as the presence or absence of the designations of the witnesses, only affects the burden of proof, and is explained, so far as I can see, by no other consideration than this—that the designations being given before the deed is founded on in Court, any party interested may inquire regarding the execution, and so aver specifically that the deed is not genuine, or that an addition has been improperly made after execution, if his inquiry shall warrant such averment; but if that, on the contrary, the means of inquiry are withheld by omitting to give these designations till after the deed has been founded on in Court, it is reasonable to put the party using it to prove that it was in fact subscribed as it stands. The policy and effect of this change of the law is to exclude all objections to a deed consistent with the fact that it was subscribed as it stands by the granter and witnesses; to create a *prima facie* presumption (which may be rebutted) of that fact if the witnesses are designed, and otherwise to allow and require the user of the deed to prove it. This *prima facie* presumption is precisely all that the term "probative" now signifies. That this change is fundamental enough to close the old chapter of our law regarding probative writs, the testing of deeds, and testing clauses, and to make the old decisions on these subjects worthless for future reference, is, I think, plain. There was something to be said for rules which limited the possibility of fraud, but after long experience, and, as some thought, suffering under them, it was at last determined by the Legislature that they did more harm than good (as excessive precautions often do); and appealing to my own experience and study, I must confess that I cannot recal a case in this Court in which any of them operated otherwise than as a formal or technical objection to a genuine and honest deed—that is, otherwise than iniquitously and deplorably. They were not unfrequently supported by positive evidence of the fact (to ensure which was their professed and only legitimate purpose) that the deed was subscribed by the maker and was his genuine deed, and I do not now remember a case in which the success of any of them was accompanied with any reasonable doubt of that fact. I must consider the present objection with reference to the existing law, and so considered, I think it is inadmissible. The only point of it is that when deeds are subscribed it is usual to leave a space to fill in the names and designations of the writer and witnesses, which may be legitimately filled in after subscription; that this was probably done here, and that improper advantage may have been taken of the opportunity so afforded to introduce the declaration in question without authority from the maker of the deed. This is quite in the spirit of the reasoning on which the laws swept away by the recent Act were founded and built up, for it rests on a fanciful supposition that a fraud which it was possible to commit was committed. Even *prima facie* to presume such a fraud, which is a species of forgery, without averment or evidence, would be a strong proceeding, but the proposition that it must be so presumed without regard to the fact, and that the presumption is incapable of being rebutted by evidence, is, I think, unworthy of serious consideration. There is no presumption that anything in a deed was improperly—that is, without the authority of the maker—inserted after execution. Such insertion may be averred and proved, but is not presumable. A blank left anywhere may imply authority to insert some things and not others, and the result of inquiry following upon relevant averments, may be to strike out parts of a deed as unauthorised, but *prima facie*, and until the contrary is shown, everything in the deed above the subscription is presumably authorised. A blank may be left in any part of a deed and filled up with the maker's authority, express or implied (according to circumstances), after subscription. In the absence of anything to the contrary, subscription presumes authority for the whole deed as it stands, and an averment that a blank was left and afterwards filled up is immaterial, without adding that it was improperly filled up without authority. The deed before us is probative, for the attesting witnesses are designed, and besides, the pursuers, who claim under it, are parties "using and upholding" it as well as the defenders. Either party may aver the improper and unauthorised insertion of anything, but in the absence of such averment, which if made would require proof, the deed which both parties found on must be taken as it stands. I need hardly observe that the arrangement of deeds in customary clauses is mere matter of convenience, and that any purpose may be effectually expressed in any clause, subject only to the risk of being misapprehended if found in strange company, or overlooked if not in its proper place.

I need say nothing about the validity of the arrestment, which will stand with any virtue that may be in it, and may, for aught I now decide, give a preference and found a furthcoming hereafter and under other circumstances. In existing circumstances I refuse decree of furthcoming, on the grounds generally expressed in the second and third pleas for the defenders, and which, with the explanations which I have given, I sustain.

Friday, November 23.

FIRST DIVISION.

[Lord Young, Ordinary.

ROSSMORE'S TRUSTEES *v.* BROWNLIE AND OTHERS.

Superior and Vassal—Effect of decree in a Tinsel of Superiority under Act 1474, *cap.* 57.

The forfeiture of superiority following upon decree in a declarator of tinsel of the superiority under the Act 1474, c. 57, is temporary, and subsists only for the lifetime of the vassal.

Superior and Vassal—Forfeiture of Superiority under the Act 10 *and* 11 *Vict. c.* 48, *sec.* 8.

Where a vassal obtained, under section 8 of the Act 10 and 11 Vict., cap. 48, a decree of forfeiture of superiority against the heir of line and heir-male of the last mid-superior, who held a Crown title feudally complete, but did not call in the process trustees of that mid-superior who had a personal right to the mid-superiority, the Court *reduced* the decree and

Crown charter of confirmation proceeding on it.

Superior and Vassal—Casualty—Relief—Composition—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94, *sec.* 4).

Held (*diss.* Lord Deas) that under the Conveyancing Act 1874 a singular successor who has recorded his conveyance, and is accordingly impliedly entered with the superior under the provisions of that Act, cannot put forward the heir of the last entered vassal to obtain an entry, so as to restrict his own pecuniary liability to the amount of the relief-duty, but, where the entry is untaxed he must pay the composition of a year's rent of the subjects.

Observed, that although prior to the Conveyancing Act 1874 a singular successor might present an heir of the last vassal for entry to the superior, he could not compel the latter to give the heir a title which could be used by way *e.g.* of assigning an open precept or suchlike.

Trust—Appointment of New Trustees—Foreign.

Where the Court of Chancery appoints new trustees on an estate which is partly English as well as Scotch, the Court of Session will not entertain any objections to their title unless in a reduction.

This action was raised by the pursuers, who were marriage-contract trustees under a contract of marriage between the deceased Lord and Lady Rossmore, of date 1819, as superiors of the lands of Monkcastle in Ayrshire, against (1) Archibald Brownlie, writer in Barrhead, who was infeft in the *dominium utile* of the lands in question, which were sold to him by a disposition dated October, and recorded 11th November, 1874; and (2) the marriage-contract trustees of (*a*) Keith Macalister of Glenbarr and Miss Alexandrina Georgiana Cuninghame Miller, and (*b*) Thomas Wallnutt and Mrs Elizabeth Maria Louisa Miller. Mr Brownlie alone entered appearance to defend the action.

The questions raised between the parties were these—1. Whether the defender, instead of holding merely the *dominium utile*, did not also hold the *dominium directum* from the Crown, the title of the pursuers' predecessors, who were the superiors of the ground, having been forfeited under two processes in 1813 and 1849 respectively? 2. Assuming that the defender did not hold the *dominium directum*, was he entitled to bring forward the heir of the last entered vassal to enter with the superior, he himself being a singular successor, and so to avoid payment of the composition of a year's rent?

The conclusions of the summons were, first, for reduction of a deliverance of the Lord Ordinary in 1849 forfeiting the right of certain alleged superiors, and declaring that right to be in the predecessor of Mr Brownlie's authors, and also of a charter of confirmation granted by the Crown in 1850 proceeding upon the said deliverance; and second, for payment of £900, or whatever sum constituted a year's rent of the lands, as a composition due upon the defender's entry. While the case was before the Lord Ordinary the only question under discussion was the first of those stated above, viz., as to the state of the title in consequence of the various transmissions of the lands and superiorities and the two processes of forfeiture.

The position of matters was this—In 1786 Douglas Duke of Hamilton and Brandon was in right of the superiorities of the said lands, and William Miller in right of the *dominium utile*, having been infeft upon a precept of *clare constat* in his favour. William Miller was succeeded by his son Alexander Miller, who expede a service as heir in special to his father in the lands of Monkcastle. He was not entered with the superior, but in 1813, having obtained a decree of tinsel of the superiority in a process under the Act 1474, cap. 57, against Lord Stanley, eldest son of the Earl of Derby, and nephew and heir-of-line of the deceased Douglas Duke of Hamilton, he was infeft upon a Crown title by precept from Chancery and instrument of sasine following thereon. Douglas Duke of Hamilton had, by general disposition and settlement dated 29th July 1796, disponed these superiorities, *inter alia*, to certain trustees, to be handed over to his daughter on majority or marriage, and they had led an adjudication in implement, in which they obtained decree in 1805. At the date therefore of the process of forfeiture the right to the superiorities lay with these trustees, their right, however, being personal. Such was the state of the title at the date of the first decree of forfeiture.

Thereafter the title to the lands was thus transmitted:—In 1816 the trustees of Douglas Duke of Hamilton disponed the superiority to his daughter, she having attained majority. In 1820 she disponed to certain trustees for the purposes of her marriage articles. Various trustees were from time to time assumed on the death or resignation of others, and in 1870 certain of the present pursuers, with a view of removing objections to their title to act as trustees, instituted a suit in the Court of Chancery against certain others who had been assumed as trustees, the result of which proceeding was that the plaintiffs were held not to have been validly appointed trustees, but the Court ordered them to be nominated to act as trustees in conjunction with the defendants, who were held to have been validly appointed. The defendants conveyed the trust-estate to the new trustees. They expede a notarial instrument in the lands of Monkcastle, and recorded it in 1872.

Alexander Miller, on the other hand, was succeeded by William Campbell Miller, his grandson, who expede a service as heir in special of his grandfather, conform to decree of service by the Sheriff of Chancery, dated 21st January, and recorded in Chancery 16th February, 1848, on which sasine followed, the instrument of which was dated 28th, and recorded in the General Register of Sasines 29th, February 1848. William M'Jannet was appointed factor *loco tutoris* to the said William Campbell Miller, and in April 1849 presented a petition to the Lord Ordinary on the Bills, under section 8th of the Act 10 and 11 Victoria, cap. 48, for forfeiture of the superiority of the said lands of Monkcastle, alleging that the said William Campbell Miller was infeft in the said lands of Monkcastle as above. The said petition set forth that the lands were held under the Earl of Derby as heir of line, or Alexander Duke of Hamilton and Brandon as heir-male of the said Douglas Duke of Hamilton, or one or other of them, and that the annual reddendo was less than £5. On the

27th June 1849 Lord Robertson, Lord Ordinary on the Bills, pronounced an interlocutor whereby he found and declared that the said Earl of Derby and Duke of Hamilton, the defenders called, both and each of them, had forfeited and amitted all right to the said superiority, and that the said William Campbell Miller and his heirs and successors were entitled to hold the said lands and others described in the petition in all time coming as vassals under the next over-superior. This was followed by a Crown charter of confirmation in favour of William Campbell Miller. These proceedings for forfeiture of the superiority were brought under reduction in this action, on the ground that the parties in whom the right to the superiority then lay were the trustees of Lady Rossmore, not the heir of line nor heir-male of the Duke of Hamilton, and that the trustees not having been called in the process the decree could not be good to the effect of forfeiting their right.

