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Thursday, November 20.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MOUNSEY *v.* PALMER.

Superior and Vassal—Casualty— Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

The Conveyancing Act of 1874 has not enlarged the superior's rights so as to entitle him to a casualty as on an entry which he would not have been entitled to before the statute.

Superior and Vassal—Casualty — Intermediate Vassal—Effect of Payment of Casualty by Duly Entered Vassal

H, the last entered vassal in certain lands, died in 1871. At that time the lands were held in property by M, who remained in possession of them till 1875, when he sold them to P. In 1883 the superior demanded from P a casualty in respect of the death of the last entered vassal in 1871, and P paid the casualty, taking a receipt "in full of the casualty payable for the subjects on the death of the last entered vassal in 1871, viz., H." Thereafter, M having died, the superior demanded another casualty from P in repect of the death of M, and P's infeftment. *Held* that the Act of 1874 had not increased the right of the superior to demand casualties, and that as the casualty now sued for would not have been exigible under the law existing prior to the Act, the defender was entitled to absolvitor.

The Conveyancing (Scotland) Act 187 4(37 and 38 Vict. cap. 94), sec. 4, sub-sec. 2, provides—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." . . . Subsec. 3 provides—"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 and exigible in respect of the lands at or prior to the date of such entry: . . . But provided always that such implied entry shall not entitle any superior to demand any casulty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter, or to pay such casualty irrespective of his entering."

John Little Mounsey, pursuer of this action, was lawful superior of an area of ground and buildings thereon, forming 90 Candlemaker Row, Edinburgh, situated at the head of the Cowgate of Edinburgh, on the north side of Greyfriars' Churchyard, all as fully described in the disposition in his favour granted by the Misses Sarah Shaw Whitehead, Annie Whitehead, Alice Whitehead, and Helen Whitehead, dated 25th December 1879, and duly recorded in January 1880. The disposition in his favour assigned the rents, feu-duties, and casualties, as well past due or exigible and unpaid as to become due or exigible.

David Palmer, the defender in this action, was proprietor of these subjects, having acquired them by disposition, dated and recorded in 1875, from James Miller, who acquired them in 1867 from the trustees of James M'Caskie. M'Caskie acquired them from the trustees of Charles Oliphant in 1858.

Oliphant's trustees had been entered with the superior, the pursuer's predecessor in the superiority. The last survivor of them was Robert Hunter, advocate, who died in 1871.

Miller was never expressly entered with the superior, but was proprietor at the time of the passing of the Conveyancing (Scotland) Act 1874.

On 20th April 1883 the pursuer, as superior, raised against Palmer, the present defender, an action of declarator and payment concluding that in consequence of the deaths of Oliphant's trustees, the vassals last vest and seised by the superior, a casualty of one year's rent became due to the superior on the death of Hunter, the last survivor of them, in 1871, which was still unpaid, and that defender, being the proprietor of the subjects, was bound to pay it.

Defences were not lodged, and after a correspondence, the amount of the casualty, after all proper deductions, was fixed at £60, and Palmer having paid that sum took this receipt—"Received from Mr David Palmer, corn merchant, Cowgatehead, Edinburgh, the sum of £60 sterling, in full of the casualty payable for subjects 90 Candlemaker Row, Edinburgh, on the death of the last entered vassal in October 1871, viz., R. Hunter, advocate, the last surviving trustee of the late Charles Oliphant, W.S., conform to summons at Mr Mounsey the superior's instance, against Mr Palmer, signeted 20th April last, which sum of £60 is accepted in full of the casualty sued for in said summons. (Signed) Campbell & Somervell, agents for Mr Mounsey."

Miller died on 5th June 1883.

Mr Mounsey in October 1883 raised this action of declarator and payment against Palmer to have it found that in consequence of his, "defender's, infeftment in the subjects, and of the death of James Miller, ironmonger, Princes Street, Edinburgh, the last vassal vest and seised, or held as vest and seised, by the superior in the said subjects, in respect of whose implied entry a casualty has been paid to the said superior, or of either event, a casualty, being one year's rent of the said subjects, became due to the superior of the said subjects on or about the 18th May 1875, being the date of the registration of the defender's infeftment in the appropriate register of sasines, or at least on or about the 5th June 1883, being the date of the death of the said James Miller, and that the said casualty is now exigible and still unpaid, that the defender is liable to make payment of the same to the pursuer, and that the full rents, maills, and duties of

the said subjects after the date of citation herein do belong to the pursuer, the said John Little Mounsey, as superior thereof, until the said casualty and the expenses after-mentioned be otherwise paid to the said John Little Mounsey." Then followed a petitory conclusion for £135, or such sum as might be found to be equal to one year's rent.

