it to the fourth parties for the purposes mentioned in the seventh purpose of the settlement: And further, that the fourth parties are not entitled under the seventh purpose of the settlement to a present conveyance of the fee subject to the liferent of Jean Simpson, and subject also to defeasance of the fee in the event of her leaving heirs of her body."

Counsel for the First and Second Parties—Shaw. Agents H. & H. Tod, W.S.

Counsel for the Third Parties—Vary Campbell. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Fourth Parties—Lorimer. Agents—H. & H. Tod, W.S.

Friday, November 15.

SECOND DIVISION.

(WHOLE COURT.)

HARINGTON STUART *v.* JACKSON.

Superior and Vassal—Entry—Casualty—Composition—Relief—Implied Entry—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4—*Trust—Power of Sale.*

A testator died in 1865 leaving a widow who was infeft in the liferent of his whole lands, conform to the terms of a post-nuptial contract between them.

By trust-disposition and settlement he directed his trustees to hold the entire estate, heritable and moveable, until the youngest of his children attained the age of twenty-one, and then to divide and make over the heritable estate equally to and between them, "declaring that in the event of any of my children dying before receiving payment of his or her share of my whole means and estate without leaving lawful issue, the survivors and survivor of them shall be entitled to the share or shares that would have fallen or belonged to the deceaser or deceasers, and the same shall be payable in the proportions" as in the case of original shares. Failing all children without issue, the trustees were directed to realise the whole estate, and pay over the proceeds as the testator might direct, or failing further directions, among his nearest lawful heirs. There was also a general power of sale "for the better enabling my trustees to carry the foresaid purposes into effect," but this power was to be exercised only "when they consider it necessary."

The trustees were infeft in 1866, and on the passing of the Conveyancing (Scotland) Act 1874 they were impliedly entered with the superior, but no casualty was ever paid by them in respect of the lands.

The testator left an only child, to whom, on his attaining the age of twenty-one, the trustees conveyed the testator's heritable estate by disposition dated and recorded in 1883.

In an action against him by the superior for a casualty of composition declared to be due in consequence of the death of the defender's father, "the vassal last vest and seised in the lands," *held* (1), by the whole Court, that the Act of 1874 did not confirm by implication the liferent of the defender's mother so as to exclude the claim of the superior; but (2), by a majority of the whole Court, that the defender was only liable in a casualty of relief.

The Lord President, the Lord Justice-Clerk, Lords Mure, Young, M'Laren, Rutherfurd Clark, and Lee *held* that as the defender was the only child of the testator, those trust purposes which were designed to meet the case of a plurality of children had become inoperative; that the trust had existed only as a burden on the radical right of the defender's heir; that he took the estate not under the trust but as heir; and that the conveyance by the trustees did not create a new investiture. Lords Adam and Kinnear *held* that in order to ascertain the casualty due, the implied entry of the trustees was to be disregarded, and that as the defender's father, on whose death a casualty became due, was the vassal last vest and seised in the lands, the defender, as his successor and heir-at-law, was only liable in a casualty of relief.

Diss. Lords Shand, Trayner, Wellwood, and Kyllachy, who *held* that the defender was liable in a casualty of composition, on the ground that there was a new investiture enfranchised in the persons of the trustees, (1) because they held not only for behoof of the heir-at-law, but it might be of others not the heir-at-law of the testator; and (2) because the trustees had powers of sale under which they might have conveyed the estate to strangers.

Superior and Vassal—Disposition of Lands "with the Casualties of Superiority"—Composition.

By a disposition in feu-farm dated 1701 the predecessor of a superior feued out to the predecessor of a vassal certain lands and teinds, "and all and sundrie the casualties of the superiority of the said lands."

In an action by the superior for payment of a casualty of composition, *held* that the vassal could not found on this disposition as importing a renunciation of any claim of composition in respect of the said lands, because composition, although now called a casualty, was not only unknown as a casualty in 1701, but was a right differing both in origin and character from the feudal incidents which were then denoted by that term.

Held that the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 is not retrospective in its effect.

This was an action at the instance of Robert

Edward Stuart Harington Stuart of Torrance, superior of the lands of (1) Westquarter, (2) Westmains and Paffle, and (3) Merkland Croft, against Mr John Miller Wilson Jackson for payment of a casualty of composition in respect of these lands. The rental of Westquarter was about £500, and the rental of the remaining lands about £100 a-year.

The last-entered vassals who paid casualties in respect of the three different parcels of lands were John Jackson, the defender's father, for Westquarter in 1850, John Loudon for Westmains and Paffle in 1813, and Michael Linning for Merkland Croft in 1799. These persons were all now dead, and in consequence the casualty sued for was due for each of the lands. The defender's father John Jackson, who succeeded his father in Westquarter, became proprietor also of Westmains and Paffle and Merkland Croft by disposition from James Loudon in 1855, whereon he was duly infeft conform to instrument of sasine recorded in the General Register of Sasines at Edinburgh, 27th November 1855. He died in 1865 leaving a trust-disposition and settlement dated 5th March 1864, and recorded in the Books of Council and Session, 24th January 1865, whereby he conveyed the whole of the above-mentioned lands to trustees, who took infeftment conform to two notarial instruments in their favour, recorded in the General Register of Sasines on 4th December 1865.

The trust-deed provided (1) for payment of debts; (2) for a liferent of the household furniture to the truster's wife Helen Richmond Williamson or Jackson; (3) for a liferent to her of one-third of the free annual rental of the heritable estate; (4) the trustees were directed "to hold the free residue of my said estate, heritable and moveable, above conveyed, and rents and accumulations thereof, subject to the payment to be made as aforesaid until, the youngest of my lawful child or children shall have attained the age of twenty-one years, when they shall divide and convey and make over to said children my said heritable estate equally to and between them, share and share alike, under burden always of the foresaid annuity provided in favour of the said Helen Richmond Williamson or Jackson should she then be alive . . . Declaring that in the event of any of my said children dying before receiving his or her share of my whole means and estate without leaving lawful issue, the survivors or survivor of them shall be entitled to the share or shares that would have fallen or belonged to the deceaser or deceasers, and the same shall be payable in the proportions, and be held and applied in the manner above provided . . . . "Fifth, In the event of none of my children surviving me, or if they survive me but predecease said term of division without leaving lawful issue, I direct and appoint my said trustees, on the death of the said Helen Richmond Williamson or Jackson, my wife, in the event of her surviving me, or as soon after my death as possible, in the event of her predeceasing me, to realise my whole estate, heritable and moveable, and to pay over the proceeds of the same in such way and manner as I may direct by any writing under my hand, and failing thereof to and amongst my nearest lawful heirs and for the better enabling my said trustees to carry the foresaid purposes into effect, I hereby authorise and empower them, when they shall consider it necessary, to sell and dispose of my whole estate, heritable and moveable, either by public roup or private bargain, and to lend out the proceeds thereof or other funds of the trust or such parts thereof as may not be otherwise required on such securities, heritable and moveable, as they may think proper."

By postnuptial contract dated October 1863 the late John Jackson bound himself and his heirs and successors to infeft and seise his wife in liferent after his decease "in the lands, teinds, and others following — (2) Westquarter, (3) Westmains and Paffle; (4) Merkland Croft . . . to be holden either of the said John Jackson, his heirs and successors, in free blench for payment of one penny Scots money upon the ground of the said lands at the term of Whitsunday yearly, if asked only, or from the said John Jackson or his immediate lawful superiors thereof, in the same manner as he holds the same himself."

The late John Jackson was survived by his widow and an only child, the defender. Mrs Jackson was infeft in the liferent of the whole lands conform to the postnuptial contract. By disposition dated February 1883 the sole surviving trustee of the late John Jackson conveyed to the defender, who had attained the age of twenty-one years, the whole heritable properties which belonged to his father at the time of his death, subject to the burdens affecting the same. "In the first place, &c.; (2) Westquarter and Castle lands, but under burden of the liferent use and enjoyment by Marion Jackson while she remains unmarried of Hallhill House and grounds, part of the subjects disponed in the second place; (3) Westmains and Paffle; (2) Merkland Croft and others. But the several lands in the first, second, third, and fourth places above disponed are so disponed with and under the burden of the liferent thereof constituted in favour of the said Helen Richmond Williamson or Jackson under and in virtue of the foresaid postnuptial contract of marriage."

The pursuer averred that the trustees of the late John Jackson, in virtue of their infeftment in 1865 above mentioned, obtained an implied entry under the Conveyancing (Scotland) Act 1874, in the whole lands disponed to them, subject to payment of the casualties of composition due to the superior by the trustees as singular successors in consequence of the deaths of John Jackson, John Loudon, and Michael Linning respectively. Without having made payment of these casualties the surviving trustee had disponed the whole lands to the defender by disposition dated and recorded in 1863. "In virtue of his said title and of the provisions of the said Conveyancing (Scotland) Act 1874 the defender is entered vassal with the pursuer in the said whole lands and others, and is liable in payment of the casu-

alties which had become due as aforesaid."

