There is, however, an averment that the train ran past the station platform unknown to the pursuer. I was doubtful whether this could legitimately be construed to mean that when she proceeded to alight she did not know the train was past the platform and was under the impression the train was opposite it, but I have come to the conclusion that it may.

"I am accordingly of opinion that the proposed issue should be approved,"

The defenders reclaimed, and argued—The action was irrelevant. The accident happened about six p.m. on 22nd September. At that hour there must have been sufficient light for the pursuer to see what she was doing. She ought to have looked before getting out of the compartment or stepping down. It was not averred that she stepped out not knowing that there was no platform. That was necessary to make the case relevant. The cases of *Whittaker* and *Cockle* cited by the Lord Ordinary were distinguishable. In the former there was an invitation to alight, and in the latter it was dark at the time of the accident. There was no invitation to alight here, for the train had overshot the platform. Further, it was not averred that the name of the station was called out after the train had stopped. Calling out the name of the station while the train was in motion was no invitation to alight—*Bridges* v. *North London Railway Company*, reported in a footnote to *Cockle* (*cit. supra*) at p. 459.

Counsel for respondent were not called upon.

LORD PRESIDENT—I am of opinion that this case must go to a jury. I think the Lord Ordinary has dealt so well with the question that I have little to add. There is no doubt that on the averments here this case is a very narrow one. The Lord Ordinary says—"In the present case there is no averment it was not daylight. Nor is there any averment that the place was not reasonably safe for passengers to alight. There is, however, one averment that the train ran past the station platform unknown to the pursuer. I was doubtful whether this could legitimately be construed to mean that when she proceeded to alight she did not know the train was past the platform, and was under the impression the train was opposite it, but I have come to the conclusion that it may." I entirely agree with what the Lord Ordinary there says, and I think it right to add that that is the only relevant averment; and, accordingly, unless the pursuer can prove that averment at the trial, I do not think she has any relevant case at all. In other words, if she proposes to prove condescendence 4 in any other way she will not have a relevant case. But that may be safely entrusted to the Judge at the trial, and if the facts are—as Mr Cooper says they are—that the lady, knowing that she had to go down four feet, stepped off and thus fell, it is clear that there would be no evidence of fault against the Railway Company. But that is on the facts and not on the averments. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD KINNEAR—I also think that this case must go to a jury. I agree that it is a narrow case on the point of relevancy. It is very clear that questions of fact may be raised at the trial which may be of some difficulty, and the jury will have to consider whether the accident was due to the negligence of the railway company or to the pursuer's own rashness in alighting where she was never intended to alight. That is a question of fact, and I think a question for the jury.

LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer and Respondent—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders and Reclaimers—Cooper, K.C.—Grierson. Agent—James Watson, S.S.C.

Friday, December 21.

FIRST DIVISION.

[Lord Johnston, Ordinary.

FIFE COAL COMPANY, LIMITED *v.* BERNARD'S TRUSTEES.

Superior and Vassal—Casualty—Implied Entry—Last-Entered Vassal still Alive—Holding Prohibiting with Irritancy Subinfeudation or Delay in Entering, but not Expressly Stipulating for Payment of a Casualty—Liability of Representatives of Impliedly Entered Vassal for Casualty not Demanded during his Lifetime in Addition to that Due in respect of their Own Implied Entry—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94) *sec.* 4, *sub-secs.* (3) *and* (4).

A feu-charter contained a clause against subinfeudation protected by an irritancy, and a clause providing that the disponees of the vassal must enter with the superior within a year and a day of their dispositions on pain of irritancy of their rights. There was no expressed obligation to pay a casualty on entry. In 1901 the feu was disponed by a duly entered vassal, and the disponee recorded his disposition; and on his death in 1903 leaving a trust-disposition and settlement, his trustees made up a title by notarial instrument which they recorded. While the vassal who had been duly entered and had disponed was still alive, the superior claimed from the trustees two casualties, the one in respect of the truster's implied entry, the other in respect of their own. The trustees denied that any casualty was due, or alternatively more than one.

Held (*aff.* Lord Ordinary Johnston) (1) that, *following Dick Lauder* v. *Thornton*, January 23, 1890, 17 R. 320, 27 S.L.R. 455, and *Church of Scotland* v. *Watson*, January 14, 1905, 7 F. 395, 42 S.L.R. 299, a casualty was due *ex contractu* in respect of the truster's implied entry, and another casualty in respect of the trustees' own implied entry; and (2) that, *distinguishing Mounsey* v. *Palmer*, November 20, 1884, 12 R. 236, 22 S.L.R. 118, the trustees were liable for the two casualties, the first as representatives of the truster, and the second in respect of their own implied entry.

Question (*per* Lord President), whether if the trustees had not been representatives of their predecessor, the truster, the casualty due in respect of his implied entry could have been recovered from them even, on the authority of *Morrison's Trustees* v. *Webster*, May 16, 1878, 5 R. 800, 15 S.L.R. 559, by a poinding of the ground; and whether that case should not be reconsidered.

Process — Particular Action — Statutory Action in Lieu of Declarator of Non-Entry—Last-Entered Vassal Still Alive—Adaptation of Statutory Action for Recovery of a Casualty on a Conventional Non-Entry—Competency—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4, *sub-sec.* (4), *Schedule B.*

In an action for recovery of a casualty raised during the lifetime of the last-entered vassal, the summons contained conclusions similar to those of the statutory action introduced by the Conveyancing (Scotland) Act 1874 in lieu of the declarator of non-entry.

Objection being taken to the competency of the action as laid on the ground that the statutory action, which this was alleged to be, could not be brought where, as here, a declarator of non-entry was, under the old law, incompetent, the pursuers restricted the summons by deleting the inapposite conclusions, viz., those for the rents of the lands, &c. during non-payment.