He stated—"(Cond. 2) The last entered vassal in the subjects, in virtue of whose entry or implied entry with the superior the casualty thereby due was paid, was James Miller, ironmonger in Princes Street, Edinburgh, the author of the defender, who died on or about the 5th June 1883. The defender is now proprietor of the said subjects, duly infeft and entered with the superior of the said subjects as at or about 18th May 1875, being the date of the registration of the defender's infeftment in the register of sasines, subject to the superior's right to enforce payment of the casualty due on entry, by virtue of the 2d sub-section of section 4 of The Conveyancing (Scotland) Act 1874. Admitted that the pursuer raised an action on the date libelled against the defender for payment of the casualty due in respect of the infeftment or implied entry of James Miller with the pursuer, and become exigible by the death of the last survivor of the last entered vassals, the said Oliphant's trustees. No defences were lodged to the said action, but after a long correspondence, asking for delay on the part of the defender, the case was settled by agreement. By the terms of settlement the casualty was paid in respect of the implied entry of James Miller with the superior in 1874, and the composition was calculated upon the rental for the year 1871-2, being the year current at the death of Robert Hunter, the last entered vassal prior to the passing of the Conveyancing (Scotland) Act 1874. Mr Andrew, S.S.C., the agent for Mr Miller, as well as Mr Alexander Gordon, the agent for the defender Mr Palmer, was a party to the said agreement. It was part of the said agreement that the defender Mr Palmer should be repaid the amount of the first casualty by his author the said James Miller, and he was so repaid. No casualty was then paid in respect of the entry of the present defender. The correspondence, which contains the terms of settlement, is produced and specially referred to."

He pleaded—"(1) The pursuer being superior of the subjects described in the summons, and not having received any casualty in respect of the infeftment of the defender, is entitled to decree as concluded for. (2) The defender being justly indebted and resting-owing to the pursuer the casualty sued for, and refusing, or at least delaying to make payment of the same, the pursuer is entitled, in virtue of The Conveyancing (Scotland) Act 1874, or at common law, to decree for payment of the sum of £135, less the ordinary deductions as they may be fixed by the Court, with expenses."

The defender in his defences narrated the proceedings in the previous action as above detailed. He stated—The defender paid the casualty sued for in the said action conform to the receipt herewith produced [quoted *supra*], and is the vassal in the subjects entered with the superior in virtue of the said infeftment in his favour and the said receipt for the casualty due on the death of the said vassals. The action raised against the defender, and in respect of which he paid the composition, was so raised in respect of his own implied entry alone. Mr Miller was bound to relieve him of the casualty which was due prior to the disposition in favour of the defender in virtue of the clause of relief contained in that disposition.

He pleaded—"(1) The pursuer is bound to exhibit his titles, and also the titles of the subjects excepted therefrom, in order that the defender may satisfy himself as to his right to the casualty sued for. (2) There being no casualty due to the pursuer in consequence of the death of the said James Miller, the defender is entitled to absolvitor. (3) The defender having paid the casualty due in respect of his entry with the superior, ought to be assoilzied from the conclusions of the present action."

