—*Ramsay* v. *The United Colleges of St Andrews*, June 28, 1860, 22 D. 1328; *Auld* v. *Shairp*, December 16, 1874, 2 R. 191.

Argued for the respondents—The only question was whether in the circumstances alleged the pursuer was entitled to damages, and on this point the pursuer had made no relevant averment. He had not alleged that he was out of pocket, or had been put to any expense, and no mode of measuring the damage, if he had incurred any, had been averred. No contract existed between the parties, and the committee were not under any obligation to elect the best of the candidates who offered, or any of them. The action was irrelevant and incompetent — *Martins* v. *MacDougall's Trustees*, December 5, 1885, 13 R. 274.

At advising—

LORD PRESIDENT—As to the main part of this case, or what may be termed the merits, there is nothing whatever to be said except what the Lord Ordinary has remarked in the opening paragraph of his note.

The pursuer's averments are opposed to the facts of the case. He was not, as a matter of fact, elected to this bursary, and consequently the remaining conclusions of the summons, which are subsidiary to this one, and depend upon it, fall with it, leaving only the question of damages to be dealt with.

No doubt if anyone is a competitor for a bursary, and if the committee who control the election corruptly prefer to the bursary a candidate who is conspicuously disqualified, the party injured will be entitled to recover damages from those who commit the delict.

Turning then to the record, and to the averments contained in condescendence 6, one cannot but feel that these averments are apparently relevant (though I feel equally satisfied that the pursuer would have completely failed to prove these averments), and that had they only been followed by an articulate statement of the damage which he considered that he had sustained, then I feel that it would have been impossible to have refused inquiry. But the pursuer has not adopted this course, nor has he suggested that he has suffered any pecuniary loss in attending or in entering into this competition. He was residing at the time in Glasgow, and he came up for his examination there, so that it is not averred that his competency for this bursary involved him in any outlay. If the fact that he was defeated in the competition is to be dealt with as a matter of loss, it is not very easy to see how such a loss is to be estimated. For my part, I am inclined to view the matter differently. I think that the pursuer not only was not a loser by this examination, but that he was a gainer. He came out well, and passed a good examination when opposed by an admittedly able competitor, and in such circumstances I cannot see that the claim of damages which the pursuer here tries to rear up is one which we can in any way recognise, and I am therefore for adhering to the interlocutor reclaimed against.

LORD SHAND—I am entirely of the same opinion. There was no contract in this case between the defenders and the pursuer by which he acquired any right to this bursary, and so any action founded on such a supposed contract must fail.

Upon the question of damages there is no specific averment on record of the damage which the pursuer is said to have suffered, nor is it suggested that he has sustained any pecuniary loss from anything which has taken place, beyond his not being the successful candidate and securing the bursary, a matter for which the respondents cannot in any way be made responsible.

LORD ADAM and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Pursuer—M'Kechnie—Lyall. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders — Low — D. Robertson. Agents — J. & F. Anderson, W.S.

Tuesday, June 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MACDONALD *v.* THE REFUGE ASSURANCE COMPANY, LIMITED.

Life Insurance — Death by Accident — Drowning — Presumption against Suicide.

A man insured his life with an assurance company upon a policy which bore that "the full sum assured shall become payable if the assured shall die from accident happening at any time after the date of this policy," . . . and required "on the death of the assured . . . if the claim is made on the ground of death by accident, satisfactory evidence of the accident." The assured was found drowned in the Clyde, but there was nothing to indicate how he had fallen into the water. In an action in the Sheriff Court at the instance of the deceased's executrix to recover the sum assured for, the company declined to pay on the ground of the pursuer's failure to produce any proof of accidental death. After a proof, which failed to throw any light on the matter, the company were assoilzied by both the Sheriff-Substitute and the Sheriff. The Second Division upon appeal *held* that the assured was accidentally drowned, and decerned against the company for the amount sued for.

The late Archibald Boyd, by policy of assurance dated 6th June 1887, insured his life for £50 with the Refuge Assurance Company, Limited, Glasgow. The policy provided—"Number one of said conditions is as follows:—'The full sum assured shall become payable if the assured shall die

from accident happening at any time after the date of this policy; or shall die from any other cause after twelve calendar months from such date.' . . . 'On the death of the assured the claimant under this policy shall transmit to the Company's manager, or to its agent for the district, a registrar's certificate of the death, and also such other evidence and information as the directors may require, including reasonable evidence of the age of the assured, and of claimant's title, and if the claim is made on the ground of death from accident, satisfactory evidence of the accident. No money will be paid without such proofs; if the same are satisfactory and the sum assured is under £100 it will be paid immediately.'" Boyd was found drowned in the Clyde upon 22nd July 1887, and his daughter, Mrs Janet Boyd or Macdonald, as his executor-dative, with consent of her husband James Macdonald, vanman, 9 Stock Street, Paisley, brought an action in the Sheriff Court at Glasgow against said company for payment of £50 as due under said policy.

