and has decerned against him because he did not appear, and I have not been able to discover any reason which appears to me sufficient for denying his right to exercise his undoubted jurisdiction and power in that manner."

The complainer reclaimed, and argued—(1) He did not challenge the jurisdiction of the Sheriff. That was not the question. What he maintained was that he was not bound to answer a citation except to the head burgh of his own county—Ersk. i. 4, 5. To hold otherwise might lead to great hardship, *e.g.*, one Shetlander might cite another Shetlander to appear at Wick as being in the same sheriffdom. (2) The citation was bad, inasmuch as it was not signed by the agent who was said in the schedule to make the service. It was no better than an ordinary letter. When so plainly invalid it vitiated the service although the execution had not been reduced.

The respondent was not called upon.

At advising—

LORD JUSTICE-CLERK—When a statute enacts that certain counties named are to be united into one sheriffdom, and are not thereafter to be regarded as separate sheriffdoms or jurisdictions, it is perfectly clear on the face of it that the Sheriff at the head burgh of the principal of the counties united cannot be barred from citing anyone in any of these counties however much they may be inconvenienced thereby. At the same time, no one can doubt that the Sheriff, upon a representation being made to him that it would seriously inconvenience the defender to defend the action in the place to which he has been cited, would consider that objection and dispose of it. It is not to be presumed that the Sheriff exercises his powers in an unreasonable manner. If all the business of Edinburgh were attempted to be removed to Peebles or Linlithgow, some means would speedily be found for putting an end to such an outrage of public decency. The public trusts the Sheriff to conduct the business of his courts properly.

Here the defender never asked the Sheriff to remit the whole case to Peebles. Indeed, when cited to Edinburgh, he says he would willingly pay the debt sued for although not the legal expenses. I think the first plea-in-law bad. As to the second plea, of not being properly cited, I am of opinion that the execution bearing that the defender was duly cited, and no steps having been taken to set aside execution, it also falls to be repelled. I consider the whole proceedings in this case idle.

LORD YOUNG concurred

LORD RUTHERFURD CLARK—I am of the same opinion, but I would like to state further that I see no objection to the citation in this case.

LORD TRAYNER—I agree upon all the grounds stated.

The Court adhered.

Counsel for Complainer and Reclaimer—Jameson — M'Lennan. Agent — Andrew Tosh, S.S.C.

Counsel for Respondent—Shaw—A. S. D. Thomson. Agent — Marcus J. Brown, S.S.C.

Saturday, February 28.

SECOND DIVISION.

THE DUKE OF BUCCLEUCH AND QUEENSBERRY *v.* SIR FREDERIC JOHNSTONE.

Superior and Vassal—Casualty—Composition—Entry of Trustees—New Investiture.

In 1810 a singular successor vested in lands, but unentered with the superior, by 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 trustees were infeft on this deed, and after the truster's death in 1811 they entered with the superior and paid composition, and in 1860 the last surviving trustee reconveyed the lands to the truster's heir, who was infeft on the conveyance, and by the operation of the 1874 Act entered with the superior, who demanded a casualty of composition.

The heir maintained that the disposition to the trustees and their infeftment and entry did not create a new investiture, because it was a trust for creditors, and the radical right remained in his immediate ancestor, the truster. Besides, the superior's confirmation of the trustees' title confirmed previous conveyances and infeftments, including the truster's, and therefore on both grounds he was only liable in relief-duty.

Held 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 was a special case presented by (1) the Duke of Buccleuch and Queensberry as superior of certain lands in Dumfriesshire, and (2) Sir Frederic John William John-

stone of Westerhall, Bart., a vassal infeft in these lands, for the opinion and judgment of the Court on the question whether the superior was entitled to a composition of a year's rent or only to relief-duty.

