power of disposal. I am unable to agree in that view. I think the case is indistinguishable from *Hyslop* v. *Maxwell's Trustees*, only that it appears to me to be a stronger and clearer case for the application of the rule there established. The circumstances here are altogether favourable to the inference of an intention on the part of the testator to dispose of the fee of the property of which he had the liferent with an absolute power of disposal, for it would be making a distinction not likely to occur to an ordinary testator to suppose that he understood that he was disposing of that part of his father's estate of which he had the fee, but not of that other part of which he had the liferent, but with an absolute power of disposing of the fee of it. That circumstance makes this case an exceedingly clear case for the application of the rule. We must of course be satisfied that the rule is in accordance with the true meaning of the will in the particular case, and if there is anything to hinder us from giving effect to the rule, of course it will not hold, but here I can find nothing, and therefore I apply the rule established in *Hyslop* v. *Maxwell's Trustees*, and give that effect to the will here which makes it carry the property of which the testator had the liferent with an absolute power of disposal. I am of opinion accordingly that we should answer the first question in the negative and the second in the affirmative.

LORD RUTHERFURD CLARK—I am of opinion that we must follow the rule of the case of *Hyslop* v. *Maxwell's Trustees*. I cannot distinguish the present from it. I have examined the case of *Mackenzie* v. *Gillanders*. I am satisfied that it was decided on special grounds, viz. (1) because of the form of the will, and (2) because of the peculiarity of the power.

LORD TRAYNER—I come to the same conclusion. I think this case cannot be distinguished in any material respect from the case of *Hyslop* v. *Maxwell*, the decision in which has never been overruled, but has, on the contrary, been referred to with approval in subsequent cases. I do not regard the decision in the case of *Mackenzie* as derogating from or competing with the authority of *Hyslop* v. *Maxwell*. *Mackenzie's* case was very special in its circumstances, and was decided in respect of specialties.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Party—C. S. Dickson—Moffat. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Party—Salvesen—M'Lure. Agents—Drummond & Reid, S.S.C.

---

*Friday, February* 16.

## FIRST DIVISION.

[Lord Wellwood, Ordinary.

## LORD ADVOCATE *v.* MORAY.

*Superior and Vassal—Entry—Casualty—Composition—Relief—Implied Entry—Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A, the heir in possession under a new entail of the lands of Abercairney, was impliedly entered with the superior in 1874 by the operation of the Conveyancing Act of that year. At this date A was not the heir *alioqui successurus* to the entailed lands, but no casualty was demanded from him until 1876, by which time he had become the heir *alioqui successurus* owing to the death of his elder brother. The superior accepted relief duties from A. After A's death B succeeded in terms of the destination in the deed of entail, and having taken infeftment was impliedly entered with the superior.

In an action by the superior against B for payment of a composition, *held* that a new investiture was created by A's implied entry, and that a casualty of composition might have been exacted from him by the superior; that the superior's failure to exact a composition from A could not affect B; and that B, as the heir of the existing investiture, was liable only in relief-duty.

William Moray Stirling of Abercairney was heir of entail of the lands of Abercairney and others, under a deed of entail dated in 1769. In the year 1849 he disentailed the said lands, and executed a new deed of entail to and in favour of himself and the heirs whatsoever of his body, whom failing Mrs Christian Moray or Home Drummond, his sister, whom failing to Charles Home Drummond, her second son, and the heirs whatsoever of his body, whom failing certain other heirs. The deed contained a provision that in case any of the heirs of entail succeeding under the deed should succeed to the estate of Blair Drummond, and should, at the time of his death, have (in addition to an eldest son, or descendant of an eldest son) a second or other younger son, or descendant of such, then the estate of Abercairney should, upon the death of such heir, descend to and devolve upon his or her second or younger sons successively in their order, and the heirs whatsoever of their bodies respectively. Infeftment followed in favour of William Moray Stirling, on 27th September 1849.

