Thursday, June 8.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

THE LEITH HERITAGES COMPANY *v.* THE EDINBURGH AND LEITH GLASS COMPANY.

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

A clause in an onerous disposition of land binding the seller to relieve the purchaser of all casualties due and payable at its date does not entitle the purchaser to relief against the seller for a composition demanded from the former by the superior in respect of the implied entry operated by sec. 4, subsec. 2, of the Conveyancing (Scotland) Act 1874, although the Act had come into operation and the seller himself had been entered thereby before the execution of the disposition.

This was an action at the instance of the Leith Heritages Company (Limited) against the Edinburgh and Leith Glass Company, for payment of "(1) The sum of £1350, being the adjusted amount of casualty due by the defenders to the Lord Provost, magistrates, and town council of the city of Edinburgh, as representing the community of the said city, as superiors of the subjects after mentioned, in respect of the heritable subjects situated in Salamander Street, Leith, purchased by the pursuers from the said The Edinburgh and Leith Glass Company, and conveyed to the pursuers conform to a disposition thereof granted by the defender, the said Dr James Scarth Combe, as trustee for the said The Edinburgh and Leith Glass Company, in favour of the pursuers, dated 10th, and recorded in the division of the General Register of Sasines applicable to the county of Edinburgh the 11th days of November 1874, and of which casualty the defender, the said James Scarth Combe, bound himself as trustee aforesaid to relieve the pursuers in terms of a clause to that effect in the said disposition; and (2) the sum of £24, 17s. 7d., being the taxed amount of expenses of process paid by the pursuers to the said Lord Provost, magistrates, and town council, and incurred to them in an action at their instance against the pursuers as proprietors of the said subjects, for payment of the said casualty, the summons in which action was signeted 28th April 1875; together with interest at 5 per centum per annum on the said two sums from the 19th day of January 1876, being the date on which they were disbursed by the pursuers, until payment."

The circumstances of the case are fully narrated in the following note which the Lord Ordinary appended to an interlocutor assoilzieing the defenders from the whole conclusions of the summons:—

"*Note.*—This action raises an important question as to the operation of the 4th section of the Conveyancing (Scotland) Act 1874, in reference to the clause usually inserted in onerous conveyances of land binding the seller to relieve the purchaser of all casualties due and payable for the subjects prior to the term of entry. In February 1874 the pursuers purchased from the Edinburgh and Leith Glass Company certain heritable subjects in Salamander Street, Leith. The feudal title to the property then stood in the name of the defender James Scarth Combe, as surviving trustee for the Glass Company, his infeftment having been recorded in the Register of Sasines on 5th January 1853. The property was held in feu-farm from the Lord Provost, magistrates, and town council of the city of Edinburgh, the immediate lawful superiors thereof, the entry of singular successors being untaxed. In 1874 the whole property was in non-entry, the greater part having been in that predicament since 1838, and other parts since 1839 and 1863 respectively; and the superiors might have called upon Dr Combe to enter with them as their vassal and pay a year's rent as the composition of a singular successor, and failing such entry and payment they might have obtained decree of declarator of non-entry and entered into possession of the property and drawn the rents so long as Dr Combe lay out unentered. The pursuers when they purchased the property from the Glass-house Company in February 1874 might have insisted upon Dr Combe completing his title by entering with the superiors and paying the composition, but they did not do so. On the contrary, in their missive offer, which was contained in a letter by their agents Messrs Morton, Neilson, & Smart, W.S., on their behalf, addressed to the agents of the Glass-house Company, dated 13th February 1874, they expressly said—'If, as we are informed, these subjects are in non-entry, our clients will not ask the Company to enter, but will accept the title as it stands.' The offer was accepted and the bargain was closed by Messrs Gillespie & Paterson, W.S., on behalf of the defenders, by letter dated 16th February 1874, it being arranged, however, that a formal minute of sale and agreement should be executed by the parties. Such minute was accordingly immediately prepared, but was not executed until 15th, 16th, and 19th October 1874. It contained a stipulation to the following effect:—'And it is agreed that the second parties (*i.e.* the present pursuers) shall accept the title as it now stands, and shall not be entitled to require the first parties (*i.e.* the present defenders) to enter with the superiors of the said subjects, nor to make up any further title to the same.' It was also agreed 'that the first parties shall pay all the feu-duties and public, parochial, local, and other burdens and taxes due and payable for the said subjects at and prior to the foresaid term of entry' (*i.e.* Martinmas 1874).

