[Heard 21*st March*. Judgment, 4*th September*, 1844.]

JOHN STIRLING, of London, and the RIGHT HON. ARCHIBALD LORD DOUGLAS, *Appellants*.

ROBERT EWART, ESQ., of Allershaw, *Respondent*.

Superior and Vassal.—Non-Entry.—Tailzie—Found that a superior having granted a charter under the procuratory in a strict entail, and received a year's rent on the entry of the first party taking under the investiture, is not entitled to a similar payment on the entry of subsequent heirs of entail, not heirs of line of the party last entered, on the ground that they are singular successors; but that he can claim only the relief duty payable on the entry of an heir, and this notwithstanding the superior, at granting the first charter under the entail, may have inserted in it a clause declaring that the granting of the charter should not exclude his claim to a year's rent, whenever the heir asking an entry should not be the heir of line of the person last entered.

ON the 20th day of July, 1802, Grizel Ewart executed a disposition and deed of entail of her lands of Allershaw, whereby she granted procuratory of resignation for resigning the lands in favour of herself in life-rent, and William Cosser, her second cousin, and the heirs male lawfully to be procreated of his body in fee, whom failing, to David Robertson Williamson Ewart, and the heirs male lawfully to be procreated of his body, whom failing, to Robert Ewart, grandson of Dr. Robert Ewart, and the heirs male lawfully to be procreated of his body, whom failing, to any person or persons to be named and appointed, in any nomination or other writing, to be granted by the said Grizel Ewart, at any time of her life.

In 1811 Grizel Ewart died; William Cosser then took up the succession under the deed, and on the 24th Nov., 1813, William Stirling, the superior of the lands, gave him a charter

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of confirmation and resignation which proceeded on the procuratory of resignation in the deed of entail, and conveyed the lands to him under the whole prohibitory, irritant, and resolutive clauses of that deed under a declaration in these terms, "declaring that by granting these presents, we shall not exclude ourselves or our heirs or successors from any claim "which we or they may have at law to a full year's rent of the "lands herein contained, whenever the heirs of entail to whom "the succession shall open shall happen not to be heirs of line "of the person who was last entered and infeft by us or our "foresaids."

Cosser, who was not the heir at law of the entailer, obtained this charter as a singular successor, and paid the superior at his entry a full year's rent of the lands.

Cosser died without heirs male, and without having executed the procuratory or precept in his charter, and he was succeeded by David Robertson Williamson Ewart, now become Lord Balgray, who was served heir of tailzie and provision, and in October, 1818, took infeftment under the precept in Cosser's charter.

Lord Balgray died in 1837, without heirs male of his body, and the succession then opened to the respondent, who, in August, 1837, expede a general service as heir of tailzie and provision to Lord Balgray.

In 1837 the appellants required the respondent to enter with them as superiors, and to pay the usual composition on the entry of a singular successor. The respondent refused to pay more than double the yearly feu duty, and thereupon the appellants brought against him a declarator of non-entry.

The appellants pleaded, in support of their action, that they were not bound to give the respondent an entry as vassal, except on condition of his paying a year's rent of the lands, and having refused to pay it, they were entitled to a decree of non-entry against him.

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The respondent pleaded that, as he had succeeded as heir of the existing investiture, he was entitled to an entry as such.

The Lord Ordinary ordered cases, and upon advising these papers, made avizandum with the cause to the Court, accompanying his interlocutor with the following note:—

" *Note.*—The Lord Ordinary reports this case as involving a " question long agitated between superiors and heirs of entail, " and which is now prepared for the consideration of the Court, " on papers of great research and ingenuity.

" The pursuers are undoubtedly superiors of the estate of " Allershaw. This estate belonged in property to Miss Ewart, " who, in 1802, executed an entail, whereby she destined it " under strict fetters, *first*, to William Cossar and the heirs-male " of his body, whom failing, to the late Lord Balgray and the " heirs of his body; whom failing, to the defender, Robert " Ewart and his heirs-male.

" Miss Ewart died in 1811, and was first succeeded by Mr. " Cossar, who got a charter in 1813, from the superior; but as " he was neither heir-male nor heir-of-law of Miss Ewart, Cossar " paid a full year's rent for his entry. The charter was qualified " with the *reservation*, inserted, it is believed, for upwards of " half a century in the greater part of tailzied fees, that the " superior, by the grant then made, should not be excluded from " any claim ' which we or our foresaids may have at law, to a " ' full year's rent of the lands herein contained, whenever the " ' heirs of entail to whom the succession shall open, shall " ' happen not to be heirs-of-line of the person last entered and " ' infeft by us and our foresaids.'

" Mr. Cossar did not take infeftment on his charter, and " having died in 1817, Lord Balgray was infeft on the precept " still unexhausted in the first charter. On Lord Balgray's " death without issue in 1837, the succession under the tailzie " opened to the present defender. It is admitted that the " defender is not an heir-of-line, nor in any way lawfully con-

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" nected, either with Lord Balgray, or even with the entailer " Miss Ewart.

" In these circumstances, the tailzied fee having become " vacant, and the succession having opened to a stranger heir " and disponee, the question arises, whether the superiors are " entitled to demand a casualty of a full year's rent from the " defender? It is not a little remarkable that the present should " be the first instance in which this question has been presented, " free from any specialty, for the consideration of the Court, " since the well-known case of Lockhart and Denham in 1760. " Now that it has occurred, it is entitled, from its importance in " practice, to the most deliberate consideration.

" On a deliberate consideration of the whole case, the Lord " Ordinary must own that he finds it difficult to resist the argu- " ment of the defender, and the various authorities by which it is " supported. That indeed appears to be founded chiefly on the " view of the same question taken by Lord Corehouse, in a very " learned note attached to his interlocutor in the case of the " Duke of Hamilton against Baillie, reported in 1827 (6 *Shaw*, " p. 94). Though a specialty occurred in that case, sufficient for " the disposal of the superior's claim, his Lordship delivered his " opinion on the abstract question as to the superior's claim in " general, under a tailzied investiture, in terms which shewed " that he had very anxiously considered the point. The views " briefly indicated in that valuable note, are elaborately enforced " in the revised case for the defenders, the fulness and length of " which are amply atoned for by the able and satisfactory expo- " sition of the argument and authorities that it contains. The " Lord Ordinary shall now explain, as shortly as the nature of " the question admits of, the grounds on which he has come to " the conclusion, that the defender's plea is well founded in law.

" It does not seem necessary in the present inquiry to enter " into any disquisition on the original or early history of feus. " Although the general tradition is probably correct, that fiefs

" were originally granted by military adventurers to their fol-
" lowers, at first for life only, and afterwards to their heirs-male,
" it is notorious that, with us, feus have for many centuries been
" descendible to heirs whatsoever. *Reg. Majest.* B. ii. sec. 25,
" &c., &c.

" When rights of property became thus fixed and inheritable,
" the superior was of course obliged to enter the heir of the
" investiture on payment of the ordinary relief duty. Hope, in
" his *Minor Practicks* (tit. 4, sec. 21), describes the course which
" was competent to the heirs of vassals to compel subject-
" superiors to give this entry. A retour was expede, after which
" a precept issued from Chancery to compel the superior to enter
" the heir, and if he refused, the vassal was entitled to apply to
" the Crown for an entry.

" While these provisions, however, were early fallen upon
" for securing the descent of feus to the heirs of the vassal, the
" superiors had influence to preserve in force restraints on the
" alienation and transmission of land altogether prejudicial to
" the improvement and prosperity of the country. Although
" these limitations evidently arose from the original destination
" and purpose of feus, the reason for them ceased when these
" became hereditary in the families of vassals; but as their
" maintenance increased the casualties exigible by superiors, it is
" not extraordinary that they were continued in the earlier
" periods of our legislation, when the interests of commerce were
" of little importance and ill understood. But at length, in
" 1469, the Statute was passed allowing land to be comprised
" by creditors for debt, and obliging superiors to give an entry
" to the apprisers for payment of a year's rent. This (as ex-
" plained in the *Minor Practicks*, tit. v., sec. 16), indirectly
" enabled purchasers to change the old investiture and to com-
" plete their title, because they always had it in their power to
" comprise the lands for the price, and so to bring their case under
" the Statute. It is true that superiors had an option, by the

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" Act 1469, to take back the feu on paying the whole debts of " the vassal; but when the debts were large, or where the price " was adequate, a superior had no object, and often was not " able to exercise the option. In practice it does not appear " ever to have formed any serious obstacle in the attachment " and transmission of land, when apprisers were willing to " account fairly to the superiors for the year's rent.

" When creditors or purchasers raised and obtained a com- " prising under this Statute, it is supposed that they could com- " petently assign it to such persons, or their heirs and assignees, " as they chose. No authority is to be found for holding that a " new vassal appriser could not make the new investiture in " favour of such persons as he chose. More especially, there " appears to be no example of the superior being entitled to " name the heir of an appriser, and no principle of law was in " force in the fifteenth century, or after it, establishing that " apprisers could be limited in the selection of their heirs, or " forced to take a charter to heirs whatsoever instead of heirs " male, or to the latter instead of heirs of provision voluntarily " selected by him. The contrary is strongly indicated by *Stair*, " B. 2, t. 3, sec. 43.

" It is true that the remedies and rights of *creditors* and " *purchasers* apprising, do not apply to the case of stranger heirs " claiming under *mortis causa* settlements and tailzies of a de- " ceased fiar. But it is probable that such settlements, without " some arrangement and agreement with superiors, were not of " very frequent occurrence for many years after 1469. It was " only in 1540 that the practice of authenticating deeds by seal, " without the subscription of the party, was abolished, which " shews that skill in writing was not before very generally " diffused; and though it certainly appears from Balfour's *Prac-* " *ticks* (finished about 1580), that *tailzies* or destinations of a " certain description were known in his time, the inference " deducible from what he says is, that superiors, in general and

" in practice, accepted of new heirs without any hard exaction;
" probably from the consideration that the casualties payable by
" a new set of heirs would be as lucrative to the superior as the
" casualties from the old series.

" But, as the country advanced, the Supreme Court assumed
" such powers as were necessary to give effect, as far as possible,
" to all rights of property. Hence the process of adjudication
" before this Court seems to have been introduced at an early
" period, by *usage* alone, without the authority of any Statute.
" Accordingly, the Statute 1621, cap. 7, refers to adjudications
" against heirs lying out for debt, as a proceeding then in com-
" mon use in the Supreme Court; and it gives all co-creditors of
" the proprietor, as well as to the first adjudger, a right to
" redeem or require possesssion in the order of their adjudica-
" tions. At the same time this process before the Supreme
" Court was not limited, even at an early period, to adjndica-
" tions for *debt*, but came to be sanctioned for the enforcement
" of irredeemable conveyances. The earliest example of such an
" adjudication seems to be the case of Johnston *v.* Carmichael,
" in 1611, mentioned by Lord Stair, in treating of dispositions
" (B. III., t. 2, sec. 53), and various other cases occurred soon
" after, as appears from the *Dictionary* (p. 54, *voce* Adjudi-
" cations), in which the Court gave decrees of adjudication in
" favour of parties holding absolute and irredeemable conveyances
" to lands. Accordingly, at the time that Sir George M'Kenzie
" wrote his *Institutions*, he mentions adjudications as in general
" use before the Supreme Court, and especially refers to adjudi-
" cation in *implement* for making dispositions effectual; and adds,
" that 'the Lords will adjudge the lands disponed to belong to
" 'the pursuer a *remedium extraordinarium*, there being no other
" 'remedy competent. This adjudication extends no farther
" 'than to the thing disponed, and *hath no reversion*.'—*Institu-
" tions*, B. II., t. 1, 2.

" In that way, stranger disponees and heirs of provision had

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" a compulsitor for obtaining infeftment from superiors, without " being liable even for a year's rent, by giving them a charge to " enter disponees on decrees of adjudication taken before this " Court, and as the Act 1469 applied only to parties following " the ancient course of *apprising* before the Sheriff, and not to " adjudgers before this Court, the superiors for a long time had " no authority for exacting a year's rent. This, however, was " remedied by the Act 1669, c. 18, which declared, that supe- " riors should be entitled to a year's rent for entry of all ad- " judgers, as well as apprisers; and from that period ad- " judgers, both for debt and in implement, before the Court of " Session, as well as creditors and purchasers apprising under " the old form, were held liable for a year's rent and no more. " This is clearly stated by Lord Stair as the rule, when his " *Institutions* were first published in 1681. As he says (B. II., " tit. 4, sec. 32),—' The Statute (1469) was by custom extended " ' to adjudications, being the same in effect, but different in form " ' from apprisings; for the design of the Statute being to satisfy " ' creditors by judicial alienation of the debtor's lands *ex pari-* " ' *tate rationis*, it was extended against the debtor's appearand " ' heir, who being charged to enter heir, did not enter; and " ' therefore lands were adjudged from him, to which he might " ' have entered, either for his predecessor's debt or his own; " ' whereupon the superior is decerned to receive the creditors " ' adjudgers, whether for sums of money, or *for implement of* " ' *dispositions and obligements to infeft.*' But the custom allowed " ' not a year's rent to superiors for receiving adjudgers, 21st " ' July, 1636, Grier., till the year's rent was also extended to " ' adjudications by Act of Parliament, *Dec.* 3, 1669.'—See first " edition of *Stair*, vol. 1, p. 305.

" Thus, in practice, all vassals were enabled, long before " 1685, to change the old investiture of their estates, and to " establish a new investiture under the superior, by paying him " a year's rent. That high composition was the utmost extent

" of the superior's claim for changing the investiture, and there " is no indication in any of our authorities, that superiors, after " the rights of property and inheritance were well understood, " had any control over vassals in the destinations they made, or " in the number of substitutions under which they chose to " settle their fees. The limitation necessarily imposed on vassals " consisted in this, that substitutions (which truly are special " assignations), fell all to be fixed *before infeftment*.—See *Stair*, " B. II., t. 3, sec. 5.

" Indeed, the ancient custom and the right of vassals to alter " subsisting destinations and tailzies, and to make new ones, is " mentioned very clearly by Balfour in a chapter before referred " to (pp. 173, 174). It is well known, also, that the same " doctrine has been confirmed by more recent cases of unques- " tionable authority, as in those of Captain Johnstone against " the Marquis of Annandale, in 1759 (*Dict.* p. 4356); and in " that of the Magistrates of Aberdeen against Burnett in 1808 " (App. *voce* Superior and Vassal, No. 5), both referred to " in the papers in the present case. And therefore, when a fee " was once settled, and an entry given for the usual composition " under a new investiture; the substitutes became heirs of pro- " vision, and in fact *members of the investiture*, and the superior " could demand no more for the entry of any succeeding substi- " tute than the ordinary relief duty exigible from heirs of inves- " titure.

" These views are not inconsistent with the doctrine of Craig " and others, that tailzies could only be made *with consent of the* " *superior*. In one sense this was correct. Heirs of tailzie not " *alioqui successuri*, certainly could not demand an entry as *ordi-* " *nary heirs*, without the consent of the superior. But some time " elapsed in the early history of the law, before the operation and " effect of the process of adjudication, whereby heirs of provision " and disponees could compel an entry from the superior, under a " new institution, on an absolute and irredeemable disposition,

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" were well ascertained. Craig (whose treatise was published in " 1602), expressly states that that process was unknown to his " predecessors, and Lord Stair observes (B. III. t. 2, sec. 45), " that 'adjudications being but recent in his (Craig's) time, and " ' few decisions thereupon, the nature and effect of it was but " ' little known, but is now in course of time farther illustrated.' " When it was afterwards found, therefore, that adjudgers had it " in their power to obtain an entry by payment of a year's rent, " it is not strictly correct to say that a tailzie could not, at least, " *by due process of law*, be made effectual without the consent of " the superior. Indeed, the competency of an adjudication by " heirs of tailzie, is distinctly explained by Lord Stair (B. II., t. " 3, sec. 43.)

" The Act 1685, giving validity to entails, certainly did not " extend the rights of superiors. The object of it was to secure " and render permanent the tailzied destinations in previous use, " by giving effect to prohibitory, irritant, and resolutive clauses, " but while it declared that superiors *should not be prejudged* of " their casualties, it did not enact that any new casualties should " be leviable from heirs of tailzie, which could not have been " demanded from heirs of investiture, according to the former " practice.

" It would appear, however, that superiors and their agents, " very soon after 1685, took up the notion that they might set " up a claim for a composition from every substitute of tailzie who " was not heir-at-law of the preceding possessor of the estate. " Accordingly, a clause to that effect was inserted in a charter " granted soon after 1711, by Mr. Lockhart of Carnwath to Sir " Archibald Denham of Westshiell (the first substitute under " the tailzie), though on every occasion the superior got a com- " position from the vassal as a singular successor. That charter " was reduced on a ground immaterial in the present question; " but the next substitute, Sir Robert Denham, got a new " charter in the same terms, the superior being allowed to retain

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" *the old composition.* Then, when a third renewal of the in-
" vestiture was required in 1760, in favour of the substitute who
" then succeeded, he not being the heir *alioqui successurus*, the
" superior demanded a second composition, which the Court
" repelled, 'in respect the pursuer had acknowledged the entail
" 'by granting charter and infeftment thereon to the late Sir
" 'Robert Denham.'

" It rather appears to the Lord Ordinary, that the real mean-
" ing of the Court in the preceding decision has been sometimes
" misunderstood, perhaps because the *ratio* set forth in the inter-
" locutor is not expressed with due accuracy and precision. It is
" not easy to understand how a superior could be said to have
" acknowledged an entail, merely by granting a charter contain-
" ing the very express reservation, which appears on the face of
" both the charters in the Westshiel's case; but when it is
" attended to that the superior had, prior to granting the first
" charter, received the *composition of a singular successor*, for the
" entry and acknowledgment of the first heir under the tailzie,
" he was thus properly barred from claiming a new composition
" from a succeeding heir of the *investiture*, which he had already
" acknowledged for the highest legal consideration that the law
" gave him a right to exact. In other words, he had acknow-
" ledged the entail for an onerous consideration; and no reserva-
" tion could give him any farther claim; as it was on its face a
" reservation of a demand plainly illegal and unjust, and not
" effectual against heirs of entail, as they did not represent the
" party who had acquiesced in its insertion in the primary char-
" ter. In that view, the case of Denham is an authority
" decisively in favour of the defender in the present case.

" It is obvious also, that the late cases are not opposed to
" the preceding decision. In the case of M'Kenzie, in 1777,
" the heir of entail who demanded an entry, being the heir
" *alioqui successurus* of the party deceased, refused to pay the
" composition of a singular successor; and the Court held that

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" he was entitled to an entry for the ordinary relief duty of an " heir, ' reserving to the superior and his successors in the supe- " ' riority, any right which they may have to a year's rent on the " ' entry of any future heir of tailzie *not an heir* of investiture " ' prior to the tailzie.' It is almost implied in this reservation, " that the payment of a composition by any substitute of entail " as a singular successor, would exhaust the claim of the supe- " rior, as the tailzied destination would then be acknowledged by " him for the legal consideration exigible on a change of investi- " ture. Accordingly, in the deliberations on the Bench, in " M'Kenzie's case, Lord Braxfield made this important observa- " tion, that ' the granting of the first charter is an enfranchise- " ' ment of all the subsequent disponees.'

" The case of the Duke of Argyll *v.* Lord Dunmore, in 1798 " (*Dict.* p. 15,068), was certainly different from the preceding; " for there the institute of tailzie who demanded an entry was " confessedly a *singular successor;* and having offered the year's " rent, he was entitled, according to the view of the law now " taken, to insist on an unqualified entry of the whole tailzied " destination; but as Lord Dunmore, who then demanded an " entry, had a family of his own to succeed him, he was probably " advised that the superior's contingent claim might never arise, " and therefore he declined to try the question, farther than to " insist on the superior's future claim being *reserved*, in case it " should ever emerge; and the Court found that the superior was " not entitled to demand more at that time, in consequence of " which the determination of the question which here occurs, was " of course superseded.

" The late case of the Duke of Hamilton against Lord Hope- " toun (8th March, 1839), is also referred to in the present ques- " tion; and certainly there are some expressions, in the opinion " of the consulted Judges in that Report, which at first sight " might afford an inference in favour of the superiors' argument " here; but truly the plea now raised was altogether unneces-

" sary in that instance. The superior had granted a charter in " the ordinary terms to a purchaser, and his heirs and *assignees*. " No special substitution was set forth in the charter; but the " vassal having got the charter in the preceding general terms, " assigned it in his son's contract of marriage to his heirs male " and other heirs of tailzie, excluding heirs of line. As the " superior was not a party to the assignation, it was contended " that he had given no consent to the new investiture, and was " not bound to give a new investiture under it, without a new " composition. But it was held sufficient for the determination " of the case, to state that, in any view of a superior's right, a " purchaser was entitled to substitute all his own heirs in any " order he chose, without the superior's consent. The question, " whether he could not have insisted on a new investiture being " granted to any series of heirs of provision he chose to substitute, " at the very time the charter was taken out, was of course not " decided by the Court, but was reserved for consideration when " the case should occur.

" Now, however, that the question arises under circumstances " which render its decision unavoidable, the Lord Ordinary, on " the grounds already detailed (perhaps at too much length), is " humbly of opinion, that the superior having already received a " composition for the entry of the first disponee under the present " tailzie, and having thereby acknowledged the entail for an " onerous cause, is bound to enter the defender as an heir of the " subsisting investiture, for the ordinary relief exigible from an " heir.

" The Lord Ordinary has the less hesitation in coming to " this conclusion, when it coincides so entirely with the opinion " expressed by Lord Corehouse in the case of Baillie in 1827, " before referred to. His Lordship remarked, most properly in " that case, that if superiors were entitled to a casualty in every " transmission of a tailzied fee to a stranger substitute, 'it would " ' make a tailzie greatly more preferable to a superior, than a fee

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" ' simple.' It may be added, that when a proprietor, by follow-
" ing out implicitly the directions of the Act 1685, may make the
" tailzied fee perpetual in his own family, or to his own kindred,
" by a destination to the vassal, and his heirs whatsoever, always
" secluding heirs portioners, it is very difficult to see how the
" condition of the superior can be made worse by any special
" substitution of stranger heirs, any more than it would have
" been by the perpetual inheritance of the heirs-at-law.

" It deserves notice also, that the Act of Geo. II. enabled
" vassals to change their old investitures, by executing procura-
" tories of resignation in favour of such disponees as they thought
" proper, on which they were entitled to give a charge to the
" superior to enter them on payment of the customary casualties
" exigible from the heir or purchaser. If the charge was in
" favour of a singular successor, and a specified series of substi-
" tutes *in fee-simple*, it never was supposed that the superior
" could object or claim a new composition from any of the substi-
" tutes allowed to succeed under a simple destination unfenced with
" irritant and resolutive clauses. There appears to be no pretence
" for such a claim under the ancient law of Scotland. Is the
" claim, then, the more maintainable that the institute under a
" tailzied investiture, purchased from the superior, has succeeded
" by the protection of irritant and resolutive clauses? There
' appears to be no room for any distinction.

