LORD JUSTICE-CLERK—I think that this case is ruled by that of *Jamieson*, not that of *Christie*.

LORD YOUNG—I am of the same opinion. I think that this lady must have her money, but I am not surprised that the trustees should have brought this case into Court. Indeed it was their duty to do so. It is a very nice question. A very small difference of expression determines the point whether a direction intended for the benefit of the proprietor shall be disregarded as repugnant to the truster's intention, or whether it is operative and may be carried out. If the property is given to anyone, any direct mode of dealing with it would generally be void for repugnancy. It is generally repugnant to the benefit given. On the contrary, there are cases, of which *Christie's* may be taken as an example, although not by any means a perfect one, where the giver may constitute a protection by keeping the fund out of the hands of the object of his bounty, and putting it under the care of managers of his own appointment. There are such cases in which it would certainly be operative, but here there is no operative restraint upon the proprietor. I think the property is here distinctly and absolutely given, and that the restriction as to exclusion of *jus mariti* and preserving the capital for the beneficiaries' own heirs and executors are not operative, and cannot be given effect to. They are repugnant to the gift proper.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court pronounced this interlocutor:—

"Answer the first of the questions stated in the case in the affirmative, and the second question in the negative: Find and declare accordingly."

Counsel for the First Parties—Dundas. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Second Party—Jameson—Fraser. Agent—F. J. Martin, W.S.

Thursday, July 18.

SECOND DIVISION.

(WHOLE COURT.)

HARINGTON STUART *v.* HAMILTON.

Superior and Vassal—Non-Entry—Casualty—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94)—*Composition—Relief.*

John Hamilton of Rodgerton, who was entered with the superior, in 1804 disponed these lands to James Hamilton, who, when summoned to enter, tendered the heir of the disponer, John Hamilton of Greenbank, who was infeft on a precept of *clare constat*. James Hamilton died in 1854, leaving a settlement of the lands in favour of James Dunlop Hamilton, the second son of John Hamilton of Greenbank, and the trustees under the settlement when called upon to enter tendered the heir of the last entered vassal, John Hamilton junr. of Greenbank, who was infeft on a precept of *clare constat*.

John Hamilton junr. conveyed the lands with an *a me vel de me* holding to his brother James Dunlop Hamilton, who held base of his brother down to the passing of the Conveyancing Act 1874. John Hamilton junr. died in 1877. James Dunlop Hamilton died in 1886, leaving a settlement of the lands in favour of his brother William Dunlop Hamilton, who was infeft thereon, and who was the heir-at-law both of the disponer and of John Hamilton junr., the last entered vassal who paid a casualty.

In an action against him by the superior—*held*, by a majority of the whole Court (following the case of *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738), that a new investiture came into existence with the implied entry of James Dunlop Hamilton in 1874, and that the defender was liable in a casualty of composition.

Robert Edward Stuart Harington Stuart of Torrance, Lanarkshire, as superior of the lands of Wester Rodgerton and Highflatt in that county, sued William Dunlop Hamilton, his vassal in these lands, for payment of a casualty of composition in consequence of the death on February 27, 1877, of John Hamilton of Greenbank, Mearns, the vassal last vest and seised in the lands.

The late John Hamilton of Rodgerton, grandfather of the defender, and holding the lands in question of and under the pursuer's predecessors as their vassal, disponed the lands to James Hamilton, writer in Glasgow, by a disposition dated 27th January 1804. James Hamilton was never infeft on the said disposition. When called upon to enter with the pursuer's immediate predecessor as his superior he induced the eldest son of John Hamilton of Rodgerton, John Hamilton of Greenbank, Mearns, to enter in his stead as heir-at-law, and he was infeft upon a precept of *clare constat* in 1838.

James Hamilton died in 1854, leaving a trust-disposition and settlement dated 19th July 1854, the purpose of which, so far as regarded these lands, was to convey them to James Dunlop Hamilton, writer in Glasgow, the second son of John Hamilton of Greenbank. John Hamilton being also deceased, the trustees acting under said trust-disposition and settlement, instead of completing a feudal title in their own persons, induced his eldest son and heir-at-law, the late John Hamilton the second of Greenbank, to enter in the lands. He accordingly obtained a precept of *clare constat*, and was infeft thereon.

John Hamilton second of Greenbank, as heritable proprietor feudally vested in the lands, and in implement of the first named disposition, and of James Hamilton's trust-disposition and settlement, conveyed the lands to his brother James Dunlop Hamilton by a disposition dated 8th and recorded 9th August 1860.

James Dunlop Hamilton died upon the 31st May 1886, leaving a general disposition and settlement in favour of William Dunlop Hamilton, his brother, the defender, dated 28th May and recorded 8th June 1886. The defender was infeft in the lands conform to notarial instrument in his favour.

The pursuer averred that in virtue of the disposition by John Hamilton to James Dunlop Hamilton in 1860, and of the provisions of the

Conveyancing (Scotland) Act 1874, James Dunlop Hamilton had an implied entry in the lands, subject to payment of the casualty of composition due by him to the superior as a singular successor of the disponer John Hamilton when it should become exigible on the death of the latter. The casualty became exigible on the 27th day of February 1877, being the date of the death of the said John Hamilton second of Greenbank. The pursuer further maintained that in virtue of the defender's title, and of the provisions of the Conveyancing (Scotland) Act 1874, he was entered vassal with the pursuer in the lands, and was liable in payment of the casualty which had become due.

The defender explained that at the date of the disposition in 1860, and down to the death of John Hamilton in 1877, James Dunlop Hamilton was the heir-at-law of John Hamilton, his brother, and that the casualty payable by him was the casualty of relief exigible from him as John Hamilton's heir. He further explained that he was the heir-at-law both of John Hamilton and James Dunlop Hamilton, his brothers, and that he was only liable in the casualty of relief.

He pleaded—"(3) The pursuer is not entitled to claim a casualty of composition from the defender, in respect that the latter is the heir-at-law of the said James Dunlop Hamilton, and also of the said John Hamilton, and as such is liable only in the casualty of relief."

On 20th December 1887 the Lord Ordinary (KINNEAR) sustained this plea, and assoilzied the defender.

"*Opinion.*—The question in this case is whether the casualty which is admittedly payable to the pursuer is relief or composition.

"The defender's grandfather John Hamilton of Rodgerton was duly entered with the pursuer's predecessor as his immediate superior. On his death in 1838 his eldest son and heir-at-law John Hamilton of Greenbank completed his title and entered in his place by infeftment on a precept of *clare constat*. On his death in 1855 his eldest son John Hamilton the second of Greenbank was entered in like manner by infeftment on a precept of *clare constat*. This second John Hamilton of Greenbank died on the 27th of February 1877. The casualty which the pursuer now seeks to enforce is that which became due upon his death; and the ground in fact, as set forth in the summons, is that he was the vassal last vest and seised in the estate. I think this is a correct statement of the true ground of action, because although there have been two implied entries since that of John Hamilton, no casualty has been paid in respect of either, and in terms of the statute they are not pleadable in defence to this action. For the purpose of the present question, therefore, between the superior and the proprietor now infeft, John Hamilton the second must be considered as the last entered vassal.

"The defender, who is now entered by virtue of the Conveyancing Act, is the brother and heir-at-law of John Hamilton the last vassal. But he is not entered in that character, but by virtue of a singular title derived from his grandfather John Hamilton of Rodgerton. The grandfather had disponed the estate to James Hamilton, who was never infeft, but who disponed to trustees with directions to convey to James Dunlop Hamilton, the second son of John the first of Greenbank. The trustees completed no feudal title, but John Hamilton the second of Greenbank having entered, as already explained, in 1855, he, in implement of his grandfather's disposition and of the trust-disposition, conveyed the estate to his younger brother James Dunlop Hamilton, by a disposition which was recorded in the Register of Sasines on the 9th of August 1860. On the passing of the Conveyancing Act of 1874 the mid-superiority which was left in the elder brother John the second was extinguished, and James Dunlop Hamilton was entered with the superior by force of the statute.

"No casualty was paid or demanded during his life, and on his death in 1886 he left a disposition and settlement in favour of the defender, who is now infeft, and who is heir-at-law both of John Hamilton, the last vassal duly entered under the old law and of James Dunlop Hamilton, the last vassal entered by force of the statute.

"In this state of the title the defender maintains on the authority of *Mackintosh* v. *Mackintosh*, 13 R. 692, that the casualty exigible from him is not composition but relief, and I think his plea is well founded. It is said that the case of *Mackintosh* is inapplicable, because in 1860, when the title, confirmed by the Act of 1874, was completed, James Dunlop Hamilton could not have been entered as heir to John because John was still in life. But the claim cannot be determined by reference to the state of rights in 1860, because at that time there was no casualty due. The lands were not in non-entry, and the action for casualties under the Act of 1874 is competent only when, but for the Act, the superior would have been in a position to sue an action of declarator of non-entry against his vassal's successor. If such an action had been brought in 1877 against James Dunlop Hamilton he would have been entitled, upon the principle established in *Mackintosh* v. *Mackintosh*, to say that he was in fact the heir of the last vassal, and therefore liable only for relief notwithstanding that he had already completed a title as a singular successor. It is said that the decision applies only where the vassal is in a position to enter as heir, although he has chosen to complete his title as a singular successor. But this is not consistent with the judgment. Both in the case of *M'Kenzie* and of the *Marquis of Hastings* it would have been impossible for the disponee, who was in fact the heir of the last investiture, to effect an entry in that character. The Lord President points out in explaining the case of *M'Kenzie* that 'the form of entry was necessarily that applicable to a singular successor or disponee. Nevertheless the Court decided that he was entitled to the full benefit of his character as heir, and must be entered on payment of relief duty only.'

"This would not aid the defender if he also were not the heir of the former investiture. But he is in fact the heir-at-law of both his brothers, and the action is brought against him in accordance with the provisions of the statute as the successor in the lands of the elder brother, who was the vassal last vest and seised in these lands, and whose death gives rise to the claim for a casualty.

"The fallacy of the pursuer's argument appears to me to lie in the assumption that a

casualty becomes exigible in respect of every implied entry, and therefore that its amount must be determined in the same way as if the vassal had demanded a charter of writ of confirmation under the old law at the date of his infeftment. It becomes exigible under the statute in respect of the lands being in non-entry, or more correctly, in respect of their being in the position which under the old law would have entitled the superior to a declarator of non-entry; and it arises against the person who is then the last vassal's successor in the lands whether he is infeft or not. No implied entry is pleadable in defence, and therefore the intermediate entry of James Dunlop Hamilton creates no obstacle to the pursuer's demand against the defender for a casualty which became due in consequence of the death of the last entered vassal in 1877. But the amount of the casualty must depend upon the relation of the defender to this last vassal. If he is a singular successor only he must pay composition. If he in fact unites the characters of singular successor and heir he is liable only for relief whatever be the form of title upon which he is infeft."

The pursuer reclaimed.

After hearing counsel the Second Division remitted the case to the whole Court on minutes of debate.

The reclaimer argued—"In view of the facts the question for decision is not, it is thought, materially different from what it would have been if raised with James Dunlop Hamilton in 1877. The defender cannot, it is thought, claim to be in a better position than James Dunlop Hamilton. The pursuer, on the other hand, cannot contend that, if relief duty had been the appropriate casualty in 1877, composition is now payable in respect of the subsequent *mortis causa* transmission from the deceased James Dunlop Hamilton to his heir-at-law. Such being the condition of the question the pursuer contends that the casualty payable was clearly a composition. In 1874, when James Dunlop Hamilton, infeft on a singular title, became by force of statute entered with the superior, John Hamilton (2), his brother, was still in life; James could not then have served heir to him. He was merely at best his heir-presumptive—a very different relation from that of heir-apparent. Propulsion of a tailzied fee to an heir-presumptive is incompetent, and would doubtless infer an irritancy, as an alienation of ward lands to such heir would have inferred the casualty of recognition. By accepting an *inter vivos* conveyance an heir-presumptive does not incur the passive title *præceptio hæreditatis—Craigie* v. *Craigie*, December 4, 1817, F. C.; Stair ii. 11, 18; Ersk. ii. 5, 16. 'A disposition by one brother to another, or to a brother's son, the disponer for the time having no children, will not infer this title'—Stair iii. 7, 5; Ersk iii. 8, 90. The necessary result of the implied entry of James Dunlop Hamilton was to evacuate, once and for all, the mid-superiority which stood in John Hamilton's person. In other words, the implied entry of 1874 operated a change of the investiture. A new investiture was created, excluding the issue of John Hamilton, *per* Lord Brougham in *Stirling* v. *Ewart*, 3 Bell's App. 240. So also the law was stated by Baron Hume. Accordingly, when John Hamilton died in 1877, his brother James Dunlop Hamilton could no longer have served heir to him in the lands. He could no longer connect himself with the old investiture, which had become extinct in the lifetime of his brother. There was no estate left in the deceased to which he could have served. He could not, in fact, resort to the device familiar under the law as it stood prior to 1874, and which had been successfully resorted to in the previous stages of the present history, viz., that of tendering himself to the superior for entry as the heir of his brother, on payment of relief duty. If therefore this action had been raised in 1877, after the death of the said John Hamilton, the casualty payable by James Dunlop Hamilton, who was then alive, would, it is submitted, have been a year's rent of the lands. And the case may, as has been said, be treated as if action had been taken in 1877. . . . With regard to the Lord Ordinary's ground of judgment—It is true that by the statute implied entries are not pleadable in defence; but it is submitted that the converse, which is involved in the Lord Ordinary's reasoning, is not legally tenable, viz., that the pursuer may not (to the effect of extinguishing all prior investitures and preventing recourse to any extinguished investitures for the purpose of defeating the superior's claims) regard or plead upon implied entries of persons between the vassal who last paid a casualty and the defender in the action. . . . The restriction of the superior's full right goes no further than this, that his right to demand payment is postponed till the death of the vassal who last paid a casualty. It seems undoubted that a fee is filled by virtue of an implied entry, and that no change in the feudal relations of the superior and vassal necessarily takes place upon the death of the person who last paid a casualty—the period to which the payment of the casualty was postponed has arrived, and that is all. Where there have been intervening implied entries, one or more, no feudal relation whatever continues thereafter to subsist between the person sued and the vassal who last paid. The first implied entry swept away every vestige of estate or interest which the vassal who last paid had in the lands."—. . . The pursuer claimed that the cases he relied on went to establish that "the effect of the implied entry introduced by the Act of 1874 is to extinguish the barren mid-superiority, so as to make it impossible thereafter for the person so entered to serve heir to the mid-superior, even though this should result in his having to pay a higher casualty to the superior than if the Act had not been passed. In other words, the cases establish that an implied entry is the same to every legal effect as an express entry by charter or writ of confirmation under the old law and practice, subject to two equitable restrictions (1) the implied entry is not to entitle the superior to demand his casualty sooner than he could have done under the old law, and (2) it is not to be pleadable by the vassal in defence to the superior's claim for a casualty—*Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738. Bayley was in a position precisely similar to that occupied by James Dunlop Hamilton in 1877, when the mid-superior, to whom (but for his implied entry in 1874) James Dunlop Hamilton might have served heir, died, and the superior's

