face of it points to accident and to nothing else. It is reasonable to say that the presumption in such a case is of accident, and here there is nothing to set aside that presumption. There might be a great many cases of this kind where nothing could be recovered if the pursuer had to prove conclusively that the cause of death was accident and not suicide. I think the Sheriffs have gone wrong, and that their judgments should be recalled.

LORD RUTHERFURD CLARK—I think this is a jury question, and as a juror I think the deceased died by accident.

LORD LEE concurred.

LORD YOUNG was absent at a proof.

The Court sustained the appeal; found in fact that the said Archibald Boyd was accidentally drowned in the river Clyde, and found in law that the defenders were liable in payment to the pursuer of the sum of £50 as concluded for.

Counsel for the Pursuer (Appellant)—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Defenders (Respondents)—Sir C. Pearson—Ure. Agents—Fodd, Simpson, & Marwick, W.S.

Tuesday, June 17.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* DRUMMOND MORAY.

Superior and Vassal—Non-Entry Duty—Casualty—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 3 (7) *and sec.* 4, *sub-secs.* 2 *and* 4.

Sub-section 4 of section 4 of the Conveyancing Act 1874 provided that no lands should after the commencement of the Act be deemed to be in non-entry, and in place of the old action of non-entry reserved right to a superior, who but for the Act would have been entitled to sue an action of declarator of non-entry, to raise an action of declarator and for payment of any casualty exigible at the date of the action.

By the interpretation clause it was provided that "casualties" should include relief-duty and composition and payments exigible in lieu of such duties and compositions, and periodical fixed sums or quantities stipulated for under the Act.

Held that an action by a superior against a vassal, infeft before the passing of the Act and impliedly entered with the superior under the Act as at the date of his infeftment, for payment of arrears of non-entry, was incompetent, the superior's right to sue for arrears of non-entry duties not having been reserved by the Act.

This action was raised by the Right Hon. James Patrick Bannerman Robertson, Her Majesty's Advocate, as acting on behalf of the Crown and the Commissioners of Woods and Forests, against Charles Stirling Home Drummond Moray of Abercairney. The pursuer sought to have it declared that certain lands belonging to the defender were in non-entry for the years 1851 and 1874 and intervening years, and that the non-entry duties due to the Crown as lawful superior of the lands amounted to £157, 12s. 3 8/12d. sterling, and were still unpaid, and craved decree ordaining the defender to pay the same to the Crown receiver for Scotland.

The pursuer averred that the lands referred to had been in non-entry since the death of William Moray Stirling in 1850, the amount of the non-entry duties being £157, 12s. 3 8/12d. William Moray Stirling had disponed the said lands by disposition of tailzie, dated 21st March and recorded in the Register of Entails 4th July 1849, to himself and the heirs whomsoever of his body, whom failing to Mrs Christian Stirling Moray or Home Drummond, his sister, whom failing to the defender. On this disposition infeftment had followed in favour of William Stirling Moray. Mrs Christian Stirling Moray was duly served nearest and lawful heir of tailzie and provision in special of William Moray Stirling by decree of service dated 29th July 1851, on which sasine had followed in her favour recorded on 14th October 1851. By disposition dated 30th October 1851 the commissioners of Mrs Christian Stirling Moray disponed the whole of said lands to the defender under reservation of her liferent. The instrument of sasine following on this disposition was recorded on 7th August 1854. The defender also was served as nearest and lawful heir of taillie and provision in special to William Moray Stirling by extract decree of service dated 30th July and recorded in Chancery, and extracted 1st and recorded in the General Register of Sasines 15th August 1868. In 1874 the Conveyancing (Scotland) Act was passed, by virtue of which the infeftment in favour of the defender had the effect of entering him with the Crown as its vassal.

The pursuer pleaded—"The said lands having been in non-entry for the periods above-mentioned, and the several sums condescended on as non-entry duties having been due before the passing of 'The Conveyancing (Scotland) Act 1874,' and being unpaid, decree ought to be pronounced therefor as concluded for."

The defender pleaded—"(1) The action is incompetent and ought to be dismissed."

Sub-section 2 of section 4 of the Conveyancing Act of 1874 (37 and 38 Vict. cap. 94), provides as follows—"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 whose estate of superiority in such lands would according to the law existing prior to the commencement of this Act have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." . . . Sub-section 4 provides—"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 said 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.* By the interpretation clause sec. 3 (7) it is provided—"'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."

On 22nd July 1889 the Lord Ordinary (WELLWOOD) pronounced this interlocutor—"Finds that the action is incompetent: Therefore sustains the first plea-in-law for the defender: Dismisses the action, and decerns, &c.