" This certainly raises the question suggested towards the
" close of Lord Corehouse's note in Baillie's case, whether the
" superior is not entitled to ' an equivalent for admitting a con-
" ' dition into the charter *which destroys the chances of singular*
" ' *succession in* future;' while his Lordship most naturally adds,
" ' that it is very difficult to put a value on that chance.' It
" humbly appears to the Lord Ordinary, that any claim of the
" superior on this ground is altogether inadmissible and con-
" trary to principle. It is established by the writings of all the

" great lawyers of the seventeenth century (including Hope, " M'Kenzie, and Stair), that tailzies, at least with prohibitory " clauses, and often with irritant and resolutive clauses, were " known long before 1685. These conditions laid the vassals " under a certain obligation, in honesty and good faith to respect " the tailzie, and they were effectual against gratuitous alienation, " though possibly not sufficient to exclude the claims of creditors; " the superior was also bound to insert these prohibitions in his " charter, it being remarked by Lord Braxfield, in M'Kenzie's " case, that a superior 'was always obliged to grant a charter " 'with *prohibitory clauses.*' This being the case, it would be " alike anomalous and unusual to give superiors a compensation " to any extent, merely because a law was passed making prohi- " bitions long sanctioned, and held obligatory *inter hæredes*, more " operative and secure, it being quite clear that vassals were pre- " viously entitled to frame such prohibitions, and that superiors " *ab antiquo*, were bound to repeat them in their charters. In- " deed, when an investiture of old was once established under a " superior, the principle and bearing of the feudal system was, " rather to retain the vassal and to maintain the rule *de non* " *aliendo*, than to enable the superior to make a profit by its " violation.

" This point was briefly adverted to in the opinion delivered " by the Judges in the late case of the Duke of Hamilton against " Lord Hopetoun, already referred to. The consulted Judges " stated, that they were 'not aware of any ground on which a " 'superior can be held bound to admit clauses irritant and reso- " 'lutive into the investure on payment of a composition or " 'casualty of one year's rent, or on which he can claim such a " 'casualty on account of having admitted such clauses.' But it " was added, that the claim of the superior on that ground was " excluded by the form of that action, and if so, it is equally " incompetent in the present case.

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" In every view, therefore, if the Lord Ordinary had given " his own decision in this case, he would have been disposed to " sustain the pleas of the defender."

The Court, after hearing counsel, ordered the cases to be laid before the other Judges for their opinions, which were delivered in the following terms:—

" We are of opinion that the pursuer is bound to enter the " defender upon the terms offered by the latter, viz. on payment " of *a year's feu duty* in name of *relief* as in the ordinary case of " the entry of an *heir*; and that he is not entitled to demand a " *year's rent*, in name of *composition*, as in the case of the entry " of a *singular successor*.

" We come to this conclusion upon the general ground, that, " where the superior, as in the present case, has already received, " upon the *change of investiture*, the composition of a year's rent " at the entry of the first member of entail not being heir of the " *previous investiture*, he is bound throughout to deal with the " entail as the *existing investiture* of the estate; and to carry out " and give effect to the destination therein contained, as *the rule* " *of that investiture* in regard to *succession*,—and consequently " to receive the whole series of substitute heirs (*without distinc-* " *tion of one from another*), as the line of succession thus fixed " respectively opens to each in the express character, and as " entitled to all the privileges and rights of *heirs of the investiture.*

" In other words, we adopt unqualifiedly the doctrine of " *Erskine*, II. 7, 7, as a correct statement of the rule of law " applicable to this question; that 'though singular successors, " ' whether adjudgers or voluntary purchasers, are liable in pay- " ' ment of a year's rent to the superior for changing the former " ' investiture; yet, where a proprietor entails his lands, the " ' superior is not entitled to the composition of a year's rent " ' from every successive heir of entail, who is not heir of line to " ' him who stood last infeft, on pretence that he is a singular " ' successor. *The heir of the last investiture cannot be called*

" ' *a singular successor*, and he is founded in a right to demand " ' an entry, upon payment to the superior of the sum due to " ' him by law, in name of relief, upon the entry of an heir.'

" Accordingly, had it not been for *the clause of reservation*, " which the superior in the present case inserted in his charter of " resignation, it is altogether indisputable that every successive " heir of entail, whether heir of line to him who stood last infeft " or not, must have been received and entered upon this footing. " The pursuer himself concedes this. It was for the express " purpose of avoiding such a result that the clause of reservation " was resorted to. And it had been the same in all the former " cases: For example,

" In *Lockhart v. Denham*, 10*th July* 1760 (*Dict.* 15,047), the " Court, even in the face of an express clause, which, if the report " be correctly stated, had been embodied in the charter, ' that " ' every heir of entail shall be *obliged* to pay a year's rent for his " ' entry, unless he be at the same time heir of line to the person " ' who died last vest and seized:' ' FOUND, that, in respect the " ' pursuer had acknowledged the entail, *by granting charter and* " ' *infeftment thereon*, he was obliged to enter the defender *as* " ' *heir of entail*, and not as singular successor.'

" So, in *M'Kenzie v. M'Kenzie*, 4*th July* 1777 (*Dict. v.* " *Superior and Vassal, Appendix, No. II.*), the Court, doubting, " it is true, whether the judgment in Lockhart's case might not " perhaps have gone too far, in refusing effect to the clause just " quoted (which, in one sense, it might be contended, was made a " positive condition of the new investiture, and as such, while it " remained unreduced, ought to have received effect against all " claiming right through that investiture), had still no hesitation " as to the general doctrine,—That, were the entail once to be " embodied in any charter to be granted by the superior, *without* " *some express clause qualifying this recognition, and reserving the* " *superior's rights*, the whole series of substitute heirs—no matter " how much strangers in blood to each other—must become from

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" that moment *heirs of the investiture*, and *quâ* such would be " entitled to an entry, not as singular successors, but *as heirs*. " In point of fact, in this case nothing was *decided*: and in order " to solve the difficulty, the question was *kept open* for future " discussion. But a reservation—saving the legal rights of both " superior and vassal—was inserted in the judgment, just because " the Court felt that *otherwise* an unqualified charter would, " by *force of the law itself*, entitle a *stranger* to enter *without* " *paying a composition*.' Indeed nothing can be more instructive " on this head than the words of *Braxfield*, as they are reported " by *Hailes*. 'QUERY—May not the superior throw in a reser- " ' vation? If he does not, he cannot afterwards claim; for the " ' granting of the first charter is *the enfranchisement of all the* " ' *subsequent disponees*.'

" The case of *Duke of Argyle v. Earl of Dunmore*, 19*th* " *November*, 1795 (*Dict.* 15,068), is to the same effect. The " superior there insisted, that it should be made an absolute " *condition* of the entail investiture, ' that he should not be " ' obliged to enter such of the substitutes as were not heirs male " ' or of line to the vassal last entered and infeft, without receiv- " ' ing a year's rent from them, as singular successors also;' and " he did this, '*because*,' as he argued, after acknowledging an " entail, '*by granting a charter upon it*, although it contained the " ' reservation proposed by the defender,' (one similar to that in " Mackenzie's case,) ' he would be *precluded from making his* " ' *present claim*.' But the Court refused what the superior thus " demanded; and ' in respect the reservation proposed by the " ' vassal leaves the question entire when it shall occur,'— " ordained the charter to be given upon that footing.

" At last, the precise question occurred, under a charter, " which had been granted without any special clause, either of " reservation or obligation, in the superior's favour: *D. Hamilton* " *v. Baillie*, 22*d Nov.* 1827 (6 S. D. 94.) The superior endea- " voured to shake himself rid of the implied recognition, by

" pleading that the charter had been granted *a non habente potes-*
" *tatem* to that effect, and that he did not represent the granter,
" —but this again was met by the answer, that the investiture
" had since stood unchallenged for more than forty years, and so
" was fortified by prescription :—and the Court had to dispose of
" the point immediately before it, as if the charter had been
" validly granted from the first. It was held that the entail
" having been *simpliciter* recognised, and embodied into the
" investiture, the superior, who had 'refused to receive as his
" 'vassal a party claiming entry as an heir of entail under the
" 'charter—*except in the character of singular successor*, and on
" 'payment of a year's rent,—*was bound to enter him as heir.*'

" Whether, therefore, the superior may at first refuse to grant
" a charter embodying a tailzied destination,—or whether, grant-
" ing it, he may be entitled so to qualify the right, as to leave it
" open to him afterwards, to insist, on a departure from the direct
" lineal line, for all that he might competently have demanded,
" had he originally refused,—may or may not be made a ques-
" tion. But it is settled law,—as regards every charter wherein
" the tailzied destination shall once unqualifiedly have been
" embodied—that under that destination, all are to be received
" as *heirs*, and that no distinction whatever can be taken among
" those heirs, as being, some, *heirs of line*, and some, *strangers*,
" to the vassal last infeft—the investiture alone affording the
" rule of succession in the fee—and all being alike *heirs of the*
" *investiture.*

" Without proceeding farther, then, we think this sufficient of
" itself to expose the whole fallacy of the pursuer's reasoning,
" inasmuch as his argument appears to assume throughout, that,
" whoever is not an *heir of line*, must, of necessity, in the eye of
" law, as applied to the constitution and construction of feudal
" rights, be regarded and dealt with as if he were a *singular*
" *successor.* The truth is, that in feudal succession, the very
" question, Who is heir *of line?* can never to any practical effect

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" arise, unless where the feu-right itself is conceived in favour of " heirs of that class. The essential question always is, Who is " heir of the *investiture?* Indeed, even where the investiture is " in favour of heirs of line, it is only as being heirs of the inves- " titure thus conceived, that the heirs of line themselves succeed.

" Nor is it out of place here to remark, that this view of the " matter seems also to dispose of the pursuer's argument, upon " the supposed reservation of the superior's rights as connected " with the present question, contained in the statute 1685, intro- " ducing and authorizing strict entails. For, if it were, indeed, " *vi statuti*, that the superior's rights were saved, it could require " no special clause of reservation, *ex pacto privato*, to be engrossed " in the tailzied investiture in order to work out that end. In " such case, a clause of this kind would be mere supererogation. " The entail itself, as it is constituted into a legal right only by " force of the statute, must of necessity have carried the statutory " reservation along with it, as parcel of the right, if not, indeed, " an express condition of its existence. Since, therefore, the law " holds that, notwithstanding the statutory reservation, there is " nothing whatever saved to a superior, who simply obeys the " statute by giving a charter unqualified *in græmio*, it follows, " that it is not by force of the statute, but by force of some " express clause embodied in the writ,—in other words, by the " positive private stipulation of the parties *inter se*,—that the " superior's rights in this respect are to be saved, if, indeed, he " have any legal rights belonging to him in the matter.

" This brings the whole question to the point,—Is or is not " the superior entitled to refuse a charter, where the vassal " demands an investiture entailing the feu?

" In the *first* place, there is nothing in the mere circum- " stance of the estate's being settled *under the fetters of a strict* " *entail*, which entitles him to refuse. The entail may be fenced " in the most effectual manner with all the clauses authorized by " the act 1685, and, *provided the destination do not extend beyond*

" *the body of lineal heirs*, the superior has no choice. This the " pursuer concedes; and it is the necessary consequence, besides, " of all those cases, wherein the superior has been ordered to " embody the tailzied destination, with no other reservation but " one affecting the succession of substitutes, who appear to be " *strangers* to the direct line. As laid down by Braxfield in " *Mackenzie's* case, 'strip the deed of substitution to *strangers*, and " '*the superior might be obliged to grant a charter, even with* " '*prohibitive clauses*, &c. The superior does not suffer by the " 'line of succession being continued.'

" Nor is this the case only, where the direct lineal line of suc- " cession is preserved. The destination may even be broken in " favour of *strangers to this line*,—and still, if the destination thus " broken and interrupted in favour of strangers was also the des- " tination of the *prior investiture*, it may be changed from a " fee-simple to a strictly fenced entail destination,—and (as was " substantially decided in Mackenzie *supra*) the superior be " obliged to grant a charter *in terminis*, and to receive even the " stranger substitutes as the *heirs* of investiture, notwithstanding " the change effected through the fee's being now constituted into " a proper tailzied fee.

" But, if it be thus true, that the superior's right of refusal in " no respect depends upon the circumstance, that the estate has " been tied up from future alienation, by the fetters of a strict " entail, it must be upon some ground wholly apart from the " operation of the statute 1685, that that right, if such indeed " there be, must rest. In other words, it must rest upon some " ground, applicable not less to an ordinary destination in favour " of *heirs of provision* before the statute, than to the most strictly " fenced and protected destination in favour of *heirs of entail* " since.

" This would, indeed, give a very large and indefinite opera- " tion to the principle contended for by the pursuers. For it " would just come to this, that wherever—no matter whether by

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" strict entail, in fee simple, or under clauses merely prohibitory " and therefore defeasible at pleasure—the legal order of succes- " sion should come to be in the slightest degree broken in upon, " the superior might reject the destination as an encroachment on " his feudal rights, and refuse a charter.

" It is difficult to conceive that so very broad and wide- " spreading a principle as this should have been the law, and a " question for the first time come to be stirred in regard to it, " under the Statute 1685. Conjunct fees,—destinations to heirs " of a marriage,—the succession of heirs of provision generally, " —in short, every case where land came to open in favour not " of the *hæres natus*, but the *hæres factus*, must equally have " raised the question under this more general aspect. But we " are not aware of a single instance, among all these classes of " cases, where a mere departure in the destination from the " direct lineal order of succession was ever set forward as a ground " entitling the superior to refuse a charter.

" The principle, indeed, is excluded by that very case of " *Duke of Hamilton v. Earl of Hopetoun*, 8*th March*, 1839, with " reference mainly to the bearing of which the present consulta- " tion has been thought necessary. It was there expressly laid " down in the opinions, that, 'a purchaser of land from the vas- " 'sal of a subject superior is entitled, on payment of a casualty, " 'or composition of one year's rent, to obtain from the superior " 'a new charter, and a precept of sasine of the fee. This char- " 'ter and precept, we think, he is for that composition entitled " 'to demand, shall be granted in favour of himself and all his " 'heirs-at-law, in any order of these heirs he pleases, provided " 'only he shall not in this destinction go beyond his heirs-of- " 'law to strangers. He may equally name to the superior heirs- " 'of-law simply, or heirs-male, whom failing, heirs-female, or " 'any other arrangement of the body of his heirs-of-law.'

" It is very true that the opinion thus delivered is qualified " by the proviso that the vassal 'shall not in this destination go

" ' beyond his heirs-of-law to strangers.' But this, it is thought, " must be held to have been introduced merely to save and keep " open a case which was not at the moment before the Court. " The particular destination there to be dealt with was one which " did not go beyond the body of the heirs-of-law, and it was of " course right to confine the judgment to the individual destina- " tion on which the question had arisen.

" The important consideration, as regards the judgment " actually pronounced is, that it completely negatives the pur- " suer's main position in the present case, viz., that the superior " is entitled to refuse a charter, wherever the destination calls " the substituted heirs in other than the *direct line of blood*,— " and this upon the general principle, that every one who would " not take *as an heir* in the common order of law, must of " necessity be dealt with *as a singular successor*.

" In this respect, indeed, we can recognise no distinction " whatever, *in point of principle*, between a departure from the " legal order of succession within 'the body of heirs-of-law,' and " a corresponding departure by going out of that body. If the " pursuer be right in his argument, that a substitute heir, who is " not heir of line to the last entered vassal, must be held a sin- " gular successor, because the destination in such a case substan- " tially operates *a conveyance* from the last heir, and is not in the " proper sense to be dealt with as at all a legal *succession*—this " applies in its full force wherever the order of law is broken in " upon in the least degree. If a father *convey* to a second or any " younger son,—or one of several brothers to a sister,—the dis- " ponee, in such case, must enter and pay composition as a singu- " lar successor, although 'within the body of the granter's heirs " ' of law.' So, if a father or brother in the two cases supposed, " take a grant to himself in the first instance, whom failing, to " the second or younger son in the first case, or to the sister in " the second,—the substitute in this destination could not, of " course, though within the general body of heirs of law, take as

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" heir of line to the last entered vassal; and the *legal* order of " succession would just be as much defeated,—and the necessity " (*but for the destination in the investiture*) of a fresh deed of *con-* " *veyance* to carry the estate over the proper heir of line would " just be as palpable,—as if the destination in its second branch " had been in favour of a total stranger to the blood. But had " this departure from the line of blood been effected by *conveyance*, " instead of being brought about by the operation of the *investi-* " *ture*, as a destination once for all, the superior must have had " his composition as from a singular successor: and so on to the " end, wherever the direct line was at all or to any effect departed " from. Now the judgment in Lord Hopetoun's case authorita- " tively excludes this, in every possible variety of case, but the " single one of introducing a stranger. The superior's right, " therefore, cannot turn upon the distinction of *heir* and *singular* " *successor* in the sense that the pursuer contends for. Yet put- " ting aside that distinction, what legal principle is there, which " discriminates between a singular successor *within* the line of " blood, and a singular successor *out* of that line?

" Accordingly, we have the authority of Lord Stair, where he " treats of tailzied destinations, such as they were known before " the statute 1685,—for holding, that the superior could not pro- " tect himself against them by refusing a charter. Indirectly, and " by force of adjudication, any destination whatever could be " forced upon him. If 'the debt and decreet whereupon the " ' same proceeded, be conceived in favour of *heirs of tailzie*, in " ' that case the apprising or adjudication and infeftment thereon " ' *must be conform*' (*Stair* 2, 3, 43.) And again, (§ 59), 'It is a " ' general rule that *quisque est rei suæ moderator et arbiter*, every " ' man may dispose of his own at his pleasure, either to take " ' effect in his life, or after his death, and so may provide his " ' lands to what heirs he pleaseth, and may change the succession " ' as oft as he will, which will be completed by resigning from " ' himself and his heirs in the fee, in favour of himself, and such

" ' other heirs as he pleaseth to name in the procuratory, where-
" ' upon resignation being accepted by a superior, and new in-
" ' feftment granted accordingly, the succession is effectually
" ' altered; yea, any obligement to take his lands so holden, will
" ' oblige the former heirs to enter, and to denude themselves for
" ' implement of that obligement, in favour of the heirs therein
" ' expressed; and if the superior refuse to accept the resigna-
" ' tion, or to give confirmation, there will follow an adjudication
" ' for implement of the disposition, which is ordinary, and there-
" ' upon the superior *must receive* the *adjudger*; so that the first
" ' constituter of a tailzie, or any heir succeeding to him, may
" ' change it at their pleasure.' That this did not mean heirs
" of tailzie merely within the line of blood, is made clear by
" another passage a little farther on in the section last quoted,
" where his Lordship speaks of ' a tailzie of a sum of money, lent
" ' in these terms, " to be paid to the creditor and the heirs of
" ' his body; whilks failing, to the father and heirs of his body;
" ' *whilks failing, to a person named*, and his heirs and assignees
" ' whomsomever."'

" We are therefore of opinion—1*st*, That independently of the
" statute 1685, the superior was not entitled to refuse a charter,
" though demanded in favour of heirs of provision, or such
" tailzied destination generally as the law then recognized; 2*d*,
" That the introduction of strict entails by that statute, made no
" difference in this respect, the superior not being entitled, where he
" would otherwise have been compellable to embody the destina-
" tion in his charter, to refuse doing so merely because of the
" fetters of entail; and 3*d*, That from the moment the destina-
" tion came thus to be embodied in the charter, and thereby be-
" came the rule of that investiture *quoad* the succession, every
" substitute within the destination became thenceforth an heir of
" the investiture, and as such, whether heir of line of the last
" entered vassal or not, was in all cases alike entitled to an entry,

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" not upon payment of composition as a singular successor, but " upon payment of relief merely, as in the case of a proper heir.

" J. IVORY.

" H. COCKBURN.

" JOHN A. MURRAY.

" I concur in all the views expressed by Lord Ivory on this " question; and beg to add, that it humbly appears to me that " his Lordship has obviated satisfactorily the argument founded " on the *reservation* of the superior's rights, inserted in the char- " ter granted to the *first* vassal, who was entered under the pre- " sent tailzie, after the form suggested by Lord Braxfield in the " case of M'Kenzie, and allowed by the Court in the case of " Argyll, and adopted in practice in other modern instances.

" It is clear, as observed by Lord Ivory, that such a clause " cannot have any other or more extensive effect than to reserve " the rights of the superior, as they stand reserved by the saving " clause at the end of the act 1685, which provided, that 'no- " 'thing in this act shall prejudge his Majesty, or any other " 'lawful superior, of the casualties of superiority which may " 'arise to them out of the tailzied lands.'

" This reservation it is thought imported no more than a " saving of such rights as superiors had *prior to the act.* No *new* " right was given to superiors. Their subsisting and ancient " right, as it existed *before* the passing of the statute was recog- " nised. But the whole authorities prior to 1685, concur in " declaring, that old vassals could at that time, by adjudication, " if not by the acceptance of the voluntary composition by the " superior, establish the validity of any new investiture he chose " to make of the fee, by paying a year's rent to the superior. " Still, in order to preserve that casualty, the reservation at the " close of the act 1685 was proper. As tailzied investitures were " then expressly sanctioned and declared to be effectual by " statute, a plea might possibly have been set up, that superiors

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" were bound to acknowledge tailzied investitures even when " the first entry under them was demanded, without payment of " the casualty previously exigible. The reservation in the act " 1685, effectually excluded that plea. But when no new additional " privilege or casualty was given to superiors by the statute, it " follows that they were not entitled to demand more subsequent " to 1685, than they could have legally exacted by the previous " law and practice, for the entry of heirs under tailzied substitu- " tions and investitures.

" J. CUNINGHAME."

The following are the opinions of Lords Mackenzie, Jeffrey, and Gillies; of Lord President Boyle, and of Lord Fullerton:

" I think that the pursuer is entitled to demand from the " defender a year's rent, as for the entry of a singular successor. " The clause of reservation prevents the defender from founding " on the rule, that all destinees of investiture must be admitted " to entry as heirs—a rule which in itself I fully recognise, but " which is excluded from governing this case, which depends on " the general question, whether a superior in landed property is " bound, on offer of one year's rent, to grant new infeftment to a " disponee or singular successor of the vassal, with a destination " of heirs of investiture including not only all the heirs of law of " the disponee, but including as many strangers as the disponee " chooses to have made heirs of investiture in the fee, by the act " of the superior. Now that question, I think (though not " without difficulty), must be answered in the negative.

" The general rule of feudal law in Scotland was, that a supe- " rior could not be forced to admit into a feu any persons but the " heirs of the vassal to whom he had given infeftment. By the " statute 1469, c. 36, an appriser got right to demand from the " superior infeftment in the feu on payment of one year's rent. " And so purchasers of the estate were enabled to force an entry " by becoming apprisers. Nothing is said in the statute regard-

" ing the heirs of the appriser; but by fair interpretation it was " evident, that the appriser or purchaser must obtain infeftment " to himself and heirs, not in liferent only, but in heritage. But " there exists not in the statute the least shadow of foundation " for holding that the appriser or purchaser, on payment of one " year's rent, had right to demand from the superior infeftment " in favour, not only of himself and all his heirs, but of other " persons who were not his heirs at all, but wholly strangers to his " blood. By other statutes, adjudgers in implement, and other " adjudgers and purchasers at judicial sales, were in like manner " entitled to obtain from the superior infeftment, on payment of " one year's rent. And lastly, by 20th Geo. II., the superior was " bound to give infeftment in the feu to any disponee or singular " successor having a procuratory of resignation in his favour. " These statutes, in like manner as 1469, c. 36, say nothing of " the heirs of the adjudger or singular successor; but on evident " grounds of rational interpretation, these parties had right under " the statutes to infeftment in favour of themselves and their " heirs. And in reference to these statutes it is just equally clear, " that they afford no grounds whatever for holding that the " adjudger or disponee had any right to demand from the " superior infeftment in favour, not only of himself and of his " heirs, but farther in favour of other persons, who were not his " heirs at all, but mere strangers. A superior might, if he chose " add such strangers to the destination of heirs granted to his " new vassal, and if he did so, he made them heirs of investiture. " But there exists not in the statutes any ground whatever for " saying, that the superior was bound, for payment of one year's " rent, to admit strangers in this way.