claim for a casualty emerged—*Rossmore's Trustees* v. *Brownlie*, November 23, 1877, 5 R. 201; *Lamont* v. *Rankin's Trustees*, February 28, 1879, 6 R. 739 . . . After the case of *Lamont* v. *Rankin's Trustees* had been decided by the Court of Session, but before the appeal came on for hearing in the House of Lords, an interlocutor was pronounced by Lord Curriehill, as Lord Ordinary, in a case of *Sturrock* v. *Carruthers' Trustees*, July 15, 1879, not reported, to which his Lordship added an elaborate and learned opinion. The case of *Sturrock* did not, as regards the point now in question, go to the Inner House, but the opinion of Lord Curriehill was laid before the House of Lords at the hearing of the appeal in *Lamont's* case, and is referred to in the judgments of the Lords. The appeal in the case of *Lamont* v. *Rankin's Trustees*, February 27, 1880, 7 R. (H. of L.) 10, was unanimously dismissed by the House of Lords—See also the opinion of Lord Shand in *Mounsey* v. *Palmer*, 12 R. 236, 246. The result of the decision in each case was to subject the defender in a singular successor's composition. The principle of law involved in all the decisions seems to be that the vassal once infeft, and impliedly entered on a singular title, under circumstances inferring liability for a singular successor's composition, if for some special reason he had then found it necessary to tender a casualty, is liable to pay a composition when the superior's claim emerges, notwithstanding that he may in the meantime have become the heir-at-law of the last person who paid a casualty. Applying this principle to the present case the pursuer submits that the decisions establish that James Dunlop Hamilton, infeft on a singular title in 1860, and impliedly entered with the superior in 1874, could not on his brother's death in 1877 have evaded payment of a composition by pleading that he had then become the heir-at-law of the deceased. It will not serve a vassal to plead merely that he is heir-at-law of the person who last paid a casualty—in order to his claiming successfully the privileges of an heir he must be able to point to an investiture in respect of which a casualty has been paid, subsisting at the time of his succession, and to show that, by virtue of that investiture, he is the heir, in the lands, of the person who last paid a casualty. The question is entirely one of investiture. A complete stranger in blood to the last entered vassal is entitled to be entered on payment of relief duty provided he be heir under an enfranchised investiture—'Where a proprietor entails his lands the superior is not entitled to the composition of a year's rent from every successive heir of entail who is not heir of line to him who stood last infeft, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular successor'—Ersk. ii. 7, 7; see also Lord Brougham in *Stirling* v. *Ewart*, 3 Bell's App. 242. The converse of this doctrine holds equally true—if the defender is not heir of an enfranchised feudal investiture subsisting for the time he must pay composition as a singular successor. If the above principle of law be not sound, the defender Mr Brownlie (in *Rossmore's* case) or the trustees (defenders in *Lamont's* case) might have escaped payment of a composition by disponing to the heir, and obtaining him infeft, and so impliedly entered, on his disposition; while in the case of *Ferrier's Trustees*, the defender George Bayley would have been entitled to insist *de plano* on his casualty being limited to a relief duty, on the ground that he was the heir-at-law of his deceased uncle. . . . Much reliance is placed by the defender and by the Lord Ordinary on the recent case of *Mackintosh* v. *Mackintosh* (the *Dalmigavie* case), March 5, 1886, 13 R. 692, as an authority, to the effect that the amount of the casualty must depend on the relationship of the vassal to the person who last paid casualty. The pursuer submits that that case decides no more than that the law prior to 1874, viz., that the superior was bound to receive, on payment of an heir's relief duty, the heir of investiture claiming an entry by confirmation, still holds good as regards such heir's implied entry by confirmation. . . . The implied entry in *Mackintosh's* case operated no change in the investiture. The investiture was in favour of the heirs whomsoever of Æneas Mackintosh. The testamentary disposition which came into operation and was impliedly confirmed after the death of Æneas Mackintosh was simply a disposition in favour of those heirs whomsoever. It would have been a different matter if Æneas Mackintosh had by an *inter vivos* deed disponed to his heir-presumptive and his heirs whomsoever and that disposition had been impliedly confirmed in his lifetime. In that case there would have been, as in the present case, a change of investiture, and composition would certainly have been due. . . . It is respectfully submitted that the cases of *M'Kenzie*, July 4, 1777, M. App. Sup. and Vassal, No. 2, and of *Marquess of Hastings* v. *Oswald*, May 27, 1859, 21 D. 871, do not help the defender's argument in this matter. In both these cases the vassal was an heir of entail. In a question, therefore, with the succeeding heirs of entail, he was no doubt in a sense bound to make up title, as was done, in conformity with the entail. But with this the superior had no concern. As between the superior and vassal the latter might quite well, had he chosen to do so, have made up title by service instead of under the entail, and indeed had he done so, and unchallenged possession of the estate for the prescriptive period had followed, the fetters of the entail might have been worked off, and the estate come to be held in fee-simple—*M'Dougal* v. *M'Dougal* (*Mackerston* case), 1739, M. 10,947; *Earl of Glasgow* v. *Boyle*, January 28, 1887, 14 R. 419, and cases there."

The respondent argued—"Two dates stand out as of chief importance, namely, 1877 and 1886. In 1877 John Hamilton second of Greenbank died. In the words of the pursuer's summons he was the vassal last vest and seised in the estate of Rodgerton. In 1886, again, the succession to the estate opened to the defender William Dunlop Hamilton. The defender is the heir-at-law of both his brothers—John Hamilton second of Greenbank and James Dunlop Hamilton—and he proposes to submit that it does not affect his claim in the present case which of these dates is taken for the purpose of ascertaining the extent of his liability to pay casualty to the pursuer. Under the precept of *clare constat* granted by the *curator bonis* of Miss Christian Anne Stuart of Torrance in favour of John Hamilton second of Greenbank dated 23rd February 1855 there is

contained this obligation—'And the heirs of the said John Hamilton, doubling the said feu-farm duty the first year of their entry to the said lands of Wester Rodgerton.' The defender is the heir of the said John Hamilton, and as such has always been willing to pay to the superior the casualty prescribed in the above precept. . . . The defender prefers to consider the question first, on the footing that there had been no intermediate implied entry. As already pointed out, this is the footing on which the summons proceeds. The declaratory conclusion narrates that John Hamilton second of Greenbank was the vassal last vest and seised in the lands, and seeks to make the defender liable in the casualty payable in respect of his death. The summons makes no reference to the intermediate implied entry of James Dunlop Hamilton but correctly connects the defender immediately with the vassal last vest and seised. The form adopted by the pursuer is that contained in the Schedule B of the Act, and its correctness is strongly shown by the decision in the case of *Mounsey* v. *Palmer*, 12 R. 236. . . . The pursuer founds on the terms of the 4th section of the Conveyancing Act 1874, but the defender submits that the pursuer's claim does not receive support from any of the four sub-sections into which that section is divided. The 1st sub-section provides for the abolition of renewals of investiture. By the 2nd sub-section it is provided that infeftment shall imply entry with the superior. This implied entry is to be 'to the same effect as if such such superior had granted a writ of confirmation according to the existing law and practice . . . but such implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands, or in the last charter, or other writ by which the vassal was entered therein.' The pursuer assumes that confirmation, according to the old law and practice, necessarily inferred, first, a title which was not only in form but also in substance and effect a singular title; and second, the payment of composition. This is a mistake. For example, it sometimes happened that a father disponed the family estate *inter vivos* to his eldest son. In such a case the son held what was in form a singular title, but if he went to the superior to have it confirmed he, being the heir, paid only relief duty. In short, the question between payment of relief and composition depended not on the form of the title, but on whether the person proposing to enter was or was not the heir of the previous vassal. This principle was the ground of decision either express or necessarily implied in the cases to be afterwards referred to of *M'Kenzie* v. *M'Kenzie*, 1777, M. App. *voce* Superior and Vassal, No. 2; *Brown* v. *Magistrates of Musselburgh*, 1804, M. 15,038; *Stirling* v. *Ewart*, 1344, 4 D. 684, *per* Lord Moncrieff, p. 735; *Marquess of Hastings* v. *Oswald*, 1859, 21 D. 871; and *Mackintosh* v. *Mackintosh*, 1886, 13 R. 692. By the 3rd subsection it is provided that 'such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feuduties, 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.' The effect of this section is to preserve entire the rights and remedies previously competent to the superior, so far as the same may not have ceased to be operative in consequence of the provisions of the Act or otherwise. The pursuer, however, seeks to read this sub-section and the other sub-sections as if his rights were thereby enlarged. There is no warrant for any such construction of the Act. By the fourth sub-section, in place of the old declarator of nonentry, it is provided that the superior may raise against the successor of the last vassal 'an action of declarator, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action.' In this case the defender is not seeking to plead either his own implied entry or that of his predecessor James Dunlop Hamilton in defence to the action. But he objects, as will presently appear, to the pursuer founding on James Dunlop Hamilton's implied entry with the view of making the defender liable in payment of composition rather than relief. Under this sub-section the point of time to be considered is the period when the action is raised, and the superior's right to relief or composition must be determined by the relation which the person sued bears to the vassal who has last paid. The standing investiture, which alone is known to the superior, is that of the last vsssal. Now, in the present case, the last vassal was John Hamilton second of Greenbank, and the defender is admittedly his heir. The defender submits therefore that he is bound only in payment of relief. Turning now from the recent Act, it is necessary to consider what was the effect of a writ of confirmation according to the law and practice in existence in 1874, when the Act was passed. Was it the law and practice that in every case a writ of confirmation involved payment of composition, or was it not rather the law and practice that in each case, notwithstanding the form of the entry, the casualty payable depended on the relation between the person seeking entry and the previous vassal; relief only if there existed the relation of ancestor and heir between them, and composition if there was no such relation? This precise question was very recently before the First Division of the Court in the case already mentioned of *Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692, following the cases of *Mackenzie*, M. App., Superior and Vassal, No. 2; *Marquess of Hastings*, 21 D. 871, and the *Magistrates of Musselburgh*, M. 15,038, therein referred to. In the case of *Mackintosh*, as in the present case, there was an implied entry on what was *ex facie* a singular title. In *Mackintosh's* case the pursuer maintained that 'the defender was entered on a singular title, and that could not be undone. If the heir was to claim an entry on payment of relief he must come in that character, but the defender could never again assume that character. . . . There was nothing here now for the heir to take up.' That argument was repelled in *Mackintosh's* case . . . The defender does not in any way question the decision in the cases of *Rankin's Trustees* v. *Lamont*, and *Rossmore's Trustees* v. *Brownlie;* he only disputes their application to the present case. In both these cases the question was whether proprietors who had made up titles which were not only in form but also in substance singular titles, were en-

titled to put forward the heir of the last entered vassal for entry with the superior. If they could have done so the heir would have taken up a mid-superiority, and they would have held from him as their mid-superior. But it was held both in the Court of Session and in the House of Lords that the effect of an implied entry under the Conveyancing Act of 1874 was to extinguish the mid-superiority so that there was nothing for the heir to take up, and no means therefore for interposing him or anybody else between the superior and the two proprietors. But in this case the defender does not propose or desire to interpose any person, or to shelter himself behind any person. He is content to meet the superior face to face, if only the superior will recognise him in his true character, namely, that of heir. The defender therefore submits that even if James Dunlop Hamilton, had the action been raised against him, would have had to pay composition on account of his title in 1860 having been made up at a time when he was not in the proper sense his brother's heir, it is clear that the defender is liable only in relief, the true and only question under the Act being what is the defender's relation to John Hamilton, the last entered vassal. So far, the case has been dealt with as if there had been no intermediate implied entry in the person of James Dunlop Hamilton. It remains to consider whether the implied entry effected by him can be treated as in any way varying the liability of the defender. The pursuer maintains that the implied entry of James Dunlop Hamilton must be taken into consideration, and that his implied entry enables him to distinguish the present case from that of *Mackintosh*, and to assimilate it to that of *Ferrier's Trustees* v. *Bayley*, on which he founds. But in that case the beneficial interest in the estate had passed to the defender's father, the son-in-law of the previous proprietor, and not his heir-at-law; in this case no stranger to the original destination has ever had a beneficial interest in the estate. In this case there has been no instance of a proper singular successor, because the defender, the heir of James Dunlop Hamilton, was infeft on the settlement of James Dunlop Hamilton, who again was the heir of John Hamilton the last entered vassal. But in truth the question raised in this case and in the case of *Mackintosh* was not brought under the notice of the Court in the case of *Ferrier's Trustees*. The best proof of this is that neither in the opinion of the Lord Ordinary nor in the opinions delivered in the Second Division are the cases of *Mackenzie* and the *Marquess of Hastings* mentioned. The sole question was whether George Bayley could enter to a mid-superiority. The Court thought it sufficient to hold that the defender's infeftment had destroyed the mid-superiority, which it was therefore a legal impossibility for him to take up. They did not consider the question whether the prior investiture was thereby affected. The defender therefore submits that if the question had arisen under a claim made against James Dunlop Hamilton at any time between 1877 and his death in 1886 he would have been clearly entitled to have escaped with payment of relief duty. If so, it necessarily follows that the defender, who is the heir-at-law of James Dunlop Hamilton, and also the heir-at-law of John Hamilton second of Greenbank, is not bound in any higher payment. If the question be taken as at 1877, then the defender is entitled to found upon the fact of his relation to James Dunlop Hamilton as his heir, and of James Dunlop Hamilton's relation as heir to John Hamilton, on the principle *heres heredis est meus heres*. If it be taken as at 1886, then at that date the defender was himself the heir of John Hamilton.

The consulted Judges returned the following opinions:—

Lord President—The facts of this case are few and simple. Prior to 1860 John Hamilton was owner of the *dominium utile* of the lands in question, and was entered with the superior. In 1860 John Hamilton disponed to his brother James, *on a me vel de me* holding, and James took infeftment but never was entered with the superior, and held base of his brother John down to the passing of the Statute of 1874. Between 1860 and 1874 therefore there were three estates in the lands—the pursuer's estate of superiority, John Hamilton's estate of mid-superiority, and James Hamilton's *dominium utile*. But after the passing of the statute there were but two estates—the pursuer's estate of superiority and James Hamilton's estate of *dominium utile*—and between the owners of these two estates there existed the direct relationship of superior and vassal, John Hamilton's estate of mid-superiority being extinguished *vi statuti*. In these circumstances the pursuer as superior became entitled to a casualty (composition or relief) for the entry of a new vassal, but was precluded by a clause of the statute from demanding payment until the death of his last-entered vassal, John Hamilton, the owner down to 1874 of the mid-superiority. James Hamilton, who had been the entered vassal of the pursuer in the *dominium plenum* since 1874 died in 1886, leaving a settlement of the lands in favour of his brother William Hamilton the defender, who took infeftment, and thus became and is now the entered vassal of the pursuer.

The right to the casualty which accrued to the superior in 1874 on the implied entry of James Hamilton has never been paid, nor has the defender paid any casualty in respect of his entry, and consequently a casualty is now demanded from him.

The only question is, whether the pursuer as superior is entitled to a composition or to relief duty only?

As regards the facts, this case is admitted to be on all fours with *Ferrier's Trustees* v. *Bayley*, 4 R. 738. *Mutatis nominibus* the facts are identical.

In that case Lord Curriehill found the defender, who corresponds to the present defender William Hamilton, liable in a composition, and the Second Division by a majority adhered to his judgment. This judgment has been recognised as settling the law in several subsequent cases, and in particular in *Rankin's Trustees* v. *Lamont*, which was appealed to the House of Lords. The noble and learned Lords who advised the House, in affirming the judgment of this Court, reviewed all the cases on the subject, and determined, after the fullest consideration, that the rule adopted in one and all of them was sound law.

But I understand the Lord Ordinary and the Judges who agree with him to say, that in *Ferrier's Trustees*, as distinguished from the other cases which followed, the heir of the last vassal tendered for entry with the superior was the individual who had been impliedly entered under the statute, or, in other words, that he was at once proprietor of the *dominium utile* and heir of the deceased owner of the extinguished mid-superiority. This is quite true, but the fact was prominently in view of the Court in giving judgment, and the distinction was clearly stated by Lord Curriehill who thought the case all the more important, because if a person in the position of the defender were entitled to offer *himself* as heir, it would be very difficult to refuse to another vassal impliedly entered the right to offer the last vassal's heir for entry though the last vassal was a stranger to him. In like manner Lord Ormidale, one of the Judges of the Second Division who affirmed Lord Curriehill's judgment, very pointedly states that "there is no longer any room or opportunity for the defender tendering himself or any one else as heir to a mid-superior whose right and title are entirely gone."

It seems to be thought that this distinction was not sufficiently pressed on the Court. But I am not prepared to disparage the authority of a careful and well-considered judgment on the ground that the case was inperfectly argued.

I am therefore of opinion that we are bound to alter the Lord Ordinary's judgment on the authority of *Ferrier's Trustees* v. *Bayley*.

But assuming the question to be open I am of opinion that the pursuer is entitled to the composition for which he sues.

When the Act of 1874 came into operation, James Hamilton, who had previously held of his brother John as his immediate superior, was at that date converted into the vassal of the pursuer, and that immediately by the operation of the statute. The postponement of the term of payment of the casualty did not and could not keep alive the estate of mid-superiority in John Hamilton, which was immediately extinguished. James was no doubt heir-presumptive of his brother John, but he could take nothing in that character while John was in life; and on John's death in 1877 John had no estate in the lands in question to which James could succeed. He was heir so far as regards propinquity of blood, and he might have served heir in general to John, but there was no estate which he could take up by special service, and if he had asked the superior to enter him by precept of *clare constat*, he would have been met with the conclusive answer that he was already entered with the superior *vi statuti*, and could not be entered a second time, and in a different character.

The existing investiture prior to 1874 was created by an entry obtained by the defender's grandfather in favour of himself and his heirs general, and the estate thereafter passed through a series of heirs in terms of the destination, which was enfranchised by the superior when he entered the defender's grandfather. John Hamilton, who died in 1877, was the last heir who held under that investiture, for he had been deprived of the estate before his death by the operation of the statute, and nobody could take up the succession as heir to him, or (consequently) as heir of investiture. A new investiture therefore necessarily came into existence with the implied entry of James Hamilton in 1874 requiring to be enfranchised, which of course can only be done on payment of a composition.

The Lord Ordinary's judgment proceeds very much on the supposed application to the present case of the judgment of the First Division in the case of *Mackintosh* v. *Mackintosh*. But the principle of that judgment is in my opinion entirely inapplicable here. It was settled law before the Statute of 1874 that if the person entering with the superior was the heir of the existing investiture, he was entitled to be entered on payment of relief only, although he had made up his title to the estate in a form properly applicable to a singular successor. The form of his title was held not to deprive him of his character of heir. The same rule was in the case of *Mackintosh* held to be applicable in implied entries under the Statute 1874. But the important fact in that case was that the person impliedly entered was the heir of an existing investiture, and might have served heir in special under the investiture. Mr Æneas Mackintosh, the last entered vassal, made a *mortis causa* disposition of his estate in favour of his nephew Mr Keir, who was one of his two heirs-portioners. Mr Keir naturally made up his title by taking infeftment on his uncle's conveyance, because one-half of the estate he could take only by virtue of the conveyance, and not as heir. But as regarded the other half *pro indiviso*, he held the character of heir of the vassal last entered, and heir of the existing investiture. He was, by taking infeftment on the conveyance, impliedly entered with the superior as disponee, but his character as heir entitled him, according to the judgment, to pay relief duty only as regards one-half *pro indiviso* of the estate which his uncle left him. Nothing occurred in that case to affect the position of the uncle as last-entered vassal and as heir of investiture, and his right as such passed (*quoad* one-half *pro indiviso*) by the operation of the law of succession to the defender as his heir.

The case of *Mackintosh*, for these reasons, appears to me to stand in clear contrast to the present, because it was attended by none of the difficulties arising from the operation of the Statute 1874.

