lants, their conviction, and the statement of the case, all proceeded on the footing that the horse had been bought for the knackery. If the transaction was something different, it was for the appellants to obtain a finding to that effect from the Sheriff-Substitute.

I am unable, therefore, to give effect to either of these general arguments.

I have already dealt with the special point which was taken on behalf of Donald Dundas, and the conclusion I have reached as to him is that he was properly convicted.

A special argument was advanced on behalf of the knacker, which, I think, is unanswerable. He is charged with having permitted the sale by Donald Dundas to Purdie. Now this prohibited sale took place at Dumfries, three miles from the knackery. It is not found that the knacker was in Dumfries at the time, or that he knew anything about what was taking place. I am of opinion that under the regulation there can be no permission if there is not knowledge and sanction. In the absence of any finding that the knacker was cognisant of and authorised the forbidden sale, I am of opinion that he was wrongly convicted.

I am therefore of opinion that the second question should be answered to the effect that Donald Dundas's conviction was justified, but that the conviction of his father was not.

The Court answered the first question in the affirmative; in answer to the second question, held that the conviction of Donald Dundas had been right and that of Francis Dundas had been wrong, and quashed the conviction of Francis Dundas.

Counsel for the Appellants—Constable, K.C.—Ingram. Agent—J. G. Reid, Solicitor.

Counsel for the Crown—Gillon, A.-D. Agent—Sir William S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Tuesday, March 17.

FIRST DIVISION.

[Lord Cullen, Ordinary.

MARQUESS OF BUTE'S TRUSTEES *v.* CRAWFORD.

Superior and Vassal—Casualty—Death of Last-entered Vassal—Proof—Onus.

A superior who claims a casualty as having become due on the death of the last-entered vassal, must, in order to succeed, prove the fact of the vassal's death. It is not for the defender to prove that the vassal is still alive.

On 2nd May 1913 Lord Edmund Bernard Talbot and another, the Marquess of Bute's trustees, *pursuers*, brought an action against Jemima Crawford, Havelock Terrace, Rothesay, *defender*, in which they craved the Court to find and declare that in consequence of the death of George Walker, merchant in Madras, the vassal last vest and seised in the subjects therein mentioned, a casualty, being one year's rent of the subjects, became due to the pursuers as the superiors thereof, and to ordain the defender to pay to the pursuers as trustees foresaid the sum of £55, or such other sum as might be found to be one year's rent of the subjects.

The pursuers averred—"(Cond. 2) By charter of confirmation and precept of *clare constat* by the tutor-at-law for the Most Honourable John Patrick Crichton Stuart, Marquis of Bute, the then immediate lawful superior of the subjects before described, in favour of the now deceased George Walker, merchant in Madras, dated 21st February, and instrument of sasine following thereon recorded 30th March, both in the year 1852, the said George Walker became vest and seised in the said subjects. . . . (Cond. 3) The subjects contained in said charter of confirmation and precept of *clare constat* were subsequently disponed by the commissioner for the said George Walker to Hector Macfie, shipmaster, Rothesay, and by various transmissions the defender the said Jemina Crawford is now proprietrix of the subjects before described and is infeft therein. The defender is a singular successor of the said George Walker, and is by the feu-right of the said subjects liable in a casualty of a year's free rent of same. The pursuers have been unable to obtain information as to the place and date of death of the said George Walker. The annual rent of said subjects belonging to the defender for 1900, being the year of her infeftment, is £55 or thereby, but in determining the sum of a year's free rent the usual deductions fall to be allowed."

The defender, *inter alia*, answered—"(Ans. 3) . . . Explained that the pursuers have produced no evidence that the said George Walker is dead, and the defender does not admit that he is dead. The defender is willing, and has all along been willing, to pay to the pursuers such sum as should be ascertained to be the amount of any casualty due by her in respect of the said subjects, but she declines to pay such casualty in the absence of evidence of the death of the said George Walker."

The defender pleaded, *inter alia*—"(1) The action is incompetent and ought to be dismissed. (2) The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The action is premature and ought to be dismissed."

On 18th July 1913 the Lord Ordinary (CULLEN) pronounced this interlocutor—"Finds that the pursuers, as a condition of their claim against the defender for the casualty sued for, are bound to prove the death of George Walker mentioned on record: With this finding, allows to the parties a proof of their averments on record, and appoints the said proof to proceed on a day to be afterwards fixed."

Opinion.—"The pursuers are the superiors of a feu in which the defender as a singular successor is infeft by virtue of a recorded

disposition in her favour, and in this action the pursuers claim right to a composition on the footing that the vassal last vast and seised in the lands, one George Walker, sometime merchant in Madras, has died. The action is in the statutory form introduced by section 4 (4) of the Conveyancing Act of 1874.

