object of it all was to keep the masters short-handed, and whether that object were a legitimate one or not, the means taken to its attainment were clearly bad. As to the *second* point—the grounds of suspicion against Macfarlane—I think the term "conspiracy," which is used by both the learned Sheriffs, is an unfortunate one. The real charge against him is that of having been "art and part" in a course of action which led to such and such results. In a question before a jury both principal and those "art and part" with him are liable to be found guilty. And if a set of men waylay and obstruct certain others, and if Macfarlane be found in concert with these men, the question for a jury would be as to the proof of their acting together or not. I shall say no more. Your Lordships have said that there is no evidence to implicate Macfarlane, and it is unnecessary and would be obviously inexpedient for me to say hard things of him. I merely indicate my general views, and I think that if Macfarlane has so much influence over his fellow-workmen as appears, he will do well to use it otherwise than towards persuading them to desert contracts which they have formed with their employers.

The Court therefore recalled the Sheriff's interlocutor, and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuers (Respondents)—Asher—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defender (Appellant)—Dean of Faculty (Fraser)—Rhind. Agent—Robert Menzies, S.S.C.

Wednesday, February 26.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

LAMONT *v.* RANKIN AND OTHERS (RANKIN'S TRUSTEES).

Superior and Vassal—Entry by Trustees—Whether Casualty Payable as Singular Successor—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94, *secs.* 4 *and* 5).

Trustees became infeft in certain heritable property in terms of a trust-disposition and settlement in their favour, under which they were, *inter alia*, to entail the property, it might be upon a party who was not the heir-at-law of the truster. There was a power of sale and excambion. Upon the superior demanding payment of a casualty in terms of the 5th section of the Conveyancing Act 1874, *held* (*diss.* Lord Young) that he was entitled to the composition of a singular successor, it being held (1) that under the decisions in the cases of *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738, and *Rossmore's Trustees* v. *Brownlie*, Nov. 23, 1877, 5 R. 201, the heir of the last entered vassal could not now be tendered for an entry; and (2), that it could not be maintained that the trustees held for the truster's heir, and so were exempted.

Question (*per* Lord Curriehill) Whether the same result would follow where there was no power of sale in the trust-deed.

Opinion contra on both points *per* Lord Young, and review by his Lordship of the cases of *Grindlay* v. *Hill*, Jan. 19, 1810, F.C., and *Ferrier Trustees* v. *Bayley*, and *Rossmore's Trustees* v. *Brownlie*, *supra*.

This was an action of declarator and for payment of casualty raised by John Henry Lamont of Lamont against Patrick Rankin and others, trustees under the trust-disposition of the deceased Patrick Rankin of Auchingray, Cleddans, and Otter, which was dated 12th October 1869. The summons concluded for declarator that in consequence of Mr Rankin's death, who had been the last vassal vested and seised in the lands in question, a casualty of one year's rent of the four pound or six merk land of old extent of Achagoyle, in the parish of Kilfinan, lordship of Cowal, and sheriffdom of Argyle, which had belonged to the deceased, became due to the pursuer as superior on 5th March 1873, the date of Mr Rankin's death; and the other conclusion was for decree for £141, 6s., the alleged amount of the rent in question.

The deceased Patrick Rankin had been entered in the lands in question by charter of confirmation in his favour, granted by the pursuer's father, and dated June 16, 1857. He had left a trust-disposition and settlement dated 12th October 1869, by which, *inter alia*, he conveyed his heritable estate to certain trustees for certain uses and purposes therein mentioned. They were to hold the estate until certain debts were paid off, and upon that being done the testator's grandson, who was his heir-at-law, was to be entitled to a conveyance of the lands. The trustees were duly infeft in the lands on 27th March 1874, and, according to the pursuer's view, they in consequence became liable, in virtue of "The Conveyancing (Scotland) Act 1874" (37 and 38 Victoria, cap. 94), to pay to the superior of the lands a composition as singular successors.

The lands in question were held of Mr Lamont as heir-of-entail in possession of the estate of Ardlamont in feu-farm for payment of the sums specified in the reddendo of the charter of confirmation. The feu-duty payable was six merks usual Scotch money; that sum to be doubled at the first year of entry by heirs. The composition on the entry of a singular successor was untaxed.

The defenders stated that Patrick Rankin, the heir of the investiture, had offered to take from the pursuer a writ of *clare constat* to enter with the superior and pay relief-duty, and they renewed that offer upon record.

The pursuer pleaded *inter alia*—"(1) The defenders, as singular successors infeft in the lands and others described in the summons, are, in consequence of the death of the said deceased Patrick Rankin, and of their implied entry under the 4th section of 'The Conveyancing (Scotland) Act 1874,' liable to the pursuer as superior of said lands and others in payment of composition."

The defender pleaded—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons: (2) The heir of the last entered vassal being willing to enter and pay relief-duty accordingly, the action cannot be maintained."

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor finding the casualty due, and appended thereto the following note:—

"*Note.*—The late Patrick Rankin of Auchin-

gray, Cleddans, and Otter, was proprietor of the four pound or six merk land of Achagoyle and others in the county of Argyle, of which the pursuer Mr Lamont is superior. The feu-duty is small, and the entry of heirs is taxed at a double of the feu-duty, but the entry of singular successors is untaxed. Patrick Rankin died on 5th March 1873, leaving a trust-disposition and settlement in favour of certain parties as trustees, of whom the defenders are the surviving acceptors. The defenders were infeft, as trustees foresaid, in the said lands of Achagoyle, conform to notarial instrument, recorded in the General Register of Sasines on 27th March 1874. They were thus proprietors infeft in the said lands when the 'Conveyancing (Scotland) Act 1874' came into operation, and the pursuer as superior of the lands is now entitled to demand from them, as being now his vassals, in virtue of their statutory entry by confirmation implied by their infeftment, the payment of a casualty. The question between the parties is, whether the defenders are liable in the composition of a year's rent as singular successors of the truster, the vassal last infeft, or whether they are liable only in the relief-duty, payable by an heir.

"It should be mentioned that the defenders, although they pleaded in the record that the action could not be maintained, in respect that Patrick Rankin junior, grandson and nearest and lawful heir of the truster, is willing to enter and pay relief-duty, did not offer at the debate any argument in support of their plea, which they very properly conceded could not be successfully maintained in this Court after the judgments in the recent cases of *Ferrier's Trustees* v. *Bayley*, 26th May 1877, 4 R. 738; and *Rossmore's Trs.* v. *Brownlie*, 23d November 1877, 5 R. 201. In both of these cases (the former being decided by the Second Division, and the latter by the First Division) it was held that the implied entry given by section 4 of the statute to a party infeft at or after the commencement of the Act, had the effect of extinguishing all intermediate but defeasible estates of superiority between the party so infeft and the true superior, and that it was no longer competent for such a party, on payment of the composition of a singular successor being demanded from him, to tender the heir of the last entered vassal for an entry on payment of relief-duty alone. The plea, however, though not urged at the debate, was not abandoned by the defenders, who stated that they desired to have the matter kept open, so that they might not be foreclosed against maintaining the plea in the event of the cause ultimately reaching the House of Lords.