Lord Mure—I concur in the opinion of the Lord President.

Lord Shand—The question in this case being whether the pursuer is entitled to payment of composition, or is only entitled to relief duty, it is essential to bear in mind the rule or principle which determines in the case of each entry with a superior, whether the superior has right to the larger or only to the smaller payment.

That rule may be stated in this way—Where the entry, which before the Statute of 1874 was given by a deed under the superior's hand, was merely a recognition or renewal of the existing investiture, the vassal was only liable in payment of relief duty; but where the superior was called upon to enfranchise a new investiture—that is to say, to grant a deed which not merely recognised and admitted the heir of the existing investiture, but admitted a singular successor—then the new vassal, as the condition of the

enfranchisement of this new investiture, was liable to pay a composition of a year's rent of the subjects.

The Statute of 1874 did away with the necessity for writs or charters by progress, for the infeftment of an heir or purchaser of any property held under a superior was thereby declared to be duly entered with the superior, to the same effect as if the superior had granted a writ of confirmation. But that statute made no change on the rule of payment I have just stated. It is not maintained by anyone that if the entry of the vassal which results from his taking infeftment is an entry not under the investiture which the superior last sanctioned or renewed, but is a new investiture, the vassal can only be required to pay relief duty. Composition in that case must be paid as the appropriate condition or price of the confirmation, or it may be of the creation of the new investiture. Even in the series of cases terminating with that of *Lamont* v. *Rankine's Trustees*, 6 R. (H. of L.) 10, in the House of Lords, no view to the contrary of what has now been stated was suggested. It was not maintained in these cases that if the vassals were unable to get behind the statutory entry with the superior resulting from infeftment they could resist the claim for composition, for the vassals entered were all singular successors. The struggle was entirely to get rid of the effect of the entry by bringing forward the heir of the vassal under the last investiture recognised by the superior, and so to make the payment to the superior that of relief duty only. On that question, the decision of which has an important bearing on the argument in this case, it was held that, after an entry taken by infeftment constituting a new investiture, the vassal could no longer adopt the device or course of bringing forward the heir under the former investiture, either to take any place in the title or to take away the superior's claim to composition and reduce it to a claim for relief.

The decision, then, of this case seems to me to depend entirely on this consideration:—Is the entry which the defender, the vassal, has obtained by virtue of his infeftment, the enfranchisement or recognition by the superior of a new or different investiture from that which the superior last recognised, and in respect of which he obtained payment? If it be, then according to the law, which has not been in any way affected by the statute of 1874, composition is due. If, on the other hand, the entry is only that of an heir under the investiture last recognised by the deed of the superior, then relief duty only is exigible.

The facts are very simple. The position in the title of three persons only requires to be considered.

1. John Hamilton (called second of Greenbank) was the last entered vassal in respect of whose entry a payment was made to the superior. He was never the owner of the property, but he had been put forward by the true owner, and had by agreement taken a place in the title in order to save the true owner a payment of composition,—as his father has also come forward on a previous occasion. This John Hamilton, as his father's heir, in February 1855 obtained a precept of *clare constat* from the superior on payment by the true owner of relief duty, and he was infeft in June of that year.

2. John Hamilton in 1860 conveyed the property to his immediate younger brother James Dunlop Hamilton, who was infeft on the conveyance in August of that year. This deed was granted at the request of the true owners of the property, who held the right of property on *de me* holdings, and indeed in implement of certain deeds granted by them, which are narrated in the conveyance, and mentioned in articles 2 and 3 of the condescendence. James Dunlop Hamilton was heir-presumptive only, and of course not heir-apparent of his brother John Hamilton, the last entered vassal. On the passing of the Act of 1874, he became the entered vassal in virtue of his infeftment in 1860. John Hamilton survived till 1877, when the superior's claim to composition or relief duty emerged, although payment has not been demanded or sought to be enforced till recently.

3. In the meantime James Dunlop Hamilton having died in May 1886, leaving a general disposition and settlement in favour of his immediate younger brother William Dunlop Hamilton, he in his turn took infeftment on that deed in August 1886, and so entered with the superior. He is not only the heir-at-law of James Dunlop Hamilton, from whom he derived the property, but it so happens that, as his brother John in 1877 also died without issue, he is heir-at-law also of John, the last entered vassal, who paid for an entry.

These being the facts, the question recurs—Is the entry for which a payment is now demanded that of a successor under singular title—has the superior impliedly recognised and enfranchised a new investiture, or, on the contrary, is the succession that of an heir of the vassal last entered who paid a casualty, and has the superior under the statute merely recognised or renewed the investiture existing when he received the last payment for entry?

The payment became exigible on the death of John Hamilton in 1877, but the demand was not made against James Dunlop Hamilton then, or during his survivance to 1886, and now his brother, the defender, is in the position of vassal infeft. The claim therefore is properly made against him as the proprietor in possession of the lands, and it is so made in respect of his own entry by the infeftment he took. This is, I think settled by the case of *Mounsey* v. *Palmer*, 12 R. 236. It is true that between 1877, when John Hamilton died, and 1886, when James Dunlop Hamilton died, the superior might have claimed a payment from the latter for his entry by infeftment, followed by the Statute of 1874, but he omitted to make that claim, and the entry to be now paid for is that of the defender. The state of the facts was entirely similar in the case of *Mounsey*, in which the opinions were unanimous to the effect that though the superior might have made a claim, for a time, against an intermediate vassal who survived the vassal who had last paid a casualty, yet as another vassal had been entered in consequence of the infeftment he had taken, the claim must be made against him, and as for his own entry.

I have come to the conclusion, differing from the Lord Ordinary, that the defender is liable to the pursuer in payment of composition and not of relief only, for I think it is clear that the claim for a payment is made not in respect of an

entry under the old investiture which the superior had recognised, obtained by an heir taking or entitled to take an entry under that investiture, but in respect of a new investiture which under the statute the superior must be taken as having recognised and confirmed.

The investiture on which the last casualty was paid was in favour of John Hamilton and his heirs, and if James Dunlop Hamilton, the intermediate vassal, had taken the property not by a *de presenti* conveyance in 1860, but by service to John Hamilton, or under his *mortis causa* deed in 1877 when he died—and the defender in his turn had taken the property as the heir of James Dunlop Hamilton—then there would have been a continuance of the old investiture, and the appropriate payment would have been relief duty. But what occurred was quite different. James Dunlop Hamilton did not take as his brother's heir, and was not so entered when the Act of 1874 passed. He was then entered, but he was not then his brother's heir. This is clear, for his brother might have had issue after that date. He was an heir-presumptive only, not an heir-apparent, and the entry he obtained by virtue of the conveyance in his favour, granted in the circumstances already explained, was clearly an entry on a new investiture. From 1874 till 1877, during his brother's lifetime, he possessed the property as an entered vassal, not as his brother's heir to whom he had succeeded, because his brother was still alive, nor as his brother's heir to whom the succession under the existing investiture had merely been propelled, for he was not his brother's heir-apparent during that time. It is therefore, I think, not doubtful that if after John Hamilton's death in 1877 the superior had demanded a payment from James Dunlop Hamilton as for his entry composition would have been due for the change of investiture. It would have been no good answer to the demand to say, John Hamilton having died without issue, it had turned out that James Dunlop Hamilton had on that event become his heir of line. The entry had been obtained in 1874. The investiture then was a new one, and the superior's right to a composition arose from the implied statutory confirmation of that investiture, although he was not entitled to demand payment of that composition "sooner than the death of the last entered vassal." By the fact of entry the new investiture was established and confirmed, and the vassal who had been so entered for three years could not on his ancestor's death thereafter successfully seek to undo the entry he had got as a singular successor, and either in fact or in theory enter as an heir under the old investiture, on payment of a casualty only, as if he had taken the property as his brother's heir of line. Such a proposal or suggestion, if made, could not have been successful, for it would have been open to the same answer on the part of the superior as was made in the series of cases ending with that of *Lamont*, already referred to. In these cases, after the various defenders had been themselves entered under the statute as vassals, they proposed to put forward the heir under the former investiture as willing to enter, and so to revert to the old investiture—or at least to do so in theory—and thus reduce the payment of composition to that of relief. It was held that this proposal was inconsistent with the entry which had been already taken in each case. So by clear analogy it follows that James Dunlop Hamilton on the death of his brother could not present himself as heir of his brother under the old investiture, because from 1874 to 1877 he had been in fact entered on a singular title and under a new investiture.

Then, is the defender in any different position? I think clearly not. He no doubt has taken the estate as the heir of his brother James Dunlop Hamilton, on whose death he succeeded, and if his brother had by a payment of composition, as on his entry, obtained an enfranchisement of the new investiture, then of course as an heir of that investiture the defender would have paid relief only for his own entry. In that case the superior would have received first a payment of composition, and now a payment of relief, in place of the single payment of composition to which I think he is now entitled. But the payment now demanded is the first that is asked since and in respect of the new investiture. The defender cannot plead his character of heir under the old investiture, because the title which his brother James Dunlop Hamilton and he have made up, and of which they have already under their infeftments obtained confirmation precludes this. Indeed, if the view already stated be sound, neither the late James Dunlop Hamilton, nor anyone taking as his heir, could do otherwise under the new investiture after 1874, when it was confirmed by the statute, and so I am unable to see how the defender can now revert to the old investiture, and claim the benefit of a payment of relief only as an heir under it.

In one way, and in one way only, could the payment be reduced to relief, and that is by obliterating from the title as an element in the decision of this question the intermediate conveyance and infeftment in favour of James Dunlop Hamilton, and the superior's confirmation of these effected by the Statute of 1874. If this could be done, then it might be maintained that, looking only on the one hand to the person who was last entered and who paid for an entry, and on the other to the person who is now last entered and from whom a payment is demanded, if the latter should happen to be the heir of line of the former, relief only shall be exigible, even although there have been one or more intermediate transmissions, with infeftments following on transactions of purchase and sale. I understand that if other arguments fail this view is contended for by the defender, who also pleads that the decision in the case of *Mackintosh*, 13 R. 692, enables him to maintain successfully that the mere fact of his entry under a title by conveyance will not preclude him from taking the benefit he can claim in his character of heir, and that the payment demanded will depend on his relationship and character of heir of line of the person who last paid a casualty.

Laying out of view for a moment the case of *Mackintosh*, the contention of the defender would, I think, lead to extraordinary and novel results in the law applicable to casualties—results which it would be most difficult to show that the provisions of the statute have brought about. Take the very case in hand, and suppose that the entries of James Dunlop Hamilton and of the defender had taken place, as they did, not by virtue of the statute, but by charters of confirma-

tion of the infeftments, I apprehend it to be too clear for argument that the pursuer must be entitled to a composition, and if the confirmation had only been asked by the defender of both infeftments at the same time he must have paid the composition. The superior's right would have arisen because of the new investiture confirmed. The only way in which that result could be avoided would have been by not so taking an entry at all. The authorities have now, however, firmly settled that if an entry with its benefits be obtained by infeftment taken it must be accompanied by any disadvantages which attend it, such as the exclusion of the right to bring forward an heir under the former investiture, or (what is the same thing) a person already entered under a new and confirmed investiture seeking to set up his character of heir under the old and sopited investiture so as to reduce the payment of relief to composition.

The argument in favour of the contention that when the question of payment for an entry arises the intermediate entries between that of the person who last paid a casualty and the person against whom the demand is made shall all be disregarded is founded, I understand, on the provisions of the statute, sec. 4, sub-sec. (3), providing 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," and sub-sec. (4) that "no implied entry shall be pleadable in defence" against an action of non-entry and for payment of any casualty exigible at the date of such action. It is argued that the result of these enactments is not only that the superior can make no claim in respect of intermediate entries till the death of the person who last paid a casualty, but that however numerous these entries may be, and even of purchasers on singular title, yet if when the death of the vassal who last paid occurs his heir of line happens to have repurchased the property and become the last person infeft, relief only is due. The contention is said to be supported by the provision that "no implied entry shall be pleadable in defence," and the argument is said to derive some force from the provisions of sub-sec. (4) of sec. 3 of the statute as to the superior's remedy by action of non-entry and for payment of a casualty, and the relative form of summons given in Appendix B of the statute.

What, then, is the meaning and effect of the provision that "no implied entry shall be pleadable in defence" against the action for non-entry and a casualty? Simply this—That the entered vassal when sued shall not be able to plead either his own or any intermediate entry as excluding the claim. He cannot say that he and the other intermediate vassals having been already entered no payment can thereafter be demanded. The clause is one to protect the superior, not to affect him injuriously. If it be said that as he so far obtains advantage by it, because the vassal cannot plead the implied entries, it follows that he cannot on the other hand found on the entries, the answer is, the statute contains a limited enactment, or provision, and there is no warrant for giving to it any effect beyond its clear terms. The words are, "No implied entry shall be pleadable in defence." But it is plain that the superior must be entitled to plead, and necessarily does plead, the defender's own entry where he has taken infeftment, for that entry is the very ground of the superior's claim to the payment of the casualty, which he can enforce by having recourse to the rents. Moreover, after all it does not appear to me that the superior does in any proper sense plead the implied intermediate entry or entries in such a case as this. When he makes his claim the defender answers the demand by saying he is heir of investiture of the last vassal who paid a casualty, but his own titles, which he cannot ignore, show that the formerly existing investiture has been superseded. The heir under the old investiture cannot as such complete a title to the property. A service in special to the last person who paid a casualty could carry nothing, and could never complete a title, and a superior is entitled to require such a service by anyone claiming the character of an heir of investiture—Menzies' Lectures (3rd ed.), p. 814, and authorities there cited. Again, if instead of intermediate entries the defender had taken infeftment on an assigned precept of sasine, and the progress disclosed a new investiture and singular title, in that case the superior without any intermediate entry could certainly demand a composition, because the infeftment confirmed carried out a new investiture.

I attach no importance to any argument founded on the form of the summons appended to the statute, and employed in this case That form properly proceeds on the view that a casualty becomes payable on the death of the last entered vassal who paid a casualty. No one can suggest that "the death of C" in the schedule means the death of an intermediate vassal, although the expression used is, "who was the vassal last vest and seised." The form is quite suitable for the case—it is probably the common one—in which there are no intermediate entries. It might have been better to have added in brackets after the words, "who was the vassal last vest and seised in all and whole the lands of X," such words as ["where there have been intermediate entries, add, 'and who paid the last casualty'"]. But it is not surprising that the schedule should not have entered into the matter with such detail. It would indeed be a very strong proposition to maintain that because the person "C," who did pay the last casualty, is only described as the vassal last seised in the lands (which will be true in most cases), and is not also described as having paid the last casualty, as he did, that therefore the intermediate entries are not to be looked at even as links in the title, or for the purpose of ascertaining whether the vassal against whom the claim is made takes under the old investiture or under a new investiture and a singular title, on the confirmation of which a composition has never been paid to the superior.

The case of *Mackintosh* is clearly distinguishable from the present, and cannot, I think, affect the decision to be now given. In that case the defender had completed his title by taking infeftment, following on a testamentary settlement by his uncle. He was his uncle's heir-at-law as regarded one-half of the lands, and to that extent it was held he was only bound in payment of relief for his entry. But in that case there was no intermediate entry, or any change of the

investiture which had been already enfranchised when the defender's uncle had paid for his entry. The defender could have entered by special service and infeftment, and it was held in conformity with the former law that the mere form of the title he made up did not render him liable to more than the relief duty payable by an heir of the existing investiture. The Lord Ordinary seems to indicate that the authority of the case goes beyond what has been now stated, for his Lordship observes—"It is said that the decision applies only where the vassal is in a position to enter as heir, although he has chosen to complete as a singular successor. But this is not consistent with the judgment. Both in the case of *M'Kenzie* and of the *Marquess of Hastings* it would have been impossible for the disponee, who was in fact the heir of the last investiture, to effect an entry in that character. The Lord President points out, in explaining the case of *M'Kenzie*, that 'the form of entry was necessarily that applicable to a singular successor or disponee. Nevertheless the Court decided that he was entitled to the full benefit of his character as heir, and must be entered on payment of relief duty only.'" But, as is pointed out in the argument for the pursuer, in both of the cases of *M'Kenzie* and the *Marquess of Hastings* the defender was an heir of the existing investiture under entail destinations, which had already been enfranchised by the superior, a circumstance which was prominently before the Court in the case of *Mackintosh*. In *M'Kenzie's* case, M. *voce* Sup. & Vas. 2 App. 7, the interlocutor of the Court finds that the superior "is obliged to enter the defender, who in this case is the heir of the former investiture, in terms of the tailzie," upon relief and not composition, reserving the superior's claim to composition "on the entry of any future heir of tailzie not an heir of the investiture prior to the tailzie;" and in like manner in the case of *Hastings*, 21 D. 872, the interlocutor expressly proceeds on the basis of "the defender being the heir of the last investiture," and adds a reservation in the same terms as in *M'Kenzie's* case. These cases and that of *Mackintosh* therefore are in sharp contrast with the present. They were decided on the ground that the defender in each case was the heir of the last and still subsisting investiture, while in the present case the last investiture has been extinguished and a new investiture created and confirmed, the defender being the person liable for the composition payable in respect of this. The case is indeed in all its circumstances identical with that of the leading case of *Ferrier's Trustees* v. *Bayley*, in which the defender was held liable in composition. It is true that the defence here maintained was not pleaded in that case, but if it had been well founded, it is very difficult to suppose it would have escaped the observation not only of the bar but of the bench, by so many of whom the case has been considered and discussed.