William Moray Stirling died on 9th November 1850, and Mrs Christian Moray or Home Drummond was thereafter duly served as his nearest and lawful heir of tailzie and provision. Sasine, dated 14th October 1851, followed on the decree of service in her favour, but no entry was

taken by her with the Crown, which was the superior.

By disposition dated 30th October 1851 Mrs Home Drummond disponed the entailed lands to her second son, the said Charles Home Drummond, under reservation of her liferent, and he was duly infeft conform to instrument of sasine recorded in the General Register of Sasines 7th August 1854. In 1868 Charles Home Drummond, who assumed the name of Charles Stirling Home Drummond Moray, was served nearest and lawful heir of tailzie and provision in special to his uncle, the entailer, and the decree of service was recorded in the register of sasines on 16th August 1868.

When the Conveyancing (Scotland) Act came into force, Charles Drummond Moray was by operation of the statute entered with the Crown as its vassal, but no casualty was then paid in respect of the said entry. At that time Charles Drummond Moray's elder brother was alive. He died on 3rd June 1876, and Charles Drummond Moray then became heir of the former investiture. The Crown did not settle with Charles Drummond Moray for several years thereafter, but finally accepted relief-duties from him upon the footing that being the heir *alioqui successurus* he would have been entitled to an entry as such. The receipts granted by the Crown contained no reservation.

Charles Drummond Moray died in September 1891, and was succeeded in the said lands by his second son William Drummond Moray, who was infeft, and thus impliedly entered with the Crown. At the date of his succession and entry his elder brother was alive, and William Drummond Moray accordingly did not possess the character of heir *alioqui successurus*.

In May 1893 the Lord Advocate, as representing the Crown and the Commissioners of Woods and Forests, brought the present action against William Drummond Moray for declarator that in consequence of the death of Charles Drummond Moray, who was the vassal last vest and seised in the lands of Abercairney, a casualty of composition had become due to the Crown, as superior at the date of the defender's infeftment, and for payment of such sum as should be ascertained to be the amount of said casualty.

The grounds upon which the claim of the Crown was made and resisted, appear from the arguments and the opinion of Lord Kinnear.

On 8th November the Lord Ordinary (WELLWOOD) pronounced this interlocutor—"Finds that in respect of his implied entry with the Crown in the lands named in the summons, or such of them as are held by the Crown, the defender is liable in payment of a causalty of composition; therefore to that extent repels the defences, but in respect that it is not admitted by the defender that the whole of the lands named in the summons are held of the Crown, continues the cause in order that it may be ascertained whether all, and if not which, of the said lands are so held, and that the amount of the composition may be ascertained and fixed, &c.

"*Opinion.*—This case raises the question whether an implied entry under the Conveyancing Act of 1874, followed by acceptance without reservation by the superior of relief duty from the heir of entail in possession under a new entail, has the effect of enfranchising the investiture created by the deed of entail, so as to preclude the superior from thereafter demanding composition, when the succession opens to one who is not *alioqui successurus*.

[*His Lordship then narrated the circumstances in which the action was brought.*]

"I am of opinion that the Crown is entitled to a casualty of composition. Under the law as it stood prior to the passing of the Act of 1874, if a vassal, purchaser, or assignee applied for a charter of confirmation, and tendered a year's rent, the superior was bound to grant without reservation or qualification a charter in favour of whatever persons the vassal, purchasers, or assignee might please to name, and to embody in the charter, if required, the fetters of a strict entail; with the result that the whole persons named in the charter, in whatever degree of relationship they stood to the vassal, purchaser, or assignee, or to each other, were entitled as heirs of the investiture to obtain an entry on payment of the casualty of relief. By granting such a charter the superior was held to have enfranchised the investiture.

"Again, the superior was bound, when applied to for a charter of confirmation of a deed of entail which changed the destination in the former investiture, to grant such a charter on payment of relief duty only, if the person first called was also the heir of the former investiture; but he was entitled to insert in the charter a reservation of his right to claim composition when the succession should open to one who was not heir *alioqui successurus*.

