an interest to have the question of their right to prevent this application being proceeded with decided before further proceedings under the petition are taken, but that is not so strong an interest as the interest of the petitioner to have the matter determined without delay.

Looking to these considerations, I think we should refuse the application.

LORD M'LAREN—It seems to me that it may now be regarded as an established practice in entail petitions that, unless in exceptional circumstances, leave to appeal to the House of Lords against an interlocutory judgment of this Court will not be granted, the reason being that the death of any of the parties to such a proceeding materially alters the conditions of the question. The right may be lost altogether, or at any rate a new party will intervene in the proceedings. The case is not so strong here as in some instances, because the application is not for a disentail of the whole estate, but it is difficult to draw a distinction between one case and another on that ground, because what is a small part of one estate may be as large as the whole of another estate of smaller size. I am rather in favour of refusing the application.

LORD KINNEAR concurred.

LORD PRESIDENT—I was at first impressed by the consideration that there are here legal questions of magnitude and importance which are undoubtedly detachable from the sequel of the case. On the other hand, there is very great weight in what has been advanced by Lord Adam, and I have come to think that the balance of considerations is in favour of refusing this application. Two points weigh with me in coming to this conclusion. The first is, that having regard to the relative interests of the disputants, the peculiarity of proceedings of this kind that the death of the petitioner before decree terminates the litigation, gives the Duke an exceptional right to be considered. In the second place, I do not think, after all, that the proceedings here will necessarily or naturally be of a highly complicated character. I sympathise greatly with the difficulties the parties may have in working out the subsequent procedure so as to promote their own pecuniary interests without hampering their argument on the main question; but the responsibility for this rests with themselves, and I am afraid we are not called upon to delay proceedings by allowing an appeal to the House of Lords merely in order to facilitate their dialectics.

The Court refused the petition.

Counsel for the Duke of Sutherland—C. S. Dickson—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Marquess of Stafford, &c.—D.-F. Balfour, Q.C.—Dundas. Agents—Macpherson & Mackay, W.S.

Saturday, February 27.

FIRST DIVISION.

M'KNIGHT & COMPANY AND HARDIE *v.* MONTGOMERIE.

Company — Voluntary Liquidation — Removal of Liquidator—Voluntary Liquidation—Due Cause—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 141.

The shareholders of a company having resolved that it should be wound up voluntarily, unanimously appointed H. to be liquidator, and a number of the creditors of the company subsequently intimated their concurrence in this appointment.

In a petition by H. for a supervision order and for confirmation of his appointment a creditor lodged answers and moved the Court to remove H. from the office of liquidator on the ground that he was a shareholder and had at one time been a director of the company. The Court *confirmed* H.'s appointment, *holding* that due cause had not been shown for his removal.

On 16th April 1890 John M'Knight & Company, Limited, was incorporated under the Companies Acts, its registered office being at Binny Quarry, Uphall. The capital of the company was £12,000, divided into 12,000 shares of £1 each, of which 6650 shares were subsequently subscribed, and the purposes for which the company was formed were, *inter alia*, to acquire from the firm of M'Knight & Marshall the whole leases, property, effects, and assets belonging to them in their business of brick-making and quarrying, carried on at Cardross Brick Works and Binny Brick Works and Quarry, together with the debts and goodwill of the said business. The company commenced business as brick manufacturers and quarrymasters immediately after its incorporation on 16th April 1890 The whole paid-up capital of the company was thereafter expended in working the said quarry and in erecting brick-works and machinery therein, and no dividend was ever paid to the shareholders.

On the 26th day of January 1892 an extraordinary general meeting of the company was held at Broxburn, when, *inter alia*, the following extraordinary resolution was unanimously adopted:—"Whereas it has been proved to the satisfaction of the shareholders that the company, by reason of its liabilities, cannot continue its business, and that it is advisable to wind up the same, it is resolved that John M'Knight & Company, Limited, be wound up voluntarily, and that a liquidator be appointed to wind up the affairs of the company and distribute its property." The said meeting thereafter appointed William Hardie, C.A., Greenock, to be liquidator, and authorised him, if he thought fit, to take all necessary proceedings for the winding-up of the company under the supervision of the Court.