On the 10th August 1857 Elizabeth Maria Louisa Miller and Alexandrina Georgiana Cuninghame Miller, sisters of the said deceased William Campbell Miller of Monkcastle, were served as heirs-portioners to their brother in the said lands of Monkcastle, and they were infeft therein. The latter of these ladies, now Mrs Macalister, in 1858, and the former, now Mrs Wallnutt, in 1860, respectively conveyed each one-half of the lands of Monkcastle to marriage-contract trustees, who, by disposition dated 26th, 28th, and 31st October 1874, conveyed to the defender Mr Brownlie.

The pursuers accordingly pleaded—"(1) The pursuers, as immediate lawful superiors of the lands libelled, are entitled to the whole duties and casualties appertaining to the said superiority. (2) The pretended decree of forfeiture said to have been pronounced by Lord Robertson in 1849 ought to be reduced, in respect the same was pronounced in a process to which the party having right to the superiority was not called, and also as being false and fabricated. (3) The said pretended decree of forfeiture having been obtained in a process directed against persons having no right to the superiority, was and is ineffectual to forfeit the right of the pursuers, or to entitle the vassal to hold of the over-superior. (6) The said defender being a singular successor of the last vassal is liable in payment of a composition of one year's rent. (7) The decree of tinsel of the superiority obtained by Alexander Miller in 1813 is ineffectual to defeat the right of the pursuers, in respect, 1st, that the trustees of the Duke of Hamilton, who had the sole right in the said superiority, were not called as parties to the action; and 2d, that if the said decree was effectual to any extent, the forfeiture thereby created subsisted only during the lifetime of the vassal."

The defenders pleaded—"(1) The pursuers have not set forth, and do not possess, a valid and sufficient title to insist in this action. (3) The defender and his authors have been in possession of the *dominium directum* and estate of Monkcastle under the Crown for more than forty years upon two or more consecutive sasines, proceeding on sufficient warrants, and the defender has thus a preferable title to that alleged by the pursuers. (4) The pursuers have not been validly and effectually constituted trustees of the heritable estate in Scotland falling under the Rossmore trusts, and are therefore not in right of the alleged superiority. (5) The lands of Monkcastle being kirk lands, the superiority thereof is annexed to the Crown in terms of the Statutes 1633, cap. 14, and 1661, cap. 54, and the defender is therefore entitled to hold his estate immediately under the Crown."

The Lord Ordinary gave decree of reduction as concluded for, and decree against Mr Brownlie for £480 as casualty due for the lands, adding the following note:—

"*Note.*—It is I think clear that the pursuers have right to the immediate superiority (under the Crown) of the lands in question, unless it shall be held that their right is excluded and a good title as immediate Crown vassal established in favour of the proprietor of the *dominium utile* by the titles made up in 1813 and 1849 and the possession following thereon.

"1. With respect to the title of 1813, it appears to have proceeded on a decree of tinsel of superiority under the Act 1474, c. 57, and I assume that it was altogether regular and efficacious. The superiority was then vested in the trustees of the Duke of Hamilton, and the proceedings under the Act of 1474 were taken by the vassal precisely because the trustees having only a personal title could not give him an entry, and declined or omitted by completing their title to enable themselves to satisfy his right to have an entry. But a Crown entry so obtained has no other effect than to complete the vassal's title, so that he shall suffer no prejudice from the remissness of his immediate superior. It does not destroy the estate of mid-superiority or hinder its owner from completing his title to it when so minded. The Legislature might no doubt have punished the mid-superior's neglect by forfeiting his estate, and merging it without recompense in that of his vassal; but it is quite settled that this is not the effect of the Act of 1474, or of a title obtained under it; and seeing no reason why the vassal, while his own proper estate is completely protected, should over and above have a gratuitous advantage at his superior's expense, I am unable to regret the construction which the Court has put on the Act, and the limited effect which it has allowed to a title under it. It is, I think, satisfactory and sufficient that the vassal, on the one hand, shall suffer no prejudice in his estate, and that the superior, on the other, shall have no benefit from his while he neglects to complete a title to it. I am therefore of opinion that the title of 1813 is no answer to the superior's claim if otherwise well founded.

"2. With respect to the title of 1849, it is no doubt true that by the Act on which it proceeded (10 and 11 Vict. c. 48, sec. 8) a mid-superior's default is visited with the absolute forfeiture or annihilation of his estate to the benefit of his vassal. But in order to this severe consequence the default must be deliberate, and after demand judicially made upon him in terms of the Act. Now, the judicial proceedings relied on were taken against Lord Derby as heir-of-line of Alexander or heir-male of Douglas Duke of Hamilton, on the assumption that in one or other of these capacities he had right to the superiority in question, and was in a position and in duty to the vassal bound to complete a title to it. But the

right was not then in the heir of either of these Dukes, but in the trustees of Lady Rossmore's marriage settlement, although standing on a personal title, and against them the proceedings under the Act were not directed. It was argued by the defender that the heir of the person last infeft in the superiority was in a position to complete a feudal title, and that proceedings under the Act against him by the vassal, who was ignorant of any personal title in another, operated a forfeiture of the personal title, without notice to the party having right under it, who was to blame for not feudalising his title. I cannot assent to this argument. *First*, On the decease of a party who has alienated his estate by a conveyance, the title on which remains unfeudalised at his death, his heir may by arrangement undoubtedly make up a title to be used in the interest and for behoof of his ancestor's disponee, but as he cannot do so honestly for any other purpose, the law will not hold that he can do so at all (except, as I have said, by arrangement with, and in the interest of, the holder of the personal right), although he is possibily in a position to enable him to commit a fraud if so minded. *Second*, The words of the Act do not, I think, sanction the notion that a valuable personal right may be forfeited without notice to the holder, through the medium of proceedings under it against the heir of his author who has no valuable right or interest in the subject. It may be that the vassal is thus disappointed of the statutory remedy from necessary or excusable ignorance of the existence of the personal right, but against this the statute makes no provision, and as the statute gives a positive advantage at the cost of another, I think it must be confined to cases where the vassal having the requisite knowledge does in fact follow out its proceedings against the very party having right and interest in the matter. Necessary or excusable ignorance affords a forcible answer to an attempt to deprive a party by reason of some erroneous procedure on his part of a right which he has, or to prejudice such right; but if the party who acted in ignorance is himself seeking an advantage through the forfeiture of another's right, he cannot, I think, be allowed to plead his ignorance as a reason why proceedings directed through excusable ignorance against a wrong party should affect the right one as if taken against him. Here the superiority in question, being a valuable estate, was held by trustees for family purposes on a personal title, which for the purposes of this argument I assume to be good, and am of opinion was good. It would be a strong thing to hold that this trust-estate was forfeited by proceedings taken against a party who had no interest in it, and without notice to the trustees or others having interest. Nothing but the irresistible force of a statute would warrant such a result, and I do not construe the statute on which the defender relies as warranting it.

"The only other question is that which is raised by the defender's fifth plea in law. I think this plea is untenable. The lands in question are held immediately under the Crown, but by the pursuers, and not by the defender, who is a subvassal. They were held under the Crown prior to the Acts 1633 and 1661, and although formerly kirk lands, there is nothing in the Acts to affect the validity of a sub-feu granted by the Crown vassal or the estate of mid-superiority so created. Lands which were once kirk lands (and a very great part of the land of Scotland was once kirk land) are undistinguishable from other lands with respect to sub-feuing and the creation of estates of mid-superiority; and the only effect of the Acts referred to is to substitute the Crown in place of the ecclesiastical superior, and so to convert the immediate vassal of the kirk into the immediate vassal of the Crown, and this effect, and no other, they would have had with respect to the lands in question had it not been previously operated by the state of the titles.

"I have only to observe, in conclusion, that although the personal title of the pursuers stands on a great number of deeds, and is rather perplexing to follow, I think it is feudally sufficient. But if the right is clear, which I think it is, the defender's interest is only to have the feudal sufficiency of the title judicially declared. For if the superiority is trust-estate, the Court will not permit it to be lost to the beneficiaries through any irregularity or informality of the title which can be amended without injustice to third parties, who have in the meantime acquired a right for onerous considerations without notice. None of the defender's criticisms on the formal validity of the pursuers' title are of a character which, if well founded, might not be obviated by amendment without injustice to him. In my opinion no amendment is needed.

"On the whole matter, therefore, I think, the pursuers are entitled to decree; but as the trustees have with respect to this estate been so excessively remiss, I think it must be without expenses. The elapse of time has been so great, and the vassals in the lands have been so long left to settle themselves as holding under the Crown, in reliance on proceedings which must have been somewhat costly, that I should willingly have upheld them in that position against the claim now tardily put forward on behalf of the trust, had I been able to find legal warrant for doing so. Being unable, I think nevertheless that the trust-estate must bear the cost of re-establishing a claim which has been so long neglected, in the face of opposition which, although unsuccessful, was, I think, not inexcusable or unreasonable."

The defender reclaimed, and was allowed to add this plea to those previously in the record—"(6) Even though the Crown title brought under reduction were set aside, the composition of a year's rent is not due by the defender, in respect that his immediate authors Mrs Macalister and Mrs Wallnutt (who are in life) were the heirs of the vassal last infeft under the predecessors of the pursuers, and as such were infeft in the lands, and so duly entered with the pursuers in virtue of the Conveyancing (Scotland) Act 1874."

It was argued for him (1) on the question of the pursuers' title—The appointment by the Court of Chancery was bad, for this Court could not recognise the appointment of trustees by the Court of Chancery where the estate was truly Scotch. In the cases of *Hall and Others, Petitioners*, March 13, 1869, 7 Macph. 667, and *Brockie, Petitioner*, July 10, 1875, 2 R. 923, such appointments were recognised, but the trusts there were English.

The Court intimated that they were of opinion that the appointment was good in spite of this objection, since the trust-estate consisted of English and Irish estate as well as Scotch, and also that objections urged by the defender to the assumption of trustees at different times were unfounded, and that the argument might be taken on the footing that the pursuers' title to sue as trustees was good.

The pursuer met the argument of the defender as to the effect of the two processes of forfeiture —(1) as to the forfeiture of 1813, by the authority of Bell on Election Law, p. 83, and the terms of the Act of 1474, cap. 57, itself, which showed beyond doubt that the forfeiture thereby incurred could only be for the lifetime of the vassal; (2) as to the forfeiture of 1849, by the terms of the Act 10 and 11 Vict. cap. 48, sec. 8, which provided that those having an interest in the superiorities should be called, which was done here, the trustees having had no intimation made to them.

