and the question would then go to proof in proper shape.

The Court adhered.

Counsel for Petitioners—J. R. Christie. Agent—Robert H. Christie, S.S.C.

Counsel for Respondent—Morison, K.C.—Macdonald. Agent—A. Stuart Watt, W.S.

Saturday, March 11, 1911.

FIRST DIVISION.

[Lord Cullen, Ordinary.

DUKE OF ARGYLL *v.* RIDDELL.

Superior and Vassal—Casualty—Composition—Relief.

A vassal who held the *plenum dominium* of certain lands under a charter of 1849, with a destination in favour of himself and his heirs and assignees whomsoever, in 1851 executed an entail conveying the lands to himself and the heirs-male of his body, whom failing to his younger brother and the heirs-male of his body, whom failing the heirs-female of the body of his grandfather; other substitutions followed, and then this clause, "the eldest heir-female and the descendants of her body always excluding heirs-portioners." The deed of entail of 1851 contained a double manner of holding, and the entailer took infeftment *de me* under it, thus holding the lands base of himself as mid-superior. In 1860 the entailer propelled the fee to his only son T. by disposition in favour of him and the heirs appointed to succeed under the entail. In 1872, after the entailer's death, when the lands fell into non-entry, T. obtained from the superior a writ of confirmation of the disposition or propulsion of 1860 and paid a casualty of relief. The writ of confirmation contained the following clause of reservation:—"And it is hereby expressly declared that I" [the superior] "by granting these presents do not exclude myself or my successors from any claim which I or they may have to a full year's rent of the lands within contained whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my foresaids, but on the contrary I hereby reserve such claim entire." The entailer's son T. died in 1883 without issue and was succeeded by his cousin R., the only son of the entailer's younger brother, and on his recording an extract decree of special service as heir of tailzie and provision relief was accepted from him as being also heir of line of the last entered vassal. On the death of R. without issue there was no heir-male of the body of the entailer's younger brother, and the succession opened to L., the eldest of R.'s three sisters, as heir-female of the body of the entailer's grandfather.

Held (Lord Kinnear *diss.*) that L. was liable to the superior in payment of composition of two-third parts of a year's rent, as *quoad* two-thirds of the lands she was not the heir under the former investiture of 1849.

Authorities reviewed.

The Duke of Argyll raised an action against Miss Louisa Margaretta Riddell of Sunart, in the county of Argyll, in which he sought to have it found and declared that "in consequence of the death of Sir Rodney Stuart Riddell of Sunart, Baronet, who was the last entered vassal in All and whole the lands of Sunart, . . . a casualty, being two-third parts of one year's rent or annual value of the said lands, and one-third part of the feu-duty exigible from the said lands, became due to the said Duke of Argyll, as superior of the said lands, upon the 2nd day of January 1907 (being the date of the death of the said Sir Rodney Stuart Riddell), and that the said casualty is still unpaid, and that the full rents, mails, and duties of the said lands of Sunart, after the date of the citation herein, do belong to the pursuer, the said Duke of Argyll, as superior thereof, until the said casualty and the expenses after mentioned be otherwise paid to the said Duke of Argyll: And the said Louisa Margaretta Riddell ought and should be decerned and ordained, by decree foresaid, forthwith to make payment to the pursuer the said Duke of Argyll of the sum of £3000, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon to be two-third parts of one year's rent or annual value of the said lands, and one-third part of the annual feu-duty exigible from the said lands."

The pursuer pleaded—"The defender being liable to the pursuer in payment of a casualty or composition of two-third parts of a year's rent or annual value of the said lands and others, and of one-third of the said annual feu-duty, as condescended on, decree should be pronounced as concluded for."

The defender pleaded, *inter alia*—"(3) The defender being liable only in relief duty in respect of her entry as heir of entail in the lands of Sunart, and having tendered relief duty prior to the raising of the action, is entitled to absolvitor."

The *facts* of the case as stated by Lord Johnston were these—"It is necessary, in the first place, to see how the title stands and how the question arises.

"The Riddell family have been in possession of Sunart since 1770. But at that date Sir James Riddell only acquired the *dominium utile* on a subaltern title, holding off Lochnell as mid-superior between himself and the Duke of Argyll. This sub-feu he entailed in 1784. His grandson Sir James Milles Riddell acquired the mid-superiority from Lochnell in 1808, and thereafter held the entailed subjects of himself as mid-superior. In 1849 Sir James Milles Riddell obtained from the Duke of Argyll

a charter of confirmation of this mid-superiority in favour of himself, 'and his heirs and assignees whomsoever,' on which he paid a composition for an entry of £388, 17s. 3d., calculated, as I think right to notice, on the basis of the sub-feu-duty, not of the rental of the lands. On this charter of confirmation he was infeft, and thus became entered with his superior in the mid-superiority, on a title to himself and his heirs and assignees whomsoever. The entailed *dominium utile* he still held of himself. But in 1851 he disentailed this *dominium utile*, and then consolidated it, now free of fetters, with his fee-simple mid-superiority. In 1851, therefore, the entry of 1849 became the ruling entry, not of the mid-superiority merely, but of the *dominium plenum*, and Sir James Milles Riddell came to hold this *plenum dominium* of the Duke of Argyll, as his superior, on a fee-simple destination to himself and his heirs and assignees whomsoever. But he at once in implement, as it was explained, of an obligation come to on disentailing, with the heirs under the entail of 1784, executed a new entail dated 16th and 19th December 1851 in favour of himself and the heirs-male of his body, whom failing of his younger brother Campbell Drummond Riddell and the heirs-male of his body, whom failing of the heirs-female of the body of his grandfather Sir James Riddell, whom failing of the heirs-female of the body of his father Thomas Milles Riddell, whom failing of his own nearest heirs whomsoever, whom failing of his own nearest heirs and assignees whomsoever, but with the declaration 'the eldest heir-female and the descendants of her body, always excluding heir-portioners and succeeding without division, throughout the whole course of succession of heirs whomsoever, as well as heirs of provision, so oft as the same shall descend to females.' And he added to this not uncommon clause the following: 'And the daughter of the heir who was last in possession of the said lands and estate after described (whether such heirs have served heirs of tailzie or not) succeeding always preferably to the daughter of any former heir, so oft as the succession through the whole course thereof shall devolve upon daughters,' and which he thereby declared to be his true meaning notwithstanding the foresaid general destination to heirs whomsoever. It is possible that this may explain the somewhat peculiar, if not otherwise unintelligible, introduction of 'nearest heirs whomsoever,' followed by 'nearest heirs whomsoever and assignees.' There evidently was an idea at the time that the exclusion of heirs portioners among heirs whatsoever perpetuated the entail (*Gordon*, 1851, 14 D. 269; *Primrose*, 1854, 16 D. 498).

"This entail in 1851 of the *dominium plenum*, then held of the Duke of Argyll under the charter of confirmation of 1849, took effect, and it has since been, and now is, the deed which regulates the succession to the estate. But nothing was done for some time to enter under it with the superior. As the deed of entail contained an obligation to infeft *a me vel de me*, with procuratory and precept, Sir James Milles Riddell only took infeftment on 23rd July 1852 on his own indefinite precept, which enabled him to hold under the entail base of himself as the entered vassal of the Duke of Argyll until confirmation should be obtained, as was the practice under a conveyance with a double manner of holding. In 1860 he propelled to his only son Sir Thomas Milles Riddell, by disposition in favour of him and the heirs appointed to succeed to him under the entail of 1851, which disposition or deed of propulsion Sir Thomas registered on 22nd May 1860, but still did not confirm and enter. After his father's death, however, which occurred in 1861, when the lands fell into non-entry, he obtained in 1872 a writ of confirmation from the Duke of Argyll which confirmed him as vassal in room and place of Sir James Milles Riddell, his father, the entered vassal under the charter of confirmation of 1849, but always "with and under the conditions, prohibitions, provisions, and reservations specified" in the entail of 1851. There is no suggestion that the taking of this writ of confirmation, according to the conveyancing of the day, did not sopite the base title of Sir James Milles and Sir Thomas Milles Riddell and enter Sir Thomas Milles Riddell as the immediate vassal of the Duke of Argyll under the disposition and deed of entail of 1851, which disposition it confirmed, and the destination in which it would have *de plano* enfranchised but for what follows. From 1849 the enfranchised investiture, at first of the mid-superiority, afterwards of the consolidated estate of mid-superiority and *dominium utile* or the *plenum dominium*, was that of the charter of confirmation of 1849. After 1872 the investiture became that of the writ of confirmation of that year, confirming the entail of 1851. But at this stage, 1872, there necessarily occurred a question as to the dues of entry which the Duke was entitled to exact. Sir Thomas Milles Riddell, as only son and heir of line of his father Sir James Milles Riddell, was heir *alioquin successurus*, that is, under the confirmation of 1849, and he claimed to be entered for relief. Having regard to a course of judicial decision, to be afterwards mentioned, the parties acted on the footing, on the one hand, that he was so entitled, but on the other that the Duke was entitled to reserve his claim to composition, should it arise, in the course of the tailzied succession. Accordingly the writ of confirmation was granted and accepted with the following clause—"And it is hereby declared that I, the said Duke, by granting these presents do not exclude myself or my successors from any claim which I or they may have at law to a full year's rent of the lands therein contained whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my foresaids, but on the contrary I hereby reserve such claim entire." And on this reservation relief was paid and accepted in 1872.

"Sir Thomas Milles Riddell was succeeded in 1883 by his cousin Sir Rodney, the only son of Campbell Drummond Riddell, the entailer's younger brother. As Sir Rodney, the heir of provision under the entail of 1851 of Sir Thomas Milles Riddell, was also his heir of line as Sir Thomas had been of Sir James Milles Riddell the entailer, the case provided for by the reservation of 1872 did not arise on his succession, and on his recording an extract decree of special service as heir of tailzie and provision to Sir Thomas Milles Riddell relief was, after correspondence between the parties' agents, accepted from him in 1910. Sir Rodney died without issue in 1907, and was succeeded by the defender as the eldest of his three sisters, to whom the succession passed under the entail of 1851, to the exclusion of her two younger sisters and heirs-portioners.

"The question at issue is—Is the defender, just as her predecessors Sir Thomas Milles Riddell and Sir Rodney Riddell had been, entitled to be entered in the whole estate and not merely in one *pro indiviso* third for relief only? She maintains that she is, while the pursuer, who raises the question in the form of a modern equivalent for a declarator of non-entry, admitting in accordance with the decision in the case of *Mackintosh*, 13 R. 692, that Miss Riddell is entitled to enter for relief in the one-third *pro indiviso* to which she would have succeeded as one of the heirs-portioners of line under the title as it stood in 1849, contends that she is bound to pay composition for the other two-thirds, which she only takes by virtue of the entail of 1851."

The Lord Ordinary (CULLEN) on 29th October 1909 found, decerned, and declared in terms of the declaratory conclusions of the summons; *quoad ultra* continued the cause and granted leave to reclaim.

Opinion.—[*After narrating the facts*]—"In these circumstances the pursuer, while conceding that the defender is due only relief *quoad* one-third of the lands, claims from her a composition *quoad* the other two-thirds. I am of opinion that this claim is well founded.

"The superior in granting the writ of confirmation of 1872 to Sir Thomas Milles Riddell, who was the heir of the former investiture of 1849, was bound to do so on payment of relief only, although the new tailzied destination introduced as heirs-substitute those who were strangers to the former investiture. (*Mackenzie* v. *Mackenzie*, 1777, M. 15,053, and Superior and Vassal App. No. 2; Ross's Leading Cases, vol. ii, p. 398; *Marquess of Hastings* v. *Oswald*, 21 D. 871). He was, however, entitled to reserve his right to a composition from the first stranger substitute on the succession opening to him. Such a reservation was allowed by the Court and inserted in the interlocutor in the case of *Mackenzie*. In the case of the *Marquess of Hastings* v. *Oswald*, where the question of the superior's right to composition on the occasion of the first entry was reopened, it was contended by the superior that a reservation such as was allowed in *Mackenzie* was of no value, as the superior could not demand a composition from an heir-substitute succeeding under an investiture which had been established by the granting of the first entry, and that if the superior was not entitled to claim composition on the occasion of the first entry he could never claim it at all. The superior's claim to composition on the first entry was disallowed but was reserved as in *Mackenzie*, and the opinion of the Court, which was delivered by Lord Wood, contains an authoritative pronouncement to the effect that the reservation was not merely of a claim but an effectual reservation of a right. Lord Wood referring to the case of *Mackenzie* said—'It has been acknowledged as a decision of authority, and acquiesced in, as settling that the heir of a prior investiture is entitled to an entry as an heir, paying the relief for an heir under a new tailzied investiture, by which also he is called to the succession; and we could not accede to that point being considered as still open, and to the law as so established being disturbed, unless we were satisfied that the Court in coming to the conclusion at which they arrived had miscarried in that which appears to have been held to be a necessary adjunct, or in other words were satisfied that the reservation which was held to be necessary was utterly unavailing, and could have no effect to secure any right the superior might have in the event to which it referred. But, for the reasons which have been stated, we are of opinion that there was no such miscarriage, inasmuch as in disallowing the superior's claim to a year's rent from the heir to whom the entry was to be given, his right at law to claim that composition from any substitute not an heir of the prior investiture was effectually reserved entire by the reservation inserted in the judgment pronounced. We are therefore of opinion that in the present case an interlocutor substantially the same as in that of *Mackenzie* ought to be pronounced, while at the same time there can be no objection to any words being inserted which it may be thought would more positively express that the giving an entry to the defender as an heir shall not infer any recognition of the new taillie by the superior in so far as it may depart from the line of succession established by the prior investiture, or in any way prejudge any claim he might otherwise have at law, when that event occurs, to the payment of a year's rent from the party then requiring to enter.'

"In the more recent case of the *Lord Advocate* v. *Moray*, 21 R. 553, Lord Kinnear stated the law on the subject thus—'But it has been decided in the cases of *Mackenzie* v. *Mackenzie* and the *Marquess of Hastings* v. *Oswald*, first, that if the institute under a deed of entail is also the heir of the existing investiture he is entitled to the benefit of his character of heir and to enter for relief, notwithstanding that in order to avoid a forfeiture he has been compelled to

make up his title under the entail, which necessarily means that he has entered in form as a disponee or singular successor, and secondly that the superior who had been compelled to enter the institute for relief duty might effectually reserve his claim for composition on the entry of the first substitute under the new investiture who should not be the then existing heir of the former investiture. The second proposition was held to be a corollary of the first, because as Lord Wood explains in the *Marquess of Hastings* v. *Oswald*, it is a "necessary adjunct" of the doctrine that the heir of a prior investiture is entitled to enter under a new tailzied investiture for payment of relief duty only. The doctrine thus established is anomalous. But there can be no question that in this Court at least it must be treated as settled law.'

"The defender did not, I think, dispute that the Duke of Argyll in entering Sir Thomas Milles Riddell in 1872 was entitled to reserve his right to a composition. She says, however, that the reserved claim could only lie against Sir Rodney Riddell, the first heir-substitute entering after Sir Thomas, and that the fact that the superior chose to accept relief instead of composition from Sir Rodney gives him no right to claim composition from any subsequent heir-substitute. The defender argues that by the entry of Sir Thomas Milles Riddell in 1872 the investiture of 1849 was sopited and extinguished; that accordingly Sir Rodney could not on succeeding tender himself as the heir under it as Sir Thomas was in a position to do in 1872; and that accordingly the superior was entitled to demand composition from Sir Rodney as a singular successor. It is true that Sir Rodney was not in a position to tender himself as heir under the extinguished investiture of 1849. It is equally true, however, that he succeeded to the lands as the heir of an already established investiture under the writ of confirmation of 1872, and was accordingly entitled to entry on payment of the relief duty appropriate to such an heir unless by force of the anomalous reserved right in the superior. If the defender is right, it seems to follow that the reserved right in such cases always lies against the first heir-substitute succeeding after the original entry, inasmuch as the original entry extinguishes the former investiture. This view does not, however, seem to be in accordance with the terms in which the reserved right is defined in the cases already referred to. In the interlocutor in *Mackenzie* the event to which the reservation referred was 'the entry of any future heir of tailzie not an heir of the investiture prior to the tailzie.' In the *Marquess of Hastings* v. *Oswald* the reservation was in these terms—'Reserving to the superior his right to claim a year's rent upon the entry of the first substitute under the new investiture who shall not be the then existing heir under the former investiture.' These words imply that there may be in such a case substitutes succeeding under the new investiture from whom relief only will be due in respect of their being the then existing heirs under the former investiture, that is to say, the heirs who would have succeeded under it if it had not been extinguished by the granting of the new investiture. Now Sir Rodney Riddell was in this position in the present case, it being admitted that he would have succeeded as heir of Sir Thomas under the destination in the charter of 1849 had it still ruled the succession, and in my opinion therefore he was liable only in the relief duty which he paid.

