abandonment. I accept that view of the case, and I am not inclined to go in the least beyond it.

LORD STORMONTH DARLING—I agree with Lord Kyllachy.

LORD JUSTICE-CLERK—My view is the same.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. Watt, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Defender and Respondent—M'Lennan, K.C.—Cullen. Agent—Thomas Liddle, S.S.C.

Thursday, June 8.

FIRST DIVISION.

[Lord Low, Ordinary.

CHRISTIE'S TRUSTEES *v.* M'DOUGALL.

Superior and Vassal—Entry—Casualty—Exemption from Casualty to First Purchasers from Original Vassal — First Purchase from First Vassal's Heirs.

A feu-charter of 1835 contained a clause whereby, in respect of prohibitions against assignation of the precept of sasine and subinfeudation, exemption from payment of a casualty was granted to the first purchasers from the original vassal A, on their entry with the superior, provided such entry were taken within six months of such first purchasers' entry to the subjects purchased by them. *Held* that the clause of exemption applied only to a first purchaser from the original vassal, and not to one purchasing from his heirs.

Superior and Vassal—Entry—Casualty—Division of Superiority—Liability of One of the Vassals in the One Portion of the Property for the Cumulo Casualty Due from that Portion—Right of Recourse of Vassal Paying a Casualty against Other Vassals.

The superiority of a parcel of land, which had been feued out for building purposes, was subsequently divided into two, following one of the divisions which had arisen in the *dominium utile*, the *cumulo* feu-duty being similarly divided. The *dominium utile* of each portion was enjoyed by a number of vassals, but the vassals in the one portion were different from those in the other. The superior in the one portion of the superiority having raised an action for the *cumulo* casualty due from his portion of the holding against one of the vassals therein, the vassal resisted the demand on the ground that the division of the superiority had prejudiced his position, inasmuch as he would not have recourse against the whole vassals of the original holding. *Held* that the vassal was liable, but had recourse against the other vassals in the same portion of the original holding.

Superior and Vassal — Casualty — Prohibition against Subinfeudation—Clause of Irritancy —Implied Entry — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4, *sub-secs.* 3 *and* 4—*Action of Declarator and for Payment of Casualty against a Vassal Impliedly Entered—Competency.*

In 1904 the superior brought an action of declarator and for payment of a casualty against the impliedly entered vassal in a holding, the feu-contract of which contained a prohibition against subinfeudation protected by an irritant clause. The vassal last entered with the superior was dead.

Objection having been taken to the competency of the action on the ground that where the feu-contract contained such clauses the superior's proper course was an action upon the contract, *held* that where the vassal last entered with the superior was dead the statutory action of declarator and for payment of a casualty was competent.

The Church of Scotland v. *Watson*, December 24, 1904, 42 S.L.R. 299; and *Dick Lauder* v. *Thornton*, January 13, 1890, 17 R. 230, 27 S.L.R. 455, *commented on* and *distinguished.*

Superior and Vassal—Casualty—Restriction of Casualty—"Where the Vassal Last Infeft is Still Alive"—Effect of Implied Entry—"Infeft."

A feu-charter of 1835 contained a prohibition of subinfeudation protected by an irritant clause. It stipulated for the payment of a duplicate feu-duty by each heir or singular successor in name of entry to the subjects, in the first year of their entry in addition to the feu-duty for the year, but contained this restriction — "Excepting only, that in the case of such entry by a singular successor where the vassal last infeft is still alive, the feu-duty of the year wherein such entry is made shall not be exigible over and above the duplicate feu-duty payable as above." The vassal died, and his heirs became impliedly entered, but did not pay a casualty.

In an action of declarator and for payment of a casualty by the superior against a disponee of the deceased vassal's heirs, who were still alive, *held* that the restriction was not applicable, and that the full casualty and feu-duty were exigible.

In 1904 William Christie, Braemar House, Edinburgh, and others, the marriage-contract trustees of Mr and Mrs John Christie, Ravelston Park, Edinburgh, as superiors, brought an action of declarator and for payment of a casualty amounting to £50, 4s. against Patrick M'Dougall, wine and spirit merchant, 7 Spittal Street, Edinburgh. The original holding, of which

