that is a right which the *Prudential* case negatives.

"There is a real question between the parties, and there must, of course, be some competent mode of raising it, but this form of action, I think, is not. That question is, whether the compearing defender, who is, and has been since 22nd November 1893, in possession of one of four feus under a decree of maills and duties, is liable as such in the feu-duty of the whole four, so far as not allocated with consent of the superior. The defender has several answers to this demand, one of which is that the vassal in No. 4 (the condition of which gives rise to the question) has renounced his feu, and consequently that the relation of superior and vassal as regards that plot of ground no longer exists.

"I heard some argument on these various points, but it would be premature to express any opinion on them, if this be, as I think it is, an action which must be dismissed."

The pursuer reclaimed, and argued—This case could be distinguishable from *Prudential Assurance Company, Limited* v. *Cheyne, &c*, June 4, 1884, 11 R. 871, and the Lord Ordinary was wrong in supposing that that case ruled the present. There the pursuer was the superior's assignee; here they were his creditors. There what was sought was

decree against the tenants of vassals for payment of their rents; here it was decree against the vassals for payment of their feu-duties. It did not follow that because a superior's assignee was not entitled to decree of maills and duties against the vassal's tenants, that therefore a superior's creditor was not entitled to such a decree against the vassals for payment to him of the feu-duties to which he held a special assignation. The argument that the assignee was in precisely the same position as the superior, which was an element in *Cheyne*, was inapplicable here, for admittedly the creditor was not. On the one hand, he could not irritate the feu or obtain a declarator of non-entry, remedies which were open to the superior, and were held to be his proper remedies in *Cheyne*, and if this action were incompetent he had no continuing remedy for recovery of the feu-duties which were admittedly due to him. On the other hand, it was unquestionably no argument against a creditor's right to an action of maills and duties that his debtor and author, the owner, had no such right. As to the objection that neither the superior nor anyone having right from him could interfere with the vassal's possession, what was sought here was not actual possession of the lands, but civil possession merely to the effect of receiving payment of feu-duties. On principle there was no reason why the action should not be allowed. The expression maills and duties was not confined to rents, but included feu-duties also.—See *Ross* v. *Governors of Heriot's Hospital*, June 6, 1815, F.C., argument at p. 401, and *per* Lord Justice-Clerk at p. 411; *affirmed* 6 Paton's Appeals, 640. All that was really asked here was that the Court should ordain the vassals to pay to the pursuers the feu-duties to which under their assignation they had an undoubted right of exactly the same nature as that of the creditor of an owner of a *dominium utile* to the tenant's rents. If the action was competent against a vassal, then it was also competent against the creditor of a vassal in possession under decree of maills and duties, and intromitting with the rents.—*Liquidators of City of Glasgow Bank* v. *Nicolson's Trustees*, March 3, 1882, 9 R. 689, especially *per* Lord President Inglis at page 693. If Miss Tod ceased to intromit with the rents the decree against her would become inoperative.

Argued for the defender — This case was ruled by the case of *Cheyne*, *cit.* There was no distinction between the case of a superior's assignee and the case of his disponee in security. The pursuers here had another remedy open to them, namely, an ordinary petitory action, but the present action, which was an action of maills and duties, and decree in which would have certain special technical effects, could not be treated as if it were an ordinary petitory action. Even if the vassals were liable under this action, the creditor of a vassal was not. On principle there was a distinction between this case and that of a creditor with a security over a *dominium utile*, for a proprietor of a *dominium utile* could order his tenants to pay to his creditor, and a decree of maills and duties merely ordered something to be done which the landlord might have ordered himself, but a superior could not order his vassals to pay to his creditor, and decree of maills and duties was therefore incompetent.

At advising—

LORD JUSTICE-CLERK—In this case heritable creditors of a superior of certain lands ask for a decree of maills and duties for the recovery of feu-duties payable by the vassal. As stated in the debate, their purpose is to secure for themselves a standing order by which they may exact the feu-duties from time to time until the decree of maills and duties is removed, and thus save themselves from the necessity of repeated procedure. The question is whether they can competently make this demand, and that would seem to depend upon whether the superior himself could make it. Can a superior competently pursue such an action? Now, that question has been raised before, and has been decided in the case of *The Prudential Insurance Company* v. *Cheyne's Trustees*, in which case the insurance company, as assignees of the superior, raised an action of maills and duties. The Court there held that the pursuers had no title to pursue such an action, and the principles and grounds laid down seem to me to be applicable to the present case, and I agree with the Lord Ordinary that there are no distinctions which should prevent its being held a precedent for the decision here. I would move your Lordships, therefore, to adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I differed from the judgment to which your Lordship has referred, and I am bound to say that I still adhere to the grounds on which I differed in that case. But if that case is a decision in point, and if, however inexpedient the result may be, it cannot be overcome except by Act of Parliament, it is a precedent and must be followed. But I think it right to say that in my opinion the view of the law taken in that case is incorrect.

