Friday, May 19.

FIRST DIVISION.

SPECIAL CASE—SKINNER AND OTHERS.

Conveyancing Act, 37 and 38 Vict. cap. 94, secs. 4 and 22—Superior and Vassal.

A vassal being entered with the superior by recording a disposition from a former vassal, *held* that the superior was not entitled to record the disposition in his chartulary at the vassal's expense, upon a casualty becoming payable.

Miss Sarah Shaw Whitehead and her sisters, the second parties in this case, acquired by singular title from Humphrey Graham, Esq., W.S., certain subjects feued to him by the superiors thereof, the Magistrates of Edinburgh, in 1860. The disposition in their favour from Mr Graham, dated 13th May 1871, was registered in the General Register of Sasines on 15th May, and accordingly, by the 4th section of the Conveyancing Act of 1874 they became entered vassals of the superiors, *i.e.*, the city of Edinburgh. On the death of Mr Graham they became liable to a casualty, and were then called on to produce the disposition in their favour and previous titles, that a composition might be settled. This they did, and the Town Clerk, Mr Skinner, who was along with the Magistrates of Edinburgh the first party to this case, having recorded the disposition in the city chartulary, claimed from the second parties his fees for recording the same.

This Special Case was accordingly presented to the Court for the purpose of obtaining a decision which might regulate the practice of the first parties in all similar cases. The following was the question submitted for opinion and judgment:—"Have the first parties, or either of them, a legal right to record the disposition constituting the second parties' title in the chartulary of the city of Edinburgh at the expense of the second parties on the occasion of a casualty being exigible from the second parties?"

Argued for the first parties:—Prior to the changes in conveyancing began in 1858 by the 21 and 22 Vict. cap. 76, it was the practice of superiors, in granting charters or other writs renewing the vassals' rights, to record every such charter in the superior's chartulary, and to charge the expense of doing so to the vassal. Under the abridged forms of entry substituted by the Titles to Land Act 1858 (21 and 22 Vict. cap. 76), now incorporated in the Titles to Land Consolidation (Scotland) Act 1868, for charters or other writs by progress, it was the practice of superiors to record the writ so granted, together with the disposition or other deed upon which the writ was indorsed, in their chartularies, and to charge the expense of recording such deed and indorsed writ in their account with the agent for the vassal; and the rate of charges was set forth in the Table of Fees authorised by the Society of Writers to the Signet. The chartulary is a private register, and is of the very greatest use in preserving the conditions of the original grants, and in rights of ancient date it is of consequence to have reliable copies of the charter. The right of the superior has hitherto been recognised, and since charters by progress have been abridged it has been the practice to record at the vassal's expense so much of the conveyance as was necessary to set forth the condition of the grant. It is the principle of the Act 1874 to maintain the substance of all rights although forms are abolished. Now, this right is essential for the protection of the superior, since it is impossible for him to know what encroachments may be made upon his rights by vassals in their conveyances to new vassals, and to defend himself against prescription, unless he is allowed to retain this right to call for and copy the disposition.

Argued for the second parties:—All that the previous practice amounted to was, that the superior was entitled to a copy of deeds granted by himself (Erskine ii. 5, 3). There is no authority, either in practice or in the Table of Fees referred to, for recording since the Act of 1858 the whole of the disposition on which the writ is endorsed. It is only "such part of the deed as is necessary" that the Table of Fees mentions, *i.e.*, necessary for making the writ intelligible; but now the feudal contract is contained in the statute itself. It is immaterial to the superior to see the terms of the disposition; by subsection 3 of section 4 his rights are not to be prejudiced by the implied entry of the vassal; and if the claim is to be made on this ground, it should be made when the vassal is infeft, not when a casualty is exigible, for that may not be for many years after the disposition, or a series of dispositions, has been granted. Such a charge as this is expressly prohibited by the 22d section of the Act, which abolishes all fees due to the superior's agent "in connection with change of ownership." Now there can be no casualty without a change of ownership.

At advising—

Lord President—There can be no doubt that before the recent changes in the law it was the practice of the superior, when granting charters or other writs renewing the vassal's right, to record the writ in his chartulary and charge the expense to the vassal, and it was the practice of the vassal to submit to this charge, and so this practice grew into a right which no one ever disputed. After the change introduced by the Act of 1858, charters by progress were shortened and simplified. A writ on the back of conveyances from vassal to vassal was substituted for a separate and independent instrument, but this was endorsed on the back of the conveyance or like deed. Then the practice came to be that the superior's agent entered this writ, and so much of the conveyance as was necessary to make the superior's rights appear, in the chartulary, and with this change the practice of charging the vassal with the expense of recording continued.