the subjects in question formed a part, had been given out in 1835 to one David Callum, a builder, by feu-charter, which in the reddendo clause provided—"Paying therefor yearly the said David Callum and his foresaids (that is, his heirs and assignees) to them (the superiors) the sum of thirty-six pounds fifteen shillings sterling in name of yearly feu-duty, and that at two terms in the year—Whitsunday and Martinmas—by equal portions, beginning the first term's payment of the said feu-duty at the first term of Whitsunday or Martinmas that shall happen six months after the whole or any part of the buildings erected or to be erected on the said area shall be habitable, and either sold or let for the half-year preceding, and the next term's payment at the immediately succeeding term of Whitsunday or Martinmas, and so forth half-yearly and termly thereafter in all time coming, with a fifth part more of liquidate penalty in case of not punctual payment and interest of each term's feu-duty from and after the respective terms of payment until payment of the same: Declaring that if it shall so happen that a part of the said buildings shall be sold or let before the whole thereof is sold or let, then only a part of the said total feu-duty proportioned to such partial sale or letting shall be exigible by virtue of this obligation till the whole is sold or let, and that such proportional part shall be allocated and fixed by the architect of the said . . . (the granters) . . . for the time being, but that as soon as the whole shall be either sold or let then the said total feu-duty shall become exigible in terms of the foresaid obligations, and doubling the said feu-duty the first year of the entry of each heir or singular successor in name of entry to the foresaid subjects, and that over and above the feu-duty for the year wherein the entry is made (excepting only that in the case of such entry by a singular successor where the vassal last infeft is still alive the feu-duty of the year wherein such entry is made shall not be exigible over and above the duplicate feu-duty payable as above): Providing and declaring, as it is hereby expressly provided and declared, that in regard this charter is issued before the aforesaid buildings are erected, the precept of sasine herein contained shall not be assignable: And the said David Callum shall be bound and obliged, as by acceptation hereof he binds and obliges himself, to procure himself infeft and seised on the precept of sasine herein contained within six months after the date hereof: And also providing and declaring, as it is hereby provided and declared, that it shall not be in the power of the said David Callum or his foresaids to sub-feu, sell, or dispose of all or any part of the said subjects to be holden of him or his foresaids, or of any other interjected superiors, but allenarly to be holden of and under the said . . . (the granters) . . . and their foresaids as superiors in the same manner in all respects as the said David Callum and his foresaids shall hold the same themselves in virtue hereof, it being understood and agreed to in respect of the above stipulations against assigning the precept of sasine herein contained, and against sub-feuing in any instance, that the said . . . as superiors shall grant the original entry to each of the first purchasers from the said David Callum respectively, providing such entry be taken within six months after such respective first purchaser's entry to the subjects purchased by him without exacting any duplication of the feu-duty payable by them.

The defender pleaded—"(1) The action is irrelevant. (2) The defender not being due to the pursuers the composition or casualty sued for, and the claim therefor being excluded by the express provisions of the feu-charter, decree of absolvitor should be granted, with expenses. (3) The pursuers are barred from insisting in the present action, in respect that they are unable to give the defender a valid right of relief against the holders of the remaining portions of the original feu in the event of his paying more than the just proportion of the cumulo casualty applicable to the subjects in which he is infeft."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), in sec. 3, provides that "'infeftment' shall include every title to an estate in land requiring and admitting of infeftment which is duly recorded in the appropriate register of sasines."

Section 4 (2) provides that infeftment shall imply entry with the superior.

Section 4 (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, or making effectual such casualties, feu-duties and arrears, or for irritating the feu *ob non solutem 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."

Section 4 (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, 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." . . .

The facts of the case are narrated in the Lord Ordinary's opinion.

On 8th November 1904 the Lord Ordinary (Low) pronounced the following interlocutor—"Finds, decerns, and declares that, in consequence of the death of David Callum, wright and builder in Edinburgh, who was the vassal last vest and seised in all and whole the shop No. 7 Spittal Street, Edinburgh, consisting of front shop, two apartments and conveniences, with the cellars under the same, and also the coal cellar under the shop, all as particularly described in the summons, a casualty of £50, 4s. became due to the pursuers as superiors of the said subjects, and is still unpaid, and that the full rents, maills, and duties of the said shop No. 7 Spittal Street, and others after the date of this interlocutor do belong to the pursuers as superiors foresaid, until the said casualty and the expenses aftermentioned be otherwise paid to the pursuers, and decerns and ordains the defender to make payment to the pursuers of the sum of £50, 4s., being the casualty foresaid: Finds the pursuers entitled to expenses," &c.

Opinion.—"This is an action of declarator and for payment of a casualty which has been brought in the following circumstances:—

"In April 1835 a feu-charter was granted by the commissioners, acting under certain Acts of Parliament, to David Callum, wright and builder, of a piece of ground in Spittal Street, Edinburgh.

