

conveyance from the heir-at-law or by a notarial instrument, as provided in section 19.

It is thus manifest that the title so made up must contain the conditions and qualifications contained in the general disposition, and no other. As to the effect to be given to these conditions and qualifications the statute of course is wholly silent. It dealt with no such matter. But it shows that the conditions and qualifications must enter the title precisely as they are contained in the general disposition; and if these are such as the law of Scotland will not recognise, there is not a word in this clause which can give them validity.

It is said that this 20th section places bequests of land on the same footing with bequests of moveables, and on this assumption the opposite argument is wholly built. But this is not what the clause does. It puts bequests of land, in testaments which contain words which would be sufficient to convey moveables, on the same footing with a general disposition of land *inter vivos*; and if this were a general disposition of land *inter vivos*, it seems to be conceded that it could not be supported. If so, the foundation of the hypothesis is destroyed, because by the very words of the section this settlement is equivalent to a general disposition of land *inter vivos*.

I am therefore of opinion that there is here no valid disposition of this estate, because it is qualified by conditions repugnant to the law, and that the pursuer as heir-at-law is entitled to the property in fee-simple.

The Court recalled the Lord Ordinary's interlocutor, repelled the pleas-in-law for pursuer, and sustained the second and third pleas for the defenders Edward Arthur Studd and Gladys Studd, and assoilzied them from the conclusions of the libel.

Counsel for Pursuer—Asher—H. Johnston.
Agents—Mackenzie & Kermack, W.S.

Counsel for Curator *ad litem*—Kinnear—Maconochie. Agent—Charles Cook, W.S.

Saturday, December 11.

FIRST DIVISION.

PETITION—HARRISON.

Process—Bankruptcy—Bankruptcy (Scotland) Act 1856, sec. 48—Warrant to Record Abbreviate in Sequestration.

The petitioner was the creditor of a bankrupt estate, on whose petition the first deliverance in the sequestration was obtained before the Sheriff of Orkney, &c. The bankrupt had since died, and as his successors were pupils and no tutor *ad litem* had been appointed, the warrant granting the sequestration of the estate had not been pronounced.

By section 48 of the Bankruptcy (Scotland) Act 1856 it is declared that the party applying for sequestration shall present, before the expiration of the second lawful day after the first deliverance if given by the Lord

Ordinary, or present or transmit by post before the expiration of the second lawful day after the said deliverance if given by the Sheriff, an abbreviate of the petition and deliverance to the Keeper of the Register of Inhibitions at Edinburgh.

The petitioner stated that through an oversight he had not complied with the above provision of the statute, and he therefore craved the Court to grant warrant for the recording of the abbreviate, which he produced with the petition.

The Court pronounced the following interlocutor—"Grant warrant and authority to the Keeper of the General Register of Inhibitions at Edinburgh, within the period of fourteen days from this date, to receive the abbreviate of the petition and deliverance in the sequestration mentioned in the petition, and to record the same in the said register, and to write and subscribe a certificate on the said abbreviate, in the form specified in the statute, as prayed for, and decern: Reserving all objections to any party having interest against the validity of the proceedings, with all answers thereto as accord: And declaring that the expenses of this application and procedure connected therewith are not to be allowed against the estate."

Counsel for Petitioner—Galloway. Agent—Thomas Carmichael, S.S.C.

Tuesday, December 14.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

(Before Seven Judges.)

STRAITON ESTATE COMPANY (LIMITED) v. STEPHENS.

(*Ante*, June 12, 1878, vol. xv., p. 622, and 5 R. 922; July 8, 1879, vol. xvi., p. 718, and 6 R. 1208.)

Superior and Vassal—Composition for Entry—Implied Entry—Conveyancing Act 1874, sec. 4—Obligation of Relief—Titles to Lands Consolidation (Scotland) Act 1868, sec. 8.

Composition for an entry being due and payable at the death of the last entered vassal, if the person who was proprietor of the lands at the death of the last entered vassal subsequently sells them without having paid the composition, by disposition containing the statutory clause of relief of all casualties, feu-duties, and public burdens, he is liable, notwithstanding the implied entry introduced by the Conveyancing Act of 1874, to relieve the disponee of the composition when demanded by the superior.

Opinion (per Lords Shand and Young) that he would be so liable without the express obligation of relief.

Where the disponee had, after notice to the disponent, contested the claim of the superior to a composition for entry, on the

ground that the disponent himself was liable, or at least that he ought to be called in the action, and had succeeded in reducing the amount of it—*held* that the disponent, who was eventually found liable for the amount of the composition, was bound to relieve his disponent of the expense of the litigation with the superior.

This was an action at the instance of the Straiton Estate Co., proprietors of the lands of Straiton, against William Walker Stephens, merchant, Leith, sole accepting trustee under the trust-disposition and settlement of Peter Brash, who died on 8th November 1872, concluding for payment of (1) £824, 6s. 1d., and (2) £233, 16s. 5d., the former sum being the amount of the casualty, as ascertained in the previous process above noted, paid by the pursuers to W. H. B. Sivright, superior of the lands of Straiton, and the latter sum being the amount of the expenses incurred by the pursuers in that process. Of this sum of £233, 16s. 5d. the sum of £100, 3s. 6d. was the amount of the taxed expenses found due to the superior and paid by the pursuers, and £133, 12s. 11d. was the amount of their own agent's account.

The circumstances in which the action was raised are thus related in the note of the Lord Ordinary (CURRIE HILL):—"The late Peter Brash, merchant in Leith, died on 8th November 1872, duly infeft and entered with the superior in the Straiton estate, described in the summons. He left a trust-disposition and settlement dated 6th February 1869, with relative codicil dated 2d November 1872, by which he conveyed his heritable property, and *inter alia* the Straiton estate, to trustees, of whom the defender Wm. Walker Stephens, was the only acceptor. He made up his title to the estate by notarial instrument, recorded in the register of sasines 9th July 1873, but his title was never confirmed by the superior, and the lands which had fallen in non-entry continued in that condition until the commencement of the Conveyancing (Scotland) Act on 1st October 1874. By the operation of that statute, the defender, in virtue of his infestment, became the duly entered vassal of the superior. Thereafter, by disposition dated 10th November 1876, he sold the lands to the pursuers, who expedite infestment therein by recording the disposition on the 15th of that month, and by the operation of the statute became the duly entered vassals of the superior.

"On 8th May 1877 William Henry Revell Bedell Sivright, the superior, raised a summons against the pursuers in the form prescribed by the Conveyancing (Scotland) Act 1874, concluding that it should be found and declared that, in consequence of the death of the said Peter Brash, the vassal last vested and seized in the subjects, a casualty, being a year's rent of the lands, became due to the superior on 15th November 1876, being the date of the infestment of the pursuers, and concluding for payment of £1930, 19s. 2d. as the value thereof. After sundry procedure the Second Division pronounced an interlocutor on 8th July 1879, fixing the amount of the casualty at £824, 6s. 1d., with interest thereon at the rate of 5 per cent. from the date thereof till payment. The pursuers paid the amount to the superior with the expenses of process, and they have raised the present action against the defender to recover from him the amount so paid by them,

and the expenses incurred by them to their own agents in defending the superior's action.

"The grounds of this claim of relief are thus stated:—"The defender was, at the period when the Conveyancing Act 1874 came into operation, liable in payment of a casualty or composition, being a year's rent of the subjects in question. This was a burden affecting the estate in the defender's hands, and for which decree might have been obtained against him by the superior. It was an implied condition of the contract of sale between the pursuers and defender that the pursuers should, upon payment of the agreed-on price, which was a full price, acquire the subjects free of all incumbrances; and this implied condition was, so far as regards casualties, made matter of express stipulation in the disposition of the subjects to the pursuers.' The express stipulation here referred to is the short clause usually inserted in all onerous conveyances of land, and is as follows:—"I bind myself, as trustee fore-said, and the trust-estate under my charge, to free and relieve the said disponent and their fore-saids of all feu-duties, casualties, and public burdens.' By the 'Titles to Land Consolidation (Scotland) Act 1868,' sec. 8, it is declared that a clause so expressed 'shall, unless specially qualified, import an obligation to relieve of all feu-duties or other duties, or services or casualties, payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry.'"