The defender answered that his mother was infeft in liferent in the whole lands in question conform to the above-mentioned postnuptial contract. "In virtue thereof she uplifts and receives for her own behoof the whole rents, maills, and duties of the said respective lands (excepting those exigible from Hallhill House and grounds after mentioned), and accounts and pays to the pursuer the feu-duties payable therefrom. By the Conveyancing (Scotland) Act 1874 her said infeftment is impliedly confirmed, and payment of any casualty is postponed until the expiry of said liferent, no casualty being demandable during the subsistence thereof, according to the intent and meaning of that Act. Part of the lands first described in the summons being Hallhill houses and grounds are possessed by the defender's aunt Miss Jackson or her tenants, she being liferented therein so long as she remains unmarried, and that preferably to Mrs Jackson's liferent above mentioned."

The defender pleaded—"(2) Having regard to the said liferents of the said respective lands and others, the declaratory conclusions of the summons are incompetent. (3) In consequence of said respective lands and others being held in liferent by the foresaid liferenters, no casualties are demandable until the expiry of said liferents."

The question raised under these pleas affected the whole lands embraced in the summons.

The defender admitted that if he were liable to pay any casualty before this liferent expired, that casualty, *quoad* Westmains and Paffle, and Merkland Croft, was composition.

With respect to the lands of Westquarter, there were two grounds upon which the defender founded to the effect that even if he were liable in a casualty before the liferent expired, it could only be a casualty of relief and not composition.

In the first place, he relied on a disposition of feu-farm lands of Westquarter by the pursuer's predecessor Alexander Stuart to the defender's predecessor Thomas Miller, dated July 1701 and recorded 1830. This disposition disponed the lands and teinds, and all and sundry the casualties of the superiority of the said lands, with the pertinents and teinds thereof "which att any tyme hereafter may happen to fall and become in the hands of me, my aires and successores as superiors thairof by nonentry, lyferent escheat, not thankfull and tymeous payment of the few duties or otherwayes howsoever for whatsomever cause or occassione, and in whatsoever maner in all tyme coming forever . . . And whilk haill casualties not contained in the said reddendo dispensand with the genarlity hereof as if the same were speciallie sett down and enumerat, I, the said Alexander Stewart of torrens, for myself, my aires and successores, now renunce, together with the property of the saids lands with the pertinents and teinds thairof, to and in favours of the said Thomas Miller and his foresaids for now and ever; in the whilk ffour merk land of the saids lands of Westquarter with houses . . . and all and sundrie the casualties of the superiority of the saids lands and teinds particularly and generally above disponed, I, the said Alexander Stewart of torrens, hereby bind and obleis me, my aires and successores, duly and sufficiently to infeft and seise the said Thomas Miller, his aires and assigneyes whatsomever, heritablie and irredeemablie, be ane valid and sufficient chartour of few ferme in all due and ample forme containing ane precept of seaseing, or be ane precept of seaseing in the taill hereof: To be holden be them of me and my foresaids in few ferme and heritage forever ffor the yearly payment to us of . . . in name of feu-dutie for the saids lands and casualties of the superiority theirof above disponed . . . . and the aires of the said Thomas Miller doubling the foresaid soume of feu-duetey for the saids lands the first year of thair entry thairto, and to the teinds and casualties before disponed without paying any further compositione whatsomever upon payment of the whilk double of the forsaid feu-duetie allanerly, I, the said Alexander Stewart of torrens, hereby bind and obleis me, my aires and successores duely to enter, receave, and admitt the air or aires of the said Thomas Miller successive after others as immediat heretable vassals to us in the saids lands, with the pertinents and teinds thairof, with the casualties of the superiority of the same above disponed, be granting to them of precepts of clare constat or any other right competent perpetuallie in all tyme comeing without putting them to the expense of ane speciale service or chargeing of us for that effect."

In respect of this disposition he pleaded—"The lands of Westquarter being feued out by a predecessor of the pursuer, and disponed along with the casualties of superiority thereof, which are renounced, the pursuer has no right nor title to the casualties sued for in respect of said lands."

The second ground on which the defender claimed that any casualty due for Westquarter must be relief is thus expressed in his fifth plea-in-law—"The defender's father's testamentary trustees having held the said respective lands and others for the defender's behoof, and he being heir of his father's investiture therein, the defender, although infeft upon a conveyance from them, is not bound to pay more than relief-duty in respect of Westquarter, Castlelands, Knowhead, and part of two merk land of Knowhead, in all which the defender's father was entered vassal."

The defender further pleaded that under the Conveyancing (Scotland) Acts Amendment Act 1887, having been entitled to take by succession the said respective lands and others which were conveyed by his father to the said trustees, and afterwards disponed by them to the defender in accordance with the purposes and directions of his father's said trust-disposition and settlement, is not bound to pay more than relief duty in respect of Westquarter, Castlelands, Knowhead, and part of two merk

land of Knowhead, in all which the defender's father was entered vassal.

The action was raised on 8th July 1887, defences were lodged on 18th August 1887, the Act became law on 16th September 1887, and this plea was added at adjustment of the record on 18th October 1887.

The Lord Ordinary (KINNEAR) issued this interlocutor :—" Repels first, second, and third pleas for the defender: Sustains the fifth plea for the defender; and in respect thereof Finds that the casualty payable in respect of the lands first libelled, viz., the lands of Westquarter and others, is relief duty: Finds that with respect to the other lands libelled the casualty payable is composition; and on the pursuer's motion grants leave to reclaim; reserving in the meantime the question of expenses.

" *Opinion.*—This action is brought for the payment of casualties in respect of three separate parcels of land.

" The first plea taken by the defender is that as regards all the lands libelled the action is incompetent or at least premature, because although he is infeft in the fee, and his title has been duly recorded, his right is subject to a liferent in favour of his mother, and also as regards part of the lands to a prior liferent in favour of his aunt. This plea is, in my opinion, untenable. There is authority for holding that non-entry might be excluded by a liferent infeftment, but only if that infeftment had been confirmed by the superior; and the liferents in question have not been so confirmed. It is said they are confirmed, by implication, by the operation of section 4, sub-section 2, of the Conveyancing Act 1874. If that enactment were applicable to the liferent rights in question, its effect would be to enter the liferenters with the superior as his immediate vassal in the feu. But I think it clear that it has no such application. The infeftment, which implies an entry, must proceed upon a title which extinguishes, or is capable of extinguishing, the right of the prior vassal; and a liferent infeftment does not defeat the estate of the granter or his heirs or disponees. The liferents are mere burdens upon the fee vested in the defender.

"The second point made by the defender is that by the terms of his title the pursuer has no claim for casualties in respect of the lands of Westquarter. By a disposition in feu-farm dated in 1701, the pursuer's predecessor feued out these lands with the casualties, and this is said to import a renunciation of any claim for composition. But composition, although it is now called a casualty, was not unknown as a casualty in 1701, but it is a right differing both in origin and character from the feudal incidents which were then denoted by that term. I should therefore have difficulty in sustaining the defender's construction. But in the view I take of the case, it is unnecessary to determine that question, or to consider whether the defender has connected his title with the feu-disposition, because I think that irrespective of the conditions of that deed the casualty for which he is liable for the lands of Westquarter is not composition but relief.

"The vassel last vest and seised in these lands was the defender's father John Jackson, who died in 1865 leaving a *mortis causa* disposition and settlement by which he conveyed his whole heritable and moveable estate to trustees for division among his children when the youngest should attain majority. The defender is the only child of the truster, and the estate has been conveyed to him accordingly. The trustees were infeft conform to two notarial instruments recorded in the Register of Sasines in 1865; and it is said that as proprietor infeft they were entered with the superior by the operation of the Act of 1874. They conveyed the estate to the defender by a disposition which he recorded in the Register of Sasines in 1883, and there can be no doubt that he is now entered by force of the statute. The question is, whether the casualty now payable by him is composition or relief?

