parties, and, from what has now passed, I think my recollection accords with that of your Lordships. Had we held in that case that there was no fraud on the part of the defender I do not think that we would have come to the decision which we did come to. But if we have a suspicion of fraud—and in this case I have a very strong suspicion—it is unusual for us hastily to grant freedom from incarceration. A creditor has at present an undoubted right to imprison his debtor. An innocent debtor has equally a right to obtain the benefit of cessio; but a discretion is given to the Court as to granting this benefit, and as to the terms on which they will grant it. Now, the circumstances of this case are quite sufficient to satisfy me that the benefit ought to be refused *in hoc statu*. If the process had been brought in this Court, I cannot doubt that such is the course which we would have followed. I, for one, am not prepared to affirm the Sheriff's finding, that this "petitioner is entitled to the benefit of cessio." I propose, therefore, that we should recall his interlocutor, and refuse the cessio *in hoc statu*. I need hardly say that I repudiate and disregard the Sheriff's last ground of judgment. It is a statement of a ground of judgment which I would not have expected from such a quarter, and which, in my opinion, ought never to have been made by any one holding a judicial office.

LORD BENHOLME and LORD NEAVES concurred.

The LORD JUSTICE-CLERK—I also quite concur. The foundation of a claim of cessio is that the party is suffering from the result of innocent misfortunes. That, my recollection of the previous action satisfies me, cannot be predicated with any truth here. I cannot refrain from making the remark, that the ground of judgment given by the Sheriff-substitute—if it can be called a ground of judgment—is a most improper one; is one which I never heard stated before, and which I hope I shall never hear stated again. It is out of the question to *punish* a man for submitting his case to a Court of undoubtedly competent jurisdiction.

Agent for Reclaimer—D. F. Bridgeford, S.S.C.
Agent for Respondent—Henry Buchan, S.S.C.

Wednesday, March 17.

KEITH WILLIAM STEWART MACKENZIE, ESQ. OF SEAFORTH *v.* THE HON. MRS ISABELLA MONRO BUTLER-JOHNSTONE MONRO AND HER HUSBAND.

*Superiority—Vassal—Non-Entry — Register of the Great Seal—Date of Sealing—*49 *Geo. III, c.* 42*—Crown-charter—Open Precept—Assignation —Notarial Instrument—Title to Sue.* (1) A Crown-charter, upon an extract of which from the register of the Great Seal a notarial instrument was expede, bore to be written to the seal and registered on 2d April 1821 and sealed 2d April 1822—*held* that, in these circumstances, there was no evidence that there was an error in the entry of the charter in the record. *Opinion* that under the Act 49 Geo. III, c. 42, a delay of a year in sealing would not raise a valid objection to the charter; (2) *Held* that a notarial instrument expede upon an open precept in a Crown-charter and assignation thereto confers a good title of superiority to pursue against a vassal an action of declarator of non-entry.

This was an action of declarator of non-entry brought by Keith Stewart Mackenzie, Esq. of Seaforth, against the Hon. Mrs Isabella Monro Butler-Johnstone Monro, of Culcairn, and her husband, by which, as superior of the lands of Contuttich Over and Nether, with the fortalice of Ardoch and Achvaich, and pertinents, lying within the parish of Alness, barony of Foulis, and sheriffdom of Ross; as also of all and whole the towns and lands of Maltavie and Leadie, with the parts, pendicles, and pertinents of the same, lying within the barony of Balnagown and sheriffdom of Ross, the pursuer concluded to have it declared that the said lands were in non-entry, and that the defenders should make payment to him of a composition of a year's rent for their entry, as being singular successors to the vassal last infeft.

The defence stated to the action (besides denying the liability of the defender to pay a composition of a year's rent) was that the pursuer had not produced a valid title to the superiority, and the title was objected to on several grounds, two of which were sustained by the Lord Ordinary (BARCAPLE).

The first of these objections was that an extract from the entry of a charter in the register of the Great Seal was not a legal warrant for giving sasine or for notarial instrument, which now constitutes infeftment; and that, in this case in particular, an extract could not be a proper warrant to that effect, because the date of sealing of the charter was erroneously recorded. The extract of the Crown-charter, upon which the notarial instrument in favour of the pursuer proceeded, bears that the charter was written to the Seal and registered 2d April 1821, and sealed 2d April 1822; and the allegation of the defenders was that there was here such a palpable error in the date of sealing,—the sealing bearing to have taken place exactly one year after the date of writing to the Seal and registering,—that this extract was to be deprived of the benefit conferred by the Act 49 George III, c. 42, sec. 16, which provided "that extracts of writs from the register of the Great Seal, of which the fact and date of sealing shall have been duly recorded, shall make entire faith in all cases, excepting in cases of improbation."