"But the defenders maintained in argument, that although not entitled to insist upon the pursuer giving an entry to the heir, they were not bound to pay the composition of a singular successor, and were only bound to pay the relief-duty exigible from heirs, in respect that they hold the lands truly for Patrick Rankin junior, the heir of Mr Rankin the last vassal. Now, it is the condition of this argument, that the fee being filled by the implied statutory entry of the defenders as vassals in the lands, the superior cannot now enter Patrick Rankin junior as heir of the truster. In form the defenders' title is that of disponees and singular successors of the truster. Why then should they not pay the composition of singular successors? Their answer to that question is, that the form of their title must be disregarded, because the trust-deed under which they act, and upon which they are infeft, is truly for the benefit of the heir, and that they are therefore entitled to enter on the same terms as the heir. Now, the general rule is, that no one is entitled to enter for payment of the heir's relief-duty but the heir himself; and even if the heir himself desires to enter as disponee of his ancestor, and not as heir by service and precept of *clare constat*, he must pay the composition of a singular successor. Thus, in the case of the *Magistrates of Musselburgh* v. *Brown*, M. 15,038, where the heir, instead of entering by service and precept, demanded a charter of resignation, with an assignable precept in virtue of a procuratory of resignation contained in a disposition in his favour by his ancestor, the last vassal infeft, it was held that he could not obtain such a charter except on payment of a year's rent as a singular successor. The ground of judgment in that case was, that a superior was not bound, except on payment of the composition of a singular successor, to grant even to the heir an entry in such a form as would enable a third party without further payment to become at once the immediate vassal of the superior. Then, in the case of *Grindlay* v. *Hill*, 19th January 1810, F.C., where trustees holding a general trust-conveyance from the ancestor, adjudged an estate from the heir in implement of the general conveyance, and demanded a charter of adjudication from the superior on payment of relief-duty, in respect that they held the estate for behoof of the heir, it was held that they were not entitled to obtain such a charter except on payment of composition as singular successors. I have examined the session papers in that case, in the Advocates' Library, from which it appears that the trust-deed gave the trustees power to sell the estate, and directed them to hold the estate not only for the heir but for other parties. And I am satisfied that, to some extent at least, the judgment proceeded upon the ground that the trustees, on obtaining the charter demanded, might have used it to create the direct relation of superior and vassal between the superior and a third party, even after the death of the heir, without any further payment being made to the superior. It appears to me that the same result would have been reached by the Court if the trustees in *Grindlay's* case had held a disposition from the ancestor with procuratory and precept, and, after taking infeftment on the precept, had applied for a charter of confirmation. They would in that case have been in form singular successors of the ancestor, and, in so far at least as they held the estate for behoof of parties other than the heirs, they would have been so in substance also. And if after obtaining such a charter they had sold the estate, or denuded thereof in favour of these third parties, and the heir had died, the superior would have had no claim for composition against either the purchaser or these third parties so long as any one of the trustees survived, even although the heir had predeceased them all. Whether, therefore, the trustees had demanded an entry by charter of adjudication, or of resignation, or of confirmation, the superior would have been entitled to refuse to grant the charter, except on payment of composition as singular successors. The principle which, in my opinion, underlies the decisions in both of

the cases referred to is this, that the Court will not compel a superior to grant an entry to anyone for payment of an heir's relief-duty, where by doing so he may debar himself from demanding a new entry, or payment of a new casualty, immediately on the death of the heir.

"If these views be sound, it follows that where trustees have by the operation of the statute been placed in the position of vassals entered with the superior by charter of confirmation, they must pay the casualty of a year's rent, at all events where they hold the estate with powers of sale, and not exclusively for behoof of the heir. I express no opinion as to their liability for more than relief-duty where they hold the estate without powers of sale, and solely for behoof of the heir of the investiture. Such a case, when it occurs, will receive, as I think it will require, careful consideration. But no such question arises in the present case, because I am satisfied from a careful study of the trust-deed of the late Patrick Rankin that the position of the defenders is not materially different from that of the trustees in the case of *Grindlay* v. *Hill*. They are indeed entered as by charter of confirmation, but such an entry is, as I have shown, not different in principle from an entry by charter of adjudication, which was the form of entry in *Grindlay's* case.

"The trust-deed under which the defenders act, and upon which they have been infeft, and which is dated 12th October 1869, proceeds upon the narrative of an agreement between the late Patrick Rankin, the truster, and his grandson Patrick Rankin junior, now his heir. By that deed he conveyed to the defenders his whole estate, heritable and moveable, in trust for certain purposes, which it is unnecessary to go over in detail. It is enough to say that the truster contemplated that the trust might, and probably would, be of long duration—the primary purposes being the gradual extinction of debts affecting his estates. After these and other purposes, including payment of legacies, provisions to grand-daughters, and annuities, are fulfilled, the trustees are to entail the estates in Lanarkshire and in Argyleshire (including the lands now in question), on his grandson Patrick Rankin junior, if then in life and of the age of twenty-five years, and the heirs-male of his body, whom failing Gavin Rankin and other persons named, who are apparently collateral relatives of the truster; but in the event of Patrick Rankin junior not attaining that age or dying without having obtained a conveyance from the trustees, but leaving an heir-male of his body, entail to be executed in favour of such heir-male on his attaining the age of twenty-one, whom failing the said other persons mentioned; and failing such heir-male the estates are to be divided, and the Argyleshire estate is to be entailed upon Gavin Rankin and other substitutes. Heirs-female are strictly excluded from the whole succession, an exclusion which operates against the truster's own granddaughter, who, failing Patrick Rankin junior and the issue of his body, would be the truster's heir; so that when the entail comes to be executed it may have to be granted in favour of a party not the heir-at-law of the truster. The trustees have, moreover, full power of sale and excambion, which the trust-deed contemplates may be executed not merely for the general purposes of the trust but for the purpose of enabling the trustees to consolidate the estates, and under these powers the lands of Achagoyle may at any time be alienated to strangers. It is thus quite clear that although the first persons named in the trust-deed as the parties in whose favour the trustees are to denude of the lands in question are Patrick Rankin junior and the heirs-male of his body, these persons may never be in a position to demand a conveyance, the party in whose favour the conveyance may come to be made may not be the truster, and the lands themselves may at any time be held as excambed by the trustees.

"Were the defenders now to pay only relief-duty, and were the heir of the truster to die to-morrow without male issue of his body, and were the trustees then to sell or excamb the lands, or to execute the entail in favour of Gavin Rankin, the result would be that the superior would not be entitled to any casualty so long as any one of these numerous trustees survived. Whereas if the heir himself had obtained the entry, and had conveyed the lands to the trustees in implement of the trust-deed, and had then died without male issue—the trustees being in the meantime infeft—the superior would have at once obtained his casualty from them as singular successors, because they could not in the case supposed, pretend that they held the lands for the truster's heir, seeing that from the moment of the heir's death they would hold for the stranger heirs of entail. I am therefore of opinion that the defenders' allegation that they hold these lands solely for behoof of the heir of the last vassal, even if it be relevant, is not true in point of fact, and that the case cannot be distinguished in point of principle from the case of *Grindlay* v. *Hill*. The pursuer is therefore entitled to decree of declarator in terms of the declaratory conclusions of the summons, and also to decree for payment of one year's rent of the lands. The case is ordered to the roll that the precise amount of the rent may be ascertained and decerned for."