The argument chiefly turned on the question raised by the plea-in-law added by the defenders in the Inner House.

On this the defender argued—The Conveyancing Act of 1874 did not alter the rights either of superior or vassal as they existed before its date, and therefore it was necessary to inquire what these would have been under the old law. Under that the singular successor might certainly put forward the heir of the last vassal to take an entry. The progress of the law might be traced through the cases of the *Magistrates of Musselburgh* v. *Brown*, Feb. 21, 1804, M. 15,038; *Hill* v. *Mackay*, Feb. 5, 1824, 2 S. 681; *Piggot* v. *Colville*, Dec. 9, 1829, 8 S. 213; and *Hyslop* v. *Shaw*, May 13, 1863, 1 Macph. 535. In the case of the *Magistrates of Musselburgh* it was observed that the heir of the vassal had no right to such an entry as would enable him to put a singular successor in his place. The case of *Hill* was decided on the ground that the heir was called as a party, and that therefore the superior could not refuse to acknowledge him and grant him an entry. The principle of the singular successor's right to put forward the heir to take an entry was fully recognised in the case of *Pigott*, and was indirectly affirmed in the case of *Hyslop*. The real vassal was the heir, and not the disponee; that was the principle of the decisions. Now, no doubt the disponee was impliedly entered by the force of the Statute of 1874, but the question really was—Was he to be taken as entered to the effect of subjecting him to a more severe pecuniary liability than he would have incurred under the old law? The statute expressly saved all existing rights of that kind, and therefore, although feudally the disponee Brownlie must be held to be the entered vassal, he must yet be liable in no heavier prestation than could have been exacted under the old law, *i.e.*, the relief-duty. Mr Brownlie was therefore entitled, on obtaining the consent of the heirs of the last entered vassal, to be relieved of all payment beyond such relief-duty. The case of *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738, was no doubt a direct authority against this contention, but the Court was now asked to reconsider the point.

The pursuer argued—By the decree of reduction in this action the Crown right of 1850 was swept away, and Brownlie is left as the vassal to whom *vi statuti* an implied entry was given. There could be no implied entry of the heirs-portioners of Miller or their marriage-contract trustees with the pursuers, for the only implied entry that they could lay claim to would be one with the Crown, since, while they held right to the lands, the Crown charter of confirmation now reduced was the regulating title. The effect of subsection 3 of section 4 of the Conveyancing Act of 1874 was to prevent persons really in possession from entering the heir of the last entered vassal, and so eluding their due prestation—cf. Lord Curriehill's note in *Ferrier's Trustees* v. *Bayley*. This was a stronger case than the case of *Ferrier's Trustees*, for there Mr Bayley held both characters in his own person.

At advising—

Lord Mure—In this case, which has been brought by the marriage-contract trustees of Lord and Lady Rossmore, as the alleged superiors of the estate of Monkcastle, in the county of Ayr, the main object of the action appears to be to seek to have reduced a decree of forfeiture that was pronounced in the year 1849, followed by a charter of confirmation proceeding upon that decree, and dated 6th of June 1850, by which Mr Campbell Miller, then of Monkcastle, was entered with the Crown in respect of the forfeiture of the superiority on the part of the alleged successors of the Duke of Hamilton, who was at one time the superior of these subjects. The pretended decree, as it is called, of 17th June 1849, and the charter following upon it, are sought to be reduced, and being reduced there is a declaratory conclusion to the effect that in consequence of the death of William Miller of Monkcastle, which happened in the year 1813, and of the purchase by the defender in this action, Mr Brownlie, of the subject in question from the heirs of that William Miller, by deed recorded in November 1874, a casualty has become due to the pursuers as the superiors of this estate, and they seek to have payment of the sum of money which they say is the amount of that casualty.

The action is directed against Mr Brownlie, the purchaser of the estate, and also against the heirs of William Miller of Monkcastle, who died last infeft in that property in 1813. The general nature of the title under which the vassals hold appears to be this—Upon the death of William Miller in 1813 he was succeeded by an Alexander Miller, who died in 1848, and his son William Campbell Miller, or rather during his minority his guardians took the proceedings in 1849 under which the superiority was forfeited. On his death in 1857 his two sisters became the proprietors of the estate, and on their respective marriages the marriage-contract trustees for both of them possessed the estate till 1874, when these trustees, with the consent of these ladies, sold the estate to Mr Brownlie, and upon that conveyance Mr Brownlie was infeft in November 1874. The representatives of Mr Miller of Monkcastle—these two ladies—do not enter appearance, but Mr Brownlie defends upon various grounds.

In the first place, he objects to the title of the pursuers to sue, and sets forth on the record a detailed statement of the way in which the original trust of 1796 was constituted and kept up; and he maintains that in regard to certain steps of

the proceedings by which this trust was reconstituted and kept up there was a want of power on the part of the trustees to do what they did, and that consequently no valid title exists in the persons of the pursuers of this action as Lord Rossmore's trustees which can enable them to pursue such an action as the present. He further pleads that the claim of the pursuers is excluded by the fact that under certain proceedings which took place in 1813 and 1849 the proprietors of the estate of Monkcastle, before it was sold to Mr Brownlie, had become entered as vassals of the Crown themselves, and that they have a title to exclude the claim of the pursuers, even assuming that under the different steps by which the trust was kept up the pursuers were in reality the trustees entitled to sue the action. This plea of title to exclude is founded upon titles made up under a tinsel of the superiority in 1813, subsequent to the death of William Campbell, the vassal last infeft, and a decree of forfeiture pronounced under an Act of Parliament regulating these matters in the year 1849. Since the case came into this Division of the Court an additional plea-in-law has been added on the part of the defender, proceeding on the supposition that the other three pleas raised by him are not well founded, as the Lord Ordinary has held; and that plea raises the question whether or not he can be called upon to pay a composition on entry as a singular successor, or simply the duty payable by an heir? This last plea does not seem to have been mooted before the Lord Ordinary—at all events his Lordship has not dealt with it. But the other three pleas are very fully dealt with in the note to his Lordship's interlocutor, and he is of opinion that these defences are ill-founded, and has given decree of declarator and payment in terms of the conclusions of the summons. Now, with reference to these three points, I concur in the result of the Lord Ordinary's interlocutor.

I think his Lordship is right in holding that the progress of titles by which these trustees have come to hold this superiority is quite sufficient to show that they have a good title to sue this action. The original trust-deed under which this part of the Hamilton estate was conveyed away was executed in the year 1796 in favour of certain trustees for the daughter of the then Duke of Hamilton, who afterwards became Lady Rossmore, and among the property conveyed over to these trustees under that trust were the superiorities of the estate in question. Then there are various steps of transference set forth on the record by the pursuers to show how they came to be in possession of these superiorities. On the daughter of the Duke being married to Lord Rossmore there was a marriage-contract trust executed in favour of certain trustees, and in the condescendence your Lordships will find narrated the details of the different steps by which the trust was carried on to the present date, and brought into the persons of the pursuers of this action. Certain objections were taken to this transmission, but one thing, I think, was quite clear, that assuming that the trust had been regularly kept up as regards the individuals nominated as trustees at the different times, there was no objection taken by the defender with reference to their title in a feudal point of view. I think Mr Rutherfurd put it very distinctly in his argument that, feudally speaking, the title of these parties is quite correct *ex facie* of the proceedings. But the objection mainly relied upon was this, that under one of the deeds of transmission executed by a person who was a trustee, and to whom certain powers were given about assuming new trustees and keeping up the trust, steps had been taken which were *ultra vires* of that trustee. That I understand to be the objection which is embodied in statement 26—"The title of the Rossmore trustees, as it then stood, rested on the title of Lord Ivory, and his title rested on the deed of Mrs Scott Waring assuming him into the trust, but that deed was inept, at least as regards the lands in question;" and it goes on to show what the particular objection was as to the power of Mrs Scott Waring to take the steps she did for the appointment of trustees. Now, I do not think it necessary to go into the question of Mrs Scott Waring's power to execute that deed, because it appears from the next statement that after that certain proceedings were taken in Chancery with a view to set up the trust if there was any good objection to the title as it then stood. Now, this is a proceeding taken in a Court competent to deal with the matter. That trust, as I understand it, was not a trust applicable to feudal property in Scotland alone, or to Scotch estate alone, but it had reference to Irish property and to estates in England, and nothing was stated to us at the bar to lead me to think that it was beyond the power of the Court of Chancery to do what they did in 1870, by which the title of the pursuers of this action was set up. At all events, I think, seeing that no step has been taken to reduce that title which was so made up upon the order of the Court of Chancery, it must be assumed in this proceeding that it was within the power of the Court of Chancery to do what they did, and that the title of the pursuers of this action, if there was any objection to it in respect of the want of power on the part of Mrs Scott Waring, is, in respect of the proceedings to which I have referred, a good title. And I concur with the opinion of the Lord Ordinary that, feudally speaking, the pursuers are trustees for the parties who are in right to these superiorities on the face of their own title.

Now, the first objection is founded on the decree of tinsel of the superiority in 1813, under the Act of 1474, cap. 57. William Miller died in 1813, and his son Alexander was served heir to him. He procured himself infeft in the estate under a title from the Crown, conform to precept from Chancery, dated 21st September 1813, and that proceeded upon a decree of tinsel of the superiority under the Act 1474. Now, the Act 1474 no doubt gives power to a vassal whose superior is not entered, and who cannot give an entry, to take proceedings under that Act with a view to the tinsel of the superiority to establish his own right to get an entry into the lands, but I think it was made quite clear from the passage read to us from Mr Bell on Election Law, p. 83—and I think it is also pretty clear from the terms of the statute itself, that that is a mere temporary loss of the right of superiority on the part of the superior. The Act is a little equivocal in its terms, and different constructions have been given to the words in which the duration of the forfeiture is specified; but I think the import of the authorities is—and that was certainly assumed in

this Court in the case of *Dickson*, 1st July 1782, M. 15,024—that it was simply for the lifetime of the vassal that the superior's right was put an end to. The statute itself says that they must enter after a charge of forty days, "the quhilk gif they do not, the saidis vassales or tennentes incontinent thereafter to be entred be the king or the over-lorde that the superiorities ar halden of, and hald of him; and the other overlorde that fraudfully differris his entrie to tyne the tennent for his lifetime." At one time it was supposed that this meant the lifetime of the superior, but it is distinctly laid down that that view of it is one for which there is no direct authority, and the Act has been interpreted as meaning a forfeiture merely during the lifetime of the particular vassal who brings the proceeding with a view to have the superior's right put an end to. That was assumed to be the law in the case of *Dickson*. Therefore on that point I think the objection is ill-founded.