"Callum was taken bound to erect certain buildings upon the ground, which it was stipulated should be completed by Whitsunday 1836. The feu-duty was £36, 15s., beginning the first term's payment 'at the first term of Whitsunday or Martinmas that shall happen six months after the whole or any part of the buildings erected or to be erected on the said area shall be habitable, and either sold or let for the half-year preceding.' There was also a declaration to the effect that until the whole of the buildings were sold or let the whole feu-duty should not be exigible, but only such part thereof as the architect of the commissioners should allocate or fix as applicable to such part of the buildings as might be sold or let, 'but that so soon as the whole shall be either sold or let then the total feu-duty shall be exigible, and doubling the said feu-duty the first year of the entry of each heir or singular successor.'

"It was also provided that the precept of sasine should not be assignable, and that Callum should procure himself infeft within six months, and subinfeudation was prohibited. There then followed this clause—'It being understood and agreed to, in respect of the above stipulations against assigning the precept of sasine and against sub-feuing in any instance, that the said commissioners as superiors shall grant the original entry to each of the first purchasers from the said David Callum respectively, provided such entry be taken within six months after such respective first purchaser's entry to the subjects purchased by him without exacting any duplication of the feu-duty payable by him.'

"Callum erected upon the ground a four-storey tenement, having shops upon the ground-floor and dwelling-houses above. He subsequently sold to various purchasers the whole tenement, with the exception of four shops and the half of two flats, in which he remained infeft. Callum's estates were sequestrated under the Bankruptcy Acts in 1838, but his trustee did not make up a title to the portion of the tenement of which Callum was still proprietor. Callum died in 1842. The sequestration was brought to an end by a decree of declarator, which was obtained in 1903.

"It appears that at the date of the sequestration a Mr Davidson was a heritable creditor of Callum's, and that he took actual possession of the four shops and two half-flats which he and his successors continued to possess until December 1902.

"In 1843 Robert Ainslie, W.S., was the superior of the ground, and in that year, in consideration of the sum of £552, 4s., he disponed to Davidson the superiority of the four shops and the two half-flats of which Davidson was in possession. By the disposition Ainslie assigned to Davidson 'not only the writs and others of the subjects, but also the sum of £25, 2s. of yearly feu-duty for the subjects hereby disponed . . . being the proportion effeiring to the said subjects of the *cumulo* feu-duty of £36, 15s. yearly payable for the whole subjects of which those hereby disponed form a part, the remainder of the *cumulo* feu-duty being hereby declared to be exigible solely from the other parts of the said subjects, and, notwithstanding anything to the contrary in the investitures, to form no charge against and to be in no way exigible out of the subjects hereby disponed, and, in the same manner, the foresaid sum of £25, 2s. of annual feu-duty hereby assigned being in no case exigible out of the subjects still retained by the said Robert Ainslie, but solely out of those hereby disponed.'

"The pursuers are now in right of the superiority acquired by Davidson.

"The four shops and the two half-flats remained in the *hereditas jacens* of David Callum until 1903, when Miss Christina Callum and Miss Elizabeth Callum made up a title thereto as (I understand) heirs-portioners of David Callum.

"In November 1903 the Misses Callum sold one of the shops (No. 7 Spittal Street) to the defender, and the disposition in his favour was duly recorded in the General Register of Sasines on 23rd November 1903.

"In these circumstance, the pursuers have brought the present action to enforce payment by the defender of a casualty of £50, 4s., being double the feu-duty, not of the shop which the defender has acquired, but of the four shops and two half-flats which constitute the estate of superiority belonging to the pursuers.

"In defence to the action the defender maintained two pleas, namely—(*First*) That he is a first purchaser of the shop acquired by him, and that therefore, in terms of the clause in the original charter which I have quoted he is entitled to an entry with the superior without payment

of a duplicand of the feu-duty; and (*secondly*) that the effect of the transaction between Ainslie and Davidson in 1843, whereby the *cumulo* feu-duty was allocated, was to deprive the defender, in the event of his paying the whole casualty claimed, of the right of relief which he would otherwise have had against the feuars in the part of the original feu the superiority of which was retained by Ainslie.

"In regard to the first of these pleas, it is not disputed that the defender is the first person who has purchased from the original vassal or his successors the shop in question, but it is maintained by the pursuers that the clause in the charter providing that no casualty shall be exigible from a first purchaser does not apply to this case.