"If the defender's view is right, the superior's reservation in the writ of confirmation of 1872 is not in habile terms. The event to which it refers is 'whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my foresaids.' This reservation could found no claim against Sir Rodney, who was the heir of line of Sir Thomas, the last-entered vassal. It would follow therefore, on this view, that the superior never had any duly reserved right at all. I am, however, of opinion that the reservation in the writ of confirmation of 1872 was in habile terms, that Sir Rodney Riddell was properly entered for relief in respect he was at the time of his entry 'the then existing heir under the former investiture,' and that in terms of the reserved right the defender is now liable in the composition which the pursuer claims."

The defender reclaimed.

The case was heard on June 30th and July 5th 1910 before LORD KINNEAR, LORD JOHNSTON, and LORD SKERRINGTON, and was reheard on December 21st and 22nd before the LORD PRESIDENT, LORD KINNEAR, LORD JOHNSTON, LORD SALVESEN, and LORD MACKENZIE.

Argued for the appellant—The appellant was only liable to pay relief. A superior could demand a composition as the price of a new investiture, and on the other hand a vassal on tendering a composition was entitled to a charter with a destination to such series of heirs as he might select. The history of the development of this right of the vassal was as follows:—By the Act 1469, cap. 36, creditor apprisers were given the right to force an entry on payment of a year's rent. The same right was given by 1672, cap. 19, to adjudgers, and by 1681, cap. 17, to purchasers at judicial sales. By the Act 1747 (20 Geo. II), cap. 50, voluntary purchasers were made entitled to an entry but by resignation only, and by 1847, cap. 48, sec. 6, entry might be compelled either by resignation or confirmation. Then *Stirling* v. *Ewart*, February 14, 1842, 4 D. 684, September 14, 1844, 3 Bell's App. 128, 2 Ross's L.C. 340, decided that a superior was bound to recognise entails, and that an entry given and casualty paid enfranchised the whole destination. A modification of the superior's right had been recognised in *Mackenzie* v. *Mackenzie*, July 4, 1777, M. 15,053, M. *voce* Superior and Vassal, App. No. 2, 5 Br.

Sup. 613, 2 Ross's L.C. 308, and *Marquis of Hastings* v. *Oswald*, May 27, 1859, 21 D. 871, namely, that when the person asking for the new investiture could have made up a title and forced an entry under the old investiture the superior was bound to grant to him his new charter for relief only, but, on the other hand, was entitled to reserve his claim against the first person of the new investiture who was not *alioqui successurus*, *i.e.*, who could not have forced an entry under the old. This must inevitably be the first substitute succeeding, for the old investiture was then at an end, having been necessarily given up in order to attain the new. In both *Mackenzie* and *Hastings* (*cit. sup.*) the defender was the heir of the last and still subsisting investiture, as was pointed out by Lord Shand in *Stuart* v. *Hamilton*, July 18, 1889, 16 R. 1030, at 1046, 26 S.L.R. 710. Accordingly a composition could have been required by the superior from Sir Rodney, but as the superior had chosen to accept a casualty of relief, that enfranchised the investiture, and only relief could now be asked—*Lord Advocate* v. *Moray*, February 16, 1894, 21 R. 553, 31 S.L.R. 432; *Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692, 23 S.L.R. 471; *Stuart* v. *Hamilton* (*cit. sup.*). But if the old investiture were not dead, but could be looked to as the test of who was an heir and who a singular successor, then they submitted that the appellant in this view too was only liable in relief. She was an heir whomsoever. It did not matter that under the old investiture she would as heir portioner only have succeeded to one third; it was sufficient that she was *inter heredes*, and was in this sense *alioqui successura*. The whole history of the development of the law on this subject supported this view, as set forth in the following cases—*Lockhart* v. *Denham*, July 10, 1760, M. 15,047, 2 Ross's L.C. 329; *Mackenzie* v. *Mackenzie* (*cit. sup.*); *Duke of Argyll* v. *Earl of Dunmore*, November 19, 1795, M. 15,068, 2 Ross's L.C. 335; *Duke of Hamilton* v. *Baillie*, November 22, 1827, 6 S. 94, 2 Ross's L.C. 389; *Duke of Hamilton* v. *Earl of Hopetoun*, March 8, 1839, 1 D. 689; *Stirling* v. *Ewart*, February 14, 1842, 4 D. 684, September 4, 1844, 3 Bell's App. 128, 2 Ross's L.C. 340; *Marquis of Hastings* v. *Oswald* (*cit. sup.*) [The LORD PRESIDENT referred to Lord Corehouse's opinion when at the bar (2 Ross's L.C. 397), as apparently supporting this contention.] Even if the reservation were good, the appellant was not struck at by it, as she was an heir of line. But the reservation was bad, and even assuming that the superior could have validly reserved his right to claim a composition from the appellant as not being the heir under the old investiture entitled to succeed at the moment to the whole estate, yet he had not succeeded in so doing, for he had sought to reserve rights which he did not possess.

Argued for the pursuer and respondent —Originally a superior was not bound to grant an entry to any but the heir-male of the original grantee, but gradually the rights of the superior to refuse an entry became restricted, so that on payment of a composition a superior was bound to receive singular successors, and thus in *Magistrates of Aberdeen* v. *Burnet*, June 17, 1808, M. App. No. 4, *voce* Superior and Vassal, an attempt on the part of the superior to refuse a charter to a new series of heirs was unsuccessful. For the early law and history of the matter they referred to Ersk. ii, 7, 5, and Stair ii, 3, 5. But prior to the 1874 Act it was held that a superior was not bound to grant an entry to a corporation—*Hill* v. *Merchant Company*, January 17, 1815, F.C., 2 Ross's L.C. 320. They maintained that two further propositions were accurately set forth as rubrics by Mr Ross, viz., "On payment of a single composition by a vassal, purchaser, or assignee, a superior is bound to grant a charter in favour of whatever persons the vassal, purchaser, or assignee may please to have, and to embody in the charter if required the fetters of a strict entail, and the whole persons named in the charter, although strangers in blood to the vassal, purchaser, or assignee, or to each other, are entitled as heirs of the investiture to obtain an entry on payment of the casualty of relief." This was borne out by the cases to which it was prefixed as a rubric, viz.—*Lockhart* v. *Denham*, *cit. sup.*; *Duke of Argyll* v. *Dunmore*, *cit. sup.*; *Stirling* v. *Ewart*, *cit. sup.* Moreover, the opinion of Lords Ivory, Cockburn, and Murray, which was also concurred in by the Lord Ordinary (Cuninghame), expressly stated that they saw no distinction in principle "between a departure from the legal order of succession within the body of heirs of law and a corresponding departure by going outside that body." Accordingly they submitted that the test of who was a stranger and therefore liable in a composition was decided by the destination in the charter—if the present title squared with that for which a composition had been paid then no composition was payable for it; if it did not square then a composition was payable. As to the opinion of Lord Corehouse, it did not appear in what circumstances it was given, and it appeared to be contrary to the opinions of the majority of the judges in *Stirling* v. *Ewart* (*cit. sup.*). The question when the composition should be paid, assuming the old investiture and the new did not square, was answered by the other rubric of Mr Ross on which they relied, viz.—"Where a vassal executes a strict entail in favour of the heirs of the last investiture, and also in favour of stranger substitutes, the heirs of the last investiture are entitled to an entry under the entail on payment of relief merely, the superior reserving his right to demand composition from the first stranger substitute on the succession opening to him." That was an accurate statement of the law laid down in *Mackenzie* v. *Mackenzie* (*cit. sup.*), and was, moreover, borne out by the subsequent case of *Marquis of Hastings* v. *Oswald* (*cit. sup.*), and also by the authority of Duff's Feudal Conveyancing, sec. 53, p. 79. They accord-

ingly submitted that as long as the heir who succeeded would have been the heir under the old destination that composition could not be exacted, but that as soon as there came an heir who would not have been heir under the old destination, the superior, if he had made a reservation in proper terms, could demand composition. It was only *the* heir who was entitled to an entry on payment of relief; to avoid composition it was not sufficient to be *inter heredes*, but necessary to be the heir *alioqui successurus*—Ersk. ii, 5, 16, iii, 8, 90; Bell's Lectures, vol. i, p. 566; *Stuart* v. *Hamilton* (*cit. sup.*); *Duke of Sutherland* v. *Matheson*, November 7, 1903, 11 S.L.T. 372. The appellant was not the heir of the old investiture, but was, as regards two-thirds of the estate, a singular successor. Heirs-portioners were not joint-proprietors—*Cargill* v. *Muir*, January 21, 1837, 15 S. 408, Lord Moncreiff at 409 (whose statement was adopted by Lord President Hope in *M'Neight* v. *Lockhart*, November 30, 1843, 6 D. 128 at 136)—and the *pro indiviso* share of an estate could be entailed, as was illustrated in *Stewart* v. *Nicolson*, December 2, 1859, 22 D. 72; *Mackintosh* v. *Mackintosh* (*cit. sup.*). The reservation was good, and the appellant was the first person from whom composition could have been claimed. It could not have been claimed from Sir Rodney. Even assuming that the reservation sought to reserve too much, that did not make it wholly bad. It was a valid reservation of such rights as the superior had.

At advising—On 11th March 1911.

LORD JOHNSTON—In this case it has to be determined whether Miss Riddell of Sunart, who is admittedly due an entry to the Duke of Argyll, as superior of those lands, is bound, as regards two-thirds of the subjects, to pay composition or merely relief. I agree with the Lord Ordinary that the duty exigible as regards these two-thirds is composition, and substantially on the grounds most clearly stated by him. . . . [*His Lordship narrated the facts ut supra.*] . . .

I have said that I agree with the Lord Ordinary in the conclusion to which he has come in favour of the pursuer. At the first hearing of the case I did not think that it presented much difficulty. In fact it appeared to me that the careful sifting of the facts as I have explained them left it perfectly plain that the effect, direct and indirect, of the entry of 1849 was exhausted the moment an heir presented him or herself under the investiture of 1872 who could not claim to be heir of line of the person last entered by the Duke, and consequently that such heir must pay composition on his or her entry. *Quoad* two-thirds of the estate the defender was in that position when she succeeded in 1907. On her recording her decreet of special service on 26th March 1907 she became impliedly entered and the composition became due.

The grounds of my opinion may be stated formally thus. I hold

First—That Sir James Milles Riddell was already in 1851 entered with the pursuer's predecessor on a destination to himself and his heirs whomsoever, which was then the standing investiture of the estate.

Second—That by his entail of 1851 he altered the fee-simple destination of the estate and substituted a tailzied destination in favour of a selected order of heirs. When I use the term "tailzied destination," it does not matter in this respect whether that tailzie is a mere substitution of heirs of provision for the heirs of line or is fenced by the fetters of a strict entail.

Third—That while it was quite within his power to do this, if he was not content to create a mere base holding and desired that the heirs under his new destination should hold directly of his superior, this required the joint act of himself and his superior to effect it. In other words, he or they must go to the superior for a new investiture, which they could only compel him to give on terms determined by law.

Fourth—That so long and so far as the new destination did not depart from the line of heirs-at-law, the disponee and subsequent heirs were entitled to enter for relief, the superior being entitled to reserve his right to composition whenever the new destination departed from that line, and that when it did depart from that line, then, provided the claim had been reserved in the charter or writ enfranchising the new investiture, the superior was entitled to exact his composition.

Fifth—That in the circumstances as they existed after the execution of the entail of 1851 and until the entry of 1872, Sir James Milles Riddell and his son Sir Thomas could at any time have obtained an enfranchisement of the new and tailzied destination, the one free, the other for relief, *under reservation as above*, and that Sir Thomas did so in 1872.

Sixth—That the reservation inserted in the writ of investiture granted to Sir Thomas was in such form as to be effective.

Seventh—That Sir Rodney on succeeding to Sir Thomas was entitled to an entry for relief, under the terms of the reservation, as heir of line.

Eighth—That Miss Riddell not being heir of line of her brother Sir Rodney in two of the three one-third *pro indiviso* shares of the estate, which she takes by virtue of the entail of 1851, is bound to pay therefor composition, not relief.

I remain, and without hesitation, of the opinion which I originally formed and have above explained. But in respect that a second hearing of the case was deemed desirable and of the course which that second reading took, I feel that I must now regard the case as one of difficulty, and may therefore be excused if I state at some length the reasons which have led me to the above conclusions.

The first two of the propositions which I have above stated can hardly be controverted. I thought the third was in the same position, but by what appears to me to be a misapprehension of the case of *Hamilton* v. *Hopetoun*, 1839, 1 D. 689, a strenuous attempt was made to dispute it.

First—There can be no question that Sir James Milles Riddell, by the combined effect of his entry in 1849 in the mid-superiority on payment of a composition and of his consolidation in 1851, was entered in the *plenum dominium* of the estate, and that the destination enfranchised in his person was to himself and his heirs whomsoever.

Second—There can be equally little question, I think, that in 1851, when he executed his entail of that year, though the tailzied destination which he then provided did not, so far as appears, go beyond his own blood, Sir James Milles Riddell sought to disturb the line or legal order of succession both directly and by the exclusion of heirs-portioners. It has been, I think, fully recognised that when an heir of blood is taken out of the order of the heirs of line he is as much a singular successor as a stranger heir introduced—*Lord Advocate* v. *Moray of Abercairney*, 1894, 21 R. 553. There a second son, though called as a substitute heir of provision in an entail created by his uncle in favour of himself and the heirs of his body, whom failing his sister, whom failing her second son, was the heir who actually entered with the superior, but the Crown as superior entered him by mistake for relief "instead of exacting the composition for which he was undoubtedly liable as a singular successor."

Third—If this new destination was to be enfranchised by an entry in terms of it, there can, I think, be no doubt that the joint act of Sir James Milles Riddell and his superior was required to effect it. An argument to the contrary was, as I have said, at the second hearing founded on the case of *Hamilton* v. *Hopetoun* (*supra*). But it was only made stateable by failing to observe the distinction in fact between that case and the present. In both, the superior on payment of a composition granted a charter in favour of heirs whatsoever and assignees. In both, the grantee of that charter sought to create a tailzied destination, disturbing the line though not going beyond the blood. But the difference between the two cases is this (and it is essential)—in the present case Sir James Milles Riddell sought to do this after the superior's precept was exhausted by infeftment in favour of himself and when he was an entered vassal, whereas in *Hamilton* v. *Hopetoun* (*supra*) Charles Earl of Hopetoun sought to do so while the superior's precept was as yet unexecuted and therefore assignable. The one had to proceed by a disposition and deed of entail, the other could proceed by a disposition and assignation and deed of entail. I think that there is a further distinction between the two cases. For Charles Earl of Hopetoun, though creating a destination differing from that of his heirs of line, did not go beyond his heirs at law, whereas I think that Sir James Milles Riddell did so, as I cannot admit that an eldest heir-portioner is an heir-at-law in the whole fief.

The decision in *Hamilton* v. *Hopetoun* (*supra*) was that, I gather, of the whole Court, and bears on the face of it that it was framed with most anxious care and precision. It consists of two propositions:—

1st, that a purchaser *paying a composition* is entitled to obtain from his superior a new charter and precept of sasine of the fee in favour of himself and his heirs-at-law in any order of these heirs he pleases, provided only that he shall not in this destination go beyond his heirs-at-law to strangers. This limitation I shall subsequently notice. But the condition-precedent of the obtaining such new charter is the paying of a composition.