The pursuers pleaded—" (1) The defender having sold the estate of Straiton to the pursuers for a full price, and as an unencumbered subject, is bound to relieve them of the casualty which ought to have been paid by the defender on his entry to the lands. (2) In respect of the obligation of relief in the disposition by the defender to the pursuers, the defender is bound to relieve the pursuers as concluded for. (3) The pursuers, having incurred expenses in consequence of the defender having refused to relieve them when the claim was made, are entitled to recover the amount thereof, and, *separatim*, are entitled to the expenses beneficially incurred on the defender's behalf in reducing the amount of the said casualty."

The defender pleaded, *inter alia*—" (2) The casualty sued for not having been due and payable at the date of the pursuers' entry, and not being a burden of which the pursuers are entitled to be relieved by the defender under their disposition, the defender should be assoilzied with expenses." He also founded on a verbal agreement which, as he alleged, had been entered into at the time of the sale to the pursuers, that the latter should pay the composition if it should be demanded. " (4) On a sound construction of the disposition, and of the Conveyancing Act 1874, the defender is not in the circumstances bound to relieve the pursuers of the sums sued for, or any part thereof."

The Lord Ordinary on 19th July 1880 pronounced this interlocutor:—"Having considered the cause, assoilzies the defender from the conclusions of the action, and decerns." He added this note—"This action raises an important question as to the operation of sec. 4 of the Conveyancing (Scotland) Act 1874, in reference to the clause usually inserted in onerous convey-

ances of land binding the seller to relieve the purchaser 'of all feu-duties, casualties, and public burdens.' I had occasion to consider a similar question in the case of *The Leith Heritages Company v. The Edinburgh and Leith Glass Company*, my judgment (which was acquiesced in) being reported in the *Scottish Law Reporter*, vol. xiii., p. 731, under date 8th June 1876. The question, which is undoubtedly one of great and general importance, having been again very ably and anxiously argued in the present case, I deemed it right to reconsider with all possible care the views expressed in *The Leith Heritages Company's* case, but the result has been to confirm me in my former opinion.

[His Lordship here narrated the circumstances leading to the action being raised, as printed above.]

"Now, it is important to keep in view that, by the law as it stood prior to the commencement of the Conveyancing Act of 1874, although lands fell into non-entry immediately upon the death of the last entered vassal, entitling the superior to the casualty of non-entry—*i. e.*, to take and retain possession of the lands until the entry of the new vassal as heir or singular successor of the last vassal, and the payment by him of the relief or composition payable in respect of such entry—the superior's right to the casualty consisted, to use the words of Erskine, merely of a 'claim which must be made effectual by an action for declaring that the lands have fallen into non-entry.' It must be observed, however, that this action was merely an indirect means of compelling the vassal's successor to enter and pay the composition, as the superior had no direct action to compel the successor either to enter or to pay the composition, the latter being only one of the conditions of entry. The lands therefore remained in non-entry, and in the hands of the superior, in virtue of his decree of declarator of non-entry, until the successor voluntarily came forward and asked to be received on payment of the composition.

"In short, neither the casualty of non-entry nor the composition (and the two things are entirely different) would ever be said to be 'payable or prestable' to the superior until after his action was raised, and in the case of the composition, until the successor had shown his submission by asking to be received as vassal.

"It is thus quite clear, that had the Conveyancing Act of 1871 not passed, the present pursuers, after paying the price and accepting the disposition from the defender, and taking infestment thereon without reserving right to call upon the defender to complete any further title in his person, or to enter with the superior, would not, in the event of the superior raising against them an action of declarator of non-entry, have been entitled to insist upon the defender entering and paying the composition. It was no doubt not uncommon in practice for the purchaser, before accepting the disposition, to insist upon the seller entering with the superior and paying the composition.

"But where the disposition was accepted without reservation, the lands remaining in non-entry, and no casualty was regarded as payable and prestable to the superior until an entry was demanded, or an action of declarator of non-entry was raised; and it was never heard of in practice that on such an action being raised the

purchaser was entitled to call upon the seller to relieve him of the action and pay the composition. In short, by the law and practice prior to 1874 this was not one of the casualties falling within the clause of obligation to relieve of casualties, &c., contained in an ordinary disposition by a seller to a purchaser; indeed, such a claim of relief would have been clearly untenable, because the defender having been divested by the infestment of the pursuers before any judicial demand for an entry had been made by the superior, the casualty of non-entry, and the payment of the composition of a singular successor, would not have been a casualty 'payable or prestable' by the seller to the superior prior to the pursuers' term of entry. The pursuers, however, maintained that the effect of the Conveyancing Act of 1874 was to make the casualty of the year's rent actually 'payable or prestable' by the defender to the superior as at the passing of the Act on 1st October 1874, and therefore before the term of entry in the disposition, although no judicial demand was made by the pursuers until after that date; and they further maintain, that so soon as the judicial demand was made by the superior the defender's obligation to relieve them of casualties took effect, and entitled them to call upon him to relieve them of the casualty in question. On the other hand, the defender maintains that the statute did not, according to its sound construction, impose any such liability upon him as seller.

"The present question depends upon the construction of chapter 4 of the statute and its subsections. Sub-section (1) declares the granting of writs by progress to be unnecessary for the completion of the title to land, and to be incompetent, and has thus rendered it no longer necessary for the heir or singular successor of a vassal to resort to the superior for an entry or renewal of the investiture as a necessary step in the completion of the title.

"In order, however, to maintain the feudal relation between the superior and vassal, it is enacted in sub-section (2) that every proprietor duly infest in the lands shall be deemed and held to be, as at the date of the registration of his infestment in the register of sasines, duly entered with his immediate lawful superior, to the same effect as if such superior had granted a writ of confirmation according to the previously existing law, and that whether the superior's own title had been completed or not.

"But as the granting and delivery of a writ of confirmation in the absence of any reservation of the claim for composition operated under the old law as a discharge of the composition, whether the same was paid at the time or not, sub-section 3 provides that 'such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu right for recovering, securing, and making effectual such casualties, feu-duties, and arrears, . . . shall continue to be available to such superior in time coming; but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to

this Act or by the conditions of the feu-right, have required the vassal to enter or pay such casualty irrespective of his entry.' The term 'casualty,' I may mention, is declared by the interpretation clause of the Act to include the composition payable by a singular successor.

"Sub-section 4 is as follows:—'No lands shall after the commencement of this Act be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry according to the now existing law, but shall cease to have such effect upon the payment of such casualty and of the expenses (if any) contained in such decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree, nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same; and the summons in such action may be in, or as nearly as may be in, the form of Schedule B hereto annexed.'

"According to the construction which the pursuers place upon these enactments, the sum of £324, 6s. 1d., being the casualty of a year's rent of the subjects in question, became on 1st October 1874 'payable or prestable' to Mr Sivright as superior by the defender, as the proprietor then duly infeft in these subjects, although the superior had not demanded payment thereof, and that the same continued to be 'payable or prestable' by the defender to the superior even after the pursuers had purchased the property, and by the implied statutory confirmation of their own infeftment in 1876 had become themselves the duly entered vassals of the superior. I am of opinion that this is not the sound construction of the statute. It appears to me that what has been done by the various sub-sections of section 4 is to substitute for an actual entry by confirmation, given by the superior under the old form, and as equivalent thereto, an implied entry by force of the statute, taking effect on the completion of every infeftment; and further, to declare that notwithstanding the death of the last entered vassal and the non-infeftment of his successor the lands should not be held to be in non-entry. But in order to protect the right of the superior to his casualty of composition, which might have been held as extinguished by the statutory confirmation, and to take possession of the lands until payment of the composition, the statute substitutes for the old action of declarator of non-entry, in which the superior might have obtained decree of Court authorising him to enter into possession of the lands and appropriate the rents while the vassal lay out unentered, an equivalent action against the actual proprietor of the lands for the time, concluding for declarator

that a casualty of a year's rent has become due, either by the death of the last entered vassal or by the infeftment of a new proprietor, and until the casualty is paid he is entitled to the rents of the property, and for decree against the proprietor for payment of the casualty personally.