I am, on the whole, of opinion that the judgment of the Lord Ordinary should be recalled, and that decree should be given against the defender for payment not of relief, but of composition.

Lord Adam—The question in this case is whether the defender William Dunlop Hamilton is liable to the pursuer in composition or relief in respect of his entry to the lands of Greenbank.

The material facts are few and simple. The pursuer and his predecessors were and are superiors of these lands.

John Hamilton was infeft in the *dominium utile* of these lands conform to instrument of sasine recorded on 25th of June 1855, proceeding on a precept of *clare constat* from the superior in favour of himself and his heirs.

John Hamilton was therefore duly entered with the superior. He died in 1877.

John Hamilton conveyed the lands to his immediate younger brother James Dunlop Hamilton, conform to disposition in his favour dated 8th and recorded 9th August 1860.

James Dunlop Hamilton died on 31st May 1886, leaving a general disposition and settlement, dated 28th May 1886, in favour of his brother the defender William Dunlop Hamilton. William Dunlop Hamilton is infeft in the lands conform to notarial instrument in his favour, recorded in the Register of Sasines on 17th August 1886.

Such being the state of the titles, I do not think there can be any doubt that, prior to the passing of the Act of 1874, the defender William Dunlop Hamilton would have been liable in relief duty only.

The superior might, at any time after the death of John Hamilton in 1877, have brought a declarator of non-entry against James Hamilton during his life; but not having done so, his only course now would have been to have brought a declarator of non-entry against the defender, and he being admittedly the heir of the last entered vassal John, would have been liable in relief duty, although possessing on a singular title in conformity with the case of *Mackintosh* v. *Mackintosh*.

The main objects of the provisions of the Act of 1874, now in question, was undoubtedly to put an end to the creation of barren mid-superiorities, and it did so by declaring that every proprietor infeft in the *dominium utile* of lands should be held as duly entered with the over-superior.

On the passing of the Act of 1874, accordingly, James Dunlop Hamilton became immediately entered with the superior in virtue of the entry implied by the Act, with the result that John ceased thenceforward to be vassal in the lands, James becoming such vassal; and on James's death, the defender William became, in like manner, entered with the superior and vassal in the lands.

But while thus putting an end to barren mid-superiorities, I think the purpose of the Act was to interfere as little as might be, consistently with so doing, with the pecuniary rights and obligations of the superior and vassal, and I think that it has left them very much on the old footing.

Thus the 3rd sub-section of the 4th clause enacts —"All rights and remedies competent to the superior under the existing law and practice for recovering, securing, and making effectual such casualties, feu-duties, and arrears, . . . and all the obligations in the feu rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative, in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming."

Then after this general enactment as to the rights of the superior there follows the provision for the protection of the vassal—that an implied entry should not entitle a superior to demand a casualty sooner than he could by the law prior to the Act have required the vassal to enter, or to pay such casualty irrespective of his entering.

Then follows sub-section 4, under which this action is more particularly brought, and which provides the only mode in which a superior's claims for casualties can be enforced—and therefore gives the measure of these rights, because, if a right cannot be enforced, it has practically no existence.

This sub-section introduces a new form of action in place of a declarator of non-entry—a declarator of non-entry being obviously no longer applicable, because no lands could thereafter be in non-entry. But although the form of the new action of declarator and payment is different, the effect is the same as that of the former declarator of non-entry.

The only person who is entitled to insist in it is a superior, "who but for the passing of this Act" would be entitled to sue a declarator of non-entry against the successor of the vassal in the lands—that is, the vassal whose death but for the passing of the Act would have caused the lands to be in non-entry. The only person against whom it can be raised is "such successor," and it is enacted that a decree for payment in such action should have the effect of and operate as a decree of declarator of non-entry, according to the "now existing" law.

Who, then, in this case, is the vassal in the lands, in the sense of the Act, and who is his successor?

It is not disputed that John Hamilton is the "vassal in the lands" in the sense of the statute, and the action is brought against the defender, as his successor, on that footing.

But John Hamilton was not the vassal in the lands, except on the assumption that an implied entry is to have no effect in this question, because if it is to have effect, then James and not John would have been the "vassal" in the lands.

But if John is to be treated as vassal in the lands for the purposes of this case, then it is as his successor, and his successor only, that the action can be insisted in against the defender. But in calling the defender as successor of John, the Act does not mean merely that at some previous period John was proprietor of the lands, but that the defender is to be treated as John's immediate successor in title. If John is the vassal, and the defender is his successor, it is surely the terms of John's investiture which must be looked to to see in what relation his successor stands to him. If that be done, as the defender is admittedly the heir under John's investiture, he is liable in relief duty only.

I confess that I cannot follow the reasoning by which it is proposed, in an action brought against the defender, as the successor to John, as "the vassal last vest and seised in the lands," to decern against him for a composition on the ground that he is not the successor of John in the lands because John had ceased to be vassal, and therefore could have no successor, but that he is the successor to James under a new investiture alleged to be created by James's implied entry.

It is quite true that as a matter of title James was John's successor and was duly entered, and that the defender is James's successor and is also duly entered, in virtue of their respective implied entries, but it appears to me that that has nothing to do with the present case, in which, for the purposes of the case, John is assumed by statute, contrary to the fact, to be the last entered vassal, and the action is, in the terms of the statute, brought against the defender as his successor.

It humbly appears to me that there are only two ways of looking at the case—either James's implied entry is to receive effect, or it is not. If it is, then John was not the vassal in the lands—he had thenceforth no connection with them, and could have no successor therein, and there can be no decerniture against the defender as his successor; or else the implied entry is not to receive effect, and in that case, John is to be treated as vassal in the lands, and if so, then the investiture under which he held the lands must be looked to to see whether the defender is heir of the investiture or a singular successor. I cannot see that the superior is entitled to found on James's implied entry to the limited effect only of showing that the defender is not John's successor, which he can only do by showing at the same time, and for the same reason, that John was not the vassal last vest and seised in the lands. It appears to me that the statutory action proceeds on the footing and assumption that the vassal who last paid a casualty was the last entered vassal in the lands, and it further appears to me that the superior cannot plead or found on implied entries, because that would be to displace the foundation of his action. In short, in an action directed, and necessarily directed, against the defender as the successor of John, I do not see how the pursuer can obtain a decree against him on the ground that he is not John's successor. I think, therefore, that the superior is precluded by the form and tenor of the statutory action from founding on intermediate implied entries. But, on the other hand, if the vassal were to be entitled to found on such entries, the effect would be to exclude the action. It was necessary, accordingly, to provide against that contingency; therefore the Act enacts "that no implied entry shall be pleadable in defence against such action," and that is all that was required to exclude any reference to implied entries on either side.

Further, it appears to me that a consideration of the form of action given in Schedule B, and which has been rightly adopted by the pursuer in this case, shows that the construction I have put upon the statute is the right one.

The summons seeks to have it found and declared that in consequence of the death of John Hamilton, who died upon the 27th February 1877, and who was the vassal last vest and seised in all and whole, &c., a casualty, being one year's rent of the lands, has become due to the pursuer as superior of the said lands, and that the said casualty is still unpaid, and that the full rents, maills, and duties of the said lands after the date of citation hereon do belong to the pursuer as superior thereof until the said casualty and expenses aftermentioned be otherwise paid to the pursuer. Had the form in the schedule been strictly followed, the summons should have

been thus expressed—"A casualty, being one year's rent of the lands, became due to the pursuer as superior of the said lands, upon 27th February 1877, being the date of the death of the said John Hamilton," and so on as in the summons.

It will be observed that the summons proceeds upon the assumption, in conformity with the form in the schedule, that John was the vassal last vest and seised in the lands; but this he certainly was not, if James's implied entry is to be taken into consideration. Then the pursuer is directed to describe or refer to the lands, and if the casualty due is a taxed composition or an heir's relief duty, to say, &c. Now this surely is meant to refer to the investiture of the vassal last vest and seised before referred to, and not to any investiture under an implied entry, and then it is said that a casualty became due upon the day of , being the date of the death of the said vassal. All this appears to me to be framed in conformity with the provisions of sub-section 4, and for the purpose of giving effect to them, and of leaving the superior's and vassal's rights and obligation, as regards casualties, just as they were before the statute.

If, then, John's investiture, as the vassal last vest and seised, is to be looked to, the question is whether the defender, as John's successor under that investiture, would "but for this Act" have been liable in relief duty only. That would depend on whether he was heir under that investiture, notwithstanding that he held the lands under a singular title. That he is heir is not disputed, and therefore I think the case of *Mackintosh* v. *Mackintosh* directly applies.

I think the case is quite different from *Rankin's Trustees* v. *Lamont* and that class of case. In these cases it was proposed by proprietors who were singular successors, but not also heirs under the investiture, to put forward the heir of the last entered vassal for entry with the superior, while here the defender is himself the heir of the last entered vassal; in the sense of the statute he is duly entered with the superior, and desires to put forward no one for entry with the superior.

I think, however, that the facts of the case of *Ferrier's Trustees* v. *Bayley* would have raised this question, but I am equally clear that the question was not raised or decided, probably because it occurred before the recent case of *Mackintosh* v. *Mackintosh*.

But it is said that a casualty became due in 1874 for the implied entry of James, that a new investiture necessarily came into existence with this implied entry, that this new investiture required to be enfranchised by payment of a composition, that the superior was precluded from demanding payment by a clause in the statute until the death of the last entered vassal, John, in 1877, but that he was now entitled to demand payment of it.

I do not, however, think that a casualty became due for the implied entry of James in 1874. The statute does not say so. But I suppose it is inferred from the fact that, as the law previously stood, if a vassal applied to the superior for a new investiture the superior was not bound to grant it, except upon payment of a casualty, even although the lands were not in non-entry. This, however, was an entirely optional proceeding on the part of the vassal, who chose to pay for a new investiture, and I do not think that it is to be necessarily inferred from it that a casualty is due for an implied entry.

As the law stood previous to the statute, lands became in non-entry, and a casualty became due, only on the death of the last entered vassal. The casualty became due because the lands were in non-entry, and was paid in order to obtain an entry. But no lands are now in non-entry, and if the whole matter had not been specially provided for by the statute, I could quite understand a vassal successfully resisting a claim for a casualty, in respect of an implied entry, on the ground that his lands were not in non-entry, because he was duly entered by statute, and that he was not bound to pay the superior for an entry which he had obtained without his intervention.

The statute, as I have remarked, does not say that such a casualty is to become due. Neither does the statute say anything about payment of such a casualty being postponed. What the statute says is that the superior "should not be entitled to demand any casualty sooner than he could by the law prior to this Act." That is a different thing from merely postponing payment of a casualty already due. As the law previously stood, a casualty became due upon the death of the last entered vassal; but when the superior came to demand his casualty, the question then arose, whether the vassal was liable in composition or relief, and that depended on the state of the title at that time, and not at the date of the lands falling into non-entry. If, when the demand was made, the proprietor of the lands was in fact heir under the existing investiture, he was liable in relief only, although he might not have been the heir when the lands fell into non-entry; and so also, if a composition was payable, the amount would be calculated, not according to the rental of the lands at the date of the lands falling into non-entry, but at the date of the action.

I think, accordingly, that when the statute enacted that the superior should not be entitled to demand a casualty sooner than he could by the law prior to the Act, the intention was not to postpone payment merely of a casualty, but to leave the parties on the same footing as before the Act, when a demand for a casualty was made.

Suppose the superior had raised after the death of John, an action of declarator and payment against James for payment of a casualty, it must have been directed against him as successor to John. But James undoubtedly at that time—John having died without children—would have been the heir under John's investiture, and so liable in relief-duty only. If John had left children James would not have been heir, and would have paid composition, just as he would have done before the Act. I do not think that it was the intention of the statute, that when a vassal conveyed the lands to an heir-presumptive, a new investiture should be created. It remained to be seen when the demand for a casualty was made, whether that was so or not. If it then appeared that the vassal was heir under the old investiture, no new investiture was created.

As I understand the matter, a new investiture, such as a superior could refuse to enfranchise except on payment of a composition, implies the

introduction of stranger substitutes, who as heirs under the investiture would be liable in relief duty only, and whose introduction therefore into the investiture would possibly prejudice the superior's rights by depriving him of composition.

Such a question arose in the case of the *Marquess of Hastings*, 21 D. 781, and might arise under an implied entry, and might entitle the superior to a composition, although the heir was also the heir under the old investiture; but no such case arises here.

I may say, although the case has not been so treated, that the only claim made on record in this case is for a casualty in respect of the entry of James, but which was not demanded during his life. The defender is clearly not liable for it, and I think that on that ground he ought to be assoilzied.

If that casualty had been paid by James, the defender would admittedly have been liable only in relief.

In the pursuer's view of the case, that casualty was not only due, but became payable by James at any time after 1877. I do not see why the defender should now be held liable in composition, because of the pursuer's negligence in failing to enforce payment of it.

It appears to be making the casualty payable by a vassal to depend not on the state of the title, but on an extrinsic fact, viz., whether a particular payment was or was not made, of which the vassal may have no means of knowledge. This appears to me to be without precedent, and contrary to principle.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

Lord M'Laren—It is unnecessary that I should recapitulate the facts on which this interesting question of property law arises. The subjects passed by title to three brothers successively, John, James, and William Hamilton. John is the person by whom a casualty was last paid to the superior. A casualty is admittedly due to the superior by William, and the entry is untaxed. The question is, whether William is to be treated as a person who has entered as the heir of one of his brothers, or whether he is to be treated as a singular successor or purchaser, and therefore liable in payment of a sum equal to a year's rent of the subjects.

1. There appears to be a preliminary question which is raised by the minutes of debate, and is considered in some of the opinions of my colleagues. I mean the question, Who is the 'predecessor' or person in consequence of whose death this claim of casualty arises? John conveyed the subjects to James by deed *inter vivos*, and thereafter died survived by James. If the superior had been attending to his rights, he would have obtained a casualty from James as successor to John, John being the 'predecessor' in the sense explained. Then on the death of James, survived by William, the superior would be in a position to claim a second casualty, in consequence of the death of William's immediate predecessor James. That casualty would undoubtedly be the casualty exigible from an heir. In point of fact the superior did not exact a casualty from James, and I find from the printed papers that Lord Trayner is of opinion that this omission makes no difference in the result. Lord Trayner points out that according to the conception of the statute, illustrated by the schedule (37 and 38 Vict. cap. 94), the claim to a casualty is always founded on the death of the last entered vassal, who in this case is James Hamilton. If this be the correct interpretation of the statute, then the superior's omission to exact a casualty from James would not have the effect of increasing the burden to William, who would of course be entitled to an entry as heir of James, which he is.

The Lord Ordinary, again, has held that the summons is rightly laid in concluding for a casualty as accruing in consequence of the death of John Hamilton, although his Lordship has not sustained the claim to the extent of the duty payable by an heir.

The result of my consideration of this question is that I agree with the Lord Ordinary in holding John to be the predecessor, through whose death the lands are to be treated as if in non-entry. It is undoubtedly the general intent of the statutory enactments that the obligations of the vassal to the superior are to be as far as possible unchanged by the operation of the statute. The form of an entry with the superior is abolished, and the feudal relation is changed to a species of freehold tenure, in which every person is held to have entered by the mere act of taking seisin or real possession of the lands. But for the preservation of the superior's rights, the statute has introduced what may be termed a fictitious process of non-entry, in which it is set forth that a casualty has accrued to the superior in consequence of the death of some one, and that until such casualty be paid, the rents and profits of the subject are to pertain to the superior. Under the feudal law the person whose death caused the lands to fall into the state of non-entry was the last entered vassal; that is, the person who had last paid a casualty, and not necessarily the person who last died in the possession of the lands.

It might very well happen in the contingencies of life that an entered vassal would survive more than one of the successive disponees deriving right from him. But so long as the entered vassal survived, his mere existence was sufficient to maintain the feudal relation with the superior, notwithstanding that the vassal had parted with the substance of his interest in the lands. To what do these observations tend? That under the new process, as under the old, there must be one definite way of ascertaining who is the predecessor on whose death a casualty accrues; either he must be always in all cases the person who last paid the entry duty, or he must be always in all cases the person who last died infeft. The second alternative is plainly untenable, because the person who last paid the entry duty may survive the person who last died infeft, and in such a case the superior's claim does not emerge. I therefore come to the conclusion that the new statutory action for recovery of a casualty follows strictly the analogy of the old action of non-entry, and that in this case the summons correctly libels that a casualty has become due in consequence of the death of John Hamilton of Greenbank.

I now pass to the main question, which in my

apprehension is to be solved by the same criterion which I have proposed to apply to the question already considered.

2. I conceive that for the purpose of enforcing the superior's pecuniary rights, and for no other purpose, the statute has authorised a form of action founded on a fictitious state of non-entry, in which the claim of casualty is to be made effectual in the same manner and to the same effect as if the lands were actually in non-entry, Such, I apprehend, is the true interpretation of these words—"No implied entry shall be pleadable in defence against such action.' These words are clear and intelligible on the hypothesis that the lands are to be treated as if in non-entry (although not really so), for the purpose of explicating the superior's rights. The alternative construction is, That no implied entry shall be pleadable to the effect of limiting the casualties payable to the superior; but that an implied entry may be pleaded to the effect of extending these claims. This seems to me to be a very forced construction; and it is also open to objection on the ground that it supposes the Legislature to have contemplated a compulsory variation of the contract between superior and vassal. I think therefore that this construction is to be rejected. The hypothesis of the statutory action is that the defender is unentered (because the summons sets forth the death of C, "the vassal last vest and seised in all and whole the lands of X"), and while this hypothesis is contrary to the facts of the case, the defender is not allowed to contradict it. It was not necessary to say that the pursuer should not contradict it, because it is the pursuer's statement, and is indeed the condition of his claim, that the lands are to be treated as in non-entry. That being so, neither party is in a position to found on any implied entry, and the case is to be determined in all respects as if the defender was unentered. I do not conceive that the construction requires any aid from equitable consideration, but it is a construction that does not suffer from any equitable test that may be applied to it, because it gives the superior his due—that is, the sum which he is entitled to receive according to the original charter or feu-contract.