"Such being the old law, the Conveyancing Act of 1874, which abolishes charters and writs by progress, provides (section 4, sub-section 2)—'Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior, whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.' If the statute had stopped there the superior's rights would have been seriously affected in various ways. For instance, formerly if the superior granted a charter of confirmation he was held to have discharged all claims for past feu-duties and casualties, and therefore it became necessary to provide, as is done by section 4, sub-sections 3 and 4, that the superior's rights in that respect should not be affected by the implied entry.

"Again, when a superior was applied to to grant a charter by progress, he was entitled, unless barred by prescription, to recur to the original charter as showing the measure and extent of the feu right. He was also entitled to refuse without a consideration to enlarge the vassal's rights by granting an assignable charter, or without payment of composition or reservation to insert a tailzied destination different from that in the prior investiture.

"But if the vassal's implied entry were to be held to be equivalent without qualification to a writ of confirmation granted by the superior, the superior might be held to have lost his right to object to the terms of the disposition which was impliedly confirmed. Therefore by section 4, sub-section 2, it is provided:—'But such an implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands, or in the last charter or other writ by which the vassal was entered therein.'

"It seems to me, then, that after the passing of the Act of 1874 the superior's rights stood thus—Charters by progress being no longer necessary or competent, and the vassal being entered as if he had obtained a writ of confirmation, the superior could no longer protect himself by inserting a reservation in the charter, or refusing to grant a charter until he was paid composition. But his right to demand a casualty on each implied entry remains intact. If the heir thus entered was *alioqui successurus*, the superior was entitled to demand and receive relief-duty only. That is what the Crown did in this case when they settled with Charles Drummond Moray. My own view is (but this does not affect the present question) that the Crown might have demanded a year's rent from him, because at the date of his implied entry, the passing of the Act of 1874, he was not heir *alioqui successurus*, his elder brother being still alive. If the Crown had then received a composition the new investiture would undoubtedly have been enfranchised. But relief-duty only was paid, and the only ground upon which the defender maintains that composition is not now exigible in respect of his entry is that because the Crown, in the receipt granted to Charles Drummond Moray, did not insert a reservation to claim composition, it must be held to have enfranchised the destination just as if a charter of confirmation had been granted without reservation or qualification.

"I cannot adopt this view. I do not think that any such reservation was required. The receipt was not in the circumstances a proper document in which to insert it. There was no transaction between superior and vassal, and no question except as to the amount of the casualty then due was raised. The most plausible view of the defender's case is that if the Crown had exacted composition from Charles Drummond Moray the defender would only have been liable in relief-duty. But this is not a fair way of putting the case. The Crown accepted what both parties then believed to be the appropriate casualty in any case; and the broad facts remain that the Crown has not received composition from any heir of tailzie, and it has never expressly discharged its right to claim composition. I therefore think that the Crown is not precluded from now demanding composition."