"Now, as I read these provisions of the statute, it is left in the option of the superior to determine whether he shall raise such an action against the immediate successor of his last entered vassal, or against some remoter successor, just as it was optional to him under the old law to allow one or more successors of the last vassal to lie out unentered without claiming composition or without raising a declarator of non-entry. Under the old law, as already explained, the casualty of non-entry did not become 'payable or prestable' until the claim was enforced by the superior in an action of declarator of non-entry. That action operated indirectly as a compulsitor upon the successor of the vassal to enter and pay the composition, because until he did so the superior was entitled to enter into possession of the lands and appropriate the rents; but until the action was raised the vassal was not regarded as contumacious, and was entitled to lie out unentered, to retain possession of the lands, and to withhold payment of the composition; and if he sold the lands to a purchaser who was infeft and took possession of the lands, the superior could not, with any effect, call upon the seller to enter or pay composition, and to make his right to composition effectual only by a declarator of non-entry against the purchaser, who, on the other hand, had no claim of relief against the seller. Now, I think there is no material change in this respect introduced by the Statute of 1874. It appears to me that the vassal is not to be regarded as contumacious, and is not bound to pay the composition unless and until the superior demands it in an action in the statutory form—see *Ferrier's Trustees v. Baillie*, 4 R. 738. But against whom is that action to be raised? It is not necessarily against the immediate successor of the last vassal, but against the successor, whether infeft or not, against whom the superior would have been entitled to raise an action of declarator of non-entry under the old law; but, as we have seen, it was against the party in possession of the lands for the time that the declarator of non-entry was directed, although there might have been many intermediate proprietors between him and the last entered vassal; and I am clearly of opinion that under the Act of 1874 the defender in the action of declarator and for payment of the casualty is to be the party in possession of the lands at the time as successor, whether immediate or more remote, of the last entered vassal, and especially is this the case where the several successors in their order have been infeft in the lands. Each successive infeftment makes the person infeft the entered vassal of the superior, and dissolves the feudal relation which has subsisted between the superior and the proprietor previously infeft. It follows, therefore, that the new proprietor, if a singular successor of the last entered vassal, or his heir, becomes by virtue of his infeftment the party against whom the superior may raise his action to constitute the casualty of composition as a debt 'payable or prestable' to the superior.

"It is true that the statute provides that the superior is not to demand a casualty sooner than

he could 'by the law prior to the Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entry.' But in the present case the superior did not demand the casualty sooner than under the old law he could have required the pursuers to enter. On the contrary, under the old law he might have required an entry from the defender long before the date of his action against the pursuers, but he did not so enforce his claim. Had he chosen to constitute his claim against the defender before he sold the lands to the pursuers, he would not have been entitled to demand the casualty from the pursuers during the defender's lifetime, because the defender would on that supposition have been in the position which under the old law would have been held by one duly entered by the superior as his vassal on payment of composition, during whose lifetime the superior could not have called upon a successor to enter. But though the defender had obtained implied entry by the operation of the statute, the superior did not, although entitled to do so, demand a casualty from him, and the statute expressly provides 'that no implied entry shall be pleadable against the new action for the casualty.' The meaning of that provision clearly is, that the proprietor infert against whom the statutory action was raised is not only not to be entitled to plead his own implied entry by confirmation as a discharge of the composition, but is not to be entitled to plead that by the implied entry of any of his predecessors the action is excluded, unless some one of such predecessors still in life has paid the composition.

"It appears to me, therefore, according to the sound construction of the Act of 1874, and of the obligation of the defender to relieve the pursuers of casualties contained in his disposition of Straiton—(1) That the casualty for which the pursuers were sued, and which they paid to the superior in 1879, was the casualty exigible from themselves in respect of their own implied entry; (2) That the demand for that casualty was not made by the superior sooner than he was entitled to do so; and (3) That the said casualty is not a casualty 'payable or prestable' to the superior by the defender prior to the term of entry of the pursuers under their disposition from the defender within the sense and meaning of the obligation to relieve of casualties contained in that disposition.

"In addition to what I have already stated, it may be well to point out, that if the pursuers' argument is sound, the defender, and not themselves, was the party against whom the superior should have raised the statutory action. But that plea was stated by the pursuers in defence against that action, and was overruled by the Lord Ordinary (Adam) and the Second Division—see *Sivright v. Straiton Estate Company*, 5 R. 922, and 6 R. 1028. And I must assume that the judgment would not have been pronounced unless the Judges who decided the case had been satisfied that the casualty for payment of which they decreed against the pursuers was payable or prestable in respect of their own implied entry, and not in respect of the defender's previous implied entry. But further, if the superior had raised his action against the defender instead of the pursuers, I think the defence of the defender would have been conclusive, viz., that he was not

the successor of the last vassal who would have been called as defender in a declarator of non-entry under the old law, and that therefore he was not the proper defender in the new statutory action of declarator and for payment of the casualty.

"Before concluding, it is necessary to refer to the defender's averments to the effect that during the treaty for the sale, and before the disposition was executed, the question of the casualty was expressly raised between the parties, and that although the pursuers urged the defender to pay the casualty he declined to do so, and that the pursuers assented to this declination and agreed to pay the casualties themselves. These averments are denied by the pursuers, who allege that the defender concealed from them the fact that he had not paid a casualty. If the clause in the disposition truly bears the meaning which I have now put upon it, then it is unnecessary to consider the relevancy of these averments on either side. On the other hand, if my construction is wrong, then it may become necessary to do so. But I may say that, as at present advised, I should not be inclined to admit these averments to probation. The alleged communings during the treaty of sale were prior to the date of the disposition, and if it had been intended to exclude the casualty in question from the seller's obligation to relieve the purchaser of casualties, the clause in the disposition should have been 'specially qualified' to that effect; and parole proof of such qualification would be clearly incompetent. On the other hand, the pursuers have not relevantly alleged on record any duty of disclosure which the defender failed to discharge. The result of the whole case is that the defender is assilized with expenses."

The pursuers reclaimed. The Second Division after hearing counsel ordered the cause to be heard before Seven Judges.

Argued for the pursuers—No doubt the Lord Ordinary was perfectly correct as to the effect of the obligation and as to the superior's rights of relief under the old law, but this sale having been effected in 1876 the obligation of relief must be construed with reference to the rights and liabilities under the then existing law, the Act of 1874. The question was therefore rather a question of the meaning of the contract between the defender and the pursuers, than one of feudal tenure. The entry being after the Act of 1874, *ipso jure* a casualty became due and payable whenever by the operation of that Act the defender became duly entered with the superior. This was shown by the terms of the form of summons in Schedule B of that Act, which shows that the superior is since 1874 in a position to enforce immediate payment of his casualty by a direct action. This case was not therefore analogous to what would have happened under the old law, where instead of having any direct action for his casualty the superior was in this position, that he could not regard it as due and payable till the vassal demanded an entry. Under the old law the true analogy to the present case was the case of a seller who had taken on himself in his disposition an obligation to pay a composition which he had not paid. In 1799 it was decided in *Gardiner v. Henderson*, M. 15,037, that a seller who was unentered was bound to enter in order to give a good title, and that he could not

oblige the purchaser to take a title which would oblige him instantly to enter as a singular successor. Applying the law of that case to the law so altered in 1874, Lord Rutherford Clark had held in 1876, in the case of *Laurie v. Scott* (not reported), that a purchaser was entitled to call on a seller, notwithstanding that he had an implied entry by the Act of 1874, to pay the composition due on the death of the last vassal entered by him, because the lands were exposed to the claim of the superior. The only meaning of the obligation of relief must be what pursuers contend for, since there is nothing else to which it can apply.