Held that the summons had been competently restricted, and that, so restricted, the action was competent. *Opinion* (*per* Lord Johnston, Ordinary), that the form of action prescribed by Schedule B annexed to the Conveyancing (Scotland) Act 1874 was capable of being adapted to other cases than those of non-entry proper—*e.g.*, cases of conventional non-entry or non-entry by contract.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 4, which provides, *inter alia*, that infeftment shall imply entry with superior, enacts—"(3) 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 salutum 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 the vassal to enter or to pay such casualty irrespective of his entering. (4) No lands shall, after the commencement of this Act, be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands . . . may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action . . . and the summons in such action may be in or as nearly as may be in the form of Schedule B hereunto annexed."

The form of summons given in Schedule B has the following conclusions—"Therefore it ought and should be found and declared . . . that in consequence of the death of C [*or otherwise as the case may be*], who was the vassal last vest and seised in all and whole . . . a casualty, being one year's rent of the lands, became due to . . . as superior of the said lands upon the . . day of . . being the date of the death of the said C [*or* the date of the infeftment of the said . in the said lands . . .] [*or otherwise as the case may be*] and that the said casualty is still unpaid, and that the full rents, maills, and duties of the said lands . . . . after the date of citation herein, do belong to the pursuer . . . as superior thereof until the said casualty . . . be otherwise paid . . . And the said . . . ought and should be decerned . . . forthwith to make payment to the pursuer . . . of the said sum of . . . being the casualty foresaid [*or* of the sum of . . . or such other sum . . . as shall be ascertained . . . to be one year's rent of the said lands] . . . . . ."

On 18th July 1905 the Fife Coal Company, Limited, proprietors of the lands of Foulford, *alias* Dewar's Beath, Fife, raised an action against Robert Addison, spirit merchant, Falkirk, and another, the trustees and executors of the late Thomas Bernard, spirit merchant, Cowdenbeath, as such trustees and as his representatives and successors in a certain portion of the said lands which was held in feu.

The conclusions of the summons, *inter alia*, were—"Therefore (*First*) it ought and should be found and declared by decree of the Lords of our said Council and Session, that in consequence of the infeftment of the said now deceased Thomas Bernard in . . . on 16th May 1901, being the date of

the registration of the infeftment of the said Thomas Bernard in the appropriate Register of Sasines, a casualty, being one year's rent of the said subjects, became due to the pursuers as superiors thereof on or about 17th May 1902, being a year and a day after the date of the said infeftment of the said Thomas Bernard, and that the said casualty is now exigible and still unpaid, that the defenders as trustees and executors and personal representatives and successors, and as vested in the said subjects all as aforesaid, or in one or other of these capacities, are liable to make payment of the same to the pursuers, *and that the full rents, maills, and duties of the said subjects after the date of citation herein do belong to the pursuers as superiors thereof until the said casualty and the expenses aftermentioned be otherwise paid to the pursuers.* And the defenders as trustees and executors foresaid ought and should be decerned and ordained by decree foresaid forthwith to make payment to the pursuers of the sum of £150 sterling, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon to be the one year's rent of the said subjects due and exigible in name of casualty foresaid; (*Second*) It ought and should be found and declared by decree foresaid that in consequence of the infeftment of the defenders as trustees and executors foresaid in the said subjects on 6th January 1904, being the date of the registration of their infeftment in the appropriate Register of Sasines, another casualty, being one year's rent of the said subjects, became due to the pursuers as superiors thereof on or about 7th January 1905, being a year and a day after the date of the defenders' said infeftment, and that the said casualty is now exigible and still unpaid, that the defenders as trustees and executors and personal representatives and successors, and as vested in the said subjects, all as aforesaid, or in one or other of these capacities, are liable to make payment of the same to the pursuers, *and that the full rents, maills, and duties of the said subjects after the date of citation herein do belong to the pursuers as superiors thereof until the said casualty and the expenses after-mentioned be otherwise paid to the pursuers.* And the defenders as trustees and executors foresaid ought and should be decerned and ordained by decree foresaid forthwith to make payment to the pursuers of the sum of £150 sterling, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon to be the one year's rent of the said subjects due and exigible in name of casualty foresaid. . . ."

[By minute of restriction lodged subsequent to the Lord Ordinary taking the case to avizandum, the pursuers departed from the conclusions of the summons so far as printed in italics and also restricted the amount of their claim under the second conclusion to £8, 5s., which second restriction they had already inserted in the fourth article of their condescendence on learning that the defenders held for the heir.]

The pursuers were the successors of Robert Beath of Foulford, who by feu-charter dated 29th June 1829 had given off the portion of the lands now held by the defenders to one John Swan. The said feu-charter in the *tenendas* and *reddendo* clauses provided—"To be holden and to hold all and sundry the lands and others above disponed by the said John Swan and his foresaids of and under me and my heirs and successors whomsoever, as their immediate lawful superiors of the same, in feu-farm, fee, and heritage for ever . . . Giving therefor yearly the said John Swan and his foresaids for the lands and others above disponed to me and my foresaids, immediate lawful superiors of the same, the sum of eight pounds five shillings sterling in name of feu-duty at the term of Martinmas yearly . . . But with and under these conditions always, as it is hereby expressly provided and declared, that it shall not be lawful to nor in the power of the said John Swan or his foresaids at any time hereafter to sell, grant, or sub-feu the subjects hereby disponed, or any part thereof, to be holden of themselves, but that all dispositions and other deeds of alienation thereof shall be granted to be holden immediately of and under me and my foresaids for payment of the feu-duty and performance of the other prestations before written: And in case the said John Swan or his foresaids shall do on the contrary, then all such sales, grants, or sub-feus holding of them, with the several dispositions and feu-rights, and all that may or can follow thereon, shall *ipso facto* be void and null, and the said subjects shall return and devolve to the granter of such dispositions without the necessity of any declarator or process of law: . . . . . And with and under this condition also, as it is hereby further provided and declared, that all purchasers from or disponees of the vassals in the subjects before disponed shall be obliged to enter with me or my foresaids within year and day of the date of such sales or dispositions in their favour: And in case they shall fail or refuse so to do, their rights to the said subjects shall become null and void, and the subjects so sold or disponed shall be held and considered still to remain with the former vassal, and be subject to his debts and deeds, notwithstanding the disposition or other conveyance to be granted by him; and which conditions, provisions, and declarations before written shall be verbatim engrossed in the infeftments to follow hereon, and in all the subsequent charters, precepts of clare constat, dispositions, sasines, and other rights and investitures of the subjects before disponed, otherwise the same shall be void and null to all intents and purposes: And these for all other burdens, exactions, demands, or secular services whatever which can be anyways exacted for the lands and others foresaid, or any part thereof in all time coming."