On 30th January the company and Hardie,

its liquidator, presented a petition to the Court praying the Court to order that the voluntary winding-up of the company should be carried on under the supervision of the Court, to confirm Hardie's appointment as liquidator, to direct all subsequent proceedings in the winding-up to be taken before one of the Lords Ordinary, and to remit the winding-up to him accordingly.

On 11th February Daniel Montgomerie, a creditor holding a decree against the company for £357, lodged answers to the petition. He stated, *inter alia*—"The said company to all intents and purposes was practically a private company. No portion of the capital was offered to the public, but the whole required capital, £6650 in shares of £1 each, was subscribed for and allotted to friends of John M'Knight and Robert Marshall, who were the partners of said firm of M'Knight & Marshall, and who were the promoters of said limited company. There are only thirteen shareholders in said company. The said John M'Knight retained and all along exercised the controlling power in said company, being the holder of 2200 shares, the said Robert Marshall holding 500 shares, the said William Hardie 600 shares, and the company's law-agent 400 shares. . . . It is explained that no communication of any kind was made to the creditors of said company as to the affairs thereof prior to said meeting. . . . The respondent is informed, and believes and avers, that the object of said meeting and this liquidation is to enable the shareholders to form a new company to secure and take over the expensive plant and machinery of the present company at a greatly depreciated price. . . . The respondent believes and avers that questions of liability relative to the shares and the calls in arrear will require to be investigated in the course of the liquidation, and it is necessary in the interests of the creditors that some independent person not connected with the company or the shareholders should be appointed to the office of liquidator, and specially to attend to the creditors' interests in the transfer of the assets to any new company. The said William Hardie was connected with the original formation of the company, and he is the holder of 600 shares therein. Moreover, from the long distance between his residence and place of business in Greenock and the company's works at Uphall, about 12 miles from Edinburgh, where the whole assets are situated, it is highly inconvenient and inexpedient that his appointment as liquidator should be continued."

The petitioners thereafter on 22nd February lodged a minute in which they made, *inter alia*, the following statements:—"2200 shares and 500 shares were allotted to Messrs M'Knight & Marshall respectively, but these persons received no part of said shares in respect of services rendered in forming the company or as payment for the value of the business. . . . It is denied that the shares were allotted to their friends, and that they have all along exercised the controlling power in the company. Out of a voting power of 899 votes Messrs M'Knight & Marshall, together, had only 306 votes. The whole shareholders, with three exceptions, were men of substance, as is shown by the fact that the whole share capital of £6650 issued by the company has been fully paid up except to the extent of £570. . . . By far the larger number of the shareholders of the company were represented at the said meeting, either personally or by mandatories, and the resolution to wind up the company voluntarily was passed by the meeting unanimously. Since the said meeting the liquidator has received from all the shareholders of the company not represented at the meeting, with two exceptions, written intimation of their concurrence in the resolution adopted, and in the present application for supervision order. The two shareholders whose written consents have not been received are in arrear in payment of calls, and are therefore not entitled to any voice in the deliberations of the company. An approximate state of the company's affairs as at 26th January 1892 has been made up by the liquidator. . . . From this state it will be seen that the company's liabilities, exclusive of liabilities to shareholders, and to the landlords for breach of contracts of lease, amount to £1164, 2s. 10d., while the assets, exclusive of value of erections and machinery, amount to £500, thus showing that the company has no funds for conducting business, and that the result of liquidation depends on the price to be realised from the sale of the works. With reference to the statement that the creditors of the company have not been consulted with regard to the liquidation, there is no statutory obligation to consult creditors prior to the adoption of a resolution for winding up. After the said resolution was adopted it was duly intimated in the *Edinburgh Gazette* of 29th January 1892, a copy of which is herewith produced, and on the present petition being presented the liquidator issued circular letters to each of the trade creditors of the company, explaining matters, and asking their concurrence in the course adopted. Creditors representing a substantial amount have intimated their concurrence. The liquidator William Hardie was in no way connected with the original formation of the company, beyond subscribing the memorandum of association in respect of certain shares which he had agreed to take. He was not acquainted with either Mr M'Knight or Mr Marshall until after he had agreed to take shares in the company. His holding of 600 fully paid-up shares in the company affords the best possible guarantee for his realising the company's assets to the greatest advantage, his sole prospect of any return for his money being contingent upon the company's creditors being first paid in full."