2nd, that the purchaser *paying a composition* is further entitled to demand that such new charter and precept shall be assignable, before the precept is exhausted by sasine taken upon it, in favour of any other person he pleases, and as a necessary consequence in favour of the heirs-at-law of that person. The charter is therefore not only to the purchaser himself and his heirs generally, or as he may direct, but to his assignees. "Under the term 'assignees' are included," the Court say, "not only the acquirer of the inchoate right under the open charter himself, but also his heirs." But as the purchaser is entitled to select among his heirs, so also is the assignee. This he does, when he desires to do so, by dictating the terms of the assignation which he will accept. I quote from the judgment of the Court—"The superior"—and it is on the disposition, or rather the assignable precept contained in it and the assignation, that the assignee takes infeftment in favour of himself and the heirs named in the assignation—"could name the original grantee, and specify the heirs that grantee chose, but he could not name the assignee or specify his heirs; for it could not be known whether there would be an assignation or not, or to whom, or what order of heirs the assignee, if there were an assignee, might choose. The ordinary style, therefore, of charters and precepts to purchasers, paying one year's rent, is to 'their assignees' generally, neither attempting to specify the first assignee nor his heirs, but leaving that to be done in the assignation to be executed afterwards. And then upon this generally expressed charter and precept granted in favour of assignees, joined with the assignation, sasine is taken in favour of the person and his heirs named in the assignation. Under a conveyance executed in this form we can imagine no reason for doubting that the right of the assignee to specify his own heirs must have effect by his getting them expressed in the assignation, just as freely as the right of the first purchaser has effect by his specifying them to the superior before the charter is granted. Neither in substance nor in form do we see any ground for doubting this. And here again we must remark that we know no instance, and the pursuer has specified none, since the statute of George II, in which a superior after receiving payment of one year's rent for a new infeftment to a purchaser ever disputed the right of that

purchaser to assign his open charter and precept of sasine to any assignee or any destination of heirs of the first assignee to whom the parties chose to take the assignation, provided the destination of the heirs did not extend further than his heirs of law."

There is no question of the importance of this decision, though I read it as hostile to the defender's contention. It appears to me to be based, not on feudal principle, but on the practice which had grown up, as feus became more and more transmissible at the will of the vassal. The Court were, I think, exercised in ascertaining how far this practice led them. And the decision was a compromise between feudal instinct and equitable relaxation supported by practice. For I cannot escape the conclusion that there is a good deal underneath the limitation, repeated both in relation to the original purchaser or grantee of the charter and to the assignee; thus, "provided only he" (the original purchaser) "shall not in this destination go beyond his heirs of law to strangers" (p. 694), and "provided the destination of the heirs" (of the assignee) "did not extend further than his heirs of law" (p. 696). It was more than once assumed in subsequent cases that the limitation meant no more than that the Court would not decide more than was necessary for determination of the question before them. But this was disclaimed by Lord Mackenzie, who took part in the decision, and, as he says in *Stirling* v. *Ewart* (1842, 4 D. 684, at p. 703), wrote the opinion, and whose words imply that the limitation was deliberate. And why? Because, I am persuaded, the Court saw that a decision carrying further the right of the purchaser to dictate to the superiors any destination he pleased would have made an encroachment on the rights of superiors which might lead to the still further encroachment of sustaining the right of the assignee to use his assignation as a means of imposing on the superior an equally wide destination—a step for which the Court was not prepared. But the fact that they imposed a limitation on their judgment, which was removed by the immediately subsequent decision of *Stirling* v. *Ewart* (4 D. 684), does not detract from the value of their judgment so far as it carried the law. And again I must emphasise the fact that the condition-precedent to the enfranchisement of the destination to heirs of provision named in the assignation was the payment of a composition by the cedent who was able to assign, because he held a still open or unexecuted precept from the superior.

I turn now to the special bearing of this decision, taking it as it stands with its limitation, on the present case. Once a purchaser has gone to a superior, paid his composition of a year's rent and got a new charter and precept, whether to himself and his heirs whatsoever and assignees, or to his heirs whatsoever in any particular order he may choose to dictate, the superior has done all he can be required to do. There is nothing in the decision to warrant the idea that the purchaser can go back to the superior and demand another charter in different terms, selecting among his heirs, even if the precept given him is unexecuted, still less if it has been executed and the purchaser is infeft. But the decision does not leave the purchaser, who still holds the precept unexecuted—who still holds, as it is said, an open charter and precept—without remedy. He may, even within the limits of the decision, effect the purpose of his selection, provided he does not go beyond the class of his heirs-at-law, by assignation. That is exactly what Charles Lord Hopetoun, having paid a composition, did, and the infeftment following on his assignation was held to enfranchise the destination which he inserted in his assignation, no stranger in blood being introduced. But this course was not open to Sir James Milles Riddell in 1851. He had closed the door upon himself by taking infeftment in 1849 upon the precept which he then obtained. He could then only effect his purpose by going to his superior. And the question then was, On what terms was his superior bound to comply with his request for a new charter either by resignation or confirmation?

It is of no materiality to the present question that as regards the purchaser and the series of heirs which he may dictate to the superior, the limitation imposed by the Court in the case of *Hamilton* v. *Hopetoun* (*supra*) was, as I have said, removed by the decision in *Stirling* v. *Ewart* (*supra*). The substantial result of the case of *Hamilton* v. *Hopetoun* (*supra*) would have been just the same had it occurred after *Stirling* v. *Ewart* (*supra*) if Earl Charles, *having paid his composition*, had inserted in his assignation not merely heirs of line of his assignee out of their order, but stranger substitutes. His assignee using the open precept (Earl Charles having necessarily paid the composition on receiving the charter), would on taking infeftment have been entered with the superior on an enfranchised destination in favour of all such substitutes and not merely of those who were of the blood, as heirs of provision.

Fourth and fifth—On what terms, then, was the superior bound to comply with Sir James Milles Riddell's, or, as it happened, his heir Sir Thomas Milles Riddell's demand for recognition of the new destination of 1851? The writ of confirmation of 1872 was the equivalent at that date of the former charter of confirmation and precept.

The situation created when the heir in possession under a tailzied destination—that is, an heir of provision—desired to alter that destination while retaining the heirs immediately substituted to him in the order of the existing destination, as the first called in his new destination, had given rise to much litigation extending over more than a century before Sir Thomas Milles Riddell in 1872 obtained his writ of confirmation from his superior. The present is a late recrudescence of the same question in slightly altered form. In the long series of decisions referred to there

have, I think, been several departures from strict feudal principles, but these departures have been made, and must, so far as we are concerned, be taken as settling the law. I suppose it may be said that custom, and the Court recognising custom, has interposed on equitable grounds to mitigate the rigour of strict feudal principles. But in doing so they have fixed the law just as firmly as an English court of equity could have done.

It is trite in legal history, that the earliest conception of a feu was a personal grant, that then a substitution of heirs, at least of male heirs, came to be implied, afterwards of heirs general, but that it took centuries to make fiefs alienable at the will of the grantee or his heirs. This was effected by the Acts 1469, cap. 36; 1669, cap. 39; and 20 Geo. II. cap. 50, section 12, which conditioned the payment of a composition of a year's rent.

But there was nothing in these Acts which compelled the superior to enter anyone but a singular successor or disponee, and by necessary implication his heirs of line, or to require him to accept such a series of heirs as his new vassal might choose to name to him. That extension of the obligation imposed upon them by these Acts was long disputed by superiors. But by the case of *Stirling* v. *Ewart* (4 D. 684, and 3 Bell's App. 128), following and supplementing that of *Duke of Hamilton* v. *Hopetoun* (*supra*), it was finally decided that on payment of a composition by vassal or purchaser a superior should be bound to grant a charter in favour of whatever series of heirs the vassal or purchaser might choose, assignable to the assignees of such vassal or purchaser, and the series of heirs which the assignee might choose to have inserted in his assignation, and that by accepting the composition the superior enfranchised such destination, either that in the charter or that in the assignation according to the infeftment taken upon his precept, each heir in which became an heir of the investiture, and entitled thereafter to enter for relief, whether heirs of line were called in their natural order or out of their natural order, or strangers in blood were introduced. The reasoning of the first Lord Mackenzie to the contrary, in *Stirling* v. *Ewart*, is I think unanswered. But it did not prevail, not by reason of want of feudal principle to support it, but by departure from feudal principle, sanctioned by custom, and on equitable grounds. And the rule was fixed and has since prevailed as I have stated it.

But it constantly happened, as I have indicated above, that an heir possessing under a destination sought to change that destination though retaining those heirs immediately substituted to himself in the old investiture as the first substitutes in the new. To enfranchise this new investiture it was necessary to go to the superior, and the hardship was felt that a composition should be exigible when the institute, and possibly more than half the series of substitutes, could enter for relief under the old investiture. At the same time it was equally felt that any remedy which would entirely deprive the superior of his composition, where sooner or later an heir was bound to come in who was not an heir of the old investiture, would work injustice on the other side. The result of the series of cases bearing on this subject was what I think may be described as a compromise, which again, with an equitable object, made a further departure from feudal principle. This was effected by *Mackenzie's* case (1777, M. *voce* Superior and Vassal, App. No. 2), confirmed in 1859 by *Hastings* v. *Oswald* (1859, 21 D. 871).

It was held, as I have said, settled that if a superior is called on to grant a charter with a destination varying from the standing investiture he must do so on tender of a composition and must accept the series of heirs, whether related by blood or strangers, dictated to him. If he admitted the first heir for relief because he was the heir of the standing investiture, feudally he enfranchised the whole new investiture and lost his opportunity of claiming a composition (*Lord Advocate* v. *Moray*, 21 R. 553). It was too late to say to the first substitute, who happened not to be an heir of the old investiture, "You can only be received on payment of a composition, not on relief." Nor could the superior, strictly speaking, save himself by any reservation, for reservation or no reservation he would by entering the institute have enfranchised the destination. Yet in *Hastings* v. *Oswald* (*supra*) he was compelled by the Court to give an entry for relief under a new destination, reserving his right to claim a year's rent upon the entry of the first substitute, who should not be the then existing heir under the former investiture, and to the vassal any legal defence against any such claim, and he was so compelled on the ground, as stated by the Court, that the reservation would preserve his right. Even without the distinct statement of Lord Wood in giving the judgment of the Court, it is impossible to conceive that the Court intended to compel the superior, for equitable reasons, to forego under reservation his immediate right, and to refuse, when the time came, a counter equity in the enforcement of his reserved claim.

Why I think this was an equitable compromise is that on strict feudal principle the entry of a vassal under a new investiture enfranchised the whole investiture, and that agreement between the superior and the institute to enter the institute under reservation could not bind a substitute succeeding under a tailzied destination, who *ex hypothesi* did not represent him. This course of decision, itself more than probably based on practice, has certainly founded a practice. Multitudes of similar transactions have been settled on the faith of it, and multitudes of titles have been made up in reliance upon it. It may be contrary to feudal principle. I think it is. One of your Lordships in the case of *Lord Advocate* v. *Moray* (*supra*) has described it as "anomalous." And I think

we both mean the same thing. But no Court would think of disturbing a train of decision on which the conveyancing practice of seventy years, if counted merely from the judgment in *Hastings* v. *Oswald* (*supra*), has rested. I am prepared to accept that *Hastings* v. *Oswald* (*supra*) decides that the superior must enfranchise the new investiture tendered to him in such circumstances, under reservation, and that the reservation will by intervention of the Court be made effectual.

The present is just one of the many cases in which conveyancing has relied on and followed—and would have been compelled by the Court to follow—the decision in *Hastings* v. *Oswald* (*supra*). For it appears to me that it applies to heirs *alioquin successuri* in the most general sense, and that it is immaterial whether it is an heir of provision who wishes to alter a destination, though preserving in the immediate succession to himself one or more of those already substituted to him in their order, or a fee-simple proprietor who desires to create a destination, though calling as those immediately to succeed him under that destination one or more of those who would have succeeded at law. The superior here had in 1849 enfranchised a destination to A, his heirs and assignees whomsoever. On this enfranchisement the title was made up and rested from 1849 to 1872. There is no question of an open precept and an assignation. A, being so infeft and entered, proceeded to make a new disposition of his estate in favour of a long series of heirs, and his successor asked that it should be confirmed. The immediate successor was undoubtedly heir of line, and entitled to be entered under the standing fee-simple investiture, for relief, and accordingly, as the law then stood, the superior did what he would have been compelled to do, accepted relief and granted a writ of confirmation under reservation of any claim which he or his successors might have at law to a full year's rent of the lands, whenever the heir to whom the succession should open should happen not to be the heir of line of the person last entered by them. If he had not done so voluntarily, he would have been compelled to do so.

I regard Lord Wood's statement in *Hastings* v. *Oswald* (*supra*) as an undertaking by the Court that what they directed should be made effectual, and as covering the present case. And the superior no more departed from his claim in entering Sir Rodney than he had already done in entering Sir Thomas Milles Riddell. I am wholly unable to follow the distinction which the defender seeks to draw between the position of Sir Thomas and Sir Rodney, on which her defence was in argument primarily founded. If the investiture were enfranchised so as to exclude any subsequent claim, it was so on Sir Thomas's entry in 1872, just as completely as on Sir Rodney's in 1883.

The result of the case of *Hastings* v. *Oswald* (*supra*), as I read it, is this, to compel a superior to give an entry for relief to an institute, and thereafter to any number of substitutes in succession, who would have been heirs under a previous destination, under reservation of a claim for composition from the first substitute, who should not be such heir; and by the rider, however expressed or by implication, reserving "to the vassal any legal defence against such claim," to enable the vassal to state any defence on the merits of the claim, but not to enable him to plead that the very act of granting, under compulsitor of the Court, without then exacting composition, a confirmation of the right of the institute, or any succeeding substitute, *ipso facto* annulled the right, the reservation of which the Court made a condition of the granting, and forfeited any claim to composition from the first substitute, who should be a stranger to the last investiture.

But though nothing that I have now dealt with is raised as a defence on the record, it has been maintained that the vassal has some defence. I am not sure that I fully understand the contention, but I gather it is this, that just as a purchaser is entitled *on paying a composition* to go to the superior and demand a charter and precept or the modern equivalent in favour of himself and any series of heirs, whether related to him by blood or strangers, he may dictate, so a vassal already infeft or his heir is entitled, the one free, the other on paying relief, to go to his superior and demand a charter and precept or the modern equivalent to himself and any series of heirs, whether related to him by blood or strangers, which he or his predecessors may dictate, and that the granting of such charter and precept enfranchises the latter destination just as much as the granting of the charter and precept for composition enfranchises the former.

I know that in the statement of the contention it was not carried to its logical conclusion as I have carried it. It was, like the judgment in *Hamilton* v. *Hopetoun* (*supra*), limited to this, that a vassal infeft or his heir was entitled, the one free the other on payment of relief, to demand a charter aud precept in favour of himself and his heirs in any order he or his predecessor chose, provided they did not go beyond his heirs-at-law (and I suppose his heirs of provision). But it is impossible to admit this limitation as in any way availing him. As I have said, it is fully recognised (*Lord Advocate* v. *Drummond Moray*, *supra*) that one in the line of heirs-at-law, taken out of his order in such line, is as much a singular successor as a stranger; and if the defender is to maintain her contention, she must, I think, be prepared to follow it to its logical conclusion, and maintain it to the full extent which I have stated.