The other forfeiture took place upon the death of that Alexander Miller, and during the lifetime of his son William Campbell Miller, whose guardian in 1849 took proceedings under the 48th chapter of the 10th and 11th Vict., with a view to the forfeiture of the superiority under the provisions of that Act; and if these proceedings at the instance of William Campbell Miller had been properly taken, it might have raised a very difficult question, and one which it would have been very serious for the pursuers of this action to contend with. But it is perfectly plain, looking at these proceedings, that they were directed against the wrong party. The action was directed against the late Earl of Derby and another defender, who were supposed to be the heirs of line of the Duke of Hamilton who conveyed the estates to these trustees in 1796; and upon that footing the petition, which ended in the decree of forfeiture being pronounced, was served upon the Earl of Derby, as being heir-at-law in the direct line of the Duke of Hamilton who executed that trust-deed, and upon the then Duke of Hamilton as his predecessor's heir-male. But at that time neither of these parties was the proprietor of the superiority. They had never taken any steps—and it does not appear that any of the heirs of the Hamilton family ever took any steps—to take up that right of superiority. They might have done so possibly, if they had chosen, in one view of it. They were conveyed to the Rossmore trustees, and at that time Lord Rossmore's trustees were proprietors of the superiority. No doubt their right was personal, but still these superiorities had been conveyed under the trust of 1796, and afterwards, on the marriage of Lady Rossmore, to the marriage-contract trustees; and at that time the parties who ought to have been called were the predecessors of the pursuers of this action, viz., the then trustees, or some of the pursuers themselves, who were the trustees of Lady Rossmore, and who had a personal right to these superiorities. But it was directed against Lord Derby and the Duke of Hamilton, who had no right to the superiority at all.

That is the ground on which the pursuers of this action seek to reduce the decree of 1849, and I am of opinion with the Lord Ordinary that that is a good ground of reduction. It is an action of forfeiture of a very serious description. It is directed against the wrong party, and there is no evidence to show that Lord Rossmore's marriage contract trustees knew anything whatever of these proceedings being taken. Besides, it is open to the feudal objection that the proceedings were taken, not against the owners of the property, but against the representatives of the person from whom Lord Rossmore's trustees acquired the superiority, and who had himself no right whatever to it. Upon that ground also I concur in the result which the Lord Ordinary has arrived at as to the proceedings taken in 1849, and I think it follows from that that both the decree of 1849 and the charter which followed on it in 1850 are subject to reduction, as asked by the pursuers of this action.

These points were all dealt with by the Lord Ordinary; but since the case came into this Division of the Court an additional plea in defence was stated on the part of Mr Brownlie, and that plea goes to this, that the composition of a year's rent is not due, but merely the duties which were payable by the heir of the last vassal; and it was stated that the purchaser had made some arrangement with the heirs by which they were ready to enter, so that he might pay the duties which an heir was liable to pay in such circumstances, thereby relieving him of the heavier duty of the full year's rent. Now, the ground on which this plea was stated was, that under the law as it stood prior to the passing of the Act of 1874 it was perfectly settled that if the heir, having sold the estate, came forward, the superior was bound to receive him. There can be no doubt that there are decisions to that effect, and that it was assumed by the large majority of the Court in dealing with the case of *Hislop* v. *Shaw*, 1 Macph. 535, that that was the law. This was founded on the case of *Hill* v. *M'Kay* in 1824, 2 S. 681—the first reported case I think in which that point is distinctly raised, and in *Pigott* v. *Colville* in 1829, 8 S. 213—in both of which cases the point was distinctly raised and decided. But in these cases it must be kept in view that the lands were at the time in non-entry, and the lands being in non-entry the heir was held entitled if he chose to come forward and enter instead of the purchaser, and this, I think, looking at the cases, was generally done by his obtaining a precept of *clare constat* from the superior. The precise reason for this practice being introduced is a matter on which there seems to be difference of opinion, and it may not be quite clear what the precise reason was, when the lands were sold and the purchaser was the party in possession of these lands, and as a singular successor would not enter himself except upon payment of the full year's rent, why this demand on the part of the superior could be obviated by the heir coming forward to take an entry. Possibly it may have arisen in the time when the purchaser could not himself demand an entry—prior to the Act 20 George II., c. 50, which enables purchasers to demand an entry. But there can be no doubt that the rule existed, and that the heir was entitled to come forward in such circumstances, the fee not being full, and say, I am quite ready to enter, and the superior was bound to enter him. On the other hand, I have not been able to find any case of an heir having been found entitled to come forward and insist on an entry after the fee was already full by an entry of a purchaser. It would of course have been an absurdity in itself to try to do that. But

it is important to observe that the rule went no further, as I read the cases, than this, that when the fee was not full the heir could enter as heir, but he could enter solely in that character, and he was the party who entered and filled the fee, the purchaser still remaining unacknowledged by the superior; and there are cases which show that when it was proposed, instead of adopting this course, to oblige the superior to give an entry as for an heir, which would have the effect of entering the singular successor, that could not be done except upon payment of a full year's rent; and looking at the case of *The Magistrates of Musselburgh* v. *Brown*, M. 15,038, founded on in the discussion, it appears to me that that is the substance of the decision of the Court. It is no doubt assumed there that the heir could come forward and ask for an entry, but the heir proposed to do it in a manner that would have had the effect of making the purchaser the vassal and filling the fee by the purchaser. The Lord Ordinary held that that was a competent course, but the Court altered and held that in the circumstances in which the party stood, and as the title by which the entry was proposed to be given would have the effect of making the purchaser a vassal, it could only be done on payment of the full year's rent. The rubric runs—"A vassal infeft having disponed the subject to his heir with procuratory and precept, the superior, though bound to enter the heir upon a precept of *clare constat*, which cannot be assigned, is not obliged to grant a charter upon the procuratory in the disposition to the effect of enabling the heir to assign it away before infeftment, and thereby to disappoint the superior of his casualty of a year's rent from the singular successor." That is a very distinct statement of the substance of the decision. It appears that the heir had sold the property to a Mr Brown, "and to complete the sale she expeded a general service as heir to her brother, thus taking up the unexecuted procuratory of resignation in Captain Dobie's disposition; she applied for a charter of resignation from the superior, which was accordingly prepared by the superior's man of business, but not delivered till it should be explained in whose person infeftment was to be taken. In the meantime she assigned it over to a purchaser, who insisted that the charter should be delivered to him on paying the casualty exigible by the superior from an heir, and that he was not liable for a year's rent." The report states that the Lord Ordinary gave effect to that plea, upon which the *Magistrates of Musselburgh* reclaimed, and the Court altered the interlocutor and found "that the respondent Alexander Brown, upon receiving the charter before mentioned, must pay to the pursuers the usual composition as a singular successor; also find him liable in expenses." The "charter before mentioned" is a charter to himself under the procuratory. He did not choose to take it in the usual way, and insisted on getting it by a process by which he himself became the entered vassal, and the Court refused to give effect to that. Substantially the same decision was given in the case of *Grindlay* v. *Hill*, Jan. 18, 1810, F.C. where a conveyance had been made to trustees for certain trust purposes, and there were various ultimate destinations. The trustees demanded an entry for themselves as trustees for the heir, on the ground that the heir was entitled to be entered. The Court held that although the heir could claim an entry upon payment of the ordinary duties, the trustees could not demand an entry in their own name as vassals in the lands from the superior except on payment of a full year's rent.

Now, that I apprehend was the state of the law at the time of the passing of the Act of 1874, and the question we are now to attend to is, what was the position of Mr Brownlie, the defender, under the clauses of that statute which regulate these matters. The first sub-division of sec. 4 of the Act 37 & 38 Vic. c. 94, provides—"Notwithstanding any provision, declaration, or condition to the contrary in any statute, &c., it shall not be necessary in order to the completion of the title of any person having a right to the lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress," &c. And the second sub-division 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 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." Now, the defender is in that position. He acquired this property in 1874, and he was infeft in November of that year. Therefore by the act of infeftment he was entered by force of the statute with the superior to the same effect as if the superior had granted a writ of confirmation "according to the existing law and practice," and the fee was thereby filled by the defender. Now, the proposal is that the fee being thus filled by force of the statute, the heirs of William Miller shall still be entitled to come forward; the precise way in which they were to do so was not explained, but it was said they were to be allowed to come forward to enter with the superior as vassals, also in order to free the purchaser of the claim for composition of a full year's rent. Now, there can be no doubt that a purchaser entered under a charter of confirmation according to the then law and practice would be liable in the full year's rent, and that is the kind of entry that the statute under sub-division 2 says is to be implied in the infeftment subsequent to the date of that act. That being so, and Mr Brownlie being entered as if he had obtained a charter of confirmation from the superior, it is very difficult to see upon what ground he can ask that another party shall be put forward who would be liable in a smaller composition. That is his position. He is fully entered by force of this statute with the superior, and I am unable to see, looking to the terms of the statute, on what ground it could be said that he can now take the steps which it is proposed he should take for the purpose of getting the heir to come forward. I do not think that after a person has been entered by force of statute with the superior, under an implied entry which is to be held equivalent to an entry by confirmation, he can now ask us to delay proceedings and let it stand over till it is seen whether

the heir will come forward. Mr Brownlie is in the position in which the parties in the case of the *Magistrates of Musselburgh* v. *Grindlay* wished to put themselves. They wished to pay the duty payable by an heir instead of the composition payable by a purchaser who stood entered as the vassal.

Now, if I am right in the view that I have taken of the cases—that, wherever a party proposed that an entry should be given when the fee was filled by the purchaser and not by the vassal himself, he must pay the full year's rent as composition—then I do not see on what ground the defender can now maintain that he is entitled to have matters reversed. It was not explained to us how it was to be done, and I do not understand how it could be done. I have had the less hesitation in coming to this conclusion, because a similar question, although in a much more favourable form for the vassal, was raised in the case of *Ferrier's Trs.*, 14 Scot. L. R. 480, 4 R. 738, and there Lord Curriehill went very fully through the provisions of the statute, and came to the decided opinion that if the matter had stood upon sub-division 2 of the fourth section there could be no difficulty in the matter. I concur in the result of his examination of the section. What appeared to be mainly relied upon, though I do not think it was pressed very strongly, was the provision in the fourth sub-section as to the nature of the action by which the superior in these circumstances was to proceed, of which a form was given. That sub-section provides that "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." It seems to have been argued that the successor in these cases meant the natural heir—the heir of line; but it is quite plain from the form given in the schedules that it was contemplated that there might be an action against a purchaser too, because the forms of schedules refer to the case of relief-duty claimed from the heir, or if it be a purchaser the full year's rent, plainly showing that sub-division 4 was intended to reach the case of a purchaser who comes under the description of a successor by conveyance. Unless he comes under that description he is not mentioned there at all. But sub-division 4 must have been intended to reach the case of a purchaser from the heir, because it contains the word "conveyance"—a successor by conveyance—and I apprehend that expression is broad enough to include a purchaser. This is confirmed by the fact that in the schedule there is an alternative of a composition of a full year's rent, which could only be claimed from a purchaser or a singular successor.