On 19th February 1884 the Lord Ordinary (Fraser) pronounced the following interlocutor:—"Finds that the pursuer is the immediate lawful superior of the subjects described in the summons, now belonging to the defender, and is entitled to all the casualties payable by the vassals in the said subjects: Finds that the vassals last expressly entered with the superior were Oliphant's trustees, the last survivor of whom was Robert Hunter, advocate, who died on the 23d day of December 1871: Finds that the property was in non-entry from the date of the death of the said Robert Hunter: Finds that Oliphant's trustees sold the property to James M'Caskie, hat manufacturer in Edinburgh, and Janet Hogg his wife, and sasine was taken on the disposition on 22d June 1858: Finds that M'Caskie conveyed the property to trustees by general trust-disposition and settlement, on which a notarial instrument was expede in their favour on 23d February 1867: Finds that M'Caskie's trustees conveyed the property to James Miller, ironmonger in Edinburgh, and that the disposition in Miller's favour was recorded on the 15th day of May 1867: Finds that Miller sold the property to the defender, and that the disposition in defender's favour was recorded on 18th May 1875, and he is now the proprietor of the subjects: Finds that the pursuer on 20th April 1883 raised an action against the defender, as the proprietor duly infeft in the subjects, for declarator and payment of a casualty in respect of the death of Oliphant's trustees, and that the defender paid such casualty on 9th June 1883, conform to receipt in the following terms:—'Received from Mr David Palmer, corn merchant, Cowgatehead, Edinburgh, the sum of £60 sterling in full of the casualty payable for subjects, 90 Candlemaker Row, Edinburgh, on the death of the last entered vassal in October 1871, viz., R. Hunter, advocate, the last surviving trustee of the late Charles Oliphant, W.S., conform to summons at Mr Mounsey the superior's instance against Mr Palmer, signeted 20th April last, which sum of £60 is accepted in full of the casualty sued for in said summons. (Signed) Campbell & Somervell, agents for Mr Mounsey:' Finds that James Miller was on 1st October 1874, by virtue of the 2d sub-section of section 4 of The Conveyancing (Scotland) Act 1874, impliedly entered with the superior: Finds that he died on 5th June 1883, after the said action against the defender had been raised: Finds in law that the defender having paid the composition to the superior, no further composition is claimable by the latter until the defender's death:

Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, &c.

"*Opinion.*—The 4th section of the Conveyancing (Scotland) Act 1874 has given rise to an amount of litigation somewhat unexampled with reference to so recent a statute, and which indicates that that section has not been drawn with all the precision that could be wished in reference to a statute dealing with interests so important as those of superiors and vassals. The main object of it was to abolish mid-superiorities, while at the same time reserving intact the pecuniary interests both of superior and vassal. It was not intended to aggrandise by one penny the rights of the superior, or to lay a heavier weight upon the vassal than he had hitherto borne; and yet so far as the decisions interpreting the section have gone the result has been different. For example, the ingenious mode by which a singular successor of a vassal could escape payment of a composition by tendering an entry by the heir of the last vassal who was only liable in relief-duty, has been declared no longer competent; and this great advantage has been given to the superior without any compensation to the vassal. Every vassal who now buys a property and takes infeftment, is entered with the superior as a singular successor, and at once must pay a composition if there be no vassal alive who has paid a composition.

"The sweep of the statute has been attempted to be further extended, and the present is a very good illustration of this. Before stating the facts in reference to the present case, it may be proper to refer to the old law anterior to the statute, because while the statute creates the implied entry with the superior, simply by a proprietor being infeft in the lands, and without any charter or other writ from the superior, it is expressly provided by the 3rd sub-division of section 4, '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 the vassal to enter or to pay such casualty irrespective of his entering.' We are thus sent to the law prior to this Act. When lands fell into non-entry the superior was entitled to demand from the proprietor in possession that he should enter and pay a composition, or submit to the seizure of the subjects by the superior under a decree of declarator of non-entry. He being a singular successor, his obligation was to pay a composition of a year's rent, but he was under obligation to pay no more. Although the property had been conveyed from the last entered vassal to half-a-dozen different intermediate persons before it came to the proprietor in possession, this last person was only obliged to pay one composition.

"Now, has this law been altered by the Conveyancing Act of 1874? The pursuer contends that it has, and states his case as follows:—Let A B be the last entered vassal. He conveys to No. 1, who conveys to No. 2, who conveys to No. 3, who conveys to No. 4, the person in possession. The superior, upon the death of A B, the last entered vassal, brings his action for payment of a composition—as he is entitled to do—against the person in possession (No. 4), and obtains payment. After he has obtained this, No. 1, the first disponee from the last entered vassal A B, dies, and the superior thereupon demands payment from the proprietor in possession, of another composition, on the ground that as No. 1 was impliedly entered, the casualty of composition became due at his death. And so on the death of No. 2 and No 3 he demands a composition on the ground that these persons were likewise entered as vassals, and that upon each of their deaths a composition as a *debitum fundi* became due, and was payable by the proprietor in possession.

"Now, all this is in contradiction of the declaration of the statute that the rights of the superiors to demand casualties shall in no way be increased. When his lands are in non-entry he is entitled to a vassal, and to a composition from that vassal, but to nothing further. After the vassal has paid him the money, there is an end of all further demand by the superior, till that vassal's death. This is the plain meaning and common sense of the statute, and the consequence is that the demand of the pursuer in the present case is untenable.