The sum of £141, 6s. was subsequently decerned for as the amount of the casualty, or one year's rent of the lands in question.

The defenders reclaimed, and argued — The case was not ruled by the authorities quoted. The Conveyancing Act 1874, section 5, while it tended to economise the working out of such questions of title, did not in any way either diminish or enlarge the rights of a superior. That such a claim as this was unprecedented could not be denied, and it must further than that be regarded as an attempt to widen the area of the superior's claims. The trustees truly held for behoof of the heir of the last vassal, and were therefore only bound to pay the relief-duty exigible from heirs.

Argued for the respondent—The superior was entitled to refuse entry where by his granting it merely for payment of an heir's relief-duty he might be deprived of a casualty he would otherwise have been sure to receive. [Lord Young—Your argument comes to this—Suppose a proprietor dies leaving a trust-deed directing his trustees to entail his estate on his sons and the heirs of his body, and suppose that then the trustees take infeftment before they execute the entail, they must pay a casualty as singular successors.]

The cases of *Ferrier's Trs.* and *Rossmore's Trs.* were relied on. [Lord Young—Here the superior is insisting gratuitously on an unheard-of claim, hence I do not sympathise with him as I should do where there was any attempt by the vassal to evade a clear right by the use of a legal technicality.] It was held in the *Rossmore* case that a power of sale formed a not immaterial feature in the position of the trustees.

Authorities—*Ferrier's Trs.* v. *Bayley*, May 26, 1877, 4 R. 738; *Rossmore's Trs.* v. *Brownlie*, Nov. 23, 1877, 5 R. 201; *Magistrates of Musselburgh* v. *Brown*, M. 15,038; *Grindlay* v. *Hill*, Jan. 19, 1810, F.C.; Bell's Lectures, vol. ii. p. 1134.

Lord Ormidale—The only disputed question in this case is, Whether the pursuer, as superior of the lands referred to in the record, is entitled to a year's rent as on the entry of a singular successor, or only to a duplication of the feu-duty as on the entry of an heir? and this question depends, in my view of it, on whether the defenders, who are the testamentary trustees of the last vassal now deceased, are or are not to be dealt with as singular successors.

I agree with the Lord Ordinary in thinking that, having regard to the decisions in the two cases of *Ferrier's Trustees* v. *Bayley* and *Rossmore's Trustees* v. *Brownlie*, to which he refers, the superior's demand for a year's rent cannot be resisted on the ground that the heir of the deceased vassal Patrick Rankin is willing to enter and pay relief-duty. That the defenders should therefore, as the Lord Ordinary states in the note to his interlocutor, have conceded this at the debate before him, and should also have thought it unnecessary to enter into any serious argument in support of their reclaiming note so far as regards that ground of defence, is only what might have been expected. They were entitled, however, in place of absolutely abandoning such a plea, to keep it open, not for discussion here, but for review in the Court of last resort, in the event of the case going there. I cannot see, however, that in the meantime I am called upon to enter upon the reconsideration of a question which has been already, after full argument, determined by two consecutive judgments—the one by this, the Second Division, and the other by the First Division of the Court—the more especially as these judgments—the grounds of which are reported at considerable length—appeared to me when they were pronounced, as they do still, to be in themselves well founded. And it is not unimportant that both judgments have, I understand, been acquiesced in, and cannot now be taken by appeal to the House of Lords. Not only so, but further, the two decisions referred to have been subsequently, in June last, held, in the case of *Sivwright* v. *The Straiton Estate Company (Limited)*, 5 Rettie 922, by Lord Adam as Ordinary, and unanimously by this Division of the Court in adhering to his Lordship's interlocutor, to be ruling precedents; that, indeed, was not disputed in the case of *Sivwright*, the party there merely endeavouring to distinguish it from the cases of *Ferrier's Trustees* and *Rossmore's Trustees*.

Assuming, however, that the tender of the heir of the deceased vassal affords no available plea to the defenders, they submitted—and this, as I understood their argument, is what they chiefly if not exclusively relied upon at the debate—that they are only liable in the relief-duty exigible from heirs in respect that they hold the lands in question for the heir of the deceased vassal. But here again I agree with the Lord Ordinary in thinking that this plea is equally untenable with the other which I have already noticed. It is met with the answer that the question is no longer an open one, seeing that it was decided adversely to the defenders' contentions by the unanimous judgment of the Court in the case of *Grindlay* v. *Hill* (January 18, 1810, F.C.) That this is so appears to me to be clear from the report of the case, which shows that the circumstances in which the question arose and was determined were in all essential respects as similar as possible to those of the present case. Nor do I think that the authority of the case of *Grindlay* v. *Hill* can with any good reason be impeached, for not only was the judgment unanimous, but it was pronounced by the First Division of the Court when the chair was occupied by Lord President Blair, and has ever since been received and referred to by lawyers of eminence, and recognised by conveyancers of experience and acknowleged ability as a ruling precedent. Thus, Lord Ivory in his edition of Mr Erskine's Institutes, published in 1824 (Note 158 at p. 396 of vol. i.), refers to the case of *Grindlay* v. *Hill* as establishing 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 without paying as singular successors." And the late Professor More in his Notes on Stair, published in 1832, refers (vol. i. p. 208) to *Grindlay* v. *Hill* in the same terms. Professor Bell, again, in his Principles of the Law of Scotland, published in 1839, founding on the same case, states (p. 724) that "Trust disponees of the vassal (especially where other interests than those of the heir-at-law are introduced) must enter as singular successors." And the late Professors Menzies and Montgomery Bell in their works on Conveyancing — the former at p. 776 of the second edition of his work, published in 1857, and the latter at p. 1134 of the second volume of the second edition of his work, published in 1876—notice the case of *Grindlay* v. *Hill* for the same purpose and to the same effect. That case must therefore, I think, be held as of conclusive authority. I have only to add in reference to both of the defenders' pleas, that for obvious reasons important questions such as the present, when once judicially settled by this Court, ought not to be disturbed or reopened except by higher authority.

In these circumstances, and for the reasons now stated, I can entertain no doubt that the Lord Ordinary's interlocutor is well founded and ought to be adhered to.

Lord Gifford—This case raises, I think, substantially the same point which was decided in the cases of *Ferrier's Trustees* v. *Bayley*, May 26, 1877,'4R. 738, and *Rossmore's Trs.* v. *Brownlie*, Nov. 23, 1877, 5 R. 201. These cases were followed by the case of *Sivwright* v. *Straiton Estate Company*, June 13, 1878, 5 R. 922, where the same principle was applied, and the cases of *Ferrier's Trustees* and of *Rossmore's Trustees* were recognised as authoritative decisions. No doubt the circumstances of the present case are somewhat different, and the

position of the present defenders is in several respects more favourable than that of the defenders in the cases cited, but I am unable to distinguish between the cases on principle, or to discover any element in the present case which would lead to a different result, assuming the judgments in *Ferrier's* case, in *Rossmore's* case, and in *Sivwright's* case to be well-founded, or to be binding upon me as authorities.

