pora" by the minister, but it is not said when this was done, and if the finding of the Sub-commissioners is to stand, that the whole teinds were possessed by the heritors of long time "bygane for payment of a silver dewtie," it is plain that the statement about drawn teinds or teind sheaves led must relate to an old state of matters which had then long ceased to exist.

This conclusion is very strongly confirmed by the effect which has been given to this report of the sub-valuation of the teinds in question. Although never approved by the High Commission in regard to the pursuer's lands, it has received effect for 250 years as equivalent to a valuation, and the teinds of the pursuer's lands have been stated in successive localities as valued teinds, and the pursuer and his authors have paid accordingly. The valued teind has always been taken as one-fifth of the reported rental of stock and teind jointly. It has never been attempted to give to the sub-valuation the meaning now ascribed to it by the defenders. I cannot help ascribing very great weight to what may be called the contemporaneous interpretation of the document in question—an interpretation which it has uninterruptedly received for 250 years.

I am therefore humbly of opinion that the defences should be repelled, and decree of approbation and valuation should be pronounced as to all the lands libelled except Over Bleloch, and that in terms of the report of the sub-valuation, striking the teinds at one-fifth of the reported value of the stock and teind jointly. Taking the facts as stated in the report, there are no grounds for holding either that the teinds of the lands in question were not subject to valuation at all, or that the valuation should proceed in any other way than by taking one-fifth of the reported and proved value of the stock and teind jointly.

I may observe that in reference to all the lands, or to most of them, the report of the sub-valuation bears that the value of the stock and teind is so and so, burdened with the feu-maills and teind silver, or some similar expression. I think that no effect can be given to these words, but that the value of the teind must be struck at one-fifth of the reported rental, without any deduction whatever. I think it quite clear on principle, that in striking teind at one-fifth of the whole of the stock and teind jointly, no deduction can be allowed either of the feu-duty paid for the lands or of the tack-duty paid for the teinds, and so it seems to have been decided by the High Commission on 28th January 1632—*Parish of Abdie*, Connell, i. 202 (2d ed.) I think therefore the summons in the present case quite rightly concludes for valuation of the teinds at one-fifth of the rent of stock and teind without asking any deduction for feu-duty or ground-annual.

Lord Mure, Lord Shand, Lord Rutherfurd Clark, and the Lord President concurred.

The Court therefore repelled the defences and pronounced decree of approbation and valuation as to all the lands libelled, with the exception of Over Bleloch, in terms of the report of the sub-valuation, and struck the teinds at one-fifth of the reported value of the stock and teind jointly.

Counsel for Pursuer — Balfour — Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders--Lord Advocate (Watson) —Solicitor-General (Macdonald)—Keir. Agents —Donald Beith, W.S.—Murray, Beith, & Murray, W.S.

HOUSE OF LORDS.

Friday, February 27.

(Before the Lord Chancellor (Cairns), Lord O'Hagan, and Lord Blackburn.)

RANKIN AND OTHERS (RANKIN'S TRUSTEES) *v.* LAMONT.

(*Ante*, Feb. 26, 1879, 16 Scot. Law Rep. 387, 6 R. 739.)

Superior and Vassal — Entry by Trustees — Whether Casualty Payable as Singular Successor —Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94, *secs.* 4 *and* 5).

Where trustees became infeft in certain heritable property in terms of a trust-disposition and settlement in their favour under which they were to entail the property upon the truster's heirs, *held* (*affirming* the Court of Session) that under the Conveyancing (Scotland) Act 1874 the superior was entitled to the composition payable by a singular successor, and that the heir of the last entered vassal could not now be tendered for an entry.

The 4th sub-section of section 2 of the Conveyancing (Scotland) Act 1874 provides that the implied entry with the superior which is provided for by that Act in all cases where a party becomes infeft, "shall not entitle any superior to demand any casualty sooner than he could by the law prior to this new Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering."

Question per Lord Blackburn—Whether the effect of that provision is to postpone the right of the superior to bring an action for payment of casualties till after the death of the last entered vassal?