"*Note.*—This is a very peculiar action. It is an action by the Crown, directed against Mr Home Drummond Moray of Abercairney, and concludes for declarator that certain lands belonging to the defender, and described in the summons, were on 29th September 1874 in non-entry for the years 1851 and 1874, and intervening years; that the non-entry duties therefor for that period due to the Crown as lawful superior amount to the various sums specified in the summons—in all, £1891, 7s. 8d. Scots, or £157, 12s. $3\frac{8}{12}$d. sterling; and that the defender should be decerned and ordained to make payment thereof, with interest, to the Crown Receiver for Scotland, for behoof of the Commissioners of Woods and Forests.

"The first plea-in-law for the defender is, that the action is incompetent; and the meaning of the plea is that such an action is no longer competent, having regard to the first provisions of the Conveyancing (Scotland) Act 1874.

"Previously to the passing of that Act there were two ways in which a superior could secure payment of non-entry duties. If the vassal came forward and demanded an entry the superior could refuse to grant a charter of confirmation until all duties and casualties, including non-entry duties, were paid. If, on the other hand, the vassal would not come forward, the superior could force an entry by bringing an action of declarator of non-entry which entitled him to enter into possession of the land, and apply the rents, *inter alia*, to payment of arrears of non-entry duties. The summons did not contain any personal conclusions against the vassal. As Lord Stair says (ii. 4, 21)—"The decreet of general declarator is not personal against the vassal to pay the non-entry maills, &c., but is real against the ground of the tenement for granting letters to poind and apprise." See also 3 Juridical Styles (1st ed.) 386. I was referred to no instance of a personal action for arrears of non-entry duties being brought.

"Now in regard to both those remedies which the superior possessed, the Conveyancing Act of 1874 has made important alterations. The section bearing on the question is section 4, sub-sections 2 and 4. Section 4 (2) provides 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 registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.'

"Now, according to the then existing law and practice, a vassal desirous of entering with the superior could not have obtained a writ of confirmation without making payment of duties and casualties then due) (See Consolidation Act of 1868, section 97. Again, a vassal who had been granted a writ of confirmation was entitled to plead that all duties and casualties due at its date had been discharged. (*Incorporation of Tailors of Glasgow* v. *Black*, 13 D. 1073, and *Lord Advocate* v. *Rollo*, 10 Macph. 1024. See also the older cases of *E. of Cassilis*, 1682, M. 6414, and *Gibson* v. *Scott*, 1739, M. 6500.) Except in so far as the superior's rights have been expressly reserved by the statute, an entry in terms of section 4 (2) has the effect, including those just mentioned, of a writ of confirmation.

"But by section 4 (4) of the statute the superior's rights were to a certain extent reserved; the old action of non-entry was no longer competent, because after the date of the Act no lands were to be deemed in non-entry; but right was reserved to the

superior who, but for the Act, would be entitled to sue an action of declarator of non-entry, to raise an action of declarator for payment of any casualty exigible at the date of the action. The section then proceeds:—'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; 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.'

"By the interpretation clause 3 (7) it is provided—'"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.' A form of summons of declarator and for payment of a casualty is given in Schedule B. It will be observed that no reference is made in it to non-entry duties but only to the casualty due whether of relief or composition.

"Now, reading these two subsections together and keeping in view that the defender was at latest infeft in 1868, I think it is clear that it is no longer competent for the superior to sue for arrears of non-entry duties. The defender having been infeft before the passing of the Act, was duly entered on the passing of the Act as at the date of his infeftment. The effect of this implied entry was both prospective and retrospective; on the one hand, there being no reservation of the superior's right in this respect it wiped out any arrears of non-entry duties due at the date of his infeftment which was constructively the date of his entry; and on the other hand, it prevented any further non-entry duties falling due, the lands no longer being held to be in non-entry. Quite consistently with this view (because there is an express reservation)—Section 4 (4) specially reserves right to the superior to sue, not for non-entry duties, but for any 'casualty'—that is any casualty of relief or composition exigible at the date of the action, and also for arrears of feu-duties which stand in a different position from non-entry duties.

"I therefore sustain the first plea-in-law for the defender and dismiss the action. I would only add, that I fancy that the reason why the superior's right to arrears of non-entry duties was not reserved is to be found in the smallness in general of the amount of such duties. In the present case the total amount of the alleged arrears for thirteen years is only £157 sterling, about £12 sterling a-year."