Whether limited or unlimited, the contention is, I think, void of support. And I have not been able to find where the defender gets his compulsitor on the superior, who has already granted one precept, which has been exhausted, to grant another, at the will of his vassal. It must be

remembered that the rule of law that the granting of a charter to an institute and his heirs of provision enfranchises the whole destination, and makes the heirs of provision heirs of the investiture to the same effect as if they were heirs-at-law, may be referred to feudal principle. But no feudal principle required the superior to grant such charter at all. That obligation arose from the statutes 1469, cap. 36, and the other statutes already quoted, as extended by custom endorsed by the courts. For there was nothing in those statutes to compel the superior to do more than accept the adjudger or disponee, and by necessary implication his heir-at-law, and that on condition of receiving a composition of a year's rent. While the rule of law that the granting of a charter containing a destination to heirs of provision enfranchises the destination contained in the charter would equally apply in the case of an heir tendering relief and obtaining such charter, there is no feudal principle and there is neither statute nor custom requiring the superior to grant to the heir such charter for relief. Composition is not a feudal casualty (*Stirling* v. *Ewart*, *supra*). Relief is a feudal casualty, and, as I have always understood, entitles the heir coming forward as heir to claim an entry for himself on the standing investiture. I am unable to see on what principle or chain of reasoning he is entitled to ask more—and particularly to ask an entry to himself and a new series of heirs dictated by him. The heir for relief on feudal principles may enter as heir-at-law or heir of provision as the case may be; if he does so, he enters on the investiture already enfranchised, and his heir, either at law or of provision, may again in his turn enter under the same investiture which has been renewed to his predecessor. But if a vassal infeft or his heir wishes to change the investiture, or is required to do so by the act of the vassal last infeft, he can only do so with consent of the superior, and that consent the superior is no more obliged to give for the purpose of breaking the line of the heirs-at-law, than of introducing strangers into the destination. Where the contention emphatically breaks down is here. If an heir entitled to enter as heir-at-law or of provision demands to be entered on a destination altering the order of his heirs-at-law or of provision, then not only at the point where he alters that order does he introduce a singular succession, but he cannot logically stop there. He must maintain that if he calls one heir *alioquin successurus* after himself he may introduce any heirs he pleases, strangers as well as heirs of the blood, and consequently that what he cannot do directly without paying a composition he can do indirectly by calling first his heir under the existing investiture and then strangers. For this there is neither principle nor decision to found upon nor practice to adduce.

But an argument has been founded on the Entail Act 1685, cap. 26, empowering His Majesty's subjects to tailzie their lands and substitute heirs in their tailzies, and I understand that it is maintained on the strength of some observations by Lord Cottenham in *Stirling* v. *Ewart* (3 Bell. 249) that this statute gives the vassal in possession the right to impose a tailzied destination upon his superior, without involving him or them or any of them in a composition for the enfranchisement of the new investiture, provided he does not go beyond his own blood, though I am not sure that that condition is or logically can be adjected. I think that this is to misapply the statute, and to misapprehend the decision in *Stirling* v. *Ewart*. It must be kept in mind that every destination which tailzies or cuts off the legal line of succession at any point is a tailzied destination. Every heir of provision is strictly an heir of entail, though we have long been accustomed to confine that term to heirs of provision under a strict entail, or one fenced with irritant and resolutive clauses, to which the Act of 1685 gives effect. It cannot be, and I do not think it is, maintained that a vassal could at his own hand enfranchise a destination to his heirs of line, out of their order and therefore in law to strangers, if he imposed no fetters on the tailzie, and I am unable to see that he is empowered by the Act of 1685 to do so if he only makes his tailzie strict or subjects it to the necessary fetters. In truth, the argument ignores the true purpose and effect of the Act. It does not make it lawful to vassals to tailzie their lands and substitute heirs in their tailzies—that they were quite entitled to do already without its assistance—but to do so under provisions and conditions, and to fence these with irritant and resolutive clauses, so that they may be legally effectual to carry out the object of the tailzie. Above all it does not empower them to impose such destinations or tailzies upon their superiors, to the effect of obtaining feudal recognition of the destination by enfranchisement of the investiture. The object of the Act is therefore to effectuate the prohibitions of the entail, and so make the tailzie or tailzied destination enduring, notwithstanding the possible inimical acts of the heir in possession or the efforts to attach of his creditors. And hence the saving clause as to the superior's rights, which is directed—and this was all that was necessary—not in the interest of the superior, but of the vassal, to the avoidance of any contravention of the prohibitions, which might be implied in undergoing the obligation for a casualty, and consequent incurring of an irritancy.

And what is said by Lord Cottenham must be read, not merely in relation to this but to the question at issue in *Stirling* v. *Ewart* (*supra*). That question was not whether the superior was bound on one consideration or another to enfranchise a destination by confirmation or its equivalent, but whether the superior, who had once enfranchised a destination, and therefore received a composition on the first entry, was entitled to regard a succeeding heir of provision, whenever there was a departure from the line of blood, as a singular successor to be entered only on a

further composition, whenever the destination or tailzie was fenced with irritant and resolutive clauses. Superiors had felt the effect of the Entail Act of 1865 in checking the traffic in land and the natural change of ownership on sale, by effectuating the prohibition against alienation, &c., and so depriving them of accruing compositions, and the case may be described as a last struggle against this result. But a composition had already been paid in *Stirling* v. *Ewart*, the tailzied destination had been enfranchised, and the attempt was to exact a second composition on an entry under the already enfranchised destination. Thus Lord Cuninghame says (4 D. 691)—"The Act 1685, giving validity to entails, certainly did not extend the rights of superiors. The object of it was to secure and render permanent the tailzied destinations in previous use by giving effect to prohibitory, irritant, and resolutive clauses; but while it declared that superiors should not be prejudged of their casualties, it did not enact that any new casualties should be leviable from heirs of tailzie which could not have been demanded from heirs of investiture according to the former practice"; and by casualties his Lordship meant casualties in the popular, not merely the technical sense. Everything that is said in the case of *Stirling* v. *Ewart* (*supra*) as to the effect of the Entail Act of 1685, the important opinion of the Lord Justice-Clerk, as well as that of Lord Cottenham, must be read in the light of the fact that they were considering and speaking of an entry under a tailzied destination which had been already enfranchised by payment of a composition and of an attempt to fix on each succeeding heir of provision on whose succession there occurred a change of the blood, the character of a singular successor by reason of the tailzie being strict or protected by fetters, and to impose on him the obligation to pay a further composition. The decision was that, though not of the blood, he was heir of provision under an investiture which had been already enfranchised, and so an heir. But in the present case that is not the situation. I do not therefore think that the argument founded on the Act of 1685 is sound, or that considerations attempted to be drawn from that Act have any application to the present question.

The series of decisions bearing upon this subject require to be distinguished, for they fall into two categories, a confusion between which confuses the issue.

In the first class the question was, What did the first-entered vassal, paying a composition, get for his composition?

In *Lockhart* v. *Denham*, 1760, M. 15,047, the casualty was paid. But the charter of resignation in favour of the new destination of heirs affected to reserve a composition whenever a substitute heir presented himself who was not heir of line of the last-entered vassal. Though the charter was accepted with this reservation, it was held that it was of no avail, and could not be pleaded against a subsequent heir offering to enter for relief, because the superior receiving his composition and granting the charter could not do otherwise than enfranchise the whole destination.

In *Argyll* v. *Dunmore*, 1795, M. 15,068, a purchaser required a charter in favour of a tailzied destination of heirs, and the institute tendered a composition. The superior maintained that he was entitled to reserve right to a composition on the entry of any heir who should happen not to be heir of line to the last entered vassal. It was held that he was not entitled to do this, but the institute having no interest to the contrary, voluntarily admitted a reservation which amounted to no more than *salvo jure cujuslibet*.

In *Hamilton* v. *Baillie*, 1827, 6 S. 94, there was a charter enfranchising the investiture, with a very general saving of the superior's rights. The question at issue was really this—Did the fact of a strict entail affect the effect of the entry? But owing to the circumstances no conclusive decision was given.

Hamilton v. *Hopetoun*, 1 D. 689, I have already referred to at length.

And lastly, in *Stirling* v. *Ewart*, 4 D. 684, a composition having been paid, it was afterwards held that such a reservation was of no avail, because the superior was bound for his composition to enfranchise and had enfranchised the whole investiture, and that the situation was not affected by the fact that the destination was fenced by the fetters of strict entail. If the judgment is carefully studied, it will, I repeat, be found that the decision which finally settled the common law on the subject proceeded not on principle, not even on statute, but on custom following on statute and sanctioned by the Court.

Now all these cases bear, as I have said, on the question—What does the superior give and the vassal get in return for the statutory composition, or what is the effect of a statutory entry? and I am unable to see how they can bear on the question—What is a vassal entitled to get without a composition, and for relief only, where his entry is not statutory but at common law?

That question was the subject of two cases—*Mackenzie* v. *Mackenzie*, 1777, M. 15,053, and App. Superior and Vassal No. 2, and *Hastings* v. *Oswald*, 21 D. 871. In both an entail was made in favour of some at least of the heirs of the last investiture in their order and of other substitutes, though it is not very clear whether these substitutes were of the blood or not, and it was held that in recognising the investiture the superior, while on the one hand he ought not to receive more than a casualty of relief from the heirs of the old investiture, was entitled to reserve his right to composition on the entry of any substitute heir, not being heir of the last investiture, the vassal's defence to such claim being also reserved. But it is impossible to read the opinions without seeing that the Court were clearly of opinion, not merely that the reservation was really effectual, but that the claim

reserved was a right. For instance, Lord Braxfield, after showing that the question was not affected by the fettering clauses of the entail, says—"But here strangers are introduced, and question is, Can the superior be compelled to receive them? and unless a reservation in the charter is effectual to save superior's right, I think that the superior is entitled to a composition." This could not be unless he had such right. Nor can I read Lord Wood's opinion in *Hastings* v. *Oswald* (*supra*) in any other sense. But even if the vassal's defence is formally open, it must be substantiated, and I cannot see that it is so by any considerations drawn from the first class of cases relating to the effect to be given to the statutory entry for a composition.

I must not, however, leave this subject without referring to the opinion of Lord Corehouse, as counsel, quoted by Ross under the report of *Hamilton* v. *Hopetoun* in his Leading Cases, ii, p. 396, and on which much reliance was placed by the defender. However great the authority of Mr Cranstoun as a feudal lawyer, I should hesitate to accept as conclusive his opinion as counsel, where I find that his grounds of opinion are not those on which the judgment of the Court proceeded. But I think that it must be discarded for this other reason, viz., that it proceeds on a misconception of the facts with which the case was concerned. Mr Cranstoun says—"But in the case of a transmission from the dead to the living, the investiture being altered in the lifetime of the vassal, and the fee taken to himself and his heirs-male instead of his heirs-general, I do not see upon what ground the superior can claim anything but the relief upon an entry." In point of fact, the investiture was not altered "in the lifetime of the vassal." There was no investiture to alter, for the purchaser who paid his composition never became vassal, but assigned without entering, and the Court were only enabled to reach their judgment on grounds appropriate to the circumstances before them, and very different from those tentatively suggested by Mr Cranstoun.

But, sixth, I understand that it is maintained that the reservation inserted in the writ of confirmation was inept and ineffective, not being in correct form. The precise words of the reservation are—Declaring "that I, the said Duke, by granting these presents, do not exclude myself or my successors from any claim which I or they may have at law to a full year's rent of the lands within contained whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by his or my foresaids, but, on the contrary, I hereby reserve any such claim entire."

The standing investiture prior to the confirmation of 1872 was to Sir James Milles Riddell and his heirs whatsoever. Assuming that the mid-superiority was conquest in Sir James Milles Riddell, and gave its character to the *plenum dominium* after consolidation, in the succession to Sir James Milles Riddell there was no difference between the line in conquest and in heritage. Even prior to 1874, when the distinction between heritage and conquest was abolished, the term "heir whatsoever" used in reference to heritage was equivalent to "heir of line" or "heir-at-law" as distinguished from heir of provision. Sir Thomas Milles Riddell being only son of Sir James Milles Riddell, was therefore his heir of line. He was entered for relief under the above reservation, according to the law as then established. At his death, had the succession continued to be at law, his heir of line would have been entitled to enter also for relief. And as Sir Rodney, the heir of provision under the investiture of 1872, was also Sir Thomas's heir of line, he too was properly entered under the law, as then established, for relief. No further or new reservation was required or could be made. It stood on the writ of 1872. Again, had Sir Rodney's heir of provision also been his heir of line, entry must have been given in the same way for relief. But if, *quoad* at any rate two-thirds *pro indiviso* of the estate, the defender was not Sir Rodney's heir of line, then the reservation took effect. Once composition by virtue of the reservation fell to be paid, the new destination was enfranchised, and the reservation went no further.

It is said, however, that the heir of line of Sir Thomas or Sir Rodney might not have been heir whatsoever of Sir James Milles Riddell, and that this possibility makes the reservation inept. It is unnecessary here to discuss this possibility. Assuming that it might have been so, then too little was reserved and not too much, and as what was reserved was enough to meet the circumstances which have occurred, the reservation is effectual in the circumstances.

Seventh—Sir Rodney on succeeding to Sir Thomas Milles Riddell was entitled to an entry for relief. That this follows by reason of his position in the family as cousin and heir of line of Sir Thomas, is not disputed.

Eighth—The only question which remains to be determined is whether the defender can maintain that she is an heir of the last investiture in respect that she is one of the heirs of line of Sir Rodney. I do not see how she can maintain this. Under the destination of 1849, had it been renewed each time the succession opened, and had it remained unaffected by the act of anyone *in titulo* to alter it, the defender would have succeeded along with her two sisters as heirs-portioners, her own right being to one-third *pro indiviso* of the estate. She and her sisters as heirs-portioners were among the heirs of line. She as one of three heirs-portioners was among the heirs of line only to the extent of her one-third *pro indiviso*. Had she succeeded under the former destination along with her two sisters as heirs-portioners, *dispositione legis*, she could have done nothing to vest herself in the whole estate except *dispositione hominis*. There must have

been either the intervention of Sir James or other proprietor succeeding him under the investiture of 1849, giving her by deed or disposition not merely her own one-third *pro indiviso* share, but the shares of her two sisters, or she must have obtained a conveyance from them of their respective *pro indiviso* shares. For by mere renunciation they could not have feudally vested her. She could not have gone to the superior and demanded an entry in her own person in the whole estate merely on the title of heir of line under the investiture of 1849 renewed to Sir Thomas and Sir Rodney. She must have produced a disposition in one form or another which took the lands out of that investiture and at once opened the superior's claim to composition, though on the authority of *MacIntosh* v. *MacIntosh* (1886, 13 R. 692) she would have been entitled to enter as heir for relief in her own one-third *pro indiviso*, paying composition for the other two-thirds *pro indiviso* only. Now what I have said would have been necessary is exactly what has happened. The entail of 1851 did intervene *dispositione hominis* to interfere with the investiture of 1849. Without it the defender would be heir merely in her own one-third *pro indiviso*. If she takes benefit by the entail of 1851, so as to disturb to any extent the succession under the former investiture, to that extent she happens "not to be the heir of line to the person who was last entered," and to that extent she is, I conceive, due a composition of a year's rent. I cannot find any principle on which she can escape, nor do I think that she has really very much to complain of. In point of fact, though this is no ground of judgment, the Riddell family have never paid a composition to the Duke of Argyll for their entry to these lands. Owing to the accidental state of the title prior to 1849, Sir James Milles Riddell was enabled to make up his title on paying a composition for entry merely in the mid-superiority. That this composition was as large as it was was due to the large sub-feu-duty of £300, which (and in those days it covered Ardnamurchan as well as Sunart), large as it was, was still a very small part of the value of the estate. Profiting by this accident of the title, Sir James Milles Riddell was able by subsequent consolidation to effect his entry in the *dominium plenum* without paying anything more. This he was perfectly entitled to do. It was one of those chances in the law of superior and vassal to which the superior had to submit. Now I think the tables are turned, and Miss Riddell has, for the first time since her family came into possession of the estate, to pay composition for a change of investiture in the *plenum dominium*.

LORD KINNEAR—I regret that I am unable to agree with the opinion which has just been delivered. I cannot have much confidence in my own opinion, since I know that your Lordships have come to the same conclusion as Lord Johnston. But I cannot persuade myself that the proposed judgment is right, and as the matter is of importance both to the parties and to the law, I will give my reasons for dissenting in some detail.