Argued for defender—Admitting that a buyer is not bound to take delivery of a disposition till the seller could show that the fee was full, if the buyer did take such a disposition on it, he was not entitled thereafter to insist on the seller showing that the fee was full. The objection was an objection to the title offered, and that title had been accepted and infestment taken upon it. This was a liability arising from the relation of tenure, in which the seller was no longer debtor. The casualty was not exigible till judicial demand was made, and that could be made only of the debtor, the person whose the lands were when the demand was made. The passage quoted from Erskine by the Lord Ordinary was still in point (see also Bell's Prin. 723), since till an action in the form of Schedule B of Act 1874 is brought there is no liability. The payment by the pursuers of composition to the superior was payment of their own debt, and this was a claim by them to be relieved from their own debt. The obligation of relief was certainly not intended to apply to this burden, because it was first introduced in its short form by the Act of 1847 (10 and 11 Vict. c. 48), sec. 3, when no such case as the present could exist. The case of *Laurie v. Scott*, quoted on the other side, did not apply, and was not considered by the Judge who decided it to conflict with the doctrine of the decision now under review, as appeared from his note.

At advising—

LORD JUSTICE-CLERK—Lord Deas has been kind enough to communicate to me the substance of his opinion. I concur in the result at which he arrives, and I shall explain in a few sentences some difficulties which have led to this hearing.

The difficulty which I have felt in giving effect to this clause of relief in this conveyance has arisen from doubts how far the debt now sued for was truly due prior to the pursuers' entry to the lands. I imagine it to be unquestionable that without this clause of relief the purchaser would have had no claim, because having accepted his title, taken infestment, and entered with the superior, the price paid by him must then have been held to represent the value of the subject as it stood. Under the former law a purchaser was entitled to refuse to complete a contract for the sale of lands unless the sellers were entered with the superior, but if he accepted the title and entered with the superior himself he could have had no claim on his author to relieve him of the casualty. I am inclined to think that even under the Statute of 1874 the same rule would hold good in both events, for although it could not be seen from the title whether the composition was paid or not, it

was as much within the power of the purchaser to ascertain that fact as whether the feu-duty was in arrear, the amount of the public burdens, or of the rental of the lands. The case therefore turns on the clause of relief. Now, although composition under the old law was not a casualty proper, but in truth a voluntary payment for an entry which never became a debt due to the superior, the Act of 1874 has expressly declared it to be a casualty, and to be a debt due by the vassal infest or by the possessor of the lands. Thus the only question remaining is, whether the composition in this case was due and prestable from the lands prior to the purchasers' entry? That there was a casualty due to the superior by the seller of the lands is certain, but whether that debt subsisted after the purchasers' entry I have found to be a question of difficulty. It was admitted at the debate that the composition now sued for was the proper debt of the pursuer; and that could hardly be said to be due and prestable by him before his own term of entry. But if the seller still remained liable to the superior, which might be questioned, or if in settling with the superior the pursuer was only bound to pay the amount due by the seller, which is not quite consistent with the principle on which the argument was placed, these difficulties would disappear. But as we are dealing with a statute from which we must discover a rule not very clearly indicated, I am content to acquiesce in Lord Deas' opinion, and to give effect to the pursuers' demand. Any judgment we may pronounce will leave some unsettled questions behind it; but the object of this consultation will be attained if conveyancers are instructed as to the rule they are to follow for the future.

LORD DEAS—By missives of sale dated 12th July 1876, Stephens, the defender, as trust-dispensee under the *mortis causa* deed of settlement of the late Peter Brash, sold to the Straiton Estate Company, incorporated by Act of Parliament, the estate of Straiton, in the county of Edinburgh, at the price of £58,000, payable £43,000 at Martinmas 1876, and the balance on 2d February 1877. This is the whole import of the missives. Nothing whatever is said on the subject of the title to be accepted by or given to the purchasers.

Peter Brash had been entered with the superior, but at his death on 8th November 1872 the subjects fell into non-entry; Stephens, his trust-dispensee, obtained himself infest by expeding and recording a notarial instrument on 9th July 1873. He did not, however, enter with the superior. Thus stood the title of Stephens, the seller, at the passing of the Act 37 and 38 Vict. cap. 94, which Act had the effect (section 4, sub-section 2) of entering Stephens with the superior as at the date when that Act came into operation, viz., 1st October 1874. Stephens consequently became liable at that date to pay the entry-money which then became due to the superior. He did not, however, pay that entry-money, and from that time forward he was liable to be sued for it as his own proper debt by the superior. In this state of matters he sold the lands to the pursuers, the Straiton Estate Company, by the missives referred to of 12th July 1876.

It is very clear that while as yet nothing had followed on these missives, the purchasers could have declined to pay the price and accept a dis-

position so long as the seller was not entered with the superior? Long prior to the Statute 1874 it was settled (*Gardiner*, M. 15,037) that a purchaser under missives or minute of sale, silent as the present missives are upon the subject of entry with the superior, was not bound to accept the title as complete if the subjects were in non-entry till the seller had paid the entry-money and entered with the superior. There is nothing in the Statute of 1874 to change the relative position in that respect in which the seller stands towards the purchaser under such missives as the present. The seller at the date of the sale was thus under an obligation to the superior to enter. He was under a similar obligation to the purchasers in order to complete his title. That obligation the statute implemented for him, so far as the entry itself was concerned, by enacting (section 4, sub-section 2) that "Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines duly entered with the nearest superior." But the statute did not relieve the proprietor of the relative obligation to pay the entry-money. On the contrary, it enacted (section 4, sub-section 3) that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c., which may be due or exigible in respect of the lands at or prior to the date of such entry." In case of non-payment of these casualties sub-section 4 gives the remedy—"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" (that is, in this case, against Stephens, who was infeft), "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." The effect of an action and decree of this kind against Stephens would have been to bring him back from the position of an entered vassal to the position of an unentered vassal, so long as he did not pay the casualty—that is, the entry-money—which had become due by him, and expenses, and consequently to have entitled the purchasers to refuse to pay the price and accept a disposition till he had reinstated himself in the position of an entered vassal who had paid the relative casualty—that is, the entry-money—the consequence of which payment would have been that an entry by the purchasers or any subsequent proprietor would neither have been necessary nor competent, as the lands could never again have been in non-entry.

That what is called in the statute "the casualty" includes the entry-money payable by Stephens the seller, is clear from the interpretation clause, which bears—"Casualties" shall include the relief duty payable on the entry or succession of an heir, the composition or other duty payable on the entry of a singular successor, whether by law

or under the conditions of the feu, and all payments exigible in lieu of such duties and compositions, and all periodical fixed sums or quantities which may be stipulated for under this Act."

Now, it is true the purchasers in place of taking their stand upon the missives, as they might have done, till the seller, who was entered by force of the statute, had paid the relative casualty due to the superior, paid the price of the lands and accepted a disposition; but then that disposition expressly bore—"I bind myself as trustee fore-said, and the trust-estate under my charge, to free and relieve the said disponees and their foresaids of all feu-duties, casualties, and public burdens." This clause, no doubt, is applicable only to feu-duties, casualties, and public burdens which were then past due. But that was undoubtedly the case with the entry-money, or, in other words, the casualty in question. The statutory entry made the casualty a debt due by Stephens as at the date of the registration of his infeftment, and that is quite consistent with the enactment (in sub-section 3) 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;" for by the law prior to the Act the superior could have required Stephens, the seller, to enter and pay the casualty so soon as Brash, the last entered vassal, died, viz., in November 1872.