The defenders pleaded — "(1) The action is incompetent, in respect that the last-entered vassals who paid a casualty are still alive. . . . (3) In any event, the de-

fenders are liable in only one casualty."

The facts of the case are given in the opinion of the Lord Ordinary (JOHNSTON), who, on 10th January 1906, decerned in terms of the first and second conclusions of the summons as restricted, and continued the cause that parties might be heard as to the adjustment of the figures required for decree under the petitory conclusions.

Opinion.—"The pursuers, who are the Fife Coal Company, Limited, are superiors of property in Fife known as Dewar's Beath. Part of these lands were feued off in 1829 by the pursuers' predecessors to a certain John Swan. They had come into the hands of David and William C Crawford, who were entered with the pursuers' predecessors in 1885. By disposition dated 18th and 22nd March and 15th May Thomas Bernard acquired the subjects from David and William C Crawford, and made up his title by recording it in the General Register of Sasines on 16th May 1901. Thomas Bernard dying in 1903 and leaving a general trust-disposition and settlement, his trustees made up their title by notarial instrument, and recorded the same in the Register of Sasines on 6th January 1904.

"It follows that both Thomas Bernard in 1901 and his trustees in 1904 were infeft and impliedly entered with the pursuers in the sense and to the effect of the fourth section of the Conveyancing Act 1874 in the subjects of the feu. The present action has been raised to determine the effect of their infeftment and implied entry under the statute, it being common ground that the Crawfords, who were entered in 1885 and last paid a casualty, are still in life. The pursuers claim a composition as due on the infeftment and entry of Thomas Bernard in 1901, and maintain that for payment of that casualty his trustees, as representing him, are still liable. They further claimed a composition in respect of the infeftment and implied entry of the trustees themselves in 1904, but on exhibition of Mr Bernard's settlement, which shows that the trustees hold for the heir, they now restrict their second demand to a claim for relief.

"The question whether either or both of these demands is well founded, the last-entered vassals being still alive, depends on the terms of the title to the subjects, and on the construction of the Conveyancing Act of 1874. The subjects are held on feu-charter, the *tenendas* and *reddendo* clauses of which bear that the subjects were to be holden by the vassal and his heirs and successors of and under the superior and his heirs and successors, as the immediate lawful superiors of the same, in feu farm, fee, and heritage for ever, giving therefor yearly the vassal and his foresaids for the lands and others above disponed, to the superior and his foresaids, immediate lawful superiors of the same, the sum of £8, 5s. sterling in name of feu-duty yearly, but with and under the conditions always:—

"First, that it should not be lawful to the vassal or his foresaids at any time hereafter to sell, grant, or sub-feu the subjects thereby disponed, or any part thereof to be holden of themselves, but that all dispositions and other deeds of alienation thereof should be granted, to be holden of and immediately under the granter and his foresaids, for payment of the feu-duty and performance of the other prestations before written. This is a very complete prohibition of subinfeudation.

"Second, That in case the vassal or his foresaids should do on the contrary, that is, should sell, grant, or sub-feu, to be holden of themselves, then all such sales, grants, or sub-feus holden of them, with the several dispositions and feu-rights, and all that may or can follow thereon, shall, *ipso facto*, be void and null, and the said subjects shall return aud devolve to the granter of such disposition without the necessity of declarator or process of law.

"Third, That all purchasers from or disponees of the vassals of the subjects before disponed shall be obliged to enter with the superior within year and day of the disposition and sales in their favour, and, in case they shall fail or refuse to do so, their rights to the said subjects shall become null and void, and the subjects so sold and disponed shall be held and considered still to remain with the former vassal, and be subject to his debts and deeds, notwithstanding the disposition or other conveyance granted by him.

"These conditions are directed to be engrossed in all subsequent writs by progress under pain of nullity, 'and these for all other burdens, exactions, demands, or secular services whatever, which can be anyways exacted for the lands and others foresaid, or any part thereof, in all time coming.'

"To recapitulate them there is—1st, A good prohibition against subinfeudation; 2nd, A clause irritant and resolutive of any deeds creating a subaltern holding; 3rd, An obligation on singular successors of the vassal to enter within year and day on pain of irritancy of the deeds in their favour. But there is— 1st, No express condition that the compulsory entry shall be on payment of a composition; and consequently—2nd, No taxation of the composition; and 3rd, No irritancy of the vassal's right on breach of the obligation not to sub-feu, but only of that of his subfeuar.

"There is thus probably a slight difference in the facts between those of the present case and those of *Dick Lauder* v. *Thornton*, 17 R. 320; and the *Church of Scotland* v. *Watson*, 7 F. 395, to be afterwards adverted to.