" And the superior, besides the right, had a strong interest " to object. For anciently the feu reverted to the superior " himself on failure of the vassal and his heirs. And after the " Crown's right as *ultimus hæres* prevailed, still the Crown's " donatory paid one year's rent to the subject-superior for an

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" entry. *Vide Erskine*, B. iii. tit. 10, §. 1 and 2; *Jur. Styles*, " vol. i. p. 346. This interest was indeed comparatively weak, " until fetters against alienation, &c., were added to destinations " of succession; because, if the vassal obtained a destination " reaching to mere strangers nowise connected with his heirs by " blood, without any fetters, it was highly probable that, by " alienation or alteration of the succession, the tailzie would be " put an end to before they succeeded; and therefore, when there " were no fetters, the right of the superior might often not be " rigidly insisted on. But when fetters were added, the interest " of the superior became certain and important.

" There are, however, conditions on which it might reasonably be held that a superior ought to grant a destination in " favour of strangers. These are, that the charter shall bear a " provision, that each stranger, who thus, being in truth no heir " but a singular successor, should obtain infeftment for himself " and his heirs as destinees of investiture should, for that infeftment, pay one year's rent; or, what in truth is equivalent, " in the view that the superior's claim is good in law, a provision, that the superior's claim for a year's rent, as a composition " for giving infeftment to each stranger, should be reserved. " Under these conditions, accordingly, I believe it has been usual " in practice to grant infeftment to singular successors, with destinations including strangers, as well as their own heirs. But " without such clauses, I do not believe the practice has prevailed; and still less has the right of the singular successor " been recognized, either in conveyancing or in judicial opinion. " On the contrary, all the authorities our decisions afford lie the " other way.

" In the case of Lockhart against Denholm, decided 10th " July, 1760, both Sir Archibald and Sir Robert Denholm, in " the early part of the last century, took charters from the superior, with a clause, ' that every heir of entail shall be obliged " ' to pay a year's rent for his entry, unless he be at the same

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" ' time heir-of-line to the person last vest and seised;' and Sir " Archibald, accordingly paid 200*l.* to Mr. Lockhart as a com- " position for a year's rent,—pretty good evidence of the under- " standing of conveyancers on the subject. True it is, that, " notwithstanding this provision, the Court, on some reason that " is not explained, found that ' the pursuer (*i. e.* Lockhart) had " ' acknowledged the entail, by granting charter and infeftment " ' thereupon to the late Sir Robert Denholm, he was obliged " ' to enter the defender (a substitute, not heir-of-line) as heir " ' of entail, and not as singular successor.' This decision has " since been declared by the Court, and universally understood, " not to be good authority on the point decided. But it is " material to observe here, that it does not rest at all on any " right the entailer originally had, to have obtained on payment " of one year's rent, new infeftment to himself and heirs of " investiture, not being his heirs of law, though that was argued; " but solely on this, that being actually admitted into the " investiture by the superior, they must have entry as heirs, not " as singular successors, the clause of reservation being, on some " ground not explained, held not to be effectual.

" The next case, Mackenzie *against* Mackenzie, 8th July, " 1777, *Mor.* 15,053, is thus abridged in the *Dictionary*:—' The " ' Lords found, that a superior of entailed lands was obliged to " ' enter the heir of entail, who in this case was likewise the heir " ' of the former investiture, and lineal successor in the lands, " ' on receiving a *duplicando* of the feu-duty, and was not " ' entitled to demand from him a year's rent, or other compo- " ' sition; reserving to the superior, and his successors in the " ' superiority, any right which they may have to a year's rent, " ' or other composition on the entry of any future heir of tailzie, " ' not an heir of investiture prior to the tailzie.' It is plain " from this, that the Court were not satisfied that the superior, " though bound to admit Mackenzie and his heirs, was bound to " admit strangers as heirs of investiture, without payment of a

" year's rent for that admission. From the fuller report of the " case in the Appendix, it rather appears that the entailer had " been himself vassal before the entail, and so was not under the " necessity of paying one year's rent for new infeftment to " himself and his heirs of law, and of the former investiture. " But if it was so, that makes little difference, since there is no " doubt in practice, nor was it denied, that a vassal resigning " may, without payment of any casualty, demand new infeft- " ment to himself and his own proper heirs of law and of the " former investiture. The demand of the superior, therefore, " in Mackenzie's case, was rested, and the reservation admitted, " solely in reference to the introduction of a stranger as heir of " investiture. In this case, it is said, 'the Court seemed very " 'much inclined to get complete information concerning the " 'practice; but the practice was discovered to be various.' " That is exactly what was to be expected, on the understanding " that the superior's right in law was good. Still there were " many considerations which would, in many cases, induce the " superior not to insist on that right.

" The next case is that of the Duke of Argyle *against* the " Earl of Dunmore, 19th November, 1795. In that case, 'the " 'defender' (who was the institute, or disponee) 'was willing to " 'pay a year's rent for his entry as singular successor; but the " 'pursuer further insisted, that the charter should contain a " 'declaration, that he should not be obliged to enter such sub- " 'stitutes as were not heirs-male, or of line, to the vassal infeft, " 'without receiving a year's rent from them as singular succes- " 'sors also.' The defender offered to take a charter, with a " clause reserving the superior's claim to a full year's rent, on the " entry of an heir of the tailzied investiture who was not heir of " line to the last infeft; and he contended, that while he made " this admission, 'it was an unnecessary hardship on the defen- " 'der to oblige him to discuss a general point of law, the " 'decision of which cannot affect the interest of himself or of his

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" ' descendants.' And on that ground evidently, the Court, " holding the case of Denholm to be wrong decided, and that " the reservation was effectual, adhered to the finding of the " Lord Ordinary in favour of the Earl of Dunmore. Their in- " terlocutor was—' In respect the reservation proposed by the " ' Earl of Dunmore leaves the question entire, when it shall " ' occur,' (unanimously) ' adhered.'

" Next is the case of the Duke of Hamilton *against* Baillie, " 22nd November, 1827, *Shaw and Dunlop*, vol. vi. p. 94, which " is thus summed up :—' A superior possessing under an entail, " ' having granted a charter of resignation in favour of a vassal, " ' embracing an entail containing a series of heirs; and sasine " ' having been taken, and possession enjoyed for forty years; " ' and an heir of entail having succeeded to the superiority, and " ' refused to receive as his vassal a party claiming entry as an " ' heir of entail under the charter, except in the character of a " ' singular successor, and on payment of a year's rent,—held " ' that he was bound to enter him as an heir.'

" The opinions of the Court are brief and clear :—

" ' LORD PRESIDENT.—In this case the superior, by granting " ' the charter, has agreed to give the heirs of tailzie an entry as " ' heirs; and this has been acted on for forty years. It may be " ' another question, whether a superior is bound to admit of an " ' entail by a vassal.'

" ' LORD GILLIES.—This case will not decide the general " ' question.'

" ' LORD BALGRAY.—There have been forty years' possession, " ' which is sufficient.'

" I have not yet noticed the case of the Magistrates of Aber- " deen *against* Burnett, 17th June, 1808, *Fac. Coll.*, because I do " not consider it at all in point here. It is thus abridged :—' A " ' singular successor of the vassal in a feu, on payment of one " ' year's rent to the superior (a royal burgh) has a right to " ' demand a charter to himself and heirs whatsoever, though

" ' the charter of his author was to heirs male, burgesses of that " ' burgh, with a clause in the redendo, that they should perform " ' burgh services, and that the fee should not devolve on the " ' feminine sex.' Your Lordships know, that the words ' heir " ' whatsoever' in a charter, have no meaning different from " ' heirs,' or ' heirs at law.' The vassal disponee in that case " made no demand of a tailzied fee at all, or any admission of " destinees beyond his own heirs of law.

" *Lastly*, I may notice, though not as a decision in point, the " case of the Duke of Hamilton *v.* the Earl of Hopetoun, 8th March " 1839. In that case too, the present question was not presented " for decision. The expression, in the opinion of the Court " touching it, is but accidental in giving a general exposition of " law. Still I cannot say it was not their opinion. It was the " opinion of myself, who wrote it, and I cannot doubt was so " also of the other Judges who signed that opinion.

" I may only add, in reference to recent practice, that I have " made some inquiries among conveyancers, and believe the " practice to have continued to this day, of superiors refusing to " grant a destination beyond heirs of law, unless upon condition " of a clause of reservation in favour of the superior's right, to " have effect in case the stranger destinees shall succeed, and as " often as they shall succeed.

" In these circumstances, I am not able to think, that there " is any thing like sufficient authority for rejecting the fair and " reasonable interpretation of the statutes, giving to the singular " successor, for his one year's rent, right to obtain new infeftment " to himself and his heirs of law, but not to other persons wholly " strangers to his blood, as destinees of investiture. And if I be " right in that opinion, then it is not, I think, denied, and at any " rate is clear, that the superior must be successful in the present " case.

" It only remains for me to notice a passage in Stair's *Insti-* " *tutions*, B. ii. tit. 3, § 43, which appears of importance at first

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" sight, but I think very little so on examination. For (1.) Stair " does not speak expressly of infeftment to strangers in addition " to the heirs of the appriser or adjudger. He speaks of a " ' tailzie ;' but that may, and properly does, mean a tailzied (or " cut) destination of heirs of law, not extending at all to strangers. " (2.) Stair ends by saying, ' or at least, if the appriser or ad- " ' judger craves the infeftment to himself and the heirs of tailzie, " ' the superior ought not to refuse it ; for the apprising or adju- " ' dication being assigned to a stranger, he behoved to be infeft; " ' much more the alteration of heirs is allowable.' Stair is " plainly considering only *the alteration* of heirs, not at all the " extension of them, so as to include an indefinite number of " distinct unconnected *stirpes* and their heirs. (3.) Stair does " not say that the tailzie must be admitted on payment of one " year's rent, or on what condition. Indeed, he seems still to " have held the doctrine, that by adjudication in implement, a " superior might be compelled to admit singular successors without " any payment at all, by force of the judgment. He says, (B. ii. " tit. 4, § 6,) ' the cause of this confusion is, that superiors are " ' not obliged to receive the singular successors of their vassals, " ' even though they should offer a year's rent for their entry ; " ' which privilege of superiors, by law and practice, is now " ' evacuated, because superiors may be compelled to receive " ' strangers upon apprising or adjudication for a year's rent ; yea, " ' if the vassal dispone the fee, and oblige himself to infeft upon " ' the obligement, an adjudication is competent against the " ' vassal, so as to oblige the superior to grant the infeftment, " ' which, though frequently practised, yet there is no express " ' law allowing the superior a year's rent : there was indeed a " ' law made for a year's rent, upon adjudication, when apparent " ' heirs did renounce to be heirs, as well as upon apprisings, " ' which doth not bear adjudications for implement of disposi- " ' tions.' Now, if Stair thought that by an adjudication in im- " plement on a disposition, a stranger disponee might force an

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" entry for himself and his heirs without payment of casualty " at all, he might well think that the superior need not make " difficulty about the ulterior heirs of investiture. But in truth " Stair does not appear to have at all contemplated the point now " in question. And accordingly, this passage does not seem to " have been cited in the case of Lockhart, or any of the other " cases in which the point was argued, and certainly could not " possibly have been the regulator of any practice of conveyanc- " ing down to the time when these cases commenced, and still " less since that time.

" J. H. MACKENZIE.

" I concur entirely in this opinion of Lord Mackenzie: Only " I give much more weight than he appears to do, to the recent " decision in the case of the Duke of Hamilton and Lord Hope- " toun, of March, 1839; which, though it does not find, in " express or direct terms, seems to me *necessarily to imply*, that " while a vassal might require his superior to grant an investi- " ture to the whole of his natural heirs, in whatever order he " might choose to arrange them, his right at all events went no " farther; and that it was an indispensable condition in any " series of heirs so sought to be enfranchised, that they should all " hold that character *jure sanguinis;* and not *provisione hominis.* " If the judgment did not proceed upon this assumption, or " rather fundamental principle, I really do not know upon what " it proceeded; and cannot perceive any connection between the " reasoning, so ably deduced in the unanimous opinion of the " consulted Judges, and their conclusion. For myself at least, I " can say, that I conceived this *limitation* of the vassal's right to " be as distinctly fixed by the decision, as its *extension* to the " case more immediately in question; and that I could not now " adopt the views of the defender, without feeling that I was " going directly against the authority of that most deliberate " decision. In strictness of principle, indeed, and especially in

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" reference to the genius and history of feudal holdings, what we " now call an heir of provision (if he has no other, or additional " character), I conceive not to be an heir at all, but a disponee or " singular successor merely; and it does not appear to me, that " the mere circumstance of such a person, if once named in any " investiture or substitution, being entitled to make up titles by " service and retour, ought to have any effect whatever on the " independent rights of a superior, who has not bound himself, " directly or indirectly, to renounce these rights.

" F. JEFFREY.

" I concur in the opinions of Lord Mackenzie and Lord " Jeffrey.

" AD. GILLIES.

" I concur in the opinion of Lord Mackenzie, with the addi- " tion made to it by Lord Jeffrey, though I was not present " when the judgment in the case of the Duke of Hamilton against " the Earl of Hopetoun was pronounced by the Second Division " of the Court.

" D. BOYLE.

" I agree in opinion with Lord Jeffrey and Lord Mackenzie, " that in this case the pursuer is entitled to demand from the " defender, the ordinary composition as for a singular successor. " And I may be permitted to add, in explanation, that I think " the conclusion thus come to, stands quite clear of certain other " points, on which the defender seems to consider it to be depen- " dent, and which I should think it quite hopeless to maintain. " Thus, in the *first* place, I think it clear, that when a superior " has once admitted, without qualification or reservation, a cer- " tain line of descent into the investiture of the vassal, that " series of persons, however unconnected by blood, must be dealt " with by the superior as heirs. That is the consequence of the

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" consent implied in the superior's own act. Though not heirs " by blood of the original vassal, or of each other, *he* has made " them heirs of the investiture. 2*dly*, I think that the imposi- " tion of fetters, and the consequently diminished probability of " alienation, does not import such an encroachment on the supe- " rior's interest, as to warrant him to demand any higher terms " of entry than if the investiture were free. That point was " fixed in the case of M'Kenzie *v.* M'Kenzie, and evidently " assumed as so fixed, in the subsequent case of the Duke of " Argyle against the Earl of Dunmore; and from the combined " operation of these principles, I think it must follow, that if a " superior has once granted, without qualification, an investiture " to a series of substitutes, strangers in blood to the institute and " to each other, he would not be entitled to refuse a renewal of " that investiture, under the fetters of a strict entail.

" But these propositions do not touch the present question; " because here the superior has never *absolutely* acknowledged the " investiture. He has never, either expressly or by implication, " agreed to hold the stranger substitutes as heirs. On the con- " trary, though granting the investiture in favour of a particular " line of descent, as he was bound to do by the decision in the " case of the Duke of Argyle against Lord Dunmore, he has " done so only under the reservation also sanctioned by that " decision, as well as that of M'Kenzie *v.* M'Kenzie, that his " right should be entire whenever the contingency happened to " which the reservation applied. No doubt, if the case of Lock- " hart against Denham were understood to fix the law, there " would be an end to the question, because there a reservation " much stronger and more express was entirely disregarded. But " the authority of that decision was superseded by the clearest of " all implications in the cases of M'Kenzie and the Duke of " Argyle; as it is impossible to suppose that the Court could " either insert in their interlocutor, as they did in the first case, " or appoint to be inserted in the charter, as they did in the " second, a reservation in itself utterly nugatory.

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" Here, then, the superior having reserved all his rights, in " the event of the succession opening to an heir of investiture, " not the heir by blood of his immediate predecessor, the ques- " tion arises, what those rights are. If a vassal is in every case " entitled, as a matter of absolute right, to demand, and a supe- " rior bound, as a matter of absolute obligation, to grant an entry, " not only to the individual seeking an entry and his heirs, but " to any number of stranger substitutes, then, of course, the " reservation would lead to no consequence. It being clear that " an heir of investiture must in the ordinary case be treated as " an heir, it would follow, that if the superior has no option, but " must admit into the investiture as many stranger substitutes as " the vassal chooses, he can have no legal right to stipulate for a " composition on the entry of any of those substitutes. But, on " the other hand, if the superior lies under no such obligation,— " if, in the general case, he is not absolutely bound to admit " stranger substitutes into the investiture, or to do more than " grant the entry to the individual craving it, and his heirs, then " of course he is entitled to reserve, and to reserve with effect, " his right to claim the ordinary composition when the succes- " sion opens to a stranger substitute. And in regard to the " composition, the Act 1685, authorising entails, has just as little " effect *against* the superior, as the imposition of fetters in terms " of that statute could have in creating a claim for a composition " to which he was otherwise not entitled. If, in the case of an " unfettered investiture, the superior was entitled to stipulate that " each stranger substitute to whom the succession opened, should " be dealt with by him as a singular successor, that legal right is " sufficiently protected by the general reservation in the statute, " of all rights of superiority.

" The question, then, truly comes to be simply this, whether " a superior is absolutely bound, to renew an investiture in the " case of a vassal in possession, or to grant a charter to a singular " successor, on payment of a year's rent, not merely in favour of

" the heirs of the party applying, but in favour of any given " number of substitutions which the party so applying chooses to " insert, or whether the superior, though admitting these substi- " tutions into the investiture at the requisition of the vassal, and " thus enabling them, in form, to take as heirs, is not fairly " entitled to stipulate that *quoad* him, they shall be dealt with, as " they substantially are, as stranger disponees.

" But it does not appear to me that there is authority for the " affirmative of the first proposition. It is undeniable that the " obligations of superiors in this matter, are the creatures of " statute. The whole of the statutes from the act 1649, c. 36, " regarding the entry of apprisers, to the 20th Geo. II., relating " to singular successors, are limited to the entry of the appriser, " or adjudger, or purchaser. They were passed for the sole " purpose of compelling the superior to admit a stranger vassal, " which, at common law, he was not bound to do. No doubt, as " the subject of the right was heritable, the entry of such appriser, " adjudger, or purchaser, necessarily implied the descent of that " right to his heirs, so that the obligations of the superior to " enter the first acquirer, necessarily included the obligation to " enter the heirs of such acquirer as the heirs of the new investi- " ture. In strictness this was applicable only to the heirs at law " of the vassal, but in practice the particular class, of the general " body of heirs to whom the original right was to devolve, seems " to have been left to the option of the vassal—and accordingly in " the case of the Duke of Hamilton against the Earl of Hope- " toun, it is laid down in the opinion of the majority of the " Court, that the vassal in getting the entry, 'may name heirs of " ' law simply, or heirs male, whom failing, heirs female, or any " ' other arrangement of the body of his heirs at law.' But that " is stated under the qualification immediately preceding, 'he " ' shall not go beyond his heirs at law to strangers.'

" I cannot doubt that this was the deliberate opinion of the " Judges who expressed it—and the distinction seems to be well

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" founded. Strictly speaking, indeed, the only right of succession " necessarily implied in the right of the original vassal is that of " his heirs at law. But every person who takes as heir, whether " heir of line, heir male, or heir female—every person in short, " who takes under a character, admitting of being established " by general service, may be said to take in right of the ori- " ginal vassal. The character, at least, in which he takes, " is the act of law, not of the original vassal. On the other " hand, a substitute who is called in none of these characters, " is truly nothing but a disponee. Not only his right, but the " character in which he takes the right, is the pure act of the " disponer.

" It is true the superior may have in general very little " interest to object to such an extension of the destination, par- " ticularly when it is unfettered; because, in such circumstances, " the probability of alienation, with its attendant benefit of a " composition, is rather increased than diminished by it. But " in many cases easily supposable, a superior may have a very " clear interest. For instance, in the case of a purchaser who " has no family, and beyond the age admitting the probability " that he ever shall have any—or an entered vassal in the same " situation, could the one demand an entry, or the other resign " for new infeftment in favour of himself and the heirs of his " body, whom failing, an entire stranger. Could a superior be " bound to grant such an entry without a reservation of his " rights; and would not that reservation entitle him to demand " the composition on the estate devolving on the substitute, " nominally called as heir, but *quoad* the superior, and in every " fair view of the case, nothing but the disponee of the vassal? " I think these questions would be answered in favour of the " superior, and the contrary pretensions on the part of the vassal " in such circumstances would neither be supported by the " statutes, nor, as I understand, by any usage which has followed " on them. Indeed, the principle necessarily involved in the

" argument for the defender, carries the matter still farther. In " these cases it is supposed that the entry may have been " demanded, in form at least, in favour of the heirs of the vassal " himself, whom failing, the substitute; but that argument " would be equally good, although the heirs were left out, and " the entry demanded in favour of the vassal, and failing him by " death, whether leaving heirs or not, to a stranger. For the " argument of the defender necessarily involves the proposition, " not only that the heir of investiture shall take without paying " composition, but that any individual or number of individuals, " can be rendered heirs of investiture, entitled to that benefit, by " the mere act of the vassal himself, or, which comes to the same " thing, by an act of the vassal which the superior is compelled " to give effect to.

" Now, it does appear to me that this view cannot be sup- " ported,—and that on the contrary, the rights of these parties " are fairly extricated according to the other principle, namely, " that although the vassal claiming the entry may have an inte- " rest, and has the right particularly under the statute 1685 to " create any number of substitutions, and thus to render the parties " so called, in form, the heirs of investiture *quoad* the form of " succession, still the superior has as clearly an interest and a " right to stipulate, that in relation to him, the substitutes shall " be treated in their character of disponees, taking by the pure " act of the vassal himself, directly operating at each successive " opening of a new substitution. For it appears to me, that in " regard to the superior, each successive substitution can be " considered in no other light than a dispositive act of the " original vassal, postponed and contingent indeed, but still his " dispositive act, operating as a conveyance to a stranger, on each " occasion when the contingency is realized.

" While I conceive this to be the sound construction in " principle of the conflicting rights of superior and vassal in this " matter, I am not aware that it is contradicted by any practice

" or authority. The decided cases, with the exception of that of " Lockhart, which must be considered as superseded, leave the " question entirely open. In fact the reservations authorised in " the cases of M'Kenzie and the Duke of Argyle, were intended " for no other purpose than that of saving it. The act 1685 is " equally inconclusive. The sole purpose of that statute was to " enable parties to secure the descent of their lands to any extent " of substitution, by clauses preventing alienation, adjudication, " or alteration of the order of succession. It expressly reserved " the rights of superiors; and the most conclusive inference " against the supposition of any contemplated interference with " the rights of superiors, is afforded by the consideration, that at " the time of its being passed, superiors were under no direct " obligation to alter existing investitures at all—it could only be " done by the circuitous form of adjudication; in all which par- " ticulars the rights of superiors were left untouched until the act " 20, Geo. II.