Another point made was as to the period of time at which the demand could be made. Sub-division 2 provides that nothing in the Act contained "shall be held to validate any sub-feu in cases where subinfeudation has been effectually prohibited; and provided further that notwithstanding such implied entry the proprietor last entered in the lands and his heirs and representatives shall continue personally liable to the superior for payment of the whole feu-duties affecting the said lands, and for performance of the whole obligations of the feu until notice of the change of ownership of the feu shall have been given to the superior." There are provisions as to the form of notice, and it goes on—"But without prejudice to the superior having all his remedies against the entered proprietor under the entry implied by this Act." Now, the remedy of the superior against a purchaser who entered by confirmation was payment of a composition of the full year's rent. Therefore I think that is kept up. The third sub-section provides that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry, . . . provided always 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." Now, it was maintained that under that provision the superior's remedy was curtailed. I think it was curtailed in one sense of the word, that it was a distinct proviso that by the implied entry he should not be entitled to demand a casualty sooner than he would otherwise have done—that is to say, if the fee was full at the time when infeftment took place he could not demand his casualty from the purchaser. If it were necessary when the time comes—when the vassal dies—that the superior should demand his entry, he may have it, but he shall not have it sooner than he could under the old law. And therefore, without going further into detail in the matter, I am of opinion, upon these grounds, that by force of this provision of the statute Mr Brownlie has been entered with the superior, and that he is bound to pay the composition of a year's rent just as every person entered under a charter of confirmation would have done. I may say, further, that I have read the opinions of the Judges of the Second Division in the case of *Ferrier's Trustees* v. *Bayley*, and I concur with the majority in the more detailed views which they state, especially in those of the Lord Justice-Clerk on that subject. It was there raised in a more favourable case than the present for such a question, because the party who raised it was actually the heir. If he had not taken infeftment at the time, he could, beyond all question, have entered himself, and it was not necessary to have made any arrangement with the heirs as to coming forward.

On the whole matter, I think this additiona plea should be repelled, as well as the others.

Lord Deas—Lord Mure has explained the nature of this action as it stood on the closed record before the Lord Ordinary, and I concur in holding that, in so far as the interlocutor of his Lordship "reduces, decerns, and declares in terms of the reductive conclusions of the summons," that interlocutor ought to be adhered to. The reasons for that judgment are, I think, clearly and correctly expressed in the Lord Ordinary's note, and I have nothing to add to them.

But assuming the reductive conclusions of the summons to have been rightly given effect to, there remains for decision an important question raised under a plea added to the record by the

defenders in the course of the discussion on the reclaiming note. That question resolves substantially into this—whether the recent Act of Parliament, 37 and 38 Vict. c. 94, entitles a superior to a composition of a year's rent in circumstances under which a mere duplicand of the feu-duty was all he would have been entitled to had the Act not been passed?

I am of opinion that the Act has not the effect contended for by the superior.

It does not admit of doubt that prior to the Act a singular successor, when called upon to enter and pay a composition of a year's rent, might, with consent of the heir of the last entered vassal, tender that heir as the person to be entered; and that the superior was thereupon bound to enter the heir by precept of *clare constat*, and to accept a duplicate of the feu-duty as the only consideration in respect of which the fee became full during that heir's lifetime.

Originally, the relation of superior and vassal was so far of a personal nature that it came to an end by the vassal's death. After the right of the vassal came to be recognised as hereditary, the heir continued for a considerable period to be the only party whom the superior was bound to receive as vassal.

Latterly, the Statute 20 George II. c. 50, imposed on the superior the direct obligation to enter singular successors on payment of a year's rent—whether as a proper feudal casualty or not has been the subject of much learned discussion, which it is unnecessary to enter upon here, especially as the Statute of 1874 interprets casualties for the purposes of the Act as including the relief duty payable on the entry or succession of an heir, and the composition or other duty payable on the entry of a singular successor. The material point is, that this conditional obligation to receive a singular successor was never held or understood to have wholly severed the feudal relation between the superior and the heir of the last entered vassal. The heir, accordingly, continued in practice to be called for his interest in the action of declarator of non-entry, although directed substantively against the singular successor. Mr Bell lays it down that in the superior's action of non-entry against a singular successor "The heir is called for his interest" (Comms. i., 5th ed., 23). In conformity with this practice, the heir was called for his interest in *Hill* v. *Mackay*, 5th Feb. 1824, (2 S. n. e. 574). Hill, the superior, had there brought a declarator of non-entry against the trustees of the late John Mackay, as singular successors under disposition granted by Mackay, and had called as a party the truster's son and heir John Mackay junior, who offered to take an entry, which the superior objected to grant. The report bears that the superior contended that "he was not bound to enter an heir while the true right to the lands was vested in third parties, nor without the production of his retour of service as heir to his father." The report further bears—"Lord Mackenzie found that Mackay had right to an entry, and that the trustees were not *hoc statu* bound to enter. On a representation by Hill, Lord Eldin adhered and assoilzied the defenders." Hill reclaimed, and pleaded that, at all events, there could be no absolvitor till the heir was infeft. "The Court refused his petition without answers, the defender Mackay agreeing to take infeftment before extract." The reporter adds—"It was observed on the Bench that when the superior calls the heir, as such, in a declarator of non-entry, he cannot refuse to acknowledge him though he be not served. The Court, however, considered the absolvitor before infeftment to be premature."

Subsequent to the date of this case of *Hill* it appears that superiors not unfrequently refrained from calling the heir in the first instance, because this had been held to bar their right to demand evidence of the alleged heir's propinquity. But the result of this simply was that in these subsequent cases the Court appointed the heir to be called *cum processu*, whenever the singular successor required this to be done and could state who the heir was and where he was to be found.

We find this course, accordingly, to have been taken in *Piggott* v. *Colvill*, 9th Decr. 1829, 8 S. 213. In that case a declarator of non-entry was raised against Colvill, who had purchased the property from Thomson, the deceased vassal. Colvill pleaded in defence that the two daughters and co-heiresses of Thomson were willing to enter, and should have been called. The Court sisted process till the daughters should be called, and this being done by supplementary summons, they produced a service, and an entry in their favour was obtained. The case then resolved into a question of expenses, for which Colvill was found liable, on the footing that if he had produced evidence of the propinquity of the two daughters when called upon to do so, the right to obtain an entry in their persons on payment of a duplicate of the feu-duty neither could have been nor would have been questioned.

The old rule, that in an action of non-entry directed against singular successors it was imperative on the superior to call the heir of the deceased vassal for his interest, thus came, latterly, to be occasionally relaxed, on the equitable ground that the superior might not know who the heir-at-law was, and that if the singular successor alleged that there existed an heir who was willing to enter, it was reasonable to require that he should point him out. This view was accordingly taken in the case of *The Magistrates of Hamilton* v. *Hart's Trustees*, 2d February 1854, (16 D. 437). The Lord Ordinary (Cowan) had in that case dismissed the action, in respect the heir had not been called. On a reclaiming note Lord Ivory said—"All the authorities show that the parties interested are entitled to insist that the heir must be called; and it is also settled by the authorities that they must say who must be called in that capacity." His Lordship therefore concurred in the suggestion of the Lord President, that a minute should be lodged by the defenders stating who else they alleged ought to be called as parties to the action. Lord Rutherfurd also concurred, observing that this course was "a modification of the old law that in every case of a declarator of non-entry the heir must be called." The Court accordingly recalled the Lord Ordinary's interlocutor *in hoc statu*, and before further answer appointed "the defenders *quam primum* to state in a minute the party or parties who they now say ought to have been called in the character of heir."

In the present case no question of this kind arises, for the pursuers have duly and formally called the heir of the last entered vassal, so that we have the heir in a position judicially to state

if required, whether he concurs in the contention of the defenders under their additional plea. In the meantime our opinions must proceed as in a question of relevancy, on the assumption that this concurrence will be obtained.

Passing from the mere procedure for bringing the heir into Court, it cannot be doubted that Mr Bell in his Principles lays down the law correctly when he says, section 712—"If the proper heir offer to enter, the superior must comply, and has no title to inquire into any conveyances which may have been granted, to insist on the entry of a disponee, or to select among the disponees a vassal for himself. He may be compelled to give an entry to anyone legally entitled to an entry. This is done by an order of Court in the process of non-entry, requiring the superior to lodge a charter, and by the Court refusing to give decree in the declarator of non-entry till this be complied with."

The important remark to be here made is, that from the earliest times down to the passing of the Act of 1874 it was invariably held that a conveyance by the vassal (even with procuratory and precept) did not entitle the superior to require the disponee to enter and pay a year's rent if the disponee could show that the heir was willing to enter, in which case the superior could demand only a duplicand of the feu-duty. To call this a device on the part of the singular successor would obviously, I apprehend, be an abuse of language. The right of a superior to a money payment for granting an entry arises entirely out of the feudal relation of the parties. That relation has always been regarded as more intimate and immediate between the superior and the heir than between the superior and the singular successor. Where there is an heir willing to enter, the only legal right of the superior has always been, and still is (unless the statute now in dispute has changed it), to exact a duplicand of the feu-duty. He never at any time in the history of the feudal law, as administered in this country, was held to have any other or higher pecuniary right. It is a question of legal right on both sides. But there is a legitimate interest, both on the part of the singular successor and of his immediate author, that this law should be upheld. The right to exact a year's rent has always been regarded as a very severe penalty for entering a singular successor, hostile to improvement, and attended with the peculiar hardship that the more the owner adds to the value of his property by buildings or otherwise, the greater the penalty which becomes exigible when a singular successor is compelled to enter.

The consequence of this is that the price to be obtained upon a sale may often be materially affected by the probability or improbability of there being an heir disposed to enter when the fee becomes vacant.