The lands of Woolcoats, Relief, and Axletreewell, in the stewartry of Annandale and sheriffdom of Dumfries, were purchased by Sir William Pulteney of Bathhouse, Bart., on 7th April 1775, from William Alexander, merchant in Edinburgh, neither of whom was entered with the superior upon the death of Sir William Pulteney; he was succeeded in these lands by his heir Sir John Lowther Johnstone of Westerhall, Bart., who was duly infeft therein. In 1790 the lands of Torbeckhill, Nether Albie, Waterbeck, and half of Dockenflatt, in the parish of Middlebie and the county of Dumfries, were purchased by Sir William Pulteney of Solwaybank. Upon his death he was succeeded by his daughter Henrietta Laura Pulteney, Countess of Bath, who again was succeeded by her cousin-german Sir John Lowther Johnstone, who was duly infeft therein.

Sir John Lowther Johnstone, who had thus acquired right to all the lands in question, was never entered with the superior therein. Upon 10th December 1810, upon the narrative that he was indebted and owing to sundry persons very considerable sums of money, and that he was anxious to put his affairs in a regular train of management for the security and payment of his creditors, Sir John executed a trust-disposition in favour of the now deceased David Cathcart, Esq., advocate, and Masterton Ure, Esq., Writer to the Signet, as trustees for executing the trust therein mentioned, and conveyed to them certain lands by description, including those which formed the subject of the present case. The trustees completed their title to the lands and were duly infeft therein. They thereafter entered with the Duke of Buccleuch as superior to the lands, and as regards the lands of Woolcoats, Relief, and Axletreewell, obtained from his Grace a charter of sale, adjudication, and confirmation, dated 27th March 1815, and as regards the other lands they obtained a charter of adjudication in implement dated 15th February 1828. They paid a year's rent as composition in respect of their entry. Sir John Lowther Johnstone had died in 1811.

The purposes of the deed of 10th December 1810 were, *inter alia*, payment of the expenses attending the execution of the trust, payment to the granter of a free yearly annuity of £3000 during his life, of which £400 was to be paid to his wife; in the event of his death the trustees were taken bound to carry into effect the provisions of the deeds of disposition and settlement executed or to be executed by him in favour of his wife and children, or any other person or persons. The trustees were empowered, with the truster's written consent, to sell any part of his lands. "*Sexto*, It is hereby provided and declared that these presents are granted for and to this special end and effect, that the said trustees may apply the prices of such lands and others above disponed if sold, and rents thereof, preceding the purchaser's entry, and whole other funds, heritable and moveable, hereby disponed and assigned, after deduction of the public burdens affecting the said estates . . . in the payment of all the just and lawful debts due by me at the date hereof, both principals and interests that may become due upon such principals thereafter in such order as the circumstances of the case may require: It being hereby expressly understood and conditioned that after payment of my debts as said is, my said trustees shall make payment to me, my heirs or assignees, secluding executors of the residue of the money or other moveable property in their hands falling under or arising from this trust, if any shall remain; and shall, when the said debts are fully paid off, or at the term of Martinmas One thousand eight hundred and fourteen, convey and redispone to me and my foresaids the whole of the remainder of my said lands and estates and other heritable property which shall not have been disposed of, with warrandice from fact and deed only: And which reconveyance, if required by me by a writing under my hand, shall take place at the said term of Martinmas One thousand eight hundred and fourteen, whether my debts are then paid off or not: It being hereby expressly provided that the said trust, and the whole powers vested in the said trustees, shall subsist and continue ay and until the said trustees shall be relieved of all advances of money and obligations whatsoever they may either jointly or individually be under on my account, and the said trustees shall be entitled to hold the whole subjects hereby disponed and made over till they are relieved accordingly: And declaring that in the event of my death before the said reconveyance shall take place, and my heir being a minor, the said trust shall subsist and continue as to the whole subjects, both lands and others, till my whole debts are paid off, subject always to such allowance to my said minor heir as I shall direct and appoint by a writing under my hand at any time in my life."