The second objection was, that a corroborative disposition, granted by Mr Donald Horne, W.S., to the pursuer, and which forms one of the connecting links in the pursuer's title, was invalid, for the reason that Mr Horne was not *in titulo* to grant the deed. Mr Horne had previously disposed the lands to John Archibald Murray, Esq., in trust for J. A. Stewart Mackenzie, Esq., the pursuer's father. Further, Mr J. A. Murray, on the narrative that he held these lands in trust for Mr Stewart Mackenzie, disposed them to him, and from him they came to the pursuer. Certain of these deeds being lost, the pursuer got the corroborative disposition from Mr Horne narrating these deeds; and the objection maintained was that Mr Horne, having granted the above-mentioned disposition to John Archibald Murray, was not *in titulo* to grant the corroborative disposition.

The Lord Ordinary sustained both these objections to the pursuer's title, adding the following

"*Note.*—The pursuer insists in this action of non-entry, as being publicly infeft in the superiority of the lands, as a singular successor of the granter of the original feu-right. In evidence of his title he produces two notarial instruments in his favour, dated respectively in 1867 and 1868.

The first of these professes to proceed on an extract of a Crown charter of resignation in favour of Mr Donald Horne, W.S., and a disposition by Mr Horne to the pursuer in 1867. The notarial instrument bears that the charter on which it proceeds is dated the 3d day of February 1821, and written to the Seal, registered and sealed the 2d day of April 1821. But on reference to the extract of the charter, it appears that while the date of the charter and the date at which it was written to the seal and registered are given as in the notarial instrument, the date of sealing is stated to be the 2d of April 1822, that is in the following year. There is here plainly a clerical error, and it is apparently the date of the sealing that is erroneously stated. In any view, the instrument is bad, as being inconsistent with its warrant.

"The second notarial instrument proceeds on the same *extract* charter and disposition. But in it the charter is set forth as bearing date 3rd February, and written to the Seal and registered 2d April 1821, *and sealed, or bearing to be sealed, the 2nd day of April* 1822. This is consistent with the terms of the extract, which the first instrument was not.

"The second instrument also differs from the first, in so far as it does not merely set forth the disposition by Mr Horne to the pursuer in general terms, but also fully sets forth the narrative or preamble of that deed, which is there called a corroborative disposition and assignation. That narrative, after reciting the Crown charter in favour of Mr Horne, bears that by a disposition in 1821 Mr Horne sold, alienated, and disponed the lands to John Archibald Murray, Esquire, *ex facie* absolutely (but, as had been recently represented to him, really in trust for J. A. Stewart Mackenzie, Esquire of Seaforth), and assigned to Mr J. A. Murray the Crown charter and the unexecuted precept of sasine therein contained. It farther bears that, by disposition and assignation bearing date the day of 1831, Mr J. A. Murray, on the narrative that he held the lands and others therein disponed in trust for Mr J. A. Stewart Mackenzie, and that Mr Stewart Mackenzie had requested him (Mr J. A. Murray) to dispone the same to him, disponed the lands to Mr J. A. Stewart Mackenzie, and assigned to him the titles, and particularly the Crown charter and unexecuted precept in Mr Horne's charter. It is further narrated that Mr J. A. Stewart Mackenzie, by a general disposition and settlement in 1843, disponed, assigned, and conveyed his whole estate, heritable and moveable, together with the whole writs and evidents thereof, to the Honourable Mrs Stewart Mackenzie, his wife, and that he died in the same year. It is also narrated that, by trust-disposition and settlement in 1857, Mrs Stewart Mackenzie assigned, disponed, and conveyed to certain trustees all and sundry lands and heritages belonging to her, or which should belong to her at the time of her death (exclusive of the lands and estate held by her under settlements of strict entail), and that she died in 1862. It is further narrated that two of the trustees accepted, and, by disposition and assignation dated 31st May 1864, sold, alienated and disponed to the pursuer the lands which are the subject of this action. It is further narrated that it had been represented to Mr Horne that the pursuer was the only son and nearest and lawful heir of Mr J. A. Stewart Mackenzie, and that under the titles before narrated, 'and also as nearest and lawful heir foresaid,' he had undoubted right to the lands, but that certain of the rights and titles 'thereto above narrated' had been lost or destroyed, whereby the pursuer was prevented from completing a feudal title. The deed then proceeds on the subsumption, which is also recited in the notarial instrument, that in consequence thereof, that is of the loss or destruction of certain of the rights and titles before narrated, the pursuer had requested Mr Horne, in order to enable him to complete a title, to grant the corroborative disposition in his favour, which he had agreed to do. The conveyance is granted without prejudice to the other rights and titles of the pursuer, but in corroboration thereof, *et accumulando jura juribus.*

"The corroborative disposition by Mr Horne to the pursuer is in process. But none of the writs recited in the narrative of that deed subsequent to the extract of the Crown-charter in Mr Horne's favour are produced. And though in the last of the notarial instruments in the pursuer's favour it is set forth that these deeds are recited in the corroborative disposition by Mr Horne, it is not stated that any of them were exhibited to the notary. Neither is it stated in the disposition by Mr Horne that any of them had been shewn to him, while it is said to have been represented to him that certain of them had been lost or destroyed.