The defender reclaimed, and argued—The defender was the heir of the existing investiture, and was therefore only liable in relief-duty. As the law stood prior to 1874, a vassal was entitled to tender a disposition to his superior with a destination to any succession of heirs, and the superior was bound to grant a charter upon payment of a composition. If the superior inserted a clause in such charter reserving his right to claim a composition on the entry of each succeeding heir, the reservation was ineffectual—*Lockhart* v. *Denham*, July 10, 1760, M. 15,047; *Stirling* v. *Ewart*, September 4, 1844, 2 Ross's Leading Cases, 340. When, however, the heir under the new investiture was also entitled to succeed as heir under the former investiture, he was entitled to be entered upon payment of relief-duty, but the superior might reserve his right to demand a composition from the first vassal who was not also heir under the old investiture—*Marquess of Hastings, &c.* v. *Oswald*, May 27, 1859, 21 D. 871; *Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692; *Mackenzie* v. *Mackenzie*, July 4, 1777, M. 15,053; *Stuart* v. *Hamilton*, July 18, 1889, 16 R. 1030. Payment of a composition was not in any way essential to the enfranchisement of a new investiture. If the superior granted a charter to the heir under a new destination, that enfranchised the investiture although neither composition nor relief was exacted, and the superior's representatives could not thereafter refuse to enter a succeeding heir on payment of relief-duty. In short, the right of the vassal to enter on payment of relief depended on whether or not he was the heir of the existing investiture. Thus in the case of the *Duke of Hamilton* v. *Baillie, infra*, the vassal was held entitled to be entered on payment of relief-duty only, in respect that he was the heir of the standing investiture although no composition had been paid in respect of that investiture. The pursuer could derive no assistance from the *dicta* of Lord Deas in *Advocate General* v. *Swinton, infra*, for these had been disapproved in the House of Lords—*Johnstone* v. *Duke of Buccleuch*, July 25, 1892, 19 R. (H. of L.) 39, *per* Lord Watson, p. 42. To ascertain the effect of the Conveyancing Act of 1874 and the implied entry thereby introduced, it was necessary to look to the provisions of that Act. The statute did not leave the rights of superior and vassal in respect of casualties just as they were before. The superior might be benefited as in *Rankin's Trustees* v. *Lamont*, February 27, 1880, 7 R. (H. of L.) 10, or the vassal, as in *Lord Advocate* v. *Moray*, June 17, 1890, 17 R. 945. In the present case the effect of the statute was that Charles Drummond Moray was impliedly entered as heir under the new

destination contained in the deed of 1849, the old investiture being swept away—*Stuart* v. *Hamilton, supra*. The defender accordingly was the heir of the existing investiture, and as such was only liable in payment of relief-duty, and the fact that the Crown had failed to exact the composition to which they were entitled from his predecessor could not affect him. Supposing that the Crown had granted a writ of confirmation in Charles Drummond Moray's favour in 1874, it certainly could not have claimed a composition from the defender unless the right to do so had been expressly reserved. If, then, the Crown intended to reserve that right when it accepted relief-duty from Charles Drummond Moray, the reservation ought to have been inserted in the receipts. There could be no presumption in law that such a reservation was intended, for it was not the invariable practice of the Crown to enforce its extreme rights on the completion of a vassal's title. But further, such a reservation would have been ineffectual for a superior could not in granting a charter to a singular successor reserve right to demand a composition from his heir—*Lockhart* v. *Denham* and *Stirling* v. *Ewart, supra*—and, as already pointed out, Charles Drummond Moray had been entered not as heir under the old, but as heir under the new investiture.

Argued for the pursuer—The Lord Ordinary's decision was right. In the first place, the defender's argument on the result of the statute went too far. While there was no presumption that the statute had left the rights of superior and vassal in regard to casualties as they were before, at the same time the Court would be slow to accept a construction of a statute leading to results which were anomalous and contrary to principle. The construction for which the defender contended was of this kind. Under the former law, when a vassal applied for a charter to give effect to an altered destination, and thus to enlarge the original grant, the superior had it in his power to insert clauses in the charter reserving and protecting his rights. The result of the implied entry introduced in 1874 would have been to deprive the superior entirely of his rights in this respect had there been no saving clause in the Act, and the proviso contained in sub-section 2 of section 4 was introduced for the purpose of protecting the superior's rights. The Act was not intended to and did not enlarge the rights of the vassal. If Charles Drummond Moray had applied for a charter, the Crown would have protected itself by inserting all clauses necessary for that purpose. The words "existing law and practice" could only mean the charter which the superior could be compelled to grant. If that were so, the question was whether the Crown had lost its right by what took place in 1874 and subsequently, to claim composition from a succeeding heir under the investiture of 1849, and that depended upon whether the Crown then consented to admit succeeding heirs under that investiture upon payment of relief-duty only. The Crown had never given any such consent, for it was clear that the Crown officials had dealt with Charles Drummond Moray under a mistaken view of the rights of a superior—a mistaken view which was generally entertained by the profession prior to the decision in *Stuart* v. *Hamilton*. Nor could it be said that the Crown had lost its right because the receipts contained no reservation. The receipts were documents entirely personal to the person to whom they were given, and they could never be allowed to contradict or contest the terms of the title. Lastly, the claim of the Crown was not excluded by the fact that a composition might have been claimed from the defender's predecessor, for payment of a composition was essential to the enfranchisement of a charter. A charter accompanied by such payment, but nothing less, enfranchised an investiture, and indeed the enfranchisement was the result not of the charter but of the payment of composition—*Lord Advocate* v. *Swinton*, November 14, 1854, 17 D. 21; *Marquess of Hastings* v. *Oswald*, *Lockhart* v. *Denham*, and *Stirling* v. *Ewart, supra; Duke of Hamilton* v. *Baillie*, November 22, 1827, 6 S. 94. The defender was therefore liable for a casualty of composition, none having been paid in respect of the tailzie of 1849.