"Between the date of the original offer and acceptance in February, and of the execution of the formal minute of sale and agreement in October, the 'Conveyancing (Scotland) Act 1874' was passed, and came into operation on 1st October of that year. It does not seem to have occurred to either of the parties when executing the minute of sale on 15th, 16th, and 19th October that the passing of the statute in any way affected the bargain between them, and particularly that part of the bargain by which the pursuers waived their right to call upon the defenders to enter with the superiors. On the 28th October, however, a new light appears to have dawned upon the pursuers' agents, who on that day sent to the defenders' agents for revisal the draft of the

proposed disposition of the property, accompanied by a letter containing the following passage:—'It occurs to us that the Glass Company are now, in terms of the late Conveyancing Act, entered with the superiors, and that a composition is now eligible from the property. It was in the contemplation of the Heritages Company themselves to enter with the superiors when the purchase was made, and perhaps the city may be induced to waive their right to two compositions. We should like to see you as to this point any time you happen to be passing.' Some correspondence took place between the agents for the parties, and ultimately the pursuers insisted that the defenders had become liable to pay the casualty of a year's rent to the city of Edinburgh, and they refused to settle the transaction at Martinmas unless the defenders paid the said casualty. The matter was settled for the time by an arrangement that £1000 of the price should be consigned in bank in name of the respective agents for the parties, to meet the composition should the defenders be found liable for the same, the rights of all parties being reserved. The consignation was made on the 11th November, and the disposition which had been executed by the defender Dr Combe on the 10th was delivered to the pursuers on the 11th November, and was on the same day recorded in the Register of Sasines, and the pursuers were thus on that day duly infeft in the property. The disposition contains a clause—in the terms usually inserted in onerous dispositions—by which Dr Combe as trustee bound himself to free and relieve his disponees (the pursuers) 'of all feu-blench and other duties and casualities, and public, parochial, and local burdens due and payable for the said subjects at and preceding the said term of Martinmas 1874.'

"On 28th April 1875 the city of Edinburgh, as superiors of the subjects, raised against the present pursuers as heritable proprietors infeft in the subjects, and against the defender Dr Combe for his interest, an action for declarator that a casualty—being one year's rent—became due to the superiors in consequence of the death of the former entered vassals, which took place in 1838, 1839, and 1863 respectively; that the said casualty was still unpaid; and that the full rents, maills, and duties of the said subjects, after the date of citation, belonged to the superiors until the said casualty and expenses should be otherwise paid to them. The summons also concluded that the present pursuers, the Leith Heritages Co., ought and should be decerned and ordained to pay to the superiors the sum of £2500, or such other sum as should be ascertained to be one year's rent of the said subjects, reserving to the present pursuers any right of relief which might be competent to them against the present defenders or their trustee under their conveyance or otherwise. The present pursuers and the superiors thereafter adjusted the amount of the casualty at £1350, which sum was paid by the pursuers to the superiors on 19th January 1876, along with £24, 17s. 7d., being the taxed amount of expenses of process incurred by the superiors in said action.

"The pursuers, founding upon the obligation undertaken by Dr Combe as trustee for the defenders, in his disposition of 10th November 1874, to relieve the pursuers of *inter alia* 'all casualties . . . . due and payable for the said subjects at and preceding the said term of Martinmas 1874,' have raised the present action of relief against the defenders, concluding for payment of the said casualty of £1350 and of the said sum of £24, 17s. 7d. of expenses.

"I think it is quite clear that had the Conveyancing Act of 1874 not passed, and had the present pursuers paid the price and taken infeftment on Dr Combe's disposition in their favour, and accepted delivery of the title-deeds without any reservation of right to demand the completion of any other or further title by the sellers, they would not have been entitled, in the event of the superiors raising against them an action of declarator of non-entry, to insist upon the defenders entering and paying a composition. Such a demand would have been not only a violation of the express bargain between the parties, but would have, as I think, been in itself an untenable demand, because the defenders having been divested by the infeftment of the pursuers before any demand for an entry had been made by the superiors, the casualty of non-entry and the payment of the composition of a singular successor would not have been a 'casualty' due and payable prior to the pursuer's term of entry. Nothing would have become 'due and payable' in the shape of composition until the vassal demanded an entry, and the superior, on the other hand, could not have claimed the non-entry duties for the past or the rents of the lands for the future unless and until they raised their action of declarator of non-entry. The question, however, now to be decided is — Whether or in what respects the Conveyancing Act of 1874 has altered the rights and liabilities of the various parties connected with these subjects. The pursuers maintain that the effect of the statute was to make the casualty of a year's rent actually 'due and payable' by the Leith Glass Co. to the superiors at the passing of the Act on 1st October 1874, and that the obligation in the disposition to relieve the pursuers of casualties extends to the casualty in question. On the other hand, the defenders maintain that the statute did not, according to its sound construction, impose any such liability upon the vassal.