" With regard to the passage in *Stair* (B. ii. tit. 3, § 43), it " is so obscurely expressed, that I do not think that it affords " any very conclusive authority; or even any clear indication of " the author's own opinion upon the point now under discussion. " And indeed, if it has any bearing upon the point at all, I think " it affords an authority in favour of the pursuer. At the time " when it was written, the superior could not be called upon to " alter the existing investiture without his consent. The object " was to be obtained only indirectly by means of an apprisement " or adjudication. After stating this, the passage proceeds:— " 'So neither in that case is he obliged to constitute a tailzie, " 'but only to receive the appriser or the adjudger and their " 'heirs whatsomever; unless the debt and decree whereupon " 'the same proceeded be conceived in favour of heirs of tailzie, " 'in which case the apprising or adjudication and infeftment " 'thereupon must be conform, unless it be otherwise by the " 'consent of parties.' Here it certainly appears to be implied,

" that if the debt and decreet be conceived in favour of heirs of " tailzie, the infeftments must be conform, *i. e.* granted to the " same series of heirs. But this opinion is qualified by what " follows—' *at least* if the appriser or adjudger *crave the infeftment* " ' *to himself and the heirs of tailzie, the superior ought not to refuse* " ' *it;* for the apprising or adjudication *being assigned to a* " ' *stranger*, he *behoved to be infeft*, much more, *the alteration of* " ' *heirs is allowable.*' It rather appears to me that in this pas- " sage, the author was considering the question, whether the " superior could be compelled on any terms to receive heirs of " tailzie, through the means of adjudication—whether, in short, " the superior could effectually stand out against admitting, on " any terms, any heirs excepting the heirs of the adjudger. This " question, put in the last form, he decides in the negative, but " without taking into view the other question which arises here, " viz. the particular terms on which the demand could be en- " forced against the superior. The opinion, such as it is, is given " with great hesitation, ' *at least* if the appriser or adjudger crave " ' the infeftment to himself and the heirs of tailzie, *the superior* " ' *ought not to refuse it!*' But it is important to look at the " reason given for this opinion, ' for the apprising or adjudication " ' *being assigned to a stranger* he *behoved to be infeft, much more* " ' *the alteration of heirs is allowable.*' Here the opinion, that " the superior ' ought not to refuse' the admission of heirs of " tailzie, is rested on the ground, that if the apprising or adjudi- " cation were assigned, it ' behoved' the superior to admit the " assignee. And the reason is perhaps satisfactory, in so far as " regards the matter of the admission of heirs of tailzie; but, on " the other hand, it seems to me to imply, that the superior, " though obliged to admit the assignees of adjudgers, and by " analogy, the heir of tailzie, was only obliged to admit the latter, " on the terms which he was entitled to from the former, viz. the " ordinary composition. The passage, though certainly not very " clearly expressed, seems to mean no more than this, that as the

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" superior was obliged to admit assignees of the adjudication, so " he could have no reasonable ground for refusing to admit heirs " of tailzie, *i. e.* heirs different from the heir whatsoever; an " inference or analogy which could only be true, on the supposi- " tion, that in regard to the interests of the superior, the heirs of " tailzie and assignees were to be dealt with on the same terms. " If this be the true construction of the passage, it is evidently an " authority not in favour of, but against the argument of the " defenders. When so constructed, it coincides exactly with the " view, which appears to me the correct one, viz. that although " the superior is obliged to admit substitutes, as he is obliged to " admit singular successors, he is obliged so to admit them only, " because he is entitled, if he pleases, to affix the same terms to " their admission. According to this view, the superior—to use " the very appropriate expression of Stair—' *ought not to refuse :*' " because in reality he has no legal interest to object. Being " obliged to admit singular successors, on payment of the compo- " sition, he cannot be permitted to refuse any number of substi- " tutions, if each substitute, not an heir by blood of the predecessor, " is to be held *quoad* him as a singular successor, taking by virtue " of the dispositive act of the original vassal.

" As to the passage from Erskine, the opinion there given in " such broad terms, rests entirely on the case of Lockhart there " referred to, which since the late decisions in the cases of " M'Kenzie and the Duke of Argyle, can no longer be considered " as an authority.

" JOHN FULLARTON.

These opinions were laid before the judges of the second division at a time when Lord Meadowbank, one of their number, was confined to his house by severe indisposition. It being deemed expedient, however, that his Lordship's opinion on the cause should be obtained, the second division of the Court, of this date, pronounced the following order :—" The Lords, in respect

" that Lord Meadowbank was present when the Interlocutor " was pronounced remitting the cause for the opinions of the " Lords of the first division, and of the permanent Lords " Ordinary,—had then considered the case,—that there has been " since laid before his Lordship the opinions of the consulted " Judges,—and that it is provided, that, in all cases where such " remits have been made, the judgment to be pronounced by the " division to which the cause belongs, shall be according to the " opinions of the majority of the whole Judges; and his " Lordship being now absent from severe indisposition; hereby " require of him, if it be not incompatible with the state of his " health, to communicate to this division the opinion, if any, " which he may have now formed on the whole cause, in order " that the same may be taken into consideration on Friday next, " with the opinions of the consulted Judges, when the case " stands on the roll for advising."

In obedience to this appointment, Lord Meadowbank returned the following opinion:—

" When this case originally came from the Lord Ordinary, " the opinion which I had formed concurred generally in the " views of that stated by Lord Mackenzie; but, having since " reconsidered the case, I have altered that opinion, and now " concur in the result of that of Lords Cockburn, Cuninghame, " Murray, and Ivory. And, having had an opportunity of very " deliberately considering the notes of the opinion which has " been formed by the Lord Justice-Clerk, I find the grounds of " my own therein so clearly and luminously stated, that I am " desirous that upon them mine should be understood mainly " to rest. My absence, therefore, from the deliberations of the " Court, can be of no importance to the parties; because it " would have been impossible for me to have added any thing " in further elucidation of his Lordship's judgment.

" A. MACONOCHIE."

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Upon these opinions coming to be advised by the Court, the Judges delivered the following opinions:—

"LORD JUSTICE-CLERK.—The great difference of opinion in "the Court on this question of feudal law, and the importance "of that question, involving great pecuniary consequences to such "an extensive class of persons, rendering it perhaps a matter of "as wide application as any question which was ever stirred, "will account for the anxiety with which I approach the point "awaiting judgment, although it is one in which my opinions "have been long matured. It is very necessary to consider the "question on strict feudal principles, else we might do great in-"justice to a class of rights just as much legal property of the "highest kind, as the rights of vassals. But in examining what "the feudal principles are which should govern judgment, I can-"not concur in a remark in one of the opinions before us, that "the relation of superior and vassal has received no modification "whatever, except from the direct and immediate operation of "special statute.

"The defender has raised an objection to the summons as not "the proper action to try the question. In the case of Lord "Hopetoun, the objection was stated *in reply* to an argument "that the general precept granted by the Duke of Hamilton had "been unwarrantably and incompetently used by one not entitled "to the benefit of it; and in that case the consulted Judges held "the reply to be good, viz., that in an action of non-entry, "calling the party who is the heir under the existing investiture, "completed by a precept granted by the superior, and the infeft-"ment following on it, the superior cannot say that the infeft-"ment was inept, to the heir under which he calls on to enter. "He ought to disregard the infeftment, or reduce it if he held "it to be bad. But as it is not disputed by the superior in this "case that the investiture containing the destination in question "was correctly made up, the declarator of non-entry is a com-

" petent, and, I think, the proper action, to try the question, on " what terms the entry is to be given.

" I may also say, that I cannot enter into the argument, " founded on a misapprehension of the ground of decision in the " case of Lockhart *v.* Denham, viz., that the reservation is not " sufficient to preserve the claim of the superior, if he could have " originally refused to sanction the destination, which the vassal's " procuratory contained. There is a somewhat metaphysical " argument stated, to the effect that the reservation necessarily " merges, and is absorbed in the sanction of the investiture, so " that the defender can plead the very charter containing the " new grant against the superior's reservation, which qualifies it " as to this matter. But I am of opinion, that the reservation " keeps the question completely open, if the claim is well " founded, and that this argument rests on a misapprehension of " the ground of judgment in Lockhart. Whether such a claim " is consistent with the character of heir which the investiture " bestows on the parties called by the substitution of heirs of " provision, is another question. But I do concur with the " defender in the complaint, that there is considerable vagueness " and obscurity as to the precise plea which the pursuer means " to maintain. His plea on the Record seems to be intentionally " as general and obscure as it could be stated. It is, ' that, in " ' the circumstances condescended on, the pursuers, as superiors, " ' are not bound to give an entry to the defender as their vassal, " ' except on the condition of his making payment of the usual " ' composition of a year's rent of the lands; and as he has " ' refused to pay that composition, they are entitled to decree " ' against him in terms of the conclusions of the summons.' Now, " one of the ' circumstances' prominently stated in the Conde- " scendence is, that the vassal's deed contained the prohibitions " and fencing clauses of a *strict entail*, prohibiting sale or altera- " tion of the order of succession. But still I must take this plea

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" to be that contained in the reservation of the charter, which " granted warrant for infeftment on that deed :—' Saving always " ' our own right, and the right of every other person as accords, " ' and declaring that, by granting these presents, we shall not " ' exclude ourselves, or our heirs and successors, from any claim " ' which we or they may have at law to a full year's rent of the " ' lands herein contained, *whenever* the *heirs of entail* to whom " ' the succession shall open shall happen *not* to be *the heir of* " ' *line* of the *person who was last entered and infeft* by us or our " ' foresaids.'

" This plea is not rested on the ground that the destination is " protected by the clauses of a strict entail. To enforce that " plea, I understand the argument to be directed; and although " there is manifestly an attempt in various passages to derive " benefit somehow from the fact that this deed contains an " entail, yet the claim truly is founded on the destination not " being to the heirs of line of the last vassal entered by the " superior. There is no other plea avowedly stated in the case. " (See p. 29, and p. 31). The same is truly the ground taken in " the opinions of Lords Mackenzie, Jeffrey, and Fullerton, which " necessarily extend the claim against every heir of provision " not being an heir at law, without any reference to the fact that " he is called in an entail. I hold it to be quite essential to settle " clearly in the mind, that the question at issue in no respect " whatever depends upon, or ought to be affected by, the fact, " that the destination is protected by the clauses of a strict " entail. In all the cases, except those of Lord Hopetoun's and " Lockhart's, it is manifest that the views stated by the Court, " or a portion of them, were much more affected by mixing up " these two matters, wholly distinct, than they were themselves " aware. A great portion of the pursuer's reasoning is founded " on the alleged encroachment on, or an injury to, the superior's " rights, caused by the prohibitions of an entail, and by the loss, " as it is said, of the benefit to the superior of alienation, of that

" very act which originally was considered a fault against the " superior of the vassal.

" I humbly conceive, that the prohibitions against alienation " or alteration cannot in any logical or legal manner affect the " question, and that the question is precisely the same as if it " had occurred *under an ordinary simple destination*, or when " such was first presented to the superior, a view of the case " which, often as it occurs, has never yet been mooted by any " superior. True, the motive of the superior may be stronger to " try the question in the one case than the other, because the " fee simple destination, if not in favour of heirs of line, will " infalliby be altered whenever the vassal has only heirs female, " and not heirs male of his body. But, in principle, the question " is, in my opinion, the same in both cases.

" A great point, however, is made when this is distinctly " brought out and kept in view, not merely in avoiding the risk " of undue impression on the mind from matter not relevant to " the inquiry, but still more from the legal view opened up as " to the rights of superior and vassal, when the proper effect " of the Act 1685 is considered. To the effect of that statute " on the present question, I must particularly invite the atten- " tion of your Lordships, for I own I have ever thought that its " operation has not received in this question the consideration " due to it. The pursuer's plea is, that, by the common law of " Scotland, he can claim a composition from every party who " is not the heir-of-line—of line, be it observed, under his clause, " of the person last entered as vassal by the superior under the " existing investiture. That, he says, is and always was the law, " —the law as to every heir of provision, not being the heir of " line—long before entails were introduced, and continued and " preserved under the system of entails;—the law, therefore, " equally as to a common destination or tailzied destination. " Then, observe, the statute expressly gives the lieges *power to* " *substitute heirs in their lands by tailzies*, and to enforce and

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" perfect them. What is the meaning of the power so granted? " It is to substitute heirs, granted without any limitation; and " all those substitutes are called by the statute heirs, and " must be held to be heirs, as your Lordships were all satisfied " in the case of Anstruther *v.* A. The substitution of other " heirs than the heirs of line could not be overlooked. That " it would be absurd to suppose. Entails originated in the " preference of other heirs over heirs of line. The term tail- " zie is derived from the usual and common effect of all such " entails, though doubtless, the direct succession might also " be often fenced. Hence, the statute was necessarily framed " with reference to the *selection* of parties by the lieges *to* " *be their heirs.* It has been said by high authority, in the " case of the Duke of Hamilton *v.* Baillie, that the statute is " throughout very ill framed. I venture to differ from that " remark. I think the statute is most skilfully drawn for all " the objects in view, if attention is paid to its terms rather than " to pre-conceived theories, which are attempted to be supported " by it. But, at all events, so plain a matter as the frequent " substitution of others than the heirs of line could not be over- " looked in framing it.

" Let us follow the power given to its consequences. Either " superiors had, before that statute, the right to refuse to enter " any heirs other than heirs of line—to reject heirs male for " instance—or they had not. If such was the right of superiors " before that statute, did it remain after that statute? The " power given to substitute heirs is unqualified, co-extensive " with the right to lands. Opposition by the superior is neither " alluded to nor reserved. Accordingly, on this part of the " statute, the superior founds no argument. Any plea he makes " on the statute is founded on the special clause of reservation " of certain rights at the end of the statute. What that reser- " vation imports, we shall afterwards consider; but, at all events, " the very plea founded on the reservation admits that the power

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" to substitute heirs is given even against superiors, (if they " had any right inconsistent with it,) though it is said that their " interests are protected by the clause of reservation. But is " not the statute very important evidence as to the common law " respecting the substitution of heirs? I believe the preservation " of the rights of superiors in 1685, was just as great an object " as any desire to legalize entails. Rights of superiority were " regarded as the most valuable species of property. Feu- " duties were thought the best income, as they could not fall in " value. The various dues paid were sums of ready money " when money was scarce, reckoned of great value; and, accord- " ingly, we know, that the great lawyers of that and the former " generation were very fond of the acquisition of superiorities. " Great political influence arose from the possession of such, and " any encroachment on the rights of superiors, I believe, never " was contemplated or intended by the Legislature. This remark " requires, no doubt, full effect to be given to the clause of " reservation, so far as its terms can go. I regard the statute " as important evidence of the common law of Scotland as " then understood. If, however, the superior had the right con- " tended for before that Act, then it made, *ex concessu*, a most " sweeping change, whatever is the practical benefit of the reser- " vation.

" What is the fair meaning of the leading provision of the " statute? That it shall be lawful to the lieges to 'tailzie their " 'lands, and to substitute heirs in their tailzies.' It is admitted, " as the condition of the argument, as I before stated, that the " superior cannot object to the prohibitions and fencing clauses " of an entail, and that the statute does not protect him as to " that matter. Is that a loss to him? It is said to be so. That " is stated in the close of the able note of the Lord Ordinary in " Duke of Hamilton *v.* Baillie, and it is thought that it was " only an oversight that the superior's right was not protected " from the loss of benefit by alienations. I incline to differ,

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" 1*st*, because I do not believe that the high aristocratic Parlia-
" ment which passed the Act 1685, would have touched on so
" plain a point as the rights of superiors, which they all held as
" important parts of their own rights; and 2*nd*, because I am
" satisfied that, on feudal principles, the superior never could have
" objected to his own grant to the vassal and the heirs called
" (who they could be is another question) being protected from
" alteration and alienation. On the contrary, I hold the prohi-
" bitions and fencing clauses of an entail to be exactly in confor-
" mity with the strictest principles as to the relation of superior
" and vassal, precisely because it secured the continuance of the
" grant to the vassal and the heirs called. The decision in the
" case of Hill, and the old case as to corporations, does not rest
" on the ground that the superior must receive compensation for
" losing the chance of alienation; but (see opinions in Hill) be-
" cause a corporation cannot be a vassal in the proper sense of the
" term—there being no succession of heirs—and hence the ordi-
" nary course of feudal tenure and the leading casualty of relief
" could not obtain. I regard then, the right to tailzie lands as
" unqualified and absolute, so far as the superior is concerned, and
" that there either had not existed or was not left, the right to
" object to the perpetuation of the estate in the heirs called. But
" if that was the law on this point, either under common law or
" under this statute, observe the great importance of this fact,
" (viz. that the fetters of the entail cannot be objected to,) on
" the next part of the clause, viz., declaring that the lieges in
" making tailzies of their lands may substitute heirs in their
" tailzies. If the perpetuation of any one line of succession—if
" prohibitions against sale and alteration—cannot be objected to
" by superiors, then how very different the interest to object to
" the selection of one set of heirs rather than another. Whatever
" the order is, it may be completely fenced, and all benefit from
" change wholly excluded, so long as these heirs do not fail; and
" the case of the Duke of Hamilton and Lord Hopetoun has set-

" tled that the vassal may call his legal heirs in any order and " way he chooses, protecting their succession by the clauses of an " entail. But, again, what is there to lead one to suppose that " this second and very important, nay, necessary, part of the " clause, is less general and unqualified than the former; 'may " ' substitute heirs in their tailzies?' This is put as co-exclusive " with the right to tailzie lands. It is declared to be the right of " all the subjects of the country. All these substitutes are made " and declared to be heirs—heirs in every sense of the word—all " equal heirs by force of the nomination in the tailzie, and no " distinction is pointed at as to the separate character of legal " relations or not. I see one opinion declares, that all heirs of " provision, if they have no other and additional character, viz., " that of blood relationship, are disponees or singular successors, " on feudal principles. (His Lordship referred to the opinion of " Lord Jeffrey, supra.) I hold just the reverse. I hold that the " heir of provision is the character to which feudal law looks, " and no other; that any other and additional character which " the party possesses is of no moment, and never looked to, and " is altogether irrelevant; that if the party is the heir of the grant " or investiture, his right and character as such is exactly the same, " whether he is a stranger in blood or the eldest son. Indeed it " is entirely new to me to hear, that, in a question with the supe- " rior, there is any other character looked to than that of the heir " of the investiture, or that one heir of the investiture is, in respect " of the quality of blood relationship, by which he is not called " at all, the proper heir, and all others in that investiture, singu- " lar successors. And under this statute, and after the opinions " in the case of Anstruther as to collation, I cannot understand " how that proposition can be maintained; and accordingly, in " the opinion by Lord Fullerton, he, in the very outset, most " anxiously disclaims that view. But, then, his Lordship's " opinion in two passages, lays down the very same point, " though differently expressed, where it is said that every

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" substitute, who has not in law a character of heir, which " he could have established by service, independent of the " deed, is a disponee. But whatever might be held as to this " point on general speculation, surely any such notion is utterly " banished out of this case in the most complete manner by " the Statute 1685, which enables the vassal to put all substi- " tutes on the same footing as heirs, whatever claim may be " reserved to superiors. Now, when it is said that parties may " substitute heirs in their tailzies, is that, or is it not, a power " to make them heirs—heirs of investiture,—heirs in every sense " of the term? That cannot be disputed, and is not disputed, by " the pursuer; for his plea is, that while that is the undoubted " effect of the Act 1685, the reservation at the close of it reserves " the *claim* of the superior exactly as if they were not made heirs. " But before the object and effect of the reservation can be ade- " quately considered, we must settle what is the legal import and " operation of the provision, that the lieges may substitute heirs " in their tailzies; and, having settled that, must give full effect " to it consistently and steadily—recollecting that the plea on the " clause of reservation admits of necessity the force of this first " provision. I am humbly of opinion, that, by that provision, " the holders of all property obtained, if they had it not before, or " now possess a right, to substitute any heirs they choose in their " tailzies, and that all substitutes are legally heirs of investiture " —heirs in every sense of the term—to the party making the " tailzie. The more the object and meaning of this part of the " statute is considered, the more clearly does this appear to be " the necessary result of this provision. That this is any change " in the law, or that a vassal could previously have been refused " an investiture to any set of persons whom he chose to name as " his heirs, I am far from holding. But whether the law was " so or not, it appears to me to be the undoubted operation of the " Act 1685, that all persons substituted in any tailzie, or destina- " tion of an estate, are heirs, in every sense of the term, to the

" entailer—heirs also to the person last infeft—but without, by " statute, the consequence of representation—whatever benefit or " right may be reserved to superiors by any after clause.

" What, then, is the import of the reservation? It is as " follows: ' It is farther declared, that nothing in this Act shall " ' prejudge his Majesty as to confiscations or other fines, as the " ' punishment of crimes—or his Majesty, or any other lawful " ' superior, of the casualties of superiority which may arise to " ' them out of the tailzied estate; but these fines and casualties " ' shall import no contravention of the irritant clause.' The " words are very peculiar. It seems to me to be very clear, that " the reservation is to secure the payment of all casualties *out of* " *the estate*, if not paid by the individual, and that such shall not " be held debts included in the prohibition and clauses authorized " by the Act, for the purpose of protecting the estate against " debts. To that object I think the clause is confined. It might " have been contended that the casualties of superiors arising out " of the estate, being also debts of the vassal, could no longer be " enforced against the estate, which was protected against all " debts; and hence for that object, to preserve the superior's " rights and the protecting clauses of the tailzie, I think the " reservation was introduced. Of course, taking that view, I " cannot concur in the explanation given of this clause by Lord " Cuninghame. The pursuer's argument on this clause is founded " on three views, 1*st*, That superiors had the right previously, to " refuse to receive as heirs, any whom the vassal chose to name; " and hence, that the right to demand a composition, as from a " singular successor, was to be reserved. 2*d*, That the compo- " sition for the entry of a singular successor is a casualty of supe- " riority. 3*d*, That, by the above clause, a distinction, unde- " fined indeed, but fundamental, was intended to be drawn by " implication between one class of substitutes and another, viz., " those who are also heirs-at-law, and those who are not—a " distinction of which, certainly, there is no other trace or indi-

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" cation in the statute, and which is only obtained by guess out " of this reservation. These three views are all essential to the " plea founded on this reservation. The pursuer's argument on " this clause, I must repeat, admits that the statute gave the " subjects right to destine their lands in any way they choose, and " and to name or substitute heirs to themselves. That is ad- " mitted in the plea founded on the reservation; and hence it " follows, that, if the reservation has not the effect contended " for, in drawing such a remarkable and singular distinction be- " tween the substitutes of an entail, the pursuer's claim wholly " fails.

" In the *first* place, I hold it to be quite clear, that the *com-* " *position* demandable on the entry of a singular successor is not " a *casualty of superiority*, and cannot by any use of legal phrase- " ology that is at all correct, be included within the force remain- " ing at that time. The casualties of superiority are enumerated " by the text writers. They existed long before the Act 1469, c. " 36. That act introduced the year's rent as a compensation for the " loss of the existing vassal, and the introduction of a new party " into the fee. But such a composition is not a casualty arising " out of the estate—was never enumerated or accounted among " the casualties of superiority, whatever looseness there may be " in modern language on the subject—and in 1685, before the " Act of Geo. II., could not have been used with reference to the " obligation on superiors to receive singular successors on pay- " ment of a certain fee, for such obligation, generally speaking, " did not then exist. There was no general right on the part of " the singular successors, taking by procuratory to demand entry " on payment of a composition. Hence, if the heir of entail " could not claim entry as heir under the first part of the statute, " he could not obtain an entry *invito domino* at all. But the " reservation of the casualties, if he is heir, cannot apply to him, " for the composition has no reference to him. This is the " meaning of President Dundas's remark as to *existing* casualties

" in Hailes's notes of the case of M'Kenzie. Accordingly, from " the time that superiors first wished to raise the question under " the Act 1685, as to their claim in the event of an heir of entail " not being heir of line, the composition has never been acknow- " ledged to be a casualty in any of the cases. This appears " remarkably from the terms of the charter in the Westsheill " case in 1720. See Session papers reprinted in Lord Hope- " toun (the casualties are first reserved, and then the claim for a " year's rent). Accordingly, in the case of Lockhart, one ground " firmly taken by that great lawyer, Sir Thomas Miller, is, that " the composition on entering a singular successor was not a " casualty of superiority, but a separate right not arising out of " the relation of superior and vassal, but given by statute as a " compensation for an invasion of that right; while the superior's " counsel tried to make out that the composition was the casualty " of relief. The composition is not *debitum fundi;* the superior " can neither enter into possession nor poind for it. It is only " a personal claim. The clause of reservation, on the contrary, " clearly is intended to save to the superior, as debts against " which the estate was not to be protected by the entail, the " proper casualties arising out of the tailzied estate. This is " clearly the view taken of the matter by the annotator on " Stair, and was the foundation of the judgment in the case of " Lockhart.