At advising—

LORD KINNEAR—It is admitted that the defender is liable in payment of a casualty in respect of his implied entry with the Crown in the lands libelled. The question is, whether he is liable in composition as a singular successor, or in relief-duty as the heir of the investiture.

The last vassal entered with the Crown under the former investiture was William Moray Stirling of Abercairney, who executed the deed of entail under which the defender now holds on the 27th October 1849. By this deed he disponed the lands to himself and the heirs of his body, whom failing to his sister Mrs Home Drummond, whom failing to Charles Home Drummond, her second son, and the heirs of his body, and failing them to a certain series of heirs, but under a condition which is not very correctly described as a clause of devolution, that in case any heir succeeding under the deed of entail should also succeed to the estate of Blair Drummond, and should at his death leave, in addition to an elder son, a second or younger son, the estate of Abercairney should upon the death of such heir descend to his second or younger sons successively in their order, and the heirs of their bodies. In the event so provided for, therefore, the estate is not to be taken by the heir of line, but by a younger brother of the heir of line, or by a descendant of such younger brother.

On the death of the entailer Mrs Home Drummond was served heir of entail and provision to him, and was infeft, but did not enter with the Crown. In 1851 she disponed the lands to her son Charles Home Drummond, afterwards Drummond Moray,

reserving her liferent. On her death it appeared that her service was technically defective, and Charles Home Drummond, to whom the succession opened, passing over his mother's service and the title he had acquired from her, made up his title by serving himself heir of taillie and provision in special to the entailer William Moray Stirling. An extract of the decree was recorded in the register of sasines; and on the passing of the Conveyancing Act 1874 he was entered with the Crown by the operation of the statute.

No casualty was paid in respect of this entry until 1876. But by that time Mr Drummond Moray in consequence of the death of his elder brother had come to be in the position of heir-at-law of William Moray Stirling the last-entered vassal, and it appears that the Crown discharged the claim for casualty or payment of relief-duty, on the assumption that he was heir *alioqui successurus* instead of exacting the composition for which he was undoubtedly liable as a singular successor.

Mr Drummond Moray died in 1891, and his second son, the defender, succeeded to him, not by virtue of a devolution, but as his immediate heir of taillie and provision in terms of the destination. The defender is infeft conform to a decree of special and general service duly recorded, and a casualty has thus become payable.

