The Court repelled the respondent's objection to the competency of the appeal, answered the question of law therein stated in the negative, and decerned.

Counsel for the Appellant—Younger—J. B. Young. Agents—Dundas & Wilson, C.S.

Counsel for the Respondents—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Friday, March 6.

SEVEN JUDGES.

[Sheriff Court at Airdrie.

MOTHERWELL *v.* MANWELL.

Superior and Vassal—Casualty—Discharge—Satisfaction—Superiority and Dominium Utile held by Same Person—Confusio—Composition—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4, *sub-secs.* 3 *and* 4.

At the date of the death of the last expressly entered vassal in 1885, the estates of superiority and *dominium utile* in certain lands were vested in the same person, but the estates, which had been acquired on separate titles, were not consolidated, and continued to be held on separate titles. Thereafter, the superiority and *dominium utile* having passed to separate singular successors, the superior claimed payment of a casualty of composition, upon the ground that no casualty had been paid since the death of the last expressly entered vassal. The vassal maintained that the claim for a casualty had been extinguished *confusione* when the two estates belonged to the same person. *Held*, by a majority of a Court of Seven Judges (Lord Justice-Clerk, Lords Adam Kinnear, Trayner, and Moncreiff—*diss.* Lords Young and M'Laren), that the claim for a casualty could not be held to have been extinguished in respect of the superior and the vassal being the same person, and that the present superior was now entitled to claim payment of the casualty from the present vassal.

Sheriff—Jurisdiction—Action of Declarator and for Payment of Casualty—Competency.

Question whether an action of declarator and for payment of a casualty, under section 4, sub-section 4 of the Conveyancing (Scotland) Act 1874, was competent in the Sheriff Court when the value of the lands was less than £1000.

Gavin Black Motherwell, writer, Airdrie, the superior of certain subjects, raised an action in the Sheriff Court at Airdrie against Mrs Margaret M'Phee or Manwell, Gourlay's Lane, Airdrie, as his vassal, for declarator that a casualty of composition was due by her in consequence of the death of the last expressly entered vassal, and for payment of £22, 19s. 9d., being the amount of a year's rent less deductions.

The pursuer averred that the value of the subjects was less than £1000.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 4, sub-section 2, provides that every proprietor duly infeft shall be deemed to be duly entered with his superiors as at the date of the registration of his infeftment. Sub-section 3 of section 4 enacts—"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 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 . . . 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." Sub-section 4 enacts—"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 now 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; . . . and the summons in such action may be in, or as nearly as may be in, the form of Schedule B hereto annexed.

The superiority of the subjects in question was acquired by William Motherwell in December 1866, and he acquired the *dominium utile* in November 1876. He was duly infeft in both estates, under separate titles, and continued in possession of them until he died in 1892. The estates were not consolidated and continued to be held on separate titles.

In November 1892, Motherwell's testamentary trustees, acting under his trust-disposition and settlement, dated 4th March 1890, and registered in the Books of Council and Session 12th March 1892, made up a title to the *dominium utile*, and in December 1897 disponed it to the defender's husband, from whom it passed on his death to the defender, who in turn was duly infeft.

In December 1892 Motherwell's trustees made up a title to the superiority, which they had conveyed in November 1892 to the pursuer, who was duly infeft therein.

There was thus a *concursus* of the characters of superior and vassal in the subjects in question between November 1876 and November 1892.

In January 1867 Thomas Greer, the then vassal in the subjects, was duly infeft and entered with the then superior. Greer died in 1885.

The pursuer maintained that as no casualty had been paid since the death of Greer, he was now entitled to demand a casualty from the defender as his vassal.

The defender in defence maintained that as (1) William Motherwell, and (2) his trustees had been both superiors and vassals of the lands at a time when a casualty was exigible, the casualty so exigible must be held to have been extinguished *confusione* and that no further casualty could be demanded until the death of the last survivor of William Motherwell's testamentary trustees, which had not yet occurred.

On 26th March 1902 the Sheriff-Substitute (MAIR) found and declared in terms of the petition and decerned against the defender for the sum sued for.