It is unnecessary to recapitulate the facts. But I observe in passing that I agree with Lord Johnston's observation that the pursuer could have had no claim for a year's rent or for anything more than a sub-feu-duty had it not been for Sir James Riddell's consolidation of his two estates of *dominium utile* and mid-superiority; and I see the force of the suggestion that it would be a reproach to our system of conveyancing if a mere simplification of the vassal's title, by a process in which the superior is not required and has no title to intervene, should result in giving him a gratuitous benefit of so great an amount at the cost of the vassal's heir. But I am afraid this is hardly a relevant consideration, for I cannot assent to the view that the superior's claim for composition from a singular successor has ever been or ought now to be sustained or rejected on equitable considerations. It is matter of strict law resting ultimately upon statute, and the only question we have to consider is whether the particular claim is valid according to law.

The defender is already entered with the pursuer as her immediate lawful superior, by force of the statute of 1874. But she is still liable for the proper casualty; and it is common ground that the question whether that is to be relief duty only, or a composition of a full year's rent, must be determined by the same considerations as if she had demanded an entry under the law as it stood before 1874, when the superior's intervention was still necessary for the completion of the vassal's title. The general rule as to the terms of entry is very familiar. I do not know that it is stated anywhere more clearly than by Lord Blackburn in *Rankin's Trustees* v. *Lamont*—"A superior was entitled to receive a casualty on each change of his vassal . . . . and when the fee became vacant (as sooner or later it must do by the death of the vassal last entered) so that the lands became in non-entry, the superior had a right to resume possession of the fief and hold it for his own use till one having a right to be entered as vassal came forward and paid the casualty—of relief if he entered as heir to the last vassal, of composition if his right was to be entered as a singular successor." For the application of this general rule it is only necessary to add, what indeed is as familiar and elementary as the rule itself, that the only method by which the singular successor could be entered was by obtaining a new charter of resignation or (since the Lands Transference Act of 1847) of confirmation, and that the payment of composition was the condition on which such new charter could be demanded; and that, on the other hand, the heir required no new charter but was entered by infeftment, which the superior could be compelled to grant on a retoured service. The criterion, therefore, for deciding whether relief duty or a composition is payable

is whether the person demanding entry is heir of the existing investiture or not. If he was such heir, he entered under the old law by service; if he was not, he must have produced a conveyance and obtained a new charter of resignation or confirmation, as the case might be. I think this is settled by the authority of the House of Lords affirming this Court in *Stirling* v. *Ewart*. The historical origin of the claim for composition from a singular successor is fully explained in the elaborate opinions of the Judges. It is unnecessary to follow the history, which is now so familiar, in detail. But the material point is that the singular successor's right to enforce an entry rests upon statute, while the right of the heir depends upon common law older than the earliest statute, and subject to no new statutory condition. By the earlier feudal law the vassal had no power to transfer his feu without the superior's consent. But when the feu had become property recognised by law as transmissible to heirs, it followed in the natural course of things that it must become subject to the obligations of the proprietor; and the statutes of 1469 and 1669 were passed for the purpose of compelling the superior to receive his vassal's creditors, who had apprised or adjudged the lands, on payment of a year's rent. But the subject of the right was heritable, and the new charter which the superior was thus obliged to grant was therefore of necessity descendible to the heirs of the new vassal, just as the original right was descendible to the heirs of the original grantee. But such heirs, whether they were heirs-at-law or specially designed as heirs in the new investiture, required no new charter when the succession opened. The fee no longer reverted to the superior on the vassal's death, but passed into his *hæreditas jacens*. It was taken up as of right by the heir, who could force an entry on the retour of his service and had no occasion to appeal to the statutes in favour of creditors and disponees, or to bring himself within their conditions. I need not remind your Lordships that although the more recent procedure for compelling a superior to infeft an heir, until the Act of 1874 rendered it unnecessary, was prescribed by the Act of 20 George II; that statute conferred no new right and imposed no new condition on heirs, but merely provided a simpler machinery in place of what Mr Erskine describes as "the former tedious method of running precepts against the superior." Accordingly as the law is stated by Lord Cottenham in *Stirling* v. *Ewart*, "before the Entail Act of 1685 all vassals had the means of changing the investiture . . . but as those means were under the Acts of 1469 and 1669 the superior was entitled to a composition of one year's rent, but as this was due only by virtue of those statutes, and as those statutes gave it only upon the entry of the apprisers or adjudgers, he was not entitled to it upon the succession of anyone claiming under such entry." I need hardly say the position of a voluntary purchaser and his heirs under the Act of George II was exactly the same as that of the adjudger and his heirs under the earlier Acts, and it is with reference to the case of such a purchaser that Lord Cottenham lays down the law in the terms that I have cited. The purchaser could only enter by obtaining a charter of resignation for which he was obliged to pay the statutory price. But the charter was in favour of him and his heirs, of whatever class, and when the succession opened the heir obtained infeftment by virtue of his service, and became liable only for the proper feudal casualty of relief.

The question then is, in which of these two characters was the defender entitled to enter? It has been seen that she entered as heir to the last vassal, and she could not have made up a title in any other way. There was no disposition or conveyance in existence under which anyone could pretend right to enter as a singular successor, and no tenable ground on which the defender's right to enter as heir of the investiture could be disputed.

This would be conclusive of the whole matter were it not for the clause of reservation contained in the charter to Sir Thomas Riddell and his heirs of entail in 1872. To determine the legal effect of this clause it is necessary to consider, in the first place, what were the relative rights of superior and vassal when the charter so qualified was granted. The charter confirmed the infeftment of Sir Thomas under his father, Sir James's, deed of entail, and there is no question that when the entail was made Sir James held the estate directly of the Duke of Argyll, from whom he had obtained entry as a singular successor or purchaser on payment of all the dues which could be legally exacted from him. It is equally beyond dispute that, holding under a charter which he had obtained on these terms in favour of himself and his heirs and assignees whomsoever, Sir James had a perfect right to settle the succession to his lands as he thought fit, and to put his heirs under the fetters of an entail. But an entail in terms of his own investiture was a legal impossibility, since it is trite law that a destination to heirs whomsoever cannot be made subject to the fetters. It was therefore necessary for Sir James to select a particular series from the general body of his heirs-at-law, and he did nothing more. All the heirs-substitute whom he calls to the succession are among his nearest heirs in blood, and the destination varies from the exact order of legal succession in two points only, viz., *first*, in the postponement of the heirs-female to the heirs-male of the first two stirpes; and, *secondly*, in the exclusion of heirs-portioners. This last condition was essential if the entail was to stand good, because I need not remind your Lordships that an entail is brought to an end by the succession of heirs-portioners. This exclusion, however, is the sole ground of the pursuer's claim for composition. The defender, although one of

the heirs, is not the sole heir of line of the last vassal, because she is the eldest of three sisters who by the ordinary rule of law would have taken jointly as heirs-portioners, and because the entail provides that instead of taking simultaneously they shall take in the order of seniority the pursuer maintains that the eldest is not an heir but a singular successor.

If Sir James had feudalised this entail by resignation in favour of himself and the heirs designated, his son Sir Thomas would on his death have entered as heir, and there can be no question that the series of heirs called after him would in their turn have been entitled to take up the succession in their character as heirs of the investiture. He did not do so, but took infeftment *de se*, and so held the *dominium utile* of himself as mid-superior. In 1860 he propelled the fee to Sir Thomas, who in 1870 obtained the charter of confirmation in question from the Duke of Argyll. Sir James had died in 1861, and but for the fetters of the entail Sir Thomas as his heir-at-law would have been entitled to serve and enter under the old investiture. There was no feudal obstacle to his entering in this way. But to do so would have been an infringement of the entail, and would have involved a forfeiture. He was bound to demand a charter which would give effect to the entail, and the superior was bound to grant it. He therefore entered in form as a singular successor. But he was in fact the heir-at-law of the last vassal, and in accordance with the settled rule of law he was therefore admitted and obtained his charter without composition, and so became liable for the ordinary feudal casualty of relief and nothing more. It was in this charter that the reservation was introduced on which the pursuer relies; but it is obvious that this cannot be in itself the foundation of any right. It is not a condition of the grant, but a mere saving clause to keep open a contingent claim, which may or may not be good in law, but is not to be foreclosed. The superior and his heirs are not to be excluded "from any claim which . . . they may have to a full year's rent . . . whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line to the person who was last entered." The question therefore is whether in the absence of express stipulation there is a rule of law by which a superior is entitled to payment of a full year's rent on the entry of every heir of provision who is not also heir of line. If there be any rule of law to this effect, it is for the pursuer to show where and by what authority it has been established. There is no statute for it; no principle has been formulated from which it is to be deduced; and it cannot be alleged that it rests upon custom, because the pursuer has failed to find an instance in the books in which an heir of entail entering by service has been compelled to pay a year's rent for his entry.

It is said that the entail departs from the line of descent sanctioned by the superior on the investiture of Sir James Riddell. But the superior had no power to give or withhold his sanction to any line of descent. He was bound to confirm a right which being heritable must of necessity pass to the vassal's heirs, if it has not been alienated during his life. But it was for the vassal to say whether they should be heirs-general or heirs of a particular class, and the superior had no will or interest in the matter.

The title to which the pursuer appeals is not an original charter, which he might have granted on such terms as he pleased. It is a charter by progress following upon a sale, and its terms must therefore be fixed by a transaction between vendor and purchaser with which the superior has no concern. But the subject of the sale was an absolute right of property, and the terms of the conveyance which the superior was bound to confirm are such as simply to give effect to a transfer of that absolute right. A conveyance to a disponee and his heirs whomsoever has exactly the same effect in law as a conveyance to him absolutely without mention of heirs. But if heirs were to be named at all it was for the purchaser to fix the order of succession to his own property, and neither the seller nor the superior had any title or interest to control his choice. If Sir James had taken a conveyance from Lochnell with a destination to a particular class of heirs instead of to heirs-general, he would have entered for the same composition as he actually paid, and the superior must thereafter have admitted the heirs of this new investiture in their character as heirs, and could not have pretended a right to treat them as disponees or singular successors. I am not sure whether this was contested. But at least the pursuer's counsel did not peril his case on any attempt to disprove it. And yet it is fundamental. For if the purchaser has a right to name his own heirs, all the rest follows. But if any point in this controversy can be fixed by decision, it is settled that while a purchaser must pay composition for his entry as a singular successor, such entry must be given to him and any series of heirs he chooses to name, whether heirs-at-law simply or heirs-male to the exclusion of heirs-female, or any other arrangement of the body of his heirs-at-law, and all persons so described are held in law to take by inheritance and not by conveyance. It follows that a preference of heirs-male to heirs-female, or of the eldest heir-female to heirs-portioners, cannot be in itself an encroachment on the superior's feudal right. But then it is said that the pursuer has acquired right to reject heirs of provision because Sir James Riddell on his entry took his title in favour of himself and his heirs-general.

The argument was that the subsequent limitation to a particular class of heirs brings in strangers to the investiture. If this were material—which, if we are to follow *Stirling* v. *Ewart*, I think it is not—the statement is inexact. It is true that a grant to a man and his heirs whomsoever will not carry the estate to heirs of

a special destination, because no particular destination has been made. But for that very reason it excludes no particular class. It does not confine the succession to the blood of the first taker. As Lord Justice-Clerk Inglis points out in *Leny* v. *Leny*, the transmission of an estate to heirs whomsoever depends upon an infinite variety of contingencies which no man can foresee or approve beforehand. A man's heir-at-law is the person who at his death is entitled to take up his estate by service. If the legal order of succession is thereafter undisturbed, the next heir may not be a relation of his at all, but will take the estate as heir of the person last vest and seised as of fee. The investiture of a vassal and his heirs or his heirs whomsoever secures nothing, therefore, to the superior beyond what is involved in a grant to the vassal absolutely—to wit, that everybody who claims to enter as heir must prove his right by serving to the vassal last infeft. It must of course be conceded that the nearest heir in the absence of a special destination is the heir of line. But the point is that the substitution of heirs of provision breaks no order of succession specially sanctioned by the superior or which he has any rational interest to preserve. The mention of heirs in the infeftment is a mere recognition, no doubt superfluous, of the heritable character of the feu. There is nothing of compact or paction in the matter. The pursuer's case, therefore, must be rested on an absolute right in the superior who has feued out lands to a vassal and his heirs to reject any heir of provision who is not also the heir of line, or in other words, to admit him only on payment of composition as a singular successor. So far as regards the institute, not being the entailer himself, this would be within his right, for the institute is not an heir and cannot take otherwise than as disponee. Nobody disputes that Sir Thomas Riddell must have paid composition if he had not been heir of line as well as disponee. But the question is whether heirs substituted to him who are not disponees, and who could not, if they would, use the feudal clauses of any conveyance to force an entry under the statutes, are not entitled to the privileges of heirs, in which character alone they can enter at all. This is the only question to be determined, and in the present state of the authorities it is really a simple one, although I need not say I cannot think it free from difficulty, since I have the misfortune to differ from your Lordships. The defender is admittedly one of the heirs-at-law of the deceased vassal, she is also his heir of entail, and she is the only person who can take the estate out of his *hæreditas jacens* by a service as heir. She has served accordingly, and is entered under the Act of 1874 to the same effect as if under the old law she had compelled the superior to give his infeftment upon the retour of her service. Why, then, should she be required to pay a fine imposed by the statutes on those persons only who apply to the superior for a charter by progress, which under the old law she did not require and had no right to obtain?

The pursuer's answer is that heirs of entail, although they must necessarily enter as heirs, are nevertheless in a question with the superior to be treated as singular successors or disponees who must pay composition for entry. The privilege of heirs to enter for relief duty is, according to his argument, confined to heirs-at-law and does not extend to heirs of tailzie and provision. This has been maintained on two grounds, which if the question were open would require respectful attention, but both of them have been completely refuted by final decisions.

1. In the earlier stages of the controversy the cases seem to show that the superior's objection was not to the mere substitution of a special destination in place of heirs-general, but to a special destination protected by the fetters of a strict entail. This was said to be an encroachment upon his feudal right because it prohibited alienation and so deprived him of his chance of composition so long as the entail lasted, contrary to the conditions of the Act of 1685, which, while allowing entails, expressly provided that the casualties of superiority should not be prejudiced. The answer, which was sustained as conclusive in *Stirling* v. *Ewart*, is very clearly stated by Lord Cuninghame, Lord Moncreiff, and Lord Justice-Clerk Hope. The former, in particular, points out that a tailzied destination was not a novelty introduced for the first time by the Act of 1685, since it was established by the writings of all the great lawyers of the seventeenth century, including Hope, M'Kenzie, and Stair, that tailzies with prohibitory clauses, and often with irritant and resolutive clauses also, were perfectly legal. These conditions laid the vassal under obligations of good faith, and were effectual against gratuitous alienations, although probably they may not have been sufficient to exclude the claims of creditors, and the superior was bound to insert them in his charter. Accordingly it is remarked by Lord Braxfield in *M'Kenzie's* case that a superior was always bound to grant a charter with prohibitory clauses, and it would have been anomalous and unreasonable to give him a compensation merely because an Act had been passed making prohibitions which had long been sanctioned and held good *inter hæredes* more operative and secure, since it was beyond dispute that vassals were previously entitled to make tailzies with such prohibitions, and that superiors *ab antiquo* were bound to repeat them in their charters. The claim of the superior was therefore held to be inadmissible and contrary to principle. But, further, it was shown that, properly construed, the Act of 1685, on which it was rested, was conclusive against it. For the Act made it lawful for the lieges "to tailzie their lands . . . and to substitute heirs in their tailzies," and the persons substituted in their order were therefore by force of the statute itself "heirs of the investiture," and must necessarily be entitled to take up the estate in

that character when the succession opened, since the right to nominate heirs was absolute, and was not touched by the clause saving casualties of superiority. The proviso is that "nothing in this Act shall prejudge His Majesty as to confiscations or other fines as the punishment of crimes, or His Majesty or any other lawful superior of the casualties of superiority which may arise to them out of the tailzied estate, but these fines and casualties shall import no contravention of the irritant clause." But the composition for the entry of a singular successor never was, like the relief, a feudal casualty payable out of the estate. It has within a comparatively recent period come to be called a casualty, and this inaccurate use of language cannot now be corrected, since it is sanctioned by a respectable usage, and now by the Act of 1874. But it cannot have been so used by the Parliament of 1685 before there was any general obligation on superiors to receive singular successors for payment of a year's rent; and whether it is called a casualty or not, it is certainly not a casualty payable out of the estate. This is demonstrated by Lord Justice-Clerk Hope. He points out that the Act was intended to protect the estate against debts which might be contracted by the owner, and if this were done effectually by prohibitory and irritant clauses, it might well have been contended that the superior's casualties, being also debts of the vassals, could no longer be enforced against the estate. The reservation was therefore inserted to preserve the superior's rights against the estate notwithstanding the protecting clauses of the entail. But the claim for composition was never available against the estate. It was not *debitum fundi*, and therefore the superior could neither enter into possession nor poind the ground for it. It was a mere personal claim, and his only means of enforcing it was to withhold the charter until it was paid. The right to nominate the heirs of his investiture was therefore given absolutely to the landowner by the first part of the Act of 1685, and was in no way qualified by the saving clause.