"The present question depends upon the construction of § 4 of the statute and its various sub-sections. Sub-section 1 declares the granting of writs by progress to be unnecessary for the completion of the title to land, and to be incompetent, an exception from this disabling clause being made in favour of charters of *novadamus* and precepts or writs of *clare constat* and the like. In short, sub-section 1 abolishes the necessity under which a vassal was previously laid of resorting to the superior for an entry or renewal of the investiture in the land as a necessary step to the completion of his title as vassal.

"In order, however, to maintain the feudal relation between the superior and vassal, it is enacted in sub-section 2 that every proprietor duly infeft in the lands shall be deemed and held to be, as at the date of the registration of his infeftment in the Register of Sasines, duly entered with his immediate lawful superior, to the same effect as if such superior had granted a writ of confirmation according to the previously existing

law, and that whether the superior's own title had been completed or not.

"But as the granting and delivery of a writ of confirmation, unless accompanied by payment of a composition, operated under the old law as a discharge of the composition, sub-section 3 provides that '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 . . . . . 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 entry.' The term 'casualty' is declared by the interpretation clause of the Act to include the composition payable by a singular successor.

"Sub-section 4 is as follows:—'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, whether by succession, bequest, gift, or conveyance, 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 any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry according to the non-existing law, but shall cease to have such effect upon the payment of such casualty and of the expenses, if any, contained in said decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree, nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same, and the summons in such action may be in or as nearly as may be in the form of Schedule B hereto annexed.'

"According to the construction which the pursuers place upon the enactments which have now been recited, the sum of £1350, being the casualty of a year's rent of the subjects in question, became on 1st October 1874 'due and payable' to the city of Edinburgh as superiors by Dr Combe as the proprietor duly infeft in these subjects, whether the superior demanded payment or not, and that even after the property was sold and the pursuers infeft therein. I am of opinion that this is not the sound construction of the statute. It appears to me that what the Legislature meant to do, and what they have done, is to substitute for an actual entry given by a superior an implied entry, equivalent to an entry by confirmation, to take effect on the completion of every infeftment, and further, to declare that notwithstanding the death of the last-entered vassal and the non-infeftment of his successor the lands should not be held to be in non-entry. But in order to do justice to the superior, and to maintain his full rights and remedies unimpaired, he is empowered, in lieu of the old action of declarator of non-entry in which he would have obtained decree of the Court authorising him to enter into possession of the property and appropriate the rents while the vassal lay out unentered, to raise an equivalent action against the actual proprietor of the lands, concluding for declarator that a casualty of a year's rent has became due, either by the death of the last-entered vassal or by the infeftment of a new proprietor, and that until the casualty is paid he is entitled to the rents of the property, and further, decerning against the proprietor for payment of the casualty personally; but as I read that provision of the statute, it is left optional to the superior to demand the casualty or to raise this action, in the same way as it was optional to him under the old law to allow a successor of the last vassal to lie out unentered without claiming composition or without raising a declarator of non-entry. Under the old law the casualty of non-entry did not become due and payable until demanded by the superior in an action, and he had no direct right of action against his vassal for the composition—the action of non-entry being virtually the compulsitor by which he obtained payment of the composition—and the vassal was not regarded as contumacious until citation in the action. Now, I think that under the statute of 1874 the vassal is not bound to pay the composition unless and until the superior demands it; and if the superior abstains from demanding it and from raising an action in the new form, the vassal is not contumacious, and the casualty is not 'due and payable' by him. But as each successive infeftment makes the person infeft the entered vassal of the superior, and dissolves the feudal relation which had subsisted between the superior and the proprietor previously infeft, it follows that the new proprietor—if a singular successor—becomes by virtue of his infeftment the party against whom the superior may bring an action to constitute the casualty of composition as a debt 'due and payable' to the superior. It is true that the statute provides that a superior is not to demand a 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.' But in the present case the superiors did not demand the casualty sooner than under the old law they could have required the pursuers to enter. On the contrary, under the old law they might have required an entry long before the date of their action against the pursuers, but they had not enforced their right. Had they chosen to constitute their claim against Dr Combe before 11th November 1874, they would not have been entitled to demand the casualty from the pursuers during Dr Combe's lifetime, because under the old law if they had given him an entry they could not have required his successor to enter so long as he lived. But though Dr Combe was entered by the operation of the statute, they did not demand the casualty from him, and the statute expressly provides 'that no implied entry shall be pleadable against' the new action for

the casualty. The meaning of that provision clearly is, not only that the proprietor infeft is not to plead his implied entry by confirmation as a discharge of the composition, but also, that although at the date of the action there may be in life a vassal who has obtained the implied entry created by the statute, but has not paid composition, his successors, when infeft and sued for the casualty exigible from himself in respect of his own implied entry, shall not be entitled to plead in defence that the superior has in life a vassal already entered.