The trustees carried on the trust under this deed, and sold certain of the lands conveyed to them, until 1856, when Sir Frederic Johnstone, the second party, who was grandson of the late Sir John Lowther Johnstone, with consent of his curator, raised an action of declarator, implement, count, reckoning, and payment against Masterton Ure, the surviving trustee, concluding, *inter alia*, that upon receiving a discharge from him and his curator he was bound to convey and dispone generally the whole heritable estates and property in Scotland then remaining vested in him under the trust-disposition to and in favour of the second party, as having right thereto under a disposition and settlement of his grandfather, dated 5th April 1810, and to the heirs substituted to him in that disposition. The parties were ordained by the Court to execute the necessary deeds for closing the trust, and

accordingly Masterton Ure, as sole surviving trustee, upon 16th March 1860 granted a disposition of, *inter alia*, the lands which formed the subject of the present case to the second party. Sir Frederic Johnstone was then infeft in these lands, this disposition being recorded in the Register of Sasines 27th September 1860, and was so infeft at the passing of the Conveyancing (Scotland) Act 1874.

The question for the consideration of the Court was—"(1) Whether the second party is liable to the first party in the sum of £671, 6s. 2d., being the composition in lieu of the casualty due by a singular successor on his entry to said lands? or (2) Whether the second party is liable to the first party in the sum of £1, 13s. $8\frac{8}{12}$d. sterling, being the heir's relief, or the casualty due by an heir on his entry to the said lands?"

Authorities cited—*Grindlay* v. *Hill*, January 18, 1810, F.C.; *Lamont* v. *Rankine's Trustees*, February 28, 1879, 6 R. 739, *aff.* February 27, 1880, 7 R. (H. of L.) 10; *Duke of Hamilton* v. *Earl of Hopetoun*, March 8, 1839, 1 D. 689; *Marquis of Huntly* v. *Earl of Fife*, July 20, 1887, 14 R. 1091; *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85; *Duke of Athole* v. *Menzies*, March 20, 1890, 17 R. 733; *Advocate-General* v. *Swinton*, January 30, 1854, 17 D. 21; *M'Millan, &c.* v. *Campbell, &c.*, March 4, 1831, 9 S. 551; *Heriot's Hospital* v. *Carnegys*, October 31, 1884, 12 R. 30.

At advising—

LORD TRAYNER—In order to determine the question submitted to us, it is not necessary to consider the state of the titles to the lands in question prior to the year 1810. In that year Sir John Lowther Johnstone was vested in the lands; he was a singular successor and unentered with the superior. By trust-disposition dated 10th December 1810, Sir John disponed the lands in question to trustees for the following purposes, viz., (1st), for payment of the expenses attending the execution of the trust; (2nd), for payment to himself during his life and the subsistence of the trust of a free yearly annuity of £3000, of which £400 was to be paid to his wife during her life and the subsistence of the trust; (3rd), for payment of all the just and lawful debts then owing by him; and (4th), in the event of his death, for the purpose of carrying into effect the provisions of any deed of settlement executed or to be executed by him in favour of his wife and children or any other person or persons. Power was granted to the trustees (with Sir John's written consent) to sell any part of the lands disponed to them, and the proceeds of the lands, if any, so sold were directed to be applied "in the payment of all the just and lawful debts due by" the truster. The trust-deed further provided that the trustees should reconvey the remainder of the "said lands and estates and other heritable property which shall not have been disposed of" when said debts had been fully paid off, or if required by writing under the hand of the truster, should so reconvey the lands to the truster at Martinmas 1814 whether the debts had been paid off or not. Upon this trust-deed the trustees were duly infeft; and they some years thereafter (as regards part of the lands in 1815, and the remainder in 1828) entered with the superior, making payment to him of a composition of a year's rent in respect of their entry. These entries were taken after Sir John's death, which happened in 1811. In execution of the trust purposes some portions of the lands conveyed in trust were sold by the trustees, and the remainder were conveyed by the sole surviving trustee, Mr Masterton Ure, to Sir Frederic Johnstone (the second party to this case) in March 1860. Sir Frederic took infeftment by recording the conveyance in his favour, and by virtue of the provisions of the Act of 1874 he now stands entered with the superior. The question now is, what is he bound to pay the superior in respect of such entry? Is it composition as a singular successor, or relief as heir of the last-entered vassal.