2. The second ground of argument was equally applicable to all special destinations, whether tailzied or simple. It was maintained that the superior, conceding that he must admit such destinations in a vassal's investiture, had a right to stipulate that in relation to him heirs-substitute should be treated as disponees, since they did not take by virtue of the common law of succession but by the pure act of the vassal himself, directly operating at each successive opening of a new substitution. The argument was urged with his usual force by Lord Fullerton, who dissented from the judgment in *Stirling* v. *Ewart*, and the conclusive answer to it is that it was expressly rejected by the Court and the House of Lords.

With these explanations, it might probably be enough to say that in my opinion the case is governed by *Stirling* v. *Ewart*. But the bearing of that decision seems to me to have been very imperfectly understood, and it may therefore be useful to examine the earlier authorities on which it proceeded, and which the noble and learned Lords who took part in the judgment found it necessary to expound and confirm. To begin with, the law is laid down in clear and unhesitating terms by Mr Erskine—"Though singular successors, whether adjudgers or voluntary purchasers, are liable in payment of a year's rent to the superior for changing the investiture, yet where a proprietor entails his lands, the superior is not entitled to the composition of a year's rent from every successive heir of entail who is not heir of line to him who stood last infeft, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular successor, and he is founded in a right to demand an entry upon payment to the superior of the sum due to him by law in name of relief upon the entry of an heir." If this is good law, it is a direct negative of the assumption upon which the pursuer's reservation proceeds. In support of this doctrine, Mr Erskine refers to the case of *Lockhart* v. *Denham*, in which it was held that a substitute not being the heir-at-law of the last infeftment, was entitled to enter for relief notwithstanding an express condition embodied in the charters that "every heir of entail shall be obliged to pay a year's rent for his entry unless he be at the time heir of line to the person last vest and seized." A minority of the Judges in *Stirling* v. *Ewart* thought that this judgment was wrong and not binding on the Court, and rejected the doctrine laid down by Erskine on the ground that it was based on an unsound decision. But the authority of *Lockhart* v. *Denham* was supported by the judgment of the Court and by the House of Lords; and as to Mr Erskine, it was observed in both Courts that his statement of the law was authoritative in itself independently of the decision to which he refers. Lord Brougham, in particular, says—"It is a clear and an unhesitating and an unqualified opinion, or rather, which augments its weight, it is given as a known principle and not as a matter of any doubt or controversy, upon which, however, had any dispute existed, his opinion would as such have been entitled to the greatest respect. But he states it as a known law, and no matter of controversy at all."

Again he says—"But it seems this opinion, or rather this authoritative statement, of Mr Erskine is entitled to little deference, because it cites as its support the case of *Lockhart* v. *Denham*, then, it is said, recently decided. The decision was, however, thirteen years old when Mr Erskine wrote the passage in question. . . . Had it not given satisfaction among conveyancers, among the learned feudalists of the day, he doubtless would have stated the doctrine which it supports with some qualification. Had it not met with his own full approval and been backed by his high authority, he probably might have expressed himself differently too. But it is to be observed that he does not lay it

down as any new law first declared by that decision. Though he refers to the decision, he does not give it as forming the only ground of his statement."

On the same point Lord Cottenham says —"The case of *Denham* in 1760 appears to be a decisive authority. The very point was raised and decided against the superior, although there was a reservation of the supposed right. . . . Erskine thought this decision conclusive, and I do not find any subsequent case displacing the authority of this decision. That of *Mackenzie*, indeed, in 1777 confirms it, and particularly the observation of Lord Braxfield, that the granting of the first charter was an enfranchisement of all the subsequent disponees."

As to the disregard of the reservation in *Lockhart* v. *Denham*, it may be observed that some of the Judges who questioned the decision appear to have thought that it was rested on the superior's consent, which it was assumed that he might have withheld, to grant a charter embodying the tailzied destination; and the form of the interlocutor affords some support to this criticism. But if the superior were at liberty to give or withhold a charter in the terms asked, it could not possibly have been held that the charter actually granted was unqualified, or that a condition so clearly expressed was ineffectual. The true ground of judgment therefore must have been what Mr Erskine took it to be, that the superior had no right or power to make any such stipulation. This was the material point raised by the argument on either side, and there can be no question that the approval of the decision by the House of Lords was given on the understanding that it determined, as between superior and vassal, that an heir of entail, whether heir of line to his predecessor or not, was an heir with the rights of an heir, and was not a singular successor. Lord Fullerton, who dissented in this Court, took the same view, for he says—"No doubt if the case of *Lockhart* v. *Denham* were understood to fix the law, there would be an end to the question, ... but the authority of that decision was superseded by the clearest of all implications in the cases of *Mackenzie* and the *Duke of Argyll*." But in the House of Lords it was held that neither of these cases overruled *Lockhart* v. *Denham*, and we have seen that Lord Cottenham thought *Mackenzie's* case confirmed it.

In the case of *Mackenzie* (July 1777) the heir of entail who demanded an entry, being the heir *alioqui successurus* of the last vassal, refused to pay the composition of a singular successor, and the Court held that the superior "was obliged to enter the defender . . . upon receiving a duplicand of the feu-duty, and was not entitled to demand from him a year's rent or other composition, reserving to the superior and his successors in the superiority any right which he or they might have to a year's rent or other composition on the entry of any future heir of tailzie not an heir of the investiture prior to the tailzie." The terms of this reservation are remarkable. It proceeds upon an assumption as to the law which is irreconcilable with that of the pursuer's reservation, because it rejects altogether the pursuer's notion that the heir of line of the vassal last infeft is in that character entitled to enter for relief, and assumes that this right belongs only to the heirs of a former investiture which has been extinguished by the entail. If this meant that the casualty payable by every substitute heir of entail for generations is to be determined, not by the existing investiture under which he makes up his title, but by an extinguished investiture under which no one could take any real right, it would be irreconcilable with feudal principle, and would be unworkable in practice. It cannot be assumed that whenever a tailzied fee becomes vacant a similar vacancy must have occurred at the same time under a prior investiture, or that the person who would have been entitled to fill it can be ascertained as readily as if he were in a position to serve in special to the last infeft. But this cannot be the meaning intended. The interlocutor must, in my opinion, be interpreted with reference to the doctrine which distinguishes between heirs of blood and mere strangers, and allows the vassal to substitute heirs of his own blood in any order he pleases, without his being held to have gone outside the limits of an investiture to him and his heirs. I do not inquire at present whether this distinction is sound, but, rightly or wrongly, it was certainly accepted as a rule of practice before the decision of *Stirling* v. *Ewart*; and the fact of its acceptance is a guide to a reasonable construction of the interlocutor in the case of *Mackenzie*. It is a construction which conforms to the grammatical sense, for the clause assumes that the right to composition will be excluded on the entry, not only of the heir who would at the time be entitled to take up the estate by service, but on the entry "of any heir of tailzie not an heir" of the prior investiture. If the indefinite article is used with intention, it points to a class of persons any one of whom will answer the description, and that can only be the class which, according to the then accepted doctrine, was defined as the "whole body of the heirs-at-law," meaning all the persons who in any event might be entitled to inherit, by reason of their nearness in blood to the grantee, without reference to the legal order of inheritance or the probability of their inheriting in the ordinary course of succession. This is the only view which is reconcilable with the opinion ascribed to Lord Braxfield, who, after pointing out that the person desiring an entry as disponee was in fact heir of the investiture, and that it was of no consequence whether he made up his title in form on the disposition, is reported to have said—"If stript of this tailzie he would be entitled to an entry on a duplicand. Even if stript of substitution to strangers the superior would be obliged to enter under the clauses *de non alienando*, &c. in the entail. The superior

is not entitled to say he suffers loss by land being tied up from alienation. Therefore the cause does not lie on irritant clauses. But here strangers are introduced." It cannot be supposed that Lord Braxfield would have described a preference of heirs-male to heirs-female, or of the eldest heir-female to heirs-portioners, as the introduction of strangers. For he clearly holds that the disponee, being also heir of the investiture, was entitled to enter for relief duty in terms of the deed of entail, and there can be no entail except in favour of a selected order of heirs as distinguished from the order of law. This is the view taken of the case by Lord Mackenzie, and I think also by Lord Fullerton, who agreed with him in supporting the superior's claim in *Stirling* v. *Ewart*. Lord Mackenzie says —"It is plain . . . that the Court were not satisfied that the superior, though bound to admit Mackenzie and his heirs, was bound to admit strangers as heirs of investiture, without payment of a year's rent for that admission. . . . It rather appears that the entailer had been himself vassal before the entail, and so was not under the necessity of paying one year's rent for new infeftment to himself and his heirs of law and of the former investiture." I pause to observe that that was exactly the position of Sir James Riddell in the present case. His Lordship goes on—"But if it was so, that makes little difference, since there is no doubt in practice, nor was it denied, that a vassal resigning may, without payment of any casualty, demand new infeftment to himself and his own proper heirs of law and of the former investiture. The demand of the superior, therefore, in *Mackenzie's* case was rested, and the reservation admitted, solely in reference to the introduction of a stranger as heir of investiture." No one who reads this opinion and the opinion of the Court in *Hamilton* v. *Hopetoun* with the care which they demand will entertain any doubt that by "his heirs of law and of the former investiture," in the passage cited, Lord Mackenzie meant precisely the same thing as he meant by the body of his heirs-at-law in *Hamilton* v. *Hopetoun*.

If this view is correct the reservation in *Mackenzie's* case will not help the pursuer. But if, contrary to my opinion, it must be construed as suggesting an inference—for it certainly is not a decision—that the superior would be entitled to a composition on the entry of any heir-substitute not the nearest heir of line, all the weight which might otherwise have attached to it is completely displaced by the judgment in *Stirling* v. *Ewart*. It ought to be observed that the report in Morison is very unsatisfactory. But the opinions of the Judges are printed by Mr Ross from the notes of various eminent lawyers, and from these it is possible to gather what the difficulties were which induced the Court to withhold a decision on a question which was properly before it. It is true that loose notes of that kind must be read with caution, for the reasons given by Lord President Inglis in *Hutchison* v. *Hutchison*, and in the present case they are the less conclusive because they are much compressed and the various versions of the different annotators do not in all respects agree with one another. But making due allowance for these defects I think that when the opinions are read with reference to the printed arguments it may safely be inferred that the Court was satisfied, first, that the heir was entitled to obtain his entry for relief, although in form he was entering as a singular successor, and, secondly, that a charter in the terms asked if granted without reservation would give all the heirs substitute named in the destination an absolute right to be entered as heirs in their turn for payment of relief only. There would still have been no question so far as I can see that an unqualified charter carrying with it this legal consequence must have been granted if all the heirs-substitute had been persons within the general body of heirs of the old investiture, although they might have been called out of the legal order of succession, so as to displace the heirs of line. It was only the substitution of strangers outside the scope of the old investiture altogether which was thought to cause any serious difficulty. On this point it was recognised that the decision in *Lockhart* v. *Denham* was against the superior's claim. But it appears from the notes that the Judges were not prepared to accept that decision as binding, but neither, on the other hand, were they prepared to overrule it. They escaped from the difficulty by allowing the superior, in Lord Braxfield's phrase, "to throw in a reservation." There is some force in Lord Justice-Clerk Hope's criticism of this procedure, that the Court was bound to decide the question before it and ought not to have put it aside. The heir had an obvious title and interest to insist upon the charter being granted, because although so far as the superior was concerned he might have entered by infeftment on his retoured service as heir, he would by so doing have incurred an irritancy and forfeited the estate, and the superior on the other hand had as clear an interest, if he had a right in law, to treat the entail as an alienation and refuse a charter except for composition. The question was distinctly raised between the parties, and if the Court had followed *Lockhart* v. *Denham* it must have been decided against the superior. But in *Stirling* v. *Ewart* it was held that *Lockhart* v. *Denham* was rightly decided, and the grounds on which the question was reserved in *Mackenzie's* case were found to be without foundation. So far then as the decision goes the case of *Mackenzie* is in favour of the defender, and the reservation by which it was qualified may be disregarded because it only served to keep open a question which is now closed by a judgment of the House of Lords.

The case of the *Duke of Hamilton* v. *Hopetoun*, which has been hitherto regarded as a decision of great importance, seems to me to have been misunderstood in the present discussion. The material facts are stated by Lord Cuninghame in

Stirling v. *Ewart* (4 D. at p. 692)—"The superior had granted a charter in the ordinary terms to a purchaser and his heirs and assignees. No special substitution was set forth in the charter, but the vassal having got the charter in the preceding general terms assigned it in his son's contract of marriage to the son and his heirs-male and other heirs of tailzie, excluding heirs of line. As the superior was not a party to the assignation, it was contended that he had given no consent to the new investiture and was not bound to give a new investiture under it without a new composition. But it was held sufficient for the determination of the case to state that in any view of a superior's rights a purchaser was entitled to substitute all his own heirs in any order he chose without the superior's consent." It is said that this case is not in point because there was no change of investiture, since the original purchaser was not infeft and the first demand for infeftment under the charter was made by the assignee. But the superior's objection was that the infeftment or investiture demanded by the assignee was not consistent with the terms of the charter, inasmuch as it brought in a special series of heirs different from the heirs-at-law, and his argument was exactly that which affords the only possible basis for the pursuer's case, to wit, that no one can be made an heir of investiture who is not an heir under the superior's grant, which is an integral part, and indeed the most essential part, of the investiture. The assignee of a purchaser still uninfeft was in exactly the same position as the purchaser himself, and could only obtain infeftment on the same terms. The point to be determined, therefore, was the right of the purchaser, who had obtained a charter to himself and his heirs whomsoever, to insert in the infeftment a destination to heirs of provision, and the reasons given for the judgment are equally applicable whether the question is raised while the charter is still open or whether, having once taken infeftment, the purchaser must obtain a new investiture in order to regulate the succession. This is conceded by Lord Mackenzie in the passage already cited, and I think it is assumed in the reasoning of other Judges who supported the superior's claim in *Stirling* v. *Ewart*. But it is explicitly stated in a very valuable opinion by Mr Cranston, afterwards Lord Corehouse, which is printed in Ross's Leading Cases (ii, 397). He begins by pointing out the fundamental distinction between an alienation and an alteration of the succession—"Where there is a transmission of the fee *inter vivos* composition is always exigible, except in the case of a mere anticipation of the succession. . . . But in the case of a transmission from the dead to the living, the investiture being altered in the lifetime of the vassal and the fee taken to himself and his heirs-male instead of his heirs-general, I do not see upon what ground the superior can claim anything but the relief upon an entry. If he has granted the fee to a man and his heirs whatsoever, he seems to have no interest to object to the restriction of that grant to the vassal's heirs-male, which has no effect except that of excluding part of the heirs previously called to the succession. Accordingly I do not imagine it will be found in practice when a vassal who held his estate in fee-simple by charter to himself and his heirs whatsoever resigned for infeftment to himself and his heirs-male also in fee-simple that a composition was ever demanded." And he proceeds to show that if this was not the custom on a restriction of the investiture in fee-simple estates there could be no reason for it on a restriction of the investiture in estates held under the fetters of an entail. This opinion is not of binding authority, being the opinion of counsel. But it is none the less of great value considering from whom it comes. In so far as it deals with legal principle it has all the weight that belongs to the great reputation of its author, and in so far as it states facts of practice I am disposed, in the absence of overruling authority to the contrary, to accept it as conclusive, seeing that it relates to forms of procedure now fallen into disuse, of which we may know more or less as a subject of study, but which to Lord Corehouse were matters of constant and familiar experience. It is also in accordance with the statement as to practice already quoted from Lord Mackenzie. But whatever be its weight as an authority, the statement as to the right of a vassal already entered to resign for new infeftment to himself and a new series of heirs seems to me to be a necessary corollary of the rule laid down by the decision. If the vassal has a right to name his heirs, he must be entitled to do so in such a form as will enable them to take up the succession, and by resigning for new infeftment to himself and any series of heirs he names he encroaches upon no right which has ever been ascribed to the superior. He cannot be required to pay either composition or relief because there is no change of vassal since he still remains in the fee and when a change is brought about by his death the heir he has called to the succession will, *ex hypothesi*, be entitled to enter as heir of the investiture. I add that if it were otherwise the argument on the Act of 1685, to which so much weight was attached both here and in the House of Lords, would be futile. For no effectual entail can be made but by a proprietor duly infeft.