"In respect that subinfeudation is absolutely prohibited, it followed that prior to, or irrespective of the Act of 1874, the only manner in which a purchaser of the lands could obtain a real right was by entry with the superior. His disposition must have contained an *a me* holding only, with procuratory of resignation. He might have been content with a personal title, but if he wanted a real title he must have gone to the superior and entered. There may be some question whether an *a me vel de me* title

would have been absolutely invalid, the *de me* title being to be used for temporary purposes only, and to be immediately confirmed, but I do not think that it is necessary to consider this question, which has already been sufficiently dealt with by Lord Kinnear in the case of the *Church of Scotland* v. *Watson, supra*. If, then, the only way in which the disponee could obtain a real title to the lands was by entry with the superior, it behoved Mr Bernard, as it seems to me, before recording it to consider what the effect of recording his disposition on 16th May 1901 would be by virtue of the Conveyanciug Act 1874, just as much as, before 1874, to consider what the effect of resigning into his superior's hands would have been. The recording of his title would infeft him, and impliedly enter him, and so give him a real right. If he did not desire to have the benefit of that statute, and so to obtain a real right, there was nothing to oblige him to record his title; it was quite open to him to leave it unrecorded, just as, prior to the passing of the Act, it was open to him to remain uninfeft and unentered, which from the nature of his title were one and the same thing. But he cannot take the benefit of the statute and repudiate the consequences. Having thus elected to record his title and so take the benefit of the statute, he has now got a real right, and the question to be determined is, what are the statutory consequences? In fact the case raises what is really a question of election, and the contention of the defenders appears to me to approbate and at the same time to reprobate both the statute and their own title.

"Having recorded the disposition in his favour, which, being in the modern curt form without a *tenendas*, must be construed, the feu being subject to a valid prohibition against subinfeudation, as a disposition *a me* only, Mr Bernard claims to hold under a title one of the conditions of which is that he shall enter with the superior within year and day. That he has entered is the result of the two decisions to which I have already referred, and after the exhaustive treatment which the subject has received in both cases, and particularly in the last of the two, I think that it would not be my province to add anything on the general question.

"I pass therefore to the specialties in the present case.

"In *Dick Lauder's* case, *supra*, it was a condition of the feu-contract that the vassals should pay not only the feu-duties but also a duplicand on the entry of each heir and singular successor, and subinfeudation was prohibited. But the irritancy clause was much more sweeping than in the present case. It irritated not merely deeds in contravention of the conditions of the feu-right but also the feu itself, and returned the subjects to the superior either on transmission, contrary to the terms of the feu-contract, or on omission of the disponee to enter.

"In both the cases submitted to the Court in the *Church of Scotland* v. *Watson, supra*, there were good prohibitions against subinfeudation, and the *tenendas* contained an express obligation to pay a duplicand on the entry of heirs and singular successors. But in one of these there was, and in the other there was not, an express obligation on singular successors to enter within a definite limited period. and in one of them the irritancy or contravention struck at the contravening deed of transmission, and in the other at the original right.

"The only distinction, then, between the present case and one at least of the cases already dealt with by the Court, viz., the first branch of the *Church of Scotland* case, is that the singular successor is not expressly called on to pay on his entry, as a condition of the contract, either a taxed or an untaxed entry, and I have to consider whether that distinction prevents the judgment in the *Church of Scotland* case being applicable to the present. I do not think that it does. The condition of the feu-right is that the singular successor shall enter. I do not think that it was necessary to add, 'and shall pay the dues of entry.' I think that that is implied. The mention of these is only necessary where, in favour of the vassal, they are to be restricted or taxed, and where, in favour of the superior, they are to be enlarged. It may be that this involves the superior in an appeal both to contract and to tenure—to contract for the contract obligation on the singular successor who would hold under his grant to enter, and to tenure for the obligation to pay the dues of entry and the measure of these dues. But the fact that the composition is not expressed does not affect the obligation to enter within the period stated, irrespective of the death of the last-entered vassal. Nor does the obligation on the singular successor so to enter impose on the superior an obligation to enter the singular successor gratis. The obligation to enter infers to enter with the ordinary consequences, and to tender with the resignation the dues of entry. That the entry is now effected without any act of the superior does not prejudice the superior, for the statute of 1874, sec. 4, sub-sec. (3), expressly says in its first paragraph 'such implied entry shall not prejudice or affect the right or title of any superior to any casualties . . . which may be due or exigible in respect of the land *at* or prior to the date of such entry.' Therefore, though the entry is effected *vi statuti* and before the dues of entry can be demanded, this is not to discharge them.

"But there is a further defence stated by Mr Bernard's trustees, which though entirely technical must be considered. They say, Be it that the pursuers' claim is good, they have mistaken their remedy; they have brought the statutory action in lieu of declarator of non-entry where they could not have brought a declarator of non-entry; they have founded their action on tenure and not upon contract. I think that there has been some confusion in the mind of the draughtsman of the summons. He has, I think, skilfully adapted the words

