On the second point also I venture to differ from the opinion of the majority of the First Division of the Court of Session. The settlement is not well drawn, but if it is read fairly, it is I think impossible not to see that it was the intention of the parties to make provision for the issue of children dying in the lifetime of their parents. I doubt whether the word "children" in this settlement of itself and by its own force comprehends "grandchildren." I rather think that the word "children" is used in its proper sense; and so I think is the word "issue." But it seems to me that the settlement is framed upon the view that in calling children the settlors were at the same time calling the issue of children. The settlement itself speaks of its provisions as being provisions "for the issue of the marriage." Each purpose of the trust that deals with the interest of children contains somewhere a reference to issue, and the reference I think is not the less significant because it is brought in (so to speak) rather casually. In fact the condition *si sine liberis* seems to run through the whole settlement, and to have been in the contemplation of the parties throughout. In the result I think that the interest of possible grandchildren cannot be disregarded.

On both grounds, therefore, I am of opinion that the appeal must be allowed.

LORD MORRIS—My Lords, I concur.

LORD HANNEN—My Lords, I also concur.

Interlocutor appealed from reversed with costs.

Counsel for the Appellants—Rigby, Q.C. —Asher, Q.C.—Dick Peddie. Agent—Andrew Beveridge, for Macandrew, Wright, & Murray, W.S.

Monday, July 25.

(Before the Lord Chancellor, Lord Watson, Lord Macnaghten, and Lord Hannen.)

JOHNSTONE *v.* DUKE OF BUCCLEUCH.

(*Ante*, vol. xxviii. p. 435, and 18 R. p. 587.)

Superior and Vassal—Casualty—Composition—Entry—Trust.

In 1810 an unentered proprietor of lands, which he had inherited from an ancestor who was a singular successor of the last-entered vassal, and who held an unconfirmed *a me* infeftment, by an *inter vivos* trust-disposition and settlement disponed the lands to trustees, directing them to pay his debts, and annuities to himself and his wife, and to carry out the provisions of his deeds of settlement in favour of his wife, children, or any other person or persons. The trustees were empowered to sell his lands, with his written consent, for payment of debts, and were bound to reconvey the remainder when the debts were paid, or whether paid or not, at Martinmas 1814.

The truster died in 1811. In 1815 the trustees were infeft on a decree of adjudication and implement obtained by them against the truster's heir, and were entered with the superior as trustees for the uses and purposes of the trust-deed only, by charter of sale, adjudication, and confirmation narrating the grounds of their right, and confirming the dispositions and unconfirmed infeftments since the date of the last vassal's entry. They paid composition. In 1860 the last surviving trustee reconveyed the remaining lands to the truster's heir-at-law, who was infeft on the conveyance, and was thereby in 1874 entered with the superior by the operation of the Conveyancing Act 1874, sec. 4. The last surviving trustee died in 1863. The superior demanded a casualty of composition; the vassal tendered relief-duty.

Held (*aff.* judgment of the Second Division) that the heir was liable in payment of composition in respect that the trustees' entry did create a new investiture, but even if it did not, the present owner was not the heir of an investiture recognised by the superior, for his ancestor had not been entered, and the superior's confirmation of the trustees' title was confined to what was necessary to complete the new investiture, and had no effect in confirming the truster's infeftment.

This case is reported *ante*, vol. xxviii, p. 435, and 18 R. 587.

Sir F. J. W. Johnstone appealed.

At delivering judgment—

LORD WATSON—My lords, the appellant is proprietor of three parcels of land, known respectively as Dornock, Woolcoats and Torbeckhill, situated in the county of Dumfries, and within the dukedom of Queensberry, which is now vested in the respondent. These lands were conveyed to the appellant by Masterton Ure as trustee under a disposition executed by Sir John Lowther Johnstone of Westerhall, the appellant's grandfather. In September 1860 the appellant recorded his conveyance in the General Register of Sasines; and immediately on the passing of the Conveyancing and Land Transfer (Scotland) Act 1874, he, by virtue of its provisions, became the entered vassal of the respondent, and (Mr Ure having died in the interval) also liable in payment of a feudal casualty in respect of his entry. The parties have differed as to the causalty payable, and they have adjusted a special case in order to obtain a decision upon the question whether the appellant's liability is that of an heir or of a singular successor. The Second Division of the Court, by a majority of three Judges against one, have held that he is a singular successor, and must therefore pay compensation, being a year's rent of the lands.