This was an action of declarator and for payment of casualty by John Henry Lamont of Lamont against Patrick Rankin and others, trustees of Patrick Rankin of Auchingray, Cleddans, and Otter.

The Second Division of the Court of Session (*diss.* Lord Young) affirmed the judgment of the Lord Ordinary (Curriehill), finding the casualty due — Feb. 26, 1879, 16 Scot. Law Rep. 387, 6 R. 739.

The defenders appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, in this case the appellants are the trust-disponees of Patrick Rankin, who died on the 5th of March 1873. Patrick Rankin held certain land at Achagoyle of the respondent as his immediate lawful superior, and in this land the appellants were duly infeft

conform to notarial instrument in their favour recorded in the Division of the General Register of Sasines on the 27th March 1874.

By the Conveyancing (Scotland) Act 1874, which came into operation on the 1st of October in that year, it is enacted (section 4, sub-sec. 2) that "Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in any land, 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 . . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.". . .

It is not disputed that according to the law and practice existing at the time of the passing of the Act, if the respondent had granted to the appellants a writ of confirmation, the respondent would have been entitled to be paid a casualty, and that such casualty would have been a composition, and not merely a relief payable by an heir. Neither is it disputed that the respondent might have refused to grant the writ of confirmation until this composition was paid, and might have resumed possession of the fief and held it for his own use till someone having a right to be entered as vassal came forward and made the proper payment.

The Act further provides that the implied entry shall not prejudice or affect the right or title of the superior to any casualties due or exigible in respect of the land at or prior to the date of entry; and it enacts that no land shall any longer be deemed to be in non-entry. But a superior who might have sued an action of declarator of non-entry may raise in the Court of Session against the successor of the vassal 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.

This is the action which the present respondent has raised. He alleges that the appellants by reason of their infeftment are to be deemed and held to be duly entered with him the respondent to the same effect as if he had granted a writ of confirmation. He alleges further that upon such entry he would have been entitled to be paid by them a composition, and not merely a relief, and he sues for this composition accordingly.

Whether he has this right is a question upon which the learned Judges in Scotland, on the different occasions on which since 1874 the question has come before them, have not been unanimous. Six of the nine Judges who have at different times considered this question being of opinion that the superior has the right, and three thinking that he has not, I am clearly of opinion that the construction put by the majority of Judges upon the statute is correct. The words of the statute are, in my opinion, clear and unambiguous. The substance of the argument for the appellants was that in the present case the heir was ready to enter, that they might according to the old practice have tendered him as vassal, and that if they had done so, a relief only, and not a composition, would have been payable.

Putting aside the difficulty of determining whether the heir is or is not willing to enter, and whether he would continue to be willing, I am of opinion that there is no longer any room for his entry, and if so, there can be no ground for contending that he can enter and that a relief is to be paid. The appellants are by the Act deemed and held to be duly entered, and if so, there is no vacant fief into which the heir could enter.

The learned Judges who are in the minority are obliged to start with the assumption that the Legislature meant to leave payments to a superior exactly as they were, and not to give him in any case a title to a more valuable casualty than he would have had if the Act had not passed. I find no such purpose or intention declared in the Act. There is, indeed, a provision at the end of sub-section 3 of section 4 that the implied entry shall not entitle a superior 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. There is no enactment that the superior shall not demand a greater casualty than he could have had if the Act had not passed and the entry had been the entry of an heir, and I am unable to interpolate these words into the Act. On the whole, I am of opinion that the respondent is entitled to what the Court below has given him, and I move that this appeal should be dismissed with costs.

Lord O'Hagan—My Lords, the question in this case is manifestly one of difficulty, as it comes before us after two full discussions in the Court of Session, each of which was followed by elaborate judgments, and in each of them the Judges were divided in opinion. Seven went for the view which has been pressed by the respondent, and three for that urged on us by the appellant. And the difference affected at once the policy and aims of the statute which was the subject of debate, the construction of its terms, and the nature of the practice which, having prevailed before the passing of it, was proper to be regarded as assisting to indicate the purpose of the Legislature, and the character of the change which it desired to accomplish.