of the Schedule B form of the statute to the situation, but he has incautiously and probably *per incuriam* allowed an inapposite sentence or conclusion to creep in, viz., 'And that the full rents, maills, and duties of the said subjects after the date of citation herein do belong to the pursuers, as superiors thereof, until the said casualty and the expenses after mentioned be otherwise paid to the pursuers.' Excluding from consideration this claim or conclusion, there is nothing in the terms of the declaratory conclusion otherwise which I could not find and declare; nay, unless I could truly find in law what it seeks to have declared, I do not think that I could decern in terms of the petitory conclusion. In fact I think it is a mistake to suppose, as the defenders appear to maintain, that section 4 of the statute has any monopoly of the set of phrases which make up the conclusions of Schedule B. If, by alteration, they can be adapted to other circumstances, whoever wants them is welcome to use them. Barring the paragraph above quoted, the form of Schedule B admits of being adapted, and I think has been quite properly adapted, to the present case. And I would observe that there is, at least to my mind, some doubt whether even the precise statutory form is restricted to a proper case of non-entry. It contemplates that a casualty may become due not merely 'on the death of C,' but 'or otherwise as the case may be.' I cannot find any meaning for these latter words, unless they are meant to cover cases of conventional non-entry or non-entry by contract. There is in them, in any view, some justification for the mistake, if it be a mistake, of the draughtsman in inserting the conclusion to which I have above adverted. It may not be, in the view of the statute, so inapposite as I think to the present circumstances; but I prefer to take it as inapposite. So doing, it does not appear to me to do irreparable harm to the summons. If the other conclusions are based on a well-founded view of the pursuers' rights and remedies, I see no reason why they should not get decree so far as they are entitled, though they must be refused that part to which they are not entitled. If the pursuers prefer they may either restrict their summons or crave leave to amend. But I am prepared to give them decree as the summons stands, with the exclusion only of the conclusion above quoted.

"I have not omitted to consider the *Drumsheugh Baths* case, 17 R. 937, upon which great stress was laid by counsel for the defender, but it does not appear to me to have any bearing on the present case. There was there no prohibition against subinfeudation.

"The summons proceeds that it should be declared that in consequence of the infeftment of the now deceased Thomas Bernard in the subjects in question on 16th May 1901, being the date of the registration of his infeftment in the appropriate Register of Sasines, a casualty became due to the superiors, &c. Now, though this borrows to a certain extent the scheme of the statutory summons, it is impossible to contend that this is an action founded on tenure or the statutory equivalent of a common law action of declarator of non-entry. I do not see anything in it really (barring the, as I think, inapposite conclusion to which I have referred) which makes it anything but a petitory summons, prefaced by a declarator of the precise circumstances which led up to the petitory conclusion.

"I am not affected by the use of the word 'casualty' either in the statute or the summons. No doubt the strict feudal meaning of the term is limited, but it is used in the statute and in the schedule in the wider and more popular sense, and may be so read in the present summons.

"I now learn that the pursuer has since the case was taken to avizandum lodged a minute of restriction of his summons in the direction which I have indicated above. I shall therefore find in terms of the declaratory conclusions, as restricted, of both branches of the summons, and continue the cause that the parties may be heard as to the adjustment of the figures required for decree under the petitory conclusions."

The defenders reclaimed, and argued—(1) The action was, assuming a payment were du the pursuers, not in competent form. The summons was in the form of Schedule B of the Conveyancing Act 1874. The former entered vassals were still alive, and consequently the superior, prior to the 1874 Act, would not have been in a position to sue a declarator of non-entry. The form of summons given in Schedule B, however, was only available where the superior would have, prior to the 1874 Act, been able to do so—1874 Act, section 4, subsection (4); *Dick Lauder* v. *Thornton*, January 23, 1890, 17 R. 320, *per* Lord Ordinary (Kinnear) at p. 325, 27 S.L.R. 455. The alternative conclusion for payment in that case, alone saved the action from dismissal; the first conclusion—*i.e.*, the statutory action—was dismissed by the Lord Ordinary (Lord Kinnear), as incompetent. See also *Church of Scotland* v. *Watson*, December 24, 1904, 7 F. 395 at p. 408, 42 S.L.R. 299 at p. 305; *Governors of Heriot's Trust* v. *Drumsheugh Baths Company*, June 13, 1890, 17 R. 937, 27 S.L.R. 751. Every material part of the statutory action had here been adopted. A superior prior to 1874 had no means of recovering a casualty in circumstances like the present. This was therefore an attempt to make use of a statutory remedy to extend, contrary to the express terms of the Act, the rights of the superior. The minute of restriction did not render the action competent. An action based on real right could not be turned into an action on contract. Both the question of right and the nature of the fund were different. (2) No casualty was due. Prior to 1874 the superior could not have got a casualty, the last-entered vassal being still alive. The charter contained no express obligation to pay on entry and the fee was full. In *Dick Lauder* (*cit. supra*) there was an obligation to pay on entry fortified by a clause of irritancy. In *Watson* (*cit. supra*)

there was again an obligation to pay on entry. If that had been intended here, it should have been expressly stipulated for, being contrary to feudal principles and not to be implied. A prohibition against subinfeudation was not equivalent to a contractual obligation to enter and to pay when entering. Reference was also made to *Morris* v. *Brisbane*, February 21, 1877, 4 R. 515, 14 S.L.R. 369. (3) (*Alternatively*) Only one casualty was due, viz., that claimed in respect of the implied entry of the trustees — *Mounsey* v. *Palmer*, November 20, 1884, 12 R. 236, 22 S.L.R. 118. A casualty was not due till demanded, accordingly, a superior who did not claim payment during his vassal's life lost his right to it on the vassal's death—*Earl of Cassillis* v. *Lord Bargeny* (1682), M. 6414; *Tailors of Glasgow* v. *Blackie*, June 11, 1851, 13 D. 1073; *Morrison's Trustees* v. *Webster*, May 16, 1878, 5 R. 800, 15 S.L.R. 559; *Motherwell* v. *Manwell*, March 6, 1903, 5 F. 619, 40 S.L.R. 429; *Governors of Trades Maiden Hospital* v. *Mackersy*, November 13, 1906, 44 S.L.R. 45.