"What the clause says is, that the commissioners, as superiors, shall grant an entry without exacting any duplication of the feu-duty to first purchasers from 'the said David Callum.' If the clause is read literally, therefore, no exemption is given to purchasers from successors of David Callum. The defender, however, argued that the words 'or his foresaids' (that is his heirs and assignees) are implied, and must be read into the clause. I am unable to give effect to that contention. I do not find anything in the charter which necessitates the conclusion that the exemption was conferred upon anyone except first purchasers from the original vassal David Callum. There is only one other instance in the charter in which David Callum is mentioned without the edition of the words 'his foresaids,' and that is when he binds himself to take infeftment within six months. Further, the exemption of a first purchaser from David Callum is part of the clause in which it is declared 'that it shall not be in the power of the said David Callum or his foresaids to sub-feu, sell, or dispose of all or any part of the said subjects to be holden of him or his foresaids, or of any other interjected superiors, but allenarly to be holden of and under the said commissioners and their foresaids, as superiors, in the same manner in all respects as the said David Callum and his foresaids shall hold the same themselves in virtue hereof.' It is in respect of that stipulation, and the stipulation against assigning the precept, that the exemption from a casualty is given in the case of first purchasers from David Callum alone. When such a marked change occurs in the phraseology of two parts of the same clause, I think that the presumption is that it was intentional.

"Further, it seems to me that there may have been a reason for limiting the exemption to the case of persons purchasing from Callum himself. The acquisition of the feu was evidently a speculation on Callum's part, his object being to erect shops and houses and dispose of them to advantage. The superiors were willing to give him as good a chance of doing so as possible, and accordingly they agreed not to exact the full feu-duty until the whole buildings were sold or let, but only so much as was applicable to such part as might be sold or let. It was, therefore, the superiors' interest that the whole of the buildings should be disposed of as soon as possible, and accordingly they agreed not to exact a casualty from a first purchaser from Callum, a provision which was certainly calculated to facilitate sales. The superiors may, however, very well have designedly restricted the privilege to the case of a sale by Callum himself, so that it should not apply to such a case as has occurred of Callum's representatives retaining a part of the tenement for sixty or seventy years, and then selling it.

"I am, accordingly, of opinion that the clause in question must be construed strictly and literally, and that the defender cannot take advantage therefrom.

"In regard to the second plea to which I have referred, it was held in *Nelson's Trustees* v. *Tod* (6 F 475) that, although a superior is not bound to take notice of divisions of the feu and allocations of the *cumulo* feu-duty made by his vassels, but can, notwithstanding, recover arrears of feu-duty by poinding any part of the feu, yet if he has granted a charter of confirmation to one of the sub-feuars for payment of the portion of the *cumulo* feu-duty which had been allocated upon the lot held by the latter, he cannot bring a poinding against another lot for general arrears of the *cumulo* feu-duty, in respect that by granting the charter of confirmation he has deprived the owner of the lot against which the poinding is directed of the right of relief which would otherwise have been open to him against the owner of the lot to which the confirmation applied.

"The defender argued that the same principle is applicable to this case, because the division of the superiority and the relative allocation of the original feu-duty which was made in 1843 have deprived him of the right of relief which he would otherwise have had against those in right of the portion of the feu of which Ainslie retained the superiority. I am of opinion that that contention cannot be sustained. The circumstances in this case are materially different from those in *Nelson's Trustees*, and I do not think that the principle which was there recognised is applicable. It seems to me that what occurred in 1843 had the same effect, so far as the defender is concerned, as if a feu of the four shops and the two half-flats had then been granted for the first time with a *cumulo* feu-duty of £25, 2s. It is plain that after that transaction there could be no claim of relief by the vassals of the one superior against those of the other. The four shops and the two half-flats were thereafter held of one superior for a *cumulo* feu-duty of £25, 2s., and the remainder of the tenement under another superior for a *cumulo* feu-duty of £11, 13s., and that was the position of matters when the defender purchased his shop. I see no reason, however, why the defender should not have a right of relief against the owners of the remaining three shops and the two half-flats, and I

apprehend that the pursuers could be required to grant him any assignation of their rights which might be necessary to enable him to operate that relief.

"The circumstances are very peculiar, and I do not know of a case in which an action of declarator and for payment of a casualty has been brought in similar circumstances. The pleas with which I have dealt, however, are the only pleas which were maintained in argument, and as in my opinion neither of them is well founded I must grant decree."