Note.—. . . "With the next defence, that of confusion, I have had some difficulty. It was argued that, in respect William Motherwell held the two fees in 1885, when the subjects fell into non-entry, and was then his own superior, the composition payable to himself was thus extinguished. It was also said that William Motherwell's trustees, in respect of their holding off themselves, have extinguished another casualty which emerged on his death, the consequence being that the fee is presently full, and will remain so till the death of the last surviving trustee. The defence of confusion as applied to a casualty seems novel. The defender's agent could only refer to one case in support of his argument, viz., *Longcroft* v. *Stirling*, 1894, 10 Sh.-Ct. R. 239. I have carefully considered the decision, but regret I cannot follow it. I can see no reason for holding that the casualty now sued for was extinguished *confusione*. Confusion is a principle applying primarily to the extinction of debts and obligations where the debt and credit meet absolutely in the same person. But it does not apply in cases where the *concursus* is not absolutely complete. In the case of an heir of entail taking to himself and his heirs whomsoever an assignation of a debt affecting the entailed lands, the debt is merely suspended during his lifetime and revives after his death in the person of his heir at law against the heir of entail. Such a suspension (not an extinction) also takes place where an absolute proprietor acquires by assignation a debt affecting his property. By taking an assignation in lieu of having the debt discharged, he is assumed to expressly reserve to himself the power of reissuing the debt for value. The *concursus* here does not clear off the burden, and so far as the records show it still exists, though it may be in suspense.

"Servitudes also are merely suspended during the ownership by the same person of both dominant and servient tenements wherever from the state of the titles a division may be anticipated, as where one tenement is entailed and the other held on an absolute title. To my mind, therefore, there is a difficulty in applying the doctrine of confusion in the case of land rights without having regard to the circumstances of each case, owing to the necessary existence of writings and titles, and to the forms which these may take as bearing on the intention as well as on the rights of parties. Here we have two separate fees held by the same party on perfectly distinct titles. I have held that the two fees were not merged in one by prescriptive consolidation, and not only did the proprietor not consolidate them by his own act, but he deliberately issued each fee separately. This being so, I am unable to see why he is not in the position of having dealt with these fees as if he had been two separate individuals, and to have issued the property fee in non-entry as he got it, and the superiority fee with the rights which it was entitled to claim in respect of the property being in non-entry. Moreover, the case is not a matter of the debt affecting the property-fee, or one of debtor and creditor. We are dealing with a feudal right, and although the time at which the question arises is after the Act of 1874, this is an old feu, and the superior's rights to casualties are not affected by that Act. No implied entry is pleadable in defence against the form of action prescribed by the Act for recovery of a casualty. We must therefore look to the superior's rights as they would have been had the Act of 1874 not been passed, *i.e.*, had Motherwell's trustees not been entered by virtue of their infeftment with themselves as superiors. The subjects fell into non-entry on the death of Greer in 1885. Though competent, doubtless, for them to do so, I do not know that the trustees would have considered it desirable to expressly enter with themselves by the use of the forms then necessary. There would not seem to have been any advantage in doing so, and indeed there would have been a disadvantage by reason of its involving an express discharge of outstanding composition. If they had been inclined to deal with the matter at all it would probably have been in the direction of consolidating the fees. But they did nothing. This being so, can it be said that the composition due owing to Greer's death is extinguished? I think not. The composition could only have been paid in respect of an entry (as the one is the counterpart of the other), but no entry was given, and the implied entry by statute cannot affect the superior's claim. I do not think the mere fact that the trustees held both fees simultaneously should lead to their putting themselves in a position they probably never contemplated putting themselves in owing to there being no necessity to do so, viz., entering themselves with themselves and discharging a composition. We are here dealing with

the principles of feudal law, and I do not think the doctrine of confusion can come in to supply the place of the writings so necessary in the matter of the entry of a vassal with his superior." . . .

The defender appealed to the Court of Session.

After hearing counsel the Second Division ordered the cause to be heard before Seven Judges.

The nature of the arguments presented at the hearing appears in the Judges' opinions.

The following authorities were cited:—

For the appellant—*Straiton Estate Company, Limited*, v. *Stephens*, December 16, 1880, 8 R. 299, 18 S.L.R. 187; Duff, Feudal Conveyancing, 508; *Sivright* v. *Straiton Estate Company*, July 8, 1879, 6 R. 1208, 16 S.L.R. 718; *Steuart* v. *Murdoch & Roger*, June 6, 1882, 19 S.L.R. 649; *Lord Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188; Menzies' Lectures on Conveyancing (1900 Ed.), 870; *Longcroft Co-Operative Society* v. *Stirling*, June 6, 1894, 10 S.L.Rev. 239; Ersk. iii., 4, 23.