I would here interpose an observation which may possibly tend to remove one of the difficulties which have weighed with some of my colleagues—I mean the difficulty of getting over what is termed the new investiture of James when James Hamilton became entered by force of the statute. My observation on this is, that in strictness there are no longer any investitures, and therefore the distinction peculiar to our feudal law between a new investiture and a mere renewal of the investiture has no longer a place in our legal system. I think that in Scotland all property is now enfranchised or made freehold by the mere act of taking seisin or real possession, and that the statutory entry is not a thing substituted for investiture, but is its virtual abolition, under reservation of course of the superior's pecuniary rights.

In applying the principle I have indicated to the facts of the case, I have only to consider what would be the casualty due by William Hamilton in consequence of the death of John, supposing that the implied entry of the statute were non-existent. As the implied entry is not pleadable in an action of this nature I think it must be treated as non-existent. In that case the lands are to be held as being in non-entry. Now, as William combines the characters of heir and singular successor he is entitled to take the lands out of the hypothetical state of non-entry, just as he might have taken them out of actual non-entry, by payment of the relief duties exigible from heirs. Indeed the decisions go further, because, supposing an entry were to be taken, William would be entitled to be entered as a singular successor on the terms appropriate to heirs. Under no circumstances, and in no state of the title, could a *de facto* heir be required (according to the feudal law) to compound as a singular successor, although in certain cases which are not *hujus loci* the superior might object to the introduction of a stranger into the destination unless composition was paid for or in respect of the insertion of his name. My opinion therefore is that although the defender was entered by the statute as a disponee of James Hamilton, who again was entered by the statute as a disponee of John, neither of these implied entries are to be regarded in this question, and so the defender is only liable for the casualty payable by an heir.

III. I conclude by stating in a word how I conceive the Lord Ordinary's interlocutor stands with reference to previous decisions. I have not been able to find any material distinction in the *species facti* between *Ferrier's Trustees* v. *Bayley* and the present case. But as the present remit to the consulted Judges is made by the Division of the Court in which the case of *Ferrier's Trustees* was heard and determined, I suppose that their Lordships desire our independent opinions on the questions of law argued in the minutes of debate. The Conveyancing (Scotland) Act has opened a new chapter of property law, and after the lapse of fifteen years, during which a great number of points have come up for decision, it was perhaps considered desirable that the present question, which is one of general importance, should be considered by a Court differently constituted, and who would not be absolutely bound by the opinions, however weighty, of a numerically smaller body of Judges.

With regard to the series of cases, including *Rossmore's Trustees*, with which I have a long-standing acquaintance, and *Lamont* v. *Rankin*, which went to the House of Lords, I conceive that the Lord Ordinary's interlocutor is not in conflict with them. These cases only settled this principle, that where the proposed limitation of the casualty to a duplicand feu-duty depended on the taking of an entry—that is, on doing something which could no longer be done—the defender must fail. In the present case the defender is entitled, as I think, to the privilege of an heir irrespective of the form of the title in his person.

Lord Kinnear—I remain of the opinion to which I gave effect in the interlocutor under review, but the special point of the case is more clearly brought out in the opinion of Lord Adam, in which I concur.

I do not think that there can be any serious question as to the state of the feudal title. But in consequence of the Statute of 1874 the superior's right to casualties no longer depends upon

the actual state of the title. The general purpose of the enactments which require consideration appears to be to abolish the necessity for the superior's intervention in order to complete the title of heirs and disponees, and at the same time to leave the pecuniary rights and liabilities of superior and vassal as far as possible untouched by the changes introduced into the system of conveyancing. In saying this, I of course accept as perfectly sound and authoritative the opinions which were expressed in the House of Lords in *Lamont* v. *Rankin*. It was there pointed out that the Legislature had expressed no intention such as had been assumed by the minority of the Judges "to leave payments to a superior exactly as they were, and not to give him in any case a title to a more valuable casualty than he would have had if the Act had not passed." But the particular case, with reference to which it was held that no such intention had been expressed, was that of a singular successor, who, but for the Act, might have escaped composition by procuring the entry of the disponer's heir. On the general question Lord Blackburn says—"I agree that it was not the object of the Act to produce any change in the pecuniary relations between superior and vassal; and if I could see any reasonable construction of the language used by the Legislature which would avoid doing so, I should feel inclined to adopt that construction. But I do not think it would be justifiable to interpolate a scheme for this purpose not expressed by the Legislature." His Lordship therefore held that the heir of an extinguished mid-superiority could not be put forward to protect the actual proprietor of the lands. But although the Act contains no such scheme as was required to support the argument in *Lamont* v. *Rankin*, it does contain provisions for maintaining unchanged the pecuniary relations of the superior and his actual vassal, not by enabling the estate to be taken up by a person who has no right to it, but by fixing the conditions on which a claim for casualty may be made against the true proprietor. It is material therefore to inquire what the rights of the parties would have been if the Act had not passed.

The facts are simple. John Hamilton the second of Greenbank was the superior's vassal in the lands. But he had conveyed the *dominium utile* to his brother James Dunlop Hamilton, who was infeft in a subaltern fee as the vassal of John. James Dunlop Hamilton's subaltern right might be converted at any time by the superior's confirmation of his infeftment into a holding of and under the superior. But if the Act had not passed it is not probable that that step would ever have been taken. There was no reason for displacing John from the immediate fee during his lifetime; and when he died in 1877 his brother James was his heir-at-law, and in the ordinary course of things he would have completed his title in that character, entered with the superior as his brother John's heir, and thereafter consolidated the *dominium utile* with the mid-superiority. By completing his title in this way he would not have subjected himself to a claim for composition, but would have entered as heir for payment of relief duty only, and when he died in 1886 the defender would have entered on the same condition as the heir of the investiture, because nothing would have happened to disturb the investiture created by the infeftment of John Hamilton of Rodgerton, the defender's grandfather. John Hamilton the first, John Hamilton the second, James Dunlop Hamilton, and the defender would, each in his turn, have entered as heir of that investiture.

The defender's position would have been just the same if James, as might have happened, had continued to possess on his subaltern infeftment after John's death, and had made up no title to the mid-superiority. The defender in that event, as heir of John, might have taken up the estate left in his *hæreditas jacens*, taken infeftment on his special service, and so entered as heir.

It would have made no difference to the defender if James had applied for confirmation. He could not have compelled an entry in that manner without payment of composition during his brother John's life, because as he was only presumptive heir a conveyance to him was not a mere propelling of the succession. But, on the other hand, he could not have been compelled to enter until the death of John, or to enter at any time in any other character than that of heir. If he had completed his title on John's death by confirmation of his own infeftment he would not have been liable for composition, because he was in fact the heir of the last vassal, and might have entered in that character if he had thought fit. But whether he had been required to pay composition or not, and whether his confirmation had been obtained before or after the death of his brother, the defender would have been the heir of an enfranchised investiture, and would, when the succession opened, have been entered as such for relief. In whatever manner the title of James Dunlop Hamilton had been completed, therefore, the defender could never have been made liable for composition under the old law.

The question therefore is, whether the statute gives the superior a right which the prior law would not have given him?

It cannot be disputed that immediately upon the passing of the Act James Dunlop Hamilton as proprietor infeft was entered by force of its provisions with the pursuer as his immediate lawful superior; and as a necessary consequence of his entry the mid-superiority which had been left in the person of John Hamilton was extinguished. On John Hamilton's death, therefore his heir, if he had left a nearer heir than James, could not have taken up his estate of mid-superiority so as to interpose a vassal between the superior and James or his successor in the *dominium utile*. This is decided in *Lamont* v. *Rankin*. It was equally impossible for James himself to take up the mid-superiority, because he was already entered in the full fee. This is decided in *Bayley* v. *Ferrier*. But the inference which it is proposed to draw from this admitted state of the title appears to me to be a mere assumption altogether unsupported by any provision of the statute. It is assumed that because James Dunlop Hamilton was entered by the passing of the Act to the same effect as if the superior had confirmed his infeftment he therefore became liable in consequence of his entry for the same casualty which he would have required to pay under the former law if he had applied for confirmation during his brother John's lifetime. It

is said that the right to enforce payment may have been postponed by the provision that the superior shall not demand a casualty sooner than he could by the former law have required a new vassal to enter, but the assumption is that nevertheless the liability attached immediately by the operation of the statute upon the title as it stood in 1874. But the statute creates no such liability as a consequence of the implied entry. It dispenses with the necessity for the superior's intervention in order to complete the title of an heir or a disponee by entry, and the abolition of the superior's right to enter heirs or disponees by his own writ or charter and not otherwise carries with it of necessity the abolition of his right to exact payment of relief duty or composition as the condition of his granting an entry. His pecuniary rights are saved as far as possible by other provisions. But the Act gives him no right, either in express words or by implication, to exact a casualty in respect of every entry. If such a right had been conferred it would have given a most unreasonable advantage to the superior, because it would have given him right to a year's rent upon every transmission of the property whether the lands were in non-entry or not. But the entry implied by the registration of a conveyance during the lifetime of an existing vassal does not of itself give right to a casualty, and there may be many such entries for which no casualty can ever be demanded. This appears to me to be the necessary consequence of the provisions for maintaining the pecuniary rights and liabilities of superior and vassal.

The provisions for this purpose are in sub-sections three and four of section four. But sub-section three has no application to the present case. That sub-section provides that the "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;' and it goes on to reserve to the superior all rights and remedies competent to him under the existing law for recovering such feu-duties or casualties subject to the proviso already mentioned. But there was no casualty due or exigible in respect of the lands at or prior to the date of James Dunlop Hamilton's entry, and the superior had no right or remedy for recovering casualties which could have been put in force at that date. This particular enactment therefore has no bearing on the case, and the rights of the parties to this action must be regulated by the fourth sub-section, and not by the third. But the fourth sub-section gives no right to any casualty except when the lands have come into the position in which but for the passing of the Act the superior would have been entitled to sue a declarator of non-entry. Now, it is certain that the superior would not have been entitled under the prior law to sue a declarator of non-entry so long as John Hamilton continued in life. The right to a casualty therefore did not accrue until John Hamilton's death, and accordingly I take it to be clear that if a change of ownership had taken place before John Hamilton died the only casualty exigible in consequence of his death would then have been payable by the new proprietor as his successor in the lands, and no casualty would ever have been exigible from anybody in respect of James Dunlop Hamilton's entry. There might indeed have been many changes of ownership between the entry of James and the death of John, and every new owner in succession might have been entered by implication of the statute, and yet none of them would have been liable for a casualty except the owner in right of the lands at the date of John's death. The statutory action could have been brought against him alone, and the intermediate proprietors would be in no way affected by the only remedy which the action affords. For the only remedy is to enter into possession, and draw the rents until the casualty is paid.

The importance of this consideration is, that when the right accrued James Dunlop Hamilton was the heir-at-law of his brother John, and if he had been required, as he might have been, to pay a casualty as John's successor in the lands he would therefore have been liable for relief duty only, and not for composition. This appears to me to follow from the well-settled rule of the former law that the casualty must be determined by the character of the applicant for entry, and not by the form of his title. There are many decisions to this effect. But that which appears to be most directly in point is the *Marquess of Hastings* v. *Oswald*, 21 D. 871, because except for the implied entry it is undistinguishable from the present. James Oswald held the lands of Auchencruive by an entailed title immediately of and under the Marquess of Hastings. In 1849 he disentailed with the consent of the three next heirs, none of whom was heir-apparent, and thereafter, in performance of the contract for disentail, he executed a new entail in favour of his nephew Alexander Oswald, as institute, and a series of heirs. This was not a mere propelling of the succession, because (as appears from the Session papers) the lands were conveyed to Alexander Oswald, with entry as at the date of the conveyance in October 1849, and Alexander, being a nephew of the disponer, might of course have been excluded from the succession under the former investiture by the birth of an heir of the body. When the fee became vacant on the death of James Oswald in 1853 the superior maintained that Alexander Oswald held by a singular title, because his right stood upon a conveyance *inter vivos* executed in performance of a contract by the last vassal. But the Court held that he was entitled to entry by a charter of confirmation for the same payment as if he had entered by service as heir of the old investiture, because although his right to the lands stood upon a conveyance *inter vivos* he was in fact the heir of the vassal last vest and seised in the fee. The case was complicated with another question, because the subsequent destination under the new entail differed from that of the old entail, and it was accordingly found that "a reservation must be admitted into the charter of confirmation by which the new investiture is established reserving to the superior his right to claim a year's rent upon the entry of the first substitute who shall not be the then existing heir under the former investiture, and to the vassal any legal defence against such claim." This part of the judgment has a material bearing on the argument. But the point of importance at present is that the casualty was determined by the new vassal's per-

sonal character as heir of the old destination, and not by the title under which alone he could hold the lands. On the same reasoning James Dunlop Hamilton would have been entitled, if the Act of 1874 had not passed, to demand a confirmation of his existing infeftment for payment of relief duty, because although he held the lands upon a singular title he was in fact the heir of the last investiture. The only difference is that there would have been no occasion to make any reservation in the charter, because the confirmation after John's death of his conveyance to James, and of the infeftment following upon it, would have made no change whatever in the investiture. It was a mere renewal of the old investiture, because no one could take up the estate in succession to James as his heir who was not also the heir of the heir of the old investiture.

The question then is, whether James Hamilton had lost the right to have the benefit of his confirmation for payment of relief by reason of his implied entry under the statute? I think he had not, because the statute subjects the successor of a deceased vassal to no other casualty than would have been exigible under the old law if such successor had been required to enter at the date when the right accrues. It is true that at that date James Hamilton could not have made up a title by special service as heir, because he had been already entered by the confirmation of his predecessor's conveyance; and it is equally true that under the former law the superior could not be compelled to enter his last vassal's successor in the character of heir unless his right were judicially ascertained by a special service. But the point is, that although the successor could not enter as heir by reason of the form of his title he was still entitled to the benefit of his character as heir, and might demand an entry by charter of resignation or charter of confirmation for payment of relief, and it was decided in *Mackintosh* v. *Mackintosh* that a successor who has been already entered by the implied confirmation of his ancestor's conveyance is still entitled to the same benefit if he be in fact the heir at the time when the right to casualty accrues. This decision appears to me to be directly applicable to the case of James Dunlop Hamilton. I agree that it would not be in point, if the right to composition accrued at the date when the Act came into force in consequence of the implied confirmation of his infeftment, or, in other words, if that implied entry were the sole ground of the pursuer's claim, but, for the reason already given, I think this is a false assumption. The right does not arise from the implied entry, but from the subsequent death of the last entered vassal. In this respect the case of *Mackintosh* v. *Mackintosh* resembles the present. The only effect of the implied entry in the one case, as in the other, is to prevent the new vassal from entering by special service. But that does not prevent him from saying that he is in fact the heir. The principle which I take to be recognised in the case of *Mackintosh* is, that the casualty payable by a successor already entered by force of the statute is to be fixed by the same rule as if he were demanding a charter at the time when the action for casualty is raised.

But, apart from that decision, I think the same conclusions follow from the conditions which the statute attaches to the superior's right of action. The case in which alone the action can be brought is when the superior would, "but for the Act, be entitled to sue a declarator of non-entry against the successor of the vassal in the lands;" and it is to be brought "against such successor whether he shall be infeft or not." It may be proper to observe that the Act seems to contemplate the possibility of a declarator of non-entry being sustained by reason of special stipulations in the feu-contract, because the prescribed form of summons contains alternatives by which it might be adapted to such cases if they occurred, and which are inapplicable to the normal case of non-entry by death. But the only case which it is necessary to consider for the present purpose is that of a feu-right conceived in the ordinary terms. And there can be no question as to the effect of the provision just cited in its application to such a right. It requires the superior to show as the condition of his right of action, first, that the vassal last vest and seised in the lands has died, because that is the only event which could have brought the lands into non-entry; and secondly, that his successor, "whether by succession or by conveyance," still remains unentered, because that is the condition which under the former law he could have sued a declarator of non-entry. The prescribed form of summons is exactly in accordance with the substantive enactment, because it requires the pursuer to set forth that the casualty has become due "in consequence of the death of the vassal last vest and seised in the lands." Now, that is an assertion which could not be made if the implied entry were to be taken into account, because the vassal last vest and seised would in that case be either the defender in the action, or any predecessor who had obtained such entry, and therefore, as a necessary complement of the provision which requires the superior to treat the vassal on whose death the right accrues as the last entered vassal, it is provided that "no implied entry shall be pleadable in defence against the action." The superior therefore is to bring his action on the assumption that no entry has taken place since that of the vassal whose death he alleges as the ground of his right, and the defender is forbidden to traverse that assumption by alleging an implied entry. But if the implied entry is to be disregarded for the purposes of the action the liability for a casualty must be determined on the assumption that the last entered vassal's successor still requires to obtain an entry; or, in other words, he is to pay for the entry which the statute has given him on the same footing as if he were demanding a charter from the superior in answer to a declarator of non-entry. The question therefore must be whether, if he were not entered at the date of the action, he could have demanded a charter without paying composition as for a new investiture.