The only ground set forth upon record for claiming a year's rent as composition is, that the heir-at-law of the last vassal is not the defender but his elder brother, and the defender is therefore infeft and entered as a singular successor. This is certainly untenable. There can be no question that the defender is the heir of the existing investiture, and he is entered accordingly as heir of taillie and provision and in no other character. The implied entry which is enacted by the statute of 1874 has the same effect "as if the superior had granted a writ of confirmation according to the law and practice" existing at the passing of the Act. Now, there can be no question as to the terms or effect of the charter which Charles Drummond Moray would have been entitled to demand under the former law, provided always that he satisfied the superior's claim for a casualty on entry. He could have obtained a charter confirming his infeftment and all the writs upon which it proceeded, and the effect of such a charter or writ of confirmation would have been to enable all the heirs of entail succeeding to him to enter with the superior in their turn for payment of relief-duty. It was settled law before the passing of the Act that the disponee of an entered vassal might require the superior to grant a charter to himself and any series of heir he chose to name, or that might be named for him by the granter of the disposition in his favour, and that when by such a charter a certain line of descent had been once admitted into the investiture of the vassal, the persons so favoured must be accepted by the superior as heirs in their order, irrespective of their relation by blood to the immediate grantee, or to one another. This is settled by a series of decisions of which *Stirling* v. *Ewart* may be taken as the final and conclusive authority, and it cannot be called in question. It is of no consequence, therefore, that the defender being a younger son, is not the heir-at-law of the last vassal. By the implication of the statute, which is equivalent in law to the superior's own Act, he is the heir of the investiture.

But the Crown's demand was supported in argument, and has been sustained by the judgment of the Lord Ordinary upon an entirely different ground from that which is pleaded on record. It is said that the right of heirs who are not heirs-at-law to enter for relief-duty arises only when the charter admitting them into the investiture has been granted without qualification or reservation, and for payment of composition; that if Charles Drummond Moray had been entered by charter or writ of confirmation on payment of relief-duty, the right to exact composition from the first substitute under the new investiture who should not be also the heir of the investiture which it superseded, would have been expressly reserved in such writ or charter, and that the implied entry under the statute cannot confer upon heirs of the new investiture any other or higher right than the superior could have been required to grant under the former law. The Lord Ordinary says that the only answer to this argument, and "the only ground on which the defender maintains that composition is not now exigible in respect of his entry, is that because the Crown in the receipt granted to Charles Drummond Moray did not insert a reservation to claim composition, it must be held to have enfranchised the destination just as if a charter of confirmation had been granted without reservation or qualification." I agree with the Lord Ordinary that if the argument is otherwise well-founded, this is not a good answer. I do not think the question depends upon the terms of the receipt, but upon the legal operation of the statutory entry. The Act alters the method by which entry is obtained. It is no longer to be effected either by a separate charter granted by the superior or by the superior's writ engrossed upon the conveyance, but by the recording of the conveyance in the register of sasines. But the substantial rights of the superior and vassal are left precisely as they stood before the statute. And therefore if it be clear that by the law and practice then existing a disponee could not have insisted upon an absolute and unqualified confirmation, the implied entry must, in my opinion, be subject to all the conditions and reservations by which the superior would have been entitled to qualify an express entry by progress.

The question therefore is, whether we are to assume that if the Act of 1874 had not passed, and Charles Drummond Moray had completed his title by entry with the Crown under the old law, the Crown charter or writ of confirmation must have been so qualified as to render the defender

liable on his entry for payment of composition as a singular successor.

Now, it is certain, in the first place, that he was entitled to demand a charter in favour of himself and the heirs of entail under which all the heirs-substitute, however remote from the legal order of succession, would be entitled to enter as heirs of provision for payment of relief-duty; secondly, that the composition or price which the Crown would have been entitled to demand for a charter in these terms was exactly the same as that exigible for a charter to the vassal and his heirs-at-law; and thirdly, that if such a charter had been granted for payment of such composition as the Crown was entitled to exact, no reservation of a right to demand composition from heirs of entail who should not be heirs of line would have been of any avail to the Crown.