For the respondent—*Mounsey* v. *Palmer*, November 20, 1884, 12 R. 236, 22 S.L.R. 118; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4, sub-sec. 4.

At advising—

LORD JUSTICE-CLERK—The sole question which was argued before us in this case was whether the superior's demand for a casualty was bad in respect that William Motherwell, who in 1866 had acquired the superiority of the subjects described in the petition, also obtained a disposition to the subjects themselves in 1876, and that on the death of the last-entered vassal, William Greer, who died in 1885, the lands falling into non-entry, it must be held that the claim for casualty of composition was extinguished *confusione*, William Motherwell being both the superior and vassal. I am of opinion that the principle of confusion does not apply to this case. It is a principle quite intelligible in its application to ordinary personal debts, that where a debtor in a pecuniary obligation comes into the rights of the creditor the debt ceases to exist, as the obligation and the right to exact it have become merged in one person. But a casualty due in respect of an implied entry under the Conveyancing Act of 1874 is not in the position of a money debt exigible from a debtor. It cannot be sued for as an ordinary debt, with a right to diligence against the debtor to make it good, or a right to exact it from his moveable estate should he die while it is still due. Under the old law the superior could only make his claim good by declarator of non-entry and entering into possession of the lands and taking the rents.

Moreover, he did not require, unless and until he chose to do so, to demand the casualty, and the vassal was under no obligation to pay. If no demand was made while he owned the lands, then on his ceasing to own them the superior could not proceed against him, and if he desired to exact his casualty, had to direct his declarator against the vassal in possession.

This is in no way altered by the Act of 1874, by which the superior's rights as regards casualty are preserved to him notwithstanding the implied entry under the statute.

The action must be as before against the vassal in possession, and the right of the superior is to enter into possession of the lands and draw the rents, and although the summons contains a conclusion for payment, it is expressly provided that "the decree for payment" is to have the same effect as a decree of declarator of non-entry under the law as existing before the Act, and shall only cease to have effect upon the payment of the casualty with expenses. It is therefore to be made good by entering into possession of the lands and drawing the rents.

It is thus plain that although one or more implied entries may intervene between the time the casualty became exigible and the time of raising the demand, it is not a claim of debt against any vassal, but must be sued for as against the vassal in possession at the time the demand is made, and to the same effect as a declarator of non-entry under the old law.

In this case the superior sues the vassal now in possession, and I am unable to see how the demand can be resisted on the ground that when Greer the former vassal died in 1885 the superiority and the *dominium utile* were both in one person. There was no consolidation, and nothing was done to afford evidence of the casualty being extinguished. The two estates remained separate on distinct titles, and the holder of both could at any time convey either to any person he chose, with all the rights belonging to the estate so conveyed.

I am on these grounds unable to hold that the composition which became exigible on Greer's death was extinguished. There is nothing to instruct that any such thing took place, and I cannot hold that the rights of the superior can be held extinguished on the application of the doctrine of confusion, which appears to me to have no application to such a case as the present.

LORD YOUNG concurred in the opinion of Lord M'Laren.

LORD ADAM—The pursuer of this action is the superior of the subjects described in the prayer of the petition. The defender is the proprietor of the *dominium utile* of these subjects.

The object of the action is to have it found and declared that in consequence of the death of a Thomas Greer a casualty of one year's rent of the subjects is due to the pursuer, and that the full rents, maills, and duties of the subjects belong to him as the superior until the casualty is otherwise paid to him.

The defender being duly infeft in the subjects is, by force of sub-section 2 of the 4th section of the Conveyancing Act of 1874, to be deemed to be duly entered with the superior.

Sub-section 3 of the 4th section of that Act declares that such implied entry shall

not prejudice the right or title of any superior to any casualty which may be due or exigible in respect of the subjects at or prior to the date of such entry, and that all rights and remedies competent to a superior under the existing law and practice for recovering such casualties shall continue to be available to such superior in time coming. But it is provided that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to the Act have required the vassal to enter, or to pay such casualty irrespective of his entry.