"The defender objects to this title that an extract from the entry of a charter in the Register of the Great Seal is not a legal warrant for giving sasine, or for the notarial instrument which now constitutes infeftment. No authority was referred to on this point except the Statutes 1698, cap. 4, and 49th Geo. III, cap. 42, sections 15 and 16. The Lord Ordinary has not considered it necessary to determine the point. If it had been so, he should have desired information as to the practice in regard to the matter among conveyancers.

"There are other two objections taken to the title—*First*, That in this case the extract is an invalid warrant for infeftment, in respect that, owing to the palpable error and inconsistency in regard to the dates of writing to the Seal and registering and of recording, it is inept, and can bear no faith in judgment; and, *secondly*, That both the notarial instrument and the corroborative disposition by Mr Horne which was exhibited to the notary, contain evidence that Mr Horne was not *in titulo* at the date of that deed to convey the lands, and that the infeftment proceeded on the footing that there was a necessary progress of writs, constituting essential links in the title, which were not produced, and some of which were lost or destroyed.

"The pursuer disputes the right of the defender to go into these objections to his title to the superiority, on the ground that there is no competition as to the right, and that it is *jus tertii* to the defender to state objections which might be competent to a party alleging a competing title; but, assuming that this would be a good reply in bar of a certain class of objections to the superior's title when stated by the vassal, the Lord Ordinary does not think that it applies to the present case. The pursuer, who cannot allege that he, or any one whom he represents, has ever been acknowledged as superior of the subjects, is here seeking for declarator of non-entry, with all its consequences, and for a year's rent as composition. To entitle him to do so he must show at least a valid *ex facie* title. If his infeftment, and the warrant on which it proceeds, are inherently invalid, he has clearly no right to require the vassal to take an entry from

him. Lord Stair's doctrine on this subject implies that the vassal may object to the superior's title, though he incurs the risk of disclamation by so doing (Stair 4, 8, 2). The superior is not in a position to say that he has been received as vassal by the Crown as his superior. He no doubt founds on a public title as completed in his person; but he has completed it by taking infeftment on the open precept in a charter granted to his author. The Lord Ordinary thinks it is quite open to the defender to state all good legal objections to the validity of the title so completed.

"In regard to the objections to the extract of the Crown-charter, the Lord Ordinary presumes that the error is in the record, and not in the extract. If it had been otherwise, a correct extract would have been obtained when the second notarial instrument was expede, in consequence of the former instrument being inconsistent with its warrant. At all events, it must be assumed that the extract correctly sets forth what is contained in the register. The result appears to be that there is a palpable error in the record as to the essential matter of the date of sealing, which was at that time necessary to give validity to the charter. This is made more important by the provisions of 49 Geo. III., c. 42. Section 15 provides that the Keeper of the Great Seal, or his deputies, shall deliver all charters to the Directer of Chancery, or his deputy, by whom, 'after making the proper entries of the sealing in the record,' they shall be delivered to the persons by whom they shall have been expede. Section 16 enacts that extracts of writs from the Register of the Great Seal, of which the fact 'and date of sealing shall have been duly recorded (such extracts being certified in due form by the keepers of the said records), shall make entire faith in all cases, excepting in cases of improbation.' The sealing and the date of sealing are thus treated as the essential matters to be recorded. On general principle, and on the provisions of the statute, the Lord Ordinary cannot hold that an entry of a charter in the record, or an extract from it, which is palpably erroneous as to the date of sealing, is valid and entitled to the privileges conferred by the law of Scotland, and the modern statute just referred to, upon public registers, and duly certified extracts from them. On these grounds, the Lord Ordinary is of opinion that this is a good objection to the pursuer's title.