By the Act of 1874 new and radical changes were introduced. There is now no such thing as an express entry by progress—that is to say, the conveyance by an old feuar to a new one, when recorded in the Register of Sasines, operates as an entry without the necessity of going to the superior at all. That is provided by the 4th clause of the Act in its second sub-section, nor is there any necessity to intimate any such conveyance to the superior. If no intimation is made the original feuar continues liable to the superior

in the prestations of the feu-charter, but it is not required that any such intimation should be made. The entry is operated by recording the conveyance in the Register of Sasines. The superior's right might have been impaired had not the statute interposed some protection, and therefore we find it provided in the 3d subsection of this 4th clause—"Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required to vassal to enter or to pay such casualty irrespective of his entering." The effect of this 3d subsection is that it leaves the superior's rights to be ascertained and settled by the original feu-contract as they stood before the statute. The superior has all his old rights except in so far as the statute interferes with them. He has all his common law remedies competent to him before, but he is not to be entitled to any new casualty, or to a casualty at any new time.

That being so, the superior was not entitled to a casualty at the time of the sale by Humphrey Graham to the second parties in this case. The last vassal was Mr Graham, who was entered with the superior in 1860. It is not said, but it is implied, that he was not dead in 1871, and it was only on his death that the casualty became due. The effect of the implied entry, operated by recording the disposition by Mr Graham, was to leave the superior and vassal in the same position as they stood in under the old law, except that the superior could not compel the vassal to come to him and take an entry. The question is, whether, when they came together, which they need not do till a casualty was due, the superior might say—"Allow me to record your conveyance in my chartulary, that I may know what your title is, and as that is in place of a charter from me I must be entitled to charge you with the expense of recording it." Now, it is clear to me that this disposition by a vassal is in no sense the deed of the superior; he is not bound by any inconsistency between it and the original grant, even if he has taken the feu-duties. This deed, therefore, in which he has neither right nor interest, is not to be recorded in his chartulary. In short, the meaning of the statute is that the original grant shall always regulate the rights of the superior and vassal, and this implied entry shall not affect the superior's rights. The superior has therefore, as I have said, neither right nor interest to require that such a disposition should be recorded in his chartulary, and far less is he entitled to charge the vassal with the expense of so recording it.

Lord Deas—I need not say that it required no statute or practice to entitle the superior to keep a copy of any deed in his chartulary, but it did require either a statute or a course of practice to make the vassal liable for the expense of making that copy. Now, the practice has been that the vassal was made liable in the expense of recording deeds granted by the superior, and these only.

The question here is not of a deed granted by a superior, but of a deed granted by some one else. It would therefore require an enactment or a new course of practice to entitle the superior to claim payment of fees for recording this deed from the vassal. The right to exact such fees appears to be founded on a practice which does not apply to the case before us, and we do not require to go far into the statute to see that this is not one of the deeds to which the practice applies. The design of passing such an Act as the Conveyancing Act of 1874 was to lessen the cost of conveying land, and if we were to sanction this demand we should be increasing, and increasing very considerably, the cost of such conveyances; because if the superior is to be entitled to have the vassal's conveyance recorded at the vassal's expense when it is brought under his notice when a casualty becomes payable, he must be entitled to have every intermediate conveyance recorded also at his vassal's expense, and these might be numerous. It is impossible to believe that the Legislature could have intended this result, for however long these conveyances or deeds of settlement might be, and however much they might contain in which the superior was interested, I do not think that there would be any right to cut and carve them. The Table of Fees approved of by the Writers to the Signet contemplates such a proceeding no doubt, but I cannot see that you could limit the superior's agent in recording such deeds, or prevent him charging for the expense of copying them at full length; that would be a most unreasonable result, and could not have been intended.

That being so, it is not necessary to go into the 22d clause of the Act, or to consider whether there is any express prohibition of such charges there or not. It is certainly against its spirit. There is another matter on which I give no opinion, viz., how far the superior's rights may be affected by such conveyances. Be that as it may, the Legislature has given him all the protection they thought he should get.