Sub-section 4 enacts that a superior who would but for the Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the subjects, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment (in the form there provided) of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action, and that any decree for payment in such action should have the effect of and operate as a decree of declarator of non-entry according to the then existing law, but should cease to have such effect upon the payment of the casualty.

From these provisions it is clear that the superior's right to a casualty is not affected by the implied entry introduced by the Act, and that all the rights and remedies competent to him for the recovery of a casualty prior to the passing of the Act continue still to be available to him—the only difference being that in place of the old form of declarator of non-entry a new form is introduced, but which would appear to have the same effect as the old form.

In defence to the action the defender pleads that the subjects are not in non-entry. She does not say that she has herself paid a casualty on entry, but she says that the fee is full because the last-entered vassal is still alive.

The facts on which she founds this defence would appear to be as follows:—A William Motherwell acquired the superiority of the subjects in December 1866, and the *dominium utile* in November 1876. He made up separate titles to and was infeft both in the superiority and *dominium utile*, and continued in possession of them till his death in 1892. In November 1892 his trustees made up a title to the *dominium utile*, and in December 1897 they disponed it to William Manwell, the defender's husband, from whom it passed to the defender, who has made up a title thereto and is infeft therein.

In December 1892 Motherwell's trustees made up a title to the superiority, which in November 1892 they had disponed to the pursuer, who is infeft therein.

It appears, accordingly, that from November 1876 till November 1892 the same person or persons were proprietors of both the superiority and *dominium utile* of the subjects in question.

It appears, further, that the before-mentioned Thomas Greer was in January 1867 duly infeft and entered with the superiors as vassal in the subjects.

Greer died in 1885, when the subjects became undoubtedly in non-entry. At this time William Motherwell was superior of the subjects and also proprietor of the *dominium utile*. These being the facts, the defender, as I understand her contention, maintains that that debt, being the amount of a casualty, then became due by Motherwell as proprietor of the *dominium utile* of the subjects to himself as superior, and that as a person cannot be debtor to himself, the debt must be held to have been extinguished *confusione*.

Motherwell died in 1892, when, in the defender's view of the case, the subjects again became in non-entry, but as his trustees succeeded to him both in the superiority and *dominium utile*, they in their turn, *pari ratione*, became entered vassals, and they being as I understand still alive, the subjects, it is said, are not in non-entry.

I should not be prepared to dispute the proposition that, as charters of confirmation are now abolished, where a vassal, impliedly entered, has in fact paid a casualty, the subjects cease to be in non-entry; and in this case, if it is to be presumed from the fact that the superior and vassal were one and the same person that a casualty has been paid, the same conclusion would follow. But I do not think that that is a just inference. As the law was before 1874 the owner of subjects in non-entry was not due any debt to the superior merely because he possessed the lands. That the Act of 1874 made no difference in this respect is illustrated by the case of *Mounsey*, 12 R. 236, in which opinions were delivered to the effect that where a series of implied entries have been taken during the life of a vassal who last paid a casualty, on the death of the latter the superior's right to a casualty against the vassal last impliedly entered emerges, but he has no claim against any intermediate vassal in respect of his implied entry. I can quite understand that feu-duties should be extinguished *confusione* when the superior and vassal become one, because feu-duties are a proper money debt. But a superior had never right to sue a non-entered vassal for payment of the amount of a casualty as a proper money debt. On the death of an entered vassal the right which emerged to the superior was the right to demand a casualty, but until the demand was made no debt was due by the vassal. But when Greer died and the subjects became in non-entry, Motherwell simply did nothing, and so long as he continued to be superior I do not see what possible interest he had, either as superior or vassal, that the subjects should cease to be in non-entry, or why it should be supposed that he would enter with himself. So far as I see, whether he meant to retain or sell the subjects, it would make no difference to him whether they were in non-entry or not. I do not think, therefore, that there is any ground for presuming that he paid a casualty to himself, and so became entered vassal in

the subjects. I think, accordingly, that when Greer died what emerged to Motherwell was not a money debt due to him by himself and which could be extinguished *confusione*, but a claim to a casualty from the lands when they should pass into the possession of a singular successor, and which claim he duly transmitted to his trustees and they to the pursuer. I therefore think that a casualty is now due to the pursuer.