" I do not think it necessary to determine whether the trustees were entered by the Act of 1874, or whether they could have been required to pay composition in consequence of their entry. In the event which has happened, the trust was for the benefit of the defender alone, and it was finally executed by a conveyance of the estate to him. There is ground, therefore, for holding that the trust was nothing more than a burden on his radical right, and therefore that the infeftment of the trustees would not have excluded the entry of heir in that character. But whatever might have been their liability, if a claim for a casualty had ben enforced against them, they have now been divested without any such claim having been made; and the claim against the defender must therefore be determined on the assumption that there has been no intermediate entry between his father's death and his own infeftment. I think this is the necessary result of the provisions of the Act of 1874. The statutory action for casualties can only be brought by a superior who but for the statute would have been entitled to sue a declarator of non-entry against the successor of his last-entered vassal. It was in consequence of the death of the defender's father that the lands fell into non-entry; and they still continued in that position at the date of the defender's infeftment, because the implied entry of the trustees who have paid no casualty, cannot be pleaded in defence to this action. It follows that the title upon which they were entered, whatever may be its importance otherwise, does not regulate the investiture for the purpose of the present question. And accordingly the pursuer has disregarded it—and I think has rightly disregarded it—in framing the summons. The ground of action libelled is that a casualty has become due in consequence of the death of John Jackson, who 'was the vassal last vest and seised in the lands,' and the summons is directed against the defender as the last vassal's successor. This is said to be wrong, because the defender is not the immediate successor of the late Mr Jackson, and cannot be liable for a

casualty which became due on the trustees' entry. But it appears to me to be perfectly accurate. The defender is certainly not liable for the trustees' entry, but their entry is not pleadable, and therefore the superior is quite entitled to say, for the purposes of the present action, that the deceased Mr Jackson was his last-entered vassal; that a casualty became due in consequence of his death, because it was that event which put the superior in a position to raise this action, irrespective of any subsequent infeftment or implied entry; and that this casualty is now exigible from the defender as being in fact the late vassal's successor in the lands.

"But then it follows that the amount exigible from the defender must be determined by the character in which he succeeds, or is entitled to succeed, to the late vassal. The suggestion that it should be determined by his relation to an intermediate proprietor who paid no casualty for his entry, and whose entry accordingly cannot be pleaded against the superior, appears to me to be altogether inconsistent with the statute. If a duly entered vassal should dispone his estate to a purchaser, and the disponee after recording the conveyance should die in the lifetime of the disponer, I think it clear that on the death of the disponer, when the claim for a casualty emerged, the liability of the heir of the disponee would not be for relief as heir, but for composition as a singular successor. He would be an heir of the implied investiture, which could not be pleaded against the superior, but a stranger to the only investiture which could affect the superior's right to a casualty.

"But if the defender's liability depends upon his relation to the last vassal I do not think it doubtful that he is liable only for relief. By the form of his title he is a singular successor, but he is in fact the heir of the last investiture. He is in no worse position by reason of his having entered upon a conveyance from his father's trustees than if he had entered upon a *mortis causa* disposition by his father directly in his own favour, and in that case it is decided in *Mackintosh* v. *Mackintosh* that his liability would be for relief.

"This reasoning, however, applies only to the lands of Westquarter and others first libelled in the summons. I do not understand it to be disputed that for the other lands libelled the liability is for composition if the pursuer's claim is not excluded or postponed by the liferents.

"The Act of 1887 which is pleaded by the defender has in my opinion no bearing upon the question, because the present action was raised before the Act was passed."

The pursuer reclaimed.

The Second Division on 31st May 1888, in respect of the importance of the question submitted for determination, appointed the parties to prepare minutes of debate to be boxed to the Judges of the whole Court for their opinion thereon.

The questions in this case were considered along with those arising in the case of *Harington Stuart* v. *Hamilton*, July 18, 1889, 16 R. 1030.

The pursuer argued in his minute of debate—By the trust-disposition and settlement a new investiture was created by the testator, the trustees by their subsequent entry became liable in payment of the composition due by strangers, and the defender must now pay the amount of such composition, notwithstanding that he happened now (in 1888) to be the person who, under an investiture which once subsisted, but which became extinct in 1874, would have been the heir of the last vassal who paid a casualty to the superior. The Lord Ordinary determined the claim against the defender on the assumption that there had been no intermediate entry between his father's death and his own infeftment, and regarded him as the heir of the last investiture. The propositions by which the Lord Ordinary reached this view were novel, and untenable in law. It was concluded by authority that the infeftment and implied entry of the trustees created a new investiture to the effect of rendering them liable in payment of a composition. Unless therefore the pursuer was precluded from regarding at all the implied entry which intervened between the death of the defender's father and the infeftment of the defender himself, the defender must be held liable in payment of a year's rent. The pursuer admitted that the defender's implied entry wiped out the trustees' feudal connection with the lands, and brought him to hold direct of the pursuer as his superior, but he failed to see how it could possibly have revived or established any feudal relation between the defender and his father, whose connection with the lands had been entirely wiped out by the implied entry of his own trustees. The case of *Harington Stuart* v. *Hamilton* raised the question whether intervening implied entries were or were not pleadable by the superior, unencumbered by the specialty now appearing of the intervening infeftment being upon a trust-disposition. The pursuer contended that the effect of an implied entry under section 4 of the Act of 1874 (37 and 38 Vict. cap. 94), on which this question depended, was, as explained in a series of binding decisions, to abolish the barren estate of mid-superiority, of which vassals under the former law used to avail themselves by tendering the heir of the mid-superior for an entry on payment of relief duty, and to make implied entries precisely identical in their legal effect with the old form of entry by charter of confirmation from the superior, subject to two safeguards provided for preventing either party from taking an unfair advantage of the other by pleading these implied entries, viz. (sub-sec. 3), that the implied entry is not to entitle the superior to demand his casualty sooner than he could have done under the old law; and (sub-sec. 4) that it is not to be pleadable by the vassal in defence of the superior's claim for a casualty. In the present case, the trustees being infeft, and entered by force of the statute, the former investiture became thereby extinguished, and there was nothing left in the defender's father to which the defender

could possibly serve as heir. The *dominium plenum* was in the trustees, from whom his title subsequently flowed. And while conceding that the form of the defender's title, that of a singular successor, was not conclusive of his liability to pay a composition the pursuer entirely disputed the Lord Ordinary's proposition that his liability depended on his relationship to his deceased father. The true question is, whether the defender was heir of an investiture duly enfranchised by the superior, and subsisting now, or at least at the date when the defender completed his title, in which case he will only be liable in relief-duty; or whether, seeing that he took from a person holding under a deed whereby the former investiture was destroyed and a new one created, but which had not yet been enfranchised by payment of the superior's claims arising in respect of its creation, he was not now liable for a singular successor's composition, and barred from pleading any rights which he might have had if a former state of matters which no longer exists had been still in force. No difference arose in principle from the fact that the infeftment and implied entry were on a disposition not absolute, but in trust. *Grindlay* v. *Hill*, January 18, 1810, F.C., established the liability of trustees holding for the heir for composition. The question was again decided after the date of the Act of 1874 in *Lamont* v. *Rankin's Trustees*, February 28, 1879, 6 R. 739—*aff.* February 27, 1880, 7 R. (H. of L.) 10, in which reference was made to *Sturrock* v. *Carruthers' Trustees*, July 15, 1879, not reported, decided by Lord Curriehill, Ordinary. The terms of the present trust-disposition, especially in the fourth and fifth purposes, were such as to ground an argument similar to and *a fortiori* of that which prevailed in these cases quoted.

When the truster died in 1864 he was survived by only one child, the defender, who was then between three and four years old. Until he reached the age of twenty-one (which was not till the year 1882) it was necessarily uncertain whether the trustees would ultimately have to convey the estates to him, as has happened, or would have to realise the estate and dispose of it as directed by the fifth purpose of the trust. It was clear, on the authority of the cases referred to, that the trustees of the defender's father would have been bound after their implied entry to pay a composition of one year's rent if they had been called upon for a casualty. It was irrelevant to consider, for the purposes of the present question, whether the interest of the trustees was beneficial or not. As between superior and vassal the only question was, is the person who is about to become vassal a stranger to the investiture or an heir under it? If he was a stranger it did not affect his liability for composition that he was to be vassal not for his own behoof but for that of the heir.

The Lord Ordinary inclined to the view that the trust was a mere burden on the radical right which was truly in the defender from and after his father's death. But the terms of the deed in question precluded such a view. The fee of the estate was carried to the trustees with a direction to convey—to whom it was impossible to say for nearly eighteen years after the testator's death—and the deed contained not only a power of sale, but a direction, if no child of the testator should reach the age of twenty-one, to sell and realise, in which event the estate would have become moveable property—*Dick* v. *Gillies*, 6 S. 1065. The trustees were absolutely vested in the full fee of the estate. The defender's sole title to it was a conveyance from the surviving member of the trust. This fact seemed sufficient at once to distinguish the present case from those where the right of the trustee was a mere burden on the radical right of the truster in whom the fee remained. The pursuer cited two cases by way of contrast and illustration. *Gilmour* v. *Gilmour*, July 3, 1873, 11 Macph. 853, *per* Lord Justice-Clerk Moncreiff, was that of a trust-deed for behoof of creditors, an infeftment on which does not invest the trustee in the radical right of property, so as to enable the granter's heir to make up a title by conveyance from him. *Earl of Home* v. *Lyell*, December 20, 1887, 15 R. 193, was that of an infeftment in trust, for special and temporary purposes, without power of sale or directions to convey. On these grounds the pursuer urged that the Lord Ordinary was wrong in holding that the implied entry of the trustees could not be regarded or pleaded by the pursuer; that, on the contrary, the pursuer was entitled to regard and to plead it as creating a new investiture; and that the casualty for which the trustees became liable was a composition.