As the output of minerals, and consequently the amount of lordships, varied at different dates, there may be, or might have been, some little puzzle, looking to the decision of the Second Division that minerals are to some extent to be taken into account, as to how the entry-money fell to have been calculated in this case; but I do not enter into that subject further than to say that I am very clearly of opinion that the casualty in dispute, whatever its amount, is not a casualty which became payable in respect of any statutory entry of the purchasers. There was no longer any room for such an entry. Stephens, the seller, stood entered at the date of the sale, and the only casualty payable was a casualty in respect of his entry. At the date of the disposition that casualty was past due by him, and consequently it falls under the very words of the obligation in that deed by which the seller binds himself to free and relieve his disponees of all casualties. This short view appears to me to be conclusive.

LORD MURE—The question here raised is one of general importance, but, in the view I take of it, it lies within a narrow compass; and it is this—What is to be the effect of a clause in a disposition by which the seller undertakes to relieve the purchaser of "all feu-duties, casualties, and public burdens" due on account of the lands conveyed, in a case where, under the operation of the fourth section of the Conveyancing (Scotland) Act 1874, both the seller and purchaser have been entered with the superior, but by neither of whom any composition has been paid at the time of entry?

The facts on which this question mainly depends are not, as it appears to me, in dispute between the parties, and are shortly these:—

After the death of the vassal last infeft in 1872

the title to his property was made up by the defender as his sole accepting trustee by notarial instrument, which was recorded in July 1873, but this title was never confirmed by the superior. So standing the title, the Conveyancing Act of 1874 was passed, which had the effect of entering the defender with the superior, and making him liable for a composition for which no demand appears to have been made. In this state of matters the property was purchased by the pursuers in 1876, and the disposition in their favour, by which the disponent was taken bound to "free and relieve the disponees of all feu-duties, casualties, and public burdens," was recorded in November of that year. By so recording the disposition the pursuers were themselves duly entered with the superior, and in May 1877 an action was raised against them by the superior to have it declared that in consequence of the death of the vassal last vest and seized in the property a casualty had become due, and concluding for payment of that casualty. In that action after a variety of procedure the pursuers were found liable in payment of the casualty, and it is for relief from the sum decerned for against the pursuers in that action that the present action has been brought.

If this action at the instance of the superior had been brought against the present purchasers after their acquisition of the property, but before they were infeft, as it might have been under sub-sec. 4 of the fourth section of the Act of 1874, and they had then called upon the defender to relieve them of that action and its consequences in respect of the obligation of relief undertaken, by him, I am unable to see on what grounds the defender could have successfully maintained a defence against that demand. He had himself become the entered vassal of the superior by the operation of the fourth section of the Act of 1874. Having been so entered, he was liable in the casualties, to use the words of the fourth section of the Act, "due or exigible in respect of the lands at or prior to the date of such entry;" and by the clause of relief in the disposition granted by him to the pursuers in 1876 he had become bound to free and relieve them "of all feu-duties, casualties, and public burdens." Now, these words are, by the eighth section of the Titles to Land Consolidation Act of 1868, expressly declared "to import an obligation to relieve of all feu-duties or other duties and services or casualties payable or prestable to the superior, or from or on account of the lands conveyed prior to the date of entry;" and when so interpreted appear to me to be conclusive of the question I am now dealing with. For it cannot, I think, admit of doubt that at the date of the sale to the pursuers a composition for an entry was "payable" and "exigible" by the superior, according to the ordinary meaning of these expressions; and all difficulty as to the question which might a few years ago have been raised as to whether a composition was truly a casualty is removed by the interpretation clause of the Act of 1874, which declares that the word "casualty" shall include "the composition or other duty payable by a singular successor," whether by law or under the conditions of the feu.

But the circumstances under which the question has been here raised are somewhat different from those in the case I have just put, inasmuch

as the pursuers were themselves entered with the superior by force of the statute, before any demand was made against them by the superior, and it was strongly contended on the part of the defender that the composition claimed from the pursuers by the superior was a composition for their own entry in 1876, and not one due in respect of the defender's entry in 1874. I was at one time disposed to think that there might be grounds on which this contention might be supported—more especially if, as appears to have been at one time supposed, a larger composition was in those circumstances due and exigible than there would have been had the composition been fixed at the date of entry of the defender. But on further consideration I have come to the conclusion that this difficulty does not arise in the circumstances of the present case. For on looking into the report of the case between the superior and the present pursuers, in July 1879 (6 R. p. 1208), I find that the question was there raised as to the period at which the composition was to be struck, and that the Court rejected the claim of the superior to have it fixed at the rental as it stood at the date of his action in 1879, and adopted the period of an average of the three years prior to Whitsunday 1874, two years before the date of the sale to the pursuers. That seems to me to be clear from the passage in the opinion of the Lord Justice-Clerk, as reported at p. 1214 of the case, where his Lordship says—"I think what I have already suggested in the course of the debate is a reasonable course, viz., that we should take the average of the three years ending at Whitsunday 1874."

What, then, the defender will in this view be now called on to relieve the pursuers of will be the composition due by himself to the superior at the date of the sale to the pursuers, and of this it appears to me, on a fair construction of the statutes, that the defender is bound under the clause of relief to relieve the pursuer.

LORD GIFFORD—I am of opinion that the pursuers are entitled to relief from the defender of the composition which the pursuers have been obliged to pay to the superiors of the lands of Straiton and others, which the pursuers purchased from the defender under a disposition dated 10th November 1876, and therefore I think the Lord Ordinary's interlocutor must be recalled. I abstain, however, from giving any opinion as to how far the claim of relief will warrant decree for the full sums concluded for in the summons, because on this question of the extent of relief there has been no completed argument—indeed, no argument at all—either before the Second Division or before the Seven Judges. There is also a question as to the defender's liability for the expenses found due to the superiors. These questions I leave open, and confine myself to the single point, whether the defender is bound under his obligation of relief or otherwise to free the pursuers of the composition of a year's rent payable on the entry of a singular successor? I think the defender is so bound.

The subjects sold fell into non-entry on 8th November 1872, when Peter Brash, who was a fully entered vassal, died. He left a trust-deed, under which the present defender, as his sole trustee, took up the subjects and completed a

title thereto by notarial instrument registered 9th July 1873, but he took out no entry with the superiors. On 1st October 1874 the Conveyancing (Scotland) Act came into force, and by virtue of that Act the defender became by implication under the statute entered with the superior, the non-entry ceasing by the operation of the Act. The same Act provided that although the lands should not be deemed to be in non-entry the superior should have the same pecuniary rights as he would have had under the former state of the law, and I take it to be clear that if the pursuer had chosen to sue the present defender anytime after 1st October 1874, and before the defender sold the estate to the pursuers, he could have compelled the defender to pay to him one year's rent of the estate. I think this is plain. The defender would have had no defence if the superior had demanded from him the casualty of a year's rent.

In November 1876 the defender sold the estate to the present pursuers, and we have now been furnished with copies of the missives of sale. Neither in the missives of sale nor in any other writing was any special agreement made regarding the composition then exigible by the superior. There are allegations about a verbal arrangement, but proof of such verbal arrangement seems incompetent, and has not been asked by either party. The formal disposition by the defender to the pursuers was granted on 10th November 1876, and was registered 15th November 1876.

The next point which also I take to be clear is, that the pursuers at any time before accepting the disposition in their favour by the defender might have required the defender to pay the composition of a year's rent which was then demandable by the superior. Under the old law a seller who had sold lands in non-entry might have been compelled to complete his title by entering with the superior before the purchaser was bound to accept of a disposition, and I think that it follows that under the existing law, although an entry is no longer required, that being implied by the seller's infetment, still the seller must pay any non-entry duties or duplicands or compositions which have become due to the superiors, and are payable under the statute in the same way as if the seller had taken out an entry.