I have delivered this opinion on the assumption that this action is competently brought in the Sheriff Court, but one cannot help seeing that that is a doubtful question; but as that matter was not argued before us I pronounce no opinion upon it.

LORD M'LAREN—The question is of some general importance, in this sense, that the state of the title which raises it may not improbably occur in other cases. It is, I think, very desirable that the point should be authoritatively determined, and as my opinion differs from that of the majority of the Court, I shall be content to state my reasons as shortly as possible and without elaboration.

William Motherwell was owner of the superiority of this small heritable property, and was also owner, of course by a separate title, of the *dominium utile*. He did not consolidate the estates. During his ownership of the two estates the last-entered vassal died and a casualty became due, as I think, from the owner of the *dominium utile* to the owner of the superiority in virtue of the Conveyancing Act 1874. It follows, in my opinion, that as the debtor and the creditor in the obligation to pay were one and the same, the debt is extinguished *confusione*. It also follows that the present owner of the *dominium utile*, a singular successor, will not be liable in payment of a casualty until William Motherwell's death. As I understand the view of the majority of the Court, it is considered that a casualty is not due until a demand is made, because the statute of 1874 (sec. 4 (4)) does not in express terms declare a right but only a power to raise an action for payment to any person "who would but for this Act be entitled to sue an action of declarator of non-entry" against the successor of the vassal. Now, as the statutory casualty was given in place of the right of composition for taking lands out of non-entry, I agree that in sound construction we should look to the pre-existing feudal law to determine the measure of the superior's right and the vassal's liability. But this can only be done approximately, because the statutory right and the feudal right are not the same. Strictly speaking, there was no feudal right to a composition; no superior could sue for a composition; he could only draw the non-entry duties until such time as the vassal should ask for an entry and offer to pay composition. But now the statute empowers the superior to sue for a casualty, and it is therefore clear that the new and the old rights are not the same. They may be the same in amount and incidence, but they are not exactly identical as to their legal character or as to the mode of recovery.

Although the statute of 1874 does not in so many words declare the casualty to be a debt, I think that such is the legal result of the power given to the superior to raise an action of payment and to obtain a decree. If this be so, William Motherwell was debtor and creditor in the obligation, and the rule as to extinction *confusione* would apply.

It may be said that this is not a debt transmitted passively against heirs and executors, but only against the owner of the lands. In this respect the superior's right and the vassal's obligation are peculiar. I am not aware of any heritable obligation of the same character, unless it be those obligations of relief which are sometimes undertaken by a seller to a purchaser or feuar, and which are said "to run with the lands." But I think it is not the less a debt that the transmissibility of the obligation to pay does not follow the ordinary rules. I think there can be no doubt that William Motherwell, when he was vested with the superiority and the property, had the power to satisfy the obligation and to sell the property free of casualties. How was he to do it? Not by payment to himself. That can only be done where the person sustains two characters and the payment has to be made for a special account, *e.g.*, payment by an individual to himself as trustee or manager for others. But William Motherwell in this case owned the two estates in the same character, for he was unlimited owner of each. Actual payment was then impossible, but this is just the case where payment is effected by operation of law on the principle of *confusio*, and I think it is more accordant with principle to hold that such virtual payment is effected whenever the debtor's obligation and the creditor's right concur than to treat the question as one of fact to be determined when a second demand is made.

In the argument addressed to us our attention was called to the circumstance that William Motherwell had not consolidated the estates of property and superiority. This is, of course, a condition of the question, because if the estates had been consolidated there would be neither *dominium utile* nor casualty. It is just because there was no consolidation that the question arises, whether the casualty may be held to be paid, and my opinion is in the affirmative.

LORD KINNEAR—I agree with Lord Adam both upon the merits and also in desiring to confine my opinion to the question which has been fully argued before us on the merits, reserving the question as to the competency of this action in the Sheriff Court.