The great importance, however, of the decision in the *Duke of Hamilton* v. *Hopetoun* is that, while it stops short of a satisfactory principle, it completely overturns the basis on which the superior's right to distinguish between heirs as *hæredes juris* and *hæredes facti* has been rested. The superior's case on this point is most forcibly stated by the minority of the Court in *Stirling* v. *Ewart*, and particularly by Lord Fullerton; and, to put it shortly, it comes to this, that although the vassal

claiming the entry may have the right to create any number of substitutes and thus to render them in form heirs of the investiture, still the superior has a right to stipulate that in a question with him they shall be treated as disponees, inasmuch as they take by the act of the entailer and not by disposition of law. It was conceded that the supposed principle on which this claim depends—to wit, that the superior is bound to recognise no heir but the heir-at-law—had been so far broken in upon by the practice recognised and confirmed in the case of the *Duke of Hamilton* that the vassal getting the entry may name heirs of law simply or any special arrangement of the body of his heirs-at-law he thinks fit. But then it was said that this rule was laid down under the qualification that he should "not go beyond his heirs-at-law to strangers." The question then arose in *Stirling* v. *Ewart* whether this qualification could be maintained. But it followed that the Court must, in the first place, accept or reject the rule to which it applied; and the judgment was that the rule was perfectly sound and that the qualification was unmaintainable; that the vassal was entitled to name his heirs without restriction; and that the superior has no title or interest to inquire whether they were strangers to his blood or his nearest-of-kin.

The facts in *Stirling* v. *Ewart* were these—The institute under a deed of entail who was not the heir-at-law of the entailers obtained from the superior a charter of resignation in favour of himself and the other heirs of entail, and as a matter of course paid composition for his entry. In this charter there was inserted a clause of reservation in the same terms as that now under consideration, reserving to the superior any claim he might have at law to a full year's rent "whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered and infeft."

On the death of the first heir-substitute the succession opened to a second substitute who was not related either to the institute or to the heir last infeft. The superior claimed a year's rent as on the entry of a singular successor, founding on what he alleged to be the legal right which had been expressly reserved in the charter acknowledging the entail. The Court held that all the persons named in the destination, although strangers in blood to the entailer, or to the institute, or to each other, were entitled, as heirs of the investiture, to obtain an entry on payment of the casualty of relief; and this judgment was affirmed by the House of Lords. This is, in my opinion, conclusive of the present case, because it means that the subsisting investiture is the sole test of the right to enter as an heir; that there is no solid distinction between one heir of that investiture and another; and that all the heirs in the destination so established are entitled to enter in their order as heirs of provision on payment of relief, whether they are natural heirs of one another, and whether they are heirs of an older investiture or not.

It may be useful, however, to see how the question was presented to the House of Lords. The Judges were almost equally divided; and the opinions on both sides are elaborate and full of learning; but the point for decision is brought to a very simple issue. No one disputed the law laid down in the *Duke of Hamilton* v. *Hopetoun*. But accepting it as sound doctrine in so far as applicable to heirs of provision who were of the blood of the vassal, the minority refused to extend it to the case of strangers to the blood, and the majority held that there was no distinction between one class of heirs and another. The reasoning of the minority is entirely in accordance with the argument already cited from Lord Fullerton. But the point is put in its sharpest and most uncompromising form in the opinion of Lord Jeffrey. He held that the case of the *Duke of Hamilton* necessarily implies that "while a vassal might require his superior to grant an investiture to the whole of his natural heirs in whatever order he might choose to arrange them, his right at all events went no further; and that it was an indispensable condition in any series of heirs so sought to be enfranchised that they should all hold that character *jure sanguinis* and not *provisione hominis*." "In strictness of principle, indeed," says Lord Jeffrey, "and especially in reference to the genius and history of feudal holdings, what we now call an heir of provision (if he has no other or additional character) I conceive not to be an heir at all but a disponee or singular successor merely." There can be no doubt as to the meaning of this last proposition, or as to its legal effect, if it be sound. But, as Lord Brougham points out, some confusion has been introduced into the discussion by an ambiguous use of the terms "singular successor," and it may be well that it should be cleared away. In one sense every heir of entail is a singular successor, because he takes by a singular title not involving universal representation. But there is another common and legitimate use according to which it means—to quote Mr Duff's definition—every person who presents himself to the superior in any other character than that of heir of the last investiture, whether it is that of a purchaser or of a gratuitous disponee. It is true, then, that an heir of provision is in this sense a singular successor? No doubt he derives his right from the act of the entailer, but it is a right of inheritance. From the moment it became well-established law that a fee, instead of returning to the superior on the death of the vassal, passed into the vassal's *hæreditas jacens*, it followed of necessity that the heir who could take it out of the *hæreditas jacens* must be the only heir who could enter to the fee in room of the deceased. But the particular person who shall take up the fee in that character depends on no feudal or contractual right in the superior, but on

the law of succession regulating the descent of the particular estate at the time. In other words, it is the heir of the investiture. I agree that this does not solve the question whether the superior may not have rights to be protected in the constitution of the investiture. But the immediate question is whether, when the fee has been settled, the heirs of provision who have been made members of the investiture are to be regarded as disponees if they have not the additional character of blood relationship. I think the answer may be put in the words of Lord Justice-Clerk Hope, who says—"I hold just the reverse. I hold that the heir of provision is the character to which the feudal law looks, and no other; that any other and additional character which the party possesses is of no moment and never looked to and is altogether irrelevant; that if the party is the heir of the grant or investiture, his right and character as such is exactly the same whether he is a stranger in blood or the eldest son." But setting aside the element of blood relationship, the assumption of the argument we are considering is that the vassal cannot give a right of inheritance to one who is not his heir-at-law without making him a disponee, and liable as such to composition when he enters to the land. But the law distinguishes between transmission *inter vivos* and transmission from the dead to the living. If a vassal conveys his land from himself to another his disponee must pay composition because he cannot complete a real right without coming under the statutes which give the superior a right to exact it. It makes no difference if the conveyance is *mortis causa* and held to be delivered on the death of the granter, because the disponee is still within the scope of the statutes. But the statutes do not touch the law by which a vassal infeft may convey to a disponee and a series of substitutes who are not disponees but heirs, or may settle his own lands upon a series of heirs substituted one after another so that each in his turn may present himself to the superior in the character of heir. And such heirs are not liable to composition because they are not within the scope of the statute. It is said that the superior must be entitled to a composition upon every change of the investiture. But this is a mere assumption, for which no authority has been produced. Investiture means infeftment, and upon every change of infeftment or substitution of a new vassal for an old one the superior has a claim, not necessarily for composition, but for relief or composition as the case may be. But the new vassal's liability to the one duty or the other must be determined by his own relation as heir or singular successor to the other, and is not affected by the character of the destination, if any, by which his infeftment may be qualified.

But it is idle to examine the arguments on either side in detail as if the question were still open. It is finally decided by the judgment of the House of Lords. The whole controversy is shortly summed up by Lord Cottenham to the following effect. Under the statutes obliging the superior to give entry to singular successors he was entitled to a composition of one year's rent, but the vassal was at liberty to make the investiture in favour of such heirs as he chose, and as the composition was due only by virtue of these statutes and as those statutes gave it only on the entry of the apprisers, adjudgers, or disponees, the superior was not entitled to it on the succession of anyone claiming under such entry. In other words, he was not entitled to it on the entry of an heir of provision any more than on the entry of an heir-at-law. The Act of 1685 in giving power to make tailzies gave a right against the lord to give effect to that right, and as the claim for composition then in question was not within the reservation of casualties contained in that Act, and certainly was not given by the Act, there could not be any legal foundation for it. Upon general reasoning Lord Cottenham thought that tolerably clear, but he found this view of the case strongly confirmed by the decisions in *Lockhart* v. *Denham, Mackenzie,* and *Hamilton* v. *Hopetoun,* and as to the last of these cases he says that if, as was there decided, the vassal is not bound to preserve the legal order of succession but may substitute any persons of the blood of the first taker without reference to their order or the probability of their inheriting according to the rules of inheritance, the only principle upon which the claim can be supported seems to be removed, for whether the party named be a perfect stranger or so remotely connected in blood and with so many before him as to make his chance of inheriting hopeless, must be matter of indifference to the superior. The ancient rules of inheritance by this decision do not regulate the superior's claim.

If this judgment is to be followed, it seems to me out of the question to reject the defender's claim to enter as heir of provision on the sole ground that the deed of entail under which she takes disturbs the legal order of inheritance by excluding heirs-portioners.

It is said that *Stirling* v. *Ewart* is inapplicable, because in that case the institute paid composition for entry, and no composition was paid by Sir Thomas Riddell. But the entail was made not by Sir Thomas but by Sir James; and it follows from the judgment that Sir James, who has entered as a purchaser on the usual terms, was entitled to entail his lands and to require the superior to give effect to his entail. If he had completed a title, as he might have done, to himself and the heirs of entail, all of the latter would beyond question have been entitled to enter in their order as heirs. But he propelled the succession to his son, and therefore the son had to complete his title by the form applicable to a singular successor. This is the peculiarity in the title which allows of the present question being raised. For it is settled law, and is

in no way disputed, that Sir Thomas was entitled, notwithstanding the form of his entry, to the full benefit of his character as heir, and was therefore liable for relief duty only. But then it is argued that as the superior could not exact a year's rent from him he is entitled to exact it from the defender. But because the disponee must be received as an heir, being heir in fact, it does not follow that a later heir is to be treated as a disponee. The assumption is that wherever there is a new destination to a different series of heirs, the superior must have a year's rent from one or other of the new series, or, in other words, that he is not bound to recognise the entail. But Sir Thomas was bound by the entail, and it is not open to dispute that he was entitled to demand a charter which should give effect to it. That he was entitled to a charter is admitted; and as the subject of the right was heritable the obligation to enter Sir Thomas necessarily implied the descent of that right to his heirs. Had the superior, then, a right to say that it must descend to the heirs-at-law and not to the heirs of entail? That is the very point decided against him in *Stirling* v. *Ewart.* If the *Duke of Hamilton* v. *Hopetoun* had stood alone it is clear that the substitution of the defender must have been admitted, because she is one of the heirs-at-law and an heir who would have taken along with others *pro indiviso* if there had been no entail. But after *Stirling* v. *Ewart* that is an immaterial consideration. Her right as heir of entail is conclusive irrespective of her relation to the entailer or to her predecessor in the fee. It is said that throughout the opinions in *Stirling* v. *Ewart* the payment of composition on entry is put forward as the ground on which the superior is precluded from demanding a second composition from heirs. But that is because in the particular case this was the only condition on which a charter could have been obtained. The whole force of the point on previous payment is contained in a sentence of Lord Cuninghame's opinion, when he says that in *Lockhart* v. *Denham* "the superior was barred from claiming a new composition from a succeeding heir of the investiture which he had acknowledged for the highest legal consideration that the law gave him right to exact." But that is exactly the position of the present superior, who received for the entry of Sir Thomas Riddell and the acknowledgement of his heirs of provision the only legal consideration which the law gave him right to exact. The point has been sometimes stated in a way which seems to me to be entirely erroneous and misleading. It has been said that according to a dictum of Lord Braxfield the payment of the composition on entry is the enfranchisement of the whole destination. But that is a misapprehension. What Lord Braxfield really said—and the House of Lords treated it as a most authoritative and important statement of the law—was that "the granting of the first charter is the enfranchisement of all the subsequent disponees." It is the charter, and not the price which is paid for it, which is to be treated as the enfranchisement of the heirs of tailzie. Accordingly the judgment of the House of Lords is that when the superior has once granted a charter which in law he is bound to grant, embodying a destination to heirs, he is altogether outside the statutes entitling him to composition on entry when he demands composition from any one of such heirs.

The case of the *Marquess of Hastings* v. *Oswald* adds little to the argument, because although it came after *Stirling* v. *Ewart* it professes to do no more than follow *Mackenzie* v. *Mackenzie.* The decision was that an institute under a deed of entail who was also heir *alioqui successurus* must be entered for relief, reserving to the superior "his right to claim a year's rent upon the entry of the first substitute under the new investiture who shall not be the then existing heir under the former investiture, and to the vassal any legal defence against such claim."

This is said to imply that the claim when it arose would be valid, and the opinion of the Court is said to be expressed to the effect that the reservation would be effectual. But the reservation covers not merely the superior's claim but also the vassal's defence. It is obvious that this could do no more than keep the matter open. For the Court could not reserve a defence and repel it in the same breath, and if they did their judgment would bind nobody. The question before the Court was whether the vassal should pay composition or relief; and the reservation was inserted at the instance of the vassal himself, who was perfectly willing that claims should at some future time be allowed to emerge against stranger heirs, provided he himself was exempt from payment. It is impossible that the Court should expressly or by implication have decided a question which had not yet arisen, against parties who were not before them, and whose rights on that hypothesis had been surrendered for his own advantage by a litigant who had no title to represent and no interest to protect them. I take it, therefore, that when Lord Wood says that the reservation must be effectual, he means exactly what he says, that it will be effectual as a reservation of the question, or, in other words, effectual to keep the question open. An effectual reservation of a question which decides the question reserved is a contradiction in terms. If this were otherwise doubtful, the intention of the Court would be cleared by Lord Wood's reference to the cases of the *Duke of Argyll* v. *Lord Dunmore,* and *Stirling* v. *Ewart.* This last he cites to prove that a reservation was effectual to keep a question open, just because it was found after litigation that it was of no beneficial efficacy to the superior, inasmuch as he had no legal right to reserve.

I am of course very far from suggesting that *Lord Hastings* v. *Oswald* is not a very important judgment for all that it really decides. On the contrary, it is, in my

opinion, of the highest authority as a confirmation of the actual decision in *Mackenzie* v. *Mackenzie*, by which the right of Sir Thomas to obtain his charter on payment of relief is fully established.

LORD PRESIDENT—The sharp divergence of opinion that has been shown between the judgment of the Lord Ordinary, which has been followed by my brother Lord Johnston, and the judgment just delivered by Lord Kinnear, whose profound knowledge of the feudal law we have always been accustomed to rely on, has made me give very critical attention to this case, and I have read more than once the whole of the cases which were cited at the bar at the hearing. But the opinions that have been already delivered have gone so minutely into the various cases that I do not think it would really be of any service that I should follow that investigation; and I propose, therefore, merely to give the leading points upon which my own opinion has been formed, with what brevity and simplicity my powers and the nature of the subject permit.

I begin with three propositions—first, the superior is bound to enter an heir, but is not bound to enter a singular successor, for relief; second, the heir in this sense is the heir of the standing investiture, and no question of blood relationship to the last vassal infeft is of any moment; and third, a superior on the tender of a composition is bound to grant an investiture which in its destination contains such series of persons called as heirs as the payer of the composition or his assignee before infeftment demands.