The defender reclaimed, and when the case came for discussion before the Division raised two additional points—(1) that the action was incompetent, and (2) that if he were liable for a casualty, then by the provisions of the original charter he was entitled to exemption of feu-duty for the year on which he paid such casualty, "the vassal last infeft," *i.e.*, Callum's heirs, being still alive.

The defender argued—The fee was full by the implied entry of the Misses Callum under the Conveyancing (Scotland) Act 1874, and the obligation of the Misses Callum to pay a casualty was personal to them. But if a claim could be advanced against the defender, then for that purpose this action was incompetent, the proper form of action being one with ordinary petitory conclusions—*Church of Scotland* v. *Watson*, December 24, 1904, 42 S.L.R. 299; *Dick Lauder* v. *Thornton*, January 23, 1890, 17 R. 320, 27 S.L.R. 455. Further, the disposition of superiority by Ainslie in favour of Davidson operated a splitting of the superiority (as to which see *Cargill* v. *Muir*, January 21, 1837, 15 S. 408), and cut off the right of relief open to the reclaimer against his co-feuars in the original feu. He therefore could only be called upon for the proportion of the casualty applicable to his own particular part of the holding. Moreover, allocation had taken place as contemplated in the original feu-charter—*Nelson's Trustees* v. *Tod*, March 2, 1904, 6 F. 475, 41 S.L.R. 332. But if he was wrong in these contentions, and was liable for the whole, it would be for only one year's feu-duty, in view of the taxing clause in the feu-charter since the vassal last infeft was alive. The case which ruled the terms of entry by disponees was *Wemyss* v. *Thomson*, January 19, 1836, 14 S. 233.

Counsel for the pursuers and respondents argued—The only question in this case was, what was the import of the taxing clause? The last vassal who had paid a casualty was dead. Before 1874 the superior could have raised an action of declarator of non-entry against the proprietor in possession of the lands. Now, *i.e.*, since 1874, his remedy was an action of declarator and for payment of a casualty, for an implied entry neither prejudiced the superior's rights to any casualties nor was it pleadable in defence against such action—Conveyancing (Scotland) Act 1874, sec. 4, sub-secs. 3 and 4. It was well settled that the superior was entitled to exact payment of a casualty, taxed or not, from anyone of a number of disponees—*Wemyss* v. *Thomson, ut supra;* Menzies' Lectures (3rd ed.), 819. The decisions in *Dick Lauder* v. *Thornton* and the *Church of Scotland* v. *Watson and Others, cit. sup.*, had no bearing, since in these cases casualties were demanded during the lifetime of vassals who had paid casualties, and there was not a suggestion that if the last expressly entered vassals had been dead the superior could not have successfully raised an action of declarator and for payment of a casualty. Here there had been in fact no multiplication of superiors, but even if there had been, the titles showed that the superiority of the ground of which the defender was a part-owner had been possessed for more than forty years in virtue of one title.

LORD PRESIDENT—In this case, which is an action for the payment of a casualty brought in the statutory form prescribed in the Conveyancing Act of 1874, we have an interlocutor of the Lord Ordinary granting decree in favour of the pursuers, and in his note appended thereto his Lordship has dealt with two pleas, which he states were the only pleas maintained before him on behalf of the defender. Of these pleas the first is founded on a special clause in the feu-charter providing for the entry of the first purchaser from David Callum (the original feuar) without the exaction of a duplication of the feu-duty. The Lord Ordinary has held, for what appears to me good and valid reasons, that this clause does not apply to the present defender, and in this Court the defenders' counsel has admitted that he cannot maintain that he is entitled to the benefit of it. The second point dealt with by the Lord Ordinary was the plea that this case fell to be ruled by the decision in *Nelson's Trustees* v. *Tod*, 6 F. 475. The original superiority has been divided into two portions, and consequently the defender as a vassal on one of these portions urges that he cannot have this casualty demanded from him, as the superior has deprived him of his right of relief against the other vassals. The Lord Ordinary has stated his reasons for holding that *Nelson's Trustees* does not apply here, and I entirely concur in them. The argument seems to be based on a misapprehension of the meaning of splitting a superiority. The only splitting of a superiority which can be objected to by the vassal is one which results in multiplying the superiors from whom he holds. That has not been done in this instance, and I agree that *Nelson's Trustees* has no application.