"The facts are that the last vassal was Robert Hunter, an advocate, who died on 23rd December 1871. He was the last survivor of a number of trustees. Hunter and his co-trustees conveyed the property to M'Caskie, whose trustees conveyed it to James Miller on 15th May 1867, who conveyed it to the defender in 1875. James Miller died on 5th June 1883.

"On 20th April 1883 the pursuer raised an action against the defender to have it found and declared that in consequence of the death of Hunter and his co-trustees, 'who were the vassals last vest and seised by the superior . . . . a casualty, being one year's rent of the subjects, became due to the superior of the said subjects upon the 23rd day of December 1871, being the date of the death of the said Robert Hunter, the last survivor of the said last entered vassals, and that the said casualty is still unpaid.' This action was not prosecuted to judgment. The defender had no good defence against it. He paid the casualty and the expenses, and he became the entered vassal of the pursuer, who last had paid a composition.

"After this action was raised James Miller died, and thereupon the pursuer, the superior, insists in a new demand against the defender, who is his entered vassal, to pay up the casualty which the pursuer maintains became due upon the death of Miller, who had obtained an implied entry in consequence of being proprietor on 1st October 1874, when the Conveyancing (Scotland) Act of that year passed. The pursuer says that the defender as proprietor in possession only paid his just debt on the decease of Hunter, and he must now pay another debt upon the decease of the vassal who was impliedly entered to it in October 1874. This is a construction of the statute that the Lord Ordinary cannot adopt. It is contrary to justice, and is a perversion of the main object of the 4th section of the statute. The pursuer has got a vassal who has already paid him a composition, and under the old law he could demand no more than one composition, and he can demand no more under the new law, for his rights under the latter are declared to be the same as under the former.

"There was the usual clause in the disposition by Miller to the defender, whereby Miller undertook to free and relieve the defender of all casualties that were due prior to the sale, and under

this clause and in accordance with the decision in *Straiton Estate Company, Limited* v. *Stephens* (16th December 1880, 8 R. 299) Miller's representatives have repaid to the defender the casualty which he paid to the pursuer. But this transaction between these parties in no way affects the relative rights and obligations of superior and vassal. The bargain between Miller and the defender was a matter with which the superior had nothing whatever to do, and the defender cannot be made to pay a composition to the superior not otherwise exigible merely because he has obtained repayment from his author."

The pursuer reclaimed, and argued that no casualty had been paid by the defender in respect of his own entry. He was the vassal of the pursuer in respect of his implied entry, and the composition paid was in respect of Miller's and not of Palmer's entry.

Authorities—Bell's Prin., sec. 720; *Neil* v. *Douglas' Trustees*, 19 Scot. Law Rep. 827; *Sivright* v. *Straiton Estate Company*, June 12, 1878, 5 R. 922, and 6 R. 1208; *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738; *Rossmore's Trustees* v. *Brownlie*, Nov. 2, 1877, 5 R. 201; *Rankin's Trustees* v. *Lamont*, February 27, 1880, 7 R. (H. of L.) 10; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4, sub-secs. 1 and 3.

Argued for defender—He had entered and paid composition for his own entry. A composition in respect of Miller's might have been demanded when he (Miller) held the subjects, but not now. The lands could not be in non-entry during the lifetime of the defender. If the Act had not passed the action would not have been raised. The superior was seeking by this action to get more compositions than one, whereas by the law prior to the Act he would have been only entitled to one. This was opposed to the letter and the spirit of the Act.

Authorities—*Leith Heritages Company*, June 8, 1876, 13 Scot. Law Rep. 731; *Stuart* v. *Murdoch*, June 6, 1882, 19 Scot. Law Rep. 649; *Hope* v. *Duke of Hamilton*, July 6, 1883, 10 R. 1122; *Hamilton* v. *Guild*, July 6, 1883, 10 R. 1117.

At advising—

Lord Shand—Although the amount at stake in this case is not large, the case raises a question of considerable importance in the law of superior and vassal. That question is, Whether in consequence of the provision of section 4 of the Conveyancing Act of 1874, by which an infeftment if taken is now equivalent to an entry with the superior, the superior's estate has been enlarged so as to give him right to casualties in circumstances in which before the passing of the Act of 1874 he would not have had such right?