"He is also of opinion that the other objections must receive effect. It is not alleged that the disposition by Mr Horne to Mr J. A. Murray was not in all respects a complete feudal conveyance of the special subjects, by virtue of the assignation in which the disponee or his assignees might have taken infeftment on the open precept in Mr Horne's Crown-charter. Mr Horne was thus entirely divested of the personal right to the lands and to the charter and open precept, which was all the right that he ever had. He could not afterwards grant any effectual deed in relation to the subjects, except in corroboration of the disposition which he had granted to Mr Murray. The deed, however, which he did grant, and on which alone infeftment was taken, was not granted at the instance of Mr Murray, to himself or to a disponee pointed out by him. It bears to be granted at the request and in favour of the pursuer, whose right to receive it is not instructed by writing of any kind. No conveyance by Mr Murray was exhibited to the notary when the notarial instrument was taken. Nor does it appear that any such conveyance was exhibited to Mr Horne. It is merely set forth in the corroborative disposition that it had been recently represented to him that the disposition by him to Murray, though *ex facie* absolute, was really in trust for the late Mr Stewart Mackenzie, that the subjects had been conveyed by Mr Murray to Mr Stewart Mackenzie, and that the right to them had passed under general dispositions of all lands and heritages in the testamentary settlements of Mr Stewart Mackenzie and his widow to the pursuer. The notarial instrument and the corroborative disposition on which it proceeds, as giving the pursuer right to the open precept, show clearly that Mr Horne was not *in titulo* to grant that deed, except by desire of Mr Murray, his former disponee, or of some person who could show that he was in Mr Murray's right, that is, of a party served heir in general to him, or holding a disposition from him. But it also appears on the face of the instrument, that the pursuer did not instruct the existence of any such right in his person, and that, so far as appears from the writs exhibited to the notary, and on which the infeftment proceeded, the right to the subjects may still be in the *hæreditas jacens* of Mr Murray, or may have been disposed of by him in a manner different from that set forth in the corroborative disposition. It appears to the Lord Ordinary that an infeftment bearing this radical defect upon its face is not such a title as the vassal is entitled to require in a party who pursues a declarator of non-entry on the allegation that he has acquired right to the superiority. If an infeftment so taken is good in the hands of the present pursuer, a similar infeftment would have been equally good if taken by any other party on whose bare representation Mr Horne might have been led to grant a corroborative disposition, with a recital of titles not produced which he was led to understand carried to his new disponee the right formerly conveyed by him to Mr Murray. In such a case the vassal has clearly a material interest to be certiorated that he is dealing with the true superior of the lands, and for that purpose to state all objections appearing *ex facie* of the title.

"It would have been different if Mr Horne had been prevailed upon to grant a simple disposition and assignation in favour of the pursuer, on his assurance that the right formerly conveyed to Mr Murray had become vested in him. The infeftment following on such a deed would not have disclosed any defect of title on which the vassal could found an objection. In such a case, any party who might afterwards establish a preferable right to the superiority could not object to the vassal having dealt with a disponee to the superiority who had been allowed to obtain a prior infeftment in all respects *ex facie* valid. But the grantor of a second disposition in such circumstances would have incurred responsibilities from which Mr Horne has naturally sought to keep himself free by setting forth his true position in the face of the deed.

"The real question appears to be, whether the vassal is entitled to take the objection. For the reasons already explained, the Lord Ordinary thinks that he is entitled to do so. He has no interest, and would have no title to reduce the pursuer's infeftment, as a party with a competing and preferable right to the superiority would require to do for the purpose of clearing the record. But he has a clear interest, and the Lord Ordinary thinks he has therefore a title, to require that the party who demands that he shall take an entry and pay a year's rent as composition, shall show a title at least *ex*

facie valid. An infeftment following upon a recent disposition of the superiority flowing apparently *a non domino*, though it might be a good foundation for a prescriptive title, if it shall remain unchallenged for forty years, would clearly not be a good title on which to pursue a declarator of non-entry. The Lord Ordinary thinks that, when the infeftment on which the pursuer relies in the present case is examined, it is very much in that position in so far as Mr Horne, the grantor of the only conveyance on which it proceeded, appears on the face of the infeftment and of his disposition to have been previously divested of all right or title in the subjects, and therefore to have had no title to grant that deed, except at the instance of a party duly vested with the right, which it appears *in gremio* of the infeftment he had previously conveyed to Mr Murray.

"The defender's fifth plea in law, that the disposition by Duncan Munro in 1813 to Robert Warden, the immediate author of Mr Horne, was inept and illegal, is founded on the allegation that it constituted an illegal splitting of the superiority. The original feu-disposition contains a declaration that the superior should have liberty to separate and disjoin the valuation of any one of three parcels into which the subjects feued were separated in the *reddendo* clause of the deed, and to dispone and convey the same at his pleasure without objection by the vassals. Though the subjects were thus separately enumerated as consisting of three parcels, they truly constituted a single tenement then feued out for the first time, which, without a special provision to that effect, the superior would not have been entitled to split. The defender states, that before the conveyance to Mr Warden Mr Munro had conveyed a portion of the superiority to Mr George Munro, writer in Dingwall, and that he conveyed one of the parcels mentioned in the feu-disposition to Mr Warden, and retained a portion to himself, so that the superiority is now split into three portions, which, the defender alleges, is not justified by the declaration in the feu-right. The plea is stated as an objection to the pursuer's title. But it is a defence depending on matter of fact, which is not admitted, and could only be proved by production of the deeds by which the superiority is alleged to have been split contrary to the terms of the feu-right. The Lord Ordinary is therefore not in a position to deal with the question.

"The question, whether, assuming the title of the pursuer to be good, the defender is not entitled to an entry gratis, was argued before the Lord Ordinary, and he thinks it right to state shortly the opinion which he has formed on that point, in case the Court may take a different view of the objection to the pursuer's title.