That disposes of the reclaiming-note so far as the pleas urged before the Lord Ordinary are concerned, but in this Court two other pleas were put forward by the defender. The first was that here there was no room for the statutory action, and in support of that plea the defender cited the cases of the *Church of Scotland* v. *Watson*, 42 S.L.R. 299, and *Dick Lauder* v. *Thornton*, 17 R. 320. Now, these two cases decided this, that where you have a prohibi-

tion of subinfeudation fenced with irritant clauses the compulsitor which a superior has in these circumstances to enforce the recovery of his casualty (whether it be taxed or not) depends on the contractual right which is expressed in the feu-charter, and consequently the action is a purely petitory one helped out by declaratory conclusions of the irritancy to make it effective, but is not the old action of a declarator of non-entry. That is quite clear, but it is not to the point in the present case. The defender has ignored the fact that in both these cases the fee was full, while here the fee is empty. The last-entered vassal died in 1842, and no one has paid a casualty as heir or singular successor since that date. I see no reason for holding, and no reason has been suggested to us, that there is anything inconsistent in both rights existing in the superior together—that is to say, the common law right of declarator of non-entry or its modern statutory equivalent, and also the right to sue on his contract if the feu-charter gives him a contractual right. There may be puzzles in working out these contractual rights in cases where the charter deals with a whole superiority which has *de facto* been subsequently divided into separate portions, but it is sufficient to deal with these puzzles when they arise for decision. In this case the pursuers' counsel says—"It does not matter what my contractual rights may be, for here I am suing at common law on the ground that my fee is empty, and I am entitled to the payment of a casualty before I enter another vassal." Section 4, sub-section 3, of the Conveyancing Act of 1874 preserves all rights of the superior to the enforcement of his casualty in spite of the implied entry granted to the successors of a vassal by that Act. Now, the only entry pleaded here is the implied entry of the Misses Callum, who admittedly never paid a casualty, and consequently in virtue of the sub-section I have referred to that entry cannot be pleaded as a defence to this action. It appears to me quite clear that if the Act of 1874 had not been passed the pursuers here would have been entitled to raise an action of declarator of non-entry, and therefore I do not think any relevant defence can be stated to the form in which the present action has been brought.

The other point maintained before us was that owing to the provisions of the taxation clause only one year's additional feu-duty was recoverable instead of two. The clause is as follows:—[*His Lordship here read the clause*]. Now, this means that in the circumstances referred to, the superior, instead of recovering for the year in which he enters the singular successor three times the feu-duty in all, only gets it paid twice over. The test of a vassal's rights under the taxation clause is this, that under the old law a superior in an action of declarator of non-entry said to the occupier—"Give me back my lands." The other replied—"I have a right to them," and produced his title. The superior then said—"I see your right, but before I give you entry you must pay me my dues." The statutory dues are of course a year's rent, but then the vassal could point to the clause in the charter taxing the entry at so and so, and say—"No, you agreed to accept this sum in lieu of your dues." So here the vassal is quite entitled to put forward this taxation clause in the feu-charter and found upon it. But how can he say that the existence of the Misses Callum entitles him to maintain that "the vassal last infeft is still alive? The Misses Callum are only infeft in virtue of the implied entry under the Act of 1874, and here again sub-section 3, to which I have already referred, comes in and safeguards the superior's rights to his casualty by providing that they shall not be affected by the implied entry granted by that Act. I think then that this plea also fails, and I am therefore led to the conclusion that the pursuers' claim in this action is well founded and must prevail.

LORD ADAM—I concur.

LORD M'LAREN—If I had been disposed to vary the Lord Ordinary's interlocutor I should have desired further time to consider my opinion, as this case involves an important question of feudal law. But here we have a very clear exposition by Lord Low of the law applicable to the subject, and I have no difficulty in assenting to the affirmance of his judgment.

There is one matter, however, pointed out by the Lord Ordinary, which I think may be considered. Lord Low says in the course of his opinion—"I see no reason, however, why the defender should not have a right of relief against the owners of the remaining three shops and the two half-flats, and I apprehend that the pursuers could be required to grant him any assignation of their rights which might be necessary to enable him to operate that relief." Now, I agree that if one feuar pays the whole of a cumulative feu-duty he is entitled to relief from his co-feuars. The position is equivalent to that of a body of joint-debtors, where, if the creditor selects one of them and exacts the whole debt from him, that debtor is entitled to an assignation from the creditor of his rights against the other debtors so as to enable him to operate his relief. There is no such reservation inserted in the interlocutor here, and I think it ought to be added.

