death of E (*or otherwise, as the case may be*), who was the last vest and seized in all and whole the lands of X (*describe or refer to the lands, and if the casualty due is a taxed composition, or an heir's relief-duty, say*) the casualty of £ (*or if a singular successor's untaxed composition be due, say* —a casualty, being one year's rent of the lands) became due to the said A as superior of the said lands upon the day of , being the date of the death of the said C (*or* the date of the infeftment of the said B in the said lands of X, *or otherwise, as the case may be*), and that the said casualty is still unpaid." Now, it is quite plain from the language of the schedule, where the former vassal has died and the new vassal has been infeft, both prior to the passing of the statute, it would be competent for the superior to demand in the summons a year's rent, not later than the rent of the year current at the passing of the statute, and that it would not be competent for him to demand the rent of any later year. But I am inclined to hold that in the present case, when both of these events occurred prior to the passing of the Act, and where the infeftment of the new vassal preceded the death of the former vassal, the casualty is the year's rent current at the date of said death. Indeed, but for the proviso in sub-sec. 3, prohibiting a superior from demanding the casualty during the life of an entered vassal who has paid composition, I should have held that it was the rent at the date of the defenders' infeftment.

"In the present case the pecuniary result would not be affected whether the date of the defenders' infeftment on the death of the former vassal or the passing of the Act were taken, as it was stated that £120 was the rental for all these years; but on the whole I think the year's rent payable to the pursuer is the rent for 1873 current at the death of the last vassal, and if I am right in this view I think that the statute so construed will operate most beneficially by enabling both superiors and vassals to know certainly the amount of casualty payable by the one and exigible by the other. It appears to me that the Legislature meant to provide fixed and certain data for calculating the amount of this casualty, and made it actually due and payable to the superior at the date when his right of action emerged, the debt continuing to be due by the vassal, though without interest, until paid either voluntarily or under judicial demand. And I think it would be contrary to the whole spirit of the statute, which was intended to simplify the relations between superiors and vassals, and contrary to the plain language of the schedule, to hold that the casualty for which the superior sues as the casualty which fell due at the death of the last entered vassal, and is still unpaid, is a debt of such a fluctuating and expansive character that it rises in a few years from £120 to £385.

"On the whole matter, then, I have come to hold a very clear opinion that the year's rent to which the pursuer is entitled is the year's rent current at the date of Thomas Gibson's death, and I am encouraged to take that view by the opinion of the Judges of the Second Division in the case of *Sivright* v. *the Straiton Estate Company* above referred to."

Thereafter parties having lodged a minute bringing out the amount of the rental on the basis of Lord Curriehill's judgment, the pursuer asked for decree for the principal sum so brought out, with interest from the date of the death of the last entered vassal. The defender maintained that interest was only due from the date at which the action was raised.

On 6th June 1882 Lord M'Laren, before whom the action then depended, pronounced this interlocutor:—"Finds that the year's rent of the lands libelled current at the death of Thomas Gibson on 11th January 1873, as specified in Lord Curriehill's interlocutor of 8th March 1881, amounts to the sum of £150, and that the amount of the usual deductions from that sum is £45; therefore decerns against the defenders for the sum of £105 in full of the conclusions of the action, with the legal interest on that sum from the 18th day of March 1880 till paid, and finds no expenses due to or by either party."

Counsel for Pursuer—Mackay. Agent—John Stewart, W.S.

Counsel for Defenders — Begg. Agents — Morton, Neilson, & Smart, W.S.

Thursday, June 8.

FIRST DIVISION.

[Lord Lee, Ordinary.

HARE *v.* STEIN.

Process—Statute 6 Geo. IV. cap. 120 (Judicature Act), sec. 10—Pursuer in Procedure Roll Refusing to Insist in the Action—Expenses.

It is not abandonment of an action in the sense of the Judicature Act when the pursuer, on the case reaching the Procedure Roll, declines to insist further in the action, and the defender is assoilzied; and the Lord Ordinary may in such cases himself modify the expenses instead of remitting the account to the Auditor to tax and report.

Opinion (*per* Lord Shand) that in certain circumstances, even in cases of abandonment of the action, the Lord Ordinary may act as Auditor.

On the 9th December 1881 Lieutenant-Colonel James Hare of Calderhall raised an action against David Stein, then residing at Redcraig Cottage, near Midcalder, for payment of £30. The defender lodged defences. When the case reached the Procedure Roll the pursuer stated that he did not desire to insist any further in the action, whereupon the Lord Ordinary pronounced an interlocutor assoilzieing the defender from the conclusions of the summons and finding the pursuer liable to the defender in ten guineas of expenses.

The defender reclaimed on the question of expenses, and argued—Pursuer was virtually abandoning the action, and this was incompetent except upon payment of all expenses incurred. The Lord Ordinary has modified the expenses here; he had not the *data* to enable him fairly to do this, nor had he the power. The account should have been remitted to the Auditor to tax and report.