" At page 35 of the pursuer's case, it is broadly stated that " Stair and all the authorities class composition among the " casualties of superiority. This is a great mistake. I observed, " that, curiously enough, no particular passages are given in the " reference either to Stair, Erskine, or Bankton, but whole titles " are referred to. And, accordingly, on examining these titles, " all that can be said is, that composition is treated of by Stair " and Bankton in the same long title, which also includes and " treats of, but *separately*, the casualties of superiority. In Ers- " kine it is not treated of at all in the title referred to. I was

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" much astonished at the reference to Stair, knowing that title, " the 4th of the 2nd Book, most intimately. The examination " of it leads necessarily to the very opposite result. Like every " other part of that most methodical and systematic writer, the " title must be considered attentively with reference to its plan. " It commences, first, with the superior's own right of superiority, " the proof thereof, and certain limitations thereof; then as to " the relative position of the vassal, the effect of subinfeudation, " and the duties of the vassal under the reddendo. Then it treats " of the change of the vassal, and of the mode in which an entry " may be forced upon the superior, at that time limited more " than Lord Stair wished. And after having shown how a " stranger may get an entry upon payment of the composition of " a year's rent, the title then proceeds to take up the relative " position of superior and vassal, after a vassal has been received, " and in reference exclusively and solely to the entered vassal " and his heirs. This distinct and separate portion of the title " begins at section 18, and Lord Stair then treats of the proper " casualties of superiority due by the entered vassal or his heirs. " Then are all these specially treated of; and first, 'of the most " 'common casualty of superiority,' non-entry, its remedies, and its " consequences; under which, in title 24, he explains the general " declarator of non-entry for neglect, and the special declarator " for contempt, and this is wholly applicable to the heirs of " entered vassals, giving right to the retoured duties or to the " full duties, according to circumstances. Then the relief is " treated of, or, as he says, immediately subjoined to non-entry, " being due to the superior by the vassal for entering him in the " fee as the lawful successor of the vassal. Then, in section 32, " he mentions what it is to be paid under the statutory compo- " sition, and points out *how it differs* from relief in several parti- " culars. Then he resumes the casualties, and goes through " them, and in no place does he ever confound the composition " with the casualties. This might have been expected in so

" accurate and clear a writer, the casualties being the rights " arising by common law out of the relation of superior and vassal, " composition being, as its term imports, a bonus or compensa- " tion to the superior for being obliged to do something directly " against the original rights of superior and vassal, by an in- " fringement of the same introduced by statute. In no one pas- " sage is the composition ever called a casualty or enumerated. " The very same remarks may be made on the corresponding " title, B. II. tit. 4, of Bankton, written on a more methodical " plan than usual, and plainly on the model of Lord Stair's title. " There is one passage in which the composition seems to be " called a casualty in the sixth paragraph; but this is obviously " loosely used, for he has a separate section in that title, beginning " at article 13, with a distinct heading of the casualty of non- " entry, another of relief; under which he certainly treats of " composition, but in such a way as to show that, as it comes in " place of relief, so it differs widely from the same; and he never " terms it directly a casualty, though he specially calls the relief " a casualty. He mentions the remarkable distinction, that the " adjudger cannot be excluded from possession till he pay a com- " position and enter. The title of Erskine, B. II., tit. 5, is " still more distinct. The casualties beginning at the 5th sec- " tion, are all separately treated of in reference to the original and " proper relation of superior and vassal, including recognition; and " he then resumes the enumeration of them as modelled by our " customs in the 29th section, viz. non-entry, relief, disclamation, " purpresture, and liferent escheat. I particularly refer to the " very accurate and distinct sections on non-entry and relief, per- " haps the very best of Mr. Erskine's work. Take the definition " of non-entry in the 29th section, as well as the full explanation " of it into the 46th, inclusive. Take the definition of relief in " the 47th section, and the explanations of it on to the 50th, in- " clusive, and it will be found, that under neither of these is there " a word which brings in, as a casualty, the composition. Nay,

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" with such rigid accuracy and propriety does Mr. Erskine limit
" himself to the casualties when treating of these, that even under
" the section which mentions that the casualty of non-entry is
" excluded if sasine has been once given to a corporation, he does
" not allude to any arrangement as the condition of receiving
" them. Then he finishes the whole subject of casualties, and
" the composition is never mentioned at all. Accordingly, in the
" 6th title, Mr. Erskine begins separately to consider of the
" right which the vassal acquires by getting the feu, and of the
" extent and import of the grant made to him; then of the pro-
" tection to his tenants; after which, forgetting rather his object,
" he wanders into the relative rights of landlord and vassal, which
" are treated of plainly out of place in the remainder of this title.
" Then, in the 7th section, he resumes the subject of the rights
" which the vassal acquires by getting the feu, and treats of the
" transmission of the right; and it is under this separate subject,
" and *in a totally different title*, that he treats of the question of
" composition, and of the effect of the Act 1685. What the pur-
" suer means, then, by the positive reference to the 5th title of
" the 7th Book of Erskine I really cannot understand, for that
" title is wholly framed upon a plan which utterly excludes com-
" position from the very notion of being a casualty—is limited
" exclusively to the old casualties—and in that title composition
" is not mentioned; while, on the other hand, the manner in
" which it is introduced in a subsequent title, draws the distinc-
" tion even more distinctly than Lord Stair. I have stated my
" views on this point fully; for I have always held, that if the
" composition is not a casualty—it was not so held in 1685—then
" the claim of the superior, excluded by the first part of the statute,
" and not saved by the reservation, is clearly repugnant to the en-
" actments of that statute. In the second place, I apprehend that
" the clause is not such as would have been introduced if the object
" had been that for which the pursuer contends. I think that the
" clause would have expressly referred to the case of the heir of

" tailzie not being an heir at law, considering that the former " part of the statute bestowed the character of heir equally on " all substitutes; and I do think we are warranted to hold that " so plain and important a limitation on the power given to sub- " stitute heirs was to be left to implication, and implication also " out of a clause which, in its obvious purpose, has reference to " the effects of the protection of the estate against debts, if the " casualties of superiority had not been specially mentioned. " The object of the clause is on that view clearly satisfied and " exhausted. In the view then, which I take of this question, I " think it is decided by the operation of the Act 1685.

" In this view of the matter I am confirmed by a careful " examination of the case of Lockhart, which, at all events, I " regard as a decision on the point, and a decision of the highest " authority, pronounced, as President Dundas says, (Lord Advo- " cate, and in the highest practice at its date,) with great una- " nimity in the Notes by Hailes of the case of Mackenzie. That " decision was understood at the time to decide the question. " Erskine, the Professor of Scots Law, says so expressly. Mr. " Erskine's authority is not confined to the passage noticed by " Lord Fullerton, (though it certainly is not the less authori- " tative that it rests on a decision of the Court). He gives his " opinion distinctly in the 6th section of 7th title of Book 2, on " the general point as to the effect of the Act 1685, to the same " purport; and then, in a separate passage, he mentions the case " of Lockhart as a clear authority on the point that a substitute " has all the rights of the character of heir.

" The decision, then, was held to be of great and direct " authority at the time. It is said, in one of the opinions, that " this decision has been declared by the Court since not to be " good authority. I know not where it was so declared. The " point was again mooted in Mackenzie. But in that case the " vassal expressly said, as he was not a stranger, ' the superior,' (I " quote the words of his paper) ' was welcome to a claim of reser-

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" ' vation ;' and, on Lord Braxfield's suggestion, that was adopted,
" one Judge only, by Hailes's Notes, not questioning the authority
" of the case of Lockhart, (for, in Covington's first opinion, he
" agrees with it,) but saying that one decision, to be sure, will
" not make law, so as to bar reconsideration of the point. Again,
" in the case of the Duke of Argyle, the vassal *offered expressly* a
" clause of reservation, not being the party struck at by the claim.
" These two cases do not in any degree appear to me to invali-
" date Lockhart *v.* Denham. They only show what harm is
" done by attempts to avoid the decision of a point when once
" raised. But what is the pursuer's claim? It is, that *every*
" heir of tailzie must pay *who is not heir* of line. The case of
" Lord Hopetoun, as I understand, lays down expressly at least
" this, that the superior has no such right, and that an heir male
" must be entered, though there are numerous heirs of line
" excluded altogether, or postponed. Hence the *plea fails* to the
" extent stated, and to the extent of the reservation in the char-
" ter. But if there is any principle at all in the point, the claim
" ought not to be made applicable to the *heir of line* of the *vassal*
" *last entered*, but to *a party not the heir of the investiture prior*
" to the tailzie. This was the way the reservation was put in
" Mackenzie *v.* M. by the express terms of the judgment (Mor.
" Dy. 15053),—a very remarkable fact not sufficiently noticed.
" But this is a wholly different point altogether. Such a reser-
" vation raises the question, whether the superior can be obliged
" to receive a new set of heirs, even of the body, *e. g.* heirs male,
" if heirs of line were heirs by the prior investiture, or goes on
" some notion of the loss of compositions by the prohibitions
" against sales? The reservation, again, in the case of the Duke
" of Argyle, was directed to the succession of a party who was
" not heir of line to the person last entered and infeft. These two
" reservations are accordingly different, and would depend on
" totally different views of the law. No two views can be more
" different. The cases were *arranged* in a way to save the dis-

" cussion of the question. But if the Court is thought to have " taken in each the view of the subject to which the terms of the " several reservations point, then it is plain that the views were " fundamentally different, yet these two cases are always men- " tioned as going on the same ground. I hold that the Court " gave no opinion in either. The pursuer has chosen the latter " form of reservation. Then he must maintain, contrary to my " view of the Statute 1685, that he can deny to certain classes of " substitutes, named by the entail and in the investiture, the " character of heir. That is the true meaning of the ratio of the " Court in the case of Lockhart, for no heir of provision can be a " singular successor. And here I must observe, that great weight " is due to an argument in the able paper for the vassal, (Sir. J. " Denham *v.* Lockhart,) by Sir Thomas Miller to this effect. " This question does not occur in an original grant of feu. If a " superior, when he first separates out his estate by feuing, shall " stipulate that every heir of entail, to be afterwards appointed, " shall enter as a singular successor, that, as a part of the supe- " rior's property reserved by the original contract, first feuing out " the land, might be effectual as much as a clause tripling the feu " duty, or stipulating for two years' rent on the entry of every " singular successor and the like, on the ground of being an " express compact, by which alone the feu was ever separated " from the *dominium directum.* But when a feu is once granted " without any such matter of special contract and condition, not " so restrained by any condition when the feu is created, and a " vassal exercises his power to substitute heirs in his tailzie, is a " substitute in a deed of provision so executed by a vassal, not an " heir, as much as if the grant had been at first to A. without " mention of heirs, and an entry had been claimed by the heir of " line? I own in that distinction taken by Sir T. Miller, I think " there is great weight.

" Holding that the question in no degree depends on the " claim for entry being by a substitute under a strict entail, in

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" respect of the operation of the fetters, the next point is, what, " then, is really the pursuer's plea? I apprehend it comes to " this, that every heir of provision (no matter under what deed) " who is not heir-of-line, is a singular successor. No doubt, the " question has been raised in cases of entail, because the motive " and interest of the superior is greater in bringing forward the " claim in cases of entail; and some advantage is supposed to be " derived to the superior from the alleged hardship to him of the " entail. But the claim is equally applicable to *every heir of pro-* " *vision*. On that view of the case, it is now admitted that an " heir-male is not a singular successor, according to the unani- " mous decision in Hopetoun. It is said that, in the opinion of " the consulted Judges in that case, the Court held as a ground " of judgment, that the vassal's power of nomination and selec- " tion extended *only* to heirs at law. Two of the Judges who " signed that opinion entirely disclaim any such view, and so, I " understand, does one of your Lordships. Again, if that expres- " sion in the opinion was deliberately considered by all as an " opinion on the limitation of the vassal's power of nomination, I " have three remarks to make, 1*st*, It was entirely *obiter*, for it " was in no degree necessary for the case of Lord Hopetoun, who " was only an heir-male of the body either of the first vassal, or " of the assignee before infeftment; 2*d*, The parties did not under- " stand the opinions to imply of necessity that every substitute " who was not heir-at-law must pay a compensation, for all that " the Duke of Hamilton (after the decision) asked in the Outer- " House, was a clause of reservation, which was also to reserve " all objection to the claim, if ever made against a stranger; and " 3*d*, The passages in the opinion in Lord Hopetoun are, with " deference, very unfortunately expressed, if intended to be a " definition, as it is now said of the law, for it is not stated " whether the limitation of the vassal's power of nomination is " confined to *selection among the heirs of the body*, or among *all* " *heirs-at-law*, however remote. The opinion speaks of his heirs-

" at-law generally, or natural heirs. That would seem to apply " to all relatives by affinity. Well, then, how far does it go? " May a man call his brother before his sons or his daughters, or " a hundredth cousin living, say the chief of a clan, before his " daughters or his sons? or (to take the Seaforth entail,) 'call " 'the descendant of Colin Fitzgerald, my progenitor, who lived " 'in the reign of Alexander the Third,' before his sons and " daughters. The opinion, which is now said to be a definition " *ex proposito* of the law, really leaves the matter as to heirs-at- " law wholly loose; or, if it is intended to mean all his heirs-at- " law, and any order among them he chooses, then it must go to " the length that a twentieth cousin or hundredth may be called " in before a man's own sons and daughters. I own I do not " know what was intended to be in view by that alleged defi- " nition, neither do any of the three Judges, who allude to this " point, explain this, unless it be Lord Fullerton, who seems " to go the length I have now stated. But on what ground can " it be truly held that the superior cannot object (laying aside the " Act 1685) to the entry, say of a fiftieth cousin, in preference to a " son or daughter? Is that party not in substance a complete " stranger, though in name a cousin? The contrary is carrying the " notion of Scotch cousins rather far. I can see no other reason, " except that the superior has no *delectus* at all in those whom " the vassal is to name as his heirs. When feus reverted to the " superior on the failure of heirs, the superior had a clear right to " limit the heirs to be included in the grant, and he had a *delectus* " as to those by whom service was to be rendered, and his lands " held in return for fidelity to the liege lord. But even then it " was not blood relationship which constituted a party heir. It " was then as now, the choice and designation of the party as " heir-of-provision in the deed settled between superior and vas- " sal. The very principle of *delectus* originally imports that. " But a feu of land is now a sale, with certain reserved rights. " When, therefore, a person has granted a feu, and the vassal

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" sells, the purchaser must pay, as a singular successor, for an " entry; but I am of opinion that the entry must be given in " favour of any successors he names as heirs, and who are to take " by succession from him under his deed. So far from concur- " ring in the doctrine that blood relationship is the legal quality " descriptive of heirs, I am of opinion that it is the nomination " and substitution of parties in the deed of the person whose suc- " cession is to be regulated, and who has right to the feu, and that " whoever appears before the superior nominated and substituted " by a proper deed to the succession, is an heir in every sense of " the term. In short, the right of succession under the deed, and " not blood relationship at all, is the only quality that was ever " looked to in the law, at any period.

" Either the vassal has the right to regulate his own succes- " sion, or he has not. If he has not, then every heir-male not " also of line *ought* to pay as a singular successor. The contrary " is found, and found, I understand, to the extent of the most " sweeping preference of collateral to heirs of the body. If the " vassal has not full right to regulate his succession, how happens " it that in no instance whatever of a stranger succeeding under a " *simple destination*, was a claim for a composition ever dreamt of " or preferred? The point never even was mooted except as to " a tailzied destination, and palpably from the influence of some " notion that the fetters of the entail aided the claim. But if the " vassal generally has the power to regulate the succession to the " feu, it seems to me to be only stating the same proposition, in " other words, (for they seem to be convertible,) when I say that " he has right to name those who are to succeed. Observe, all " take as heirs under a deed of succession. Where a party was " named by the superior's consent, the only character which the " law ever looked to at any time, was the nomination in the " investiture, that made him heir equally whether he had the " additional character of blood relationship or not,—that an heir " of provision is a disponee or singular successor merely, I con-

" sider to be a contradiction in terms, or a legal impossibility.
" Now, when a vassal came to have the full right of feu, without
" reversion to the superior, and the right, generally speaking, to
" regulate the succession in that feu, I am of opinion that substi-
" tution in his deed gives the character of heir, which the supe-
" rior cannot refuse.

" Farther, the reservation in this case is a very singular one,
" for it seems to me to be founded on no clear principle whatever.
" It is to claim from any party *not heir of line of the person last*
" *infeft* under that grant. But all the heirs under a branch of
" substitution to A. B., a stranger in blood to the original granter;
" are equally strangers in blood to the granter with A. B. himself:

" Then, on what ground is a distinction taken between A. B.,
" the present Mr. Ewart, and his heirs of line—all being equally
" strangers to the granter or to Lord Balgray. It seems to be
" thought that each substitute who begins a new branch of the
" substitution, is to appear like a purchaser, and to get a new
" grant for himself and his heirs. That view is manifestly repug-
" nant to the Statute 1685, as to the power to substitute heirs.
" But how is he a purchaser? He can enter only by service.
" The last vassal got no benefit by his succession, and he has no
" character of a singular successor whatever. Nay, he is heir of
" the granter in every sense of the term,—fully as much as Lord
" Balgray—and incurs representation *ad valorem* to him. But,
" farther, the heir of tailzie who is so to pay, has no power to get
" an entry including all his heirs. Nay, his heirs of line may be
" wholly excluded, and all his collaterals, if the tailzie is limited
" to the heirs-male of his body. So he would have to pay without
" the benefit of a general grant, and would be worse off than a
" common purchaser; and the result will be that the right of
" superiors are infinitely improved by entails, for they will get a
" composition on every new substitution, and for a far more
" limited class of heirs than at common law. This certainly
" would be a whimsical issue of the effect of entails on the situ-

" ation of superiors. But it is said it is only his heirs of line " who can be admitted. Then the reservation is clearly against " law, and fails beyond all question according to the case of " Hopetoun.

" It seems to be a point not undeserving of grave considera- " tion, whether, when the reserved claim fails, as it confessedly " does in the opinion of the whole Court, and is bad according to " the *terms and object of the reservation*, the superior is entitled " to maintain that he can form and mould that clause into a " different reservation, applicable to a totally different case. He " has no claim; because the succession has opened to one who is " *not the heir of line* of the vassal last entered. On that ground " he has no claim. Every heir male, if the destination was broad " enough, in whatever order, however capricious, could enter. " Now, if the ground of exclusion is bad in law, it is matter of " grave doubt whether the clause can be carved into a different " and special reservation, not founded on the principles stated in " the clause, but on another and separate point. I am unwilling, " however, at this stage of the case, to press a point not started " by the defender.

" I am more anxious earnestly to request the attention of your " Lordships to the distinction which seems to be taken between " the first party in a new substitution, and the heirs under that " clause of substitution. For instance, turn to record, p. 20, " ' whom failing, to Robert Ewart, grandson of Dr. Robert " ' Ewart, physician in Jamaica, my brother, and the heirs-male " ' lawfully to be procreated of the body of the said Robert " ' Ewart, my grandnephew.' Take the substitution to the defen- " der. This might have included those who were not heirs to " Robert Ewart. But even with Robert Ewart and his heirs- " male, what difference is there between the character in which " Robert Ewart presents himself and his heirs-male? I can see " none. There may be no blood relationship to the original " granter. Each takes equally by service. Each takes by force

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" of the nomination in the deed. Each takes independent of the " other. Each takes as heir of provision, and as heir of provision " only. Accordingly, in the only opinion which humbly appears " to me to approach this very difficult point in the argument of " the pursuer, this is admitted in one passage, and the person first " named in a new branch of substitution is put precisely on the " same footing with all those called in that substitution. For, " after disclaiming very anxiously the doctrine of Lord Jeffrey as " to blood relationship, Lord Fullerton not only reverts to it, but " follows it out to the extent of putting every substitution called " upon the same footing, whether he is the first of a new branch " or not. Now, upon that principle, it is quite plain each substi- " tute in a *new branch* must be viewed as a disponee or singular " successor, if he has not in him the separate quality of blood " relationship as much as the first member, called nominatim of " that new branch. Lord Fullerton here holds that you must " only look to relationship to the original granter. But the " pursuer's claim is rested upon the different ground, that the " defender is not the heir of Lord Balgray. But, with great defer- " ence, the principle stated, if I understand another passage, " is not adhered to, and it seems to be thought that the claim " opens only when the succession devolves *upon a new branch* of " substitution, giving a right to a composition only from the first " substitute in that new branch,—a view which draws a second " distinction between substitutes, not consistent, as I conceive, " with the Act 1685. If this means that each new substitute is to " pay upon the ground of being a disponee, taking by the act of " the original vassal, then it is quite consistent, and on the same " principle on which Robert Ewart pays, so will each of his heirs- " male. Is that the principle which is to be laid down? In that " case, again, superiors will have got a great benefit by entails, for " every substitute who is not the heir of line of the original vassal " must pay as a disponee, though he succeeds his own father, and " most consistently and necessarily, upon any view I have been

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" able to take of the general argument of the superiors. For " what difference is there between the case of A. B. in a new sub- " stitution in an entail, if he is to be viewed as a disponee, because " he takes by the act of the original vassal, and the case of A. B.'s " sons. They are disponees as much, beyond all doubt, as A. B., " on the principle stated by Lord Fullerton, and if the principle " is to be adopted, it must be carried to that length. I have " ventured to notice this point in the opinions of my brethren, for " I candidly own that, if these opinions had ruled, I could not as " yet have been able to propose any Interlocutor to your Lordships, " not knowing whether only the first substitute of a new branch " of the substitution, or each heir in each branch must pay, if not " heir of line. But how does the general view as to the substi- " tute being a stranger, if he could not take otherwise by service " to the entailer, support the claim of the present pursuer? He " rejects the principle of relationship to the *original* vassal, and " he claims because the defender is not the heir-of-line of *Lord* " *Balgray*. Now, on what ground is that claim founded? Lord " Balgray was not the maker of the entail. His act did not call " Mr. Ewart. He got no benefit, surely, by the destination in " favour of Mr. Ewart; and I cannot see how the reasoning here " applies at all. Farther, Mr. Ewart is asking for no new grant. " He does not ask for the admission of any heirs of his own; he " cannot exclude them; he cannot benefit them. His entry " gives them no right; on the contrary, it only postpones their " succession. Then, if he is to pay because not a relation of Lord " Balgray, on what ground are the heirs-male of his body not " equally to pay? They do not succeed by his act or as his heir; " they succeed because they are so called *descriptive*, to be sure, " but, as Lord Fullerton says, by the act of the maker of the " entail, and any claim competent against Robert Ewart ought " to apply equally to the heirs-male of his body. According to " one view of the opinions they would pay, and I see no intelli- " gible principle on which they could be exempted, for Mr.

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" Ewart asks nothing for them, and can give them nothing by his " entry.