The defender was not entitled to plead the Conveyancing (Scotland) Acts Amendment Act 1887. He founded on sec. 1, but that section dealt with limitation of liability of trustees for casualties, and did not in terms apply to such a case as the present, where trustees had already conveyed away the lands and a question subsequently arose between their disponee and the superior. Besides, when the Act became law the pursuer's claim was an existing and vested right, and the Act would not apply retrospectively without express words—*Urquhart* v. *Urquhart*, 1853, 1 Macq. 658, *per* L.C. Cranworth, p. 662; *Kerr* v. *Marquis of Ailsa*, 1854, 1 Macq. 736; *Gardner* v. *Lucus*, Feb. 8, 1878, 5 R. 638, *aff.* March 21, 1878, 5 R. (H.L.) 105; *The Queen* v. *Ipswich Union*, 1877, 2 Q.B.D. 269, *per* Cockburn, C.J., 270; Maxwell on Interpretation of Statutes (2nd ed.), p. 257 *et seq.*; *Ballinten*, 14 D. 927; *Donald*, 24 D. 25; *Reid*, 1 M. 774. Further, litiscontestation had been constituted prior to the passing of the Act of 1887—Mackay's Practice of Court of Ses. i. 442.

There was no defence possible under the disposition of feu-farm lands of Westquarter in 1701. The superior's obligation as to entering vassals was expressly confined to Miller and his "aires." The words "aires and assigneyes" in the dispositive clause, taken along with the terms of the *reddendo*, must be read as equivalent to heirs and assignees before infeftment—*Brisbane* v. *Lord Sempill*, 1749

M. 15,061; *Magistrates of Inverkeithing* v. *Ross*, October 30, 1874, 2 R. 48; More's Notes to Stair, ccviii. The course pursued in making this original grant illustrated the statement of the practice by Lord Stair in his time—the time when the grant was made. The deed in question was described as a "disposition;" it was in favour of "heirs and assignees," and the granter bound himself to infeft and seise the feuar and his heirs and assignees "be ane valid and sufficient charter of feu ferme in all due and ample form, containing ane precept of seaseing, or be ane precept of seaseing in the taill hereof." The disposition was, in point of conveyancing, a preliminary deed upon which a formal charter, written in Latin, ought to follow, but it contained a precept of sasine, and feuars were often content to take direct infeftment upon it, and not to apply for a charter. Lord Stair, ii. 3, 14, observes—"Any disposition, *per verba de præsenti* in fee, is valid as to that part of the infeftment, and although the disposition contain an obligement to grant charters, yet the not granting thereof doth not prejudge." Again, ii. 4, 32—"For though in dispositions lands are ordinarily disponed to the purchaser, his heirs, and assignees, yet assignees use not to be repeated in the charters, and the meaning of that clause in dispositions hath been several times interpreted that the disposition may be assigned or transferred. But infeftment being once taken, assignees have no further interest, and that clause doth not save recognition." Accordingly after infeftment the disposition now in question must be read simply as a grant to the vassal first infeft and his heirs, and the renunciation of casualties must be held to have been for their sole benefit. There was not a word in this deed to bind the superior to enter or receive strangers to the first investiture on any terms whatever. The result was that the casualties dealt with by the said deed were casualties exigible from the original vassal or his heirs, and were never meant to include the composition payable by a singular successor. The renunciation of casualties was a token of favour towards, or a matter of bargain with, the original vassal, and as a vassal's creditors were at the time the only strangers to the investiture who could have forced an entry with the superior, it seems improbable that the feuar should have stipulated for any special favour to be shown to them. Further, if it had been the intention of the parties not only that the superior should receive singular successors, but that he should receive them gratis, it is almost certain that there would have been an express stipulation to that effect, and that so important a provision would not have been left to implication or conjecture. The word "composition" in the disposition did not help the defender. That word was not a *vox signata* in feudal law applicable only to the statutory compensation payable to the superior by a singalar successor. Heirs were frequently accustomed to "compone or transact" with superiors for feudal casualties—Stair, ii. 4, 28; *Ibid.* 16; Erskine, ii. 5, 50; Printed Register of Privy Council, vols. 3, 4, 5, Indices, *voce* "compositions" or "casualties of superiority;" and that was what was referred to in the clause above quoted. The heir was to be liable for his relief-duty, but he was to be liable for no further "composition" on any ground whatever. From the structure of the sentence it was clear that no reference was intended to the composition on entry of singular successors. Composition was included in the interpretation clause of the Act of 1874 (37 and 38 Vict. c. 94), sec. 3, in the term "casualties." But, as the Lord Ordinary observed, "composition, although it is now called a casualty, was not only unknown as a casualty in 1701, but it is a right differing both in origin and character from the feudal incidents which were then denoted by that term." At the date of the deed in question—1701—and for many years after, a superior was not bound to enter a purchaser on any terms at all, unless he came within the class either of an "appriser" or an "adjudger," who by virtue of special statutes formed an exception to the general rule, and might demand an entry on payment of one year's rent—Acts 1469, c. 36; 1672, c. 19; 20 Geo. II. c. 50; Stair, ii. 3, 5. It was not till the year 1747—20 Geo. II. c. 50—that it was enacted that voluntary purchasers also must have the benefit of a similar right of entry. Prior to this last date the "composition" or "compensation" due to the superior for the legalised right of a voluntary purchaser to enforce an entry was unknown to the law. It was not a proper feudal casualty, and it could not be said, in the words of the disposition in this case, "to fall and become in the hands of the superior." It was in the will of the superior whether there should be any such payment or not. The institutional writers did not deal with composition among the proper feudal casualties. Stair in his chapter on the latter (ii. 4) did not deal with the statutory "compensation" money or composition payable by creditors on their entry (the only description then known) otherwise than incidentally when discussing the casualty of relief. The casualties enumerated by him are (1) non-entry; (2) relief, (3) ward, (4) marriage—"the fourth casualty of superiority is called the marriage of the defunct vassal's heir," &c., sec. 37; and (5) "the last common casualty of superiors is the liferent escheat," &c., sec. 61. So also the subjects are dealt with separately and apart from one another by Erskine—Erskine, ii. 5 (feudal casualties); Erskine, ii. 7, 7 (composition); *Brisbane* v. *Lord Sempill*, 1794, M. 15,061, in which case a superior's claim for composition was sustained on similar grounds to the present, though the charter, which was in favour of "heirs and assignees," bore that so often as the lands should fall into the hands of the superior "by reason of liferent, escheat, non-entry, or otherwise from whatsomever occasion," they were of new to be made over to the vassal and "his foresaids" on payment of a small taxed sum of Scots money — Duff's Feudal Conveyancing, 54; and *The Edinburgh Gas Company*, 5 D. 1325,

per Lord President Boyle and Lord Mackenzie. That case was different from the present.

The defender founded on his mother's infeftment in liferent in the whole lands, and claimed that her infeftment was impliedly confirmed by the superior in terms of section 4, sub-sec. 2 of the Conveyancing (Scotland) Act 1874, and formed a bar to any demand by the superior for a casualty from the defender so long as the liferent subsisted. In order to obviate a plea of "all parties interested are not called," which was stated by the defender, a minute was lodged, by which Mrs Jackson, the liferentrix, adopted the defender's pleas and pleadings so far as founded on her rights. The Lord Ordinary's view of this contention was sound — Stair, ii. 4, 32 (3); iv. 8, 7; Erskine, ii. 5, 44; ii. 12, 24; ii. 5, 44. As to effect of liferents to which the superior has given his express consent in excluding non-entry, the superior's legal right to his composition could not be prejudiced without his consent. Accordingly, in ascertaining the amount of composition, there fell to be deducted from the year's rent, in addition to feu-duties and public burdens and reasonable annual repairs, "all annual burdens imposed on the lands by consent of the superior"—*Aitchison* v. *Hopkirk*, M. 15,060. Were it otherwise it would be open to vassals to resort to a very effectual device for defeating the superior's claims. The question here was not of non-entry, the fee was full by the implied confirmation of the disposition by the trustees in the defender's favour, and the widow's liferent was, as the Lord Ordinary justly put it, a mere burden on that fee. It was, moreover, not a burden created by the said trust-deed, but a hostile liferent arising by the terms of Mrs Jackson's marriage-contract, upon which she had chosen to rest her rights repudiating the provisions made for her by her husband's settlement.

