the Court: Direct that the expenses of this application for a supervision order be treated as expenses in the liquidation, and decern: Find the respondent Daniel Montgomerie liable in the expenses occasioned by his appearing and opposing the granting of the petition," &c.

Counsel for Petitioners—D.-F. Balfour, Q.C.—M'Lennan. Agent—James Skinner, S.S.C.

Counsel for Respondent — Strachan — Clyde. Agent—James Ayton, Solicitor.

Tuesday, March 1.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HOUSTON *v.* BUCHANAN.

Superior and Vassal—Casualty—Composition—Implied Entry—Infeftment—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94).

The Conveyancing Act, section 4, sub-section 2, provides—"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 . . . duly entered with the nearest superior to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice."

A vassal was infeft in certain heritable subjects, and the infeftment was registered on 19th May 1873. It was admitted that the last vassal died previous to 1873. In an action by the superior for a casualty of composition, *held* that the rental of 1874, the year of the vassal's entry, and not 1873, the year of his infeftment, must be taken as the standard for fixing the amount due to the superior.

George Ludovic Houston, superior of certain subjects in the town of Johnstone, Renfrewshire, sued William Buchanan there for a casualty, being one year's rent of the subjects due upon the 1st October 1874, being the date of the commencement of the Conveyancing Act 1874. The rent for the year 1874-75 was not less than £80, 6s. The sum claimed as casualty was £65.

The subjects were feued out about the beginning of the present century by the pursuer's author, and came to belong to William Robertson, cotton-spinner, in Johnstone, who on 3rd June 1866 was entered with the superior by precept of *clare constat* in his favour of that date. The precept bore that he was then of full age, and he was in point of fact 34 years of age, having been born on 30th April 1872. Upon this precept Robertson was infeft, conform to instrument of sasine in his favour dated 19th July, and recorded in the Particular Register of Sasines for the county of Renfrew 17th September 1816. Robertson was the last-entered vassal in the subjects under the law as it stood prior to the passing of the Conveyancing (Scotland) Act 1874. He went to America about 1834 or 1835, and the pursuer averred that he died there in 1856, when the subjects fell into non-entry. The defender acquired the subjects by disposition in his favour, dated May and recorded on 19th May 1873. He was thus infeft in the subjects, and on 1st October 1874, by the operation of the Conveyancing (Scotland) Act, he was impliedly entered with the pursuer as vassal in them.

The defender averred that as the date of the death of the last-entered vassal was not stated, the year of infeftment must be taken as the date on which the casualty became payable, and he consigned £48 to meet the superior's claim.

After proof the Lord Ordinary (STORMONTH DARLING) upon 9th January 1892 pronounced this interlocutor:—"The Lord Ordinary having considered the cause, finds, decerns, and declares that in consequence of the death of William Robertson, cotton-spinner in Johnstone, who was the vassal last vest in all and whole the subjects described in the summons, a casualty, being one year's rent of the said subjects, became due to the pursuer as superior of the said subjects upon the 1st day of October 1874, being the date of the commencement of the Conveyancing (Scotland) Act 1874, and that the said casualty is still unpaid, and that the rents, maills, and duties of the said subjects, after the date of citation following upon the said summons, do belong to the pursuer as superior thereof, until the said casualty be otherwise paid to the pursuer; decerns and ordains the defender forthwith to make payment to the pursuer of the sum of £48, 1s. sterling, the rent of the said subjects, subject to the usual deductions, for the year from Whitsunday 1873 to Whitsunday 1874, being the year in which the defender must be held to have been duly entered with the pursuer as superior of the said subjects; finds no expenses due to or by either party, and decerns."

The pursuer reclaimed, and argued—The year on which the casualty fell to be paid was 1874-1875. The defender was infeft in 1873, and impliedly entered by the statute in 1874. By the old law the date of entry was the date of the charter of confirmation granted by the superior, although the charter once granted operated *retro* to the date of the infeftment. The statute provided that after October 1874 the vassal's infeftment should be of the same effect as if the superior had granted to him a writ of confirmation. If the date of infeftment had been after October 1874, that would undoubtedly have been the date on which the casualty was to be reckoned, but the process was not complete without both the infeftment and the Act working together. The Act could not operate *retro*, therefore