Now, in the present case this was not done. Although the superior was undoubtedly entitled to exact from the seller at the date of the sale a year's rent of the subjects, he did not do so, and the seller without making any payment to the superior proceeded to grant a disposition to the purchaser in common form. The disposition, however, contains the following clause of relief and obligation upon the seller—"I bind myself, as trustee foresaid, and the trust-estate under my charge, to free and relieve the said disponees and their foresaids of all feu-duties, casualties, and public burdens." Now, I am of opinion that this clause of relief and obligation undertaken by the seller, which in terms of the statutes is interpreted as meaning all feu-duties, casualties, and others due prior to the date of the purchaser's entry, entitles the pursuers to insist in the present action. The word "casualties" certainly includes the present claim, and indeed can refer and be applied to nothing else but the present claim. It seems to me to be quite as effectual as if the clause had been more fully expressed, and had borne

that the seller was to relieve the purchaser of the casualty of one year's rent which became due to the superior, and was exigible by him in consequence of the death of Peter Brash and of the implied entry in virtue of the Statute of 1874 of Mr Stephens as his trustee. Of course if the clause had been so expressed, this would have removed every doubt, but as there is no other possible casualty to which the obligation of relief can apply, I think the clause is quite as effectual as if it had been expressed in the fullest detail. I am aware that this short form of the obligation of relief was introduced by a statute passed long prior to the Conveyancing Act 1874, and that the word "casualties" occurs in it when it could not have the same meaning as that contended for in the present action. But I am not moved by this consideration. When I find the clause occurring in a deed executed in November 1876, I must hold that it refers to the state of the law at that date, and that the parties had the Statute of 1874 in view. The use of all these clauses and of the shortened forms of conveyancing are optional, and the clauses, or the words given as examples therein, may be adopted in whole or in part so far as applicable, and they may be varied so as to make them applicable to each particular case. Although the word "casualties" occurs in the earlier statute, no conveyancer is bound or entitled to insert that word if it has no application to the case with which he is dealing. But if that word is adopted by the parties, and if there is a casualty to which it is directly and strictly applicable—as fully applicable as if it had been devised on purpose to meet the present case—then I cannot refuse to give effect to the clause according to its express and unambiguous terms. To deny effect to the clause in the present deed, and in the circumstances in which that deed was granted, would, I think, be to deny effect to the explicit and most natural agreement of the parties.

It is worth notice that the decree pronounced in the action at the superior's instance for payment of the casualty expressly bears (differing in this respect from the conclusions of the superior's summons) that the casualty found due to the superior became due to him upon the death of the said Peter Brash. Apart from this, however, I think it is quite clear that under the statute the casualty of one year's rent became due and exigible, or, in the words of the statute, payable or prestable, to the superior by the seller prior to the date of his sale to the present pursuers, and this is enough for the purposes of the present action.

I am therefore for altering the interlocutor of the Lord Ordinary, but reserving in the meantime the exact amount for which the pursuers will obtain decree.

LORD SHAND—It cannot, I think, be questioned that after the pursuers purchased the lands of Straiton in terms of the missives of sale of 12th July 1876 the defender was bound to pay the composition then due to the superior, so as to free the purchasers from liability for the amount. This view is in accordance with the law as it was understood long prior to the Statute of 1874, and as settled by the case of *Gardiner* in 1799, and with universal practice, and I cannot doubt that the law continued to be the same after the statute, as was indeed found by Lord Rutherford Clark in the recent case of *Laurie & Scott v. Scott*. The

legal principle on which the law rests appears to me to be simply this, that the seller of an heritable property is bound to free the subjects of all burdens and incumbrances affecting it which are not like feu-duty of a permanent and annual or continuing nature, unless in so far as the purchaser has specially contracted to take upon himself such liability. The liability of the property to the superior's claim for composition in lieu of non-entry duties is in truth as much a burden or incumbrance as any heritable debt affecting the property. It was so, as I think, prior to 1874, for the superior's claim might lead to eviction of the proprietor in an action of non-entry unless the composition were paid; and it became even more clear after the Statute of 1874, in a case like the present, in which the seller, the successor of the last entered vassal deceased, was infeft in the lands, because the seller had obtained an implied entry to the same effect as if the superior had granted him a charter, and with the direct result of rendering him and the lands liable for the composition as a debt due to the superior.

The ordinary rule of law is that the delivery of a disposition which is intended merely to pass the title to the lands, with such warrandice as may have been agreed on, does not affect the seller's obligation to clear the lands of all incumbrances, and I see no good reason for holding that this rule does not apply to the liability of the lands for the composition of a year's rent, which is a burden or incumbrance often of very substantial amount. Whether the burden be a heritable debt of £800, or the claim of the superior for that sum as a composition due to him in respect of an implied entry taken by infeftment, the liability of the seller to relieve the purchaser is the same. I am unable to see any good reason for holding that the acceptance by the purchaser of a title to the lands will relieve the seller of his obligation under the contract of sale to free the subjects of the composition, any more than it would relieve him of his obligation to have the heritable debt discharged. I am not prepared to say that the taking delivery of a disposition prior to the Act of 1874 would have had the effect of relieving the seller of his obligation to pay the composition, as the Lord Ordinary assumes; but even if this would have been the case on the narrow and technical ground that the superior's claim was one to non-entry duties and not composition, because the vassal was not entered, the case is, I think, now essentially different under the Act of 1874, for the seller having obtained an implied entry, the composition is at once a debt due to the superior and a burden or incumbrance affecting the subjects, and as such the seller is bound to have it discharged in the same way as any other burden.

Accordingly it appears to me that even if the deed of conveyance in this case had not contained the special clause of relief of all casualties, the seller would have been bound, notwithstanding the delivery and acceptance of that deed, to pay the composition due to the superior, for it was quite as much an implied term of the contract of sale that the seller should free the subject of incumbrances, as that he should give a title, and the giving of a title did not in any degree supersede or affect the other obligation. Even, however, if this were not so, I agree with

the Court in opinion that the clause of relief expressly reserves the pursuers' right to the relief asked, just as that right existed before the disposition was delivered, and in the same way as if the disposition had not been granted. I see no other meaning that can be given to the word "casualties" in the clause, occurring as it does in company with the word "feu-duties," than to hold that it applies to the composition then due and payable or prestable to the superior in respect of the death of the former vassal and the implied entry of the seller, the successor of that vassal.

It was maintained that the composition paid by the pursuers was not that for which the defender was liable, but this contention is in my opinion unsound.

The casualty which was due at the date of the purchase became payable in consequence of the death of the last entered vassal, the predecessor of the defender, and it was this casualty that the pursuers were obliged to pay, although the obligation arose from their acceptance of the conveyance, or from that acceptance and the infeftment that followed. If the defender is able to show that the sum paid is in excess of the amount due to the superior by him in respect of his implied entry, I do not say he is liable for that excess, for I do not think the delivery of the disposition enlarged the defender's obligation under the contract of sale. On this point there has been no argument, and it raises a subordinate question only. It may be fairly contended, I think, that the amount of the composition for which the defender became liable to the superior must be fixed as at the date of his own infeftment, or rather at 1st October 1874, when the Conveyancing Act came into operation, for on that date he was actually entered as vassal by force of the statute; that it was the benefit of this entry only that he was bound to give; and that his obligation in its pecuniary consequences should not be carried beyond the sum for which he was liable in that view. The pursuers, I understand, get the benefit of an entry in their own favour as at a later date, and if it be the fact that they have paid for this a composition of larger amount than the defender could have been called on to pay to the superior—a point as to which we have not been informed—I am not prepared to say that the defender is liable in the full amount claimed. On this question, and the question of the defender's liability for the expenses of the pursuers' litigation which are sued for in this action, I express no opinion. On the general question which has been raised for the opinion of the consulted Judges, and which alone has been the subject of argument, I am of opinion, differing from the Lord Ordinary, that the pursuers are in the right.