Some of the learned Judges regarded that statute as a mere Conveyancing Act, leaving the substantial rights and relations of superiors and vassals altogether unaltered; whilst others, looking with much disfavour on the old feudal niceties, which they described as encumbering and embarrassing the progress of titles, and authorising devices for the defeat of legitimate rights, ascribed to it the design of doing away with—as was said by the Lord President—"barren and useless estates of mid-superiority," so as to prevent technical or formal interference with the real interests of persons beneficially entitled.

There was another conflict as to the practice before the statute. On the one side it was alleged that the superior was accustomed habitually to insist upon the casualty of a year's rent, although the demand was sometimes evaded by putting forward the heir and paying the relief-duty only; and, on the other, that the demand of the casualty was the exception and not the rule.

As to the latter controversy in such a balance of authority, it seems to me impossible that your Lordships can reach a satisfactory conclusion, and I think that you must therefore avoid the consideration of it, and with it of the argument from the hardship alleged to be attendant on the

respondent's construction of the Act. But on the other subject of dispute between the Judges this House is competent to form an opinion; and there seems to me to be good reason for regarding the Act of 1874 as designed at once to modify the forms of conveyancing and to work material changes in the Scottish law of property.

Lord Gifford (*Ferrier's Trustees*, 4 R. 748) states as the ground of his opinion that the statute is "a mere Conveyancing Act," not intended to enlarge "in any degree" the rights of superiors, or to enable superiors to demand from vassals "any other or different casualty" than they could have exacted if it had never been passed. If this view be adopted by the House, the judgment of the Court of Session will be discredited, but if the Act, although a Conveyancing Act, was passed substantially to affect the rights of superiors and vassals, and to abolish with that result a mere "technical device," "as well as the system under which alone it was formerly practicable," that judgment will be materially sustained.

If we were at liberty to examine the report of the Law Commissioners of 1838 (pp. 74 and 519), to which one of the learned Judges refers at length, and compare its recommendations with the Act which was the outcome of it, the latter view would be much supported; but putting these recommendations out of account as scarcely legitimate guides to the construction of the statute, and looking only to the provisions it embodies, I am led to the conclusion which the appellants assail. Its object is defined in the preamble to be not merely to simplify the modes of making up titles, but "to amend the law relating to land rights and conveyancing, and to facilitate the transfer of land in Scotland." Is it possible to say that these words are not large enough to comprehend such a change in feudal relations and monetary claims with reference to land as the respondent alleges to have been wrought by the enactment? Whether his contention is just remains to be decided, but is there anything in the preamble to stop him from making it?

And when we run through the sections we find several of them which more or less make such alterations affecting such relations and claims in a very important way. I do not advert on this branch of the argument to the 4th section, which is the subject of controversy, or go into detail as to others which have been sufficiently pressed on the attention of the House; but I may note, that whilst the rights of corporations and trustees are sensibly affected by the 5th section,—whilst the provisions of the 15th for the redemption of casualties alter the relative positions of the superior and vassal,—whilst the superior is obliged, *in invitum*, by the 20th in certain circumstances to receive a fixed payment for carriages and services,—and whilst annual feu-duties are regulated on a new basis by the 23d—it seems difficult to maintain that the Act was not designed to alter, and was not successful in altering, at least to some extent, the pecuniary rights of the superior or the vassal. All these changes, be they great or small, are in the same direction, and dictated by the same policy as would be indicated by the 4th section if the respondent's construction should be put upon it, and they are all, as well as the 4th, within the scope of the preamble, as pointing to modifications of rights as well as to facility of conveyancing.

I am therefore, my Lords, disposed to concur with the general view of the majority of the Judges as to the frame and purpose of the statute, and I proceed, very briefly, to consider the operation of the 4th section as applicable to the undisputed facts of the case.

There is only one point for decision. In the Court below another was discussed as to the peculiar liabilities of trustees holding property for an heir-at-law, but it has been abandoned, and was not argued here.