If I understand the matter rightly it is this. The pursuers are the holders of a security title granted to them by the superior of the lands in question, with an assignation to feu-duties embodied therein. They have intimated their security title and their assignation to the feu-duties to the vassals. They are entitled to have the feu-duties paid to them by the vassals. That is not capable of being disputed. This action is called an action of maills and duties, but the name does not signify; its purpose is to have the vassals ordered to pay their feu-duties to the pursuers. The record indicates that there is an important question here with a party who is in possession of part of the subjects as a creditor of one of the vassals, and whether that party is liable only for the feu-duty which appertains to the part she occupies, or whether she is liable just as the vassal under a well-known rule of law is liable, not only for her own share but for the whole. That question will have to be

decided in some competent action. But as regards this action, I do not understand the objection which is taken at this stage by the defender. The pursuers have right to these feu-duties. I asked more than once what the defender thought the pursuers should do, and I was told they must proceed against the vassals annually. But if it will save trouble and expense to give them a decree once for all, why should they not have it? It will be less expensive and more expedient. What interest have they that there should be an action brought against them annually rather than that an action should be brought against them now which would settle the question altogether?

An action of maills and duties no doubt has important effects when brought by a creditor of the owner of the *dominium utile*, and certain technical effects follow upon it. But suppose this action is regarded not as an action of maills and duties but simply as an action to have the vassals ordained to pay their feu-duties to the superior's creditor as they are bound to do, then I do not see what technical difficulties there are; but even if there were technical difficulties, I should be prepared to overcome technical difficulties to save expense.

The question with the vassal's creditor to which I have referred must arise some time, and it would arise and would have to be determined in this action, if it were allowed to go on, just as well as in the first of the annual actions which it is suggested the pursuers should bring against the vassals.

I think this action is perfectly competent and ought to be allowed to proceed. I cannot see any legitimate interest in any of the parties which requires that it should be dismissed at this stage.

LORD TRAYNER — I think the case of *Cheyne* has decided this question, and has decided it adversely to the reclaimer. I am not disposed to go back on that decision, and therefore I agree that this reclaiming-note must be refused.

LORD MONCREIFF was absent.

The Court refused the reclaiming-note, adhered to the interlocutor reclaimed against, and decerned.

Counsel for the Pursuers — Rankine — F. T. Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Defender — Guthrie — Macphail. Agents—H. & H. Tod, W.S.

Thursday, July 9.

SECOND DIVISION.

STUART *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Process—Proof—Diligence and Recovery of Writs—Confidentiality—Reports by Railway Servants to Railway Company—Reparation—Railway.

In an action of damages against a railway company for the death of a passenger, at the instance of his widow and children, occasioned, as alleged, by the fault of the railway company's servants, the pursuers moved for a commission and diligence for recovery of reports made by the railway company's servants to the company with reference to the accident to the deceased. The Court *refused* to grant diligence, on the ground that such documents were confidential.

This was an action at the instance of the widow and the pupil children of the late Robert Stuart, farmer, Wraes, Kennethmont, Aberdeenshire, and the widow as guardian of the pupil children, against the Great North of Scotland Railway Company. The pursuers sought damages for the death of the said Robert Stuart, which was caused, as they alleged, by the fault of the company's servants, in allowing a train by which he was about to travel to start before he was safely seated, and in inviting and ordering the deceased to attempt to enter the train while in motion, in consequence of which he fell between the platform and the train, and sustained injuries from the effects of which he subsequently died.

An issue was adjusted for the trial of the cause by jury, and notice was given for the Summer Sittings.

On 9th July the pursuers moved for a commission and diligence to recover documents. The first article of the specification was as follows—"(1) The written reports made to the defenders by the stationmaster at Gartly Station, and by the guard and engine-driver of the 1.15 p.m. down train from Aberdeen to Huntly on 12th October last with reference to the accident to the deceased Robert Stuart at Gartly station, caused by said train, and the time of its arrival at and departure from said station."

Counsel for the Railway Company objected to this article, and argued—These reports were confidential, and the pursuers were not entitled to get a diligence for recovery of them.

Argued for the pursuers—These reports were not confidential. There was no distinction between them and the letters and reports for recovery of which a diligence was granted in the case of *Tannett, Walker, & Co.* v. *Hannay & Sons*, July 18, 1873, 11 Macph. 931.

At advising—

LORD JUSTICE-CLERK—This is practically a demand for confidential reports to the