But it has been decided in the cases of *Mackenzie* v. *Mackenzie* and the *Marquis of Hastings* v. *Oswald*, first, that if the institute under a deed of entail is also the heir of the existing investiture, he is entitled to the benefit of his character of heir and to enter for relief, notwithstanding that in order to avoid a forfeiture he has been compelled to make up his title under the entail, which necessarily means that he has entered in form as a disponee or singular successor; and secondly, that the superior who had been compelled to enter the institute for relief-duty might effectually reserve his claim for composition on the entry of the first substitute under the new investiture who should not be the then existing heir of the former investiture. The second proposition was held to be a corollary of the first, because, as Lord Wood explains in the *Marquis of Hastings* v. *Oswald*, it is "a necessary adjunct" of the doctrine that the heir of a prior investiture is entitled to enter under a new tailzied investiture for payment of relief-duty only. The doctrine thus established is anomalous. But there can be no question that in this Court at least it must be treated as settled law. It is therefore maintained on the authority of these decisions that the Crown admitting Charles Drummond Moray for payment of relief-duty would have been entitled to reserve a claim for composition on the entry of a substitute who should not be his heir of line. But the doctrine is inapplicable to this case, because Charles Drummond Moray was not the heir *alioqui successurus* when he entered with the Crown. He was disponee of the last vassal under a deed which displaced the heir of the investiture, and he could not have entered in any other character than that of disponee. It makes no difference that at the time when the casualty was paid he had come into the position of heir-at-law to his uncle, because the character of the entry implied by the statute must be determined with reference to the date of the registration of his infeftment. He is to be deemed to have been entered as at that date to the same effect as if a writ of confirmation had been granted. But if the extent of his liability were to be determined as at the date of payment of the casualty, it would still have been the liability of a singular successor, because the right of the heir *alioqui successurus* to enter as disponee for payment of relief-duty is available only when the old investiture remains open, so that he might, if he had thought fit, have made up a title by service, and the old investiture had been entirely sopited by the operation of the statute on Mr Drummond Moray's infeftment as disponee. This was decided in *Stuart* v. *Hamilton*. Charles Drummond Moray therefore had no right to demand a charter from the Crown except on payment of a year's rent as composition.

The question then is whether we are to assume that if it had been necessary or possible to grant a charter by progress in 1876, such a charter would have contained a reservation that the Crown should be entitled to claim composition on the entry of a singular successor. I think this cannot be assumed for two reasons. In the first place, the statute leaves no room for speculative reasoning as to the terms of the charter. The vassal who is duly infeft is to be deemed to be duly entered to the same effect as if the superior had granted a writ of confirmation according to the existing law and practice, and that must mean such a writ as would have been granted in ordinary course and in such terms as were usual and necessary for completing the vassal's title in the character in which he was infeft. Now, Charles Drummond Moray, who was not the heir of the former investiture, was entered as disponee under a conveyance by the former vassal with a tailzied destination, and in ordinary course the superior's confirmation must have imported an absolute and unqualified investiture of the disponee and the whole series of heirs in the specified line of descent. There is nothing to suggest that it would have contained any exceptional condition or reservation except the fact that the payment exacted for entry was less than the sum which the superior was entitled to demand. But that might be accounted for in various ways. He knew that the extreme rights of the Crown were not always enforced on the completion of Crown titles, and a vassal might be admitted for relief who was liable for either because the Crown chose to waive its rights or because the Crown officers were mistaken as to the extent of their claim. There would be no reservation in either case. It is admitted that the casualty which the Crown chose to demand was duly paid, and it is to be held, under the statute, that a charter was granted in return for the payment. The rights of heirs cannot, in my opinion, be determined by speculation as to clauses which might or might not have been inserted in such charter, but by the terms which the charter must have contained if it were granted in ordinary course to a singular successor on satisfaction of the superior's claim.