Argued for the respondent—The Court had power to remove a liquidator appointed in a voluntary winding-up—Act of 1862, secs. 141-150; Buckley, pp. 294-5. The petitioner's appointment was open to grave objection, on the ground that he was a

shareholder, and had been a director of the company—*Northumberland and Durham District Banking Company*, 1858, 2 De Gex & Jones, 508. A liquidator in a voluntary winding-up had power to sell the whole property of the company without the authority of the Court—Act of 1862, secs. 95 (3) and 133 (7). The petitioner's interests as present shareholder and past director might be at variance with his duties as liquidator, and the respondent had to complain that he had repeatedly applied for information without success. In sequestrations it had been held a sufficient objection to the election of a party as trustee that he had intromitted with the bankrupt's estate as trustee prior to the sequestration—*Mowbray* v. *Bruce*, November 13, 1821, 1 S. 132; *Macfarlane* v. *Grieve*, January 29, 1848, 10 D. 551. The position of a trustee in bankruptcy had been held in England to be analogous to that of a liquidator in the winding-up of a company—*Marseilles Extension Railway and Land Company*, 1867, L.R., 4 Eq. 692. The creditors should have been consulted before the appointment of a shareholder as liquidator was made, and the subsequent concurrence of some of the creditors should be disregarded, as the respondent had not been furnished with a list of the creditors, though he had asked for it, and had therefore been unable to approach them. The Court might have regard to the wishes of creditors—Act of 1862, sec. 149—and in the whole circumstances another liquidator should be appointed in place of the petitioner.

The petitioners argued—The liquidation was a voluntary one, and it was not necessary that a meeting of creditors should be called. If they had anything to complain of, they had their remedy under the statute. The petitioner was the unanimous choice of the shareholders, and it would be a strong step to remove him, even if all the creditors concurred in asking the Court to do so. As a matter of fact the respondent was the only objecting creditor, and thirteen creditors, with claims amounting to £621, 3s. 3d., had expressed their approval of his appointment. In these circumstances no reason had been given to warrant the petitioner's removal from the office of liquidator, but at the same time he was quite willing that the Court should order any proposed sale of the property of the company to be submitted for the approval of the judge supervising the liquidation.

At advising—

LORD PRESIDENT—The respondent in this case does not oppose the granting of the supervision order, which will therefore be granted, but he asks that the liquidator appointed by the shareholders should be removed and another appointed in his place. It is not suggested that we should saddle the estate with the expense of an additional liquidator, which it is competent to do under the section of the statute. We must therefore face the question whether due cause has been shown for the removal of Mr Hardie, the liquidator appointed by the shareholders. Now, it is I think very important to observe that Mr Hardie is the unanimous choice of the shareholders, and that all the creditors with the exception of the respondent, who have expressed an opinion upon the matter—all having been asked to do so—have expressed an opinion in favour of the continuance of Mr Hardie's administration. That is a material fact in the case, and is one which to a large extent displaces the objection first urged against him, founded on the fact that he is a shareholder.

It was further urged that Mr Hardie was a director of the company, and if that had been so, it might have raised a question of a different complexion, but it is now explained that Mr Hardie was not a director at the date of the liquidation, but merely during the first year of the company's existence. Accordingly I do not think that we are called upon to assign high importance to his past directorship, but leaving this to be decided on its merits when the question arises I confess to thinking that no adequate cause has been shown for removing Mr Hardie from the office of liquidator. It is true that he is a shareholder, but it is not asserted that he is in arrears as regards the calls, and he has therefore a strong interest to see that other shareholders pay up the calls due by them. It has not been shown that he has any interest adverse to a favourable realisation of the estate, and nothing has been said against him personally. He is a business man, quite able to wind up what is not a large estate.

As the Dean has stated that he has no objection to the insertion of the condition that the liquidator should consult the Court before any sale of the estate is carried through, I think that condition should be inserted in our interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Direct and ordain that the voluntary winding-up of John M'Knight & Company, Limited, resolved upon by the members of the said company on 26th January 1892, be continued, but subject to the supervision of the Court in terms of the Companies Act 1862 to 1886: Confirm the appointment of William Hardie, chartered accountant, Greenock, as liquidator of said company in terms of and with all the powers conferred by said Acts: Declare that any of the proceedings under the voluntary winding-up may be adopted as the Court may think fit: And declare that the creditors, contributories, and liquidator of the said company, and all other persons interested, are to be at liberty to apply to the Court as there may be just occasion: And further direct and ordain that unless and until it shall be otherwise directed and ordained by the Court the liquidator shall not dispose of the company's works except with the special leave of

the Court: Direct that the expenses of this application for a supervision order be treated as expenses in the liquidation, and decern: Find the respondent Daniel Montgomerie liable in the expenses occasioned by his appearing and opposing the granting of the petition," &c.