If the superior had brought such an action in 1877 it does not appear to me that James Dunlop Hamilton's right to demand a charter without composition could have been disputed. The pursuer would have alleged, as he does now, that the casualty had become due in consequence of the death of John Hamilton, who was the last

entered vassal. The answer would have been that the defender was heir of line of this last vassal, and had therefore right to obtain a charter confirming the titles on which he already held the lands for payment of relief, and the superior could not have maintained that the implied entry had excluded that right without admitting that he had been already entered, and so contradicting his own ground of action. It has been suggested that he might nevertheless found upon the title of the defender, who could not dispute his own title, and that that title would have disclosed a change of the investiture. That is just saying in other words that John Hamilton was not the last entered vassal, because there can be no change of investiture until a new charter has been obtained from the superior in favour of strangers to the old investiture. But the suggestion is fallacious, because it confuses between the title upon which the vassal may be supposed to have entered, or to have right to enter, and the entry itself. The pursuer's argument indeed appears to me to be vitiated throughout by this inaccurate use of the terms "entry" and "investiture." It is elementary, but it has not perhaps been sufficiently kept in view, that the entry of a vassal who has been infeft upon the precept of a prior vassal, and not directly upon the precept of the superior, means nothing but the superior's recognition of the infeftment. The investiture in like manner is the title and infeftment *plus* the recognition. It would not therefore have occurred to me to doubt that either party might found upon the vassal's title notwithstanding the prohibition against pleading the implied entry. It must be permissible to found upon the title for the purpose of ascertaining the successor in the lands, against whom alone the action lies. But what cannot be pleaded is not the title, but the recognition of the title, which would otherwise have been implied under sub-section 2. In other words, the statute says that it shall not be maintained that the registration of a conveyance during the lifetime of an entered vassal has operated as a recognition of the disponee by the superior or as a change of the investiture. It cannot of course have changed the investiture if it is not a recognition of the disponee, because it is elementary and fundamental that an investiture once recognised cannot be displaced except by a return of the feu to the superior, or by the superior's recognition of a stranger.

If this action had been brought therefore in 1877 James Hamilton's title would have disclosed no change whatever in the investiture. It would have shown only that James Hamilton, who was the heir of the investiture, had been already entered by a charter by progress, which, if it had not been implied by the statute, he would have been entitled to obtain for relief. The implied writ of confirmation would no doubt have altered the investiture if it had enabled James Hamilton's heirs to enter for relief, although they were not also the heirs of John, and therefore could not have come in as heirs under the original grant. But the implied entry of James Hamilton could not prejudice the superior's right in this way, because it could not be used to enable a stranger to enter as heir, or to enable James Hamilton himself to escape liability for composition if he were not the heir when the right to a casualty accrued.

This is a material difference between the implied entry under the statute and the entry obtained under the former law by actual charter. By the old law the casualty payable for the entry of a new vassal was necessarily fixed at the date of entry, because the entry discharged the claim. By the new law it is fixed when the right accrues, or when the action is brought, because the implied entry does not affect the claim. But by the former law the superior could not exact a year's rent as the price of a new charter, unless he thereby admitted strangers to the feu, from whom he would have no other opportunity of exacting composition. The second branch of the case of *Hastings* v. *Oswald* shows that even when a new charter altered the destination the superior would not be entitled to composition on granting the charter if his right to demand it when a stranger substitute presented himself could be effectually reserved. On similar grounds it appears to me that he cannot exact a year's rent, because of its being uncertain at the date of the implied entry whether the title thereby confirmed would operate in favour of an heir or of a stranger at the date when the casualty should become due. The implied entry is not a recognition by the superior of a new vassal and his heirs, who may be strangers to the existing investiture, and therefore he is not entitled to be paid for it as if it involved such recognition. The pursuer's right to casualties remained after James Hamilton's entry exactly as it was before—a right to exact payment of a casualty on John's death, on the footing that his investiture was still the rule of the feu, and the successor's liability must be determined upon that footing, irrespective of the implied entry. If John had left heirs of his body James would not have been his heir, and must have paid composition at his death. But since he was in fact the heir he would have been liable only for relief on the same ground on which he could then have obtained a charter of confirmation for payment of relief under the former law.

If James Hamilton would have been liable only for relief, it follows that the defender's liability is also for relief, because he is the heir both of James and of John, and might therefore have obtained a confirmation of the conveyances and infeftments by which he holds the lands without paying a year's rent for it. But the form of the action against him brings out with remarkable clearness the contradiction which appears to me to make the pursuer's case untenable. He did not think proper to make any claim for casualty during James Hamilton's life, and in stating the claim against the present defender he had therefore to consider whether the casualty became due on the death of John or on the death of James. As the action is laid he founds his claim on the death of John as the last vassal. And this view may probably be supported on the ground that although James was entered by force of the statute he paid no casualty, and therefore that there is nothing to prevent the pursuer from alleging that he would under the old law have been entitled to sue a declarator of non-entry in consequence of the death of John. But then the pursuer's case must be that John Hamilton was the last entered vassal, or, in other words, that nothing has occurred to disturb the investi-

ture since the date of his entry, and accordingly he alleges as the ground of his action that a casualty has become due in consequence of the death of John Hamilton, "who was the vassal last vest and seised in the lands." This is said to be a technical and immaterial point. I venture to think, on the contrary, that it is of vital importance, because the superior has no action unless he can show that but for the Act he would be entitled to sue a declarator of non-entry. Now, the only way in which the lands could have fallen into non-entry before the passing of this Act was by the death of the vassal last vest and seised as of fee.* The foundation of the pursuer's action therefore is the averment that John Hamilton was the vassal last vest and seised in the lands. But that implies an averment that no other vassal has entered since his death, or, to use the language of the old law, to which the pursuer is required by the statute to appeal, that the fee is still vacant in consequence of his death. If these propositions cannot be substantiated the action fails. But then it follows that the investiture established by the original charter to John Hamilton of Rodgerton has not been changed for the purpose of this action. The superior's right to casualty, and the corresponding liability of the vassal, must be measured by the same investiture. And when the pursuer avers that John Hamilton was the last entered vassal the casualty payable must of necessity be determined by the relation of his successor in the lands to his investiture, because that is the last investiture according to the pursuer's own statement. The pursuer cannot be permitted to contradict his own ground of action, and the condition of his action is that he has recognised no new vassal, or, in other words, that he has made no change in the investiture since the entry of John Hamilton. He cannot be permitted to say that nobody has been recognised since John Hamilton, and therefore that John Hamilton's heirs are the only persons enfranchised, and at the same time to say that James was recognised during John's lifetime, and therefore that John's heir must pay composition. If the superior's right is to depend on the assumption, which the statute requires to be made, that John Hamilton was the last entered vassal, it appears to me to follow that the vassal's liability must be determined upon the same assumption. I cannot suppose that this admits of argument. The right and the liability must necessarily be reciprocal. These are not two different or separable things, but only two aspects of the same obligation. If the statute provides that the implied entry shall not be considered as a recognition so as to affect the liability of the vassal it follows of necessity that it shall not be considered as a change of the investiture so as to alter the right of the superior.

But if this reasoning be erroneous, and the old investiture has been extinguished by the entry of James Dunlop Hamilton, the defender is the heir of the new investiture, and in that character is liable only for relief. It is of no consequence whether James paid a casualty or not if he is to be considered as an entered vassal for the purpose of the action. For it is decided that no casualty exigible from James can be demanded from the defender, and I do not understand that there is any difference of opinion upon this point. If the pursuer chose to waive his claim against an entered vassal he must submit to the loss. He cannot throw it upon a succeeding vassal.

The pursuer is in this dilemma. Either the investiture has not been changed since the entry of John, and in that case the defender is liable only for relief, because he is the heir of the old investiture; or else it has been changed by the entry of James, and in that case the defender is still liable for relief only, because he is the heir of the new investiture. The pursuer may possibly be entitled to treat the entry of James as an alteration of the investiture. But if he so treats it he must accept the necessary legal consequence of that position. He cannot be permitted to maintain two contradictory propositions at one and the same time, and to say that James was duly entered during the lifetime of John, and therefore that the defender cannot have the benefit of his character as John's heir, and at the same time to say that James was not duly entered, and therefore that the defender takes no benefit from his character as heir of James.

The sounder view appears to me to be that the action lies against the defender as John's successor, and that his liability must be determined by his right to obtain a confirmation of the series of titles on which he holds the lands on the assumption that there has been no entry with the superior since that of John Hamilton. But if he were now in the position of demanding a charter he would be entitled to obtain it without payment, and his liability for the implied charter which the statute has given him must be determined by the same rule.

The effect of the whole series of enactments appears to me to be that the infeftment of a disponee during the lifetime of an entered vassal shall have the same feudal effect as a charter of confirmation under the former law; that no casualty shall be exigible in respect of this implied entry until the lands fall into the position which under the former law would have been non-entry; that when this event happens a casualty is to be exigible from the person who is at the time the last vassal's successor in the lands, and from no other person; and lastly, that his successor shall be liable for the same casualty as he would have been required to pay by the former law if he had been demanding an entry at the date when the casualty is demanded upon the titles on which he then holds the lands. I do not think this view inconsistent with the decisions. What I take to have been decided is, that the actual successor in the lands must pay a casualty according to his own liability, because when he has once been entered by the registration of a conveyance in his favour he cannot put the last vassal's heir into his place. The ground of judgment is thus expressed by the Lord Chancellor in *Lamont* v. *Rankin*—"The appellants are by the Act deemed and held to be duly entered, and if so, there is no vacant fief into which the heir could enter." I think it quite in conformity with the law so laid down to hold that the actual successor, who alone holds the fee, must pay the same casualty as he would have paid if instead of being entered by implication he had been required to enter under the former law. Therefore, if the successor is in fact the heir of the last vassal when the right

arises he shall pay relief. If he is a stranger, he must pay composition. If it is proved or admitted that he is in fact the heir, the question whether he can still make up a title in that character does not appear to arise under the statutory action, for the action does not, like the old declarator of non-entry, require the defender to make up a title or forfeit the lands. It merely requires that he shall pay a casualty. The only previous case in which the point now to be determined could have been raised was that of *Ferrier* v. *Bayley*. But in that case it was not raised, and therefore it was not decided. The decision was that an implied entry as disponee excluded a subsequent entry by the same person as heir of an extinguished mid-superiority. But no question was raised as to the amount of casualty payable, if it were decided that the title could not be completed otherwise than by the implied entry. But if *Ferrier* v. *Bayley* is to be taken as a decision in point it is not binding upon the whole Court, and ought not in my opinion to be followed.

Lord Trayner—Applying the provisions of the Act of 1874 to the admitted facts of the present case, I think it clear (1) that James Hamilton was entered with his superior by force of statute in 1874; (2) that a new investiture was thus created, whereby the prior investiture was evacuated; and (3) that in 1877, on the death of John Hamilton, a casualty became due to the superior, and could then have been exacted from James. Granting these propositions, it follows that the defender's claim to be entered as heir to John Hamilton cannot be sustained. After the completion of James' right by implied entry in 1874 there was no right left in John to which the defender could have served. The decision in the case of *Ferrier's Trustees* appears to me conclusive of this part of the case.

It is in accordance with the pursuer's argument to hold, as I do, that the result of the implied entry of James was to operate a change of the investiture, and to create a new investiture excluding the heirs of John Hamilton. But I have some difficulty in seeing how the pursuer can maintain that argument, and at the same time maintain the claim as put forward in his summons. The pursuer concludes for decree against the defender for a "casualty, being one year's rent of the lands," which has become due "in consequence of the death of John Hamilton, . . . who was the vassal last vest and seised," &c. How could John Hamilton be the vassal last vest and seised when James became the vassal vest and seised in 1874? The pursuer explains this by saying that he had to follow the form of summons provided by the Act. But the schedule appended to the Act does not require him to state what is not the fact; it gives a form no doubt, which is to be followed, "as nearly as may be"—but not to be followed, as I have said, irrespective of the conditions of the case. The importance, I suppose, of setting forth John as the last vassal is that the defender cannot bring himself as an heir within the investiture as it stood in John, and if not an heir, then necessarily a singular successor liable in composition. If the summons had set forth James as the vassal last vest and seised, the defender being admittedly his heir, it would have followed that he was liable only in relief. But turning from the conclusions of the summons to the averments in the condescendence, I find the facts to be thus stated (Cond. 4 and 5)—That James, in respect of his implied entry in 1874, became subject to payment of the casualty of composition "as a singular successor of" John, "when it should become payable on the death of the latter;" that the "said casualty" became exigible in 1877 when John died; that James died in 1886 without having made payment of "the said casualty;" that the defender is infeft in the lands in question in respect of a general disposition and settlement in his favour granted by James; and that in virtue of his infeftment he is liable to the pursuer "in payment of the casualty which had become due as aforesaid." That is, in a word, that as James did not pay the casualty exigible from him in 1877 the defender is not bound to pay it—not to pay a casualty in respect of his own entry in 1886, but to pay a casualty due by and exigible from his predecessor in the lands. The decision in *Mounsey* v. *Palmer* has settled that the defender is not liable for any casualty except that exigible in respect of his own entry, and the pursuer's claim as laid cannot in my opinion be sustained.

But apart from this, and assuming the present claim to be relevantly stated as a claim for the casualty due on the defender's own entry, the question is, what is the extent of the defender's liability—is it for composition or relief? That depends upon the character in which the defender stands to the person last entered, and it is admitted that the defender is the heir-at-law of James. It therefore appears to me that as heir of James, who was the vassal last vest and seised, the defender is liable in relief duty only. The answer which is made to this, however, is, that the defender is not the heir of an enfranchised investiture recognised by the superior, James not having paid the composition exigible from him in 1877. I think there is a fallacy involved in this answer. (1) There is no recognition by the superior of James' entry required. It is recognised by the statute, and the superior cannot disregard it. (2) It is not payment that enfranchises an investiture, but the act of the superior admitting the vassal to his public holding. The act of the superior is essential; the payment may be called accidental. For a superior may, if he pleases, enfranchise an investiture without exacting any payment. He may, at his own pleasure, refuse to exact any payment; he may in a doubtful case accept relief duty where he thinks composition due; he may accept half the amount of the casualty as a compromise rather than go to law about a disputed casualty.

In all cases it lies absolutely within the pleasure of the superior to renounce in whole or in part the pecuniary advantage he may be entitled to derive from a change in investiture. But whatever he may elect to do in reference to the payment due to himself the enfranchisement of the investiture is not thereby affected. The enfranchisement is complete when the superior has recognised the new investiture by granting his writ of confirmation, either on or without consideration. Now, that being so, how stands the investiture of 1874? James by recording his infeftment became entered with the superior "to the same effect as if such superior had

granted a writ of confirmation according to the existing law and practice" (Act of 1874, sec. 4, sub-sec. 2). It is not open to doubt that if under the old law—that is, as it stood prior to 1874—the superior had granted James a writ of confirmation, the investiture thereby created would have been enfranchised quite irrespective of what, if anything, had been paid for it. No conveyancer having that writ of confirmation in his hand would have asked on what consideration it had been granted. The fact of its being granted was the essential matter; the vassal under it was duly entered by its execution and delivery. But if the implied entry under the statute is to have all the effect of a writ of confirmation, then it must have the effect of enfranchising the investiture, and if that effect followed the investiture created by James' implied entry, then the defender, as heir of that investiture, owes the pursuer relief duty and nothing more.

There is this difference between the case of an entry by writ of confirmation granted under the former practice and the implied entry under the Act of 1874. The superior could formerly withhold his writ of confirmation until his casualty was paid; he has no such protection now, because the entry is completed by the vassal taking infeftment, an act which the superior cannot prevent or control. The statute, in view of this difference, provides that no implied entry shall be pleadable in answer to the superior's demand for a casualty—that is, as argued by the pursuer, "it is to be impossible to avoid the claim by saying—'I am already entered by force of the statute, and therefore no casualty on entry can possibly now be due by me.'" But this difference is only one affecting the mode in which the superior can make good or secure his pecuniary claim; it does not affect the legal consequences of the entry itself.

Again, if the payment of the casualty has anything to do with the question, which I think it has not, through whose fault is it that the casualty due on the entry of James has not been paid? That casualty was due in 1877, and then exigible. It was never demanded. Had the superior enforced his right the casualty would have been paid, and the defender would only have been liable on his entry in payment of relief. This will be conceded. Is the neglect of the superior to enforce his right to increase the burden on the defender? Suppose the feu-duty to be one penny Scots, and the yearly rental of the subjects £500, the defender will be liable for £500 (composition), or only one penny Scots (relief duty), just as the superior enforces or neglects his rights. Surely that is not reasonable. If the superior suffers by his neglect, *sibi imputet*, the defender may justly claim to be dealt with as if the superior had done his duty by his own interests.

In my opinion the judgment of the Lord Ordinary is right. The defender is undoubtedly the heir of James, and succeeds to the lands in question as his heir. James was duly entered with the superior by force of statute to the same effect as if the superior had granted him a writ of confirmation; but had the superior granted such a writ in point of fact, I think no one would ever have asked on what consideration he had granted it. It would have been sufficient for the defender to have produced the writ in favour of his author to entitle him to an entry on payment of relief duty. I think that is really the position in which the defender now stands. Regarding the defender as claiming to enter as the heir of James (not as claiming to be heir of John, which, as I have said, he cannot successfully claim to be) the case of *Ferrier's Trustees* has no application.