The action is brought at the instance of the superior of a small heritable property in Edinburgh against the proprietor infeft and in possession, to have it found that a casualty, being one year's rent of the subjects, became due on the death—upon the 5th of June 1883—of James Miller, ironmonger, Edinburgh, alleged to be the vassal last vest and seised in the subjects in respect of whose implied entry a casualty had been paid, and for decree for payment of one year's rent accordingly, and right to the rents of the lands in the meantime, as in the case of non-entry, until payment should be made, all in the form provided by the Conveyancing Act of 1874. It appears from the statements on record that the pursuer's own right to the superiority was acquired later than that either of Miller or the defender. The pursuer seems to have acquired right to this superiority in 1879, and to have taken infeftment in 1880. Miller, upon whose death it is said this casualty became due, had acquired right to the property and taken infeftment in May 1867, while the defender acquired his right from Miller, and was infeft in May 1875, four years before the pursuer had acquired his right. The action is maintained on the averment contained in article 2 of the condescendence:—"The last entered vassal in the subjects, in virtue of whose entry with the superior the casualty thereby due was paid, was James Miller, ironmonger in Princes Street, Edinburgh, the author of the defender, who died on or about 5th June 1883. The defender is now proprietor of the said subjects, duly infeft and entered with the superior of the said subjects at or about 18th May 1875, being the date of the registration of the defender's infeftment in the register of sasines, subject to the superior's rights to enforce payment of the casualty due on entry by virtue of the 2d sub-section of section 4 of the Conveyancing (Scotland) Act 1874." And the defence which is stated is contained towards the close of the answer to that averment, and is to this effect:—"The pursuer on 20th April 1883 raised an action against the defender, as the proprietor duly infeft and entered with the superior of said subjects, for declarator and payment of casualty in respect of the death of Robert Hunter, Esquire, advocate, the last survivor of the trustees of the said Charles Oliphant, which took place on 23d December 1871, the then last entered vassal. The defender paid the casualty sued for in said action, conform to receipt herewith produced, and is the vassal in the subjects entered with the superior in virtue of the said infeftment in his favour, and the said receipt for the casualty due on the death of said vassals. The action raised against the defender, and in respect of which he paid the composition, was so raised in respect of his own implied entry alone." So that the question between the parties is really this, whether the casualty referred to in that answer was paid in respect of the entry of Miller on the death of his predecessors in the feu, Oliphant's trustees, of whom Mr Hunter was the last survivor, or whether that casualty was paid by the defender in respect of his own entry by virtue of the registration of his disposition, which was equivalent to infeftment and charter. The Lord Ordinary has sustained the defence, and I am of opinion that the judgment is sound and should be adhered to.

The case practically turns upon a question of fact. It is admitted that the defender has already paid a casualty to the pursuer for an entry. He maintains that this was in respect of his own implied entry by infeftment in May 1875, while the pursuer maintains that it was in respect of the implied entry of Miller. The receipt for the casualty is in these terms:—"9th June 1883.—Received from Mr David Palmer, corn merchant, Cowgatehead, Edinburgh, the sum of £60 sterling, in full of the casualty

payable for subjects 98 Candlemaker Row, Edinburgh, on the death of the last entered vassal in October 1871, viz., R. Hunter, advocate, the last surviving trustee of the late Charles Oliphant, W.S., conform to summons at Mr Mounsey, the superior's, instance against Mr Palmer, signeted 30th April last, which sum of £60 is accepted in full of the casualty sued for in said summons." Now, it appears to me that the effect of that receipt in the position in which the parties stood, was that the defender made payment of the amount therein specified as on his own entry, and not as on the entry of Mr Miller, who had been an intermediate vassal entirely divested of the subjects about twelve years before. But in order to see that this was so, it is necessary to determine the effect of what occurred in that previous action. Now, that action was raised on the 20th of April of last year, about six months before the present action, and when it was so raised the defender had been infeft in these subjects for eight years, for which time he had been the entered vassal of the superior to the same effect as if he had obtained a charter of confirmation. In no part of the conclusions of the action against him for payment of a casualty, nor in the statement of the pursuer, nor in the pleas of the pursuer, is there any indication of a claim for a casualty due as on the entry, not of the defender himself, but of Miller, who was no longer the vassal. The conclusions of that summons were that a casualty became due on the death of Mr Hunter, and that the defender was liable to make payment of that casualty to the pursuer, and that the rents, mails, and duties after the date of citation belonged to the superior until that casualty was paid. And there was a conclusion against the defender to make payment of a year's rents of the subjects accordingly. In the condescendence, in article 3, after stating the death of Mr Robert Hunter, who had been the last entered vassal upon whose entry a casualty had been paid, the pursuer averred—"and the defender is now proprietor of the said subjects, subject to the superior's right to enforce payment of casualties exigible on entry." And again in the second plea-in-law the ground of action is stated in this way—"The defender being justly indebted and resting-owing to the pursuer the casualty sued for, and refusing or at least delaying to make payment of the same, the pursuer is entitled, in virtue of the Conveyancing (Scotland) Act 1874, or at common law, to decree for payment of the sum of £120," and so on. So that the action was in its substance brought against the debtor of the casualty in respect of his being the proprietor of the lands, and seeking for decree against him in that character for payment of the casualty which was alleged to be due by him. There were no defences lodged to the action, but a correspondence ensued between the parties, and the result was that a year's rent, estimated apparently as on the rental of the year 1871-1872, being the year when Mr Hunter died, was paid, and the receipt which I have read was granted upon payment of the sum accepted as the composition.