Authority—*M'Aulay* v. *Cowe*, December 19, 1873, 1 R. 307.

Counsel for the respondent were not called upon.

At advising—

Lord President—In the ordinary case, when under the Judicature Act the pursuer desires to abandon an action after the record is closed, he is allowed to do so on the understanding that the account of expenses incurred is to go to the Auditor to be taxed and reported upon. That, however, is not the rule which is to determine the present question. If the pursuer had abandoned the cause, then there would have been the usual taxation of the accounts, but it would have been open to him to have brought a new action against the defender. What was done here, however, was this—When the case reached the Procedure Roll the pursuer made up his mind to insist no further in his claim against the defender, and accordingly the Lord Ordinary assoilzied the defender from the conclusions of the summons, and fixed a sum which in his opinion would cover all the expenses which ought to have been incurred. His Lordship so acted to prevent the further expense which would necessarily be incurred by a taxation of accounts before the Auditor. I think that the Lord Ordinary acted rightly in the circumstances, and I am for adhering to his interlocutor.

Lord Deas and Lord Mure concurred.

Lord Shand—As your Lordship has observed, we have not before us the case of an action abandoned under the provisions of the statute, when it is usual that the account of expenses incurred by the parties be remitted to the Auditor for taxation. I am not, however, prepared to say that even under the Judicature Act the Lord Ordinary might not in certain circumstances do the duty of an Auditor. I think there are circumstances in which even under the statute the Lord Ordinary might, for the purpose of avoiding further outlay, fix the amount of expense to be paid by the party abandoning. What the Lord Ordinary does in the present case, however, is not to modify in the sense of striking off, but for the purpose of avoiding the expense of an audit fixes a sum, and in so doing I agree with your Lordship in thinking his Lordship has acted rightly.

The Court adhered.

Counsel for Pursuer—Moncreiff—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for Defender—Watt. Agent—D. Howard Smith.

Thursday, June 8.

FIRST DIVISION.

FLYNNE, APPLICANT.

Poor Roll—A.S., 21st Dec. 1842, secs. 2 and 3, Schedule A—Appearance of Applicant before Minister and Elders of Parish—Certificate of Minister and Elders.

Michael Flynne was an applicant for admission to the poor roll. He received an injury on 1st August 1881, while working in the parish of Lasswade, which caused the loss of a leg, and the proposed action was one of damages against his employer for alleged *culpa* on his part resulting in that injury. After the accident he removed to his native country, Ireland, and resided in County Mayo. In this note he alleged that he was in poverty and in weak health, and unable to travel to Scotland for the purpose of appearing before the minister and elders of Lasswade to emit the declaration required by the 2d and 3d sections of the Act of Sederunt. He further stated that due intimation of the note had been made to the defender in the proposed action. He craved the Court to permit him in these circumstances "to appear before Standish M'Dermott, Esq., resident magistrate, Cloongee, Texford, County Mayo, and emit the declaration or statement as prescribed by the said Act of Sederunt, and upon this being done and upon a certificate, in or as nearly as may be in, the form of Schedule A, under the hands of the said Standish M'Dermott, being produced, to hold that the intimation given to Archibald Hood the defender, and the declaration or statement before the said resident magistrate, are a sufficient compliance with the said requirements of the said Act of Sederunt."

It was stated at the bar that the resident magistrate above named had written a letter to the applicant's agent stating that he knew the applicant, and was willing to give the required certificate if the Court thought fit.

The applicant referred to *Rattray*, 8th July 1824, 3 S. (n.e.) 163; *M'Kellar*, 15th July 1863, 1 Macph. 1114; *Carrigan*, 17th Nov. 1881, 19 Scot. Law Rep. 118.

The Court in the special circumstances of the case granted the prayer of the note.

Counsel for Applicant—Sym. Agent—Thomas M'Naught, S.S.C.

Thursday, June 8.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Sheriff of Midlothian.

THOMSON *v.* THOMSON.

Donation—Husband and Wife—Deposit-Receipt and Current Account in Bank in Donee's Name—Delivery.

In an action raised by the executor of a deceased person against his widow for payment of two sums of money—one being contained in a deposit-receipt, the other being the balance on an account-current, the defender averred that in pursuance of an expressed intention the deceased paid these sums into the bank on deposit-receipt and current-account respectively in her name, and had thereafter delivered to her the deposit-receipt and the bank pass-book. The Lords, relying upon the defender's testimony, corroborated by the terms of the deposit-receipt and the pass-book, and supported by evidence *aliunde* of the goodwill of the deceased to his widow, and his desire to benefit her, *sustained* the defender's plea that she had right to the sums as a donation, and *assoilzied* the defender.