Argued for respondents—(1) The action was competent. The summons having been restricted, the pursuers had no longer any title or interest to object. The statute had not been given a monopoly of the language used in Schedule B, nor had the schedule been literally followed. Besides, the schedule might be taken advantage of, so far as it was applicable, for it contained the words—" . . . [*Or otherwise as the case may be*]." In *Dick Lauder* (*cit. sup.*) this point was not decided, and in the *Drumsheugh Baths* case (*cit. sup.*) it was the claim not the summons that was incompetent. The present action claimed payment of a contract debt and so far as the summons did so it was competent. (2) The casualties claimed were due. The feu-charter contained all that was essential to support the claim — (*a*) the prohibition against subinfeudation and (*b*) the obligation to enter—*Dick Lauder* (*cit. sup.*). Under the old law a disponee could have had no real right unless he had adopted the manner of entry provided for by the charter, viz., by resignation, and that within year and day. The obligation to enter implied payment of the dues of entry—Duff's Feudal Conveyancing 225—and the Act of 1874 reserved to the superior all his old remedies—section 4, sub-section (3). The distinction between this case and that of *Watson* (*cit. sup.*), founded on by the reclaimers was immaterial. (3) Two casualties were due. This case was in a different region from that of *Mounsey* (*cit. sup.*)—viz., contract and not tenure. The vassal had taken advantage of the Act to enter and was therefore liable for the dues of entry. There being a direct obligation to enter, to stipulate for payment would have been superfluous—*Rankine* v. *Logie Den Land Company*, July 19, 1902, 4 F. 1074, 40 S.L.R. 4. There was nothing in *Morrison's Trustees* (*cit. sup.*) inconsistent with the superior getting payment of two casualties at the same time. The opinion of Lord Rutherfurd Clark in that case supported the respondent's contention, and was reversed only on other grounds. Reference was also made to *Marshall* v. *Callander & Trossachs Hydropathic Company, Limited*, July 18, 1895, 22 R. 954, 32 S.L.R. 693; and to *Lord Advocate* v. *Moray*, February 16, 1894, 21 R. 553, 31 S.L.R. 432. [The LORD PRESIDENT referred to *Magistrates of Edinburgh* v. *Horsburgh*, May 16, 1831, 12 S. 593]. The case of *Mackersy* (*cit. sup.*) cited by the reclaimers was inapplicable as it dealt with section 5 of the 1874 Act, as to which no question was raised.

LORD PRESIDENT—This is an action by the superior of certain lands against the trustees of Thomas Bernard presently infeft in said lands, and concludes for payment of (1) a casualty of a year's rent due by the deceased Bernard, and now due by the defenders as presently representing him, and (2) a casualty of relief for their own infeftment.

The pursuers are the successors in title of Mr Robert Beath, who granted the feu. The charter contains a *tenendas* expressing an *a me* holding, and a *reddendo* expressing the feu-duty only, but it also contains an express clause against subinfeudation fenced with an irritancy, and a further condition by which all purchasers of disponees of the vassals are bound to enter within a year and day of the sale or disposition under pain of irritancy of their rights.

Under this charter David and William Crawford stood in the year 1901 as vassals duly entered and infeft. In that year they sold to Bernard, and granted a disposition, dated 15th May, in terms of the charter. That disposition was recorded in the Register of Sasines on 16th May of same year. Bernard died in 1903 leaving a trust-disposition and settlement in favour of the defenders, who thereupon executed a notarial instrument in their own favour, which they recorded in 1904.

The defenders do not object to paying a relief duty, but to the demand as made they enter three objections as follows:—

(1) They say the action is incompetent in form, (2) they say that no composition is due, (3) they say if the composition is due then no further relief duty is due.

It will be convenient to take the first objection last. Dealing with the second objection the defenders are at once faced with the decision of the Court in the cases of *Dick Lauder* v. *Thornton*, and *The Church of Scotland* v. *Watson*, in both of which cases it was held that when there was a casualty stipulated for on every transmission, the superior could sue for such casualty in a personal action even although the vassal who had last paid a casualty was still alive. They seek, however, to distinguish the cases by pointing out what is the fact, viz., that in those cases the payment of a duplicand on entry was made part of the *reddendo*, and could thus be sued for directly just as much as the feu-duty—whereas in the present case there is no expressed obligation to pay composition.

It seems to me that in their argument the defenders mistake the true import of those cases, and endeavour to take as the rule itself what are merely illustrations of the rule. The rule itself embraces both these and the present case. The rule itself necessarily depends on the true import of the provisions of the Act of 1874, and especially section 4 thereof. This section has frequently been made matter of judicial comment, and I need not therefore go through its provisions again. But I remind your Lordships that section 2 enacts that infeftment however affected is made to operate entry, and then section 3 expressly provides that such implied entry shall not prejudice the right of the superior to any casualties—the remedies for the recoveries of which are preserved intact subject only to the proviso that the superior is not to be able to demand any casualty sooner than "he could by the law prior to this Act or the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering."

The matter is easily tested by taking the sub-sections as they follow each other, and seeing what would have been the case if the statute had stopped at the end of each of the earlier ones. If sub-section 2 had stood alone, then the superior's casualty would have been lost, because the vassal would have had an entry without going to the superior at all, and the superior who had *not* granted an entry never had or could have an action for a composition or relief which was only payable on his granting an entry. To avoid this result sub-section 3 was added. Had it stood without the proviso then the superior would in all cases have had a casualty on any new infeftment being taken—for such infeftment would have operated a new entry, and the superior could always make good his casualty when he granted an entry—because he either refused to grant his charter till paid, or if he granted the charter upon the faith of getting the payment he had a personal action for the proper dues of the charter—see *Magistrates of Edinburgh* v. *Horsburgh*, 12 S. 593. To this statement the position arising on transmissions under a double manner of holding forms no exception; for the whole point of that was that the new disponee was infeft on the *de me* precept. Nay more, the device known as the tendering of the heir is just an illustration, for there the superior got his due for the new entry, but his due was only relief.

Then comes the proviso, and the otherwise ever recurrent right of the superior is cut down and brought into harmony with what had been his right under the old law.