Lord Wellwood—I am of opinion that the defender is liable in a casualty of one year's rent of the lands, and not relief duty merely.

The material dates are as follow—In 1860 John Hamilton second of Greenbank, who was duly entered with the superior, conveyed the lands of Rodgerton to his brother James Dunlop Hamilton, who was infeft in the same year. In 1874 James Dunlop Hamilton, by virtue of his infeftment, was on the passing of the Conveyancing Act of that year impliedly entered with the superior; at that time he was not heir-at-law, but merely heir-presumptive of John Hamilton, second of Greenbank. In 1877 John Hamilton second of Greenbank died childless, and a casualty then became due from James Dunlop Hamilton. No demand, however, was made upon him, and he died in 1886, also childless, leaving a general disposition and settlement in favour of the defender, his younger brother, and the defender was infeft in the lands conform to notarial instrument recorded in the General Register of Sasines 17th August 1886.

The superior (the pursuer) now demands from the defender a casualty, being one year's rent of the lands, "in consequence of the death of John Hamilton of Greenbank, . . . who was the vassal last vest and seised in the said land." The defence is that the defender is only liable in a casualty of relief in respect that he is heir-at-law both of John Hamilton the second of Greenbank and James Dunlop Hamilton.

Under the law as it stood prior to the passing of the Conveyancing Act of 1874 the defender would have been entitled to enter with the superior in the character of heir by taking up the mid-superiority, which in that case would have been *in hæreditate jacente* of John Hamilton second of Greenbank. He could thereafter, by executing the appropriate deeds, have consolidated the *dominium utile* with the mid-superiority. It is decided, however, by *Ferrier's Trustees* v. *Bayley*, 4 R. 738, and following cases, in particular *Rankin's Trustees* v. *Lamont*, 6 R. 739, and 7 R. (H. of L.) 10, that the effect of the 4th section of the Conveyancing Act of 1874 is to make it impossible for the defender now to adopt that course. The question for consideration in the present case is, whether although the defender cannot in point of form make up his title as heir of the vassal who last paid a casualty, he is liable only in relief duty, in respect that although his title is in form and must remain that of a singular successor, he is *de facto* heir of the vassal who last paid a casualty. This depends upon the true scope and effect of the 4th section of the Conveyancing Act.

The leading provision is contained in section 4, sub-section 2—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands, shall be deemed and held to be as at the date of the registration of

such infeftment 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 defeasable 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." This I take to be the cardinal provision. The province of those which follow is simply to modify in favour of one or other of the parties the consequences which would otherwise have attended a completed entry equivalent to entry by confirmation.

In particular according to the then "existing law and practice," a disponee desirous of entering with the superior could not have obtained a writ of confirmation without paying the appropriate casualty. Again, a vassal who had been granted a writ of confirmation was in a position to plead that all casualties due at its date had been discharged. It was therefore necessary, as by the statute infeftment was declared equivalent to entry by confirmation, to protect the rights of the superior by declaring that a vassal impliedly entered should not be entitled to found upon his implied entry as an answer to the superior's claim, and accordingly it was provided by section 4, sub-section 4, that no implied entry should be pleadable against the superior's action for a casualty.

On the other hand, the statute does not allow the superior to claim a casualty oftener or sooner than he could previously have done, it being provided by section 4, sub-section 3, "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."

There are other provisions which seem to me to show that, except in so far as its effects are expressly modified, an implied entry is attended with all the consequences of an entry by writ of confirmation. For instance, if notice of change of ownership is given to the superior, the previous proprietor is freed from liability for performance of the obligations of the feu—See section 4 (2).

If, then, an implied entry carries with it, except in so far as its effects are modified, the consequences of entry by confirmation, the next thing to be considered is, what are those consequences? Now, the first effect of an entry was under the old law, and is under the Act, to evacuate and sweep away the mid-superiority as it stood in the person of the disponer, and to make the disponee thus entered hold directly of the over-superior. In the next place, the superior is entitled to a casualty in respect of the entry, and this right is preserved intact, subject only to the proviso which I have quoted, to the effect that he shall not be entitled to demand a casualty sooner than he could by the law as it stood prior to the Act have required the vassal to enter or to pay such casualty. But the Act does not declare that when a casualty becomes due and exigible it shall or may be different in amount from what it would have been if demanded at the date of the implied entry. As Lord O'Hagan says in *Rankin's Trustees* v. *Lamont*, 7 R. (H. of L.) 15—"The word 'sooner' points neither to the amount of the payment nor to the person to make it, but to the period at which it would be exigible." And again—"The proviso forbade the superior to claim the casualty before he was entitled to it on the death of an entered vassal. If it was intended further to limit his right as well with reference to the amount as to the time of payment, the privilege of tendering the heir, and the sufficiency of his discharge of the relief duty, might have been perpetuated by a few simple words."

I am of opinion that in the present case the defender is bound to pay composition and not relief duty, for this reason, that on the passing of the Conveyancing Act 1874 his author James Dunlop Hamilton was entered with the superior. The effect of that entry was not merely to evacuate the mid-superiority in the person of John Hamilton second of Greenbank, and thus sweep away the old investiture, but also to make the vassal entered under the new investiture liable in a composition (he being a singular successor), although payment of it could not be demanded until the death of John Hamilton second of Greenbank. In other words, I think that the amount of the casualty which would have been payable at the date of the implied entry had the vassal been then entered under the old law cannot be affected by any change of circumstances which may have taken place subsequently to infeftment, as, for instance in the present case, by the accident of the vassal from whom a casualty is demanded happening at the time when the demand is made to be heir of the vassal who last paid a casualty.

If it had been intended that the character in which the vassal should be held as entered, and the amount of the casualty to be paid should be determined as at the date of a casualty becoming due, it would have been enacted that on the death of the vassal who last paid a casualty the person then infeft in the lands should be held to be duly entered with the superior. Or it might have been provided that the superior should not on a casualty becoming due be entitled in respect of a prior implied entry to claim any other or higher casualty than he would have been entitled to had such implied entry not been previously taken. This would have suspended the effect of the implied entry as regarded the amount of the casualty as well as the time at which it might be demanded. In the view which I take of the statute, however, an implied entry takes immediate effect except in so far as it is otherwise expressly directed, and as no exception is made in regard to the amount of the casualty to be paid that must be taken to be the amount which would have been payable if demanded at the date of the implied entry.

The defender relies on the provision of the statute (Act 1874, sec. 4, sub-sec. 4) that no implied entry shall be pleadable in defence against the superior's action for a casualty, and it is argued with much force that if an implied entry is not to be pleaded against the superior it should not be pleaded in his favour to the effect of enlarging his rights. The answer is, that while this provision is made in the superior's favour the converse is not enacted, and cannot, I think, be implied and read into the statute.

Again, it is said that the superior's rights will

be enlarged if the pursuer's contention is sustained. This is true; but *Ferrier's Trustees* v. *Bayley* and *Rankin's Trustees* v. *Lamont* establish that this consideration is not of itself sufficient to override the fair construction of the statute. No doubt this is a harder case for the vassal than if he were seeking to put forward an heir who was not also proprietor of the lands, but the defender is not in a more favourable position, because the old investiture having been extinguished in consequence of James Dunlop Hamilton's implied entry he can only claim through the new investiture, which has not been enfranchised.

The facts of the case indeed are identical with those in *Ferrier's Trustees* v. *Bayley*. It may be that the defence here is rested on more plausible grounds, because it is not sought to revive an extinct mid-superiority. The defender, however, seeks to avail himself of the old investiture by founding on his relationship to the vassal whose mid-superiority was extinguished.

It is true that the form of the title is not conclusive, but the question turns not upon the form of the title, but upon the character of the vassal at the time when the title is made up. If he is then heir of the existing investiture he will be dealt with as an heir; if his position is that of a stranger to it, he will be treated as a singular successor. In the case of *Mackintosh*, 13 R. 692, the vassal was at the date of the implied entry heir of the existing investiture, and might have demanded an entry as such. Again, in the older case of *M'Kenzie*, 1777, the vassal, although he made up his title so as to comply with the provisions of the newly executed deed of entail, was heir of the existing or prior investiture, and was for that reason held entitled to be entered on payment of relief.

In the present case, however, when John Hamilton (2) died in 1877, James Dunlop Hamilton was already fully entered as a singular successor and could not have thereafter reverted to the old investiture. The defender is in no better position than his author. This case must be taken as if the question had arisen in 1877, and if James Dunlop Hamilton would then have been held to be a singular successor, the impediment created by his implied entry cannot, if the view which I take of the case is correct, be ignored in a question with his disponee and heir, the defender.

I am therefore of opinion that the Lord Ordinary's judgment should be altered.

Lord Kyllachy—The question in this case is, whether the defender is liable in a casualty of relief or of composition? and there are, as I understand the case, two views on which it is maintained that he is only liable in relief. The first is, that James Hamilton, his immediate predecessor, was duly entered with the superior, and that he is James Hamilton's heir, and that that being so, it is of no consequence that James Hamilton paid no casualty upon his entry, or that his entry was only an implied entry under the statute. The other view, which is alternative, is, that the defender is entitled, for the purposes of the present (statutory) action, to treat the old investiture in favour of John Hamilton of Greenbank and his heirs as still subsisting, and to connect himself as heir with the old investiture, and so pay only an heir's casualty in the same manner as under the old law.

It is obvious that the questions thus raised depend for their answer on the precise effect which is to be given—in fixing the pecuniary rights of the superior—to the implied entries under the statute intermediate between the entry of the last vassal who paid a casualty, and that of the existing proprietor, who is the defender in the statutory action.

The case would be clear enough if those implied entries were to receive effect all round. It would also be clear enough if they were to be ignored all round. It is admittedly, however, impossible to go that length in either direction. If the implied entries were to receive full effect —as if in each case there had been a writ of confirmation under the old law,—there would not only be an implied enfranchisement of new investitures without payment of casualty, but the fee would, or might, be kept always (impliedly) full, so that no casualty could ever be demanded. On the other hand, if the implied entries were for the purposes of the statutory action to be wholly ignored the result would be to conflict not only with the decisions of the Court in the case of *Ferrier's Trustees*, 4 R. 738, but also with the decision of the Court in the case of *Rossmore's Trustees*, 5 R. 201, and that of the House of Lords in the case of *Lamont* v. *Rankin*, 7 R. (H. of L.) 10.

The question therefore really is (1) how far the view first above mentioned can be maintained short of ignoring altogether the proviso that implied entries shall not be pleadable against the superior, and (2) how far the view second above mentioned can be maintained short of ignoring the decisions in the cases of *Rossmore's Trustees* and *Lamont* v. *Rankin*. I exclude in the meantime the case of *Ferrier's Trustees*, it being at least doubtful how far the present question was in that case argued.

(1) In my opinion it is impossible for the defender without violating the express words of the statute to found on the implied entry of James Hamilton (the last impliedly entered vassal) as foreclosing all reference to former investitures, and enabling the defender to take his stand on the simple fact that he is the heir of James Hamilton. The statute, dealing with the statutory action, provides expressly that "no implied entry shall be pleadable against the superior," and I see no reason why this proviso should not receive effect according to its terms. No doubt it is necessary (because it is necessarily implied) to confine the proviso to implied entries on which no casualty has been paid (just as it is necessary to make a similar implication in the schedule in construing the words which refer to the death of the vassal "last vest and seised)." But (subject to that restriction which cannot help the defender) I see no reason for denying effect to words which seem to be plain, and not only to be plain, but to be essential to the statutory scheme. In particular, I am not able to discover any ground for holding as suggested that the proviso only affects the mode in which the superior can make good or secure his pecuniary claim, and does not affect the legal consequences of the implied entry itself. In my opinion the whole object of the proviso was to exclude the legal consequences of the implied entry in so

far as the same might prejudice the pecuniary rights of the superior.

Moreover, it is not, I think, possible for the defender in this view of the case to stop short at treating the implied entry of the last vassal as an enfranchisement of the last vassal's investiture. If the implied entry is good for that purpose, it must also, it is thought, be good to the effect of postponing the superior's right of action in many cases quite indefinitely. No doubt James Hamilton, the last impliedly entered vassal in this case, happens to be dead, but if he had been alive the question would have been just the same. And if the view now under consideration were well founded the superior would have had no action as now on the death of John Hamilton of Greenbank, but would have had to wait until the death of James Hamilton, and if James Hamilton had happened to dispone *inter vivos* to a disponee who took infeftment he would have had to wait until the death of that disponee. Now, as I already said, I do not think it possible to maintain that such is the meaning of the statute, nor indeed do I understand that the defender would so contend.

(2) It remains, however, to consider how far it is possible to take the other view, viz., to ignore the implied entries for the purposes of the statutory action, and at the same time to give due effect to the decisions to which reference has been made.

Apart from those decisions I quite follow and appreciate the defender's argument. In particular, I accede to the proposition that the superior's whole rights and remedies are for the purposes of this question to be found in the 4th subsection of section 4, and that there is nothing in the statute which gives him right to demand a casualty except the provision in sub-section 4 to the effect that "when but for the Act the superior would have been entitled to sue a declarator of non-entry, he shall have right to bring the statutory action against the proprietor of the lands for the time." I also accede to the proposition that under the old law no declarator of non-entry could have been brought when the fee was full, and that that being so, the superior requires as the basis of his statutory action to ignore the intermediate implied entries, because standing those implied entries, the fee may be and indeed generally will be full. All this I think quite sound, and thinking so, I acknowledge the force of the argument, that as the superior ignores and must ignore the implied entries as filling the fee, he cannot at the same time object to the defender ignoring the implied entries as extinguishing the old investitures.

But, in the first place, in construing a statute like the present it does not necessarily follow that all its provisions are in precise logical symmetry. The question always is, what does the statute mean, and it may very well be that logically or illogically the purpose and meaning of the statute was to entitle the superior to ignore the implied entries so far as they might be pleaded as excluding his action, and yet to found upon them as excluding any attempt on the part of the existing proprietor to connect himself with extinguished investitures. It is certainly the case that while it is expressly provided that "no implied entry shall be pleadable in defence against such action" it is nowhere said that such implied entry shall not be pleadable in support of such action.

In the second place, however, I am unable to regard this question as still open. The case of *Ferrier's Trustees* v. *Bayley*, is, it is hardly disputed, expressly in point, and I doubt whether it is sufficient to displace the authority of that judgment that the point now taken does not appear to have been specially argued. But however that may be, there is no disputing the authority of the case of *Rossmore's Trustees* or of the case of *Lamont* v. *Rankin*, which went to the House of Lords. And I am quite unable to distinguish this case from those cases. It is true that the defender here is himself the heir of the old investiture, and is here tendering himself, and that in the cases in question the defenders sought to tender heirs who happened to be third parties. But having carefully read the judgments in those previous cases, I am unable to discover that they or any of them proceeded on this distinction. It was nowhere, so far as I can see, suggested that notwithstanding subsequent implied entries in favour of strangers, the statute left open the old investitures for the benefit of the heir of the old investiture if he happened to be the true owner of the estate, foreclosing merely the right to put forward—in answer to the superior's action—anybody but the true (beneficial) owner of the estate. That could hardly, I think, have been held consistently with the subsequent decision of the Court in the case of the *Duke of Hamilton* v. *Guild*, 10 R. 1122, which expressly affirmed the right of the defender in the statutory action if uninfeft to exclude the superior's claim for composition by putting forward a third party—not the owner of the lands at all, and making up a title in the person of that third party as the heir of the subsisting investiture. Neither do I think it is possible to hold that the principle of the judgments in question was merely this—that the old investiture was still open, but that entry being abolished nobody could be put forward to connect with the old investiture who was not in a position to obtain infeftment, and thus become a successor in the lands. That would rest the judgments in question on a mere technicality, and one which could have been easily overcome, viz., that the heirs there put forward had not had dispositions executed and recorded in their favour, or that the defenders did not propose to execute and procure the recording of such dispositions. It appears to me that if this had been all that was meant it would have been somewhere expressed, and moreover, that the unimportance of the judgments—which in this view would have been clear—would have been speedily recognised. The true principle of the judgments was, however, in my opinion different, and was the same in all the cases (*Ferrier's Trustees* included), and was simply this—that however the superior's action may be laid, and whatever he may require to assume *fictione statuti* as the basis of his action —implied entries under the statute in favour of strangers have the effect of extinguishing all previous investitures, and of forbidding all recourse to those extinguished investitures for the purpose of enabling any person to connect himself therewith as heir.

I am therefore of opinion that the pursuer is here entitled to prevail, and I have only to add

that I do not consider that the case of *Mackintosh* touches the present question. In the case of *Mackintosh* there was no change of investiture operated. Giving the fullest effect to the only implied entry which there occurred the old investiture remained intact. The old investiture was in favour of Æneas Mackintosh and his heirs-at-law, and the disposition which he executed, and which was impliedly confirmed, was in favour of his heir-at-law. And that appears to have been the basis of the judgment. It is true that the case in question, and the previous cases on which it followed, may be held to affirm the proposition that under the old law a person might claim entry on relief who had so made up his title that he was no longer in a position to serve. But the important fact which distinguishes all those cases from the present is that at the date when the heir in those cases made up his title by confirmation he was in a position to serve. By making up his title by confirmation he merely exercised an option affecting the form of his title, and in the exercise or non-exercise of which the superior had no interest.