We have before us on the one side a superior, and on the other a singular successor, clothed with such reciprocal rights as legally attach to those positions respectively. I need say nothing as to the circumstances which have induced this relation in the present case, but its existence being admitted, the sole question is, whether the superior can enforce payment of a casualty of composition—a year's rent—or only of a casualty of relief payable by the heir—a duplicand of the feu-duty? To one or the other he is entitled, and the appellants insist that he can only demand the latter, raising their defence by the plea—"The heir of the last entered vassal being willing to enter and pay relief-duty, accordingly the action (*i.e.*, for the casualty of composition) cannot be maintained." The law bearing on this matter before the passing of the Conveyancing Act is not the subject of dispute. It was very clearly explained in the lucid argument of Mr Russell, and it is stated thus by Lord Deas (*Rossmore's Trustees*, 5 Rettie 216)—"It does not admit of doubt that prior to the Act a singular successor when called to enter or pay a composition of a year's rent might, with consent of the heir of the last entered vassal, tender him as the person to be entered, and the superior was thereupon bound to enter the heir by precept of *clare constat*, and to accept a duplicand of the feu-duty."

The heir was not obliged to enter. He must have done so of his own free choice. The duplicand feu-duty was materially less than the composition, but on paying it the heir was entered as the vassal and burthened with all the responsibility which attached to him as such.

It is plain, therefore, that before the statute the plea of the appellants would have been a good one, and that on the tender of the heir the superior could have exacted only the relief-duty payable by him.

Has the Act of 1874 altered the position of the parties? The answer must be given according to the construction to be put on the 4th section in its connection with the general scheme and operation of the statute.

With all the hesitation properly induced by the conflict of opinion among the learned Judges as to the effect of this section, I have been unable to discover sufficient reason for differing from the view of the decisive majority, so deliberately considered and so repeatedly expressed.

The appellants here are in the position, under the action of the statute, in which they would have been before it was passed if the respondent as superior "had granted a writ of confirmation." They are "proprietors." They have been "duly infeft in the lands." They must be "deemed

and held to be" as at the date of the negotiation of their infeftment "duly entered" with the superior (the respondent), and whatever might have been the condition of a "duly entered" vassal after "a writ of confirmation," seems to be their condition now.

Then it seems clear that when the vassal required confirmation, which relieved him from previous liability, it was competent to the superior to demand his composition as a preliminary to the grant. It was the usage, as it was the right, of superiors to make and enforce that demand, and the actual grant was the best evidence that the proper casualties had been paid and other liabilities discharged.

When the confirmation was completed it destroyed the mid-superiority. It brought the vassal and the superior into immediate contact, liberating the mid-superior from liability.

The statute aimed to abolish fictitious titles and recognise the reality of things, and the intervention of the heir, who had only the shadow of an interest, became apparently impossible when the statutable confirmation was accomplished.

A question was put more than once in the Court of Session as to the possibility of carrying out the view of the appellants in the altered state of circumstances created by the Act. It was repeated at your Lordships' bar, and neither here nor there was it met by a satisfactory reply. If the superior and the singular successor have been put into direct relation, if the intermediate estates have been extinguished, and if there have been a statutable confirmation and a statutable entry, how can there be room for the intervention of the heir? If the singular successor has been entered, the heir can give him no defence against the exaction of the casualty.

I have already adverted to the argument founded on the hardship of taking from the singular successor the protection heretofore derived from the presentation of the heir, but even if there were such a hardship it would not warrant refusal to enforce the provisions of the Act. Material changes such as it was designed to effect are rarely accomplished without inconvenience to individuals, and if they invoke injurious consequences, the Legislature, which has authorised them, must interfere to rectify the mischief. But, as I have said, we have no sufficient reason in the balance of judicious testimony to hold that the old practice gave the singular successor generally an advantage which he will not enjoy under the law as it has been interpreted in favour of the respondent.

The argument of the appellants, founded on the 3d subsection of the 4th section of the statute, seems to me to have received a sufficient answer. That subsection seeks to provide against certain consequences which might have attended the implied confirmation of infeftments, under subsection 4 of section 2, if they were not guarded against. A charter of confirmation before the statute discharged casualties and feuduties due at its date. Such a charter, it seems to be conceded, was not often granted by the superior until they were satisfied, and to prevent confirmation of infeftments being held to discharge claims of that kind whilst it was enacted "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," the proviso was added 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."