This cannot be better illustrated than by referring to the case of *The Governors of Heriot's Hospital* v. *Ross*, decided in the House of Lords on 24th July 1820 (2 Bligh's Reps. 707). In that case Ross held a piece of ground in Edinburgh under the Hospital, at the yearly feu-duty of 3 bolls of wheat and 3 bolls of barley, which, no doubt, formed the full value when the feu was granted. The entry duty was not taxed. In 1804 Ross obtained an entry on payment of a composition of £30 as a year's rent of the ground. In 1807 he sub feued the ground to builders, who covered it with houses, the sub-feu-duties derived from which amounted to £420 per annum, while the gross rental after the houses were built amounted to £3000 per annum. The sub-feuars were taken bound to pay a duplicand of their sub-feu-duties on the entry of heirs and singular successors, and were prohibited from themselves sub-feuing. Ross, being desirous to sell his interest in the feus, applied to the Governors of the Hospital to assess the composition upon the entry of a purchaser, and offered to admit their right to £420, being a duplicand of the year's sub-feu-duty. The Governors refused to agree to less than one year's rent of the ground, as increased in value by the buildings, amounting, as I have said, to £3000. This Court, by a majority, found that the entry money on a sale fell to be a duplicand of the sub-feu-duty, and not a year's rent; and this judgment was affirmed on appeal, the Lord Chancellor (who delivered judgment at the lapse of two years after having heard the argument) observing that the question was one of great importance and difficulty, but that after much and repeated consideration "he could not venture to advise the House to disturb the judgment."

This was a narrow enough ground of judgment for the proprietor who had feued the ground; but it is sufficiently obvious that if, in place of having granted sub-feus to builders, the proprietor had himself expended the money in building the houses, the composition exigible would have been £3000, subject only to deduction of an allowance for annual burdens and repairs. The law was so decided after a hearing in presence in *Aitchison* v. *Hopkirk*, July 14, 1775, M. 15,060, and the precedent was followed in *Anderson* v. *Milne*, Nov. 25, 1791 (*ib*), and in *Anderson* v. *Marshall, &c.*, Nov. 30, 1824 (3 S. 236). If, therefore, the Act of 1874 is to be construed as now contended for, it seems to follow that proprietors who erect mansion-houses or other buildings, at whatever cost, and who could hitherto have sold upon the footing that the fee might be filled by the purchaser obtaining an entry for the heir of the last vassal on payment of a duplicand of the feu-duty, must hereafter calculate on the entry money in every case being a full year's rent of the subjects in their improved condition. In other words, if a proprietor has raised the value of his ground from £30 a-year to £3000 a-year by erecting buildings on it at his own expense, a fine or penalty of £3000 must now be paid for an entry in circumstances under which hitherto, from the earliest times downwards, £30 only would have been exigible.

I think we approach this construction of the statute with no great presumption in its favour. I am not aware that the right to tender the heir for entry in place of the disponee had at any period of our law been regarded as a grievance calling for a remedy. Nor do I find anything to countenance that supposition in the statute.

The palpable grievance to be remedied by the particular enactments now under consideration was the necessity for a great number of useless deeds and instruments, which served only to multiply risks of error and create expense. I read the Act as sweeping all these away, but leaving the pecuniary rights and interests of

superior and vassal as to casualties payable on the occasion of an implied entry 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 would formerly have been done as matter of title is now to be held as actually done, and the pecuniary results which would have followed are to be held to follow as before. If the disponee must have taken a charter in his own name and paid a year's rent, the charter is held to have been taken and he must pay the year's rent. If, on the contrary, it appears that the deed to have been granted would have been a precept of *clare constat*, the precept is held to have been granted, and a duplicand of the feu-duty only is payable.

It will be observed that with the exception of the definition of "casualties" in the interpretation clause, there is not in the Act, down to the 3d sub-section of section 4, any mention made of the superior's casualties at all. The 2d sub-section provided that a proprietor infeft shall be held as at the date of registration of such infeftment to be "duly entered with the nearest superior."

This proviso regulates the matter of nominal title, and that equally whether the infeftment shall happen to be that of an heir or of a disponee. But it prescribes no pecuniary payment as an accompaniment or consequence of that nominal title which in the outset of the next section is described as an "implied entry." Still less does it say that the implied entry shall infer payment of a year's rent. Nor is it reasonable to suppose that such a result could have been contemplated, for the infeftment might, as I have just said, be that of an heir served and retoured, and not of a disponee.

Accordingly it is not till we come to sub-section 3 that we find any mention made of the superior's casualties, and there it is enacted expressly that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry," for recovery of which all the superior's rights and remedies are to remain available to him—that is, as I understand it, the superior shall neither be in a better nor a worse position, in a pecuniary point of view, with respect to his casualties on the occasion of an implied entry than if he had brought an action of declarator of non-entry under the former system, in which case it is undoubted that his demand for a year's rent might have been competently and exclusively met by an offer to enter the heir and to pay a duplicand of the feu-duty.

The object of the implied entry is to substitute a nominal for a formal written title. But neither the right nor the title of the superior to his casualties is to be prejudiced or affected one way or other by the nominal title—that is, the implied entry in the person of the proprietor. In short, the implied entry is to carry with it neither loss nor gain to either side as regards pounds, shillings, and pence.

Sub-section 3 concludes with the words "but provided always 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."

Here it will be observed that the words used are all words regarding the supposition that the superior is to have right to exact any casualty sooner than he could have done so by the law prior to the Act. There is nothing in this passage affirmative of rights in the superior, nor suggestive of his being entitled to exact a different and much larger casualty than in the particular circumstance he could have exacted before. If such a result had been comtemplated, it is to be presumed that it would have been distinctly and substantively expressed. I think it is not even implied, but rather the reverse. The effect of an heir entering amicably is to delay the necessity of the purchasers entering. The lands could not have been declared in non-entry till the heir had declined or failed to enter; here the heir never had declined or failed to enter. On the contrary, we must assume that he offered to enter, and thereby to postpone, during his lifetime at all events, the period for demanding a year's rent from the disponee, or that the superior is really demanding the casualty of a year's rent sooner than he could by the law prior to the Act have demanded that casualty irrespective of the implied entry.

By sub-section 4 it is provided that after the commencement of the Act no lands shall be deemed to be in non-entry, but a superior who could but for the Act be entitled to sue an action of non-entry against the successor in the lands, whether by succession, bequest, gift, or conveyance, may raise an action against such successor, whether infeft or not, for payment of any casualty exigible at the date of the action, against which no implied entry shall be pleadable as a defence, and decree in that action shall operate as a decree of declarator of non-entry till the casualty is paid. That is, accordingly, the nature of the present action. It is properly directed against the successor "by succession," as well as the successor by conveyance; and from the successor by succession—that is, the heir of the last entered vassal—the casualty exigible is simply a duplicand of the feu-duty, payment of which we must here hold to be tendered. My opinion is that this duplicand is the only pecuniary payment the superior is at present entitled to exact, whatever may be his right at some future period, which we are not called upon here to decide.

I am aware that in the recent case of *Ferrier's Trustees* v. *Bayley* in the Second Division, although the Court was divided, and the circumstances were not the same with those which occur here, the views of the majority must be regarded as adverse to the views I have now expressed. But that case was not pressed on us as a precedent we were bound to follow, and no proposal was made to consult the whole Judges—a course in which I should willingly have concurred. Being thus called upon to give my individual opinion, I can only do so, very respectfully, to the effect I have now stated.

Lord Shand—I am of the same opinion generally as that which has been expressed by Lord Mure. With reference to the different defences which have been disposed of by the Lord Ordinary, I concur with the Lord Ordinary and Lord

Mure in the opinion that these defences ought to be repelled.

There were various objections stated, in the first place, to the title of the pursuers to the superiority which they claimed to be vested in them, but I concur with the Lord Ordinary in thinking that these objections are of too critical and unsubstantial a character, and that the pursuers have, by the titles which they have produced, established their right to this superiority.

It was maintained that the right which was originally vested in the family of the Duke of Hamilton to the superiority had been forfeited upon two grounds—in the first place, because the vassal for the time in 1813 had obtained a decree of tinsel of the superiority by virtue of the provisions of the Act 1474, cap. 57, and had followed that up by obtaining a charter from the Crown; and, in the next place, because at a later period, in 1849, a second proceeding had been adopted with the same result—a proceeding by which the defender maintains that the superiority was absolutely forfeited, to the effect of the Crown becoming superior. With reference to the first of these objections—I mean in regard to the proceedings of 1813—I think it is almost too clear for argument that that defence is unfounded. The old statute of 1474 did not introduce any forfeiture or transfer of an estate of superiority. The enactment of that statute went this length, and this length only—that there was a suspension of the right of the superior. In the words of the statute, the superior lost or "tyned" the tenant for his lifetime; but upon the death of the vassal the suspension of the right of superiority no longer had effect. The right itself remained in the superior, within whose titles it had originally been. Again, with regard to the proceedings in 1849, it is clear, upon the statements of parties and on the titles, that the trustees of Lady Rossmore were then in right of the superiority; but instead of calling the trustees of Lady Rossmore, there were called two other parties—Lord Derby, as heir of line, and the Duke of Hamilton, as heir in another character, *ab intestato*—neither of whom had right to the superiority. That being so, these proceedings were plainly directed against the wrong party, and can receive no weight. Accordingly, I am satisfied that the judgment of the Lord Ordinary is well founded.

There was, however, maintained in argument before your Lordship a plea which raises a very important question under the Conveyancing Act of 1874. It is maintained on behalf of the defender that, assuming that the pursuers have made out their right of superiority, the defender, although a singular successor, is liable, not for a year's rent by way of casualty, but for a duplicand of the feu-duty only, upon the theory that in some way or other he can present the heir for entry or take the benefit of the heir's right. The question which is thus raised came up directly for decision in the case of *Ferrier's Trustees* v. *Bayley*. It was not maintained on behalf of the defender that the point decided in *Ferrier's* case was not precisely the point that he seeks to raise now, and if that had been maintained, I do not think it could have been well maintained. But it was said the question is a very important one. It arises under a very recent statute, and we ask the Court to reconsider it, as the decision has been so recent. And with regard to so important a question probably that was a reasonable enough request. But I may say that after the best consideration I have been able to give to the argument, I concur with Lord Mure in holding that the case of *Ferrier's Trustees* was well decided, and I agree generally in the opinions which were there expressed by the Lord Justice-Clerk and Lord Ormidale and by Lord Curriehill in a very able judgment.