"While the pursuers aver that George Walker is now deceased, they say on record that they do not know when or where he died, and from what was said at the hearing it would appear that the information which they at present have does not ascertain the fact of his death, and that it is mere matter of supposition. The defender does not admit that George Walker is dead. It was explained that the present action was intended to present for decision a question of general importance—to wit, whether, when a superior claims a composition as having become due in consequence of the death of the last-entered vassal, there is an *onus* on the superior to prove the fact of such death, or whether the *onus* lies on the defender to prove that the last-entered vassal is still alive. It is rather singular that this question should be an open one at this time of day, but it is said to be so.

"The present action, as I have said, is the species of action introduced by section 4 of the Conveyancing Act of 1874. While that is so, the parties at the hearing were at one in saying that the question fell to be decided in the same way as if it had been raised in a declarator of non-entry brought prior to the Act. The pursuers say that in a declarator of non-entry the superior producing his sasine in the lands was bound to do nothing more in the first instance than to allege that the lands had been in non-entry from a stated date, and that the *onus* then lay on the defender to oppone a subsequent entry. The defender says that the superior was bound to prove in the first instance the death of the former vassal whom he alleged to be the last entered, and that it then lay on the defender to oppone if he could a subsequent entry, or if he could not do so to offer himself to enter.

"A declarator of non-entry was not a claim by the superior to the fee of the land by virtue of his sasine therein. The hypothesis of it was a duly constituted feu and a formerly entered vassal. On the averments that that vassal had died and that his heir had not entered—in more modern times that no successor had entered—the superior sought to have it declared that the lands had been in non-entry since the death of the former vassal, and that he should be held entitled to the fruits of the feu so long as the non-entry continued. Following on a decree that the feu had been in non-entry since the date he libelled as that when by the death of the last vassal the fee had become vacant, he had a retrospective claim for the retoured duties.

"In the styles to which I have referred (Dallas' and Juridical Styles) the summons of declarator of non-entry libels as a fact the death of the last-entered vassal and the date of the death. The insertion of the date marked the period to which the superior's claim for retoured duties went back.

"Now as the hypothesis of the action was a duly constituted feu and a formerly entered vassal whose entry filled the fee, the superior's claim rested fundamentally on the fact of that vassal having died, so that his entry was spent and a vacancy had occurred. 'Ex morte vassalli . . . ad dominum superiorem pertinent non-introitus et custodia. . . . Mortuo igitur vassallo, quamdiu haeres differt intrare, sive adire hereditatem feudi, seque pro haerede gerere tamdiu feudum in non-introitu dicitur esse.'—Craig ii, 19, secs. 1 and 3.

"The death of the entered vassal being the fact which gave rise to the superior's claim to have a new vassal, and to the casualty of non-entry so long as no successor entered, I do not, apart from authority, see why the superior should not have been bound to show that a vacancy in the fee had in fact arisen.

"The authorities cited by the pursuers to show that the superior was relieved from proving—although he alleged—the death of the former vassal, consist of two passages in Stair and Erskine. Stair (2, 4, 21) dealing with the declarator of non-entry says—'In this declarator the superior producing his infeftment needs not instruct the defender his vassal . . . neither needs he instruct that the lands were void since the time libelled, because that is a negative and proves itself, unless the vassal instructs that they were full.' Similarly, Erskine (2, 5, 41) says—'In the action of general declarator the superior must produce as his title his seisin in the lands to prove his right of superiority. . . . But neither superior nor donatory need bring evidence that the lands were without a vassal from the time libelled, because that is a negative which proves itself, unless the defender make it appear that the lands were full.'

"The corresponding passage in Craig is where, speaking of the defences to a declarator of non-entry, he says—'Prima, quod terrae sint aditae sive introitae, seu feudum intratum (nos plenum dicimus); non-introitus enim negatio est, neque melius negationi occurritur, quam per affirmationem'—(Craig, ii, 19, sec. 14).

"Underlying these statements is there not the assumption that the death of the former vassal, alleged by the superior to have been the last-entered vassal, was an ascertained fact? What the superior is said to be relieved from proving is called a 'negation'—the negation of entry 'from the time libelled.' But what about the fact of a vacancy in the fee having occurred *at* the time libelled? This, from the superior's point of view, was not a negative but a positive fact, seeing that his summons postulated a constituted feu and an original full fee, which while it continued excluded non-entry. It seems to me, therefore, that the negation which the superior was relieved from proving did not include proof of the fundamental fact on which his action was based—to wit, that the former entered vassal had died so as, *prima facie*, to show a vacancy thereby occurring in the fee.

This fact being ascertained, the continuance of the non-entry was a negative fact which it lay with the defender to displace by pointing to a subsequent entry.

"Non-entry was generally treated favourably to the vassal rather than the superior. If the pursuer's view of the law is right, then in any case where the entered vassal had disappeared and it could not be ascertained whether he was alive or dead, the superior could at once have had a non-entry declared, and he could have carried back his claim for the retoured duties to a purely arbitrary date. I do not think that the authorities cited warrant this result.