From the state of the title as I have described, it appears that the last-entered vassal in the lands in question was Mr Masterton Ure, and Sir Frederic Johnstone does not claim to be his heir. So far therefore as regards the form in which the title has been made up it seems plain enough that Sir Frederic, not being the heir of the last-entered vassal, must, as a singular successor, be liable in respect of his entry in payment of composition. But it is maintained on his behalf that the trust conveyance to Mr Ure and his entry with the superior did not create a new investiture, because the trust was either a trust for creditors, or for behoof of the heir, or both, leaving the radical title in Sir John, whose heir Sir Frederic is. Having regard to certain recent decisions, which must be regarded in the meantime at least as sound, I think it must be conceded that the implied entry (under the Statute of 1874) of trustees in whose favour a conveyance has been granted for behoof of creditors, or the implied entry of testamentary trustees who hold for behoof of the heir, does not create a new investiture, and in saying "implied entry" I do not intend to distinguish between the implied entry under the statute and the entry more formally given by the superior according to the law and practice as it existed prior to 1874, for the Act of 1874 put the two forms of entry on the same footing and gives them the same effect. But making these concessions it does not follow that the entry of Mr Ure did not create a new investiture. The trust conveyance in favour of Mr Ure was not merely for behoof of creditors or for behoof of the truster's heir. It was a trust in some measure for behoof of the truster himself and his wife; it was a trust also, or might become so, for behoof of "any other person or persons" whom the truster might desire to favour by his settlement, and these might have been strangers. But even disregarding these features of the trust conveyance, it is possible to suggest other reasons for regarding Mr Ure's entry as the creation of a new investiture. In the first place, it appears to

me that Mr Ure's entry with the superior (Sir John, the truster, never having entered) was necessary to enable him to hold the trust lands conveyed to him on a valid title, and to enable him to give to the purchaser of that part of the trust lands which he sold such a title as the purchaser was entitled to demand and was only bound to accept. The investiture of Mr Ure was necessary to enable him validly to carry out the trust purposes if it was necessary for that end to sell any part of the truster's lands. In the second place, no one who acquired the trust lands or part thereof from Mr Ure could be called on by the superior to enter or pay a casualty so long as Mr Ure survived. Why? Because during Mr Ure's lifetime the fee was full, and was full because of the investiture created by his entry. There was in fact no other investiture existing which the superior had recognised. I am of opinion that the entry of Mr Ure did create a new investiture, and that to hold so in the circumstances of this case is not going contrary to any of the recent decisions to which I have alluded. If the entry of Mr Ure created a new investiture, then, as I have said, Sir Frederic is liable in composition, because he is not the heir of that investiture.

But assume now that the entry of Mr Ure did not create a new investiture, what is the position of Sir Frederic? Claiming to enter as heir, on payment merely of relief-duty, he must show himself the heir of some investiture recognised by the superior. There is no such investiture. Sir John Lowther Johnstone (whose heir Sir Frederic is) was himself a singular successor in the lands and was never entered, and (if Mr Ure's entry is set aside as not being a new investiture) the last-entered vassals were persons entered much more than a century ago, whose heir Sir Frederic is not and does not pretend to be. The case therefore comes to this, that Sir Frederic is neither the heir of Mr Ure, the last-entered vassal, nor the heir of the vassal last before entered. He is not the heir of any investiture recognised by the superior. This fact distinguishes the present case broadly and essentially from the recent cases of *Stuart* v. *Jackson*, 17 R. 85; *Duke of Athole* v. *Menzies*, 17 R. 733; and *Duke of Athole* v. *Stewart*, 17 R. 724. In all those cases the persons claiming to be entered as heir was in point of fact the heir of the last-entered vassal, if (as was done) the intervening title of trustees was disregarded. Here, however, to disregard the title of Mr Ure does not enable Sir Frederic to connect himself as heir with any other investiture whatever.