Now as to the first of these propositions, I imagine no controversy is possible. I pass over the second for the moment. As to the third, I think it is simply and solely the decision in *Stirling* v. *Ewart*, which, of course, as a House of Lords decision is a ruling case on this matter. I therefore pass to the second, as I have expressed it, that the heir is "the heir of the standing investiture," no question of blood relationship to the last vassal infeft being of any moment. Now there can only be one heir of the standing investiture in the true sense—that is to say, the person whom I may call the man of the moment, and for this reason, that he is the only one who can serve as heir in special. I think that becomes very clear when one considers what was the procedure by which, apart from the question of strangers and singular successors, an heir was enabled under the ancient law (I mean the law after feus had ceased to be merely personal) to force an entry from the superior. I need not go into the procedure by charges and so on, but service in special was a necessary preliminary to charging the superior to grant an entry to the heir. I may cite as authority for this Erskine, iii, 8, 79.

Now I turn next to consider the question, What shall be the answer if one of the members of the standing investiture—that is to say, one of the persons who are included in the description in the standing investiture—but not the person entitled at the moment to succeed under the standing investiture, that is, the person entitled to serve heir in special under the standing investiture, come with a deed flowing from the last vassal infeft, which prefers him, the profferer of the deed, to the person entitled to serve heir in special? In other words, what is to be said when the person demanding an entry is not indeed a stranger in the full sense of the term but yet is not the heir entitled to serve in special, and comes under a deed in which the order of persons entitled to succeed has been changed? Must the superior enter him as an heir, or is he truly a singular successor? I think the whole authority points to the fact that he is a singular successor. I take Mr Duff's definition of it, and I think Mr Duff's view is none the worse that he really in his comments pretty well foresees *Stirling* v. *Ewart*, and I think foresees it rightly. His work was written in 1838; *Stirling* v. *Ewart* was decided in 1844. Now Mr Duff, on page 216, under the heading, "Who accounted singular successors," says—"It may be stated as a general rule that with the exception of a donator of the Crown all who present themselves to the superior in any other character than that of heir of the last investiture, whether purchasers or mere gratuitous disponees, must pay the legal composition," and then he gives an illustration of that—a very familiar case, which I think is rather cogent in this matter, namely, the case of *Grindlay* v. *Hill* (January 18, 1810, F.C.) Now *Grindlay* v. *Hill* was decided on 18th January 1810, and has again and again been held as ruling this point. The rubric of it is that "The trust disponees of a deceased vassal to whom the estate was disponed in trust for the heir, whom failing, to strangers, are not entitled to demand an entry from the superior without paying the casualty of superiority as singular successors." Now one might suppose that the point of that decision was that if the trustees had been granted an entry they might by arrangement with the heir—for he could have discharged them if he had liked of the trust in his favour—have been enabled to grant a conveyance to a stranger, having been duly entered, upon payment of relief. In other words, it might have presented the same class of question as is raised in the equally well-known case of the *Magistrates of Musselburgh* v. *Brown*, where it was held that although an heir is entitled to an entry upon relief, nevertheless he must take his deed in such a form as will not enable him, after he has got his entry and the fee is full, to push in a singular successor. But that was not the true ground of the decision in *Grindlay* v. *Hill*. It becomes quite plain if you look at the report of the case. What is said there is that George Grindlay died being infeft upon a simple destination to himself and his heirs whomsoever, leaving a son. The trustees made up titles to the estate by an action of adjudication and implement upon the trust deed, and demanded from Mr

Robert Hill, the superior, a charter of adjudication on payment of relief, and offered to take infeftment on it immediately—that is say, that they would not keep the charter in such a form as to enable them to introduce a stranger. One sees accordingly that, inasmuch as they made these offers, it was truly the heir that was going to get the benefit of the charter, and the heir alone. The only thing that was afterwards to follow was a conveyance by the trustees to the heir when he came of age. Accordingly I think that illustration which Mr Duff gives is really a very strong argument in showing that the only thing that can be looked at is the standing investiture.

I think the same thing is very clearly brought out by what seems to be the acknowledged position as regards a *mortis causa* deed by a father in favour of his second son instead of his eldest son—assuming that the father is infeft on a deed under which his heirs whomsoever are called. What that is seems perfectly well settled because I find it twice mentioned. The one place where it is mentioned is in the opinions of the consulted Judges in *Stirling* v. *Ewart*, 2 Ross's Leading Cases (Land Rights) 340, and it has been already referred to by Lord Kinnear. It is upon page 349, in the opinion that was written by Lord Ivory and concurred in by Lords Cockburn and Murray—"If a father convey to a second or any younger son—or one of several brothers to a sister—the disponee in such case must enter and pay composition as a singular successor." They take that as an acknowledged thing, although, of course, they say it is quite different if it is not done by disposition but by the effect of the standing investiture. In the same way, I find Mr Ross (Land Rights, vol. 2) on page 409 says—"It is believed to be generally understood in practice that where a father passes over his eldest son and conveys to a younger son, the latter is bound to pay composition for his entry the same as a singular successor. This practice may be considered as well founded in the case of a general investiture to heirs whatsoever, for a superior cannot be supposed to enfranchise everyone who can show himself to be related to the first vassal, however remote in degree." So that it seems to me acknowledged as a settled thing that where a father chooses to convey to a second son instead of an eldest son, that son, if he comes to take the benefit of his father's conveyance, must pay composition as a singular successor.

I cannot help thinking that this is really the result of a fact which must never be kept out of view, viz., that by the law of Scotland there is no such thing, speaking strictly, as a conveyance of land by will. The conveyance is a conveyance *inter vivos*, and although, of course, a *mortis causa* deed is not delivered until after the death of the granter, nevertheless it is a conveyance *inter vivos*, and really when you convey *inter vivos* and settle a destination you only use the word "heirs" because it is the only way in which you can settle a destination to persons who are yet unborn. It would be a perfectly good destination, of course, to ask a superior to grant lands to yourself, whom failing to A, whom failing to B, whom failing to C, and so on through all the letters of the alphabet. But it obviously would not be practically useful as a destination which was to govern the lands in all the years to come until altered, because A, B, and C must die, and so you would only settle the lands for what probably would be the duration of the longest life of all the people whom you name. When you want to go on and settle as to persons in the future you cannot name them by name; you do not know who they are to be, and the only way you can select them is by their relationship to others who have been in life. Therefore, availing yourself of certain definite terms which have a settled significance in law, you can either use the term "heirs general," knowing the result of that, or if you do not want that you can use the term "heirs-male" or "heir of the body," and so on.

Now, if that is so, it really reduces the point, after all, to one of great simplicity. Everybody who has a right to an estate, and has a right to go to a superior and ask for an entry, must be either an heir or a singular successor; and I think he can only be an heir, in the sense in which we are talking, if he does not need to show to the superior anything else than the subsisting investiture. If he is content with that—if he can go to the superior and say, "Here is an investiture which I show you; your old vassal is dead, and I show you a service in special which establishes my character and enables me to link myself personally with the standing investiture," then he will get an entry as an heir. But if, on the other hand, he has to show a deed from the last vassal, then he is really demanding a entry in respect, not of something that has made him an heir, but in respect of an *inter vivos* conveyance.

With these views I come to the question in hand, and it seems to me a perfectly fair test of it to suppose that this particular question had arisen in 1872. Of course I do not mean it could have arisen in 1872 with the state of the family as it was; but if the family had been otherwise the same question might have arisen in 1872. But if I am not to be allowed to take liberties with other people's families, suppose the lands had been allowed to lie out in non-entry all these years. Suppose they had not gone to the superior in 1872, and the lands had been lying in non-entry all this time—the thing is not unknown; lands have been, through carelessness, in non-entry for hundreds of years with possession on apparency all the time—I take it the position under either of these circumstances would have been exactly the same. Let me take it at its simplest; the lands have been in non-entry, and the question has arisen now. The superior has never seen *ex hypothesi* the deed of entail under which the present defender is claiming. Could the defender have served under the old destination as heir in special to the estates

which she takes up under the deed of entail? Clearly she could not. She could, of course, have expede a special service as an heir-portioner to her *pro indiviso* share of the estate, but she could not have served as an heir who takes up the whole estate as she does under the deed of entail. Having settled that, could the superior have been forced to grant a new charter with this new destination? If I am right in the opinion I have expressed, he could not. *Stirling* v. *Ewart*, the authority of which I absolutely admit, does not seem to me to touch that question really at all, because in *Stirling* v. *Ewart* a composition was being tendered and then a destination was being asked. Of course if a composition is tendered and a new charter asked you can get what destination you please. But that does not touch the present question, because here admittedly there is no tender of composition. It does not seem to me, accordingly, that Miss Riddell could have been in what I call the simple position of being able to approach the superior with a service in special, and of saying—"Now then, you see the rest of it in the investiture, which is the standing investiture you have enfranchised by your charters." It is of necessity to make out the defender's title that she produce the deed of entail, and for a charter in terms of the deed of entail no composition has ever been paid.

I have taken the matter, of course, at this moment as if there had been no writ of confirmation granted in 1872. If I am right so far, does the fact of the writ of confirmation granted in 1872 make any difference? In the view of strict law it seems to me that in 1872 composition might have been demanded; but it could not have been successfully demanded for the good reason that the person who then wanted an entry was in a position to do just what this person cannot do, namely, to serve as heir in special under the old investiture and take precisely the same estate as he took under the deed of entail. Of course there are cases on that. The first of them was *Mackenzie*, and the second was the *Marquis of Hastings*. I take it under these cases to be perfectly well settled that if the applicant for the new charter is the heir—by which I mean the heir of the moment under the old investiture—he will be entitled to get a new charter even in the new form for payment of relief, simply because he could have got a charter which would have given him the same estate by service in special under the old investiture. But then a form of reservation is put in. I may say in passing with regard to the *Marquis of Hastings* case (which I agree does not go further than *Mackenzie*) that I am quite content with the general review of the cases given by Lord Wood in that case. I see nothing to criticise in what he there says. I think the reservation in the *Marquis of Hastings* case is really expressing in a little more accurate language what was said in *Mackenzie*. It is quite clear that the reservation does not give any right, but merely reserves a right which exists otherwise. Why was it necessary to put it in at all? I think it was put in merely to prevent what otherwise would have been a successful argument, namely, that by granting a new charter in the form in which he had granted it the superior's mouth was for ever shut against telling anybody who came forward that he was not the heir of the standing investiture. I think that exactly follows from the argument which I have laid stress upon, for if a new charter is granted it wipes away the old, and the standing investiture is the investiture of the new charter, and any person called under that charter who happened to be the man of the moment could come and say in triumph to the superior "Here am I, the heir of the investiture; grant me an entry for relief." I do not think one needs a great deal of authority for it, but you certainly get it amply in the case of *Lockhart* v. *Denham*, where it was held that a superior who had granted a charter which he could have been forced to grant, could not be allowed to talk about any other investiture or to talk about any other reservations; and the opinion of Lord Braxfield, which you find quoted by Mr Ross on p. 408 (Land Rights, vol. ii), not from jottings on session papers but out of Lord Hailes' Decisions, is to the same effect. Accordingly I think that it was to prevent that that this reservation was put in. I therefore come upon the whole to be of the opinion—and I must say so far I have not had a great deal of difficulty in my own mind—that here the person who asks the entry could not have had recourse to the old investiture, but must truly have entered as a disponee from the previous vassal, were it not for the charter of confirmation. That I will deal with later. But upon the general question, to which far the greater part of the two opinions which have been delivered was directed, viz., as to whether the superior could have been forced to grant a charter in these terms if asked for the first time, I am of opinion he could not.

The only piece of authority I myself have found that seems to me to tend the other way is that of an opinion by Lord Corehouse, which has already been referred to, on page 397 of Ross's Leading Cases, where he says—"I do not imagine it will be found in practice, when a vassal who held his estate in fee simple by charter to himself and his heirs whatsoever, resigned for infeftment to himself and his heirs-male also in fee-simple, that a composition was ever demanded." I cannot quite get out of Lord Corehouse's remark in the way my brother Lord Johnston has got out of it, because he seems to think Lord Corehouse vitiated his remark by taking a wrong view of the case of the *Duke of Hamilton* v. *Hopetoun*. I do not think his remark, however, is based on any one case; I think that it is his own impression as to practice; and I am afraid that I recognise Lord Corehouse as a very great authority on a matter of practice at a time when there was practice, and at a time when our

predecessors knew a great deal more about this matter than we can possibly know. But were I to hazard a guess at the matter, I venture to think that what he must have meant is that when a man had a charter in that way and went to the superior and said, "I want to alter the destination from heirs whatsoever to a set of heirs I am going to pick out; give me another charter," I can quite understand that that charter would be given without another payment of composition. It is quite within one's knowledge that superiors do not always insist on their extreme rights. The Crown, for instance, gives entries for less than could be demanded. The Crown in the case mentioned by Lord Johnston of *Drummond Murray* gave entry for less, and I know that subject-superiors have acted in the same way.

Now I think here that if Sir James Riddell, after he had got his charter in 1849, had made up his mind about his entail at once, and had gone back to the superior, say the next week, and said, "Now I have got a charter from you to my heirs whomsoever, but in the meantime I want to settle my affairs by entail; I propose to do that by a procuratory of resignation, and I propose to get a charter of resignation from you and take infeftment myself and start my own entail," I do not think the superior, unless he or his agent had been a Shylock, would have had the face to ask a composition. Now that class of thing, I cannot help guessing, is what Lord Corehouse is referring to. But it is a different thing to say that the superior could have been forced to do it. And if the whole thing was left over, and the vassal afterwards disposed of his estate by *mortis causa* deed, and no title was taken upon it till the year 1872, the situation would be entirely altered, and I do not think the superior would be a Shylock in 1872 in demanding his composition. I do not mean demanding it from Sir Thomas, for he was entirely shut out from that by the decision in the case of *Mackenzie* and the *Marquis of Hastings*.

Your Lordships will have observed that hitherto I have treated the case entirely upon the view of what the superior could have been forced to give. I now come to the one remaining question, viz.—whether the actual granting of the charter of confirmation of 1872 and the reservation there makes any difference. Here I confess I have had the very greatest difficulty, and it is this part of the case which to my mind is much thinner than the general view so well argued by Lord Kinnear. There is no question that, as expressed, this reservation reserves to the superior a right to claim composition on occasions when he has not the slightest right to get it, because, of course, it is a reservation of a right to composition whenever the heir that happens to succeed is not the heir of line of the last entered vassal. That is exactly what was held to be bad in the case of *Stirling* v. *Ewart*. Therefore I have had very great difficulty, but on the whole I have come to the conclusion that the reservation will do, and for this reason—I think we are all agreed that the superior's right does not turn on the reservation; he must have his right first, and all that the reservation does is to prevent the retort that would be made to the superior, "Oh no, you have granted another charter of confirmation under which I am the actual heir" (the man of the moment, as I call it). Well, now—I of course assume that I am right on the first point here—if the superior as matter of right could demand composition upon a charter which would have brought in then and there the person now claiming, I think it would be rather hard that he should be cut out of having that right because he framed his reservation in such terms that, while it included the particular case, it also included other cases in which he would not have had a right to demand his composition. I think this is a very narrow point, but to the best of my judgment I have come to the conclusion that it would be too hard to tie the superior down to a judaical interpretation of that clause; and therefore upon the whole matter I come to the same conclusion as is come to by the Lord Ordinary.

LORD SALVESEN—At the end of the first hearing I formed the opinion that the Lord Ordinary was right, and I must say that that opinion was much strengthened by the able argument that we had from Mr Macphail at the second hearing in defence of the Lord Ordinary's interlocutor. I therefore concur with the majority of your Lordships that his interlocutor should be affirmed.

LORD MACKENZIE—I have had an opportunity of reading the opinion delivered by Lord Johnston, and concur in its result.

The Court adhered.

Counsel for the Pursuer and Respondent—Macphail, K.C.—Chree. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Defender and Reclaimer—Constable, K.C.—Moncrieff. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, February 3, 1912.

FIRST DIVISION.

[Sheriff Court at Duns.

KERR v. SIMPSON.

Executor — Executor-nominate—Confirmation—Danger to Estate—Judicial Factor.

A master left a universal settlement in favour of his servant. The servant having presented an initial writ craving confirmation, it was opposed by the next-of-kin of the deceased, who averred that there was danger of the estate being lost if confirmation were granted to the petitioner. The objectors had already raised an action of reduction of the settlement.