But in the second place I think that the

reservation, if it had been inserted, would have been ineffectual. A reservation has no effect in law except in so far as it saves an existing right, and the defender's case is not rested, as the Lord Ordinary had supposed, upon the superior's omission to reserve a legal claim, but on the stronger ground that he had no claim to reserve. I think this follows from the judgment of the House of Lords in *Stirling* v. *Ewart*. Composition is not a casualty payable out of the land from time to time. It is the price of the charter. The superior's right to demand a year's rent as the price, rests upon the Acts of 1469 and 1669, and upon the Act of George II. But these statutes give the right upon the entry of an adjudger or a disponee and upon no other occasion. They give no right "upon the succession of anyone claiming under such entry." These propositions being established, the right of an heir of entail to enter for relief duty depended on the Act of 1685. It was maintained for the superior that an entail which departs from the legal line of succession is, in substance, an alienation to strangers by anticipation, and each substitution which departs from the line of the vassal last entered is a repetition of the alienation, so that every substitute who is not an heir of line as well as an heir of provision under the deed of entail, is, in truth, a disponee or singular successor, and bound to pay a composition accordingly. The answer to which the judgment of the House of Lords, affirming the decision of this Court, gave effect, is thus expressed in the opinion of Lord Cottenham. The Statute of 1685 "in giving power to make tailzies, gave a right against the lord to give effect to that right, and as the claim in question did not exist before that time, and was not within the reservation" to the superior of casualties of superiority, "and certainly was not given by that Act, there can be no legal foundation for it." I think it follows that if composition were exigible by law, as the price of a charter confirming a deed of entail, the claim must have been enforced on the entry of the institute or not at all. For the superior had no claim except against a disponee, and no remedy except by withholding a charter. He might enter the institute as disponee, if he pleased, for a lesser price than the law entitled him to exact. But he could not, by entering the institute for relief duty, when he was entitled to composition, acquire a right which the law did not give him, and which the institute could not give him by contract, to demand composition from the future heirs of entail. For the Act of 1685 had a double effect. It deprived the superior of his right of refusing to give effect to an entail notwithstanding that it might operate as an alienation, and it brought in a series of heirs who do not represent the institute, and are not bound by his personal contracts. When the charter has once been granted, therefore, in such terms as the superior has thought fit to exact, within his legal right, the right is determined. He cannot control the series of heirs in whose favour the charter will operate, and he has no right by law, and can acquire none by contract, to treat them as singular successors, for whatever reason he may have chosen to treat the institute as an heir.

I am therefore of opinion that Charles Drummond Moray must be held to have been entered to the same effect as if a writ of confirmation had been granted in absolute and unqualified terms. The payment to which the superior was entitled in respect of his entry has been satisfied and discharged, and the defender has no concern with the terms on which the discharge was granted. The claim against him is for his own entry, and as he is entered in the character as an heir of provision, the claim is for relief duty and not for composition.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for the Pursuer—Guthrie—C. N. Johnstone. Agent—Donald Beith, W.S.

Counsel for the Defender — Graham Murray, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

---

*Friday, February* 16.

## SECOND DIVISION.

## BEVERIDGE AND ANOTHER (SPINKS' EXECUTORS) *v.* SIMPSON AND SPINKS.

*Succession—Fee—Liferent—Intestacy.*

A testator left his whole estate to his two surviving daughters "during their lifetime, share and share alike," and appointed two trustees "to see the provisions of this my will carried into effect." He was predeceased by a daughter who left one child. *Held* that the testator conferred only a liferent on the surviving daughters, and died intestate as regarded the fee of his estate.

Thomas Spinks, watchmaker, Edinburgh, died on 24th March 1893 leaving a settlement in these terms—"I will and dispose of all my money, goods, chattels, household property, furniture, merchandise, stock-in-trade, and all my earthly belongings, etc., in favour of my daughters — Margaret Galloway Spinks, and Alexandrina Ramsay Spinks, during their lifetime share and share alike. I hereby appoint the following trustees to see the provisions of this my will carried into effect—John Beveridge, residing at 3 Comely Green Crescent, Edinburgh, and Alexander Miller, residing at Queensberry House, Edinburgh." The trustees accepted office as executors and were confirmed. Mr Spinks was predeceased by