In *Ferrier's* case, which was decided in this Division of the Court, I had the misfortune to differ from the other Judges, and in that case I explained the grounds upon which I then thought that the judgment should have been in favour of the defender; but in that case I stood alone; the Lord Ordinary (Lord Curriehill) and the two other Judges of this Division, the Lord Justice-Clerk and Lord Ormidale, were all of opinion that the full year's rent was exigible by the superior. In *Rossmore's* case, which was decided in the First Division, there was also a difference of opinion, Lord Deas dissenting from the judgment, but the other three Judges—the Lord President, Lord Mure, and Lord Shand—affirmed the superior's right to the full composition. In that case there was no judgment on the point by the Lord Ordinary.

Now, I think I am bound by these two judgments, and although, if the point had been open, I should have adhered to the view which I took in the case of *Ferrier's Trustees*, and which Lord Deas took in the other case, I am no longer at liberty to do so.

I may say in a single word that the difficulty in all the cases arises from the apparent conflict between the different statutory provisions contained in the Conveyancing Act of 1874. On the one hand, by the force of section 4th of the statute, the trustees of the last entered vassal Patrick Rankin stand at this moment, in virtue of their infeftment, the entered vassals in the lands under the pursuer as their immediate superior. No doubt it is only a statutory and implied entry, but it is not the less complete and effectual, and no other form of entry with the superior in favour of the trustees is either necessary or competent under the statute. Now it can hardly be disputed that in a feudal sense Patrick Rankin's trustees are his singular successors, and that if under the old law they had demanded a charter from the superior they could only have obtained it on payment of a full year's rent as composition on the entry of singular successors. On the other hand, however, the statute expressly declares (section 4, subsection 3) that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry;" and further, the statute contains the express proviso in the same section—"But provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering." The next subsection (subsection 4), while enacting that no lands shall after the Act comes into operation be deemed to be in non-entry, gives to superiors who under the old law would be entitled to sue an action of declarator of non-entry, a remedy against the successor of the last entered vassal by action for payment of any casualty exigible at the date of the action exactly as under the old law, and a form of action for payment of such casualties is provided in the Act.

Now, reading all these provisions together, I held in *Ferrier's* case, and I would hold still but for the decisions mentioned, that the true meaning and effect of the Act was merely to simplify the mode in which the title of proprietors of lands might be made up and completed, and to dispense with useless or merely formal deeds, but on the other hand to leave the pecuniary and patrimonial rights of superiors exactly the same as they were before, or as they would have been if the Act of 1874 had never been passed. Charters and entries are abolished, but the money rights of superiors and all their patrimonial interests in the lands, whether for feu-duties, or for casualties, or for rents, are to remain precisely as before. These rights are to be made neither better nor worse by the Conveyancing Act of 1874, or by any of the provisions therein, and a new mode is provided for making good all the pecuniary or patrimonial interests of the superiors. In this way I thought—and excepting for the decisions which have been pronounced, I would still think—that the pecuniary and patrimonial rights of the superior, as they could not be prejudiced or made worse by mere variations or simplifications in the forms of conveyancing, so they could not be bettered or made more valuable by an Act the sole purpose of which was the simplification of formal deeds; and if I were right in this, it would follow that in the present case the superior, who, under the old law, as is admitted on all hands, could only claim a duplicate feu-duty as upon the entry of Patrick Rankin junior, the grandson and heir of the last entered vassal, would not be entitled to a different casualty merely because the Act of 1874 has given for its own purposes an implied entry to the grandfather's trustees.

The hardship of the result, if hardship is to be looked to, is the greater that in the present case Patrick Rankin's trustees took infeftment on his trust-disposition before the Act of 1874 was passed or came into operation. It is undoubted that before that Act passed their infeftment would not make them liable to the superior in a year's rent. They might have possessed upon their base infeftment, and tendered the heir of Mr Rankin to the superior with a simple duplicand of the feu-duty. The superior could have asked no more. If it is to be held that the statute of 1874 deprived them of this right, and entitled the superior the moment it came into effect—that is, on 1st October 1874—to demand a year's rent which he could not have demanded the day previously, then I think it follows that the statute of 1874 is not a mere Conveyancing Act, but that it operates in enhancing, and in some cases enormously enhancing, the estate of the superior and his pecuniary rights, and that gratuitously and at the expense of the estate of the vassal. I think it is clear that this was not the intention of the statute.

But I feel myself absolutely bound by the deliberate decision in *Ferrier's Trustees* and in *Rossmore's Trustees*, and viewing the point as no longer open it follows that the judgment of the Lord Ordinary must be affirmed.

In *Ferrier's* case I had occasion to explain that conveyancers who are aware of the risk which may arise of liability for a year's rent through the implied statutory entry may always avoid such risk by making the holding a base holding only. Infeftment on a base holding only will create only a subfeu, and will never operate as an implied entry with the over-superior under the statute. If this had been done, and if the heir of the investiture was willing to enter, the superior could have claimed no more than the duplicate feu-duty or relief-duty.

The only other point is, whether the trustees of Patrick Rankin are singular successors in the feudal sense of that term. I have no doubt they are. It was so decided in the case of *Grindlay's Trustees*, and it is in accordance with the definitions of singular successor given by Mr Erskine, and of all the institutional writers.

Lord Young—The deceased truster held the lands in question (Achagoyle) under the pursuer as superior on an investiture to himself and his heirs general without limitation and without any prohibition of subinfeudation. The trust of which the defenders are trustees is an ordinary executory family trust to pay debts and legacies and settle the truster's landed property by an entail in the terms directed. The dispositive clause of the trust-deed is general, with an obligation on the truster and his heirs to grant all necessary deeds to complete the trustees' title. Before the simplification of conveyancing on this head effected by recent legislation, the trustees could have made up a title to the lands only through the medium of the truster's heir, on whom the obligation I have noticed was imposed, and in implement of which he would necessarily have entered with the superior and conveyed the lands specially to the trustees. The necessity of following this course was avoided by the trustees making the general disposition special in the more economical manner allowed by statute—although the trustees might quite competently have entered the heir and taken a special conveyance in implement from him. The choice between these two methods was merely of an economical character regarding the comparative cost of conveyancing procedure. As it is, the trustees have a good title to the lands in question exactly equivalent to a title by conveyance in implement by the heir.

The pursuer by this action demands from the trustees a casualty of composition, being a year's rent of the lands, to which he contends that he is entitled as superior. The Lord Ordinary has by his judgment, reclaimed against, allowed the demand, and we are now to determine whether the judgment is right.