Counsel for Petitioners—D.-F. Balfour, Q.C.—M'Lennan. Agent—James Skinner, S.S.C.

Counsel for Respondent — Strachan — Clyde. Agent—James Ayton, Solicitor.

Tuesday, March 1.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HOUSTON *v.* BUCHANAN.

Superior and Vassal—Casualty—Composition—Implied Entry—Infeftment—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94).

The Conveyancing Act, section 4, sub-section 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 . . . duly entered with the nearest superior to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice."

A vassal was infeft in certain heritable subjects, and the infeftment was registered on 19th May 1873. It was admitted that the last vassal died previous to 1873. In an action by the superior for a casualty of composition, *held* that the rental of 1874, the year of the vassal's entry, and not 1873, the year of his infeftment, must be taken as the standard for fixing the amount due to the superior.

George Ludovic Houston, superior of certain subjects in the town of Johnstone, Renfrewshire, sued William Buchanan there for a casualty, being one year's rent of the subjects due upon the 1st October 1874, being the date of the commencement of the Conveyancing Act 1874. The rent for the year 1874-75 was not less than £80, 6s. The sum claimed as casualty was £65.

The subjects were feued out about the beginning of the present century by the pursuer's author, and came to belong to William Robertson, cotton-spinner, in Johnstone, who on 3rd June 1866 was entered with the superior by precept of *clare constat* in his favour of that date. The precept bore that he was then of full age, and he was in point of fact 34 years of age, having been born on 30th April 1872. Upon this precept Robertson was infeft, conform to instrument of sasine in his favour dated 19th July, and recorded in the Particular Register of Sasines for the county of Renfrew 17th September 1816. Robertson was the last-entered vassal in the subjects under the law as it stood prior to the passing of the Conveyancing (Scotland) Act 1874. He went to America about 1834 or 1835, and the pursuer averred that he died there in 1856, when the subjects fell into non-entry. The defender acquired the subjects by disposition in his favour, dated May and recorded on 19th May 1873. He was thus infeft in the subjects, and on 1st October 1874, by the operation of the Conveyancing (Scotland) Act, he was impliedly entered with the pursuer as vassal in them.

The defender averred that as the date of the death of the last-entered vassal was not stated, the year of infeftment must be taken as the date on which the casualty became payable, and he consigned £48 to meet the superior's claim.

After proof the Lord Ordinary (STORMONTH DARLING) upon 9th January 1892 pronounced this interlocutor:—"The Lord Ordinary having considered the cause, finds, decerns, and declares that in consequence of the death of William Robertson, cotton-spinner in Johnstone, who was the vassal last vest in all and whole the subjects described in the summons, a casualty, being one year's rent of the said subjects, became due to the pursuer as superior of the said subjects upon the 1st day of October 1874, being the date of the commencement of the Conveyancing (Scotland) Act 1874, and that the said casualty is still unpaid, and that the rents, maills, and duties of the said subjects, after the date of citation following upon the said summons, do belong to the pursuer as superior thereof, until the said casualty be otherwise paid to the pursuer; decerns and ordains the defender forthwith to make payment to the pursuer of the sum of £48, 1s. sterling, the rent of the said subjects, subject to the usual deductions, for the year from Whitsunday 1873 to Whitsunday 1874, being the year in which the defender must be held to have been duly entered with the pursuer as superior of the said subjects; finds no expenses due to or by either party, and decerns."

The pursuer reclaimed, and argued—The year on which the casualty fell to be paid was 1874-1875. The defender was infeft in 1873, and impliedly entered by the statute in 1874. By the old law the date of entry was the date of the charter of confirmation granted by the superior, although the charter once granted operated *retro* to the date of the infeftment. The statute provided that after October 1874 the vassal's infeftment should be of the same effect as if the superior had granted to him a writ of confirmation. If the date of infeftment had been after October 1874, that would undoubtedly have been the date on which the casualty was to be reckoned, but the process was not complete without both the infeftment and the Act working together. The Act could not operate *retro*, therefore