It was maintained on behalf of Sir Frederic, however, that the superior's confirmation of Mr Ure's title had the effect of confirming all previous conveyances and infeftments, and that this operated as a confirmation of Sir John's title. It was deduced from this that Sir John's title having been thus confirmed, Sir Frederic was now entitled to an entry as Sir John's heir on payment of relief. It is quite true that a superior's confirmation of a vassal's title has a retrospective effect. All the conveyances granted and infeftments taken prior to the date of the charter of confirmation are thereby confirmed, but they are confirmed only as transmissions, and to the effect of completing the title of the vassal in whose favour the confirmation is granted. The superior by his subsequent confirmation is debarred from stating any objection to such transmissions on the ground that they were transmissions of lands held *a me* to which his consent had not been given or on any other ground. But I never heard it suggested until now that such subsequent confirmation of prior transmissions and infeftments had the effect of enfranchising the different series of heirs to whom under those transmissions the property had been destined or might have descended. There is no authority for such a view. Indeed the retroactive effect of such confirmation and the limit of that effect cannot be better stated than in the words of the 115th section of the Titles to Land Consolidation (Scotland) Act 1868, which provides that "Every charter or writ (*i.e.*, confirmation), whether from the Crown or from a subject-superior of whatever description, shall operate a confirmation of the whole prior deeds or conveyances necessary to be confirmed in order to complete the investiture of the person obtaining such writ or charter." This was no new enactment; it was a declaration of the law as it then stood. The effect of the confirmation, then, being confined to what is necessary to the completion of the new investiture, there is no room any more than there is authority for the view that such confirmation has the effect of enfranchising the heirs under all or any of the previous transmissions. Such enfranchisement is in no way necessary to "complete the investiture of the person obtaining the charter." If such enfranchisement did not follow as a consequence of the charter of confirmation in favour of Mr Ure, Sir Frederic can take no benefit from that confirmation in the present question.

It follows from what I have said, that whether the entry of Mr Ure with the superior created a new investiture or not the position of Sir Frederic is not different. He is not the heir of any investiture recognised by the superior, and must therefore as a singular successor pay a composition.

LORD RUTHERFURD CLARK—Irrespective of the cases of the *Duke of Athole* v. *Stewart*, and the *Duke of Athole* v. *Menzies*, I should have no hesitation in deciding this question in favour of the first party.

My difficulty has arisen entirely from these cases. I understood them to lay down the rule, that where trustees held for the heir of the truster, and disponed the estate to him in obedience to the directions of the trust-deed, the heir was not bound to pay more than relief-duty, provided that the title of the truster had been completed with the superior. Here the title of the truster was not completed with the superior during his lifetime. But inasmuch as the

trustees entered with the superior under a charter of confirmation, the base title on which the truster held was confirmed, and of course confirmed as from its date. It appeared to me therefore that the present case might be brought under the rule of the cases to which I have referred, in respect that the title of the truster was completed with the superior, though not till after his death. For the charter of confirmation would draw back to the date of the base infeftment which it confirmed. But as one of the Judges who formed the majority of the Court thinks that we shall do no violence to these cases in deciding in favour of the Duke of Buccleuch, I conceive that I am entitled to proceed on my own view of the law, and in my opinion the vassal is liable for composition. I need not state the grounds of my opinion. They are sufficiently expressed in the case of *Duke of Athole* v. *Stewart*.

LORD YOUNG—This case was originally heard in July 1890, when I was not present, and when our late brother Lord Lee was a member of this Court. Lord Lee then wrote an opinion (see *infra*) upon the case, which I think should be communicated to the parties, and with a perusal of which I have been favoured. My opinion is in accordance with the views expressed by his Lordship in that opinion, and I think in accordance with that of Lord Rutherfurd Clark upon the reported cases. I am of opinion with Lord Lee that on these cases our decision should be in favour of the second party.

I do not think it necessary to go into the very subtle arguments upon the feudal law which were presented to us on both sides. For my own part, I adopt that argument which was presented on the side of the vassal and against the contention of the superior. I am not disposed to be subtle to make the heir—the undoubted heir—of a family which has been in possession of those lands for more than a century, pay a year's rent to the family of Buccleuch, to whom those lands belonged some two hundred years ago. I am not disposed to reach that result, especially when it is only practicable to do so through a blunder, which has been admitted to be a blunder in Parliament in the Conveyancing Act of 1874. I hope the attention of the Legislature will be called to this matter, as I think the law on this subject is in a very unsatisfactory state.