The effect of that transaction, as it appears to me, is in fact that the defender paid a casualty on his own entry. I see nothing on the face of the proceedings to support the view contended for here, that the demand was for a casualty on the entry of Miller, the intermediate vassal, whose connection with the subjects had ceased in 1875, and not on the entry of the vassal from whom it was demanded, and who alone was vested with the fee of the property. The casualty then was paid in respect of the entry of the defender, who was then the entered vassal, and that payment excludes the claim now made a second time and for a second casualty.

The circumstance that the defender had stipulated with Miller, from whom he bought the subjects, that as a year's rent might be claimed in consequence of Mr Hunter's death, he should get an entry with the superior free from the payment of a casualty, so that Miller had really to pay the money as in a question between Palmer and him, has no bearing upon the question as to the nature or extent of the obligation of the defender to the superior. I think that matter was *res inter alios*, and that the superior had no concern with the contract made by the purchaser with the seller relating to the payment of the casualty.

That view seems to me to be sufficient for the decision of the case. But as the Lord Ordinary has dealt with a somewhat larger question, I may farther say that I agree with him in thinking that even if the former payment of a casualty could be said to be ambiguous or indefinite in its nature, I should still hold that the demand formally made must in law be regarded as a demand for payment of the casualty due on the defender's own entry as the only demand competent to the pursuer; or to put it otherwise, if the former action had concluded for the casualty as being due, not upon the defender's entry, but upon Miller's entry, I should have held that the defender was not bound to pay.

I agree with the Lord Ordinary in thinking that the statute has not enlarged the superior's rights so as to entitle him to a casualty as on an entry which he would not have had before the statute. As matter of convenience, and in order to save expense, the statute has provided that the constant renewals of investiture by formal charters formerly in use should be abolished. The purpose was to simplify conveyancing and save expense, and there is nothing in the preamble or provisions of the statute to suggest that it was intended to alter the pecuniary relations of superior and vassal as regards casualties or compositions payable by the vassal to the superior, except where you have express provision to that effect, as in the case of the clauses providing for the redemption of casualties, and the like; and nothing in the statute to suggest an addition to the number of occasions on which the superior would be entitled to demand casualties, so as to improve and enlarge the estate of the superior, and thereby reduce the value of the property to the owner.

It would, I think, have required an express enactment to give the superior the right for which the pursuer contends to demand payment of casualties in circumstances where such payment was not exigible before the statute. No such enactment occurs; but further, the provision of section 4 (sub-section 3)—"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 condition of the feu-right, have required the vassal

to enter or to pay such casualty irrespective of his entering"—seems to exclude a demand for casualties in circumstances like the present, in respect of intermediate transmissions of the property, though each followed by infeftment. The casualty cannot be demanded "sooner" than formerly. So it is only when the vassal last entered who paid a casualty has died that another casualty can be demanded. This claim must, of course, be made against the proprietor of the subjects last entered as vassal. If there have been three or four intermediate disponees, it is clear that under the old law they could not have been called on to pay casualties, and equally clear that the proprietor for the time could not be called on to pay casualties in respect of these transmissions. It is true that their several infeftments became equivalent to entries under the statute, but these entries took place when the fee was full. Before the lands fell into non-entry, these infeftments and implied entries had been suspended by the infeftment of the last disponee. He becomes the debtor of the superior under the statute, and he alone suffers prejudice if the lands remain in non-entry and the superior has recourse to the rents. It is extravagant to suppose that he is liable to pay a year's rent, not on his own entry only, but on the entry of each of the intermediate disponees between him and the last-entered vassal who paid a year's rent, and who may be five or six in number, as each of these die in succession. When the claim emerged their temporary connection with the land had been superseded by the entry implied by the infeftment of the last vassal and proprietor.