Lord Ardmillan—The origin of the practice stated in this case to have been in use is according to Erskine to be found in the superior's right to see the titles of the vassal holding from him. The practice—an universal practice—arose under that state of the law. By the statute of 1858 there was a writ instead of a new charter, but it was still the writ of the superior, and it was necessary to the understanding of the writ to record the disposition which gave it its meaning, or at least so much of the disposition as was necessary to explain it.

There is no longer, however, any writ from the superior, and although I do not say but that

cases of uncertainty and hardship may possibly arise for want of such a record, still we are not entitled to extend to the superior a protection which is not given by the Act.

Lord Mure—The practice formerly was to allow the superior's agent who prepared the charter to record it in the chartulary of the superior, and to charge all the expense of recording it against the vassal. Now, the superior's agent has nothing to do with preparing the conveyance from one vassal to another, and we cannot therefore allow him to make a charge for recording it.

The Court answered the question submitted to them in the negative.

Counsel for First Parties—M'Laren. Agent—William White Millar, S.S.C.

Counsel for Second Parties—Begg. Agents—Morton, Neilson, & Smart, W.S.

Thursday, May 19.

FIRST DIVISION.

[Lord Shand, Ordinary.

CADZOW *v.* LOCKHART.

(See *ante*, vol. xii. p. 624.)

Landlord and Tenant—Reparation—Damages—Game—Rabbits.

By the lease of a farm under which the game was reserved to the landlord it was "expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm." In an action of reparation for damage by rabbits—*held* (1) that the claim of the tenant was not absolutely barred, nor the landlord entirely protected by the clause in the lease; but (2) that considering the terms of the lease the increase in the number of rabbits was not here proved to be so great as to warrant a claim of reparation.

William Cadzow, the pursuer of this action, which concluded for £600 of damages, was tenant of two farms on the estate of Lee, of which the defender Sir Simon Macdonald Lockhart was proprietor, having succeeded to his brother Sir Norman in May 1870. The pursuer became tenant of one of the farms, viz., East Nemphlar, at Martinmas 1857 as to arable land, and at Whitsunday 1858 as to the houses and grass. The term of the lease was nineteen years, and the rent £155. In the lease, dated 9th and 15th May 1858, there was the following reservation:—"Reserving also to the proprietor and his foresaids the sole right to the whole game and fish of every kind within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm without liability in damages; and the tenant shall be bound to preserve the game of all kinds to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The pursuer became tenant of the other farm, viz., West Nemphlar, at Martinmas 1862 as to the land under crop, and at Whitsunday 1863 as to the houses and grass. The lease was for seventeen years, and the rent was £54. In this lease the game clause was as follows:—"Reserving also to the proprietor and his foresaids the sole right to the whole game, including hares and rabbits of every kind, and to all the fish in the rivers and burns within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm, without liability in damages; and the tenant shall be bound to preserve the game of all kinds, including hares and rabbits, to the utmost of his power, and to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, and rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The two farms adjoined one another and extended along the Clyde, a strip of ground belonging to the defender, and covered with copse and brushwood, being interposed between them and the river.

The pursuer averred, *inter alia*—"At the dates of the leases foresaid there were few or no rabbits on the said farms or in the said strip of ground mentioned in the last article. For a number of years back, however, and in particular since the succession of the present defender in the year 1870, the said strip of ground has been turned into a rabbit preserve; and in consequence the pursuer's farm has been so infested with rabbits as to make the profitable occupation of his land impossible. The stock of rabbits in said strip of ground and in the pursuer's farms has been unduly and unreasonably increased year by year by the defender's predecessor and by the defender; and the said increase has been permitted and fostered for purposes of profit, the proprietor having for many years derived, and still deriving, a large annual revenue from the rabbits on his estate, and in particular from the rabbits on and adjacent to the pursuer's farms. From the date of the defender's succession to the present time the pursuer has suffered loss, injury, and damage from the foresaid undue increase of rabbits on his said farms to the extent of not less than £120 per annum, or in all £600, as concluded for in the summons. From the year 1871 inclusive the pursuer has had said damage carefully ascertained and estimated every year." It was alleged by the pursuer that "he had not ceased to complain to the defender, or those representing him, of the injury sustained," and that he had intimated to his landlord the claims of damage which he was now seeking to enforce. In consequence of the loss thereby sustained, the pursuer's rents from Whitsunday 1870 had not