The defender argued in his minute of debate—He was not liable for any casualty before the expiry of his mother's liferent. This question affected the whole lands. If held liable a great hardship would be inflicted upon him, for he was not yet and might never be in the beneficial enjoyment of the lands in question, the whole rents and income derivable therefrom (except a very small portion to which an aunt had a prior claim), going to his mother Mrs Jackson. Before the Act of 1874 no such hardship could have arisen, for in the case even of a liferent other than those arising *ex lege* (in which by law the claim for a casualty was necessarily postponed), if the superior declined to confirm or recognise it, a fiar in the position of the defender with respect to Westquarter might have entered to the mid-superiority and continued base infeft and lain out unentered as to the property. Where the fiar was a singular successor, he might have put forward the heir of the last entered vassal, and so have avoided payment of more than relief-duty, which in nearly every case was comparatively trifling. It would be only natural to expect, therefore, that the Act of 1874, holding as it did all disponees infeft in fee to be entered vassals, and abolishing the old mid-superiority, would contain some provision to meet the circumstances of such a case as the present so as not to increase the burdens of a vassal. The defender submitted that in point of fact it did. In considering the old law relation of a superior to a liferenter—First, In the case of liferents arising *ex lege*, of which the most familiar instances are the courtesy of a husband and the terce of a widow, the superior's claim for a casualty was correspondingly postponed until their termination. Second, A superior was also barred from insisting for payment of a casualty owing to the existence of any conventional liferent if he can be shown to have in fact confirmed it by accepting the liferenter as his entered vassal. Stair, ii. 4, 23; Erskine, ii., 5, 44; *Bryce*, M. 9333; Duff's Feudal Conveyancing, 477; Bell's Lect. on Conveyance (2nd ed.), 616 (3rd ed.) 622. The liferent of Mrs Jackson was declared to be in full of terce and *jus relictæ*, and it followed therefore that the pursuer's claim, *quoad* at least one-third of the whole lands, must be postponed until her death or until the liferent enjoyed by her was otherwise discharged. This was conceded. But the pursuer by founding on and deriving his right of action from the Act of 1874 had impliedly confirmed the liferent. The holding under the postnuptial contract was *a me vel de me*. Mr Jackson died in 1865. Under the law before the Act of 1874, the superior might either have confirmed the widow's liferent without exacting any casualty, or he might have declined to do so and called upon the vassal in the fee to enter. In the latter event, the defender being under the old law the heir of the standing investiture, the pursuer could not have obtained more than relief-duty, and on entering the heir he would have confirmed not only the heir's right but also the widow's liferent interest. No demand was made by the superior on the death of her husband, the last-entered vassal who paid a casualty. The liferent opened to Mrs Jackson in 1865. Her title having been completed and recorded she became by the Act of 1874 impliedly entered with the pursuer, just as if the pursuer had granted her a writ of confirmation. The interpretation clause favoured this view, so also section 4 (1) and (2). Therefore no casualty could be demanded from the fiar while the liferent continued, and this was equitable, for during its existence the fiar derived no profit from the lands. An analogous equity was referred to by Erskine, ii. 12, 24. The pursuer founded on section 4 (4) of the Act of 1874—"No implied entry shall be pleadable in defence" to such an action as the present. That provision was not to be read so absolutely. The implied entry of a vassal would not enable him thereby to exclude the superior's claim against himself—*Duke of Hamilton* v. *Guild*, July 6, 1883, 10 R. 1117, per Lord Kinnear, p. 1120—but that was very different

from pleading the implied entry of another vassal so as merely to postpone the claim. Nor was the pursuer protected by the subsection 3, which declares that such implied entry shall not prejudice or affect the right of the superior to any casualties due at or prior to the date of such entry, because at the date of Mrs Jackson's implied entry in 1874 no casualty was exigible from the defender, for he was not impliedly entered until 1883. He might, doubtless, in 1874 have served as heir to his father, but in that event he would not have been liable to pay more than relief duty, at any rate with respect to Westquarter, and this he was willing to pay now. So that the superior's right in the matter—*quoad* the defender—would be in no way prejudiced. The Act applied to the implied entry of a liferenter, that being an interest capable of confirmation under the old law, and the infeftments of a liferenter and of a fiar not being coordinate might quite well co-exist, but full legal effect must be given to the implied confirmation of the prior though less extensive right, whatever that might happen to be. The implied confirmation of the liferent postponed but did not exclude the claim in respect of the implied entry of the defender.

The defender was only liable in relief duty for Westquarter. (1) He was *de facto* the son of the last-entered vassal who paid a casualty, whatever was the form of his title. The trustees, although they were impliedly entered with the superior by the 1874 Act, were in no sense singular successors in the estate, having no beneficial interest therein, but merely holding it for behoof of the defender—the heir of the truster. Their infeftment as trustees was of a limited character. They would consequently have been liable in no higher casualty than relief-duty if the superior had made any demand upon them, and it could not be supposed that the superior could, by merely allowing the trustees to convey to the heir before asking for a casualty, convert that casualty from a relief-duty into compensation on the ground that the heir held on a singular title from the trustees. The interposition of trustees, who truly held for the heir and the heir alone, would simply be ignored as affecting the question of casualties on the ground that there had been *de facto* no change in the existing investiture in a proper feudal sense—*Advocate General* v. *Swinton*, 17 D. 21. Rather it would seem that a relief-duty having been payable by the trustees but not demanded, the heir by paying it now would be free from all further claim. The pursuer maintained that if he had gone against the trustee, as he might have done any time after 1874, he would have obtained a composition, and he founded on the cases of *Grindlay* v. *Hill*, *supra*, and *Rankin's Trustees* v. *Lamont*, *supra*. But it was apparent that the trust here was necessarily for behoof of the heir. The terms of the deed showed this, and as he had survived and taken the estate from the trustees, the trust had been clearly shown to have been for no one else. This being the fact at the moment when the casualty was demanded, it seemed to be of little importance to consider what might have happened, as the pursuer could possibly run risk of prejudice now in his character of superior by any retrospective recognition of the trustees as holding for the heir. But the powers of sale if they had to be regarded were of the most restricted and limited description. The first of them could not be exercised so long as the defender was alive, and there was no purpose for the carrying out of which any sale under the second was requisite. The trust-deeds in *Grindlay* v. *Hill*, and *Lamont* v. *Rankin's Trustees*, were of a totally different nature. The exact effect of *Grindlay* v. *Hill* was described in a note by Lord Ivory to Erskine ii. 7, 7. It was only in a case where the trustees were to hold, not for the heir only but also for a stranger, that the superior could exact from them a composition; such was not the case here, for even failing the defender, the only destination in the trust-deed was to the truster's "nearest lawful heirs," unless he left any other directions by any separate writing, and in point of fact he left none. Accordingly the position of the trustees was simply that of machinery to carry out the truster's ultimate object of conveying the estate to his heir. They acted as the dead man's hand in transmitting the estate and their interposition did not make the case really different from what it would have been in the event which had happened if the disposition had been direct to the son. Another view of the position of the trust was that it was a mere burden on the radical right to the estate which had now been cleared off. The implied entry therefore of the trustees was only for a limited purpose, which had been accomplished. The defender as heir could have made up his title to the estate subject to the trust purposes until they were satisfied. The same result has been achieved in a different way, and the heir had allowed the trustees to discharge the burden before connecting himself with the estate. And accordingly the superior, if he had claimed a casualty while the trustees were still impliedly entered, might have been met with a tender of the heir and relief-duty, on the principle given effect to in the *Marquis of Huntly* v. *Earl of Fife*, 14 R. 1091; *Earl of Home* v. *Lyell*, 15 R. 193. In either view, since the death of the last-entered vassal who paid a casualty, no stranger had been introduced into the investiture. The defender was no stranger. The apparent difficulty arising from his title being in form that of a singular successor was removed by the decision in *Mackintosh* v. *Mackintosh*, 13 R. 592, which settled that if a vassal was heir in fact he was only liable in relief duty, though his title was singular in form. But the trustees' implied entry had been evacuated by the subsequent entry of the defender, and it was immaterial now what casualty the pursuer might have obtained from the trustees while they were still infeft. When an action was raised the defender therein had no concern with any

intermediate implied entries. He paid a casualty in respect of his own entry, and his own entry alone—*Mounsey* v. *Palmer*, 12 R. 236, *per* Lord Shand, 247, *per* Lord Mure, 249. The only other vassal with whom he was concerned was, in the language of the summons, the vassal last vest and seised, in consequence of whose death the right to bring the action had arisen, and that vassal was his father.

The pursuer overstrained the provision of the Act of 1874, that "no implied entry shall be pleadable in defence." The provision was limited in its operation. An implied entry could be pleaded, not to exclude a claim, but to regulate the amount of the casualties payable—*Duke of Hamilton* v. *Guild*, 10 R. 1117. *Quoad ultra*, the rights of superior and vassal in respect of implied entries were reciprocal. One was not to be in a worse position than the other.