LORD YOUNG—The question for decision depends, in my opinion, on the meaning of the clause in the disposition by the defender to the pursuers binding the disponer to free and relieve the disponees "of all feu-duties, casualties, and public burdens," limited by the Titles to Land Consolidation Act 1868, and probably also by the common law, to those payable or prestable "prior to the date of entry." At the date of the sale to the pursuers, of the disposition, and of the entry under it, a composition, being a year's

rent of the lands, was "payable or prestable" to the superior—or, waiving for the moment a criticism on the applicability of these words, which I shall afterwards notice, the superior had a "right or title" to this casualty as the condition of permitting the proprietor, whoever he might be, to remain in possession of the lands. The defender did not in fact pay this casualty, and in consequence the pursuers were called on to pay it, and did so. I say "in consequence" because it was conceded by the defender's counsel that payment by the defender would have relieved the pursuers of the necessity of making the payment which they did, and of any obligation to pay, at least while the defender lived. The pursuers now ask relief from the defender under the clause which I have referred to, and I am of opinion that their demand ought to be allowed.

The judgment of the Lord Ordinary, which is against the pursuers, seems to rest mainly on the view that the words "payable or prestable to the superior" are strictly inapplicable to a casualty of relief or composition—the casualty being in truth a right in the superior to declare a non-entry and enter on possession of the lands to be retained till the proprietor may choose voluntarily to relieve them out of his hands by a money payment of ascertained amount, which, although the superior is bound to accept of it when offered, is not "payable or prestable" to him, inasmuch as he cannot enforce payment of it directly, or otherwise than by seizing and holding the lands till he gets it.

I should, I confess, have thought unfavourably of this argument as used to affect the interpretation and effect of a clause of relief irrespective altogether of the Act of 1874. In the common and familiar language of lawyers and men of business, a casualty of composition signifies the money payment on receipt of which the superior is bound when the casualty falls to permit the proprietor to possess the lands as his vassal and forego his right to resume possession, and it is as often as not taxed, as it is called, at a certain pecuniary amount by the name of casualty. The superior's right is, and always has been, spoken of as a right to demand money, and it in truth is so, none the less that his only, though singularly effective, mode of enforcing it is (or at least was prior to 1874) to seize and hold the lands till it is satisfied. The Act of 1874 in many places refers to these casualties in just such language as was always used regarding them. It speaks of them as "due or exigible;" of the superior's right "to demand" them; of the "rights and remedies competent to a superior under the existing law for securing, recovering, and making effectual such casualties;" and of the "payment of any casualty exigible." The Consolidation Act of 1868 also refers to "casualties" as "payable or prestable to the superior." To say that the casualty, strictly speaking, is, if not the occurrence or happening of the death of the last entered vassal, at least the superior's right thence resulting to seize and hold the lands till a certain fixed payment is voluntarily made, and that therefore the words "payable or prestable" are inapplicable, very much resembles a criticism on the words "sunset" and "sunrise" as inaccurate, inasmuch as the sun does not rise or set—the phenomena familiarly and even in statutes referred to by these words being caused, not by the sun rising or setting or moving anyhow, but

by the rotatory motion of the earth. What men mean by "sunset" and "sunrise" is not more certain than what Scotch lawyers and conveyancers mean by casualties "due or exigible" or "payable or prestable" to a superior, and it is an idle thing to show that their language is scientifically inaccurate, whether the science involved be astronomy or feudal law.

I put it to the Solicitor-General whether on the contract of sale, assuming it to be in the terms indicated by the disposition that followed on it, *i.e.*, such as the disposition would exactly fulfil, the pursuers as buyers could not have compelled the defender as seller to pay the casualty which the superior had then confessedly right to demand. The answer candidly given was that in a case exactly similar Lord Rutherford Clark had decided, on grounds which he (the Solicitor-General) was unable to controvert, that such was the buyer's right. The Solicitor-General, however, contended that this right was lost by the buyer's acceptance of the disposition. I pointed out that this seemed to be a strange result of accepting a disposition which contained an express obligation on the disponent to pay all casualties due prior to the disponent's entry. It was thereupon urged that the disponentes (the pursuers) lost their right and liberated the defender by recording the disposition, inasmuch as they thereby incurred a casualty on their own account, and in respect of their own entry as vassals in the lands, and that the defender's escape was nothing to them. The point of this argument is that by recording their disposition the pursuers annihilated the casualty therefore due, and to which the obligation of relief applied, and created another in which they were themselves the debtors without relief.

I think this argument is fallacious. I assume of course (for that is the condition of the argument) that had the pursuers not recorded their disposition they would have been entitled to require the defender to relieve them of the casualty due at their entry to the lands—*viz.*, Martinmas 1876—either by paying it directly or repaying it to the pursuers in case the superior exacted it from them, which, I need hardly observe, he might have done equally whether their disposition was recorded or not. The question then is, Did the pursuers discharge their right by recording their disposition? It is not reasonably supposable that they so intended, and although a valuable right may be unintentionally renounced or obligation discharged, I venture to think that it would be unjust, and contrary to the principles which usually govern our decisions, to attribute this effect to a formal act not intended to that end, and by which the party seeking a gratuitous and undesigned benefit was in no way prejudiced. It was conceded, and is clear, that the defender's original obligation under the clause of relief cannot be enlarged by the recording of the disposition containing it which he granted. But, indeed, it is not suggested that the casualty which the pursuers in fact paid was greater than that which was exigible by the superior at the date of their entry without reference to the recording of the disposition, or that they are now demanding more under the clause of relief than, *ex hypothesi* of the argument I am now considering, they were entitled to demand before the disposition was recorded.

That the pursuers may possibly (for there is no certainty) have a greater benefit, in a question with the superior, by the payment made after recording than they would have taken by a similar payment before, whether by the defender or by themselves, or, in other words, that the superior may possibly be prejudiced by the substitution of the buyer's life for that of the seller, is not, in my opinion, a pertinent consideration. The pursuers suffer no prejudice, for their payment is of exactly the same amount as it would have been had it been made before the recording, and the superior does not complain, and so far as I see cannot.

What I have hitherto said is in fact the judgment which I prepared to be delivered in the Second Division, when I thought the case might be decided there without the assistance of your Lordships of the First Division. And it will be observed that I have taken the case exactly as presented—viz., with an express obligation of relief, and without considering what would have been the rights and obligations of the parties *hinc inde* without it. But the case having been so dealt with as to make it eminently a case of light and leading, I think it according to my duty to say that I should have been prepared to decide it in the same way irrespective of the express obligation, provided always there was nothing to show that the parties had otherwise bargained. The maxim *expressum facit cessare tacitum* appears only when the *expressum* is at variance more or less with the *tacitum*—that is, with what the law would have implied in the absence of expression. When the two are in perfect harmony, the maxim is *expressio eorum quæ tacite insunt nihil operatur*. Now, I am of opinion with Lord Rutherford-Clark, in the decision to which we were referred, that in the absence of express or necessarily implied agreement to the contrary, it is the right of the buyer to require the seller to pay any casualty due to the superior at the date of his entry to the lands, and further, and beyond what Lord Rutherford-Clark found it necessary to decide, that this right is not forfeited or the corresponding obligation discharged by the acceptance and recording of a disposition. Prior to the Act of 1874 the superior's right to the casualty strictly depended on the question, Is the fee full or are the lands in non-entry? So that if the seller was entered (or the fee otherwise full) the buyer had no occasion to inquire whether the casualty had been paid or not, for whether or not there was none due, and no call could be made on him. Since the Act the superior's claim is independent of the fact of entry or non-entry, and subsists or not according as it has been paid or not. Under the existing law every seller with a recorded title is entered with his superior, but the superior's right to a casualty subsists nevertheless if he has not been paid any since the death of the last vassal who paid, and this right if existing must be satisfied either by the seller or the buyer. I say by either, for it was conceded that payment could not be demanded from both, and that payment by either would satisfy the right. Now, I am of opinion that the common-law obligation of the seller on the contract of sale, in the absence of any contrary agreement, is to pay and to relieve the buyer, and that this obligation, which is merely pecuniary, subsists until it is fulfilled by payment, to the relief

of the creditor therein, and is not discharged by his accepting and recording a disposition.