It has been fairly argued that the object of this proviso was to prevent the superior from demanding his casualty whilst he had a vassal regularly entered. He was entitled to it only when the feu was no longer full. And the word "sooner" points neither to the amount of the payment nor to the person to make it, but to the period at which it would be exigible. "If," says Lord Curriehill, "at the date of the implied entry the feu happens to be full, the superior is not entitled to exact payment of the casualty until the death of the person who fills the feu; the lands fall into the condition in which prior to 1874 they would have competently formed the subject of an action of declarator of non-entry at the instance of the superior." The proviso forbade the superior to claim the casualty before he was entitled to it on the death of an entered vassal.

If it was intended further to limit his right, as well with reference to the amount as to the time of payment, the privilege of tendering the heir, and the sufficiency of his discharge of the relief duty might have been perpetuated by a few simple words. The right of the superior to his casualty is expressly reserved and enforceable, under the fourth subsection, by an action of declarator and for payment of it, notwithstanding the implied entry, but he is not to enforce it as long as he has an entered vassal. There is no provision that he is not to enforce it if the heir be tendered, even when the feu has ceased to be full. Such a plea might have been authorised by Parliament, but I do not see that it has been directly or by any implication.

My Lords, this House has been always slow to differ from the learned Judges of the Court of Session on questions connected with Scotch conveyancing, and I should have had extreme hesitation in venturing to disturb the well-considered decision in this case, even if I had failed to appreciate fully the force of the reasons on which it has been formed. But those reasons commend themselves to my mind as strong and sufficient, and I am therefore of opinion that the appeal should be dismissed with costs.

Lord Blackburn—My Lords, the only question which has now to be decided is, What is the construction of the Conveyancing (Scotland) Act 1874? That had been much considered in two cases—*Ferrier's Trustees* v. *Bayley* (4 Rettie 738), in the Second Division, which was not unanimous, Lord Gifford dissenting; and again in *Rossmore's Trustees* v. *Brownlie* (5 Rettie 201), in the First Division, where again the Court was not unanimous, the majority agreeing in opinion with the majority of the Second Division, Lord Deas dissenting; and in the present case Lord Young has also dissented; so that of the nine Judges below who have had occasion to consider this question, six have taken the view favourable to the respondents, and three have dissented from that view.

In considering this question it is necessary to bear in mind the state of the law of real property in Scotland before the passing of the Conveyancing (Scotland) Act 1874.