But it was further objected that the defender could not now found on the fact of his being heir, because the form of his title was that of a singular successor. The implied entry, it was said, under the Act operated to the same effect as if the superior had granted a writ of confirmation, and where an heir was entered by a charter of confirmation he could no longer have the benefit of his title as heir. But the reverse of this was decided in *Mackintosh* v. *Mackintosh*, 13 R. 692, *per* Lord President; following upon *M'Kenzie* v. *M'Kenzie*, 1777, M. App. *voce* Superior and Vassal, No. 2; *Brown* v. *Magistrates of Musselburgh*, 1804, M. 15,038; *Marquis of Hastings* v. *Oswald*, 21 D. 871; *Stirling* v. *Ewart*, 4 D. 684, *per* Lord Moncrieff, 735. There, as here, the defender was in fact the heir in heritage of the vassal last vest and seised who paid a casualty, but there, as here, though entitled to enter as heir he did not do so, but took through a disposition from his author—there no doubt directly, while here the defender took through trustees—a distinction, however, in the circumstances without a difference. Even though it were the case that the heir could not have made up an heir's title here, that did not matter. It was pointed out by the Lord President in *Mackintosh* that in the cases of *M'Kenzie* and *The Marquis of Hastings* a singular title was an absolute necessity, but that still the character of heir was what determined the amount of the casualty. The point now raised was not taken in the cases of *Ferrier's Trustees*, *Rossmore's Trustees*, and *Rankine's Trustees*.

(2) The casualties of superiority were renounced in the feu-disposition of the lands of Westquarter, and the "casualties" of superiority so renounced included the composition payable by singular successors. The expression casualties of superiority was wide enough in a deed of the present day to include the composition payable by a singular successor; the question was whether in interpreting a deed executed in 1701 the word had that meaning. But the pursuer was barred from raising that question, for he had to found on the Act of 1874, and that Act declares "casualties" to include, *inter alia*, "the composition or other duty payable on the entry of a singular successor." For the pursuer could not exact more than relief-duty from the defender, the latter being in fact the son and heir of the last-entered vassal according to the old law unless he invoked the aid of this Act of Parliament, and it was therefore a reasonable proposition to maintain that the defender also was entitled to found on the Act, and so to take the benefit of the interpretation clause. The larger question whether or not such a composition as claimed was in a strictly feudal sense and in its origin a casualty of superiority was still open, and was clear from the case of *Morrison's Trustees* v. *Webster*, &c., May 16, 1878, 5 R. 800. But the defender need only show that the expression as used in 1701 must be held to include composition. It would do so in a deed of date long prior to 1874—*Edinburgh Gas Light Company* v. *Taylor*, July 5, 1843, 5 D. 1325, *per* Lord President, 1327, *per* Lord Fullerton, 1328. If in a deed of 1825 "casualties" included composition so did it in the deed of 1701. For the position of a purchaser in the later year was *quoad* his practical rights just what it was in 1701, although the method of asserting and enforcing these rights had been considerably simplified. True that in 1701 no purchaser of an estate could strictly in that character come to a superior and force an entry from him. But yet if the superior in any case declined voluntarily to give an entry to a singular successor as such, the latter could nevertheless obtain himself an entered vassal with the aid of the Act 1669, c. 18—Walter Ross, ii. 302. Moreover, 20 Geo. II. c. 50, did not confer any new right on purchasers of obtaining an entry; it only reformed the mode of enforcing an entry—secs. 12 and 13 of Act; Erskine ii. 77. The Act alludes to the entry of purchasers as no less known to the law than the entry of heirs, while the payments made in respect of them both are referred to the same category of fees or casualties. The fee or casualty payable by a singular successor was accordingly a payment evidently recognised and in practice long before 1747. Composition had been used in the Act 1677, c. 19, "concerning adjudications," to describe the fine on payment of which an appriser or adjudger was entitled to an entry, for it provides that the lands adjudged shall remain irredeemably with the creditor if not redeemed within five years "by payment or consignation of the sums, principal and annual rent, for which the adjudication did proceed, the composition paid to the superior," and expenses. It was known therefore that in 1701 purchasers were able to obtain, and were in the habit of obtaining, entries on payment of a year's rent, just like adjudgers, and that the expression used to describe that payment was composition. The deed in question, then, renounced every right the superior had of exacting payment except the relief duty exigible from heirs. The Conveyancing Act of 1887, sec. 1, applied.

The consulted Judges returned the following opinions:—

LORD PRESIDENT—I concur with the Lord Ordinary in so far as he has repelled the first four pleas stated in defence; and as I do not understand that there is any serious difference of opinion on the questions raised by these pleas, I think it enough to refer to the Lord Ordinary's reasons for his judgment.

The fifth plea stated for the defender raises a question more difficult and important; and although I should hardly be prepared to sustain that plea in the precise form in which it is stated, I am of opinion that the Lord Ordinary is right in giving effect to it in the special circumstances of the case as stated on record.

The defender's father, John Jackson of Hallhill, was infeft and entered with the superior in the lands of Westquarter and others in 1850. He died in 1865, leaving one child, the defender, who of course was his heir-at-law, and as such heir in the lands of Westquarter, and entitled to expede a special service, unless he was disinherited by his father. But he could not be disinherited without the lands being effectually conveyed to or for the use of some other person or persons, for his or their beneficial use and enjoyment in fee.

The defender's father executed a trust-disposition and settlement whereby he disponed, *inter alia*, the lands of Westquarter and others to certain persons as trustees, who took infeftment on the precept contained in the trust conveyance in 1866, and on the passing of the Conveyancing Act 1874 were impliedly entered with the superior.

It appears to me that if there was, by virtue of that trust-disposition, a disinherison of the defender, he could not now serve as heir-in-special to his father, although by the operation of the trust and subsequent events it has come to be a resulting trust in favour of the heir as a beneficiary under the trust. If the heir can now claim the estate only as a beneficiary under the trust, then his character as heir is gone. But if his rights as heir have only been suspended or burdened by the operation of the trust, and all the purposes of the trust have failed, then his radical title of heir has not been extinguished.

Before the Act of 1874 not only persons vested with the *dominium utile* of an estate in absolute property, but also persons possessing only temporary and conditional rights to the estate, entered with the superior, and were entitled to require the superior to enter them. Adjudgers, disponees in security, and disponees under an absolute disposition, qualified by a back-bond, were so entered, but when the debt was paid or their claims satisfied their right to the lands came to an end, and the radical right of the true owner or his heir remained unaffected except as concerned the temporary possession of the estate. In like manner, I apprehend a *mortis causa* trust conveyance by the proprietor will come to an end, though confirmed by the superior, so soon as the trust purposes are satisfied or have failed or become impossible, and the radical right of the heir, which has never been extinguished, will become operative.

The provisions of the Act of 1874 make no alteration in the law in this respect, and cannot be supposed by the operation of implied entry to transform what was previously a temporary or conditional right into an absolute right of property.

Everything, therefore, in the present question seems to me to depend upon the nature and effect of the trust created by the defender's father.

The purposes of the trust are—(1) payment of debts, (2) a liferent of furniture, &c., to the widow, (3) a liferent to the widow of one-third of the annual rent of the heritable estate. These three purposes of course do not affect the question under consideration in any way.

The fourth purpose is a direction to the trustees to hold the entire estate, heritable and moveable until the youngest of the testator's children attains the age of twenty-one, and then to divide and make over the heritable estate equally to and between them, "declaring that, in the event of any of my children dying before receiving payment of his or her share of my whole means and estate without leaving lawful issue, the survivors or survivor of them shall be entitled to the share or shares that would have fallen or belonged to the deceaser or deceasers, and the same shall be payable in the proportions," &c., as in the case of original shares.

As the truster had only one child (the defender) it seems clear that this fourth purpose never could receive any effect. There being no plurality of children, there could be no division, and the defender as only child could take nothing under a direction to divide. It is equally clear, for the same reasons, that the clause of survivorship cannot receive effect, and that the defender can take nothing as the survivor of brothers and sisters, as he never had any such relatives. If there had been a plurality of children, the defender might and would have taken as a beneficiary under the trust; but in the absence of any other children this is impossible, for he takes the whole estate, not under the trust but as heir. There is no direction to the trustees anywhere in the deed to convey the lands of Westquarter and others, or the whole or any specific part of the estate, to the defender, and therefore, taking the whole estate, he cannot take either the whole or any part of it as a beneficiary.

In so far as this fourth purpose is concerned, the failure of its provisions does not arise from any emerging facts or events occurring after the truster's death, or the infeftment of the trustees. It was manifest on the occurrence of the truster's death that this purpose could never be carried into execution. It was simply impossible.