"The defender's plea on this subject is rested specially upon the terms of the minute of sale, in implement of which the feu-disposition was afterwards granted. That minute was entered into by Mr Munro of Culcairn, the seller, and Sir Hector Munro, the purchaser. It contains an obligation on the seller, on payment of the price of £30,000, to grant a feu-disposition containing, *inter alia*, 'an obligation to enter and receive the heirs and successors of the said Sir Hector Munro as vassals in the said lands from time to time, and that gratis without paying any composition for their entry.' If it be necessary for the defender's case to resort to this provision as contained in the prior minute of sale, the Lord Ordinary does not think that the minute can be competently referred to for the purpose of derogating from the legal import and effect of the feu-disposition as finally constituting the rights of parties in the matter. As matters stand, the defender can only ask an entry under the feu-disposition. That deed was no doubt granted in very anomalous circumstances, and to parties who were afterwards found to have no right to take it. But it was taken up and adopted by the defender's predecessor in 1828, and has ever since constituted the right of her predecessor and herself, though no entry has hitherto been taken under it. The defender's predecessor might perhaps have originally set it aside, and demanded a new feu-disposition in his own favour, in terms of the minute of sale. But that course not having been taken, the defender is here founding on the feu-disposition as constituting her right to the lands, and the Lord Ordinary does not think that she can go beyond it, to found upon the minute of sale as taxing the entry differently from the disposition.

"But the feu-disposition also contains a clause as to this matter which the Lord Ordinary is disposed to think entitles the defender to a gratis entry. The deed was granted in very peculiar circumstances. Sir Hector Munro died in 1805, without having paid the price of the lands, or taken a conveyance to the estate. He left trust-settlements under which questions arose which led to a prolonged litigation. In 1807 Lord Meadowbank, Ordinary, pronounced an interlocutor by which, in the meantime, and until the final issue of the cause, he vested the management of the trust-estate in the persons of Mr Coutts and Mr Brodie, two of the trustees appointed by the settlements, and authorised and empowered them to act in the execution of the trust in so far as requisite for conducting the business of the succession previous to a distribution in terms of the settlements. Messrs Coutts and Brodie, acting under this judicial authority, paid the price of the lands to Mr Munro, the seller, and took a feu-disposition from him in their own favour, on which they were infeft in 1809. The feu-disposition thus taken by these trustees is the constitution of the feu which is the subject of this declarator of feu-entry.

"It was ultimately decided, in 1826, that, the lands having been specially destined in the minute of sale to Sir Hector Munro's heirs of entail in the estate of Novar, they were not included in the direction in his trust-settlement as to the destination of the general residue, but went to the heir of entail of the estate of Novar in fee-simple, Sir Hector not having carried out his apparent intention to execute an entail of these lands. The judgment is set forth in an extract decree of adjudication produced by the defender. The nature of the question as to these lands, to which it is unnecessary more particularly to advert, will be seen from a report of the case at an earlier stage of the litigation—(*Ferguson* v. *Munro*, 1 Sh. Ap. 394).

"Sir Hector Munro having died childless, his brother Sir Alexander took up the personal right to these lands by general service, and executed a deed of entail of them, in the form of a procuratory of resignation in favour of himself, whom failing, his second son Hugh Andrew Johnstone Munro, and the heirs-male; whom failing, the heirs-female of his body; whom failing, the defender, his daughter, and the heirs of her body. Sir Alexander having died while the litigation was still in dependence, his son Hugh Andrew Johnstone Munro expede a general service as heir of tailzie and provision to him. After obtaining a judgment find-

ing that the lands in question were not carried by the trust direction in Sir Hector's settlements as to the residue of his estate, but were effectually conveyed by Sir Alexander's deed of entail, Hugh Munro led an adjudication against the heirs of Mr Coutts, the survivor of the disponees under the feu-disposition, and got decree, adjudging the lands in his favour as heir of entail, in implement of the obligation on the trustees to convey them in terms of the decree in the previous litigation. He died childless, without further completing a title, and the defender is now served heiress of tailzie and provision to him.