We know that in ancient times, when civilisation was not so far advanced as it is now, the over-lord who gave out his land among vassals was entitled to take back the land on the death of the vassal. Well that passed away, but the over-lord on the death of the vassal was still entitled to take measures so that it should not pass out of the family. Not very long ago that was corrected by statute, and the superior was made bound to accept a stranger as his vassal, but he was entitled to exact from that stranger a composition of a year's rent. Unfortunately that state of the law remains; I do not think it can long remain in that condition.

The result of it in this case is that the present representative of the family of Johnstones of Westerhall, in whose hands the lands have been for more than a century, and who was himself infeft in these lands in 1860, is now sued by the over-lord for a composition of a year's rent, as if he had been a stranger who had acquired the lands by purchase, although he was the legitimate heir of the family and had been in possession of the lands for thirty years. I repeat I should willingly be as subtle as I can, or as the law will allow me, to avoid such a result. I have no sympathy with any argument or reasoning that would lead to our dealing with the second party as if he was a stranger to the lands. I think we should answer the first question in the negative.

LORD JUSTICE-CLERK—I have read Lord Trayner's opinion and concur with it in every respect. If this case had been upon all fours with that of the *Duke of Athole* v. *Menzies* we should have had to follow that judgment, but I think that this case is quite distinguishable. I agree in the judgment of your Lordships.

The following is the opinion of the late LORD LEE, referred to by Lord Young, *supra*:—The question in this case is whether Sir Frederic Johnstone is liable in composition, or only in payment of the casualty of relief, in respect of his entry to certain subjects held of the Duke of Buccleuch, and which may be described shortly as (1) Axletreewell and (2) Torbeckhill.

The form of his title to the subjects is a disposition executed by the last surviving trustee of his grandfather, Sir John Lowther Johnstone of Westerhall, in his favour, as heir-male to his grandfather, and therefore the heir entitled to succeed under the trust-settlement therein recited.

The trust-deed in favour of Sir John Lowther Johnstone's trustees was executed in 1810, and the purposes of it, so far as material, were (1) to pay debts, and with power to the trustees, with Sir John's consent, to sell such parts of the lands as he and they should see proper; (2) in the event of Sir John's decease, to act as his trustees and executors, and to carry into effect the provisions contained in a deed of disposition and settlement executed by him in favour of his wife and children; (3) for reconveyance of the remaining lands "when the said debts are fully paid off, or at the term of Martinmas 1814," but subject to a declaration that, in the event (which happened) of Sir John dying before a reconveyance, and his heir being a minor, the trust should continue till the debts were paid off. This deed contained an obligation to infeft by two several infeftments and manners of holding, and also a procuratory of resignation; and the trustees obtained entry under it in the manner after mentioned, on payment of composition.

Sir John Lowther Johnstone was not infeft in the subjects in question either at the date of this trust-disposition, or at the date of his death, which took place in 1811.

At these dates the last-entered vassals in the lands of Axletreewell, being the subjects No. 1, were James Douglas in liferent, and Archibald Douglas in fee; and the last-entered vassal in the subjects (Torbeckhill and others) was Margaret Graham.

It appears, however, from the case, that Sir John had a personal right to both subjects, firstly as regards Axletreewell as heir served to his uncle Sir William Pulteney, and thereby in right of a decreet of sale and adjudication obtained in 1768 by Alexander against James and Archibald Douglas, and of a disposition and assignation of the lands and decreet granted in 1775 by the said William Alexander in favour of the said Sir William Pulteney and his heirs and assignees whatsoever; and secondly, as regards the Torbeckhill subjects, as heir of his cousin Henrietta Laura Pulteney, Countess of Bath, the daughter and only child of the said Sir William Pulteney, and thereby in right of a decreet of sale and adjudication obtained by Sir William Pulteney in 1790 against Margaret Graham's disponee.

It is set forth in the case that the trustees of Sir John Lowther Johnstone were entered with the superior in the first subjects by a charter of adjudication and confirmation of date March 27, 1815, and in the other subjects by a charter of adjudication in implement of date 1828, and these deeds are printed; and it is one of the facts of the case that the trustees in each case paid a composition.

But it was contended for the superior that Sir Frederic Johnstone, acquiring right by disposition from the trustees, must be regarded as a stranger to the investiture, and was therefore liable in composition.