The fifth purpose is a direction that, failing all children without issue, the trustees shall realise the whole estate and pay over the proceeds as the testator may direct, or failing further directions, among his nearest lawful heirs. As the failure of all his children is the condition precedent of

this purpose being carried out, the survivance of the defender defeats the purpose altogether.

Following all these purposes, there is a general power of sale; but this is given only for the "better enabling my trustees to carry the foresaid purposes into effect," and only when they "consider it necessary" so to enable them. Of course this power does not apply to the case where there is a positive direction to sell on the failure of all the truster's children, and therefore it is to be used only to enable the trustees to carry into effect the provision under the fourth purpose. They were not entitled to use it with any other object. The provisions of the fourth purpose being impossible, the power of sale cannot be legitimately exercised any more than the trustees can act on the direction to sell, which is made conditional on an event which has not occurred and never can occur.

Here then is a testator's trust, the purposes of which, from its coming into existence on the testator's death, are utterly inoperative and nugatory, except in so far as it provides that, failing his own children, remoter heirs shall receive the succession in the form of the proceeds of a sale of the entire mixed estate, heritable and moveable. It has obviously been framed to provide for a state of the family which never existed, but which the testator fondly imagined, and perhaps hoped, might exist. It is unworkable, and was so from the first moment it became irrevocable by the death of its maker.

The question at once occurs,—How can this affect the character and rights of the truster's heir? He can take nothing under the provisions of the trust, but he is entitled to the estate. Nobody doubts this. In what character then is he to take it?

No doubt he has taken a disposition from the surviving trustee, but that cannot affect the question. This was obviously done for mere convenience, because the trustees were infeft. And he was quite entitled as heir to demand such a conveyance, because the trustees were holding an estate which was not theirs but his. The form of making up the heir's title is of no importance in a declarator of non-entry, or in the statutory action which comes in its place. The superior is bound to square his pecuniary demand for an entry not according to the form of the vassal's title, but according to his character as heir or singular successor.

We have nothing to do in this question with the terms on which the trustees were entitled to enter with the superior in 1866. Adjudgers before 1874 could demand an entry only on composition, and so probably disponees in security, or disponees under an absolute disposition with back bond, might have been and may be still liable in composition. But the only question is, on what terms the defender is entitled to enter; and I am of opinion that since the death of his father, the vassal last seised as of fee in the lands, he possessed the character and rights of his father's heir, and might at any time since his father's death, notwithstanding the implied entry of the trustees, have been served heir in special to the lands of Westquarter and others, subject to the burdens, such as they were, contained in his father's trust-disposition and settlement, and is therefore liable in relief-duty only.

LORD MURE—I concur in the opinion of the Lord President.

LORD SHAND — I agree with the Lord Ordinary in thinking that the grounds of defence embodied in the defender's pleas in law, other than the fifth plea, for the reasons contained in his Lordship's judgment, are not well founded, and that these pleas ought therefore to be repelled. But differing from his Lordship, I am of opinion that the defender's fifth plea-in-law ought also to be repelled, and that decree in terms of the conclusion of the summons should be pronounced in the pursuer's favour.

On the passing of the Statute of 1874, the trustees of the late John Jackson, the pursuer's father, became entered with the superior as vassals in the lands in question, in the same way and to the same effect as if a charter of confirmation had been granted in their favour of their infeftment, recorded in the General Register of Sasines on 4th December 1865, following on Mr Jackson's trust-disposition and settlement, dated 5th March 1864. If the destination contained in this trust-disposition and infeftment so confirmed, created a new investiture, then, for the reasons fully stated in my opinion in the relative case of *Harington Stuart* v. *Hamilton*, it follows in my judgment that the pursuer is entitled to a payment of composition. If, on the other hand, the trust created by the late Mr Jackson's trust-disposition was nothing more than a burden on the heir's radical right—that is, on the right of the defender as his father's heir—I should hold that the pursuer was entitled to relief-duty only.

The decision of the question whether relief-duty only or composition be exigible, depends on the legal effect of the special provisions of the trust-deed, and the implied entry of the trustees resulting from the passing of the Statute in 1874. It appears to me that the trustees did not obtain an entry for the defender as his father's heir which could be made available to him and to him only. It is true he was his father's only child and heir, but the trustees had not only a power of sale of the property, but they were vested with the fee of the estate under a title which excluded the heir's right. From 1865 to 1882 (a period of seventeen years) his right was entirely in abeyance. If he had died before attaining the age of twenty-one years leaving lawful issue, such issue would have had right equally among them to the property; and failing such issue, the trustees were directed to sell the property and pay over the proceeds along with the moveable estate to the nearest heirs of the testator. It is, in my opinion, the result of the authorities, that where trustees of a testator hold the estate with powers of sale, and not exclusively for behoof of the heir, they are singular successors in a question with the superior; and whether demanding an entry by confirma-

tion, as they might have done before the statute, or entered under the statute, the superior is entitled to composition on their entry.

It appears to me that the conveyance to the trustees for the purposes of the deed was the creation of a new investiture. If the trustees had required the superior to grant a charter of confirmation of their right, he would, I think, have been entitled to decline unless on payment of a composition, for the right which the heir had was uncertain and contingent; and the entry under the statute gives the superior right to the composition which he could have claimed in return for a confirmation. The measure of the payment must, I think, depend on the nature and effect of the investiture as at the date when the entry is taken, and not upon some subsequent event—such as the survivance of the heir to a date eight years afterwards. The fact that if the defender had died at any time within eight years after the entry with the superior, leaving lawful issue, the right to the estate would have devolved on such issue equally among them, and that if he died without issue, the lands were directed to be sold under the investiture then confirmed, in which case they would not have descended to the defender as heir, is sufficient to show that a new investiture had been created, — that the trustees' right was no mere burden on the right of the heir,—and that the trustees' entry was that of singular successors.

The case appears to me to fall directly under the principle to which effect was given before the statute in the case of *Grindlay and Others* v. *Hill*, January 19, 1810, and again after the statute in the case of *Lamont* v. *Rankin's Trustees*, 6 R. 739, affirmed 7 R. (H. of L.) 10. In the former of these cases the trustees held directly for the heir in whose favour they were to denude on his reaching a certain age, whom failing for strangers, and it was held that an entry by the trustees must be regarded as a new investiture. In the latter the state of the facts was substantially the same, as appears from the statement of the provisions of the trust-deed given in the note of Lord Curriehill to his interlocutor (6 R., H.L. 742). The primary purpose of the trust was the gradual extinction of debt, after which the lands were to be settled by entail on the truster's heir-at-law, and a series of substitutes, whom failing by his death before attaining the age of twenty-five to a series of other heirs named, and at least in one case the institute of entail might not be the nearest heir. In this case also it was held that an entry in favour of the trustees was the creation of a new investiture.

I do not think any sound distinction can be drawn between the effect of the trust-deed in this case and the deeds in the two cases just noticed. The trustees' infeftment, and the confirmation of it under the statute of 1874, were, I think, inconsistent with a service and infeftment by the heir, and excluded the heir from making up any such title to the property. The defender does not on record maintain that standing the trustees' infeftment he could have effectually made up a title to the lands except through the trustees. Accordingly he took a title from the trustees on the narrative of the trust and its purposes, and as in fulfilment of these purposes. The narrative of the deed as bearing on this point is in these terms—"And now seeing that John Miller Wilson Jackson, residing in Edinburgh, only child of the truster, attained the age of twenty-one years complete on the 24th day of July 1882, and has requested me, as trustee foresaid, to convey to him the whole heritable properties which belonged to his father, the said deceased John Jackson, at the time of his death, subject to the burdens affecting the same, in implement of the latter's trust-disposition and settlement in part before narrated, which it is reasonable and proper I should do, therefore I, the said John Marshall, as sole remaining trustee foresaid, do hereby assign and dispone to and in favour of the said John Miller Wilson Jackson," &c. The disposition was thus asked and given "as in implement of the trust-disposition and settlement," and, as I think, rightly so. The title was not attempted to be made up by service and infeftment on the footing that the trust was all along a mere burden on the heir's right. Nor does the defender's 5th plea-in-law present any different view. His contention as there expressed is not that the trustees' infeftment was a mere burden on his own right which has flown off because the whole trust purposes have failed, but, on the contrary, that the trustees held the lands for him (which was precisely the contention maintained by *Grindlay's Trustees*), and that his survivance of the age of twenty-one entitled him, in virtue of the provisions of the trust-deed, to the conveyance he obtained.