The true relation of the appellant to his superior, whether that of an heir of the standing investiture, or that of a stranger to it, can only be ascertained by reference to the titles under which these parcels of land were acquired and held by the predecessors in title whom the appellant represents until they became vested in his person. I shall therefore endeavour to describe, as briefly as may be consistent with accuracy, the state of possession and title since their acquisition during the last century by the appellant's ancestor Sir John Pulteney, afterwards Earl of Bath.

In the year 1768, Dornock, which then belonged to John Douglas of Dornock, and Woolcoats which belonged to him in liferent and to his son Archibald in fee, both father and son being duly entered with the superior, were exposed for judicial sale, and were purchased by one William Alexander, who obtained a decree of sale in virtue of which he was base infeft in Woolcoats. On the 7th April 1775 he conveyed both parcels, and assigned the decree of sale to Sir William Pulteney, who also took base infeftment in Woolcoats. Upon his death the lands were possessed by his nephew Sir John Lowther Johnstone without expeding a feudal title.

The third parcel—the lands of Torbeckhill — were in June 1765 disponed by Margaret Graham, who was fully entered with the superior, to David Armstrong of Kirtleton, whose personal right was brought to judicial sale by his creditors, and was purchased by Sir William Pulteney. He obtained a decree of sale on 27th January, under which he possessed without taking infeftment, and on his decease the lands passed into the possession of his daughter and heir of line, Henrietta Laura Pulteney Countess of Bath, upon whose death they passed to her cousin-german Sir John Lowther Johnstone. Neither the Countess nor her successor made up a title or was infeft.

On the 10th December 1810 Sir John Lowther Johnstone, being then in possession of all three parcels under his personal title, conveyed them, along with the rest of his Westerhall estates, to David Cathcart and Masterton Ure, but that in trust only for payment of his debts, and of annuities to himself and his wife, and the fulfilment of any provisions contained in deeds of settlement executed or to be executed by him. The power of the trust disponees to deal with the fee of the trust-estates was limited to selling such portions thereof as might be deemed necessary, with the consent of the truster expressed in writing. They were bound to reconvey—the debts being paid off — on or before the 11th November 1814, and after that date whenever required to do so, whether his debts were paid or not. In the event of the truster's death before reconveyance, and of his heir being then in minority, it was declared that the trust should subsist until his whole debts were paid off, the heir in the meantime receiving an allowance.

Sir John Lowther Johnstone, the truster, died in 1811, leaving a deed of settlement by which he conveyed his estates, including Dornock, Woolcoats, and Torbeckhill, to himself in liferent, and to the heirs-male of his body and certain heirs-substitute *seriatim* in fee, subject to family provisions which were implemented by his trustees.

The trustees appointed by the deed of 1810 appear to have entered at once upon the administration of the trust-estates, which they carried on jointly until the death of Mr Cathcart in 1829. After the death of the truster they proceeded to complete a title by adjudication to Dornock and Woolcoats, in which they were duly infeft, and on payment of a composition they obtained from the respondent's predecessor a charter of sale, adjudication, and confirmation dated 27th March 1815, which expressly confirms the base infeftments taken in Woolcoats by William Alexander and his disponee Sir William Pulteney. They next adjudged and were infeft in the lands of Torbeckhill, and then entered as singular successors with the late Duke of Buccleuch and Queensberry, obtaining from his Grace a charter of adjudication in implement dated 15th February 1828.

It is proper to notice here that the special case contains express averments to the effect that Sir John Lowther Johnstone was duly infeft in Dornock and Woolcoats and also in Torbeckhill. These statements appeared to your Lordships to conflict with the tenor of documents of title which are incorporated with and form part of the case, and your Lordships therefore required the parties either to explain the discrepancy or to inform the House of the true state of the facts. The result was that the parties by their counsel concurred in stating to your Lordships that the statements in the case were inaccurate, and that with the single exception of Sir William Pulteney's infeftment in Woolcoats no sasine was taken in any of the three parcels either by Sir William Pulteney or by any ancestor and predecessor of the appellant.

At the death of the truster Sir John Lowther Johnstone in 1811 the heir entitled to succeed was his eldest son Sir Frederick George Johnstone, the appellant's father, who died in 1841 without having made up any title to the lands. Some years after his decease the appellant raised an action in the Court of Session for the purpose of compelling the surviving trustee of his grandfather to denude in his favour, and the conveyance upon which the appellant has been infeft and obtained a statutory entry with his superior was executed in obedience to a decree of the Court.