The pursuer reclaimed, and argued—The granting of a charter of confirmation by the superior did not under the old law necessarily imply a discharge of claims of this kind—Ersk. Inst., ii. 5, 46; Stair, ii. 4, 23; Duff's Feudal Conveyancing, 1840; *Ayton* v. *Duncan*, January 14, 1676, M. 6464; *Earl of Cassilis* v. *Lord Bargeny*, February 1682, M. 6414. If confirmation did imply a discharge of previous claims against the vassal, it was because that was assumed to be the intention of the superior. It was a most illogical inference that a statutory confirmation should have that effect. This debt was due to the Crown at the date of the Act, and it was very unlikely that without a special provision to that effect a superior should be deprived of right to recover debts already due to him. Non-entry duties were included in casualties, and the right to sue for them was accordingly reserved—1874 Act, sec. 4, sub-sec. 3.

Argued for the defender—A petitory action for recovery of non-entry duties was a novelty in the law of Scotland. An action in this form could never have been brought before the passing of the Act of 1874, and that Act, while it abolished the state of non-entry, did not provide for the recovery of non-entry duties due before its date—Section 4, sub-sections 2 and 4. The defender was impliedly entered with the superior as at the date of his infeftment in 1854, and so in any view the pursuer could only ask for the non-entry duties between 1851 and 1854.

At advising—

Lord President—The Lord Ordinary has observed that this is a peculiar action, and I agree with that observation. It is in form a summons of declarator of non-entry, because the pursuer asks to have it found and declared "that certain lands were on the 29th of September 1874 in non-entry for the years from 1851 to 1874, and it having been so found and declared he asks that the defender should be decerned and ordained to make payment of a certain sum as the non-entry duties due for the whole lands.

Now, in a declarator of non-entry before the passing of the Conveyancing Act of 1874, the latter conclusion would have been incompetent, because an action of declarator of non-entry was directed not against the person of the vassal but against the lands. The Act of 1874, however, declared that no lands should, after the Act came into operation, be deemed to be in non-entry, but that a superior who but for the Act would have been entitled to sue a declarator of non-entry might raise the action described in the Act.

Now, this action raised by the Lord Advocate on behalf of the Commissioners of Woods and Forests is not in terms of the statute, and the statute says that there shall be after its date no declarator of non-entry, because it substitutes in place of that action the statutory action by which any

superior who but for the Act would have been entitled to sue a declarator of non-entry in place of such action, "may raise . . . an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action."

The summons in the present action is obviously a combination of the old declarator and the statutory action for payment of casualty, and on that ground is, I take it, entirely incompetent apart from everything else, but a more important objection is because the action authorised by the statute it is said "shall have effect and operate as a declarator of non-entry according to the now existing law, but only "for the purpose and to the effect of securing payment of any casualties exigible at the date of such action."

The question then comes to be, what is the nature of the casualties which it is contemplated are to be recovered in this form of action? Still further light is thrown on the matter in Schedule B, the Act which prescribes the form of action. The action runs in name of the superior, and sets out that it should be declared "that in consequence of the death of C, who was the vassal last vest and seised in all and whole the lands of X, 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." Can it be said that the non-entry duties which are sought to be recovered in the present actions are "casualties" within the meaning of the statute? It is clear both from the 4th sub-section of the 4th section and also from the schedule that nothing but casualties are to be recovered. It seems to me that what is meant is the casualties payable on the entry of an heir or singular successor, and that is, I think, made more plain by the terms of the interpretation clause of the statute, when it is said that "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 impossible to say that that definition comprehends the non-entry duties sought to be recovered here. These are duties payable while the lands are in non-entry, but before the declarator of non-entry has been instituted by the superior, and it may be said that the statute excludes the superior from all other claims competent to him before it was passed, and that may easily be explained by considering the extremely trifling amount of these duties in almost every case, as is exemplified in the present case. I think, therefore, it is quite a fair presumption that it is not the intention of the statute to keep up the claim for non-entry duties as a right belonging to the superior.

On the whole matter I am of opinion that the Lord Ordinary has plainly come to a right decision.

LORD SHAND—I agree in thinking that the decision of the Lord Ordinary is sound, and should be adhered to.

The leading enactment in the statute of 1874 is the 2d sub-section of the 4th section, which provides as follows—"Every proprietor who 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 whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." So the defender in this case is entered with his superior as at the date of his infeftment. One result of this is, that all the past casualties and all charges such as are here made are held to be wiped away, probably on the footing that they are presumed to be paid. In this case the vassal being entered as such arrears are exigible unless the right to demand them is saved by the statute. Now, we find that the statute does save something. There is no longer any action of declarator of non-entry, but an action is introduced in its place to enable the superior to recover casualties. In the Titles to Land Consolidation Act of 1868 mention is made of "duties" and "casualties." There is no such expression in the Act with which we are now dealing; "casualties" only are referred to. This is very clear from what has been pointed out, for in the first place we have the term "casualties" interpreted, and in the next place the action in the form prescribed in Schedule B is for recovery of relief-duty or of composition. So I am of opinion that the implied entry introduced by the Act wiped out duties such as are sued for in this action, while it saved the superior's claim for casualties, and also for feu-duties and arrears of feu-duties in the 4th sub-section of the 4th section.