The sole question therefore in all these cases really comes to be, is the superior making a demand which under the old law would have been premature. In the ordinary cases, *i.e.*, when there is no prohibition against subinfeudation and the disposition of the vassal is or is equivalent to a disposition with double manner of holding, this will prevent the superior using an implied entry to get a casualty when the last vassal is still alive, or to get two casualties, as was attempted to be done in the case of *Mounsey* v. *Palmer*. But when as in *Dick Lauder's* case and *Watson's* case there was a proviso binding the disponee to enter within a certain period after the date of his disposition, and when the demand made was not before the expiry of that period, then the implied entry gave action as the real entry would have done for the proper dues thereof.

All this is quite independent of whether there was or was not a taxation of the entry dues expressed in the *reddendo*. To effectuate taxation it had to be mentioned elsewhere, and the *reddendo* is quite a proper place to put it.

But the want of it in no way affects the right of action which stands on the broader ground of which the *Magistrates of Edinburgh* v. *Horsburgh* gives an example under the old law.

I am therefore of opinion that the casualty here became due when Bernard having availed himself of the implied entry, the period of one year elapsed from his receiving his disposition, and that not having been paid by him, is now due by the defenders, who represent him quite irrespective of the fact that they are now the infeft vassals. Indeed, as vassals, if they had not represented Bernard, I do not think they could have been sued in a personal action, and though possibly they might have been virtually reached through a poinding of the ground, that is only on the assumption that the case of *Morrison* v. *Webster* was well decided—a case which in my opinion needs to be reconsidered.

This view necessarily disposes of the third objection. The defenders are here liable directly in respect of their own entry.

There only remains the point of form. On this point I have nothing to add to what is said by the Lord Ordinary—and any difficulty originally felt has been removed by the minute of restriction.

LORD KYLLACHY—In this action the pursuers, who are the superiors of certain subjects in Fifeshire, sue (in the first place) for a casualty of composition said to have become due by the defenders' author (the late Mr Bernard), upon his infeftment and implied entry as the pursuers' vassal in the year 1901.

The defence is that the fee was then, and is still, full—Mr Bernard's authors (the Messrs Crawford), who had entered and paid a composition in 1885, being still alive. In other words the defence is that the case falls not under the enactment of sub-section 3 of section 4 of the Conveyancing Act of 1874—the enactment which conserves as against the implied entry the superior's right to his casualties—but under the proviso which is attached to the sub-section, and which declares that the implied entry "shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by any conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

The pursuers' answer to this defence is that under the defenders' feu-right it is one of the conditions of the grant that the feuar shall under pain of an irritancy take out an entry, not merely when the feu has become vacant, but upon every transmission—every sale or disposition of the feu—and that the superior being thus, under the old law if it had still applied, in a position to compel an immediate entry whether the fee was full or not, the proviso in question has no application. Their answer, in other words, is that the late Mr Bernard by taking infeftment (as he chose to do) on acquiring the feu, and thereby obtaining under the statute an implied entry, put himself just in the same position as if he had under the old law applied for a charter or writ by progress, and the charter or writ had been granted (not as usual in exchange for the appropriate casualty), but reserving the superior's right to sue for such casualty when he pleased.

The Lord Ordinary has sustained this answer—holding in terms of the decisions of this Court in the cases of *Dick Lauder* v. *Thornton*, and the *Church of Scotland* v. *Watson*—that Mr Bernard became, immediately upon his implied entry, liable in the casualty claimed, and not having paid it, that the defenders as his trustees and executors are now liable for its payment.

I am of opinion that the Lord Ordinary is right. I am unable to distinguish the present case from the cases referred to. The only distinction suggested was that in addition to the obligation to enter upon each transmission, the feu-rights in those cases contained, each of them, an obligation to pay a duplicand "on the entry of each heir or singular successor." But that obligation was, it appears to me, for the purposes of the present question, quite immaterial. It operated only to restrict the amount of the casualty when the casualty became legally due. It imposed no obligation to enter—certainly no obligation to enter when the fee was full. It merely provided that when an entry became due and was taken, the casualty should take the shape of a duplicand. It did not therefore in the least help the superior's argument in the cases referred to. For there, as here, the question was whether the superior could compel an entry upon every transmission whether the fee was full or vacant. And that question turned, as here, not on the taxing clause in the *reddendo*, but entirely on the subsequent clause, which imposed the alleged obligation to take out an entry on every transmision.

I am of opinion, therefore, that we ought to pronounce decree in terms of the first conclusion of the summons.

The pursuers, however, and in the next place, claim a second casualty said to be due by the defenders in respect of the transmission to them of the subject of the feu, by the disposition in Mr Bernard's settlement and of their infeftment and implied entry on that disposition. They restrict their claim to relief-duty in respect that the defenders really hold or hold ultimately for Mr Bernard's heir. But they claim the relief-duty due, just as they would have claimed it from the heir under a different action, if Mr Bernard had died intestate and the heir had made up his title and taken infeftment.

The defenders' answer to this (I mean their answer apart from their general answer founded on the survivance of the Messrs Crawford) is rested on the supposed application of the case of *Mounsey* v. *Palmer* (12 R. 236), where they say the principle was established that two compositions cannot be demanded from the same entered vassal, one of them in respect of his own entry and the other in respect of the omission of a predecessor in title to pay a casualty exigible but not exacted during his tenure.