My opinion is that this argument is ill-founded, and that the superior is precluded from dealing with Sir Frederic Johnstone as a stranger to the investiture by the charters granted to the trustees.

These not only give entry to the trustees as trustees for the purpose (after payment of debts) of conveying the lands to Sir John Lowther Johnstone's heir, but they also confirmed the rights vested in Sir William Pulteney and his daughter the Countess of Bath, and acknowledged the right of Sir John Lowther Johnstone and his eldest son (Sir Frederic's father) to take up the succession as heirs to Sir William Pulteney and his daughter. It is in respect of this right that Sir John's trust-disposition is confirmed by the two charters.

Now, the effect of a confirmation (though we were not favoured with any authority on the subject) is well settled. It is thus stated by Professor Menzies (part iii. cap. 3)—"When confirmation is obtained it operates *retro*, validating the infeftment from its date; and the superior is therefore excluded from demanding casualties which may have fallen due between the date of the sasine and the confirmation, although before confirming he could have claimed these." After giving certain authorities and illustrations, he adds—"The confirmation necessarily accresces to every prior infeftment flowing from the author whose sasine is confirmed."

This is supported by the doctrine of Stair (ii. 3, 15)—"Charters of confirmation do deduce the rights to be confirmed. . . . Those charters of confirmation whensoever granted, are drawn back to the date of the charters confirmed, which was absolutely null till confirmation unless there be a *medium impedimentum* as a prior infeftment by confirmation, or upon resignation by the superior; yet though the infeftment by confirmation be after the death of the granter of the charter to be confirmed, if the superior do confirm it the confirmation is drawn back, and will import the superiors passing from any causalty falling by the death of the author unless these be reserved." (See also Stair, ii. 3, 28, and the authorities given in Ross's Leading Cases (Land Rights), vol. ii. pp. 127-134).

Lord President Campbell's Session Papers in the case of *M'Dowall* v. *Hamilton*, contains a note of his opinion thus—"Can he claim as apparent heir when his father was never publicly infeft? Will the charter of confirmation expede so late as 1789, being after old Aikenhead's death, supply the defect? The confirmation draws back and makes the possession public from the beginning. The intermediate death of the party infeft does not prevent the operation of it. The objection therefore seems to me not to be good."

Now, in the present case, I take, by way of illustration, the charter of adjudication and confirmation granted in 1815. It is not said that the other charter had any different or lesser effect in the question of casualties.

After confirming the trust-disposition and the right of the trustees (but in trust always for the uses and purposes specified), it deduces the right confirmed by reciting (1) the rights of the Douglases; (2) a decreet of sale in favour of William Alexander; (3) a disposition and assignation by Alexander in favour of Sir William Pulteney, and his heirs and assignees; (4) the service of Sir John Lowther Johnstone, as heir of line to his uncle Sir William Pulteney; and (5) the adjudication led by the trustees against Sir Frederic George Johnstone, only lawful son and heir of Sir John, and as decerned to enter himself as nearest and lawful heir in special to the said Sir William Pulteney. And it then confirms—firstly, the disposition of the lands by Archibald Douglas to William Alexander, 1796; secondly, instrument of sasine following thereon in favour of William Alexander; thirdly, disposition by William Alexander to the aforesaid Sir William Pulteney, 1775; fourthly, an instrument of sasine following thereon in favour of the said Sir William Pulteney, dated 2nd May 1775 and registered in the General Register of Sasines the 8th June thereafter.

The effect of this charter was to confirm the infeftment of Sir William Pulteney and the adjudication led against Sir Frederic George Johnstone, as lawfully charged, in the character of Sir John Johnstone's heir

and representative, to procure himself served as nearest and lawful heir in special to the said Sir William Pulteney, as well as the trust-disposition in favour of the trustees, and in virtue of which they completed their right.

The adjudication so led against Sir Frederic George Johnstone, and followed by charter, was equivalent to a disposition by Sir William Pulteney in favour of Sir Frederic George Johnstone as Sir John Johnstone's heir, and I think it impossible now to represent his son and heir, Sir Frederic Johnston, as a stranger to the investiture, or to distinguish the case from that of the trustees having obtained a disposition in trust from the last-entered vassal or from his heir duly infeft.