I was, I confess, unwilling to adopt any reading of the Act which had the effect of wiping out the debt due from one party to another. Such an effect is not lightly to be presumed as intended, but I think the Lord Ordinary is right in the reasons he has given for his decision. We are dealing with a large estate here, and the non-entry duties come to a trifling sum per annum, and I rather take it that the view of the Legislature must have been that it was proper to save the superior's right to the casualties of relief and composition and to feu-duties, but that the non-entry duties were of trifling amount, and ought rather to be abolished.

I agree in thinking that the Lord Ordinary's judgment should be adhered to.

LORD ADAM—I have been from the first much struck with the form of this action,

because the pursuer seems to have recognised that the action of declarator of non-entry was at an end, and to have endeavoured to adapt the modern form of action to the circumstances of the case, and accordingly we have an action concluding for declarator that certain lands were in non-entry for a number of years prior to 1874, and that the non-entry duties are still unpaid, and for decree ordaining the proprietor of these lands to make payment of the amount of these duties. That is to say, the action is personally directed against the vassal in the lands, but prior to 1874 we never heard of a personal action of this kind against the vassal; the action was always directed against the lands, and therefore this action is quite a novel invention. The question accordingly arises whether there is any authority for it in the statute. Now, with regard to the declarator introduced by the Act, it is provided in sub-section 4 of section 4 that "a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action." The only thing provided for is an action of declarator and for payment of a casualty, and the question is whether under the term 'casualty' non-entry duties can be recovered. There can be nothing clearer than that non-entry duties were not casualties under the old law, and there is nothing in the Act to say that non-entry duties are to be considered casualties. We have a definition of casualties in the interpretation clause of the Act, and it just describes what casualties were before the passing of the Act.

For these reasons I think the present action is incompetent and ought to be dismissed.

Lord M'Laren—The present action is one for a claim which is, I think, cut off by the Act of 1874. Prior to that statute there was no way in which a superior whose proper vassal declined to enter could recover the feu-duties and other sums due to him except by bringing a declarator of non-entry, and thereby by an interdict method compelling the vassal to enter. If the vassal elected to enter he could only do so under the old law by accounting for the whole rents or profits of the estate during the period of non-entry, and this, I rather think, was one of the known casualties of superiority, though that is disputed, but at any rate that is not referred to in the Act of 1874. By the later law which prevailed for some centuries prior to 1874, the claim was limited to the feu-duties *plus* the retour duties or the old valuations. Now, when the statute of 1874 provides that lands shall no longer be in non-entry, it is a natural consequence of the statutory entry that it becomes necessary to deal with the rights of a superior to the arrears due to him.

Now, it is plain enough under the law established by the Act of 1874 that the state of non-entry could never exist, where the vassal was infeft, and therefore it was not necessary to provide for the recovery of retour duties in the future but only for the recovery of casualties, feu-duties, and arrears, and these are to be recovered in an action in a form prescribed in Schedule B of the Act. With regard to non-entry duties which had accrued before the Act came into operation, it was probably more in accordance with usage that as the superior's right had already arisen, it should have been reserved, and where lands were in non-entry before the Act of 1874 should have provided that the superior might recover them, as well as the casualties of composition and relief, but that was not done, probably because these duties were of very inconsiderable amount, and it was thought undesirable to complicate the Act with provisions as to rights which were never deemed substantial parts of the superior's estate. I think that while the logic of the case is in favour of the claim, there is no provision in the statute for enforcing it, and as the vassal is impliedly entered, the superior is not in a position to establish his claim by an action at common law, because at common law the right to non-entry duties was not a personal claim against the vassal, but was the condition upon which the superior was bound to give a charter to the vassal. Now, the statute has given the vassal an entry with the superior without requiring him to execute the condition, and the superior is accordingly in the same position as if he had, under the old law granted an entry without demanding payment of the duties.

For these reasons I am of opinion that the Lord Ordinary's judgment should be adhered to.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. N. Johnstone. Agent—Donald Beith, W.S.

Counsel for the Defender and Respondent—Low—Dundas. Agents—Dundas & Wilson, W.S.