There is one passage in the note to the Lord Ordinary's interlocutor which indicates a view that recent decisions have had an effect somewhat at variance with the view that the statute did not create a difference in the pecuniary relations of superior and vassal in favour of the former. His Lordship says that the main object of the statute "was to abolish mid-superiorities, while at the same time reserving intact the pecuniary relations both of superior and vassal," and in that I quite concur. His Lordship goes on to say—"It was not intended to aggrandise by one penny the rights of the superior, or to lay a heavier weight upon the vassal than he had hitherto borne," and in that I also concur; but he goes on to say—"And yet so far as the decisions interpreting the section have gone the result has been different. For example, the ingenious mode by which a singular successor of a vassal could escape payment of a composition by tendering an entry by the heir of the last vassal, who was only liable in relief-duty, has been declared no longer competent; and this great advantage has been given to the superior without any compensation to the vassal." Now, that requires some qualification. I think the passage scarcely represents correctly the effect of the decisions. I do not think the statute has taken away from a singular successor the right to present to the superior the heir of the last entered vassal as the person to be entered. I think he is still able to do so where he can arrange with the heir to come forward. If he remain uninfeft he may offer the heir as the person to be entered, and so save the larger composition payable on the entry of a singular successor. But, of course, if he take infeftment, and so enters himself, he is then just in the same position as if he had taken his charter from the superior, and, of course, can no longer present the heir for entry. He has in that case excluded himself from afterwards presenting the heir, because he has himself assumed the position of the vassal, and is liable in the casualty affecting a singular successor.

Coming, then, to the conclusion that the statute gives no such advantage to the superior as the pursuer here claims, the question occurs, How would the rights of the pursuer and defender have stood under the old law? When the former action was raised in April 1883, what was the position and rights of the defender? It appears to me there can be no doubt that the defender was then entitled to say that he desired to enter by taking the charter in his own favour, and that the superior would have been bound to give him a charter accordingly on payment of the casualty of a year's rent; and this was in effect the result of the transaction which actually took place between the parties.

It is true, as was pointed out in the course of the debate, that there was a period from 1871, when Mr Hunter died, down to May 1875, when the defender was infeft on the conveyance by Miller, and so became entered as vassal with the superior, the predecessor of the present pursuer in the superiority, during which the superior for the time might have called upon Miller to enter and pay the casualty. Mr Hunter was then dead, Miller was the vassal in the feu, and he had been entered by his infeftment. But that period passed, and the defender in the meantime having been infeft, the claim for a casualty was thereafter made against him which could have been made under the old law, as I have just said. He was, however, entitled to demand a charter in his own favour in return for a payment once and for all, and the statute does not make him liable to more.

If the superior had insisted on his right as against Miller before the defender's infeftment, his claim would have been irresistible; but in that case he could have had no claim against the defender even after his infeftment so long as Miller was in life, such as he made in his former action.

On the whole, I agree with the Lord Ordinary in thinking that where property passes from one to another of a series of disponees, each of whom takes infeftment, the superior is not entitled on the death of the first disponee to have casualties or relief-duties from each of the disponees who were impliedly entered by infeftment. His right is, I think, to obtain payment of the casualty or relief-duty as soon as the vassal dies on whose entry the last payment was made, and not sooner. He has then right to this payment from the vassal last infeft, and so entered; and the payment is due on the casualty or relief-duty payable on the entry of that vassal, and not on the entry of intermediate disponees whose right to the property has ceased. Under the former law and practice the vassal had the right to call on the superior to grant a charter, not to himself, but to one of the intermediate disponees between the last-entered vassal and himself, and might hold the property under his base infeftment from the vassal so entered by charter; and this right was at times exercised where the proprietor was satisfied that the expectation of life of the inter-

mediate disponee was greater than his own. This was a right in favour of the vassal, however; and it seems clear now under the statute, as the law has been changed, that as on the one hand the superior cannot prevent an entry as the result of infeftment, which has the same effect as if a charter of confirmation had been granted, so on the other the vassal taking infeftment, and thus obtaining an entry, can no longer, on the death of the last-entered vassal on whose entry a casualty or relief-duty was paid, elect to pay the next casualty as on the entry of an intermediate disponee. His own infeftment being in effect equivalent to a charter in his favour, the casualty or relief-duty is payable, and must be paid, as on his own entry.