I think with Lord Adam that it is essential to inquire in the first place what is the true legal character of the right to a casualty as the law now stands. I cannot

assent to the view that the Act of 1874 has entirely altered both the legal character of the right and the force and effect of the remedy by which it may be enforced. In the first place, the Act abolishes the necessity for the superior's intervention in order to effect the entry of the vassal to the feu. It creates an implied entry by the registration of an infeftment in the Register of Sasines, and it enacts that lands shall no longer be deemed to fall into non-entry. But it provides that the 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 lands, and that all rights and remedies competent to a superior for recovering and making effectual such casualties, in so far as the same may not have ceased to be operative in consequence of the provisions of the Act, shall continue to be available. The right to the casualty therefore remains exactly what it was before; and there is no material change in the remedy. It is true the action of declarator of non-entry has ceased to be operative, because lands cannot fall into non-entry under the new law. But a new form of action is given to the superior, who but for the Act would be entitled to sue a declarator of non-entry; and it is enacted that any decree for payment "shall have the effect of and operate as a decree of declarator of non-entry according to the existing law, but shall cease to have such effect upon payment of such casualty and expenses." Now under the old law a declarator of non-entry did not of course enable the pursuer to charge for payment, but it enabled him to resume possession of the feu and to draw the rents until some one came forward with a good property title, who was ready to pay the casualty; and the form of summons given in the schedule to the Act concludes that the full rents, maills, and duties belong to the pursuer until the casualty and expenses be otherwise paid. The only difference therefore is, that the defender in the new action does not require to take a charter or writ of confirmation, because he is already entered by implication of the statute. But he must pay the casualty, and until he does pay it the superior is entitled to enter into possession and draw the rents. Two further provisions of the Act are to be observed—first, that the superior cannot demand a casualty sooner than he could by the former law have required the vassal to enter, and secondly, that no implied entry is pleadable in defence against the new action; and when these conditions are taken into account along with the others already mentioned it seems to me that the practical identity of the old remedy and the new is sufficiently established. It appears to me therefore to be clear that the superior's claim for a composition is just what it was before. The basis of his right is, as formerly, his own infeftment in the lands as superior, and the ground of claim is the entry to the feu of a stranger to the recognised investiture. It follows that only one casualty can be exigible at the date of the action; and that that must be the casualty due in respect of the defender's entry. The vassal actually in right of the feu cannot be called on to pay a casualty exigible in respect of the entry of some predecessor; but he must pay a casualty in respect of his own entry if the title is in such a position that the superior could have brought a declarator of non-entry. The superior may bring the action as soon as the last-entered vassal dies if he pleases. But he is not bound to do so any more than under the old law a superior was bound to bring his declarator immediately upon the lands falling into non-entry. There may be an indefinite number of vassals in the feu against whom no demand is made, but that will not prevent the superior from bringing his action against their successor in actual possession; and when he does so the liability of the defender will arise in respect of his own entry, and not of the entry of anybody else. This appears to me to follow necessarily from the provisions of the statute, but it is matter of decision in the case of *Mounsey* v. *Palmer*, to which Lord Adam has referred.

If these views are sound, the first point taken by the defender cannot be maintained. It is said that when the last-entered vassal died in 1885 a debt arose to the superior which must be presumed to have been discharged, and that this is an action for the same debt. The answer is that no debt arose, but that the superior was entitled to make a demand or not as he pleased, that he did not think fit to do so, and that the demand he now makes is for the defender's entry alone.

But then the defence was put also in a different way, which requires more consideration. It is said that because the right of superiority and the right of property in the *dominium utile* were combined in the same person when the last-entered vassal died, the liability for a casualty was extinguished *confusione*, and therefore that the vassal must be held to have entered with himself for payment of a casualty, and it follows that the superior is now bringing his action sooner than he could have raised a declarator of non-entry under the old law, because there is a vassal still in life who has paid a casualty. Now I do not think it doubtful that the action would be excluded if payment had been made. But it is common ground that no payment was made or could have been made in fact, and I see no reason whatever for holding that payment or discharge must be presumed in law. If there is no presumption of law the superior would be just in the same position as if he had allowed a vassal to possess without paying the casualty, and in that case it would have been of no consequence whether he abstained from a demand for payment from favour to the vassal or from mere negligence. In either case a succeeding vassal could not have alleged that a casualty had been paid, and he could not found a defence upon the implied entry of his predecessor if the casualty had not been paid.