It appears to me, however, as seems clear even upon the statement of the point, that the present case is entirely outwith the doctrine of the case of *Mounsey*. In the first place, there was in that case no obligation, as here, to enter upon every transmission. On the contrary, no entry was claimable except when the fee became vacant. There was therefore no room, as here, for any personal action by the superior—no room for any personal liability of the vassal, transmissible if he died to his representatives. The only action competent to the superior was the statutory declarator of non-entry which involves, as we know, no personal liability, but only a right to enter and draw the rents—a right which was of course at an end so soon as the tenure terminated. Even, therefore, if the defender in *Mounsey's* case had represented his predecessor in title, there could have been no liability on his part for that predecessor's casualty. Further, in the next place, and separately, the defender in *Mounsey's* case did not in fact represent his predecessor in title. He was simply a purchaser and disponee, and as such was only liable for his own casualty. On the other hand, here (1) there was, as has been decided, room for a personal action. There was, in other words, a personal liability for the unpaid casualty incurred by the late Mr Bernard; and (2) the present defenders are not merely Mr Bernard's successors in title, they are also his trustees and executors. Therefore, quite accepting the principle of the case of *Mounsey*, I am unable to see that it at all helps the defenders. They pay the first casualty claimed as Mr Bernard's representatives. They pay the second as disponees infeft in the feu, and as such liable in a casualty of their own.

I therefore also on this point agree with the Lord Ordinary.

There is a third point on which we also heard argument, and with which also the Lord Ordinary deals. It relates to the form of the pursuers' summons, which it is said ought to have been an ordinary summons for payment, but as brought was a statutory summons not for payment but for declarator of non-entry. Here, again, however, I agree with the Lord Ordinary. The summons no doubt as brought bore a considerable resemblance to the statutory

form. But it was nevertheless, it seems to to me, sufficiently good as an ordinary summons of declarator and payment at common law. All that could be said against it was that it incorporated, although quite separably, an inappropriate conclusion for the rents of the lands, &c., during non-payment. But that, I consider, was in substance only a *pluris petitio*, and was therefore competently enough rectified by the pursuers' minute of restriction.

On the whole, therefore, I am of opinion the Lord Ordinary's interlocutor should be affirmed.

LORD PEARSON—I am of the same opinion as your Lordships.

The Court adhered.

Counsel for the Pursuers and Respondents—Dickson, K.C.—Macmillan. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Reclaimers—Craigie, K.C.—Munro. Agent—P. R. M'Laren, Solicitor.

Friday, December 21.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PLOTZKERS *v.* LUCAS.

Process—Summons—Instance—Action on Behalf of Partnership at Instance of Whole Individual Partners—Existence of Partnership not Disclosed in Instance.

A note of suspension and interdict was presented at the instance of A, B, C, D, and E, "proprietors of the business 'Irish Linen Company.'" The respondent objected to the instance in respect that while on their statements the complainers were partners and acting on behalf of the partnership, the instance did not disclose that fact.

Held that the respondent was entitled to have that fact set forth in the instance, but that his objection was obviated by the pursuers substituting "carrying on business under the style of Irish Linen Company" for the words quoted.

Opinion (*per* the Lord President) that while a firm may competently sue in the names of the whole individual partners, an instance which merely enumerates the names of the partners without disclosing that the action is in respect of a partnership right is defective.

On 14th September 1906 a note of suspension and interdict was presented for "Marcus Plotzker, residing at 67 Exeter Road, Cricklewood, London; William Plotzker, residing at 4 Acomb Street, Greenhays, Manchester; Herman Plotzker, residing at 26 Row Lane, Southport; David Plotzker, residing at 311 Ecclefall Road, Sheffield, and Bernard Plotzker, residing at 5 University Avenue, Glasgow, proprietors of the business, 'Irish Linen Company'—complainers," against Hessel Lucas, carrying on business at 23 Nicolson Street, Edinburgh, under the name of "Irish Linen Company."

The respondent, *inter alia*, pleaded—"(1) The instance in this note is defective, and the note should be dismissed with expenses."

The circumstances in which the action was raised and the nature of the complainers' averments are stated in the Lord President's opinion.

On 4th December 1906 the Lord Ordinary (MACKENZIE) repelled the respondent's first plea-in-law and allowed a proof.

Opinion.—"The respondent's first contention was that the instance is defective, inasmuch as the complainers' averments necessarily involve that there is a partnership. They argued that as the Irish Linen Company was a separate *persona* the instance could only be stated by giving the descriptive name of the firm and three of the partners.

"It seems to me a sufficient answer to this that the complainers nowhere aver that they are partners, and the respondents themselves deny that there is a partnership. Whether the complainers are joint adventurers or not there is not in my opinion disclosed on the record the existence of a separate legal *persona* which ought to be made a party.

"The first plea-in-law for the respondent should therefore be repelled. . . ."

The respondent reclaimed, and argued The averments showed that the complainers were partners and were suing in respect of partnership rights. A joint adventure, assuming that it existed here, was really a partnership — Bell's Prin. sec. 392; Bell's Com. ii, p. 538, *et seq.*; Partnership Act 1890 (53 and 54 Vict. c. 39), sec. 1 and sec. 4 (2). A partnership sued in Scotland in the descriptive name with the addition of at least three of the partners—*Antermony Coal Company* v. *Wingate, &c.*, June 30, 1866, 4 Macph. 1017, 1 S.L.R. 206—and a foreign (*e.g.*, English) firm, such as this firm was, must, if it availed itself of the Scottish Courts, comply with the Scottish forms of procedure. The respondent's objection was not merely technical. The individuals named in the instance might have no assets, and in the event of success the respondent could not attach firm assets in Scotland (without raising a supplementary action) unless he got a decree against the firm. Moreover, a defender was always entitled to know by whom he was being sued. The complainers were in a dilemma. For if this was a firm the instance was bad; if it was not a firm the complainers' demand was irrelevant, as it was based on the existence of a partnership.

Argued for respondents (complainers)—A firm was entitled to sue in the names of the individual partners — Mackay's Manual, p. 159. The complainers, however, were quite willing to add to the instance the words, "carrying on business under the style of 'Irish Linen Company.'" That obviated the respondent's objection.