Lord Mure—I concur in thinking that the interlocutor of the Lord Ordinary should be adhered to, and substantially on the grounds which have now been very clearly stated by Lord Shand.

It appears to me that the Lord Ordinary has taken quite a sound view of the general scope and effect of the Conveyancing Act of 1874 when he says it was not intended to prejudice, or in any material respect affect, the relative rights of superior and vassal in a pecuniary point of view. That statute was, I think, intended to make, and did make, an important and material alteration in the forms of conveyances, and also in some respects in the forms of procedure applicable to these rights; but it did not in my opinion go further, or enable the superior to demand casualties which he could not have demanded before the passing of it. It left those pecuniary relations substantially as they were at its date, and to be regulated as they would have been according to the rules in force prior to that date.

It is necessary, therefore, to look at the demand now made in the light in which it would have stood had the Act of 1874 not been passed, so that the first question for consideration is—What in the circumstances that have occurred in the transmission of this property would have been the superior's right in the matter of casualty if the claim had been made at the date of the present action?

Now, the facts as to the transmission of the property are very few and simple. Mr Miller acquired the property in 1867. At that time Mr Hunter, the last of the trustees who had been infeft, was still alive. He died in 1871, and thereupon the lands fell into non-entry. Miller remained possessor of the property till 1875, but no demand was made upon him to enter with the superior. By the operation of the statute of 1874 he got an implied entry, but up to the date of the Act no demand had been made upon him for payment of a casualty in respect of the death of Mr Hunter. He sells in 1875, and from 1875 to 1883 the present defender has been all along in the possession of the property, and no demand was made upon him to enter, and no demand was made upon him for a casualty. But in 1883 this action was brought against the defender, which is in the form of action prescribed by the Act of 1874, in lieu of an action of declarator of non-entry. Now, in this state of matters it appears to me to be clear that the defender could not have made any such demand as that which is now brought forward under the law as it stood before the passing of the Act of 1874. The law is to be gathered from the various decisions pronounced before the passing of the Act, which may be found in some respects to be somewhat contradictory, but the substance of it is very well stated by Mr Bell in section 723 of his principles, thus—"In conveyances to a purchaser it may be observed that the disponee is not bound to enter, although he shall have been infeft base, or shall have assumed possession of the lands, if the fee be full by the disponer continuing infeft and alive; and that when the fee does fall into non-entry, and there are successive disponees, the superior cannot insist for more than one entry, and that from the last disponee." I apprehend that to be a correct statement of the law and practice in Scotland in these matters at the date of the passing of the Act. And applying the law to the present action, it appears to me that the pursuer, if successful in his present demand, would be getting more than he could have got if this Act of 1874 had not been passed. Under the old law the person liable was the person in possession of the land, and the superior called upon him to take an entry and to pay the duties. But if he allowed that person to possess the lands and to sell them to another party, and that party sold to a third party, and so on, he could not demand an entry upon the death of his vassal, from the last of the purchasers—an entry in respect of each of them. He must go against the person in possession at the date when the non-entry duty was demanded, and calling upon him to enter and to pay the duties exigible on the death of the last vassal. That was what the superior was entitled to under the old law, and I do not think he is entitled to ask for more under the statute of 1874, there being, as I have said, no change in the pecuniary relations of the superior and vassal introduced by that Act.

As pointed out by Lord Shand, there was a time when the superior for the time might have proceeded to recover from Miller the casualty due by him on his entry, but by the death of Miller, and the infeftment of the defender, and entry implied thereby, he lost his opportunity of doing so, and the pursuer is consequently confined to the demand which has been satisfied, for payment of the casualty due on the entry of the defender as vassal in the subjects. I do not think the statute intended to allow a superior to demand more than that, and therefore I think the Lord Ordinary has taken the correct view of the case, and that his interlocutor should be adhered to.

I may also mention with reference to this case, that we had considered it very anxiously along with the Lord President, and were all of one opinion regarding it, and his Lordship has authorised me through Lord Shand to say that he entirely concurs in the result arrived at in our judgment.

The Lord President was present at the debate, but was absent when the case was advised.

The Court adhered.

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