I do not think it necessary, as the statute formed the subject of such full consideration in that case, to go into any detailed examination of its provisions; but I shall state generally the view which I take upon the question, and in doing so I must, in the first place, notice the position in which the title of the defender stands with reference to this point. Assuming that by the decree of reduction the Crown titles of superiority are to be swept away, the title then comes to stand thus—that William Miller, who was infeft in 1786 on a precept of *clare constat* granted by the Duke of Hamilton in 1780, was the last entered vassal. William Miller was succeeded by his son Alexander Miller, who expede a service as heir in special to his father, and who was infeft. Alexander again was succeeded by William Campbell Miller, his grandson, who expede a service as heir in special to his grandfather, and likewise was infeft, having his decree of service and infeftment confirmed by a Crown charter. Thereafter William Campbell Miller's sisters Elizabeth Maria Lousia Miller and Alexandrina Georgiana Cuninghame Miller obtained a decree of service in their favour as heirs-portioners of their brother, and were infeft in 1857. They sold the property to the defender, and, with the concurrence of the trustees under their marriage-contracts, to whom the property had been conveyed, granted a disposition in October 1874, which was recorded in the General Register of Sasines on the 11th of November 1874. The result of that state of the title is this, as it appears to me—that upon the decree of reduction now to be pronounced in this action taking effect, we find that the two parties last infeft in this estate are the two Misses Miller, infeft in 1857, and Mr Brownlie, infeft in 1874, and under the Conveyancing Act, which became law in August 1874, it is expressly provided that every proprietor who at the commencement of the Act shall be duly infeft, shall be deemed and held to be at the date of his infeftment duly entered with the superior; and there is also a provision that upon a person taking infeftment after the date of the Act the same result shall follow, so that at the date of Mr Brownlie's infeftment therefore, in November 1874, we have his infeftment taking effect as an entry in terms of this provision of the statute. The result, as I take it, of that entry is this—that Mr Brownlie, the defender, in the character of a singular successor, has become entered with the superior. He is entered with the superior to the same effect as if the superior had granted to him a charter of confirmation by which he was recognised and confirmed as the vassal in the feu.

Now, it is said that before the Conveyancing Act of 1874 the defender might have tendered the heir of William Miller, the last entered vassal—that is, I presume, he might have tendered as the vassals the two Miss Millers, who I understand are still in life—and so avoided the casualty, and that probably would have been

so so long as he did not himself become infeft and so enter to the feu. There has been a good deal said as to the origin of that privilege by which a singular successor is entitled to put forward the heir in a question with the superior. It has been sometimes represented as a considerable hardship that a singular successor should have to pay a year's rent in the shape of a casualty, and in modern times that appears to some extent to be a hardship; but it must not be forgotten that there was a time when a singular successor was not entitled to be entered at all—when the superior was bound only to recognise the heir of the person entitled to enter—and it was a privilege to parties purchasing or acquiring a property by singular title to get an entry at all, and the price of a year's rent was paid as a return for that privilege, at a time when probably a year's rent was considered a small price to pay for that privilege. And in regard to the present hardship of payments of that kind, it is not unworthy of notice that one of the beneficial objects of this very useful statute is to provide means by which that burden of a year's rent as a casualty upon subjects of this kind may be redeemed by the vassal for all time coming, if he thinks fit, upon very reasonable and moderate terms. But however that may be, it is no doubt the fact that a singular successor, although he was virtually the proprietor of the estate and getting all its benefits, was enabled to avoid payment of his year's casualty by putting forward the heir of the last vassal and having him entered with the superior.

That proceeding was characterised in the case of *Ferrier* as a device upon the part of the singular successor, and I cannot say that it occurs to me that that expression is inapplicable to the fact. Anyone acquainted in practice with such matters knows perfectly that a singular successor having right to the property, instead of paying the sum to the superior and taking his entry himself, frequently searches for an heir who has no interest whatever in the property and no right of any kind to it, and endeavours to make a bargain with him that he shall get the benefit of his name for the purpose of an entry at a sum somewhat less than the superior will demand for the purpose of an entry of a singular successor, and sums of money have often been paid in that way for the use of a name—bringing forward a mere shadow into the title where there was no reality or substance in the heir entering at all. It does not occur to me that a transaction of that kind is very wrongly characterised in being described as a device. Undoubtedly it is a privilege on the part of a singular successor, arising, I think, from this rule—that a superior finding his lands in non-entry, and claiming that he shall have an entered vassal, is bound to accept any vassal who has a right and may be tendered to him so as to fill the fee.

But taking it that the singular successor was clearly entitled to make arrangements with an heir and to bring that heir forward to be the entered vassal, on the other hand, I take it to be equally clear that if, instead of taking that course of arranging that the heir shall come forward as the vassal, he himself came forward and insisted upon an entry, and obtained an entry, he was only entitled to do so upon payment of the casualty. It has been distinctly explained by Lord Mure how limited the right of the singular successor was. He might no doubt present an heir, but he could not compel the superior to give the heir a title which could be used by way of assigning an open precept or the like. The heir might be recognised individually and personally as the vassal, and entered in that character, but if he were so, and had to give any other right, he must again convey the subject from him. It was a limited right. But although the heir might be put forward, and was frequently put forward and entered as the vassal, if the singular successor himself took the benefit of becoming the vassal, he could only do so on payment of the casualty.

Now, keeping that circumstance in view, what is the effect of this statute? The provision of the statute is this—that if the singular successor takes an infeftment, he is thereby entered as the vassal in the feu. He is entered in the same way as if he had obtained his charter of confirmation; and as I read the statute, he is entered precisely to the same effect, and with the same and no higher consequences, than would have occurred if that entry had taken place before the statute. The statute has certainly conferred upon persons in that position very considerable benefits. In the first place, this provision saves the expense of any deed of confirmation such as formerly was requisite. In the next place, the true vassal is entered directly instead of there being that mid-superiority or fictitious right which formerly was used, at times only for the purpose of saving the expense of a casualty or of diminishing it to some extent. And, in the third place, where the heir was entered, formerly upon the death of that heir a new transaction had to be entered into—a transaction of a kind which is now saved—for the singular successor himself is the person in right of the fee, and until his death no new casualty or relief shall become payable. These, on the one hand, are benefits. On the other hand, the singular successor now, just as formerly, must pay the casualty which he would have had to pay if he had been put in the same position in which the statute now puts him. If he had infeft himself and got his charter of confirmation, becoming the vassal in the feu under the old law, he would have had to pay the casualty. The statute puts him in that position now, and accordingly he pays the same casualty.

And so I think the question is not here whether the superior is entitled to a composition in circumstances which would have entitled him only to the duplicand and not to a composition before this statute? I do not think that is the question, for the vassal in the position in which the statute has now put him is in that position which would have entitled the superior not to the duplicand merely, but to the composition, which accordingly the vassal is bound to pay. That appears to me to be the general effect of these provisions of the statute, and I have only to add, with reference to one part of it, that I think the reasoning upon which this result follows is a good deal strengthened by that provision which was referred to by Lord Mure, contained in sub-section 3 of section 4, by which it is provided 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. The view in which that clause has been added obviously is, that without some protection of this kind the superior might have demanded his casualty at once even where he had an entered vassal, but in order to avoid that evil it is specially provided that the infeftment shall only give the superior the right to the casualty at the time he would have got it formerly, that is, when the fee is no longer full. But I think the observation is a very obvious one, that if it had been intended further than that to provide, as is here contended, that the entry of a singular successor by virtue of his infeftment and the provision of the statute was not to operate the usual result of such an entry, viz., the liability for the full casualty, that would have been provided also, and we should have had here some such provision as a declaration that notwithstanding that the singular successor was to have the full benefit of an entry, he was only to pay such a casualty as an heir would have paid provided they could get an heir to come forward and give him the benefit of his name. But I very much agree in the view which I see is stated by Lord Curriehill on this subject in the note to his interlocutor in the case of *Ferrier*, where he says that he thinks one of the main objects of the statute was not only to facilitate conveyancing, but to abolish the creation of mere technical base fees and mid-superiorities which by a rigid adherence to old feudal forms had complicated and encumbered progresses of titles without conferring any real benefit upon any of the parties concerned. Perhaps I would not put my opinion quite so strongly that the purpose of the statute was absolutely to abolish these base fees, but certainly substantially and in time that the provision of the statute should have that effect.

I have only further to observe, that I see very great difficulty in this particular case in possibly giving the defender the benefit of now putting forward an heir to enter instead of him. The counsel for the defender were scarcely able to tell us how that could possibly be done. At this moment I do not think that any device was suggested which would have that effect, and for this obvious reason, that in the meantime the effect of the statute has been at once to enter Mr Brownlie himself as the vassal in this feu—to enter him at the same time that there is a confirmation of the title in favour of the Misses Miller—and the result of that confirmatory act by the force of statute is to make Mr Brownlie himself the entered vassal and to evacuate the base fees, which formed mere links in his title before. In that state of matters, Mr Brownlie being the entered vassal, and the pecuniary result of his being so entered and being a singular successor following from that, I cannot see how he can possibly ask that somebody else shall now be entered as an heir of the last vassal. The very fact of his having got his entry in the way which the statute has enacted is, to my mind, exclusive of the notion of his now proceeding to put forward somebody else to enter as the heir of the last vassal. The last vassal is completely divested by the chain of titles and by Mr Brownlie's own conveyance and infeftment, and I therefore think that even if there may be cases in which an heir may yet be put forward, this is not one in which that can be done. It does not occur to me at this moment that cases can occur in which that can be done except where the vassal thinks fit to lie out uninfeft; if he chooses to take the risk of leaving his right to heritable property to rest on a personal title only, with all the disadvantages which attach to that, it may be that in that way he can put forward the heir in a question with the superior; but if he desires to get the benefit of this statute, and become a fully entered vassal with the superior, he being still a singular successor, and does get the benefit of it, I think that under the statute he must just pay what all along he was obliged to pay for such a benefit, viz., the casualty which the singular successor is by law liable for.

Lord President—As regards the questions decided by the Lord Ordinary I have nothing to add. The judgment, I think, is perfectly well founded, and I concur in the opinions which have been delivered by your Lordships upon these questions.

The question which has been raised in the course of the discussion upon the reclaiming note is one of an entirely different kind, and certainly of very great practical importance. It has been raised by means of a plea which has been added to the record, and now stands as the sixth plea for the defender; and I think it material to call attention to the precise terms of that plea, for the purpose of showing what is the question that the defender intends thereby to raise. He says—"Even though the Crown title brought under reduction were set aside, the composition of a year's rent is not due by the defender, in respect that his immediate authors Mrs Macalister and Mrs Wallnutt (who are in life) were the heirs of the vassal last infeft under the predecessors of the pursuers, and as such were infeft in the lands, and so duly entered with the pursuers in virtue of the Conveyancing (Scotland) Act 1874." Now, I think the meaning of that plea is, that the fee is full, and that the existing vassal of the pursuers are the two heirs-portioners of Mr William Campbell Miller, who was entered with the Crown by charter of confirmation in 1850. But it seems to me that the mere statement of that title, even in this short way, shows the fallacy of the contention that is embodied in this plea.