Testamentary trusts such as the present are very familiar, and have been so for centuries, and we naturally desired to know whether there was any precedent for the demand now made. We were informed that there was none, the pursuer's counsel candidly and properly stating that no trace could be found in the books of a superior having required the trustees under such a trust to enter and pay composition, and that the result of inquiries made at experienced conveyancers was that no instance of such a thing had occurred in practice. It was, however, urged upon us that the absence of precedent was no doubt owing to the ready and conclusive answer which, prior to the Act of 1874, such trustees had to such a demand by entering the truster's heir, which being well known, the demand was really not worth making. Assuming this to be the right account, it is true all the same that there is no authority for the proposition that by the law prior to the Act of 1874 a superior was entitled to require such trustees as the defenders to enter and pay composition, and that no instance of such requisition and payment has occurred in practice; and indeed so much was conceded by the pursuer's counsel.

But consistently with this concession the pursuer's case was presented to us with great clearness and simplicity, thus—The superior, says the pursuer, is entitled to have an entered vassal, and as the defenders occupy that position by virtue of their implied entry, it is impossible now to enter the truster's heir or any other, and so the defenders must themselves pay the proper casualty applicable to the case of trustees taking an entry, which, according to the case of *Grindlay* v. *Hill*, Jan. 19, 1810, F.C., is composition or a year's rent.

The demand is thus put quite precisely on the "implied entry" of the defenders by virtue of the Act of 1874, none the less so because of the mere turn given to the argument stated upon it, viz., that by excluding the possibility of entering the truster's heir it deprives the defenders of the answer which might otherwise have been effectually made to it, and which in fact sufficed as a protection against and practical bar to such demands prior to the Act.

We are thus asked to put a construction on the Act of 1874, or perhaps rather to deduce consequences from its operation in proceedings of a necessary and formal character, which will not merely appreciably but largely increase the value of estates of superiority at the expense of estates of property, the value of which will be correspondingly diminished. It was admitted that this was so, but we were referred to the cases of *Ferrier's Trs.* and *Rossmore's Trs.*, cited by the Lord Ordinary as authority for it.

I will advert to these cases in the sequel, but it is, I think, fitting that I should in the first instance express my opinion on the true construction of the Act as applicable to the facts of this case.

The clause immediately in question is the fourth. By prior Acts the registration of a disposition had been declared to imply infeftment, thus dispensing with the useless ceremony of taking infeftment. By this Act (sec. 4) the registration was declared also to imply entry with the superior, thus dispensing with the equally useless ceremony of confirmation or resignation. The only object was simplification of conveyancing, and with reference to this object accordingly the enactments and provisions ought to be construed and have effect. It is obvious, and must have occurred to anyone moderately acquainted with the subject, that to *compel* every proprietor of land to enter with the over-superior by attaching an implied entry to the registration (past or future) of his title, without special provision on the subject of casualties, would subject a very great number of proprietors in casualties for which they were otherwise not liable, and greatly interfere with the comparative or relative

value of estates of superiority and property as standing on existing law or paction. It was therefore reasonable, and indeed only just and according to the custom of Parliament, that such provision on this subject should be made as would confine the effect of the "implied entry" to the object in view, viz., simplicity and economy of conveyancing, and prevent conclusions being drawn from it whereby the patrimonial rights and liabilities of superiors and vassals, *hinc inde*, would be either enlarged or diminished. Accordingly I am not surprised to find it enacted by sec. 4, subsec. 3, that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c.," and again, "that such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

An "implied entry" is thus, for I think an intelligible and sufficient reason, distinguished, as regards the superior's claim for a casualty, from an entry given at the vassal's request, which no superior was or is bound to give except on payment of the casualty of relief or composition according to the occasion. If a proprietor at liberty to hold base if he pleased, and whom therefore the over-superior could not have required to enter, chose nevertheless to demand an entry from him, he could only have it on the condition of paying composition, which would be a year's rent, unless he otherwise bargained with the superior, as indeed, when not bound to enter, he generally or always did. Where subinfeudation was not prohibited, the proprietor of the *dominium utile* with a double holding (*a me vel de me*) was entitled by legal right to hold base so long as an heir of investiture under the original feu existed, and the over-superior's right was not evaded but completely satisfied, according to its terms, in spirit and letter, by having an heir of the investiture entered as his vassal. It was no concern of his, but matter of covenant between the vassal and subvassal, to which he was no party, that the mid-superiority was defeasible at the will of the latter, who might if he pleased enter with him by confirmation or resignation. It was frequently, and perhaps more commonly, otherwise covenanted, and the sub-vassal limited to a holding *de me*. This was no affair of the over-superior's, subinfeudation being lawful. Where the sub-vassal held double (*a me vel de me*), there was often, perhaps generally, a desire to obtain at once a public holding which circumstances might sooner or later render inevitable, and this led to bargaining with the over-superior to give it. But the base holding was in every respect as secure a title as the public holding, and the only substantial inducement to change the one for the other, before a necessity arose by the heirs of investiture becoming extinct, was that more favourable terms could be made with the over-superior when he was in no position to compel an entry, and might not be for a lifetime or longer. The payment of a year's rent of any considerable amount for an entry when the superior was not in a position to compel an entry on these terms, probably never occurred, and I am persuaded that no man of business would have advised or permitted a client to make such a payment. Year's rent casualties were never paid till the heirs of investiture were extinct, and even then such payments were the exception rather than the rule. It was of course different when subinfeudation was prohibited, and perhaps no fact connected with land rights is more familiarly known and appreciated than that the value of superiorities and properties respectively is greatly different according as subinfeudation is prohibited or not. But the difference is really only in this matter of casualties, for any other has for a long while been removed in practice by the creation of ground-annuals. If the pursuer's contention as to the effect of the Act of 1874 shall prevail, the distinction will, as regards casualties, be to a large extent annihilated, to the benefit of superiors and commensurate detriment of proprietors, and I venture to doubt whether this consideration has been sufficiently appreciated.

The language of the statute shows, I think clearly, that Parliament did not intend the result to which the pursuer's argument leads, and, on the contrary, that foreseeing that attempts might be made to attain it by a not unplausible argument on the logical consequence in that direction of the implied entry with the over-superior of every proprietor infeft, it carefully guarded against any such consequence. This, in my opinion, is the effect of the last paragraph of subsection 3 of clause 4, which I have already quoted, and even if I thought the language ambiguous (which I do not) I should construe it to that effect as alone consistent with justice, and so presumably according to the intention of Parliament. The provision in question contemplates and refers to two classes of casualties—the first comprehending all casualties payable on the entry of a vassal, and the second those payable by the conditions of the feu at stated intervals or on events "irrespective of his entering"—and furnishes the Court with a criterion whereby to judge of a demand for "any casualty." That criterion is that the superior making the demand shall show that "he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal" (*i.e.*, the vassal having implied entry) "to enter or to pay such casualty" (*i.e.*, the casualty demanded) "irrespective of his entering." To apply the criterion, it is of course necessary to contemplate another state of matters than that which actually exists under the operation of the Act itself; for the vassal being entered, the superior could not by the law prior to the Act require him to enter. We are therefore directed to disregard the "implied entry," and, for the purpose in hand, to look upon the party against whom the demand is made as unentered, and consider whether or not by the law prior to the Act the superior could have required him to enter. To follow this direction, and so apply the statutory criterion, does not require any considerable effort of mental contemplation. The matter seems to me very simple indeed. The sum and substance of it is this—that a party entered by the quality which the Act has attached to all registrations of title shall not be called on to pay a casualty sooner than the superior can show that he could by the prior law have required him to enter. Till then the statutory entry is in abeyance, and inoperative with respect to casualties.