I therefore think that the case is ruled by the case of the *Advocate-General* v. *Swinton*, 17 D. 21, and other cases, in which it has been held that if a composition be paid for a new investiture, the intervention of a trust to execute an entail or to convey in a certain destination will not render the disponee (being heir of the investiture) liable to pay composition as a singular successor.

Sir Frederic Johnstone is only in form a singular successor, and in my opinion is entitled to obtain entry as an heir.

I therefore answer the first question in the negative and the second in the affirmative.

The Court answered the first question in the affirmative.

Counsel for the First Party—Graham Murray — P. J. Blair. Agent — Robert Strathern, W.S.

Counsel for the Second Party—Guthrie—Ure—Craigie. Agents—Welsh & Forbes, S.S.C.

Saturday, February 28.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GILCHRIST AND OTHERS *v.* MORRISON AND OTHERS.

Process — Reduction — Title to Sue — Disponee — Heir-at-Law — Proving of the tenor.

On 16th December 1889 a testatrix executed a trust-disposition and settlement in favour largely of certain members of her family, including her heir-at-law and next-of-kin.

On 20th January and 6th February 1890 she executed other deeds of settlement which excluded the members of her family, who then raised an action to reduce the two latter deeds on the ground of facility and circumvention, and for declarator that the succession to the testatrix fell to be regulated by the deed of 16th December 1889. It appeared from the statements in defence that this deed was destroyed, and the Lord Ordinary (Wellwood) found that the pursuers must prove the tenor of this deed, and sisted process to give opportunity for raising the necessary action.

Held that while this would have been the proper procedure if the title of the pursuers had been only that of disponees under the destroyed deed, as they included the heir-at-law and the next-of-kin of the testatrix, they had sufficient title to call for reduction of the deeds granted to their prejudice; that the question of the case was the state of the testatrix's mind on the 20th January and 6th February 1890, and that that question would best be tried before a jury on the usual issue, and not incidentally in the proposed action of proving the tenor.

This was an action of reduction by the widow and children of the deceased John Gilchrist of Summerside Place, Leith, in which they sought to set aside certain testamentary writings of the deceased Mrs Jemima Gilchrist or Purdy, who was also a daughter of John Gilchrist.

The pursuers averred that in 1889 Mrs Purdy was in a failing state of health, and that (Cond. 10) "About the middle of December she sent for the family law-agent, Mr Asher, and gave him instructions to make a fresh will, as she knew her illness was incurable, and she wished to make a final settlement of her affairs in prospect of an early death. Mr Asher accordingly prepared a trust-disposition and settlement, which was executed by her on the 16th day of December 1889, and by which she conveyed her whole means and estate to Mr Asher and his managing clerk Mr John Rose, whom she appointed her trustees and executors. The purposes of the trust were, *inter alia*—1. Payment of debts, funeral expenses, &c. 2. Payment of the following legacies free of duty at the first term of Whitsunday or Martinmas after her death—(1) To Mrs Jane Molinda Goodlet or Morrison (the defender) £500; (2) To Mrs Elizabeth Watson or Hume (an aunt) £100; (3) To Mrs Elizabeth Allan or Blair £100; 3. Payment to the pursuer Mrs Gilchrist during her life of the free annual income or revenue to be derived from the remainder of her means and estate. 4. Payment of the following legacies at the first term of Whitsunday or Martinmas after Mrs Gilchrist's death—(1) To Mr Rose, one of her trustees, £1000; (2) To the Leith Hospital £300; (3) To the Leith Industrial Schools £300; (4) To the Redhouse Home for Destitute Boys, Musselburgh, £300. 5. Lastly, the trustees were directed to pay and convey the residue and remainder of her means and estate to the pursuers William Gilchrist and Jane Alexander Gilchrist, her brother and sister, equally between them, or to the survivor in the event of the other dying without leaving lawful issue. The said will was carefully prepared by the instructions of Mrs Purdy, and it was fully considered by her before she signed it. The said deed contained the real wishes of the testatrix with regard to