"The Lord Ordinary has thought it necessary to advert in some detail to the peculiar position of matters as to the rights of parties when the feu-disposition was granted to Messrs Coutts and Brodie as trustees in 1808, and also to the right now in the defender as it was judicially determined in 1826, and has been since transmitted. By the feu-disposition Duncan Munro, in implement of the minute of sale, and on a recital of the interlocutor authorising Messrs Coutts and Brodie to act in the management of the trust, disponed the lands to them, 'and to the survivor of them, as trustees foresaid, and to the heirs and assignees whomsoever of them, or the survivor of them, *or to such other person or persons as may be found entitled thereto in the course of the said process of declarator.*' It was quite proper that, the deed being granted in the circumstances already explained, the person or persons who should be found entitled to the lands should be called as the successors of the trustees. In point of fact they were so called. The question in the depending action was not merely for whose behoof were the trustees to hold? but whether the lands fell under the trust, so as to belong to the trustees at all? The Lord Ordinary thinks that the destination must be read as being conceived in favour of the parties who were claiming the estate adversely to the trustees in the event of a judgment being pronounced in their favour. It was quite right that it should be so, as in that event they would be the parties who ought to have been the original disponees. The feu-disposition contains a clause by which Mr. Munro bound himself and his successors in the superiority, 'to enter and receive the *heirs and successors* of the said Thomas Coutts and Alexander Brodie as vassals to us in the said lands and others, and that gratis, without payment of composition or any consideration therefor.' The Lord Ordinary is clearly of opinion that the term 'heirs and successors' in this clause cannot be so read as to include singular successors. That is a well established rule of construction in regard to a clause taxing an entry. The question is, Whether, under the deed, the defender is a singular successor? That is not a question to be determined by the mere form by which the right is taken up. This is well illustrated by the case of a party who, being *alioque successurus*, applies for an entry as institute under a deed of entail granted by his immediate predecessor. A party in such circumstances is entitled to an entry as an heir, though he is a disponee, and would incur an irritancy by taking the lands in any other character—(*Mackenzie* v. *Mackenzie*, 8th July 1777, 5 Br. Sup. 613, M. 'Superior and Vassal,' Ap. 2). In the present case an adjudication led against the heirs of the last surviving trustee was the mode adopted for taking up the right. But that does not affect the question, whether Hugh Munro was not entitled, on the defeasance of the right of the trustees by the decree against them, to take up the fee constituted by the feu-disposition, as the party called by the destination in that deed to succeed to them in that event. He might have had a difficulty, as matter of form, in expeding a service as heir of provision. But the possibility of expeding a service cannot be taken as the invariable test for determining whether a party is to enter as a singular successor. The cases of devolution and propulsion of the fee in favour of the next heir are instances where there can be no service, the predecessor being in life. But the party who takes in this way is not obliged to enter as a singular successor, because he is one of the parties called to the succession by the investiture. The principles as to the nature of a composition, and the grounds on which it can be demanded by the superior, which were recognised and applied in the case of *Stirling* v. *Ewart*, 3 Bell Ap. 128, are important in this question. The Lord Ordinary thinks it would be inconsistent with these principles to hold that a superior who has granted a charter with a special destination including such person or persons as might be found entitled to the subjects, is entitled to a year's rent from the first party who claims an entry in that character, just as if there had been no such destination.

"Upon the whole matter, the Lord Ordinary is of opinion that, the defender being the party called to take the feu subjects by the destination in the original feu-rights, she is entitled to the benefit of the obligation come under by the superior to enter the heirs and successors of the original vassals without payment of a composition."

The pursuer reclaimed.

CLARK and MANSFIELD for him.

HORNE and DUNCAN in answer.

At advising—

LORD COWAN—This declarator of non-entry is insisted in by the pursuer, as superior of the lands mentioned in the summons, against the defenders, as in right of the *dominium utile*. The Lord Ordinary has dismissed the action, on the ground that the pursuer has not produced a valid and sufficient title to the superiority of the lands entitling him to sue.

The pursuer's title, as set forth in the record, consists of—(1) charter of resignation in favour of Donald Horne, dated 3d February, and written to the Seal and registered 2d April 1821, and sealed 2d April 1821 or 2d April 1822; (2) disposition and assignation by Donald Horne in favour of the pursuer, dated 12th September 1867; (3) notarial instrument in the pursuer's favour following upon these titles, registered 11th October 1867; and (4) another notarial instrument in the pursuer's favour following upon the same writs, registered 13th July 1868.

That the defender in a declarator of non-entry may dispute the pursuer's title to the superiority on grounds appearing *ex facie* of the title is not doubtful. Lord Stair says that, albeit the vassal may deny the superior's right, which might infer disclamation, yet that consequence will not follow "if the vassal had just ground of doubting whether the party claiming the superiority was truly superior, even though he might find his sasine in the register." I quite adopt the principle stated in the note to the interlocutor, that if the superior's "infeftment and the warrant on which it proceeds are inherently invalid, he has clearly no right to require the vassal to take an entry from him." The question is, whether the defender has succeeded in showing that there exists, *ex facie* of the

superior's title, good legal objections to its validity?

That the notarial instrument has been expede upon an extract of the Crown-charter, and not directly upon the charter itself, was not urged at the debate as, in itself, a good objection to the title; and, having regard to the terms of the Statute 49 Geo. III, c. 42, I do not think it doubtful that infeftment, or its equivalent, a notarial instrument thus completed, can be open to objection. By the 16th section it is enacted "that extracts of writs from the Register of the Great Seal, of which the fact and date of sealing shall have been duly recorded (such extracts being certified in due form by the keepers of the said records), shall make entire faith in all cases, excepting in cases of improbation." The extract in this case is not alleged to be other than duly certified by the keeper of the record, and both the fact and date of sealing have been duly recorded, as the extract itself bears. Moreover, it was expressly admitted that the register bears that, of the date stated in the extract, the charter was written to the seal and registered and sealed. All the statutory requisites are here to entitle this extract to bear faith.