The application of these views to the present case is too obvious to require that I should dwell upon it. In judging of the pursuer's demand

we must disregard the "implied entry" of the defenders, and, looking on them as unentered, consider whether at the date of the action, or now, the pursuer could by the law prior to the Act have required them to enter. I am of opinion that he could not, and that his demand, of which this is the statutory criterion, must therefore be disallowed.

I have already, and perhaps sufficiently, noticed the argument by which an opposite result is attempted to be reached. It is in substance this, that the feu being full by the "implied entry" of the defenders, which creates a new investiture destructive of the former, it is no longer possible to enter the heir of the former investiture. The argument is just, but nevertheless does not support the demand if we are to judge of it by the statutory criterion to which I have referred. It is obvious that an equally just and indeed exactly similar argument would have arisen had the heir of the former investiture been entered at the date of the implied entry and been alive now when we are considering the superior's demand. For by the implied entry a new investiture, destructive of the former, was created, so that the heir of the former, although he was entered, thereupon ceased to be vassal in the feu, with which indeed he had no longer any connection. It seems, however, to be conceded by the majority of the learned Judges in the cases of *Ferrier* and *Rossmore's Trustees*, that while an heir entered under the former investiture survives the superior cannot demand a casualty in respect of the new investiture and entry implied by the statute. To this I assent; but how, I venture to ask, is this result reached otherwise than by applying the statutory criterion as I have interpreted it, and to the effect of refusing to enforce a demand for any casualty in respect of an implied entry sooner than irrespective of that entry it could have been enforced by the law prior to the Act? If to this end we may mentally contemplate the former investiture, although completely destroyed, as still subsisting, with an heir entered and holding under it, I am unable to see why we may not also mentally contemplate the same investiture as still subsisting with an heir thereof demanding an entry under it. In both cases alike the supposition is contrary to the fact and actual possibility, but the statute which has created the impossibility directs us to make the supposition all the same, in order that substantial rights and liabilities may remain as they stood under the prior law. There is no intention to continue or revive to any conveyancing effect the former investiture which the implied entry has superseded and destroyed, and we are in truth only considering how rights and liabilities would have stood under the former law to the effect of enabling us to decide upon a money claim. Of course no heir can in fact be entered under the prior investiture, for it is gone and the fee full under another. It is true nevertheless that if by the law prior to the Act of 1874 the superior could not have required the testamentary trustees of his deceased vassal to enter while the vassal's heir existed and demanded an entry under the then existing investiture, he is by the express words of the Act precluded from demanding a casualty from these trustees because of the investiture in their favour "implied" by the Act.

The existence of a willing heir, relied on as a legal answer to a demand for money, may, if the fact is disputed, be proved *habili modo*, for there is here no question of conveyancing or title. Indeed, the only difficulty is one of a metaphysical character, viz., that the willingness alleged is with reference to a supposed and not a real state of matters. This is incident to the statutory criterion of the demand in question, which involves the supposition of the subsistence of a former investiture, and the possibility of an entry being continued or given under it. I assume, in deference to the case of *Dundas* v. *Drummond* (M. 15,035), that in general the heir of a mid-superior cannot be compelled by the sub-vassal to enter, although Lord Moncreiff seems to have had another opinion—see *Fullarton* v. *Hamilton*, 12 S. 117. It is, however, not doubtful that in this case the heir would have been bound to enter and convey in implement of the obligation upon him by his ancestor's trust settlement had it not been for the conveyancing reforms which superseded the necessity of enforcing the obligation.

The Lord Ordinary informs us that in the debate before him it was assumed that the two cases which he cites, viz., *Ferrier* and *Rossmore's Trustees*, govern the present case, except only on the question whether or not testamentary trustees, such as the defenders, are liable for composition as singular successors, to which question accordingly the argument addressed to him was confined. His Lordship however explains that the defender's counsel, contemplating the possibility of an appeal to the House of Lords, claimed, by formally maintaining all their pleas, to reserve to themselves the right of impugning the validity of the prior decisions, both of which had been pronounced by a narrow majority. In these circumstances we thought it unadvisable to make any assumption, and saw fit to invite a full argument and take time to consider our judgment. I think it right to say so much in explanation of my reason for having considered the question under the Act, as I think this case presents it, and for having stated my opinion upon it irrespective of the weight which properly attaches to the decisions referred to. I offer the same explanation of my reason for thinking it not unbecoming, but according to my duty, to examine these decisions and express my opinion upon them. This accordingly I proceed to do.

In the case of *Ferrier's Trustees* v. *Bayley*, 4 R. 738, there was no question of the superior's right by the law prior to the Act of 1874 to require the defender to enter irrespective of his "implied entry" by that Act, for he was himself the heir of the investiture, which but for this "implied entry" would still have subsisted. Indeed, that investiture did in fact subsist at the date of his base infeftment (19th January 1874), his uncle, whose heir he was, being then entered as immediate vassal in the feu. The beneficial value of the immediate vassal's right was of course diminished by the subfeu that had been granted by his predecessor, to which his own heir had in the result acquired right, and in which he was infeft. He was none the less the vassal in the lands duly infeft and entered with the superior, and on his death, which happened in 1876, his heir was entitled to succeed to him and demand an entry in his stead, notwithstanding that he had in the meantime acquired (by gift as it happened, but no matter how) the subfeu which had burdened the investiture in the person of his immediate predecessor.

Principal Baird was the author of the subfeu, and after his death his son and heir was properly entered as heir of the original feu, without reference to the subfeu, and exactly as if it had never been granted, for it in no way affected the superior or his relation to the heirs of the investiture. Had the heir so entered been fortunate enough to acquire for himself the subfeu, the acquisition would have been a good deal to him, but nothing to his superior, who had no interest in the matter, the original investiture never being disturbed. Nor was that investiture affected by the next heir's acquisition and infeftment in 1874. He was next in succession under the subsisting investiture, and for him to have demanded a new investiture would have been such an act of folly as probably was never actually committed. His title was secure; the superior could not require him to enter while his ancestor lived, and on his ancestor's death he had right to succeed him as heir of investiture, taking the inheritance relieved of the subfeu to which he had acquired right. That this was the state of matters by the law prior to the Act of 1874 is really not disputable. That Act came into operation in October 1874, and attached the quality of an implied entry to the defenders' infeftment of January preceding, so relieving him of the necessity of entering as heir of investiture by precept of *clare constat* on his ancestor's death in 1876, and this without injury to anyone, provided pecuniary rights and liabilities were preserved as they stood by law or paction prior to the Act. But the superior contended that the effect of the Act was to give him a year's rent, to which confessedly he had no right by law or paction prior to the Act, and so the majority of the Court, I think erroneously, decided. I should have thought it clear (first) that by the law prior to the Act the superior was entitled to require the defender to enter as heir of investiture on the death of his ancestor in 1876, and to demand the casualty, viz., relief-duty, payable for such entry; and (second) that his pecuniary claim was neither prejudiced nor enlarged by the "implied entry" effected by the Act of 1874.