But then I think it is putting the law a

great deal too favourably for the defender to say that there is no presumption of payment or discharge in 1885. I think the possibility of payment or discharge in 1885 is absolutely excluded by the operation of the doctrine of confusion, rightly understood. For confusion does not operate either payment or discharge. It prevents the possibility of a debt arising. It extinguishes the *jus crediti*. From the moment that the inconsistent characters of debtor and creditor are combined in the same person both debtor and creditor cease to exist; there is no longer any debt or any relation of debtor and creditor at all. This is in accordance with all our authorities, but it is matter of express decision in a case which was cited by Mr Macmillan in his able argument, in the case of *Blantyre* v. *Dunn*. The question in that case was what in fact was the true amount of the year's rent payable as composition for an entry. The vassal demanding an entry had been tenant of the lands under a long lease before he acquired the property. While the lease under which he was tenant still subsisted he bought the lands at a judicial sale, and applied to the superior for a charter, and maintained that for the purpose of fixing the composition the rent stipulated in the lease must be taken as the rent of the lands. But the Court held that the stipulated rent could not be taken into account, because the debtor and creditor in the obligation for rent being the same person the obligation was extinguished, and there was therefore no rent and no effective lease at the date of the vassal's entry. This was not a decision that confusion was equivalent to payment or discharge. If that had been held the judgment must have been the very reverse of that actually pronounced. If it had been held that the rent had been paid, that would have been conclusive of the question whether it was in fact the rent for the time being, and if it had been held that the rent was discharged, that would have meant that it was exigible and must be treated as paid. But what was decided was that no rent was due and exigible, and therefore the terms of the lease had no bearing on the question as to the annual value of the lands in the year of entry. Some of the judges seem to have doubted whether the lease itself was extinguished *confusione*. But they were all clearly of opinion that if it was not absolutely and for all purposes brought to an end, it was at least suspended so as to extinguish the obligations *hinc inde*, while the same person was both landlord and tenant. The bearing of this doctrine on the present question is clear enough. There is one distinction which Lord Curriehill points out between a lease and a feu-right, that in the latter case there can be no question that the feu is not extinguished absolutely, because a feudal estate once created cannot be extinguished otherwise than by observance of the appropriate feudal solemnity. The two estates therefore of *dominium directum* and *dominium utile* remain separate in the hands of one feudal proprietor until he chooses to unite them by consolidation. But in the meantime, although the estates are still feudally distinct, the money obligations are extinguished. It is just as impossible and unmeaning for the same person to exact and pay feu-duties from and to himself as to exact and pay any other money debt, and the application of the principle to the claim for casualty is equally obvious. I have already said, agreeing with Lord Adam, that I do not think the casualty arises *ipso facto* as a debt upon the death of the last entered vassal. But the superior is entitled to demand a casualty from the vassal in the feu; and the right to demand and the liability to pay money are extinguishable *confusione*, whether the obligation rests on feudal tenure or on personal contract. I am therefore of opinion that in 1885 no casualty was exigible in law, and none was or by possibility could be paid in fact. I must add that in my judgment it would have made no difference if the superior had signed a receipt for casualty in his own favour, or preserved a record in any other form that the casualty was discharged. It might be possible for a superior to create a personal bar against his own action by intimating to a purchaser that the casualty was paid. But the documents of the kind I have described, which it was suggested in argument that he might have executed, would be mere futilities.

The result, in my opinion, is that no composition was paid on the implied entry in 1885, and that the law does not require us to hold, contrary to the fact, that it must be deemed to have been paid, but absolutely rejects the hypothesis of payment, just because it is impossible that there can have been payment in fact. I think it follows that the defender has no answer to the demand except the implied entry of 1885, and the statute enacts that no implied entry shall be pleadable in defence to the action.

LORD TRAYNER concurred with LORD ADAM and LORD KINNEAR.

LORD MONCREIFF — I agree with the majority of your Lordships that the pursuer's claim for a casualty was not extinguished *confusione* on the death of Thomas Greer on 19th December 1885, at which time William Motherwell was infeft separately in the superiority and *dominium utile* of the subjects.

A casualty due in respect of an implied entry under the Conveyancing Act of 1874 is not an ordinary money debt. If it were it could be sued for by an ordinary petitory action; the debtor would be the vassal entered under the statute at the date when the casualty first became exigible, and the creditor would be the superior at the same date, or his executors if he died before receiving payment.