That is in my opinion the true state of the case, and the effect of the provisions of the trust-deed. It is true that in the fourth purpose of the trust the truster contemplates and provides for the case of his leaving more than one child, and in that expectation (which, after all, may have been the conveyancer's expectation or mode of giving effect to his general instructions) directs the residue of his estate, which his trustees were to hold till the youngest of his children should attain the age of twenty-one, to be divided and conveyed among his children equally. It appears to me to be the result of this provision by the testator in favour of all his children, and to be the sound construction of the deed by necessary implication from the language used, that in the case of there being one child only, that one child must take under the deed all that is given to the children, subject of course to the condition that he must attain the age of twenty-one. That is not only the view on which all the parties acted, but also the only view which the defender has presented on the record. To hold otherwise on the construction of the deed—to hold that the fourth purpose entirely failed as soon as the testator died leaving only one son, because he had provided for the case of more than one child—

would result in this—that during the years from 1865 to 1873 the trustees had no title to hold this property; that the limit of age was only applicable to the case where there were several children, amongst whom the property might come to be divided, and not to the case of one child only surviving—and that consequently there was no destination-over in favour of the issue of the surviving child who did not attain the age of twenty-one years, nor of the testator's nearest heirs. In that view, the only trust purpose the trustees had to perform was to pay the truster's debts, for his widow declined to take any benefit under the deed, and so the heir-at-law was entitled to take up the heritable estate as intestate succession. I cannot, for my part, adopt that view. It seems to me that such a construction can only be reached by construing the language used so as to defeat the truster's intention rather than to fulfil it. I think a destination to all the children surviving includes and implies a destination to one child only, if there be only one child alive on the parents' death.

But, further, the deed contains a power to the trustees to sell and dispose of the truster's whole estate, heritable and moveable, either by public roup or private bargain, "and to lend out the proceeds thereof . . . on such securities, heritable and moveable, as they may think proper." In my opinion this clause empowered the trustees, if they thought it desirable in the interest of the trust—as, *e.g.*, where they thought part of the heritable estate likely to become depreciated in value—to dispose of it, and invest the proceeds. Had they done so, it is clear that their title, which had been confirmed, was the first step of a new investiture; but the fact that under their title as confirmed they had the power of sale and disposition is enough to show that the trust-deed and infeftment did constitute a new investiture.

It must be conceded by the pursuer to the defender that under the final destination of the testator's property, heritable and moveable, to his nearest heirs, the defender would take the whole residue of the estate as his father's heir on the failure of all the other trust purposes. That is settled by the recent decision in the House of Lords in the case of *Gregory's Trustees* (*Hood* v. *Murray and Others*), not yet reported, which in effect reversed *Wannop's* case (*Haldane's Trustees* v. *Murphy*, 9 R. 269), and the defender may further, I think, successfully maintain that his right to the residue vested in him *a morte testatoris*. If there were nothing else in the case the defender might thus contend that under the destination as a whole the trustees held solely for his behoof. Lord Curriehill observed, in the case of *Lamont*, 6 R. (H. of L.) 742, "I express no opinion as to the liability of trustees for more than relief-duty when they hold the estate without powers of sale, and solely for behoof of the heir of the investiture. Such a case, when it occurs, will receive, as I think it will require, careful consideration." But I think the present is not such a case. The defender's right, taken at the highest, is subject to defeasance, for if he died before the age of twenty-one leaving two lawful children the estate must be divided amongst them, and would be no longer in the direct line of succession from the defender's father. It may be said, and with truth, that this was an improbable event, but it was an event provided for, and it might occur. This seems to me to bring the case directly under the authority of the two cases of *Grindlay* and *Lamont*.

I am of opinion that in this case there was a new investiture enfranchised in the persons of the trustees—(1) Because the trustees held not solely for behoof of the heir-at-law, but it might be of others not the heirs of line of the truster; and (2) because the trustees had powers of sale under which they might have conveyed the estate to entire strangers. These were the determining elements in the decision of the cases of *Grindlay* v. *Hill* and *Lamont* v. *Rankin's Trustees*, and following these authorities, I am of opinion that the pursuer is entitled to succeed in the action.

LORD ADAM—For the reasons stated in my opinion in the case of *Harington Stuart* v. *Hamilton* I think that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN—I concur in the opinion of the Lord President.

LORD KINNEAR—I am of opinion that the interlocutor should be adhered to for the reasons assigned in the case of *Harington Stuart* v. *Hamilton*. But if, contrary to my opinion, it should be held that the successor of a deceased vassal, being his heir-at-law, cannot have the benefit of his character as heir unless he is in a position to make up a title by service, I should still think that in the present case the defender is liable for relief and not for composition, because I am of opinion that the trust did not extinguish the prior investiture, but was a mere burden on the radical right of the heir. The conveyance by the trustees to the defender did not therefore in my opinion create a new title, but extinguished the trust so as to disencumber the original title. On this point I concur in the opinion of the Lord President.

LORD TRAYNER—The Lord Ordinary has held that the defender is only liable to the pursuer in payment of relief-duty in respect of his entry to the lands of Westquarter. From that view I dissent.

It appears to me that the implied entry of the trustees in 1874 created a new investiture. They were in my opinion singular successors, and anyone taking through them in virtue of the provisions of the trust-deed upon which they were infeft must also be a singular successor. I think that is the defender's position, and it follows that he is liable to the superior for composition.

If the trust-deed had been one for behoof of the truster's heir alone a different question might have arisen, but I cannot read the trust-deed as one for behoof of the heir.

I take the same view of the trust-deed, its meaning and effect, as that taken by Lord Shand, in whose opinion generally I concur.

LORD WELLWOOD — I concur in the opinion of Lord Shand.

LORD KYLLACHY—I concur in the opinion of Lord Shand.

At advising—

LORD JUSTICE-CLERK—In this case I concur in the opinion of the Lord President.

LORD YOUNG—I agree with the Lord Ordinary.

LORD RUTHERFURD CLARK—I agree with the Lord President.

LORD LEE—My opinion is that the interlocutor of the Lord Ordinary is right.

On the grounds stated in the opinion of Lord Kinnear in the case of *Harington Stuart* v. *Hamilton*, I think that the defender is entitled to obtain entry to the lands of Westquarter as an heir, and is not liable to pay composition.

I also concur in the opinion of the Lord President that there is nothing in the trust-settlement executed by the defender's father, or in what followed upon it, which can affect the defender's rights as heir of the truster.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause with the opinions of the consulted Judges in accordance with the opinion of the majority of the Judges of the whole Court, Refuse the reclaiming-note for the pursuer against Lord Kinnear's interlocutor of 20th December 1887, and adhere to the interlocutor reclaimed against: Find the defender entitled to expenses from the date of the said interlocutor, subject to abatement of one-fourth of the taxed amount thereof," &c.

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

Counsel for the Respondent—Sir C. Pearson—Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, December 10.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee.)

DERRICK *v.* BLACK.

Justiciary Cases—Slaughterhouse — General Police and Improvement Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 363.

The General Police and Improvement Act 1862, by section 363, provides that where the police commissioners of a burgh have provided a proper slaughterhouse within the burgh, no person shall thereafter slaughter any cattle or beast within the burgh, or within two miles of the boundaries of the burgh, except at this slaughterhouse. Further, to prevent evasion of the Act, dues of equal amount to the slaughterhouse dues are to be paid upon carcases of animals brought into the burgh for sale or consumption if killed more than two miles beyond the boundaries.

A butcher who carried on business in Kirkcaldy, where a slaughterhouse had been provided in terms of the Police Act 1862, slaughtered certain cattle in a licensed slaughterhouse at Dysart, which was within two miles of the boundaries of the burgh of Kirkcaldy. *Held* that he was properly convicted of a contravention of the Police Act 1862, sec. 363.

This was an appeal on case stated at the instance of Robert Derrick, flesher, residing in Harriet Street, Kirkcaldy, against a conviction obained against him in the Police Court of the burgh of Kirkcaldy upon a complaint at the instance of Roger Black, Procurator-Fiscal of that Court, in the following terms, viz. — "That Robert Derrick, flesher, residing in Harriet Street, Kirkcaldy, (1) on 24th June 1889, within the slaughterhouse of Dysart, being a place within a distance of two miles beyond the boundaries of the burgh of Kirkcaldy, and not being the shambles or slaughterhouses provided and established by the Police Commissioners of the burgh of Kirkcaldy for the purpose of slaughtering cattle therein, and not being a place licensed by them for the slaughtering of cattle therein, did slaughter or cause to be slaughtered an ox or other beast falling under the category of cattle, within the meaning of the section after mentioned of the Act after mentioned, contrary to the Act 25 and 26 Vict. cap. 101, sec. 363; Likeas (2) the said Robert Derrick, on 26th June 1889, within said slaughterhouse of Dysart, did slaughter or cause to be slaughtered one ox and two sheep, all being beasts falling under the category of cattle, within the meaning of said section of said Act, contrary to the Act 25 and 26 Vict. cap. 101, sec. 363, by which contraventions the said Robert Derrick is liable to a penalty of £5 for each of said offences, or otherwise to be ajudi-