A superior was entitled to receive a casualty on each change of his vassal; he had not any direct remedy to enforce the payment of a casualty, but he was entitled to refuse to enter anyone as his vassal until the casualty was paid—relief if the person entering was heir of the last vassal, composition if he was a singular successor,—and when the fee became vacant (as sooner or later it must do by the death of the vassal last entered), so that the lands became in non-entry, the superior had a right to resume possession of the fief and hold it for his own use till one having a right to be entered as vassal came forward and paid the casualty—of relief if he entered as heir to the last vassal, of composition if his right was to be entered as a singular successor. In this indirect way the superior had a very stringent remedy to obtain payment of a casualty. But the complicated system of conveying to hold *a me vel de me* enabled a purchaser and the heir of the vendor, if they could agree together, to obtain for the purchaser the benefit of a registered title, and yet to pay only relief to the superior instead of composition, except in cases where subinfeudation was effectually prohibited by the terms of the feu. This was done by entering the purchaser as sub-vassal holding base of the vendor, and entering the heir of the vendor as vassal to the superior; and this mid-superiority so created might be kept alive and the proceeding repeated, and so *toties quoties* as long as an heir to the original vassal could be found willing to enter. I do not think there was anything dishonest or deserving of reprobation in this contrivance. If the purchaser thought it more for his interest to hold by a title safe enough to hold by, but complicated and occasioning at intervals trouble and expense, rather than to pay a composition, he might be unwise, but he was not dishonest. There is a singular conflict of testimony as to the extent to which in practice purchasers took advantage of this device, but I think Lord Curriehill agrees that the power to do so caused superiors (in some cases at least) to compromise their claim to a year's rent, whilst Lord Young seems not to dispute that the superior generally got more than the relief, which was all he would have been entitled to if the succession had been in truth and in fact, as well as in technical form, that of an heir to the former immediate vassal. But though there was nothing dishonest in this contrivance—the keeping up of mid-superiorities, which were only nominal estates—complicated titles occasioned unnecessary deeds and expense, and increased the chance of mistakes. The Legislature therefore determined to do away with them, and that was one main object of the Conveyancing (Scotland) Act 1874. By doing away with the system of nominal mid-superiorities the Legislature deprived purchasers of the power of using this contrivance as a means of postponing the time when a composition must be paid, or perhaps in some cases preventing its being ever paid; and unless the Legislature has provided some equivalent for this which is taken away, the effect must be to enhance more or less the pecuniary value of the superior's chance of getting a composition. The real question, in my opinion, is, Whether the Legislature has provided any substitute for this contrivance which they have destroyed? I think that it has not done so. I agree that it was not the object of the Act to produce any change in the pecuniary relations between superior and vassal, and if I could see any reasonable construction of the language used by the Legislature which would avoid doing so I should feel inclined to adopt that construction. But I do not think it would be justifiable to interpolate a scheme for this purpose not expressed by the Legislature, and after having very carefully considered the judgments of each of the three Judges who formed the minority, I cannot but think that they have each of them put qualifications and restrictions on the language of the Legislature which I am inclined to think those who framed the Act did not intend to express. I am, at all events, decidedly of opinion that if they meant to express them they have not used such language as to justify a court of law in construing the Act so as to give effect to them.

The 4th section of the Act, subsection 2, enacts that a proprietor duly infeft in lands shall be deemed and held to be as at the date of the registration of such infeftment duly entered with the superior. This deprives the superior of the power to refuse such entry until his casualty was paid or secured, and would therefore—if no other remedy was provided to enforce payment—put it in the power of every proprietor duly infeft to be entered without paying any casualty. The 4th subsection abolishes non-entry altogether, and then proceeds to give a new remedy against successors to enforce payment of casualties. The superior "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." Such an action is here raised against the successors of the last-entered vassal for a year's rent, being the casualty exigible from them as being singular successors impliedly entered as such; and the plea-in-law is that "the heir of the last-entered vassal being willing to enter and pay relief-duty, accordingly the action cannot be maintained." No such plea is, in terms at least, given by the 4th subsection; and as the singular successor is already, by virtue of the second subsection, to be deemed to be entered, it is a contradiction to propose to enter the heir; he may be willing to enter, but he cannot. But each of the three dissenting Judges relies on the 3d subsection, the language of which is, I think, not at all happily chosen.

Lord Gifford reads the earlier words, "that such implied entry shall not prejudice or affect the right or title of any superior to, *inter alia*, casualties which may be due at the date of such entry," as if the word "affect" was in an antithesis to prejudice, and so makes this equivalent to an enactment that the superior's right to a causalty shall not be either worse or better than it was before. I doubt much if those who used the words had any such antithesis in their minds. The words seem to me to have been inserted with a view to quiet the alarms of superiors who thought their rights were disregarded; and the proviso at the end of the subsection is properly added in that view. I am unable to guess what was, as far as regards casualties, meant by saying

that all rights and remedies competent to a superior for recovering or making effectual, *inter alia*, casualties shall continue to be available to the superior. The words have a sensible meaning as regards feu-duties, &c., but as to casualties, all rights and remedies, either by way of refusing an entry without payment or compelling an entry, are expressly destroyed, and I know of no others. The utmost effect, I think, that can be given to these words is that they indicate that those who used them would have preferred a scheme which left the pecuniary rights quite unvaried if they had known how to frame one. But this does not, I think, justify a Court in attaching to the form of action given by the fourth subsection a condition that such a plea as that used here should be good. Lord Gifford does not seem to me to attach sufficient importance to the necessity of finding words in an Act of Parliament sufficient to express an intention on the part of the Legislature to give such a plea, even if the language used is such as to lead to a suspicion that those who used such words had a wish to produce such a result.