She averred that the deceased met with his death by accidental drowning in the river Clyde at or near to Renfrew Ferry Slip between the 17th and 23rd days of July 1887. This the defenders denied, under reference to the above condition in the policy as to satisfactory evidence of the accident, and pleaded—"(1) The pursuer having failed to produce any proof of accidental death, the defenders are not liable in the sum sued for."

The Sheriff-Substitute (SPENS) allowed a proof of the averment that the deceased met his death through accident.

"*Note.*—At the debate I was disposed to take a different view, and to hold that it rested upon the Insurance Company to prove that the deceased had committed suicide, and that if they were not prepared to take this *onus*, decree should be granted. Further consideration has induced me to take a different opinion. The question is, of course, entirely one of contract, and by the conditions of the policy, the directors may require 'if the claim is made on the ground of death from accident, satisfactory proof of the accident.' Now, suicide is not accident, and the mere fact that the man was found drowned does not itself necessarily point to accident. If the circumstances disclosed in the proof infer that death was accidental, then the pursuer will be entitled to prevail, but the *onus* at all events rests upon him of establishing the alleged accident."

The pursuer appealed to the Sheriff (BERRY), who adhered.

The evidence led at the proof failed to throw any light upon the way in which the deceased fell into the water The Sheriff-Substitute found that the pursuer had failed to prove that the deceased died through an accident, and assoilzied the defenders.

"*Note.*—Under the conditions of the policy, the directors are entitled to require when a claim is made 'on the ground of death from an accident, satisfactory proof of the accident.' Now, the result of the proof to my mind is that it is impossible to predicate with certainty whether the deceased committed suicide, or whether being drunk, accidentally walked or slipped into the river Clyde. I admit that of the two I think the latter is the more likely, but still no one can speak with any reasonable certainty on the subject. Now, if death was through suicide, it was not accident, and there being such a large element of doubt as to the matter, no 'satisfactory proof of the accident' has been given. I am therefore of opinion that defenders are entitled to prevail."

The pursuer appealed to the Sheriff, who adhered.

The pursuer appealed to the Second Division of the Court of Session, and argued—If the Sheriff's view was correct it would be impossible to recover under such a policy as this without the evidence of an eyewitness. The construction put by them upon the conditions in the policy was unreasonable. If there was any doubt, the policy was to be construed *contra preferentem*—*Scott* v. *Scottish Accident Insurance Company, Limited,* March 19, 1889, 16 R, 630. The legal presumption was against suicide—*Mallory* v. *The Travellers Insurance Company,* 1871, 7 Amer. Rep. 410. The circumstances here pointed to accidental death by drowning which was covered by such a policy as the present—*Frew* v. *Railway Passengers Assurance Company,* May 14, 1861, 6 Hurl. and Nor. 839; *Reynolds' Executor* v. *The Accidental Insurance Company,* June 22, 1870, 22 L. T. (N.S.) 820; *Winspear* v. *The Accident Insurance Company, Limited,* November 29, 1880, L.R., 6 Q.B.D. 42.

Argued for the respondents—One of the conditions of recovering under this policy was "satisfactory evidence of the accident." This had not been produced. The pursuer had failed to discharge the *onus* which lay upon her of negativing the possibility of suicide. In this case the Sheriffs were right in holding that a balancing of probabilities was not sufficient but that there must be distinct evidence of the alleged accident—*M'Kechnie's Trustees* v. *Scottish Accident Insurance Company, Limited,* October 24, 1889, 17 R. 6.

At advising—

LORD JUSTICE-CLERK—The only fact apparent here is that the deceased some time after he left his house was drowned in the Clyde. There is nothing in his previous history or in what is known about him up to the date of his death to suggest that he was likely to commit suicide or that if he were found drowned it would be anything else than the result of an accident.

There is no doubt that the policy here requires "if the claim is made on the ground of death from accident, satisfactory evidence of the accident." Well, the pursuer brings forward this, that her father, a respectable man, so careful of the interests of others that he insures his life, and a man in no way likely to commit suicide, is found drowned in the Clyde. That on the

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. $3\frac{8}{12}$d. 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. $3\frac{8}{12}$d. 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