" Such are the results and the inconsistent operation of the " principles of the superior. Two remarks only in conclusion; " 1. It appears to me that there is some error in the inferences " drawn from the statutes respecting the entry of adjudgers, and " apprisers, and latterly purchasers. These were cases of com- " pulsory charges of the vassal *invito domino*, often against his " interest as superior, against the bargain and contract subsisting " between superior and vassal, and against the fundamental obli- " gation on the vassal of keeping the feu. Hence, as the superior " could not be called upon to change the investiture once consti- " tuted, a bonus was to be given to him. But I do not think " that these statutes, and the rights which they recognize in " superiors, bear very materially, if at all, on the question as to " the vassal's power (having paid for his entry) to name his own " heirs in the investiture that is to be completed, and by which " he proposes to hold the feu without the power of sale. 2. I am " surprised to find reference made to practice, which, however, is " said only to exist to the extent of requiring reservations when " entails are executed. No one need object to that, for the effect " of such was future and undecided. But the important practice " to look to is this. Is there a single case of any superior demand- " ing a composition when a stranger succeeds under a fee-simple " destination of an estate? Neither has notice been taken of the " important practice of the prime superior of the whole land in " the country, and attention has not been paid to the alarming " claims which could open to the Crown against the subjects. On " the argument of the superior, the Crown would have a claim " for a year's rent in every case in which the heir, asking for an " entry, had no other character than that of heir of provision, " whether in a fee simple, or tailzied destination. It is a great " mistake to suppose that the rights of the Crown were not very " deliberately and thoroughly investigated, after the institution of

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" the new Court of Exchequer on the Union. On the contrary, " the opinions in the State Paper Office, and the Advocates' " Library, by the Scotch Crown Counsel, show that every point " was most narrowly and vigilantly looked into. It is stated in " the case of Lockhart *v.* Denham, and I believe is the fact, that " the Crown first raised the question after the Union, that a supe- " rior was not bound to receive a corporation. Many instances " might be given of the vigilance with which all questions, " respecting the rights of the Crown, were considered after the " Union. Yet in no single instance has a composition ever been " asked from any party named as heir or substitute by the vassal, " that vassal having paid his own composition if a stranger. On " the contrary, one composition, and one composition only, has " hitherto enabled the Crown vassals, in obtaining right to their " lands, to name any heirs of provision or tailzie they chose, and " from no heir of tailzie has a composition ever been demanded, " at least up to the date when I was a law officer of the Crown. " On this point I have a distinct memorandum from the office of " Presenter of Signatures, obtained in 1829, when I was Solicitor- " General. I must say that I attach the greatest importance " to this practice on the part of the Crown. They have never " even attempted, generally speaking, to reserve the claim for " composition, although regularly exacted in every case of a " proper stranger not entering as substitute, but as purchaser. It " would be with great reluctance that I should feel constrained " to open up to the Crown a new claim that would operate so " severely and so extensively on the principles contended for by " the pursuer.

" On the whole, I am of opinion that the claim of the supe- " rior to one year's rent of the lands in question should be " repelled, being the form of the Interlocutor in the case of Lord " Hopetoun, and the cause remitted to the Lord Ordinary to " proceed farther as he shall deem just. Whether a ratio " should be added or not, in this case, may be a matter of

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" question. If so, and I rather think the ground of judgment " should be stated, I would propose that the finding should be, " that 'the defender, being an heir substituted in the deed granted " ' by the vassal, and in the investiture for which a composition " ' was previously paid, is entitled to be entered as an heir, on " ' payment of the casualty of relief.'

" LORD MEDWYN.—This is certainly a very nice and difficult " question. The Court, ever since the case of Denham, 1760, " have waived the determination of it, and the diversity of " opinion among our brethren, now that it comes before us for " decision, shows its difficulty. I have given the case the most " careful consideration, more especially since I have had the " benefit of the opinions of my brethren; and the opinion I have " formed I now submit with all deference to that delivered by " your Lordship.

" I consider this declarator as the proper mode of trying the " question, upon what terms the defender is to obtain an entry " to the lands of Allershaw; neither do I think it of any " importance, in this case, that he is called into process as heir " of entail. The question is, since the defender is unquestionably " not the heir of the person last infeft, but is an heir of provision " merely, is the composition of a year's rent due for an entry, or " is he to be received simply for a duplicand of the feu-duty?

" When the first heir of entail, who was not heir of line of " the maker, obtained an entry and was infeft under the entail, " he paid a year's rent to the superior, and a clause was inserted, " that the superior was not to be excluded from any claim there " might be at law for a full year's rent, when the future heirs " of entail shall happen not to be heirs of line of the 'person last " ' entered and infeft.' The question, then, is open, and now " comes for decision, as the defender is not heir of line but heir " of provision only of Lord Balgray, the heir last entered under " the composition paid; it is of no consequence whether it be

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" under a strict entail or a simple destination. It will occur " when the heir of provision comes to enter, although, by the " unfettered nature of the property, he might have been excluded " by the prior heir having changed the destination.

" The question seems to me to depend much on the effect " which the Act 1685 had on the right of superiors previously " existing, which necessarily involves the inquiry as to how these " rights stood at that period. 'By the genuine principles of the " ' feudal system, no vassal had a power to transfer the right of his " ' feu to another without the superior's consent, and the superior " ' was not bound to receive any person in the lands other than " ' the heirs to whom he himself had limited the descent by " ' the investiture, though the greatest sum should have been " ' offered him in the name of entry.' And he quotes the case " of Cleland, 24th February, 1685, for this,—decided the very " same year in which the act concerning tailzies was passed,— " where it was held that it was arbitrary for a superior to receive, " or not receive, a vassal. An important right was originally " connected with this, that, when the heirs of the investiture " failed, the superior succeeded as *ultimus hæres*. There is a " case in *Balfour*, p. 484, c. 5, to this effect in 1506, where the " grant had been to a man and the heirs-male of his body; on " the failure of these it was held that the superior was entitled " to take them even from the heirs-female of his body. See also " *Balfour*, p. 232, c. 38; Craig, B. 2, D. 17, §. 17, mentions " this also as the rights of the superior, but says that some " thought the Crown should succeed. The opinion in favour of " the Sovereign gained ground, so that in *Dirleton*, p. 119, he " resolved the question by a reasonable distinction, that if the " fee be limited, as to heirs-male, on their failure the superior " should have right; but if the grant be to heirs whatsoever the " fee is simple, and the granter, having given every right away, " the superior had reserved nothing, and can pretend no right to " the same.

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" But this distinction was not followed out, and the right of " the Sovereign prevailed, and was enforced. In 1680, Fountain- " hall, Vol. I, p. 97, mentions two cases where the Crown, as " *ultimus hæres*, excluded, in the one case, daughters, and in the " other, a brother; and in Tenant July 1688, ' The " ' Lords found, that, either in an original feu or posterior infeft- " ' ment of tailzie, where the provision is in favour of heirs " ' male, and not the heirs whatsomever, that the heir of line " ' cannot succeed, but that the right does devolve on the King as " ' *ultimus hæres.*' Now, although the superior's right was here " abridged, yet the donator of the Crown necessarily could obtain " an entry on no other terms than any other singular successor. " The donator is liable for the debts of the last possessor coming " in place of the Crown, who, as Dirleton says, cannot succeed " but by way of representation and as *ultimus hæres*; and he " also must be liable in a composition like any other grantee. " It would be different in the case of forfeiture for treason. " A donator, on forfeiture, does not pay a composition for an " entry. Blair, 1680, p. 15,045; Duke of Gordon, 1771, p. " 15,050. The Sovereign did not take as an heir but by escheat, " and therefore was not liable for the rebel's debts till 1690, " c. 33.

" The superior's right to refuse an entry to a stranger came " to be abridged so early as the fifteenth century, for by 1469, " c. 36, superiors were forced to receive creditors apprisers as " vassals on payment of one year's rent of the lands; and " although this was only intended for the case of judicial sales " at the instance of creditors, and for their behoof, yet it came " to be used as a device to compel the entry of a purchaser, by " which, as Craig says, Lib. 3, D. 1, § 13, this right of refusal " ' *hodie pœne subvertitur magno dominorum damno;*' and yet he " never heard such apprisings set aside, *sub prætextu aut collu-* " *sionis aut simulationis.* Superiors, it may be presumed, were " generally satisfied with obtaining a year's rent for the trans-

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" ference, and this came to be fixed as the price for foregoing his " right to refuse an entry, which might thus have been enforced " upon them circuitously, more especially after the example set " by the Sovereign; for the Act 1578, c. 66, mentions, that, by " several acts of the Privy Council, purchasers were secure of " being received as vassals by the Crown upon their reasonable " expenses, *i. e.*, on a composition to be paid to the Treasury, " which practice fixed, at a moderate rate, one-sixth of the valued " rent. The favourable manner in which the Sovereign has " always treated vassals as to their entry, makes the circum- " stance that the Crown makes no such claim as the superior " here does, which your Lordship says is the case, of less weight " than it might otherwise have. A subject superior is entitled " to and exacts a year's rent from a purchaser, although the " Crown only claims a small portion of the valued rent. That, " then, will not affect an ordinary superior's rights.

" By 1669, c. 18, adjudications were put on the same footing " as comprisings with regard to payment of a year's rent, so that " the superiors of lands, annual rents, and others adjudged, shall " not be holden to grant any charter for infefting the adjudger, " till such time as he be paid and satisfied of the year's rent of " the lands and others adjudged; for although the Act 1621 had " treated of adjudications against the heir lying out unentered, " following out the Act 1540, c. 106, when a creditor, either his " own or his ancestor's, wished to pursue for his debt; and " although custom had also introduced adjudications in imple- " ment of disposition and obligements to infeft, yet to these the " payment of a year's rent had not been extended.

" When adjudications were substituted for apprisings by " 1672, c. 19, the payment of a year's rent was still the con- " dition; and finally, purchasers at a judicial sale were, by 1681, " c. 17, entitled to an entry on the same terms.

" Now, these relaxations of the superior's right were all, ex- " cept the last, in favour of creditors, and the last, which was in

" favour of purchasers, was on account of its bearing on the " interest of creditors. It was to give them payment of their " debts that these statutory regulations were introduced. No " change was made in the case of an ordinary purchaser, still " less of a proprietor wishing to make a tailzie of his lands, " cutting off the right line of heirs. These statutes, accordingly, " speak only of the superior receiving the appriser, or adjudger, " or purchaser at the judicial sale, and never even mention " heirs, far less heirs of provision. This would have been " going beyond the object in view, which was simply to prevent " the privilege of the superior absolutely to refuse a new vassal " standing in the way of a creditor obtaining payment of his " debt. If he wished to acquire the lands themselves, and " destine them to heirs different from his heirs of line, I " see no provision in any of these statutes which could compel " the superior to receive a series of strangers substituted to him. " This, it appears, must have been still the subject of treaty with " the superior.

" I am quite aware that it was common for proprietors of " land to tailzie their estates, sometimes more strictly and some- " times less so, by simple destination, with prohibitions, and " finally, with irritant clauses, but they were not favourites of " the law, and with great difficulty sanctioned. That this was " so, is apparent from our Statute-Book. Thus James III., by " 1476, c. 70, revokes all 'Tailzies maid in his tender age fra " 'the richteous aires;' and Craig, Lib. 2, D. 16, § 12, says, " that taillies confirmed by subject superiors when minors, might " be reduced by them. James IV., in like manner, by 1493, " c. 51, revokes 'all tailzies maid fra the aires general to the " 'aires maill of anie landes in our realm,' plainly implying that " scarcely any other tailzie was then known; and in the revoca- " tion by James VI., by 1587, c. 31, of all tailzies made by him " in his minority upon resignations, from the heirs general to the " heirs male, 'against the law and gude conscience;' an excep-

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" tion is made as to conquest 'because it is not against conscience
" 'that onie person quho acquires the richt of onie heritable
" 'landes, may take the same to sik aires as he pleises.' This
" merely imports that a person acquiring lands might make them
" to descend to heirs male, or perhaps stranger heirs, without
" being held to proceed against good conscience, but it by no
" means imports that the superior must receive these extraneous
" heirs, as he must the acquirer and his heirs of line. It is
" true, Craig, Lib. 2, D. 1, § 13, maintains that such entails are
" neither against law nor conscience, and mentions that they
" were supported by the Court in the case of M'Lachlan *v.*
" Lamont, 1st March, 1548, and accordingly this decision is
" reported by Balfour, p. 173, as the first case supporting that
" view of the law, but in the very next year an opposite
" judgment is given, p. 174, c. 3, and from a case also noticed by
" Balfour, decided a few years afterwards, where the term heirs
" of tailzie in general was extended to all such, as well in the
" right line descending, as in side line or collateral—Campbell
" *v.* Grahame, 18th June, 1566, p. 174, I infer that these heirs
" of tailzie were heirs male, and certainly could not be stranger
" heirs. Craig distinctly restricts the term heirs of tailzie to
" heirs male, to the exclusion of heirs female of the maker.
" Accordingly, one of the reasons he gives (L. 2, D. 16, § 20)
" why tailzies were not encouraged by superiors, (and he says,
" 'Tailliari feuda ex jure nostro non possunt, nisi ex consensu
" 'domini sui superioris,' L. 2, D. 3, § 43; and Stair lays down
" the same doctrine, that 'a tailzie must be constituted by the
" superiors) is, that it excludes females 'cum majores multas
" 'commoditates proveneant ex hærede fœmina, quam masculo.'
" This was no doubt the first form of entails; but when more
" distant relations came to be introduced into a substitution,
" Craig denominates them heirs of provision, giving them a new
" designation, *as now first known to the law*, in consequence of
" this enlarged exercise of the power of entailing.

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"But it may be that the form of apprising came at a later "period, and nearer the date of the Act 1685, to be used not "merely to procure an entry to a purchaser and his heirs or his "heirs male, but to strangers in their character of heirs of "provision. But I see no proof of this, and I think there is no "probability of it. When Craig complains, that under the "Act 1469, purchasers, not creditors merely, compelled the "superior to receive them on payment of a year's rent, and that "he had never seen the attempt to resist this successful, I think "it cannot be supposed that this was anything else than the "purchaser assuming the character of a creditor, but with-"out any substitution of extraneous heirs. I do not believe "that such substitutions were very common at that time; I "rather suppose I may say that they were not; and I can "scarcely doubt that, although the courts of law were willing "to abridge the rights of superiors, so as to admit a purchaser's "entry on the same terms as if he were a creditor, they would "have scrupled to allow of a substitution of stranger heirs, and "compel the superior also to receive them by assuming a "character totally alien from his true one, in order to accom-"plish such an object, at a time when the state of the country "and of the law made so very intimate a connection between "superior and vassal, and when it was almost essential that the "superior should have a *delectus personæ* in his vassal.

"The opinion of Stair on this point is noticed on both sides. "One thing is very clear, that in neither of the passages is the "learned author treating of the point at present in dispute—the "composition for an entry. In the first passage referred to, "(B. ii. t. iii. § 43,) he states it as the law, when his first edition "was written prior to 1685, that tailzies must be constituted by "the superior, and that he is not bound to alter the tenor of an "investiture, except where it is provided by law, whereby he is "necessitated to receive apprisers and adjudgers. This of course "would be presumed to include only these creditors themselves

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" and their heirs, as all that was necessary for the object in view;
" and so it is, for Stair goes on thus: 'so neither in that case is
" 'he obliged to constitute a tailzie, but only to receive the
" 'appriser or the adjudger and their heirs whatsoever.' This is
" a very distinct expression of opinion; and I cannot help think-
" ing, that when public opinion induced the courts of law to
" sanction the extension of the form of apprising to the case of
" purchasers, it would not go beyond the heirs whatsoever or
" possibly heirs male, and would not compel the superior to
" receive strangers not of his own selection for vassals, and to the
" loss of a composition for an entry. One case mentioned by
" Stair, which immediately follows the words last quoted, forti-
" fies this view; for the superior is only to receive the adjudger
" and his heirs,—'unless the debt and decreet whereon the same
" 'proceeded, be conceived in favour of heirs of tailzie, in which
" 'case the apprising or adjudication, and infeftment thereupon,
" 'must be conform, unless it be otherwise by consent of parties.'
" Certainly an adjudication on a debt must be in conformity with
" the destination in the bond constituting the debt, and unless by
" mutual consent this be altered, the decree must pass in these
" terms. This is merely following out the benefit conferred on a
" creditor, in order to recover payment from the lands of his
" debtor, for the remedy would have been incomplete if adjudica-
" tion could not pass on a taillied bond for borrowed money:
" But it would not be often that securities for money would be
" taken in that form so as to bring in a stranger, instead of
" simply to the creditor, his heirs, and executors; and to admit
" it in such a case is a very different matter indeed from allowing
" a proprietor to make an entail of his estate to a series of
" stranger substitutes, and adjudge either upon a bond or oblige-
" ment to convey so framed. As yet Stair most clearly is treat-
" ing of the case of a real creditor for borrowed money adjudging;
" and I farther think he is treating of the rights of a proper
" creditor, when he goes on to consider the case where the

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" apprising or adjudication has been on a bond to heirs, and a " tailzied infeftment is wished; for he says, 'or at least if the " 'appriser or adjudger crave the infeftment to himself and the " 'heirs of tailzie, the superior ought not to refuse it.' He is cer- " tainly not bound to do more than allow the lands to be adjudged " in terms of the bond; but the reason why he should not refuse " to give infeftment in favour of heirs of tailzie, is not that he has " no right to do so, but this—'for the apprising or adjudication " 'being assigned to a stranger, he behoved to be infeft, much " 'more the alteration of heirs is allowable.' It is then only an " alteration of heirs that is in view, as instead of heirs whatso- " ever, destining the lands perhaps to heirs male, not the substi- " tution of strangers, and the reason given shows that, even as to " heirs, it is only one alteration of heirs that is contemplated, not " a destination including as many strangers to himself and to " each other, as the maker of the deed may choose. For if an " adjudication be assigned before infeftment to a stranger, the " stranger must be infeft. But he will pay a composition " just as the adjudger would have done. Nay, there is a " case where an adjudger assigned to an assignee, and he " again, without taking infeftment to another, and the superior " was obliged to receive this second assignee, receiving only a " single composition—(Colmslie, 12th March, 1629, p. 200). But " this only introduces the first stranger into the investiture, it " goes no way to support the notion that any number of stranger " substitutes might be introduced into a taillie, and the superior " compelled to receive them on payment of a single composition, " still less that a proprietor might taillie on himself or his heirs " male, whom failing strangers, and could force the superior by " adjudication to grant him an investiture in these terms, when " of course he must be received upon payment of relief as an heir " only. Nay, I think I may draw this inference from it, that it " could not then be held that an appriser even, far less a pur- " chaser, under the form of an apprising, could compel the supe-

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" rior to give an investiture to him, and to a series of strangers " substitutes for a single year's composition, otherwise such a " claim never would have been made, that each assignee before " infeftment must pay composition. This was plainly viewed as " defeating a right to refuse such substitutes without paying a " composition. But the claim was not sustained upon a prin- " ciple quite apart from admitting the right of an appriser to " force the superior to receive any heirs of provision the appriser " chose to offer as vassals.

" It will be observed, that I use the term taillie in its original " meaning, whether protected by irritant clauses or not. If they " be so protected, this gives the superior a stronger interest to " enforce his right, but it arises under the other form also.

" It is fit, too, that I should notice that, after the passing of " the Act 1685, Stair made no change in the above passage of his " work. He does not seem to think that the Act in this respect " at all abridged the right of the superior. How easy and how " natural would it have been for him to have noticed this, if it " really had been his view of the Act. But it must not be for- " gotten, that if a purchaser did wish to destine his lands to a " series of stranger heirs, there was a privilege which the superior " had which would effectually prevent him under the guise of an " adjudger from forcing upon him strangers as his vassals, so that " it must still have been matter of treaty between them. For the " Act as to apprisings authorized the superior to acquire the sub- " ject apprised by making payment of the debt, and the same " privilege was extended to an adjudger in the case of Scot, 10th " June, 1671, where it was farther found that it was redeemable " from the superior by the vassal within the legal, without pay- " ing a year's entry, because the vassal was thus not changed. " (*Stair*, B. 2. T. 4. § 12.) I may notice, in passing, that the " same privilege was not given to the superior in the case of a " judicial sale. (Kennedy, 6th February, 1695.) Fountainhall

" says, 'the Lords unanimously found the superior's right of " ' redeeming took no place in their sales.'

" As to the other passage referred to from *Stair*, § 59, it " seems to me to advert merely to this, that if a superior does " not accept of resignation voluntarily, he will be obliged to admit " the adjudger in implement; but it says nothing as to stranger " heirs being forced on the superior by this form of proceeding. I " wish finally to remark, that, in neither of the cases last men- " tioned, is there the least appearance that the destination was " other than to the adjudger and his heirs; nor can I discover in " our books a single instance of an adjudger forcing an entry for " stranger heirs. There are abundance of instances in the *Dic-* " *tionary v.* Superior and Vassal, of adjudgers claiming an entry, " and also of superiors suspending such a charge on various " grounds, but not a single instance on the ground that it was to " introduce stranger heirs. All bear that the entry is for the " adjudger simply; which, I must say, satisfies me that no " greater relaxation of the superior's right to refuse a change of " vassals was sanctioned beyond the statutory enactment com- " pelling him to receive an appriser or adjudger. I cannot hold " that it was so extended in practice, that it was vain for even the " most determined stickler for a superior's privileges to urge this " plea. I think the legitimate conclusion from the absence of " decided cases, is, that no adjudger believed the Court would " sustain such a claim, and therefore, that, as in the case of a " voluntary purchaser, he knew he must transact with the supe- " rior, if he wished the subject adjudged to pass to stranger heirs, " and that he could only acquire this privilege by treaty with the " superior.

" Upon the whole, then, I do not see that it has been made " out that a superior was bound, prior to 1685, in granting an " investiture to an adjudger, or to a purchaser in the form of " an adjudger, to go beyond the ordinary style to him and his

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" heirs male or heirs of line, but not to strangers whom he might " wish to substitute; and as the superior could always exclude " him by taking the adjudication to himself, this was an addi- " tional power he had to make him purchase a destination such " as he wished, by paying what could only be matter of treaty " and contract between them.

" The Act 1685 was then passed, and as it is the main ground " of the vassal's plea in this case, it is of great importance to " attend to its object and its enactments for carrying out that " object. I presume it will not be disputed, that its sole object " was to legalise the irritant clauses of an entail so as to make " them effectual against creditors and purchasers, and to do this " in such a way as to protect the interest of future heirs of entail, " at the same time doing as little injury as possible to any other " members of the community. Hence when the Legislature " enacted, that it should be lawful to tailzie estates and to sub- " stitute heirs in their tailzies, with such provisions as they " think fit, and to affect them with irritant and resolutive clauses, " it was necessary to provide some mode of informing the public " of what tailzies were allowed, that creditors and purchasers " might know they were dealing with a person who could not " bind his estate. This was done by production of the entail to " the Court of Session, and its insertion in the Register of Tail- " zies. In case it might be thought that, by implication, the " superior's rights might be affected, which was the only other " interest to be attended to, this was done by an express reserva- " tion thrown in at the close of the act, that nothing in this act " shall prejudge 'his Majesty or any other lawful superior, of the " 'casualties of superiority which arise to them out of the tailzied " 'estate.' I must say, this is just what I would have expected " from the aristocratic Parliament which sanctioned tailzies. I " never could have conceived that they would have made so total " a change on the rights of superiors, as to make any act com- " pelling them to receive any series of heirs the vassal chose.

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" This was not necessary to secure their estates for the welfare of ' their family, which is always the inductive cause of entails. I ' am aware that Erskine says, B. ii. t. 7. § 6, that a method of ' obtaining an entry, which was universally considered as a new " limitation of the superior's rights, was established by the Act " 1685, so that the superior is not left at liberty to refuse the " entering of those heirs whom the vassal hath named under the " authority of a public law; and, moreover, that the superior is " not entitled to a composition for every heir of entail, who is " not heir of line to him who is last infeft. These views of the " law are rested on the case of Denham, and the opinions of law- " yers which led to that decision; and certainly they would have " been entitled to the greatest weight, and, indeed, could hardly " have been got the better of, if the credit of that decision had " not been shaken by subsequent judicial procedure. The right " of the superior was, in that case, held so much altered by the " Act 1685, that it was not competent for the parties even to " stipulate that, in the event occurring of a stranger heir succeed- " ing, he should pay a year's rent, at least he could not bind an " heir of entail in this payment. But in the subsequent cases of " Mackenzie and the Duke of Argyle, the Court disclaimed this " view, and allowed a clause of reservation to be inserted in the " superior's charter, to allow the right to be determined when the " case should occur. We are now called upon to do so; and I " cannot discover any thing in the Act 1685 to abridge the supe- " rior's prior rights, even had there been no reservation in his " favour. The powers of the proprietors alone was the subject of " the Act, so as to make an entail effectual against creditors and " purchasers, putting it out of the power of heirs of entail to deal " with any such to the prejudice of future heirs. It had no other " object. It does not enact that the superior must grant an " investiture to such heirs as the maker chooses. It left the entry " as before, to be the subject of adjustment between them. But " if possible, to make this more clear, the superior's right to the

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" casualties is declared not to be prejudiced. This surely as " clearly applies to composition, as it does to relief.