Lord Deas says that the Legislature intended things to stand as they would have done if the deeds or instruments which would in the particular circumstances of each case have fallen to be executed, had actually been executed; whatever, he says, would formerly have been done as a matter of title is now to be held as actually done. I doubt whether it would have been thought judicious to enact this. In such a case as the present, where the disponer was settling his estate on the person who was his heir, and the heirs of that person's body, it may be conceded to be tolerably certain that the heir of entail, who must necessarily be the heir of the disponer, would not have any objection to hold the lands direct from the superior, and to hold the estate tail base from himself as mid-superior; but where the heir of the vassal is a stranger it would be very difficult indeed to say what he would have done if the circumstances had been different. It seems to me objectionable, as being a scheme well contrived to produce litigation. But I base my judgment on this, that I can find nothing in the Act which expresses any intention to make such a scheme.

Lord Young says that to compel every proprietor of land to enter with the over-superior would subject some proprietors in casualties which they would not otherwise have had to pay; and without expressing any opinion as to the extent to which it would have this effect, I agree that it would to some extent have that effect, and would so far interfere with the relative value of estates of superiority and property. He thinks this so objectionable that to avoid it he adopts a very strained interpretation of the third subsection, by which, if I rightly understand it, the superior is never to receive composition from the purchaser on a sale so long as an heir of the vendor exists and the purchaser is willing to pay relief in his name. This would interfere with the relative values of superiority and property by prejudicing—indeed destroying—the rights of superiors to composition, whether taxed or untaxed, in all feus where subinfeudation was not effectually prohibited, which is at least as objectionable as what Lord Young deprecates, and is, I think, much more clearly contrary to the words of subsection 3.

Perhaps Lord Young meant to confine his judgment to the cases in which the heir not only existed but would have been willing to enter if the law had not been changed. If so, his judgment comes to nearly the same thing as that of Lord Deas, and seems to me subject to the same objections.

I again repeat that I base my judgment on the absence of any language proper to express an intention to attach a condition to the action given as against a successor for composition, that it should be a defence that there was an heir of the vassal last entered who could under the old law have entered paying only relief. The proviso at the end of subsection 3 has not that effect. It is not now the question whether it postpones the time for bringing the action till after the death of the vassal last entered, and I express no opinion on that, either one way or the other.

I think for these reasons that the judgment below should be affirmed and the appeal dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—Russell, Q.C.—C. S. Dickson. Agents--Hewitt & Alexander, Solicitors.

Counsel for Respondent—Benjamin, Q.C.—Balfour. Agents—Faithful & Owen, Solicitors.

Friday, February 27.

(Before the Lord Chancellor (Cairns), Lord O'Hagan, and Lord Blackburn.)

THE LORD ADVOCATE *v.* LORD LOVAT.

(In Court of Session March 7, 1879, *ante*, vol. xvi, p. 418.)

Fishing — Salmon-Fishing—Barony Title—Possession—Rod-Fishing.

L had a barony title to the lands on both sides of a river, dating from 1774, and also express grants of salmon-fishing of a much earlier date to certain parts of the river situated below the falls of K. He had from time immemorial exercised a full and exclusive right of fishing below these falls, *inter alia*, by means of close cruives, which caught almost all the salmon ascending the river. In consequence of the cruives and the falls, the fishing above the falls was, up to 1862, when close cruives were abolished, almost worthless. L had asserted his right above the falls for a prescriptive period (1) by protecting the river during the spawning season; (2) by exercising the right of fishing occasionally; (3) by taking his tenants bound to protect the water; (4) by preventing others from fishing. Since 1862 he had fished regularly above the falls. It was not alleged that any other party had possessed the right of fishing. *Held* (*affirming* Court of Session), in an action at the instance of the Crown, who claimed the fishings above the falls, that apart from the question of express grant, L was entitled to attribute his possession of the whole river to the barony title, and that under it the possession which had been had