But that is not the character of the superior's claim, or the mode of recovering it. The policy of the Conveyancing Act 1874 was, as far as consistent with implied entry of the vassal, to interfere as little as

possible with the rights of the superior, either by enlarging or restricting them. Before the passing of the Act the superior had no direct mode of recovering payment of the casualty; he could only do so by suing an action of declarator of non-entry and entering into possession of the lands and drawing the rents, and thus putting a compulsitor upon the vassal to pay the casualty. The vassal was not bound to pay a casualty until the superior demanded it, and if the superior delayed to demand it until another vassal was in possession of the lands he was bound to direct his declarator of non-entry against the vassal then in possession.

Now, the remedy provided by the Conveyancing Act 1874, sec. 4 (4), and Schedule B, practically preserves intact the superior's rights. The action must be at the instance of the superior at the time when the action is raised, and it must be directed against the vassal in possession of the lands at the same date. Under it the superior is entitled as before to enter into possession of the lands and draw the rents. It is true that the summons contains a conclusion for decree for payment of the casualty, but section 4 (4) provides that "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 now 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." It may therefore be doubted whether such a decree could be enforced by ordinary diligence.

The main point, however, to be noted is that the casualty must still, as before, be demanded by the superior, that the person entitled to demand it is the superior at the time the demand is made, and that the person bound to pay it is the vassal in possession of the lands when the demand is made, however many implied entries may have intervened since the casualty first became exigible.

If, then, the vassal liable in 1885 had been a person other than the superior himself, there would have been no doubt as to the present pursuer's right, and although the question is highly technical, I do not think it is affected by the fact that William Motherwell, who was infeft by separate titles in the superiority and *dominium utile* in 1885, became debtor to himself in the casualty. He did not consolidate the two estates, neither did he take any steps to record that the casualty was extinguished. He did nothing, and such indication of intention as we find is in the direction of the two estates with all their incidents being allowed to remain separate.

It may be said that it would have been a useless form for William Motherwell to record the payment of a composition to himself, but the same might be said of consolidation; it is a form, but a form which is rendered necessary from the character of the estates.

I therefore agree that the Sheriff's judgment should be affirmed.

The Court dismissed the appeal, found and declared in terms of the declaratory conclusions of the action, and decerned against the defender for the sum sued for, with interest, &c.

Counsel for the Pursuer and Respondent —Clyde, K.C.—J. A. T. Robertson. Agent —W. B. Rankine, W.S.

Counsel for the Defender and Appellant — Craigie — M'Millan. Agent — William Balfour, S.S.C.

Friday, March 6.

FIRST DIVISION.

[Lord Low, Ordinary.

MITCHELL'S TRUSTEE *v.* GALLOWAY'S TRUSTEES.

Contract—Feu-Contract—Mutual Obligations—Obligation to Build—Obligation to Allocate Feu-Duty when Obligation to Build in Part Implemented—Refusal to Proceed Further with Building—Bankruptcy.

By a feu-charter the vassal was taken bound to erect buildings on the subjects feued to the value of £5000, and it was provided that when these buildings were erected the feu-duty might be allocated in such proportions as might be approved by the superiors. In the course of building on one portion of the subjects the vassal, requiring a loan, applied to the superior to allocate a portion of the feu-duty. The agents of the superiors wrote a letter in which they said that their client was satisfied with the plans of the building, and that "when the same is completed they are prepared to allocate thereon" a certain portion of the feu-duty. Thereafter the vassal was sequestrated, and his trustee having completed the building, called upon the superiors to allocate the feu-duty. He declined to give any undertaking to proceed to erect any other buildings on the ground feued. It was not disputed that the buildings erected were not worth £5000. On the superiors refusing to make the required allocation the trustee brought an action of declarator, implement, and damages. *Held* (*rev.* judgment of Lord Low, Ordinary) that the feu-charter and the letter of the superiors' agent must be read as forming one contract, and that as the trustee in bankruptcy was not prepared to fulfil the vassal's obligations under it by erecting buildings of the required value he was not entitled to call upon the superiors to implement their obligation to allocate the feu-duty.

The following narrative of the facts in this case, as they appeared from a proof, is taken from the opinion of the Lord Ordinary (Low)—"This action is brought by the trustee on the sequestrated estate of Alexander Mitchell, builder in Edinburgh,