LORD KINNEAR—I agree. As to the first point taken by Mr M'Lennan, that in terms of the clause of the original feu-charter, a purchaser in his position is entitled to an entry with the superior without payment of a duplicand of the feu-duty, it appears to me that whether his construction of the deed be sound or not, the defender has no title to raise it. His right does not rest upon the original charter. He acquired right to the *dominium utile* of certain lands which, at the time he acquired them, were held by the superior as a separate and distinct estate; and it is elementary that he cannot challenge his superior's

title. Mr M'Lennan says that when he completed his title he did not know what his superior's title was, and therefore he is not bound by its terms. But this is, in my opinion, quite inadmissible. It was said that in practice a purchaser's agent examines the property titles only, and does not at all consider the position of the superiority, although he knows that by recording a conveyance he is effecting an entry with the superior. If that be so, it is a practice which must have grown up since 1874, for before that it was necessary for a vassal to find out at least who the superior was before he could enter with him. If it is possible by mere registration of a conveyance to enter with a superior without knowing anything about the superiority title, it is a disadvantage that must be taken along with the many advantages conferred by the Conveyancing Acts that a conveyancer may follow the short-hand methods introduced by these statutes without adverting to legal consequences which must have been obvious to a practitioner who had to carry out the more operose procedure of the older law. It is plain enough that under the old law no one could have gone to a superior for a charter of confirmation without ascertaining who the superior was and the conditions of the holding; and if a purchaser under the present system records a conveyance, which is to have the effect of an entry by confirmation, he must either make the same inquiry, or take his risk of discovering that his superior's title is different from what he had supposed. I can see no good ground for relieving the defender from the consequences of making up his title in the way he did. The relation of superior and vassal is fixed by the titles, and the vassal cannot alter the conditions of his holding because he has chosen to complete his title without knowing what they are. But apart from that consideration, this particular ground of challenge is, in my opinion, unfounded for the reason your Lordship has given.

The defender further says that the transaction between Mr Ainslie and Mr Davidson was objectionable because it amounted to a splitting of the superiority. Now, it is settled in feudal law that a vassal is not bound to submit to a multiplication of his superiors; but it does not follow that a proprietor cannot divide his property merely because his estate is feued out. He may substitute a purchaser for himself in the superiority of the estate held by each of his vassals provided no vassal is subjected to more than one superior, and it cannot be suggested that anything that has been done has given the defender two or more superiors. He holds his land of the pursuer, and the pursuer alone; and the action proceeds upon no other assumption. But again it is too late for the defender to raise any objection to the process which he calls quite erroneously a multiplication of superiors. The original estate of superiority was divided in 1843, and his authors made up a title in 1903 to the portion which he has since acquired as a separate property. He has thus voluntarily acquired right and made up a title to a distinct estate, and the superior has done nothing to alter his position in any respect whatever. It is idle to suggest that he is deprived of a right of relief which he would have had if the estate had not been divided, because he never held any portion of a larger superiority than the estate of his present superior, and was never a co-feuar with any holder of a feu outside the limits of that estate.

The only remaining point is whether the pursuer has a good action in the form in which this action was originally brought. The defender founded on something which I am reported to have said in the case of *The Church of Scotland* v. *Watson and Others*, 42 S.L.R. 299, as suggesting that an implied entry under the statute might fill the fee and so be a good answer to the statutory action in room of a declarator of non-entry. But this is contrary to the express words of the statute, and I do not think the observation cited, when read with reference to its context, will bear the meaning ascribed to it. I held both in that case and in *Dick Lauder* v. *Thornton* that when a disponee had completed a title on an *a me* holding only, so as entirely to dispossess the disponer and take up the position of vassal in his room, the superior was entitled to enforce against him all the prestations of the feu-charter or contract, because he could not hold the land by virtue of the superior's grant without complying with the conditions of the grant. But then a superior cannot enforce the conditions of a charter as against an entered vassal, and on the express ground that he has taken infeftment, or in other words has entered, and at the same time deny that he has entered and allege that the fee is empty. It appeared to me, therefore, that when a superior claimed to enforce the terms of the charter as against an entered vassal, his proper action was an action on the contract, and not the statutory action in lieu of the declarator of non-entry. But on the other hand he is not bound to rely on the contract if there is no other vassal in life except a disponee who has entered by implication of the statute. He is quite entitled in that case to bring the statutory action on the ground that there is no vassal in the fee, and the implied entry will afford no defence to that action. It will still be perfectly competent, if the vassal entered by implication is found to be liable or admits his liability for a casualty, to refer to the terms of the charter or contract for the purpose of ascertaining the amount due. But the action will not be an action upon the contract but the statutory action. But in the present case this question does not arise. There is no vassal in life who has paid a casualty, and therefore there is no pretence for saying that the action is brought sooner than a declarator of non-entry ought to have been raised under the old law. The superior has no vassal except the defender, who is undoubtedly liable for the casualty, and it seems to me immaterial whether the liability is enforced under the original or

under the new conclusion of the summons.