It thus appears that the appellant does not represent any predecessor in these three parcels of land who was during his lifetime an entered vassal. He is not the heir of the trustee from whom he derives his feudal title, and he is not the heir either of the Douglases of Dornock or of Margaret Graham, who were or had been the last entered vassals at the dates when the trustees of Sir John Lowther Johnstone completed their titles to Dornock, Woolcoats, and Torbeckhill by obtaining charters of confirmation from the superior following

upon decrees of adjudication in their favour. He is, however, the representative and heir of Sir William Pulteney and his daughter, as well as of his own father and grandfather. But not one of his predecessors was entered with the superior or was even infeft base in Dornock or Torbeckhill. The state of their title to Woolcoats differs in this respect only, that Sir William Pulteney took base infeftment in that parcel, a circumstance which gave rise to an argument for the appellant which I shall notice in due course.

The appellant's counsel strongly relied upon the recent case of *Stuart* v. *Jackson*, 17 Sess. Cas. (4th series) 85, which was decided by the Whole Court, and was followed by the Judges of the Second Division (Lord Rutherfurd Clark dissenting) in *Duke of Athole* v. *Stewart*, 17 Sess. Cas. (4th series) 724, and *Duke of Athole* v. *Menzies*, 17 Sess. Cas. (4th series) 733. In *Stuart* v. *Jackson* there was much and serious diversity of judicial opinion, but the majority of their Lordships held that the terms of a trust-disposition executed by an entered vassal were such that although the trustees took infeftment and were entered with the superior by force of the Statute of 1874, their right constituted a mere encumbrance upon the standing investiture, and consequently that the heir of the truster who expeded a title by taking a conveyance from the trustees was entitled to enter upon payment of relief-duty. I do not think it is necessary for your Lordships in disposing of this appeal to consider the merits of these decisions or the conflicting opinions expressed by the learned Judges who took part in them. Had Sir John Lowther Johnstone or his predecessors been duly infeft and entered, the case would have been different. But these decisions, assuming them to be sound, only go this length, that the heir of an entered vassal is not divested of that character by the fact that the ancestor whose heir he is has created a trust which does not extinguish but is a mere burden upon the investiture. Even if the trust created by Sir John Lowther Johnstone were held to be simply an encumbrance, the appellant's position would be no better now than if the trust had never been in existence, and in that case he would not have been in a position to enter as an heir. It cannot be said in this case, as was held in these decisions, that the appellant takes from an entered predecessor either *non obstante* the trust or through the medium of the trust.

Then it was argued that the superior's confirmation by the charter of March 1815 of Sir William Pulteney's infeftment in the lands of Woolcoats had the effect of making him an entered vassal, and of enfranchising his heirs in these lands. No authority was cited to us which bears out that proposition, which appears to me to be founded upon a misconception of the object of confirmation, which is to fortify and complete the investiture of the person obtaining the charter. Beyond what is necessary for that purpose, confirmation of prior writs by the superior has, in my opinion, no operation whatever. My views upon this point are so fully and satisfactorily expressed in the judgment of Lord Trayner that I shall not discuss it further.

It was also urged on behalf of the appellant that his entry was enfranchised by the previous entry of his grandfather's trustees upon payment of a composition, and in support of that argument he mainly relied upon *Advocate-General* v. *Campbell Swinton*, 17 Sess. Cas. (3rd series) 21. That case was a very special one, and does not appear to me to have any material bearing upon the facts before us. The person from whom a composition was claimed was at the time the entered vassal of the Crown, and had already paid a composition, and the opportunity afforded to the superior of claiming a second composition was entirely due to the form of conveyancing which the parties had adopted with the object of subjecting him to entail fetters. The judgments of four out of the five learned Judges who constituted the Court of Exchequer proceeded on these specialities. That of Lord Deas went further, and contains many *dicta* which, so far as I know, are without authority, and with which I am not prepared to agree.

I am, accordingly, of opinion that the interlocutor appealed from ought to be affirmed, and the appeal dismissed with costs, and I so move your Lordships.

The LORD CHANCELLOR — My Lords, I concur in the judgment which has been moved.

LORD MACNAGHTEN—My Lords, I have had an opportunity of reading the judgment of my noble and learned friend Lord Watson, and I entirely concur in it.

LORD HANNEN—My Lords, I also concur in the judgment which has been moved.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellant—H. Johnston—Craigie—Le Breton. Agent—Henry S. Sherry, for Welsh & Forbes, S.S.C.

Counsel for the Respondent—Sol.-Gen. Graham Murray, Q.C.—P. J. Blair. Agents—Grahames, Currey, & Spens, for Strathern & Blair, W.S.

END OF VOLUME XXIX.