At advising—

Lord Justice-Clerk—After much deliberation and consideration the consulted Judges have given their opinions in this case, and these opinions disclose the great difficulties raised by it. For their Lordships are divided as nearly equally as an uneven number admits of, being five of them in favour of reversing the judgment of the Lord Ordinary, and four of them for adhering to it. The responsibility of this Division is thus rather increased than lessened by our having sought the assistance of our brethren, for instead of their deliberations having disposed of the difficulty which led to their being consulted, the case comes back to us hanging in the balance as before, and we have to take our choice between very learned and closely reasoned opinions which are in strict conflict with each other.

After studying these opinions and the whole case, my opinion, arrived at in the end without any substantial doubt, is in accordance with that of the majority of the consulted Judges. That being my opinion, I might have contented myself with expressing it, knowing that I could add nothing of weight to their reasons. But in a case of so great importance, which in its ultimate decision must rule so many and so important interests, it may be considered desirable that the views of individual Judges should be expressed on the points which affect its decision. In doing so, however, it will be unnecessary to recapitulate the facts which are already so clearly stated in more than one opinion, and about which there is no controversy.

The first question is, Did every proprietor holding as a singular successor become at the passing of the Act of 1874 the direct vassal of the superior? This I hold to be conclusively settled by the decisions already pronounced. It is clearly expressed in the Lord President's judgment in the case of *Rossmore's Trustees*. The refusal to allow the defender in that case to put forward the heir of the previously entered vassal, so as to limit the payment to relief, is justified by the Lord President in these words—"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 person taking infeftment subsequent to the passing of the Act of 1874" (which is the same thing as his being infeft at the date of the Act) "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." This view of the law is fully upheld in the other cases which are referred to in the opinions of the consulted Judges including decision by the House of Lords. The question is not in my opinion an open one, but if it be assumed that the laying of a case before the whole Court re-opens questions which have already been made subject of decision, then my opinion is, that apart altogether from previous decision, the view contended for by the pursuer of the effect of the statute is sound and ought to be sustained.

The opening part of sub-section 2 of section 4 of the Act of 1874 makes the change in the law in very clear terms. By it a proprietor infeft at or after the passing of the Act is to be deemed and held as at the date of registration of his infeftment duly entered as if the superior had granted a writ of confirmation. No enactment could be more clear and distinct, and if the clause had stopped there no possible doubt could have existed as to its effect. But there is modification by proviso, and the modifications made require careful consideration to see whether they so affect the direct enactment as to give it a different meaning from that which its words import. Here it is noteworthy that the modifications are specific and sharply defined. There is no suggestion of modification to be implied. The direct modifications which have a bearing on the present question are these—(1) That although the proprietor is held entered by registration of his infeftment he is not necessarily to be liable at once to pay a casualty, but only at the time at which, under the conditions subsisting before the statute, the superior could have demanded it; (2) that his implied entry shall not also imply, as a writ of confirmation would have done, that all previous casualties were discharged, and shall not be pleadable in defence against the superior's action for a casualty; (3) that although no lands are to be deemed to be in non-entry, and no action of declarator of non-entry can be raised, yet that the superior may raise an action of declarator and for payment of any casualty exigible at the date of the action, decree in which is to have the same results as a decree of declarator of non-entry until the casualty is paid.

These are practically all the statutory modifications of the enacting words in sub-section 2 of section 4. There is nothing said in that or other sub-sections to modify to any other effect the declaration that registration of infeftment implies entry. In particular, it is not said that the entry by force of statute does not extinguish mid-superiority. It is not said that when a casualty is exigible it is not to be that which, but for the postponing proviso, would have been exigible at once. It is not said that the postponement of the time for the enforcement of the ordinary pecuniary conditions of confirmation is to expose the superior, in whose favour these conditions

exist, to having their value modified by the subsequent course of events. It is not said that the character of the casualty which is the sequence of the entry forced on the superior by the statute without present payment of casualty is to depend upon the chapter of accidents occurring after the entry. Had such anomalous results been intended they could have been easily expressed. As was pointed out in the House of Lords in *Rankin's* case, "a few simple words" would have expressed such intention of the Legislature had the intention really existed. Even admitting that implication might be enough, it would require to be necessary implication, and it can scarcely be contended that there exists any necessity for such implication.

Keeping in view these three things—First, what the statute enacts; second, what modification it applies to the enactment; and third, what modifications it does not apply—let us now consider the grounds of the judgment of the Lord Ordinary. These are mainly two in number—First, that as the payment of a casualty in respect of James' entry under the statute is postponed by statutory proviso till the death of the vassal last vest and seised in the lands, therefore, as James ceased to be a mere presumptive heir at that date, or became the heir *de facto*, he is entitled to limit his payment to that applicable to an heir, and the superior could not demand a composition. Second, that whether this is so or not, the casualty is now one of relief only, William being the heir, and succeeding as heir—that is, as heir of John's investiture.

Now, taking this last contention first, it appears to me to be fallacious to speak of William as being the heir of the investiture of John, as some of my brethren do. In *Ferrier's* case it was distinctly held that no person could now tender himself as heir to one who had disponed away the property prior to the Act of 1874. By that Act the right and title of such a one were absolutely taken away whenever registration of the disponee's infeftment was completed. Nothing remained in him as the basis on which alone such a tendering of his heir as would have been competent before the statute could rest. If the question be asked, Who after the passing of the Act was the vassal of the superior, liable to him in the feu-duties affecting the lands, and the performance of all the obligations of feu? the answer plainly is "not John, but James." James' entry by virtue of the statute is declared to be "to the same effect as if the superior had granted a writ of confirmation." So certainly is this so, that it is only by special proviso that the superior's claim against the former vassal and his heirs is reserved to him "until notice of the change of ownership shall have been given to" him, and this again is declared to be without prejudice to the previous proprietor or his heirs, &c., recovering all feu-duties he "may have had to pay in consequence of any failure or omission to give such notice." I am therefore unable to understand how it can be held that William has any defence to this action on the ground that he is the heir of John. John's right ceased to exist by force of statute in 1874. James could not therefore succeed to John when John died in 1877, for John was divested, and that being so, neither can William claim the character of heir of John's investiture. The Lord Ordinary, and those of my brethren who are in favour of upholding his judgment, found strongly on the case of *Mackintosh* in support of the opposite view. But I must confess that I am unable to understand why they should rely upon *Mackintosh's* case at all. If John's investiture ceased to exist in 1874, then *Mackintosh's* case cannot apply. If it did not cease to exist, and William can take advantage of it, then there is no need to appeal to *Mackintosh's* case in support of his right to satisfy the superior's claim for a casualty by a casualty of relief only. It is trite law that if the person succeeding as heir is to be entered, the superior must enter him for relief. And if James had not been entered till 1877 at John's death the case we are dealing with would have been a different one altogether. I therefore do not see even the purpose for which *Mackintosh's* case is founded on. In the view I take of that case it has no application to the present. There the vassal from whom a casualty was demanded was, as regarded one-half of the estate, which he took only on the death of the previous vassal, the heir of investiture entitled to enter by special service. It was held that having that right he was not debarred from pleading it against the demand for the greater casualty for the whole property by the last proprietor, merely because having the right to the whole testament he had taken infeftment as a singular successor thereunder, he being at the same time his heir in relation to a half. That comes to nothing more than this, that if the vassal entered by virtue of the statute has the character of heir of the already enfranchised investiture, he can claim that the investiture is continued in his person, and can therefore claim to limit his payment of casualty accordingly, notwithstanding that the form in which he made up his title is that appropriate to a singular successor. That which was in his predecessor, and which could pass to him by right as heir, he was entitled to found upon in any question as to what casualty was due to the superior on his entry under the statute. His relation at the time of the statutory entry being that of heir to a *pro indiviso* half of the estate, he was held entitled to plead that relation in the question of composition or relief. Here there is no such case. James was in 1874 only heir presumptive to John, and therefore not in a position to take anything as heir. He, when he obtained his entry in that year, did so solely on the right obtained from John by disposition, and therefore fell to be dealt with as a stranger in the question of payment of casualty when that should become exigible. That this brings about a claim for a greater casualty than might have been the case had the Act not been passed is no reason for not giving effect to the statute. As Lord Cairns pointed out in the case of *Lamont*, such a consideration will not justify the interpolation of words into the statute upon an assumption that the Legislature intended what the legislative enactment does not express.

But then it is said—and this is the second ground on which the Lord Ordinary's judgment is sustained—that as James, though only the heir presumptive of John at the time when he was entered by force of statute in 1874, turned out to be actually his heir when he died, James was entitled as at 1877 to satisfy the superior's claim for a casualty by payment as for relief only. This

view is based on the principle that the casualty must be determined "by the character of the applicant for entry, and not by the form of his title," as Lord Kinnear points out. But the answer seems to me to be this, that James was not in 1877 an "applicant for entry." He was entered at the passing of the Act "to the same effect as if the superior had granted a writ of confirmation." It seems to me impossible to maintain that if there had been no words in the statute postponing exaction of casualties a demand in 1874 for a casualty could have been resisted by James, and if payment of casualty could not have been resisted there could have been no pretence for limiting it to relief. It was the confirmation in the case of a singular successor which was impliedly effected in James' case by the passing of the Act of 1874. It is quite true that prior to 1874 a singular successor could by the device of tendering the heir for entry limit the casualty to relief. But it has been expressly decided that the singular successor cannot now tender the heir. What is the difference in this case? It is only that the heir as to whom it is suggested that he might have been tendered in 1877 is the same person as the singular successor, it happening to be the fact that at the time of John's death James was his heir. But if Lord Cairns' doctrine in *Lamont's* case must be accepted, that "the appellants" [*i.e.*, the singular successors] "are by the Act deemed and held to be truly entered, and if so, there is no vacant fief into which the heir could enter," then the distinction between the two cases is a distinction without a difference. Lord Cairns' words may be applied to this case thus—James is by the Act deemed and held to be truly entered, and if so, there is no vacant fief to which he—though on the death of John he proved to be the heir—can enter. The death of John added nothing to James' right or title. There was in 1877 nothing left in John for James to take up as John's heir. The death of John had only one practical effect. It put an end to the statutory postponement of the payment due to the superior for the enfranchisement of that entry, which was already completed as if by writ of confirmation in 1874. I am confirmed in this view by the knowledge that it was held by so high an authority in the feudal law as the late Lord Curriehill, who in his opinion in the unreported case of *Sturrock* v. *Carruthers' Trustees* in 1879, after stating the rule that the heir cannot now be put forward so as to evade payment of a composition, says—"This rule must take effect where the person whose entry is implied happens, after his infeftment as a singular successor of the original vassal, to become also the heir of that vassal."

Some stress is laid by those who are in favour of adhering to the Lord Ordinary's interlocutor upon the form of the action, which proceeds, following the form in the schedule, to describe the heir on whose death a casualty became exigible, namely, John, as "the vassal last vest and seised in the lands." The view taken is that this description of John implies—to use Lord Kinnear's words—"an averment that no other vassal has entered since his death, or, to use the language of the old law, to which the pursuer is required by the statute to appeal, that the fee is still vacant in consequence of his death." This reasoning seems to me to ignore the fact that the statute creates an anomaly by its implied entry and postponed exigibility of the casualty which but for proviso would have been at once exigible. This anomaly necessarily creates difficulty in the formal procedure for obtaining a decree on the occurrence of the event which removes the bar to exaction. It requires to be enacted that "no implied entry shall be pleadable against" the superior's action when the event has occurred. And accordingly the form of action passes by all such implied entries, and the vassal, to the occurrence of whose death the right to enforce payment of a casualty is postponed, is for the purposes of that action (which passes by implied entries) dealt with as the vassal who was last vest and seised in contradistinction to the vassal who is impliedly entered, and from whom the superior demands a casualty by his action. That this is the sound view of the meaning of the form in Schedule B appears in my judgment very clearly when consideration is given to the expressions used in the Act itself to describe the old and new vassals in the case of implied entries under the statute, where it is dealing with the rights of the superior, both as reserved and as taken away, in the case of implied entries.

In sub-section 2 of section 4 two persons are contrasted, the vassal who is impliedly entered, and the vassal who was entered before him. The words which the statute uses to describe the latter are "the proprietor last entered." Thus it is enacted that notwithstanding the "implied entry the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable" for feu-duties, &c., until notice of change of ownership is given to the superior." And again the right is conferred upon "the proprietor last entered in the lands to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered may have had to pay in consequence of any failure or omission to give such notice," and all remedies competent to the superior are to be held to be assigned "to the proprietor last entered in the lands and his foresaids" for recovery of such sums from the entered proprietor. The same expression "proprietor last entered in the lands" is again used in reference to the preservation of evidence of the notice of change of ownership, which is to save him from being still liable to pay feu-duties after the implied entry. And accordingly in Schedule A the instructions for drawing up the notice direct that after the words "which formerly belonged to," the name "of the last entered vassal" is to be inserted.

Now, nothing can be more clear than this, that the statute in the passages I have quoted adopts the words "proprietor last entered in the lands" to deseribe the proprietor who was entered but has been divested by implied entry of another, and the words "the entered proprietor of the lands" to describe the proprietor who is entered by the statutory implied entry. The two expressions are used in contrast to designate the two proprietors, the old and divested proprietor, and the new and impliedly entered proprietor. Such being the distinctive expressions used in the statute itself, and they being in no way ambiguous when they occur in the statute as to their application, it appears to me that all difficulty which might be supposed to exist regarding the wording of the statutory form of summons in Schedule B

is removed. In that summons the word "last" is used in the same sense in which it is used in the statute itself. The words "the death of C, who was the vassal last vest and seised," do not in my opinion mean who was such vassal when he died, but mean who was the vassal last entered, in contrast to the vassal who, previous to C's death, had entry effected for him by statutory implication, and is thus the entered proprietor of the lands. The words in the enacting clauses cannot be read in any other sense, and the words in the schedule can be read in the same sense, and if they can be so read, then they must be so read—it not being allowable to assume repugnancy—and if so read, all the difficulties suggested disappear.

I have only further to add that I do not think the result is affected by the fact that William has succeeded to James. It is said that as James was entered by implication, and William succeeds James as his heir, that therefore William is liable as for relief only. But this contention is directly in the teeth of the statutory proviso that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c., which may be due or exigible in respect of the lands at or prior to the date of such entry." Now, William's entry is an implied entry, and at the time at which it took place a casualty was due and exigible for the enfranchisement of James' entry. William therefore cannot plead his implied entry to debar the superior from making good out of the lands by action of declarator and payment the casualty which at the time of that entry was due and exigible, while William is further debarred from pleading either his own entry or that of James in answer to the action by the express words of the statute that "no implied entry shall be pleadable in defence against such action." William has no entry upon which he can found except either his own or James' entry. But both of these entries being statutory entries by implication only, I hold that under the express words of the statute they cannot be looked at. As regards the determination of any question of class of casualty or exaction of casualty, William's position must be considered as if he had to make up his title by the ordinary method necessary before 1874. This, as he cannot found upon implied entry, he could not now do as heir of John, consolidating by resignation *ad remanentiam* in his own favour. It is only as heir of James that he could proceed. And what would have been his procedure? It would have been to take up and execute the procuratory in the disposition by John to James, thus placing himself in the position to obtain a charter of resignation from the superior. But what would have been the payments he would have had to make in that case? Plainly a composition would have been exigible, and he could not have successfully maintained that he was liable as for relief only.

Although it is not permissible in forming an opinion as to the interpretation of statutory enactment to take into consideration what the effect of a particular interpretation may be, it is satisfactory to know that the judgment which the majority of the consulted Judges recommend will be consistent with the general idea which seems to run through the different clauses. The enactments of the statute are evidently not intended to cut down the superior's pecuniary interests, but are to save these. It is quite certain that if the views of the minority were to prevail, the superior would in many cases be deprived of all chance of obtaining a casualty of composition, and indefinitely. This would be a curious result, in the case of property held by individuals, of an Act which expressly provides in the case of corporations or trusts which have no succession, that a composition is to be paid to the superior at regular intervals. I think that the judgment we must give will bring about a more consistent result in the application of the statute than that of the Lord Ordinary.

On these grounds, and in respect of the opinions of the majority of the consulted Judges, I must move your Lordships to recal the interlocutor, and to decern in terms of the conclusions of the summons.

Lord Young—I am of opinion that the interlocutor of the Lord Ordinary is right and ought to be affirmed.

Lord Rutherfurd Clark—I agree with the Lord President.

Lord Lee—I agree with the Lord Ordinary and his views as stated in his note. I also agree with Lord Adam as to the specialty in the case.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Judges of the whole Court, Recal the Lord Ordinary's interlocutor of 20th December 1887: Find that the casualty due by the defender to the pursuer is a composition of one year's rent of the lands described in the summons: Find the pursuer entitled to expenses; allow an account thereof to be lodged; and remit the same to the Auditor to tax and to report: Remit the cause to the Lord Ordinary, with power to him to decern for the taxed amount of said expenses, and to proceed further in the cause as may seem just."

Counsel for the Appellant—D.-F. Balfour, Q.C. —Graham Murray—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent — Sol. Gen. Robertson, Q.C.— Guthrie. Agents—Campbell & Smith, S.S.C.

Friday, July 12.

FIRST DIVISION.

[Exchequer Cause.

LORD ADVOCATE *v.* LAIDLAY'S TRUSTEES.

Revenue—Indian or British Company—Contract of Copartnery—Death of Partner—Transfer of Shares—Inventory Duty.

The firm of R. W. & Co. carried on an extensive business in indigo, silk, and other produce, which after being grown or manufactured in India was either sold there, and the proceeds remitted to this country, or was