I add that I agree with Lord M'Laren's observation in regard to relief. I agree with it, but I understand Mr Craigie to say that the pursuers assent to the Lord Ordinary's view that the defender is entitled to operate his relief and undertake to see that it is given effect to.

The Court affirmed the interlocutor of the Lord Ordinary.

Counsel for the Pursuers and Respondents — Craigie, K.C. — Inglis. Agent — James F. Mackay, W.S.

Counsel for the Defender and Reclaimer —M'Lennan, K.C.—A. M. Anderson. Agent —W. R. Mackersy, W.S.

Friday, May 26.

FIRST DIVISION.

[Lord Johnston, Ordinary on the Bills.

FREE CHURCH OF SCOTLAND *v.* MACRAE AND OTHERS.

Administration of Justice — Judge — Declinature — Bill Chamber — Court of Session Act 1821 (1 *and* 2 *Geo. IV, cap.* 38), *sec.* 4.

A cause was enrolled in the Bill Chamber Hearing Roll before a Lord Ordinary who had acted in his capacity of counsel as adviser to one of the parties in a series of kindred litigations, though not in this particular case. His Lordship appeared in the Division and proponed his declinature, referring to the provisions of the Court of Session Act 1821, sec. 4. The Court *sustained* the declinature and remitted the cause to another Lord Ordinary.

Lord Johnston, who before his elevation to the Bench had acted as counsel for the Free Church of Scotland in a series of litigations regarding its property, was Lord Ordinary on the Bills. In his Lordship's Bill Chamber Hearing Roll was set down a note of suspension and interdict at the instance of the Free Church of Scotland against Macrae and others. This was not a case in which he had acted as counsel, but was one of the series of litigations. His Lordship appeared in the First Division and proponed his declinature, saying—"I have to ask your Lordships to deal with certain cases that have appeared in the Bill Chamber Hearing Roll to-day, the first of which is the *Free Church of Scotland* v. *Macrae*, from Aberfeldy. This is not a case in which as counsel I have taken part, but it is in connection with a series of litigations in which I have acted throughout as counsel for the Free Church of Scotland and for the local parties connected with it. Under these circumstances I thought it proper to decline. But looking to the fact that they are Bill Chamber cases I cannot do so without your Lordships' assistance under the statute."

The Court of Session Act 1821 (1 and 2 Geo. IV, cap. 38), sec. 4, provides—"That in case of the death, sickness, necessary absence, or legal declinature of the Lord Ordinary on the Bills during the period of the Session, but at a time when the Court is not actually sitting, any one of the permanent Ordinaries, on a due statement by any of the Clerks of the Bills of such fact and of some urgency in the case, shall and may pronounce on any Bill which may in such case be laid before him such interlocutor as circumstances may require without prejudice *quoad ultra* to the provisions of the aforesaid, and also without prejudice to the power of either Division, upon legal declinature of the Lord Ordinary on the Bills when represented to them in any case, to remit the same to another Ordinary in his stead."

The Court (LORD ADAM, LORD M'LAREN, and LORD KINNEAR) pronounced the following interlocutor:—

"The Lords having heard the verbal report made in Court by Lord Johnston of the reasons for his declinature to act as Lord Ordinary on the Bills in disposing of the cause in the Bill Chamber, in respect of said verbal report sustain the said declinature, and remit the present note of suspension and interdict to Lord Pearson, Ordinary, for disposal, and authorise the Clerk of the Bills to lay the process before Lord Pearson accordingly, and to act as Clerk of Court before him during its discussion and advising."

Counsel for the Complainers — J. R. Christie — Fenton. Agents — Simpson & Marwick, W.S.

Friday, June 16.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON *v.* HENDERSON & SONS, LIMITED.

Minority — Lesion — Discharge of Claims under the Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37)—*Reduction— Enorm Lesion—Circumstances in which Held that Enorm Lesion had not been Proved.*

A minor employed by a firm of biscuit makers was injured while engaged in his work. The injury involved the loss to a great extent of his right hand. The accident was not in any way due to the fault of his employers, or those for whom they were responsible, so that apart from the provisions of the Workmen's Compensation Act 1897 he would have had no claim against them. For some time after the accident his employers paid him compensation at the rate of half his weekly wage prior to the accident,