"The pursuers, pointing to the style of a summons of declarator of non-entry which libelled the death on a particular date of A B, 'the last-entered vassal,' say that it would be inconsistent with the law as stated in the authorities above referred to that the superior should have been bound to prove the whole of his averment. This is true, because if the superior proved the death of the 'last-entered' vassal there would be no room for a proof by the defender of a subsequent entry. But what the superior was relieved from proving was a negative fact—non-entry 'from the time libelled'—and as his summons postulated a former full fee, I read these authorities as meaning that when the superior had shown *positive*, the occurrence of a vacancy by the death of a former entered vassal whom he alleged to be the last entered, it then lay on the defender to show that there had been an entry subsequent to that of the said deceased.

"As the point was not argued, I express no opinion on the question whether the *onus*, under the statutory action introduced by the Act of 1874, is different from what it would have been in a declarator of non-entry brought prior to that Act."

The pursuers reclaimed, and argued—It lay on the defender to show that the last-entered vassal was alive, not on the superior to prove that he was dead. Under the old law a superior was not bound to aver specifically the date of the last-entered vassal's death. All he had to do was to allege that the lands were in non-entry from a date libelled, it being then for the vassal to instruct that the fee was full—Stair, ii, tit. 4, secs. 3, 6, 21, 23; Ersk. Inst., ii, tit. 5, secs. 29, 39, 41; Menzies' Lectures, 484; Bell's Lectures, 622; *Earl of Lauderdale* v. *Brand*, (1704) M. 9325; *Walker* v. *Earl of Eglinton's Tutors*, January 22, 1828, 6 S. 407; *Magistrates of Dundee* v. *Kid*, June 26, 1829, 7 S. 801; *Mackenzie* v. *Mackenzie*, July 10, 1838, 16 S. 1326; *Town Council of Brechin* v. *Arbuthnot*, December 11, 1840, 3 D. 216; *Mackenzie* v. *Mackenzie*, December 3, 1842, 5 D. 246. Failing his doing so, the superior could then resume possession. The fact that the lands were in the possession of a third party did not defeat the superior's right, for he could combine with his action of non-entry an action of reduction-improbation, and if no valid title to the lands were produced enter into possession—Bell's Prin., sec. 709. *Esto* that the defender was impliedly entered, that did not deprive the superior of the casualty sued for—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4—the measure of the casualty being the rent for 1900, the year of the defender's implied entry—*Houston* v. *Buchanan*, March 1, 1892, 19 R. 524, 29 S.L.R. 436.

Argued for respondent—It lay on the superior to prove the death of the last-entered vassal. That was the rule under the old law, for the summons of non-entry libelled both the death and the date of death of the last-entered vassal—Dallas' Styles, 240; Juridical Styles (2nd ed.), iii, 186. It was the rule of the old law that the vassal rather than the superior was to be favoured——Stair, ii, tit. 4, secs. 21 and 24. The Conveyancing Act 1874 (*cit.*) had not altered the burden of proof, for the form of summons appended to the Act, viz., Sched. B, libelled both the death and the date of death. Moreover, the action now was a petitory one, and in such actions it was for the pursuer to prove his case. The passages in Stair (ii, 4, 21) and Erskine (ii, 5, 41), which seemed to support the reclaimers' contention, did not really do so, for they assumed that the death of the last-entered vassal was an ascertained fact. The negative which the superior was said not to be bound to prove was the continued non-entry. The case of *Lauderdale* (*cit.*) was not in point, for that was a decision on "competent and omitted." The cases of *Walker* (*cit.*), *Brechin* (*cit.*), *Kid* (*cit.*), and *Mackenzie* (*cit.*) were also distinguishable, for these were actions of reduction-improbation combined with the declarator of non-entry, and if the superior got decree in the reduction process he was relieved from going into the further question as to the vassal's death. It was essential in the interests of the defender that the date of the last-entered vassal's death should be ascertained, for that was the date at which the casualty fell to be measured—*Steuart* v. *Murdoch & Rodger*, June 6, 1882, 19 S.L.R. 649; *Campbell* v. *Stuarts*, December 11, 1884, 22 S.L.R. 292. A superior was not entitled to choose an arbitrary date from which his claim for the retoured duties would run, and the feu must be assumed to be full until it was proved to be empty—*Hamilton* v. *Chassels*, January 30, 1902, 4 F. 494, 39 S.L.R. 337. The case of *Houston* (*cit.*) was in the respondent's favour, for in that case (as appeared from the session-papers) the superior led in the proof.

At advising—

LORD PRESIDENT—The acute and learned criticism of the reclaimers' counsel failed, in my judgment, to detect any flaw in the closely-reasoned judgment of the Lord Ordinary. I am therefore for adhering to the interlocutor reclaimed against, for the reasons assigned in the note, on the statement of which I am certain I cannot improve and to which I can add nothing.

LORD JOHNSTON—I concur.

LORD SKERRINGTON—I concur.

LORD MACKENZIE did not hear the case.

The Court adhered.

Counsel for Pursuers—Chree, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for Defender—Lippe—Little. Agent—Walt. M. Murray, S.S.C.