On the case of *Rossmore's Trustees*, 5 R. 201, I have no special remark to make, except that the question (as a decision of which it is cited) was not mooted before me as Lord Ordinary in the case, but raised by a plea added to the record in the Inner House. Had it been raised before me, I should have decided it in conformity with the views which I have now expressed and the judgment of Lord Deas, with which I concur, in which case the judgment would have appeared to be that of a majority of one of the five Judges who had considered the question.

I have, however, to observe that even if I thought otherwise than I do of these decisions with reference to the facts of the particular cases in which they were pronounced, or felt myself precluded from questioning them as binding authorities, I should be indisposed to extend and apply them to any case in which the facts were appreciably different. Now, I think the facts of this case are appreciably, and even materially, different, although I quite understand the argument by which the pursuer's counsel applied to them what he not improperly represented as the principle which found favor in the prior cases and governed their decision. I have already observed that there is no authority or trace of practice to support the proposition that by the law prior to the Act of 1874 a superior was entitled to require testamentary trustees to enter. It is indeed notorious that in practice such entry was never required, and the pursuer's counsel candidly admitted to us that this was the result of inquiries made on the subject. The case of *Grimdlay* cited by the Lord Ordinary is not to the contrary, for in that case the superior did not require the trustees of his deceased vassal to enter, but was on the contrary required by them to grant them an entry. In that case the superior offered to enter the heir for the usual relief-duty, but this offer the trustees, for some reason unexplained in the report, saw fit to reject. They demanded an entry to themselves, and the only question was on what terms the superior was bound to comply with their demand. With the decision of this question (which I think clearly right) the defenders here have no reason to be dissatisfied. Their contention with respect to the state of law and practice prior to the Act of 1874 is in exact accordance with what was assumed in the case of *Grindlay* and conceded by the superior, viz., that a superior is bound to receive and enter the heir of his deceased vassal notwithstanding that he has left behind him a conveyance to testamentary trustees. In that particular case the trustees had no doubt some reason, although it is not stated, for taking the very exceptional course of demanding an entry to themselves, and it is, so far as I know, unique in this respect. Now, the pursuer's contention is that since the Act of 1874 all testamentary trustees who record the trust-deed (as indeed all trustees must) are, by the "implied entry" which the Act attaches to the registration, put with respect to liability for casualties in the position of trustees demanding an entry — so that the question is no longer whether by the prior law the superior could have required them to enter? but (as in *Grindlay's* case) on what terms he would by that law have been bound to comply with their demand for an entry? I have already pointed out that this is putting the superior's demand precisely on what the statute enjoins us to take no account of in judging of it, viz., the "implied entry" by the statute itself, the object of the injunction being exactly what the argument in question is intended to frustrate, viz., that proprietors shall not be subjected to demands by superiors which according to the prior law, and irrespective of the "implied entry," they could not have maintained. In *Ferrier's* case this Division of the Court decided, by the narrowest possible majority, that the superior was entitled to a year's rent on the entry of the heir of investiture who had acquired right to a subfeu created by his predecessor. I think this was wrong, irrespective altogether of the Act of 1874, and indeed I fail to see how any question under the Act arose in that case, although no doubt many observations bearing on it were made by the two learned judges who concurred in the judgment, and also by the Lord Ordinary. The observations are no doubt at variance with my opinion, and favour another view, but the judgment itself upon the facts of the case then before the Court is not in point, and I cannot accept it as ruling the present case. That an heir of investiture succeeding to a subfeu granted by his author shall on entry pay a year's rent to his superior is, I think, a startling proposition, but

the affirmance of it is no authority in the present case. In the case of *Rossmore's Trustees* the decision (also by a majority) was that a purchaser with an "implied entry" under the Act of 1874 must pay a year's rent on the death of the vassal last entered under the present investiture, which is no doubt a decision of another order than that in *Ferrier's* case, and is in fact a decision on the Act of 1874. I have made my remarks on the merits of that decision, and only observe now that I think it not impossible or even improbable that the learned Judges who concurred in it might have seen the question in a different light had they been dealing with a demand made not against a purchaser but against testamentary trustees. I think at least that some of the language used in the judgments of these learned Judges imputing manœuvering devices to evade payment of a just claim would probably have been deemed inapplicable to the case of testamentary trustees. On the whole, I cannot regard that case as an authority so clearly applicable that I am, in deference to it, constrained to decide this case contrary to my judgment on its proper merits. It does not decide in terms, and I decline to imply from it, that the Act of 1874 forces all testamentary trustees into the exceptional and I believe unique position which the trustees in *Grindlay's* case voluntarily, and no doubt for some good reason or other, took up. The reasoning from the decision to that result is intelligible and even plausible, but I decline to adopt it, for I think the result is wrong.

I notice that the Lord Ordinary is of opinion that should the trustees in the present case in the result convey to a purchaser or other stranger, the superior could have no casualty so long as any one of them survived, and if they now pay a year's rent this may be so, but otherwise certainly not, in my opinion. The pursuer's counsel indeed contended that the Lord Ordinary's views on this head were altogether erroneous, and that the superior must have a year's rent on every recorded conveyance to a singular successor, inasmuch as that is by the "implied entry" of the statute a new investiture and entry under it. This is consistent, but in my opinion erroneous. I think every demand for a casualty is to be regarded as a mere money claim, to be subjected to the statutory criterion on which I have said so much. This criterion is, I am satisfied, capable of being consistently and justly applied to the various facts of individual cases, and with the result of preserving pecuniary rights and liabilities, *hinc inde*, substantially as they stood by law prior to the Act of 1874, which is in my opinion the plain intention and meaning of that statute. If, indeed, the entries implied by the Act were, with respect to casualties, equivalent to entries demanded and given under the law prior to 1874, the case of *Grindlay* would probably determine the amount of the casualty payable by the defenders. But the statute expressly enjoins that they shall not be regarded as equivalent in this respect, and this, as I have pointed out, precisely to avoid the injustice that would be done by putting proprietors without their will in the position of having demanded and taken entries for which they had no occasion under the prior law, and compelling them to pay a year's rent of their estates therefor. The manifest intention of the Legislature was to harmonise the simplification of title with the preservation of substantial rights, and this intention is, I think, effected with respect to casualties by the language employed, which we are bound to construe and apply according to the plain intent of it.