It is said, however, that there is a palpable error in the record as to the essential matter of the date of sealing. Now, there is no evidence that the date of sealing entered in the record is an error. The charter itself having been lost, or at least not having been produced, it cannot be assumed that it bore any other date of sealing than 2d April 1822, and I do not see how such error can be shown to exist. It may be for conjecture that, as the date of the charter being written to the seal and registered is 2d April 1821, the keeper of the record may erroneously have written 1822 instead of 1821. But there was nothing to prevent the sealing having taken place as recorded, and unless the delay of a year in the sealing is a fatal objection to the charter, had it been forthcoming, or to this extract of it, there is no room for holding this to be a good objection to the pursuer's title. But the delay of a year in the sealing has not been shown—naccording to the sound reading of the 15th section of the Statute of Geo. III, or on the authority of any decision of the Court, or of any of our text writers in the law—to be destructive of the validity of the charter itself. I cannot, therefore, hold that the entry of this charter in the record is "palpably erroneous" as to the date of sealing. And I arrive at this conclusion the more readily, seeing that the charter, so completed, and the relative entries in the record, have stood for more than forty years unchallenged as a good personal title to the superiority under the Crown, and that there is no competing right or claim to the superiority by any third party. The defender, in this state of matters, is not, I think, entitled to evade the consequences of his non-entry upon such an objection to the title of the pursuer.

Upon the other objection, which the Lord Ordinary has sustained, I have very few observations to make in addition to what has been already stated by your Lordships. It is impossible for me to hold that, *ex facie* of the corroborative disposition and assignation from Mr Horne, it appears clearly that he was not *in titulo* to grant that deed, except by desire of Mr Murray, his former disponee, or some one in Mr Murray's right. As disclosed on the face of the disposition and assignation, the right in Mr Murray was disponed in 1831 to the pursuer's father, and by him was conveyed in his general disposition to the Hon. Mr Mackenzie, from whose trustees the personal right to the open precept was conveyed in 1864. All these connecting titles may not be produced, or may have been lost; but the narrative inserted in the deed has the effect of deducing the pursuer's interest to obtain from Mr Horne the corroborative disposition and assignation to the open precept. And, assuming that without such deduction of the intermediate writs the infeftment following on the corroborative deed would not have been open to objection, I can see no good ground for holding its insertion fatal to the validity of the infeftment. The notarial instrument stands effectually expede upon the open precept in the Crown-charter and the assignation thereto obtained by the pursuer from Mr Horne. His title to the superiority having in this manner been completed, his right to the *dominium directum*, no third party disputing, does, in my opinion, confer on him a title to sue this action to which the defender cannot object.

Had infeftment on the open precept been expede on the last of the series of the deeds of assignation conveying the personal right, it would have been necessary that the deeds of transmission should have been exhibited to the notary, and been specially referred to in the instrument. But as the infeftment was expede on the open precept, in virtue of Mr Horne's assignation to the personal right vested in him under the Crown-charter contained in his corroborative disposition, no such necessity existed. The intermediate writs never having been followed by sasine formed no objection to infeftment being taken under and in virtue of the corroborative deed. All that was required to enable the notary to give due infeftment to the pursuer, was the assignation to it in the deed by Mr Horne, the disponee under the Crown-charter. An unchallengeable feudal title was thereby completed.

It is a mistake to think that by his first assignation Mr Horne was so divested of the personal right that he could not execute a second conveyance under which a feudal title might be completed by a second disponee. It is not the first dated personal right, but the first infeftment, although following on a conveyance of a subsequent date, that is preferable in competition. No party attempting to complete a title under any of the intermediate personal rights could be listened to in competition with the pursuer's completed title by infeftment under the Crown-charter. The defender consequently runs no risk in taking an entry from the pursuer.

With regard to the proposal made by the defender's counsel since the opinions of the Court were delivered, I think your Lordships will agree with me in holding that an offer of proof and amendment of the record to the effect proposed, are inadmissible, and comes a great deal too late. A record has been closed, judgment has been given by the Lord Ordinary on two defences, which, if well founded, destroy the title of the pursuer; and the Court, after full argument and deliberate consideration, have stated their opinions that these defences are not well founded, and ought to be repelled. I do not think it possible, at this stage, to allow the state of the record to be altered to the effect proposed. And as to the proof offered, the declared object is to impugn the entry of the date of sealing of this charter—recorded in the public register—as false and erroneous. No allega-

tion to that effect is contained in the closed record, even were it relevant in such an action as the present, and of necessity no proof can be allowed of what is not averred therein. A mere verbal allegation at the bar interposed to prevent judgment upon the case as it stands, cannot be listened to. Indeed some declaratory or reductive proceeding would, as I think, be indispensable ere an entry in the public records of the country,—for which the registrar and his clerks are alone responsible, and not the private party whose interests may be affected,—could be allowed to be impugned.