" Your Lordship has examined with great minuteness the " character of this payment, and the place it holds in our law " books. You also mention, that in the clause of reservation in " the Westshiel case, the payment of composition is distinguished " from the ordinary casualties of superiority; and you conclude " that the reservation in the Act does not apply to the compo- " sition for an entry of a singular successor, but only to the relief " for an heir. As already said, I cannot believe that the Parlia- " ment 1685, wished to abridge a superior's rights, without even " any express notice that they were doing so, or that, in the reser- " vation of these rights, they did not intend to include this most " important one, the right of not having a vassal forced upon him, " not the heir of the person entered. I know very well that the " composition for receiving a singular successor could not origi- " nally be reckoned among the superior's casualties, because it " was not matter of right in the stranger, but of purchase and com- " position from the superior, whence its name, and whence also " its place in our Institutes of law; but when it could be enforced " by an appriser or adjudger, it becomes of the same nature as " any other of the casualties; it truly became a casualty; and in " truth I think the reservation more expressly referred to it than " to any other of the feudal casualties. What effect could the " entailing clauses have upon ward, marriage, or recognition? " The last it more effectually prevented; the others would occur " as before. Moreover, an entail would not exclude irritancy *ob* " *non solutum*. In fact, it was the introduction of strangers into " the series of heirs-of-entail which would affect the superior's " casualties, and therefore this probably alone called for the " express reservation. And this, I think, was effectually done " by the Act; so that whatever privilege the superior had before " the Act, as to agreeing or not agreeing to receive strangers as " heirs of investiture, he continued to have after it; and the

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" entailing powers only operated in favour of the vassal, when he " paved the way for it, by receiving the superior's consent to the " admission of strangers as heirs of the investiture, and adjusting " the composition due on alteration of heirs.

" To say, because the Act authorizes the lieges to substitute " heirs in their tailzies, that this gave these substitutes, in all " respects, the character and right of heir of line to the maker, " in a question with the superior, so as to convert a mere stranger " into any other heir than an heir of provision, does not seem to " me a sound inference. The term heir, I think, will never solve " the question. Each substitute is an heir of entail, and has his " rights and character as such in reference to the maker, and the " heirs before him, and the heirs substituted after him under the " entail, which is the charter and measure of his rights. But " *quoad* the superior, he is still an heir of provision, and, if a " stranger to the former investiture, he will remain so under " the entail, until it is acknowledged unreservedly by the " superior, and an investiture in his favour made up under it. " But till then, though called as an heir in the entail, he is a " stranger to the superior, and must be dealt with as such by " him.

" I may remark, that the insertion of the clause in the supe- " rior's confirmation of the entail of Westshiel, that every heir of " entail should pay a year's rent for his entry, unless he was heir " of line to the person last vest and seised, is very strong proof " that our lawyers at that time did not hold such an heir entitled " to an entry merely by paying the relief. It appears that the " clause was twice introduced in 1726, and again in 1737, when " the judgment which forfeited the estate was reversed, and the " appellant took an entry. The composition paid had been 200*l*. " I cannot conceive a stronger illustration as to the understand- " ing of the law at this time of both superiors and vassals than " this; and it is important to observe who were the counsel who " advised the parties at that time. From the appeal cases, it

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" appears, that, besides others on one side, there was Duncan " Forbes, and on the other, the last President Dundas and Lord " Grange, during the period of his return to the Bar, after resign- " ing his seat on the Bench. These were great lawyers, and we " may presume, that, at the suggestion of the one, and with the " approbation of the others, this clause was introduced as a due " exercise of the reservation in favour of the superior's rights " in the Act 1685. I may notice, in passing, an illustration " arising out of this case: The entail which Sir William Den- " ham made in 1711 was not feudalized by him. Sir Archibald " Stewart Denham was the first heir who made up a title under " it, having irritated the right of a prior heir, and as he was not " heir of line to Sir William, he paid the composition as a singu- " lar successor. This title was set aside, and the prior heir, Sir " Robert, was found entitled to the estate, the composition being " allowed to Sir Archibald, as if paid to the superior by Sir " Robert, and the same clause was again inserted. It was held " in 1760, that, having thus acknowledged the entail, the supe- " rior was not entitled to a year's rent, when Sir Archibald " succeeded to Sir Robert, as he did, not being his heir of line. " But suppose that Sir William Denham had, at the date of the " entail, applied to the superior to give him an investiture under " this entail to himself and the heirs-male of his body, whom " failing, to Robert Baillie and the heirs-male of his body, whom " failing, to Mr. Archibald Stewart, and the heirs-male of his " body, would the superior have been bound to do so on payment of " relief as an heir? The entail was made in 1711, and the entailer " was an old man without heirs-male. He died next year. The " superior was not, if he confirmed the entail in favour of Sir " William, entering a singular successor, so that composition was " not then due as for a singular successor, while it was very clear " that it must be due at no very distant period. The superior " surely was not bound to acknowledge the entail? *That* the " interlocutor in 1760 implies, as it holds he had excluded his

" claim to refuse, and this must have been by a voluntary act of " his own. The vassal could not surely force a renewal of the " investiture, as if it had been simply to Sir William Denham, " and his heirs or his heirs-male? Therefore, I think it must " be held, that it was still a matter of transaction between the " parties, as they clearly viewed it at the time, although effect was " not afterwards given to it by the Court. Sir William Denham " could not be called on to pay composition as a singular succes- " sor, as was found subsequently in the case of Mackenzie; and " if I am right in holding that the superior was entitled to a " composition when Baillie took an entry under this entail, which " really seems not questionable, on what principle can it be said " that if he, having possessed the estate, should die without heirs- " male, and Archibald Stewart, not his heir of line, came to " succeed, he should not be liable for a composition on his entry? " It might be held that an heir of entail was not entitled to bind " a future heir in payment of this; but if a reservation of the " right to demand it be inserted when the case occurs, I am " unable to see on what ground it can be resisted as often as it " occurs.

" Considering that there is so much difference of opinion upon " the point among us, I am happy to fortify my own views, by " referring to the opinion of Lord Balgray, in the case of the " Merchant Company, 17th January 1815. He observes, 'a " ' third encroachment arose from the Statute 1685. It empowers " ' all men to entail their lands; and, by that Act, the rights of " ' the Crown, and of all superiors, are reserved. Yet the supe- " ' rior was bound to receive the heir of entail, if he were also " ' heir of line, though he succeeded as a disponee, and he could " ' not object to do so:' that is, when he received him, he was " bound to receive him as an heir, and paying relief only. ' But " ' whenever the entail went beyond the heir of the original inves- " ' titure, or called others than the heir of line, it was considered " ' that the superior's right to impose an entry revived under the

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" ' reservations in the Act.' He then refers to the cases of " Mackenzie and the Duke of Argyle, ' and the cases of the " ' Earl of Dalhousie and the Earl of Breadalbane, decided in " ' Exchequer, where the parties found caution, that, upon " ' the succession opening to the fourth son, they would pay a " ' year's rent.' This I must consider an opinion of very great " weight.

" The same observation applies to the last change made on the " rights of superior and vassal by the Act 20 Geo. II. A pur- " chaser may obtain an entry from the superior under a title, " containing an unexecuted procuratory in his favour. He was " no longer to act as an adjudger; but then it is expressly pro- " vided that the vassal must pay such fees or casualties, as the " superior is entitled to ' receive on the entry of such purchaser.' " The case here is simply the reception of the purchaser as vassal, " and the superior's casualty on his entry is to be paid before he " can obtain his title. This statute in this respect shows a due " regard to the superior's rights; its object was to take from him " a privilege inconsistent with the advanced state of the country, " and the altered condition of superior and vassal, in relation to " each other; but it went no farther, and it did not say that the " payment then made would cover any series of heirs of investi- " ture that might be introduced into an entail. To extend a " vassal's right so far, and so far abridge the superior's, was not " necessary for the object in view, and was certainly not expressly " enacted. The utmost that can be said for it is, that it is infe- " rentially deduced as the result of the two Acts, granting an autho- " ritative right to the entry of such heirs as the vassal chooses, " without expressly declaring that no casualty is to be paid on a " change of heir. The view of the Legislature seems to have been " all along the very proper one, to grant a privilege to vassals " trenching as little on the superior's rights as possible, when both " are compatible. It is quite compatible to allow the entailing " on a series of heirs, and not defeat the right of the superior to

" a composition as often as a stranger succeeds as heir of provision ;
" and therefore, upon the whole, I concur in the views of the
" majority of the consulted Judges.

" LORD MONCRIEFF.—This is undoubtedly a question of
" importance. It was once decided in Lockhart against Denham,
" July 10th, 1760; and, notwithstanding all that has since
" occurred, I still think that case, rightly considered, an authority
" of very great weight. But if the discussions which have since
" taken place have the effect of rendering the material question
" still an open point, subject to the force of all the authorities
" together, though in none of the latter cases, except that of
" Baillie, did the facts require or admit of a judgment on the
" point, at the least I cannot hold it to have been determined in
" opposition to Lockhart, and the express authority of Erskine,
" by any thing which took place in the case of the Duke of
" Hamilton against Lord Hopetoun, which appears to me to have
" been different from the present case, in the essential facts on
" which it depended, and which did not admit of any judgment
" on the question which the Court are here called upon to
" resolve.

" On principle, I can find no solid distinction between the
" case of one heir of an investiture and that of another; between
" one series of heirs, not the heirs of the old investiture, who are
" once established in the superior's charter, and any other series
" so established. Whether they are natural heirs to one another
" or not, they are all heirs of the investiture, and enter as heirs of
" provision.

" The case is,—That there is an entail by Miss Ewart (who
" was fully entered) to herself in liferent, whom failing to William
" Cossar, &c., with a procuratory of resignation. He resigned, and
" got a charter engrossing the entail, on paying the composition
" of a year's rent. This was right. But, once done, the entail
" was sanctioned as the ground of the investiture, and all the
" heirs as heirs of provision under it. The superior had no power

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" to refuse the charter in these terms. He was bound by the " statutes to grant it, the composition being paid. He could not " refuse, on the ground that the granter exercised the statutory " power of imposing the conditions of an entail. This is not the " question argued. The superior would not have been allowed " to insert a clause, binding the heirs of tailzie, who might not be " heirs of line of their predecessor, to pay a year's rent on enter- " ing ;—not such a clause as that which occurred in the case of " Lockhart. All the decisions together import, that the utmost " admissible was a mere reservation of such a question, leaving it " open on both sides. Cossar might have taken infeftment. But " he held on the open charter. Still Lord Balgray took the estate " as heir of provision to him, by service. He was no assignee of " Cossar to whom the charter was granted ; a fact very material " with reference to the case of Lord Hopetoun. He was the heir " specially, and nominatim, recognized as such in the charter. " Lord Balgray was infeft on the charter ; as the vassal of inves- " titure, taking, not as assignee, but as heir. No composition " could be due then, on any supposition. Yet it must be said, " that, as he was not an heir of line or heir-male of Cossar, he " would have been bound to pay it, if Cossar had taken infeft- " ment, his not doing of which was a mere accidental circum- " stance. Lord Balgray dies without issue. The defender is " heir of the investiture nominatim ; and the question arises, Is " he bound to enter as if he were a disponee or singular successor, " paying a year's rent? because he is not the *heir of line*, or an " heir by blood of *Lord Balgray*.

" The plea-in-law for the pursuer is very vague: That, in the " circumstances condescended on, the defender is bound to pay a " year's rent. It is not made precise in the pursuer's case, p. 29. " He speaks of '*the heir of the last vassal.*' He does not say the " heir of line, nor does he exclude the case of *heir-male* general " of the last. He leaves it doubtful, whether his plea limited to " total strangers or not. But I understand the pursuer to mean

" his ground to be, that the defender is not heir of Lord Balgray " by blood; not, that he is not heir of Cossar, the institute of the " entail and the charter; nor, that he is not an heir of the " entailer. It is put on his not being heir of blood to the *last* " *person infeft* as heir, though that person was himself a stranger " both to the entailer, and to the first heir or institute. It so " stands by the clause of reservation, which puts it on the heir " succeeding not being heir of line of the last heir. There is " another peculiarity in the conclusion of the pursuer's case,—That " the defender must accept of a charter with a similar reservation. " But, suppose the composition were due by the first extraneous " heir, it might be a question, whether that must be continuous. " Yet I understand the plea to be, that it must apply to every " such heir successively.

" In this state of the case, I look for the law necessary to " support such a claim. And I may just observe, before going " farther, that it appears to me to be a claim totally different in " principle and character, from anything to be found in the " opinion incidentally delivered in the case of the Duke of " Hamilton *v.* Lord Hopetoun, on which the chief reliance is " placed by the pursuer.

" It is not necessary to go into the ancient history of the law, " the state of it now in the essential points being clear. 1. By " the Act 1469, a superior was bound to enter apprisers on pay- " ment of a year's rent. 2. By the Act 1669, c. 36, he was " bound to enter adjudgers on the same footing. It is unnecessary " to observe, that thereby the investiture was fundamentally " altered, without the consent of the superior. 3. But by 20 " Geo. II. he became bound to enter all disponees on payment " of the usual 'dues and casualties,' which provision has been " understood to mean, the composition of a year's rent in the first " instance, and the casualties afterwards falling due. Entries or " renewals of the investiture, under the force of these statutes, are " totally different from an original grant. But 4. By the Statute

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" 1685, c. 22, all proprietors became entitled to make tailzies of " their lands and estates to any series of heirs that they pleased, " and under such conditions and clauses irritant and resolutive as " they might think fit, but with a provision that the Act should " not militate to the prejudice of superiors of the casualties of " superiority. I understand it to be undoubted law, that, what- " ever reservations it may be competent to insert in the charter, " the superior cannot refuse an entry upon such a title, or object " to it on the ground that it contains clauses irritant and resolu- " tive. I do not understand, that any point is here raised on this " subject. But I may observe, that, if the superior were entitled " to object on account of the entailing clauses, the time for settling " any such question ought to be, when the charter is first " granted constituting the new investiture. The Duke of Hamil- " ton was in that position in Duke of Hamilton against Lord " Hopetoun, and the opinion delivered in that case, whatever " may be the effect of it, had precise relation to that position. If " there were any equity for a consideration being paid to the " superior, because of the effect of the entailing clauses, it could " only be at first,—for something to be paid, besides the compo- " sition by the institute as disponee. If the entail has been " acknowledged by the superior without any reservation of such " a claim, the investiture is constituted, and has become, by the " act of the superior, the law of the feu; and as to the clause of " reservation in the statute of the superior's casualties, I concur " in the commentary of the Lord Justice-Clerk.

" And, with reference to the present case, if the estate may " be effectually entailed, so that no alienation can ever take place, " what intelligible interest can the superior have in the particular " nature of the destination? If the vassal may tie up the property " for ever to any number of heirs, ending with the Crown, what " is it to the superior whether these heirs shall be heirs of blood " to one another, or successive serieses of strangers, but all called " as heirs, one after another. I agree in the observation of Lord

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" Kaimes, that, if the superior suffers, it is by the inevitable " effect of the power to make such an entail.

" When I look to the law, as it stands upon the authorities, " I can see no ground for the present claim; and I think that, if " it were sustained in the form in which it is maintained, it would " introduce great confusion in the practical application of the " principles which regulate the subject.

" All the cases settle this generally, that persons who are heirs " of the last infeft are entitled to enter on payment of the relief, " only as heirs, although they succeed in virtue of special desti- " nations.

" The case of Mackenzie is particularly strong on this point. " For the question arose with the first heir of tailzie, asking, for " the first time, a charter upon the entail: and he was found " entitled to the charter as an heir, because he was the heir of " the former investiture; with only a reservation of any claim " against future heirs, but reserving also their defences. The " reservation in that case was of a very peculiar nature; because " not only the entail had never been acknowledged by the supe- " rior, but no composition had yet been paid for the change of " the investiture. It was, in like manner, determined in the case " of the Duke of Argyle, that the heir of entail was entitled to " enter as an heir, though the superior was permitted to insert a " similar reservation of the question as to future heirs. I shall " again advert to these cases more particularly. But, though a " question of this kind may stand reserved, it still remains to be " considered, what the nature of that question is, and what the " merits of the claim are, when the occasion arises for considering " them. The Court have constantly refused to sanction any " reservation directly recognizing the validity of the claim. " Accordingly, the reservation, in the present case, is merely, that " the superior shall *not be precluded*, by granting the charter, " from any claim which *he may have at law* for a full year's rent, " whenever the heir of entail succeeding shall not be heir of line

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" of the last entered and infeft. It will be observed, that the " pursuer does not venture to make a claim to this precise effect; " and, as I understand the opinions which differ from mine, it is " not held that the composition is due wherever the heir of tailzie " is not the *heir of line* of the last infeft. The doctrine now " maintained is much more peculiar and abstract,—that the ques- " tion depends altogether on whether the heir of provision asking " an entry is, in any manner, related by blood to the predeceasing " heir. This is a very different proposition from that advanced in " the summons in this case: and I must own, that it is a propo- " sition for which I can find no authority in the law. It is in " no institutional writer, and in no decision with which I am " acquainted. Even the incidental opinion, in the case of the " Duke of Hamilton against Lord Hopetoun, is, as I have under- " stood that opinion, utterly at variance with it. That seems to " intimate, with reference to the special case, that the heirs called " by the charter claimed on by the assignee of the procuratory, " must all be heirs by blood to him. It happened that it was so " in that case, which excluded the point, and withdrew attention " from the peculiar qualification of the opinion. I understood it " merely to indicate, that a tailzie by the assignee to strangers " would be a different case. But that is a very different matter " from the plea in the present case.

" When we look at the authorities, the first thing which pre- " sents itself is the express doctrine laid down by Erskine. The " question reserved, even if the pursuer be allowed to rid himself " of the peculiar conclusion above alluded to, is distinctly this, " whether the heir of a special investiture already in the titles " derived from the superior must enter as a singular successor, if " he be not an heir by blood to the last entered vassal. Then " what says Erskine to that doctrine? (*Ersk.* ii. 7. 7.) 'Yet " 'where a proprietor entails his lands, the superior is not entitled " 'to the composition of a year's rent from every successive heir " 'of entail, who is not heir of line to him who stood last

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" ' infeft, on pretence that he is a singular successor. The heir
" ' of the last investiture cannot be called a singular successor;
" ' and he is founded in a right to demand an entry, upon
" ' payment to the superior of the sum due to him by law, in
" ' name of relief, upon the entry of an heir.' Then as to
" Erskine's authority, it is true he refers to the case of Lockhart.
" I am not satisfied that that is not very high authority; but the
" first authority is in Mr. Erskine's own work. He so held it;
" and to this hour there is nothing to contradict it. The utmost
" is a permission to keep the point open. Mr. Bell is incorrectly
" referred to. He merely says that the question is undecided.
" Then consider the state of the cases,—1*st*, Lockhart *v.* Denham
" —I think it remains a decision of great importance. Divested
" of specialities, the heir of entail had taken a charter on a procu-
" ratory of resignation, with a very special clause of reservation.
" An attempt was made to *decide the point* on the *charter*, on the
" ground of the reservation being made a condition in the title.
" The real question there was whether that was consistent with
" law. It was pleaded that the *heir of entail* could not be bound
" by the acceptance of the charter by another. But, besides,
" what power had the superior to insert the reservation if he was
" bound to grant the charter? Therefore, it could have no effect
" but as a *reservation* of the *question*. The idea, in the later
" cases, seems to have been, that the Court refused to acknowledge
" it even as a reservation, because they found, that, in respect the
" entail had been acknowledged, the claim would not lie. But
" I doubt the correctness of this. I suspect that the idea was,
" that the imperative nature of the clause, once put in the inves-
" titure, should have been binding, being unreduced. But it may
" have been otherwise. The Court may not have regarded the
" reservation. But surely, if with such a clause they still held
" *on the merits* that the heir of investiture was entitled to enter
" on payment of relief only, it is a judgment on the *merits of that*
" *question*, and *a fortiori* in the present case, where clearly the

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" clause does no more than keep the question open. For the " effect of the clause is *not* to qualify the charter or investiture. " The superior *could not help* granting the charter, and the clause " is merely a *salvo* by permission, to avoid discussing a question " which might be unnecessary. In the report of Lockhart's case, " the pursuer argues on the reservation as barring the defender " from objecting, *personali objectione*. The defender merely said " it was of no weight, because he does not represent the taker of " the charter. But he argues the whole merits on the footing of " the question being open. In the later cases all that can be said " is, that the question was waived as unnecessary to be decided. " In the case of M'Kenzie, it was a single composition that was " asked, and it was found not due, though the entail had never " before been recognized, because the heir asking an entry was " the heir of the former investiture. The reservation allowed " was only of the claim on the entry 'of any future heir of tailzie " 'not an heir of the investiture *prior to the tailzie*.' This is not " at all what is maintained here; and it reserved also 'to the said " 'heirs all defences against the same.' It is clear, that all that " was contemplated was the question of one composition for the " change of investiture. The opinions reported by Lord Hailes " are not favourable to the pursuer. The Lord President " evidently held the case of Lockhart an important decision. " Lord Gardenston and other Judges held the same. Lord Brax- " field says nothing against it, nor the Lord Justice-Clerk. The " reservation was agreed to, to leave the question open.

" In the case of Argyll, Lord Dunmore had offered to pay a " composition, being *institute*. The pursuer required a *positive* " *declaration* that he would not be bound to enter future heirs, " *not heirs* male or of line of the person last entered, without " another composition. The defender *offered* a reservation *of the* " *question*, and the question discussed was whether that was " sufficient? Plainly it decided nothing; but that the pursuer " was *not entitled* to frame his charter in the way he required.

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" The observation on Denham was, merely, that, so far as effect " was supposed to have been denied to a *similar* reservation as " that *offered*, it must have been erroneous. But it does not " appear that effect was so denied to it. It was only denied to " the effect asked by the Duke of Argyll. In the case of Baillie " the precise case occurred. But there was this specialty that a " charter had been granted without any special reservation, and " it was pleaded the pursuer did not represent the granter of the " charter but as heir of entail. It was indeed said it would not " decide the general question. But the point of *right* was decided. " Lord Corehouse's note is direct on the very question. I grant " that the question is reserved here; but, though it is reserved, " the question remains, how is it to be decided?—Duke of " Hamilton *v.* Hopetoun. The judgment in that case was not " meant to be adverse to the opinion in *Baillie*. But the case " was very peculiar. There was a charter to Lord Hopetoun and " his heirs and assignees. A composition had been paid. Then " there was an assignation to a series of heirs in the marriage con- " tract of his son, Earl John, all heirs *of the assignee's blood*. " There had been *no acknowledgment by the superior of any special* " *destination*, and the question was simply, whether one compo- " sition was not due for the *first* acknowledgment of the destina- " tion in the deed of assignment? That was manifestly an entirely " different question from that which here occurs. Lord Stair in " the passage which has been referred to, (B. ii. t. 3, § 59, " beginning 'as to the first case, it is a general rule,' &c.,) contem- " plates strangers as well as heirs in blood, being members in the " constitution of the tailzies he is speaking of. And your Lord- " ship reminds me, that, if the principle contended for were to be " sustained, it would throw the whole matter of making up titles " to entailed estates into confusion. At present it is impossible " to say, whether it be necessary for every heir who is a stranger " to the heir last infeft to pay composition, or whether the first " substitute of a new series in blood should pay composition. It

" is difficult to say what would be the result, if the views of the " defenders were to regulate the law; and as there are very few " entails in which new members are not introduced, whether " every substitute of a new series in blood is to be considered as " a stranger, or whether only the first. The superior asks com- " position on the succession of the first member of a new series, " but I do not well see whether every other member is to pay " composition equally with the first."