LORD PRESIDENT—I concur in the judgment proposed. I am of opinion that the seller was bound at the date of the contract to relieve the purchaser of the burdens then due, and particularly of the composition, and that by reason of the clause of relief he is still so bound.

Whether he would have continued so liable without the clause of relief which we have here I do not say. It is not clear whether or not the obligation would have subsisted without the clause of relief.

Thereafter on 16th December the case was put out in the roll of the Second Division, when it was argued for the defender, that admitting that the great bulk of the expense of the previous litigation must be paid by him, he should not be found liable in expenses so far as incurred by the pursuers in disputing their liability in a question with the superior for any casualty, on the ground that they had an implied entry under the Act of 1874, that question having been already decided in the case of *Rossmore's Trustees*, Nov. 23, 1877, 5 R. 201, and the previous case of *Ferrier's Trustees*, May 26, 1877, 4 R. 738, and others cited in previous case.

At advising—

LORD JUSTICE-CLERK—All reasonable expenses incurred by the party entitled to relief must be paid. The pursuers were entitled to state all available pleas, and the party found ultimately liable must keep them *indemnes*. I think we should find pursuers entitled to the amount of the composition as ascertained, and to the taxed amount of their expenses incurred to the superior, and send the remaining accounts to the Auditor, and consider any further question which may arise on his report.

LORD GIFFORD concurred.

LORD YOUNG—I am of the same opinion, and put it on a broader ground. The superior raised his action against these pursuers in May 1877. According to our unanimous decision in this case the pursuers had no interest in the subject-matter of that litigation. It was no affair of theirs whether the superior's claim was well founded, or if well founded exaggerated. The seller (the defender here) was bound to relieve them of anything the superior could justly demand, and therefore they had no interest in the question, though in the first place liable to the superior. They intimated to the seller when the superior's action was brought that he was making the claim. The answer was, "I have nothing to do with it; defend the action if you choose." If the pursuers in then defending the action had been guilty of any impropriety, it would have been another matter, but if they defended the action justifiably, the party bound to relieve them must keep them *indemnes*. The seller having forced the litigation on the buyers, there was nothing improper in their stating the plea that the superior had no claim. Indeed, in the case of *Lamont v. Rankine's Trustees* the point was only decided by a majority in this Division Feb. 28, 1879, 6 R. 738, and one of the two Judges who formed the majority intimated that his opinion concurred with that of the dissenting

Judge, though he held himself to be bound by previous decisions if they applied. The exact point had never before been decided. The buyers therefore rightly defended the action. It is in accordance with a vast amount of practice that the party ultimately liable is responsible for the whole expense of defending the claim.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusion of the summons, and for payment by the defender, as trustee, to the pursuers, of £824, 6s. 1d., and £100, 3s. 6d., and remitted the other accounts to the Auditor.

Counsel for Pursuers—Kinnear—Jameson. Agents—Welsh & Forbes, S.S.C.

Counsel for Defender—Solicitor-General (Balfour, Q.C.)—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, December 14.

SECOND DIVISION.

(Before Seven Judges.)

SPECIAL CASE—LINDSAY'S TRUSTEES AND LINDSAY AND OTHERS.

Trust Disposition and Settlement—Repugnancy—Protected Succession—Fee and Liferent.

T. L. died survived by seven children of his second marriage and two children of his first, viz., W. L. and C. L. In a trust-disposition and settlement and codicil thereto, T. L. directed his trustees, in the third purpose of the trust, in respect that he had acquired considerable means by his first wife, to convey to W. L. a dwelling-house, and (as equivalent to this gift) to C. L. the sum of £1200 (afterwards restricted by the codicil to £1000). In the ninth purpose, while settling the shares of his estate to be given to his whole children, he directed that the above legacy of £1000 should be settled on C. L. on her attaining majority, "so as to provide to herself a liferent only thereof, and to the lawful issue of her body equally among them the fee thereof." She died unmarried, a major, and intestate. On a competition between her executor-dative *qua* next-of-kin and the trustees, as such and as tutors and curators to the rest of the children, —*held*, that looking to the intention of the truster, it was clear that the qualification in the ninth purpose of the trust was only intended to apply in the event of C. L. marrying and leaving children, and that therefore the fee vested in her and had passed to her executor.

Thomas Lindsay, Shipowner, Leith, died on the 8th April 1877, survived (1) by his widow, (2) by two children of his first marriage, viz., William Bruce Lindsay and Catherine Bruce Lindsay, (3) by five children of his second marriage, viz., Thomas James Lindsay, John Allan Lindsay, Charles Cossar Lindsay, Agnes Veitch Lindsay, and Mary Eliza Louisa Lindsay. He left a trust-disposition and settlement and codicil, dated

5th June 1874 and 7th April 1877. In the former, after appointing William Lindsay Esquire of Hermitage Hill House, and others, his trustees, he directed them as follows:—"Secondly, I direct my said trustees to implement and fulfil the obligation undertaken by me in antenuptial contract of marriage entered into betwixt me and my spouse Mrs Agnes Cossar or Lindsay, bearing date 2d April 1859, whereby I bound and obliged myself to invest in heritage or other good security the sum of £3000 sterling, in addition to the heritage therein conveyed, and to take the titles thereto as therein stipulated and agreed on. Thirdly, In respect that I acquired considerable means by my deceased wife Catherine Bruce or Lindsay, who, by a mutual disposition dated the 14th day of April 1852, and recorded in the books of Council and Session the 7th day of March 1857, disposed and bequeathed to me all the heritable and moveable estate which she might die possessed of, it is my wish that the following provisions to my children by the said Catherine Bruce or Lindsay, viz., William Bruce Lindsay and Catherine Bruce Lindsay, should be preserved or made for them over and above the other provisions herein contained in their favour, viz.—I direct my said trustees to execute and deliver, so far as that may be necessary on their part, a legal disposition or other regular conveyance for vesting in my son the said William Bruce Lindsay the dwelling-house and pertinents in Charlotte Street, Leith, now occupied by me, the conveyance to which is dated the 17th day of May 1853, and which subjects fall to him in virtue of the said conveyance; and as I consider the said subjects to be of the value of £1000 or thereby, to make my said daughter, the said Catherine Bruce Lindsay, equal thereto I leave and bequeath to her the sum of £1300 sterling, which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease." He then, after directing them to pay certain specific legacies, said—"Sixthly, I appoint my said trustees, after fulfilling the before-written purposes, to pay over to my said spouse, in case she shall survive me, and so long as she shall remain my widow, the nett income which shall accrue from the residue of my means and estate, and that by such instalments or intervals of not longer than six months, as may suit the position of my estate, or in the opinion of my trustees be proper and expedient; but it is hereby provided and declared that my said spouse shall be bound, as by acceptance hereof she binds and obliges herself, to clothe, educate, and maintain all my children herein named (including the said William Bruce Lindsay and Catherine Bruce Lindsay), and any other that may still be born of my marriage with her; and she shall be bound also to keep her own children in family with herself so long as they shall remain unmarried; and my said spouse shall be bound also to keep the said William Bruce Lindsay and Catherine Bruce Lindsay in family with her so long as they choose to remain, provided always that the said William Bruce Lindsay shall not be entitled to remain longer than his reaching twenty-seven years of age, unless the trustees see fit to decide otherwise, which I hereby empower them to do; declaring that the said William Bruce Lindsay shall throughout pay for his own clothes, and the sum of ten shillings per week for bed, board, and washing;