It is impossible to exaggerate the importance of the question. A year's rent of an estate may be of any amount, and under the former law such a casualty was of very rare occurrence indeed, except in the case of building feus with a prohibition against subinfeudation. Hereafter, if the construction of the Act of 1874 which superiors contend for shall prevail, this enormous casualty will be of frequent and familiar occurrence. That it is payable on the occasion of every testamentary trust of land held of a subject-superior, although only to resettle the estate, is what we are now asked to decide—is indeed what the Lord Ordinary has decided. In this and the two previous cases on the subject the superiors have frankly avowed that they regarded the Act of 1874 as conferring a boon on them at the cost of their vassals, and I observe that one of the learned Judges in the case of *Rossmore's Trustees*, apparently acquiescing in that view of the Act, suggested that against that particular effect of it might be set the power of redemption of casualties which the same Act gives to the vassals. That power is given on terms which it is only reasonable to assume (as indeed is the fact) were after careful inquiry ascertained to be equitable with reference to the law and practice prior to the Act, and I fail to see how it bears on the present question. I do not feel at liberty to hold that the Legislature intended to subject vassals to larger or more frequent casualties than they were subject to by the prior law, and to set off against that *prima facie* injustice the option of redemption on terms unduly favourable to them, and of course the reverse to their superiors. The subjects are not reciprocal or commensurate.

I have to observe, in conclusion, that I think conveyancers would do well to take notice of the risks which now attend the indefinite or double manner of holding (*a me vel de me*), which was devised, and has so long subsisted, because of its safety and convenience. It had indeed become so common—almost universal—that the Titles to Land Act 1868 declares it shall be implied without expression. That the "implied entry" of the Act of 1874 takes the whole virtue out of this ancient manner of holding is clear, as it also is that the cases of *Ferrier's Trustees* and *Rossmore* attach a tremendous and unforeseen pecuniary risk to it. It is matter of course that every disponee shall record his disposition, and if his holding is *a me vel de me*, whether express or by the implication of the Act of 1868, the registration instantly and *eo ipso* by virtue of the Act of 1874 enters him with the over-superior, and so limits his holding to *a me*—that is, of the granter's superior with whom the Act enters him. He may or may not escape payment of composition (a year's rent) while his author, if he was entered, lives—this has not been decided,—but if the cases of *Ferrier* and *Rossmore* are to be relied on, he must pay it on his author's death, which, in the case of testamentary trustees, means instantly. The *a me vel de me* holding being thus deprived of all its virtue, and a risk of great magnitude being attached to it, I venture to ask why it should be continued. When subinfeudation is prohibited, the holding is necessarily *a me*, with

all its consequences, which in that case are counted on, but when not prohibited why should not the holding be expressly limited to *de me?* The recording of a disposition with a *de me* holding will not imply an entry with the over-superior, for in that case the mid-superiority is not defeasible at the will of the disponee, and the over-superior will be bound to receive and enter the heirs of the original investiture as long as they continue to exist. Should we affirm the Lord Ordinary's interlocutor in this case, no well informed conveyancer will hereafter prepare a testamentary trust-deed without being careful to limit the holding of the trustees to *de me*, for everyone will perceive at once that had the holding of the defenders been so limited the recording of the trust-deed would not have entered them with the over-superior (the pursuer), who would accordingly have been bound to receive and enter the heir of his deceased vassal, with the result of saving a year's rent to the trust-estate. It is a pity that those who are beneficially interested in this trust should have to pay so heavily for teaching others a very simple lesson in conveyancing, and also that, the Act of 1874, being retrospective on this subject, very many may suffer without being able to profit by the lesson. It is, in my view, matter of deeper regret that the import of the lesson is, that the superfluities of conveyancing procedure which it was the chief object of the Act of 1874 to abolish, ought, from mere prudential and economical considerations, to be perpetuated—this Court being unable so to construe the Act as to reconcile its provisions for the suppression of worthless mid-superiorities with the preservation of the pecuniary rights and liabilities of superiors and vassals substantially as they stood before the Act.

The Court adhered.

Counsel for Pursuer (Respondent)—J. A. Reid. Agents—Davidson & Syme, W.S.

Counsel for Defenders (Reclaimers)—M'Laren. Agents—J. & A. Hastie, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, February 28.

LORD MACDONALD *v.* MACLEAN AND M'INNES.

(Before the Lord Justice-Clerk, Lord Young, and Lord Craighill.)

Justiciary Cases—Stat. 2 *and* 3 *Will. IV. c.* 68 *(Day Trespass Act)—Game, Trespass in Pursuit of—Removing Dead Game.*

Held that the entering upon land without the leave of the proprietor for the purpose of removing dead game, there being no proof that the persons so entering had killed the game, was not "trespassing in search or pursuit of game" within the meaning of section 1 of the "Day Trespass Act" (2 and 3 Will. IV. c. 68).

This case was stated by the Sheriff-Substitute of Invernesshire at Portree (SPEIRS) at the request of Lord Macdonald (appellant) against John MacLean, gamekeeper, and Ewen MacInnes, cottar, both residing in Skye. The case was a prosecution under the "Day Trespass Act," 2 and 3 Will. IV. cap. 68, and the "Game Law Amendment Act 1877," the proceedings being adopted under the "Summary Procedure Act 1864," in which the respondents were charged with being guilty of an offence within the meaning of the Day Trespass Act, and particularly of section 1 thereof, actors or actor, or art and part, in so far as upon the 3d day of October last 1878, or about that time, they, in the day-time, committed a trespass by unlawfully entering, or being without leave of the proprietor, on the lands called Corriebhruadarain, being part of the Macdonald deer-forest belonging to the appellant, and occupied by Mr Wolstenholme, his tenant, in search or pursuit of game, or of deer, or the other game specified in the Act. It was proved that on the 2d October shots were heard in the direction of Corriebhruadarain. On the following day, being the day libelled, the three respondents were seen carrying a dead stag up from the bottom of the Corrie, placing it on the back of a horse they had with them, and so making their way out of the Corrie. They had no guns or dogs with them, and no shots had been heard that day. The stag appeared to have been shot. The Sheriff-Substitute found that the accused were not guilty of trespassing in pursuit of game within the meaning of the Act in question. The agent for Lord Macdonald then appealed, and requested the Sheriff-Substitute to state the case.

The question of law for the consideration of the Court was—"Is the entering or being upon land without leave of the proprietor, for the purpose of taking away the dead body of a stag, there being no proof that the persons so entering had anything to do with the killing of it, an offence within the meaning of the first section of the Act?"

Argued for appellant—It was submitted that the Legislature had in view game both dead and alive (25 and 26 Vict. c. 114, sec. 2), and certainly dead game ought to be included, for if not (1) it afforded a wide loop-hole to evade the Act; (2) each case would end in an inquiry as to the amount of life in the game, or whether they were dead or alive; and besides the words of the statute were wide enough to cover it. It was admitted that the English cases seemed to be against this view, but this case was different from them, because it began in poaching, and besides the English law as to game was quite different from ours, and the magistrates' cases, which all those quoted were, were ill considered.

Authorities—*Osbond* v. *Meadows*, May 5, 1862, 31 L.J., M.C. 238: *Kenyon* v. *Hart*, Feb. 3, 1865, 34 L.J., M.C. 87; 2 and 3 Will. IV. c. 68, sec. 1.

Argued for respondents—"Game" in the statute meant living game that was capable of being both searched for and pursued. The opinions in the case of *Kenyon* v. *Hart* completely decided the question.

At advising—

LORD JUSTICE-CLERK—The Court have taken time to consider this appeal, and I shall now state