the date when the infeftment and the Act came together was the date of the beginning of the Act. To read the Act otherwise would be to make a casualty due before the Act provided. Again, the reading contended for by the defender would have this result, that in the case of a mid-impediment the right to the property might be confirmed in some one who had not the real title. That was opposed to the principles of the law previous to the passing of the Act, and the Act was not meant to supersede the old law, but only to make it easier—*Leith Heritages Company*, 1876, 13 S.L.R. 731; *Straiton Estate Company (Limited)* v. *Stephens*, December 16, 1880, 8 R. 299; *Sivwright* v. *Straiton Estate Company*, July 8, 1879, 6 R. 1209; *Campbell* v. *Stewarts*, December 11, 1884, 22 S.L.R. 292; *Steuart & Murdoch* v. *Rodger*, June 6, 1882, 19 S.L.R. 649.

The respondent argued—The statute provided that every proprietor who at the date of the passing of the Act was infeft in the lands should be deemed and held to be impliedly entered with the superior "as at the date of registration of such infeftment." The defender was infeft and infeftment registered in 1873; that must be taken to be the date of his entry with his superior, and not 1874. The Act operated *retro* not merely in the sense that a charter of confirmation did, in validating the title, but as making the date of infeftment the date of entry with the superior. The casualty payable was the rent for 1873-1874, and the Lord Ordinary was right. With regard to the difficulty raised on the other side as to the mid-impediment, it was enough to say that that would raise a difficulty between a disponer and disponee, while here the question was between superior and vassal. The implied infeftment by the Act extinguished the said superiority, so that the difficulty could not arise—*Ferrier's Trustees* v. *Barclay*, May 26, 1877, 4 R. 738.

At advising—

LORD TRAYNER—The defender in this case is the proprietor of certain heritable subjects situated in Johnstone held by him of and under the pursuer, who is the superior of the same. The defender acquired the subjects in 1873, and the conveyance in his favour is recorded on 19th May of that year, from which date he therefore stood infeft. The subjects were at the date of the defender's infeftment in non-entry, but he became entered with the superior by operation of statute on 1st October 1874. The pursuer claims from the defender a casualty of a year's rent in respect of such entry, and this the defender admits to be due. But the parties differ, and this is the only question between them, as to what year's rental is to be taken as the criterion or standard for fixing the amount due to the superior. The pursner maintains that the rental of the year 1874 must be taken, that being the year of his vassal's entry; the defender, on the other hand, maintains that it is the rental of 1873, that being the year of his infeftment.

The determination of this question depends on the construction of the Conveyancing Act of 1874, which provides (section 4, sub-sec. 2)—"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, duly entered with the nearest superior . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." The defender maintains the meaning of that provision to be, that any proprietor infeft at the date of the Act should be held to be entered as at the date of his infeftment, and that as the date of entry is the time at which the year's rental is to be taken for ascertaining the amount of the casualty, so the amount of the composition due by him should be taken as at May 1873, the date of his infeftment, and, according to his view, the date also of his entry. This is the view which the Lord Ordinary has adopted, and a very plausible argument was submitted in support of it. But I differ from that view, which I think is not the meaning nor the fair construction of the Act. In my opinion the entry, which was operated by force of statute, took place at 1st October 1874, the date when the Act came into operation, and no sooner. The defender was not entered with the superior, as matter of fact, before that date; he became an entered vassal then by virtue of the statutory provision. The words of the Act, that by such implied entry the vassal is to "be deemed and held to be duly entered" as at the date of his infeftment, must be read with the words that follow, namely, "to the same effect as if the superior had granted a writ of confirmation according to the existing law and practice." When so read I do not think the meaning of the provision is doubtful. By the law and practice existing before 1874, a writ of confirmation had the effect of entering the vassal as from the date of his infeftment in any question with the superior. It perfected the vassal's title as from the date of his infeftment. But the date of the entry as regarded any question of casualty was the date of the writ of confirmation. Accordingly, when the statute provides that every unentered vassal at its date should be thereby held and deemed entered as from the date of infeftment to the same effect as if the superior had granted a writ of confirmation, it provides merely that the implied or statutory entry shall have the same but no greater effect than a writ of confirmation granted of its date by the superior would have had—they operate "to the same effect." While therefore the implied entry under the Act has the same retroactive effect as a writ of confirmation (and to declare that seems to me the purpose of the part of the clause I am dealing with) it does not interfere with any law or practice or any claim which might be affected by the actual date of entry. I think the defender's entry, both in fact and law, was 1st October 1874,

and therefore I am of opinion that the pursuer's casualty is to be ascertained on the basis of the year's rent from Whitsunday 1874 to Whitsunday 1875.