"On the whole, therefore, it appears to me that according to the sound construction of the statute (1) no casualty was 'due and payable to the superiors by Dr Combe at or prior to the date of the pursuers' implied entry on 11th November 1874; (2) that the casualty for which the pursuers were pursued, and which they paid in 1876, was the casualty exigible from them in respect of their own implied entry; (3) that the demand for that casualty was not made by the superior sooner than they were entitled to do so; and (4) that the said casualty is not one of the burdens of which the pursuers are entitled to be relieved by the defenders under the clause of relief in Dr Combe's conveyance.

"In conclusion, it may be well to point out that some serious inconvenience, if not absurdity, would result from giving effect to the pursuers' contention that the casualty in question was 'due and payable' by Dr Combe simply in respect of the entry implied by his infeftment. It is by no means an unlikely occurrence that two or more implied entries may take place without the superior demanding payment of a casualty, and all the vassals so entered may have died; yet, according to the pursuers, on each implied entry a casualty may have became 'due and payable,' so that all of these casualties would subsist as burdens upon the property simply because the superior had chosen not to demand them during the life of the respective vassals by whom they were payable. Suppose, for instance, that Dr Combe had died immediately after granting the disposition to the pursuers, then, if the pursuers' argument is right, the superiors would have been entitled to demand a casualty both from Dr Combe's representatives and from the pursuers as his singular successors. But such representatives are not the successors of the vassal in the lands, and they are clearly not within the scope of sub-section 4 of the 4th section of the Act. It is only the party who has succeeded a former vassal entered in the lands that is liable in a composition, and he is liable under the statute, not as for a debt of his predecessor, but as for a debt due by himself as the entered vassal in the lands and the singular successor of the predecessor. And it would be an absurdity to maintain, as the pursuers necessarily must maintain, that two actions for successive casualties are payable by one and the same vassal.

"On the whole matter, and for the reasons already stated, I am of opinion that the claim of the pursuers is untenable. It may or it may not, in a question like the present, be competent to refer to the original offer and acceptance, or to the subsequent and more formal minute of sale and agreement, as evidence of the arrangement of parties as to this composition. I have not in forming my opinion in anything given effect to these documents as evidence. But it is satisfactory to my mind to see from these documents, and particularly from the correspondence attending the consignation of part of the price to meet this claim, that the present demand of the pursuers, though I am satisfied that it has been made in good faith, was an afterthought on their part, and that the judgment now to be pronounced is in entire conformity with what both parties intended until within a few days of Martinmas term, viz., that the composition, payment of which might have been enforced by the superiors at any time between 1838 and Martinmas 1874, should be paid not by the defenders but by the pursuers themselves."

The judgment was acquiesced in.

Counsel for the Pursuer—M'Laren—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Defenders—Balfour—Low. Agent—John T. Mowbray, W.S.

HOUSE OF LORDS.

Monday, February 28.

STEPHEN *v.* AITON.

(*Ante*, vol. xii. p. 342.)

Property—Harbour—Statute—Private Act—Righ to beach Boats.

The fishermen of a sea-coast village were provided by the proprietor of the village with houses under tacks which fixed a certain rent, to include all dues connected with the fishery, the right of beaching the boats not being specially mentioned, although the habit and use was to beach the boats during the winter season on a certain piece of ground. In 1845 the proprietor obtained an Act of Parliament for the improvement of the harbour of the village, which *inter alia* authorised him to levy five shillings on all boats laid up for the winter season. He subsequently charged five shillings from each fisherman on that account, and this he did by dividing the slump rent which had formerly been paid under the tacks into specific portions—so much for house-rent and so much for the other dues, one item being five shillings for laying up boats. The village was sold in 1865, and the new proprietor continued the same system until 1874, when he asserted a right to exclude the fishermen from beaching their boats on the said piece of ground. In a suspension and interdict brought against him by the fishermen—*held* (aff. judgment of Court of Session) that they were entitled to use the said ground for beaching their boats, on payment of five shillings, until the proprietor provided them with another safe and convenient place, in respect that the right given by the Act to levy dues for beaching boats implied the obligation to provide ground for doing so.

This was a suspension by William Stephen and others, fishermen, residing in Boddam, a village on the east coast of Aberdeenshire, as individuals, and also as a committee elected by the fishermen of