Let me illustrate that, however, by going a little more into the history of this estate. The vassal "last infeft under the predecessors of the pursuers" in terms of this plea means of course the William Miller who was entered in 1786. And no doubt he was the last man who held these lands as the vassal of the pursuers' predecessors. For what happened afterwards was that Alexander Miller, the son of that last entered vassal, having made up a base title, proceeded to bring a declarator of tinsel of the superiority belonging to the predecessors of the pursuers under the Act 1474, and by the operation of that process he got himself entered as Crown vassal in 1813. Now, I agree with all your Lordships in holding that he was Crown vassal only for his own lifetime, and that as soon as he died the effect of the tinsel of the superiority came to an end, and his heir was bound to enter with the predecessors of the pursuers. But instead of doing that his heir brought another process of a different kind in 1849—a petition for forfeiture of the superiority under the 10th and 11th Victoria, c. 48—the effect of which, if it had been regularly carried through, would have been

to extinguish the estate of mid-superiority for ever; and so, having succeeded in that proceeding, but without having called the proper party as contradictor, he made up a Crown title and became the Crown vassal in 1850. Now, if that was not subject to reduction, the estate of the pursuer—the estate of mid-superiority—would have been thereby permanently extinguished, and the estate belonging to William Campbell Miller would have been an estate held directly of the Crown; and it was so held for the time, and down to the decree of reduction in this process. This Crown title was during this period the regulating title to the estate, and those who succeeded to William Campbell Miller by inheritance took up that estate—held directly of the Crown and none other. Accordingly what took place? William Campbell Miller having died, his sisters Mrs Macalister and Mrs Wallnutt were served heirs in special to him, and were infeft upon their decree of service; and what was their position then? They were, no doubt, at that time—in 1857—only base infeft, and had no entry; but if that infeftment of theirs had continued in their person, which it did not, down to the passing of the Conveyancing Act of 1874, they would by the operation of the Conveyancing Act have become the entered vassals of the Crown, because the estate which they took up was an estate held of the Crown, composed not only of the *dominium utile* of the lands which was originally held of the pursuers' predecessors, but of that and of the estate of mid-superiority, which was the estate of the pursuers' predecessors. They held the two estates combined in one, and held them as one estate directly of the Crown. In point of fact, however, the infeftment of these ladies did not continue down to 1874. They were each of them married, and each of them upon occasion of her marriage conveyed to marriage-contract trustees, and these marriage-contract trustees were infeft; and these were the subsisting infeftments in this estate at the date of the passing of the Act of 1874. What then was the effect of the Act of 1874 upon that state of the title? It made the marriage-contract trustees the vassals of the Crown in this estate; and if this decree of reduction had never been pronounced, that would have been the estate carried by all the subsequent conveyances. It was the estate which they conveyed to Mr Brownlie, and but for the reduction Mr Brownlie would continue to be the Crown vassal.

But observe the effect of the decree of reduction. It sweeps away, in the first place, the proceedings for the forfeiture of the superiority in 1849, and it sweeps away, in the second place, the charter of confirmation of William Campbell Miller in 1850. These things stand now reduced, so that, the ladies and their trustees and Mr Brownlie can no longer hold of the Crown, because the foundation of their Crown title is that charter of confirmation of 1850; and all right that they have to hold of the Crown is swept away, and the estate of mid-superiority is restored, and the consequence is that the only estate which Mr Brownlie after the decree of reduction can hold is the estate of *dominium utile* holding of the pursuers. He being infeft in the subject, became by the operation of the statute 1874, as the vassal impliedly entered, the vassal of the pursuers.

But how can it be said that Mrs Wallnutt or Mrs Macalister, or their marriage-contract trustees, were ever the vassals of the pursuers? What they held under the leading title of 1850 was an estate held of the Crown. Instead of being the vassals of the pursuers, they came in place of the pursuers as Crown vassals, and stood so until the decree of reduction was pronounced, so that it appears to me that to say that the ladies or their marriage-contract trustees—for it is of very little consequence which of the two it is—as heirs of the vassal last infeft in 1786 under the predecessors of the pursuers, were duly entered with the pursuers, is quite untenable.

But although this is sufficient in my opinion to dispose of the plea as stated, I am very far from desiring to avoid the consideration of the more general question—What is the effect of an infeftment taken since the Act of 1874 by a purchaser in the position of Mr Brownlie? And I agree with the majority of your Lordships in holding that the effect is to subject that purchaser to the liabilities of an entered singular successor, and consequently, where the entry is untaxed, to the payment of a composition. The object of this statute is to simplify conveyancing, and for that purpose it plainly contemplates among other things that, as far as possible, all barren and useless estates of mid-superiority shall be extinguished. I do not say that it succeeds entirely in extinguishing such mere barren mid-superiorities, but I think that is one of the objects of the statute, and although it may be not completely and fully, it is at least to a very great extent accomplished. I agree also with my brother Lord Deas in saying that the principle of this statute is to hold a great many things to be done which are not done—to hold these to be impliedly done; and that whatever is impliedly done is to be followed by all the same pecuniary consequences as if the thing implied had actually been done. That is precisely the principle of construction which I apply to this statute.

Now, keeping these two things in view, let us consider for a moment section 4 of the statute. The first sub-section of section 4 abolishes with certain necessary exceptions all renewal of investitures—that is to say, in more plain language, all writs by progress proceeding from the superior—and instead of these writs by progress, the effect of which is merely to enter a vassal, sub-section 2 proceeds to supply the necessary equivalent. Now, the equivalent is this, 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 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." There the object of the statute comes out very clearly. There shall be no base holding of the seller after infeftment—that is to say, the estate of mid-superiority which the seller retained in his own person when his disponee took infeftment upon a double manner of holding shall no longer exist. There shall be no relation of superior and vassal between the seller and purchaser. The only relation of superior and vassal from the moment of infeftment shall be the relation of the existing proprietor of the *dominium utile* as vassal, and the nearest superior who holds an indefeasible estate of supe-

riority as superior. The plain object of that is, that after the passing of this Act fictitious superiorities shall be at an end, and fictitious vassalages shall come to an end, and the man who is the true owner of the beneficial estate in the land shall hold directly of the first superior he can reach backwards who has a real and beneficial estate of superiority in him.

That is to be the relation, and there is to be no other relation of superior and vassal. And what according to the statute is to be the effect of that? Sub-section 2 goes on thus—"to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." Now then, Mr Brownlie as purchaser of this estate is to be the vassal of the pursuers from the moment that he takes infeftment, and he is not to be at any time after infeftment—and he could not be before—the vassal of the seller—of the party from whom he purchased. He shall by the operation of this statute become the entered vassal of the true superior, and he shall do so to the same effect as if that superior had granted him a charter of confirmation. Now what would have been the effect of the superior granting him a charter of confirmation? It would have been to entitle the superior to a composition. Of that there cannot be the smallest doubt. He would not have got his charter of confirmation without a composition, and if he is to get his charter of confirmation by implication, we must hold, as my brother Lord Deas very properly said, that that is to be followed by all the pecuniary consequences just as if the charter of confirmation had actually been granted.

If indeed it had been the purpose of this statute to perpetuate that *quasi* right of a purchaser to bring forward an heir to be entered in place of him to the superior, it would have been very easy to do so by a very few words in this enactment. It would have been saved by merely saying that the superior shall not be entitled to a casualty as upon the entry of a singular successor if there be in existence the heir of the vassal last entered with the superior. But there is no such saving of the vassal's right. There is not the smallest appearance on the face of any of the sub-sections of section 4 of this statute of any intention to operate such a result as that. And I am not at all surprised that it should be so, because when the statute was abolishing all those useless estates of mid-superiority as far as possible, I think it was not at all unnatural that it should seek to abolish also every other fiction which complicated the relation of superior and vassal; and with all due deference to those who differ from me upon this point, I must say that I think the practice which prevailed before the passing of the Act, of bringing forward an heir nominally to take the position of vassal in place of the true proprietor of the subject—the purchaser of the *dominium utile*—was nothing but a device to get the better of the superior's right. For what did it come to? The original vassal sold to a singular successor with a double manner of holding, the purchaser was infeft, and the immediate effect of his infeftment feudally was to create the relation of superior and vassal between the seller and purchaser. The purchaser held base of the seller. Well, the seller dies, being the vassal last entered, and then the superior demands an entry; and the purchaser says, Well, no doubt the fee is empty, and you are entitled to have a vassal, but although I am the person who has the sole property and interest in this estate, and am in all true substance and effect the owner of that *dominium utile* which holds of you as superior, I will not enter with you, because I can find a man who upon strict feudal principles can complete a title as heir to the mid-superiority which stands between me and you, and he shall be your vassal. I think that is nothing but a device. It is a device perfectly consistent with feudal principles; I admit that, but it is not a bit the less a device in order to substitute a duplicand of the feu-duty for a year's rent. That is the whole affair.

Now, if it was the purpose of this statute to abolish fictitious titles, I cannot but think that it is entirely consistent with it to abolish a right to create such a fictitious superiority for a mere pecuniary purpose. The hardship of a singular successor paying a composition of one year's rent I cannot think enters into the consideration of this question at all. If it is a hardship such as ought not to exist, by all means let the Legislature put an end to it. But it is a statutory hardship. It is a hardship depending upon the statute of 20 Geo. II. cap. 50, which secures it to the superior as a compensation for what the superior then gave up; and until the superior is deprived of that right I do not see why he should be more unfairly dealt with in the exercise of his right than anybody else who has a right to such a statutory composition.

Therefore I confess I come to the conclusion—certainly not without much consideration, but also in the end, I am bound to say, without any difficulty—that the effect of a purchaser taking infeftment subsequent to the passing of the Act of 1874 is to enter him as a singular successor with the superior, and of course to subject him to all the conditions of such an entry as it stood before the statute, and among other things to the payment of a composition.

I am therefore, on the whole matter, of the same mind with the rest of your Lordships, and I am for adhering to the Lord Ordinary's interlocutor, which I think may be the form of our judgment, although we have had occasion to consider a plea which was not before his Lordship, because he not only decerns in the reduction, but he also decerns in the declaratory conclusions and for payment of the composition.

The Court adhered.

Counsel for Pursuer—Kinnear—Rutherfurd. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders—M'Laren—Jameson. Agent—John Martin, W.S.

Friday, November 23.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CRUM EWING *v.* BOUVERIE CAMPBELL.

Superior and Vassal—Feu-Contract—Where Vassal barred from Erecting anything but "Dwelling-houses"—Does "Public-house" include "Hotel?"

A feu-charter imposed, *inter alia*, the following restrictions:—(1) That "no buildings of