The LORD JUSTICE-CLERK and LORD YOUNG and LORD RUTHERFURD CLARK concurred.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in terms of the conclusions of the summons.

Counsel for Appellant — D.-F. Balfour, Q.C. — Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for Respondent—H. Johnston—Craigie. Agents—Macpherson & Mackay, W.S.

Tuesday, March 1.

SECOND DIVISION.

[Lord Low, Ordinary.

JACKSON AND ANOTHER *v.* MACDIARMID AND OTHERS.

Married Woman—Separate Estate—Antenuptial Debt—Cash-Credit Bond—Cautionary Obligation.

A man died in 1872 leaving a trust-disposition and settlement under which his estate was divided among his children, a son and three daughters. One of his daughters married in 1875, and by antenuptial contract of marriage conveyed her whole estate to trustees. It was afterwards discovered that her father had died cautioner in a cash-credit bond which the bank called up in 1885. By arrangement with all the parties interested, her brother, for whose benefit the cash-credit bond had been originally granted, paid up half the amount due and obtained a new cash-credit bond for the remaining half with himself as principal, and his sister, with consent of her husband, and two other brothers-in-law as cautioners. There was no formal discharge of the original bond, but the new one proceeded upon the narrative that the previous one had been discharged. Subsequently upon the cautioners being called upon to pay, the brothers-in-law paid up the whole sum due, obtained an assignation of the bond from the bank, and raised an action of relief against the sister and her marriage-contract trustees for payment of her share of the debt, which was less than what she had received from her father's estate.

Held (Lord Young *diss.*) that the original debt due by her father had been discharged, and that the cautionary obligation entered into in 1885 by her as a married woman was not enforceable either against her or against her separate estate.

The late Peter Jamieson, merchant, Edinburgh, became bound as cautioner in a cash-credit bond to the National Bank for £5000, dated 16th and 18th October 1871, in order to start his son James Jamieson in business. The full sum was soon thereafter drawn out, and he died on January 21st, 1872, leaving this liability upon his estate. His trustees, after paying all the debts of which they had notice, divided his estate among his four children, James, Janet wife of Alexander Wylie, W.S., Jane now deceased, then wife of Joseph Jackson, surgeon, Bradford, and Margaret Turnbull, then unmarried, but now and since 1875 wife of Rev. Alexander MacDiarmid, Free Church minister, Grantown-on-Spey.

The share of each of the children amounted to £4717, and by the addition of certain heritable property specially destined to her, Mrs MacDiarmid received by succession to her father about £6000.

By antenuptial marriage-contract Mrs MacDiarmid conveyed to trustees all her estate, heritable and moveable, then belonging to her or which she might afterwards acquire during her marriage, including particularly the means and estate to which she had succeeded from her father. The first trust purpose was for payment of her debts due or contracted by her prior to her marriage. She was secured in a liferent of her estate, and a similar liferent was given to her husband if he survived, the fee going to her children.

In 1885 the bank demanded payment of the amount in the bond, but by arrangement James Jamieson, who was making certain business changes, paid up £2500 with the interest due, and a new cash-credit bond was granted to the bank for the remaining £2500 with himself as principal debtor and Alexander Wylie, Joseph Jackson, and Mrs MacDiarmid with consent of her husband as cautioners. The old bond was neither formally discharged nor assigned, but it was delivered up by the bank to Mr Wylie, and the new bond proceeded upon the narrative that the old one had been discharged.

John Jamieson was made notour bankrupt in 1890, and the National Bank called upon the three cautioners to pay the £2500 with interest. Mrs MacDiarmid refused to pay her share, and the whole sum was paid by Alexander Wylie and Joseph Jackson equally, to whom the bank assigned the cash-credit bond of 1885.

Alexander Wylie and Joseph Jackson thereupon brought an action against Mrs MacDiarmid, her husband, as her executor and for his interest, and her marriage contract trustees, to have it found and declared that Mrs MacDiarmid and her separate estate were bound to free and relieve the pursuers of the obligations undertaken by them for her and for the benefit of her estate, and of the payments to the amount of £100, 6s. 11d. made by the pursuers equally between them for her and for the benefit of her estate with interest thereon, and to have Mrs MacDiarmid and her marriage-contract trustees decerned and ordained to make payment to the pursuers