The other Judges concurred.

LORD JUSTICE-CLERK absent.

Agents for Pursuer—Mackenzie & Black, W.S.

Agent for Defenders—James Steuart, W.S.

Thursday, March 18.

FIRST DIVISION.

THOMSON *v.* GORDON.

Landlord and Tenant—Mineral Lease—Notice to Landlord of intended Abandonment. Under missives of lease which provided for the lease coming to an end when the coals were worked out, or proved unworkable to profit, on examination by competent persons,—*held* that the tenant, if he means to abandon the lease, must give due notice to the landlord, otherwise his obligation for rent will continue.

Amendment of Record—Court of Session Act 1868—*Diligence for Recovery of Documents.* Amendment of the record, as sanctioned by the Court of Session Act 1868, is such as can be made forthwith; and a party proposing to amend will not be allowed a diligence to recover documents in order to enable him to state his amendments.

Miss Jessie Thomson, proprietrix of the estate of Kirkhill, in the parish of St Quivox, and county of Ayr, brought this action against J. T. Gordon of Nethermuir, for payment of £150, as the five last terms' rent of a seam of coal leased by the defender from the pursuer on a nineteen years' lease from Whitsunday 1850. The defence was, that the coal having been worked out, or become unworkable to profit, at or previous to Whitsunday 1867, up to which time the rent was regularly paid, the lease had thus come to an end—this defence being rested on a clause in the missives of lease, which declared —"(First), the lease to be for nineteen years from Whitsunday 1850, with power to you to communicate with the adjoining coal field of Auchencruive, and to work the coal from pits on the lands of Auchencruive, with the ordinary clause providing for the lease taking end when the coals are worked out, or found unworkable to profit, on examination by competent persons, or an oversman, if they differ in opinion."

The Lord Ordinary (JERVISWOODE) allowed the parties a proof of their averments, doubting whether he ought not to appoint the defender to lead in his proof.

The pursuer reclaimed.

SHAND and BRAND for reclaimer.

CLARK and ASHER for respondent.

The respondent craved leave to amend by adding a statement to the effect that he had given intimation that the coal was exhausted, and the case was continued.

Thereafter the respondent moved for a diligence to recover his letters containing the intimation, he having kept no copies, in order that he might make his amendment more specific than he could otherwise do.

The LORD PRESIDENT thought that to grant the motion would be to introduce great confusion into the working of the new Court of Session Act. It was not a very common practice now to ask for a diligence in the course of preparing, or to enable a party to prepare, a record, though formerly there had been a great many discussions on the propriety of such practice. But if the Court were to grant a diligence to enable a party to make an amendment, the substance of which he had already proposed, that would be entering on a new cause altogether, and using this clause of the new Act for expanding and altering causes in such a way that there would be no end to them.

An amendment under the Act must be one which the parties must be in a position to make at the moment when it is suggested; and if any delay, as for a day or so, was granted, that was for convenience merely. This was just one of those cases where the party had the least possible right to make such a demand. He proposed to aver that he himself gave a precise notice that his coal was exhausted, and if he did not know the circumstance of his giving that notice, it was difficult to believe that he gave it at all.

LORD DEAS concurred. There was now a power to allow amendments even after the record had been closed; but if before allowing his amendment the Court were to grant a diligence for inquiry, which might perhaps extend over many months, that, instead of causing greater despatch in the conduct of a cause, would be doing the very reverse. Here was a final interlocutor appointing this amendment to be received, but only on payment of expenses, and the motion to hang up the lodging of the amendment was extravagant.

LORD ARDMILLAN and LORD KINLOCH concurred.

Amendment to be put in same day.

Thereafter the respondent declined to amend.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has allowed parties a proof of their averments, and he has stated in his note that he had some hesitation whether he ought not to have appointed the defender to lead in the proof. I don't know why he hesitated at all, for the only thing requiring proof, if any proof was requisite, is the allegation of the defender that this coal, of which he has a lease, is worked out or not workable to profit.

But there is a prior question to that, and that is whether there ought to be proof at all, or whether the defence ought at once to be repelled, and I have no hesitation on that point. I think the defence is entirely irrelevant as an answer to this action.

The summons concludes for payment of five sums of £30 alleged to be due by the defender for the terms after Whitsunday 1867. The only answer is this:—"The seam of coal let by the said missives had been worked out, or was unworkable to profit, previous to Whitsunday 1867, *i.e.*, the term up to which the rent had been paid by the defender, and has continued to be so ever since. The said lease had come to an end at that term. No part of the said seam has been wrought by the defender since that date." And then he says he is willing to enter into a reference to competent persons to examine the seam, if called on. This defence is rested on a clause in the lease which