Thereafter the Court, 18th February, 1842, pronounced the following interlocutor:—" The Lords having resumed considera- " tion of the cause with the opinions of the consulted Judges, in " accordance with the opinions of a majority of the whole " Judges, find that the pursuer is bound to receive and give an " entry to the defender as an heir of the investiture, on payment " of the ordinary casualty of relief; and remit to the Lord Ordi- " nary to proceed farther in the cause as to his Lordship shall " seem just, and find no expenses due to either party."

The appeal was taken against this interlocutor.

The *Lord Advocate* and *Mr. Moir* for the Appellants.—The ancient law was that no change in the investiture could be made without the consent of the superior, and that on failure of the vassal's heirs, the feu reverted to the superior, *Ersk.* iii. 10, 2. That rule is still in force, unless in so far as it has been modified by statute. The Act 1469, cap. 36, gives apprisers right to demand an entry, but only on payment of "*a zeire's* " *maill*" of the lands. The same right is given to adjudgers by 1669, cap. 18, and to purchasers at judicial sales, by 1681, cap. 17, but each of these statutes gives the right only upon the same payment as in the case of apprisers, viz., a year's rent. Then came the 20 Geo. II., cap. 58, which took away the right of the superior to control the investiture, and gave heirs and singular successors a method of compelling an entry by letters

of horning; but although the statute thus compelled the superior to acknowledge a change in the investiture, it did not impose any obligation upon him as to the terms upon which the entry was to be given. On the contrary, it declared that he should not be obliged to obey the charge, unless the charger should tender to him "such fees or casualties as he is by law entitled to re-"ceive." This leaves the amount of fees and casualties to be demanded just as it was previously.

Previous to the passing of the Act 1685, cap. 22, which enabled vassals to entail their lands upon a series of substitutes, whether strangers or of blood, by effectual fetters against alienation, superiors had little interest to protect themselves against the admission of strangers under the ineffectual destinations then in use, as the destination was almost sure to be defeated before it came to the stranger. That statute, however, gave the vassal the power of fencing the destination against alienation, and of forcing the superior to acknowledge an investiture which might include any number of singular successors. This statute is also silent, however, as to the terms upon which the superior is to enter the heirs of entail, and might have altered materially the position of superiors in this respect, unless provision had been made for their protection, but it declares that it shall "not pre-"judge lawful superiors of the casualties of superiority which "may arise to them out of the tailzied estate." This declaration cannot have any other meaning than as a reservation of the superior's casualties, and a declaration that, although his common law-rights had been touched so far as to force upon him the recognition of an inalienable feu, his right to those casualties was untouched.

It is evident, therefore, that none of the statutes have in any way infringed the superior's rights at giving an entry, though they have compelled him to give entries to which he was not previously compellable; and therefore, although he cannot now refuse to give a charter under an entail with strict fetters, yet his right remains as before, to demand from every heir, a

stranger in blood to the party last entered, the composition payable on the entry of singular successors. Though the heirs of entail are heirs of provision, yet where not heirs of line, they are singular successors in every sense of the term. In Argyll *v.* Dunmore, *Mor.* 15,068, it was held an institute of entail not being the heir of line, was bound to pay a year's rent; and there is no principle why a substitute should be in a more favourable situation.

An entail 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, and the substitute asking entry is a disponee or singular successor, and bound to pay a composition accordingly. In Lockhart *v.* Denham, *Mor.* 15,047, it was held that the superior was bound to enter heirs of entail, not heirs of line, as heirs and not as singular successors, but that proceeded entirely on the fact of the superior having acknowledged the investiture; and, moreover, the decision has always been considered of questionable authority, and not as deciding the question; but at all events, in the present case the charter given to the last vassal entered, expressly reserved the superior's claim to a year's rent, when the succession should open to an heir of entail not an heir of line. In McKenzie *v.* McKenzie, *Mor.* 15,053, the vassal was the lineal heir, and in right under the feu as it stood before the entail. The Court expressed itself dissatisfied with the decision in Lockhart *v.* Denham, and while they found that the superior was bound to enter Sir Hector McKenzie upon payment of a duplicand of the feu duty, they inserted in their interlocutor a reservation pretty much in the terms of that in the last charter in the present instance, which shows conclusively that Lockhart *v.* Denham was not held as having decided the general question. But this is shown even more distinctly in Argyll *v.* Dunmore, *Mor.* 15,068, where an institute of entail was willing to pay a year's rent as a singular successor, but the superior refused to receive him, unless he would consent to a reservation in his

charter of a right in the superior to refuse to enter the substitutes of entail not heirs of line, unless upon a similar payment. If Lockhart *v.* Denham had been held as deciding the general question, then the discussion as to this reservation could not have arisen; the payment offered by the institute would have enfranchised all the substitutes, and the institute's right to refuse insertion of the reservation would have been indisputable, but the Court, while they rejected the reservation proposed by the superior, directed the insertion of a general reservation of the superior's rights. In Hamilton *v.* Baillie, 6 *Sh.* 94, the superior was obliged to enter an heir of entail as an heir, but that proceeded on the fact that the superior had granted a charter without reserving any claim on future heirs, and that possession had been had upon that charter for forty years. Hamilton *v.* Hopetoun, 1 *D. B.* and *M.*, 689, N. S., merely decided that a purchaser was entitled to an entry on payment of a year's rent, but that the destination must be confined to his heirs at law.

[*Lord Cottenham.*—If you are to look to the heir of the investiture, a younger son would not be such before an elder one. Would the superior be entitled to a year's rent in that case?—If he would not, the reservation could not give him the right.]

Yes, but the question was not as to the heir of the entailer, but of the first party who took investiture under it.

[*Lord Cottenham.*—It was not so understood by the Judges.]

There was no question in Hopetoun's case between the heirs of the maker of the deed, the question was with the heirs of the party having the investiture. It was there held that a party taking assignment of the precept before infeftment, is entitled to take up the investiture, and introduce his own heirs. Here Cossar was a stranger to Miss Ewart, and so was Lord Balgray. Lord Balgray being a stanger, took the first entry, and it is he who asks the introduction of the respondent into the investiture.

Mr. Turner and *Mr. Anderson* for the Respondent.—I. So far

as the claim of the appellants is founded upon the reservation in the charter granted to Cossar, it must be admitted that the respondent is an *heir* of entail, and not a singular successor, the clause itself *ex hypothesi* of its application, gives him that character, and the summons, both in its narrative and its conclusions, proceeds on the footing of his possessing such character. By the charter, the heirs of line of Lord Balgray not being heirs of his body were excluded, and the right of succession then devolved to Robert Ewart, and the heirs male of his body. Lord Balgray died without heirs of his body, the succession therefore is in *hereditate jacente* of his Lordship, and can be taken up only by the party who has the character of heir under the investiture, —in no other character can it be taken up. Moreover, when Cossar resigned upon the procuratory in the deed of entail, the warrant for such resignation, he could do so only in the terms of the warrant, that is, for infeftment to be given to the series of heirs prescribed by it; and the superior, when he gave a charter upon the resignation, must have given it in favour of the same series, and that excluded the heirs at law not being heirs of the body of both Cossar and Lord Balgray, and on failure of the heirs of their bodies admitted the respondent.

If the respondent then take under the investiture, and under it alone, he has every character of an heir, and none of a singular successor, who, in the definition of Craig is, "*is qui immediate* "*non est successurus ratione habita ad id tempus quo investitu-* "*rum accepit.*" It is only by special service as heir that the respondent can take up the succession, and the 20 Geo. II., cap. 50, assumes the production of a special retour to be the criterion of the character of heir. If then the respondent be heir of the investiture and entitled to an entry as such, it can be only upon the terms upon which an heir is entitled to an entry; that he is heir of provision and not of line, makes no difference in regard to these terms upon any authority which can be produced; though not the heir of line, he is not the less the heir of the

investiture. All the grounds upon which relief duty is described as being payable by an heir, (*Ersk.* ii., 5, 47; ii. 7, 5, 6 & 7; *Stair*, ii. 4, 26 & 32;) are alike applicable to an heir of entail or of provision. The entry is given to him as to one whom the investiture points out, and in conformity with feudal custom; and not, as in the case of a singular successor, to one unknown to the investiture, but whom the statutes, infringing upon his original right, forces upon the superior.

II. That the entail under which the respondent claims to be entered, contains fettering clauses, which, so long as the line of succession prescribed is unexhausted, will prevent the admission of singular successors, and the falling of the casualties which would thereby accrue to the superior, will not support the superior's claim, is admitted. The opinions delivered by the consulted Judges in Hamilton *v.* Hopetoun, 1 *D. B.* & *M.*, 689, show this to be incontrovertible. The Act 1685, cap. 22, allows vassals to tailzie their lands upon strangers, but makes no provision for any such fine. A strict interpretation of that Act, therefore, would warrant the position that the superior is not entitled to a composition even on the entry of strangers under the investiture, and such appears to have been the opinion of *Ersk.* ii. 7, 6 & 7. However this may be, the superior cannot be entitled to a recompence for admitting strict fetters into the investiture. Anciently, before vassals came to have the power of alienating the feu, and before the Crown had acquired the right of *ultimus hæres*, superiors could prevent tailzied destinations, because they altered the succession, *Craig*, ii. 16, 20; *Stair*, ii. 3, 43. Now that the law is changed in this respect, they cannot ask a recompence, on the very opposite ground that strictly fettered entails prevent the sale of the feu, and the frequent alteration of the investiture. And if the superior must recognise the entail, the injury to him is the same whatever be the series of heirs. His exclusion from the chance of a composition is as effectual where the fetters are laid

on the old destination, as where that is discarded, and the estate devolved on a new series of heirs; and therefore, if the insertion of the fetters gave the superior any right of claim, the claim would apply to all entails, whether in favour of heirs of line or of strangers; yet it is indisputable that the vassal is entitled to introduce the fetters of an entail into the destination, provided he does not alter the course of succession, without the superior being entailed to make any demand; that was settled in McKenzie *v.* McKenzie, *Mor.* App. 2, vo. Sup. & Vass. In Hamilton *v.* Hopetoun, 1 *D. B.* & *M.* 689, the opinions of the consulted Judges was express against any claim by the superior for the mere insertion of fetters into the investiture.

III. Previously to the Statute 1685 the vassal had acquired the right to name the heirs to the feu, and to change the succession from the legal to an arbitrary line, *Stair*, iii. 4, 2, 20 and 23, and ii. 3, 43. The mode by which the vassal could compel compliance from the superior with this nomination was by adjudication, and the heirs introduced in this way stood in the same relation to the superior as the heirs they displaced; and so far were the heirs of the adjudger from being liable to be treated as singular successors, that until the Act 1669 even the adjudger himself was not liable in any composition, *Stair*, ii. 4, 32. After the Act 1669 the heirs of the adjudger continued free from liability, for it made the Act 1469 the rule of the superior's right, and by it a year's rent was payable only on the entry of the appriser himself.

The Act 1685, though perhaps it had chiefly in view the making fetters of entail effectual, nevertheless confirmed this power of nomination in the vassal when it gave the vassal power to tailzie his lands and to substitute heirs. Under the statute the superior cannot refuse to grant a charter upon an entail, whatever may be the series of heirs, and unless any infringement thereby occasioned upon his rights is saved by the clause of reservation in the present charter, there is nothing in the statute

itself to save it. No doubt the statute saved the casualties of superiority, but the right of naming heirs, which originally was an ingredient in the *dominium directum* afterwards detached from it in favour of the vassal, was never a casualty of superiority. The casualties of superiority, such as relief, are *debita fundi*, and may be made effectual by poinding of the ground. Composition is a mere personal debt, which cannot be enforced against the lands. The object of the statute plainly, therefore, was to save the former, not the latter. When the vassal exercises his right of nomination in such a way as to bring strangers into the investiture, no doubt the superior is entitled to a composition upon such change, but there his right stops; when the composition is paid in respect of the change his right is satisfied, he cannot control the series or class of heirs in whose favour the change is made. Here Cossar paid a composition for the alteration in the investiture, and thereby he enfranchised all the heirs called by the change. When that change is in favour of strangers in blood, the superior's chances of gain are not diminished, the fetters of the entail being left out of consideration, for the chances of a change in the investiture are evidently much greater where the heirs of provision are not the legal series. If the fetters are taken into consideration, no doubt the superior's interests are affected, but the loss is through them, not through the particular choice of line, for the fetters equally prejudice him whether they be in favour of the line of legal heirs or depart from it.

So far as regards the present question, an heir of the blood not being the heir of line is in identically the same position as an heir of provision not of the blood; they neither of them take according to law, or by the provision of the law, but by the will or by the provision of the entailer, and they must both take by the same form, service, and retour. There may be a class of persons who might successively be entitled to the character of heir-at-law, but only one person at a time can enjoy

that character; all others, however near of blood, have no more right as heirs than the most perfect stranger. But the sole criterion for determining whether relief duty or a composition is payable, is whether the party asking the entry is heir by the charter, for if he is not he is not heir at all. However near the party may be in blood, if not the heir in the charter, he can obtain an entry only as a singular successor.

Lastly, even if the respondent were a singular successor, it would not follow that he must pay a composition for an entry, that payment is strictly statutory, and therefore demandable solely from those parties upon whom the statute has imposed it, as was found in regard to adjudgers, previous to the Act 1699, in Grierson, *Mor.* 15,042, and in regard to Crown donators, in Gordon, *Mor.* 15,050. But there is no statute which imposes this payment upon a party claiming an entry under an investiture, because he is a stranger in blood to the vassal last infeft. If it be payable, therefore, the vassal must be at the mercy of the superior, as to its amount, for there is no authority for making it a year's rent more than any other sum. The right, if it exist, then, must be by the common law, and be universal; but there is no trace of the claim at all until the case of Lockhart *v.* Denham, although entails were known long prior to that time; neither is there any mention of it in the institutional writers prior to that time.

In Lockhart *v.* Denham, *Mor.* 15,047, there was a special obligation on the heirs of entail to pay a year's rent when not heirs of line, which was stronger than the reservation in the present case, but the Court refused to give effect to the obligation, and though they did so mainly upon the ground of defence set up by the heir, that the heir who had allowed the obligation to be inserted in his charter had no power thus to bind the substitutes, this was in truth to negative the superior's claim to the payment, and in this view it is a direct authority. In Mackenzie *v.* Mackenzie it does not appear that the superior claimed a suc-

cession of compositions, but one composition from the institute, because if he gave an entry under the entail he would be deprived of a composition so long as the entail endured. Accordingly the Court refused the claim as against the institute, because he was heir under the former investiture, but reserved it against any future heirs who should not be in that position, so that this case in truth confirmed Lockhart *v.* Denham. In Argyll *v.* Dunmore the present question was not decided either way, it was simply reserved; and Hamilton *v.* Baillie was decided on its own specialties, but the opinions expressed, especially by Lord Corehouse, were strongly against the appellant's claim.

LORD BROUGHAM.—Miss Grizel Ewart being seized in fee simple of the estate of Allershaw, and having completed her title to it by charter of confirmation from the superior in 1796, executed an entail of the same in 1802, which in 1811 was duly recorded. By this tailzie she settled the estate upon herself in life rent, then upon William Cossar, her cousin, and the heirs male of his body, whom failing, upon Lord Balgray and the heirs male of his body, whom failing, to the heirs general of his body, whom failing, to Robert Ewart, her great-nephew, and the heirs male of his body, whom failing, to other series of nominees, which it is unnecessary to enumerate. This entail is made strict by the usual fencing clauses against sale, contracting of debt, and alteration of the order of succession, and no question arises as to the strictness of those fencing clauses.

Miss Ewart died in the year 1811, before the tailzie was recorded, and was succeeded by William Cossar, who took the name of Ewart, according to the conditions of the tailzie. He resigned into the superior's hands, by virtue of the procuratory in the original tailzie, and obtained a charter of resignation in favour of himself and the heirs of the investiture. The reddendo clause specifies eighteen merks to be paid yearly in lieu of feu duty formerly paid, and also stipulates for the payment of the double of

such feu for each heir's entry; and a right of poinding is given in case of non-payment, which non-payment, it says, shall work no forfeiture.

This charter contains an important saving clause (when I say "important," I mean important on account of the argument which has been raised upon it, because the reservation of what is a man's right by law does not seem worth much; he would have his legal right whether it was reserved or not). It will presently appear how it operates—reserving all claims of the superior and his heirs, which they may have at law, for a *full year's rent*, whenever the heir of entail to whom the succession may open, *shall not be the heir of line of the person last entered, and infeft by the superior* or his heirs. A composition of 486*l.* being a full year's rent, was paid by William Cossar to the superior on this occasion. He died without taking infeftment on this charter of resignation, and leaving no heirs male of his body, he was succeeded by Lord Balgray. His Lordship was served heir of tailzie and provision, in June, 1818. He took up the unexecuted precept in the charter, and was infeft under the reservation which has been mentioned. He died in February, 1837, without heirs of his body, and the respondent, Robert Ewart, was served heir of tailzie, and provision to him. It is a fact in the cause admitted, that he was not heir of line, nor stood in any degree of relationship to Lord Balgray, the person last seized. He was a relation of the entailer, but a stranger to the person last seized. The appellants are the superiors, and they brought their declarator of non-entry, calling upon the respondent, Robert Ewart, as heir of tailzie and provision, to enter; and on his refusing, calling upon the Court to have it found and declared, that the lands are in non-entry by reason of Lord Balgray's decease, and shall so continue until entry of his heir or of his legal disponee, and that therefore they have a right as superiors to the bygone non-entry dues.

The question, therefore, intended to be raised by the action, and which it does raise, is whether or not the appellants as supe-

riors are bound to enter the respondent as vassal, upon payment of the ordinary relief payable by the heir of the vassal last entered, or only to enter him as a singular successor, on payment of a full year's rent.

An objection was taken by the respondent, the defendant in the Court below, and a good deal insisted upon there, that this was not the competent form of action for trying such a question of the right to a year's rent. But that objection may be taken to be now abandoned. It is not urged in the respondent's cases here, it received no countenance from the learned Judges below; indeed, the only two who refer to it, the Lord Justice Clerk and Lord Medwyn, though differing widely from one another upon the merits of the question itself, both in express terms declare against the validity of this preliminary objection. None of the other eleven Judges make any allusion to it. Lord Meadowbank agrees in every respect with the Lord Justice Clerk, who had declared against the objection. In a word, all their Lordships either decide or assume that the objection has no force at all.

We are therefore brought to the merits of the question itself. It is one of great importance, and its difficulty is testified by this remarkable circumstance, that the narrowest possible majority of the learned Judges below has pronounced the decision now appealed from, there being seven in its favour, and six against it, and that the decision would have been the other way, and by the same majority of seven to six, had not one of those learned persons changed his opinion in the course of the proceedings, that is to say, abandoned the opinion which he had formed upon hearing the case argued, in consequence of reconsideration, and of the arguments used by the consulted Judges and the permanent Lords Ordinary. It is now then necessary to dispose of this main and only question in the cause.

It cannot fail to strike in the outset any one who attentively considers this argument here, that they who maintain the appellant's case, the superior's claim, are in two particulars driven to

setting up very arbitrary propositions. First they assume, that if any composition, any extra payment is due, it must be one year's full value; and next they take no distinction between the next heir of line, the heir of law independent of the entail, the only one indeed who can be called an heir of line, and all the other heirs of the blood of the party last seized; but they do take a distinction between all heirs of the blood, and all other persons succeeding under the entail, holding that each and every of them stands in a position different from each and every heir of the blood. Both these positions appear to labour under the grave suspicion of being invented to suit the contention of the superior, for each is in itself arbitrary and gratuitous.

First, the taking one year's value is only derived from the rule of taking it when the superior accepts the tailzie by the first charter which he gives, carrying the feu to persons not of the original investiture and of his first grant. But it by no means follows that the same rule is to apply where he subsequently admits any person under the new investiture, and only follows out that for which he had been paid his composition. The year's value first taken, is derived from the ancient right of the superior while he was not as he now is, a mere instrument of conveyance, and while he had some option in the matter of granting or refusing a charter.

But the second assumption is more important, and is found to be too strong for some of those learned persons below, who yet agree with the minority in the Court below, and support the claim of the superior. It is too strong for them, and they repudiate it, although they agree with those who come to that conclusion upon that question. It is contended, or rather it is taken for granted by the argument of others, that it is one thing to admit under an entail an heir called to the succession, who is related by blood to the person deceasing, and another thing to admit an heir called to the same succession in the same tailzie, but who is a stranger in blood to the person last deceased. The

latter, a stranger in blood, is likened to, nay, is in terms called a singular successor, while the former is treated for the purpose of this argument as rather an heir than a singular successor. I particularly refer to the argument, very short indeed, but very able as it always is, of the very learned and ingenious Judge, Lord Fullerton. Now, it appears to me wholly impossible to go along with this position. The person succeeding by the tailzie out of the turn which he would have at common law, is as much a singular successor as a mere stranger in blood. He serves as heir not of law or of line, but of tailzie and provision. He takes not as heir, but as purchaser. He succeeds, not by law, but by the law of the feu, that is, in this case, of the tailzie. He may be the second son of the person last seized, and yet be as much a singular successor as if he had not a drop of his blood in his veins.

Now, this seems to have been clearly perceived by some of the learned Judges who agree with Lord Fullerton in supporting the superior's right. Lord Fullerton, differing wholly from Lord Jeffrey, takes this more accurate view of the matter, and holds those strangers in blood to be, as they most clearly are, heirs male out of the investiture, while Lord Jeffrey will not call such persons heirs at all for want of blood, but terms them disponees or singular successors. It is however worthy of observation, that Lord Jeffrey's opinion is extremely short and general; he contents himself with a general acquiescence in Lord Mackenzie's opinion, who preceded him, and goes at no length himself into the argument, while Lord Fullerton has very fully argued the point. Lord Mackenzie falls, though not so entirely, into what I take leave to regard Lord Jeffrey's erroneous view of this fundamental matter. But then I must so far agree with both these learned persons, and differ with Lord Fullerton, that I do hold this position—what I call this erroneous position—to be fundamental, and that I am wholly unable to see how the superior's claim can be maintained on any other view. The heir of the

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investiture, the person called out of his order by force of the tailzie, is a singular successor, to all intents and purposes, whether he have the blood of the person last seized in him, or is a stranger. They who maintain the contrary, are bound to show book for it, and they have not done so—they have shewn no book.

I may here dispose of the argument raised upon the reservation. The superior rests upon that very clause, not denying that but for its import and operation he can have no ground to stand upon. Now, to what does it amount? The superior reserves all right to this casualty, or payment. (I see one learned Judge, the Lord Justice Clerk, argues at length against its being a casualty, on which I give no opinion, for it is not necessary farther than to say, that his Lordship's argument has not at all satisfied me that it is not a casualty, but the point needs not here be settled.) The superior reserves all such right as he may be found to have, nothing more. He saves such right as he may *have by law*—no more. Then to what does this amount, but to a reservation of the right, if by law it belongs to him, but leaving the question open to be determined when it arises? And this too may be said of the cases relied upon mainly by the superior; they only deal with what it was necessary for the Court in each instance to determine, they go no further than was necessary, they tell the parties you have such and such rights clearly and at present, and the further matters shall not be deemed and taken to be needlessly concluded by any thing now adjudged, but must be dealt with hereafter, when it becomes necessary to decide upon them. And to show more clearly that such is the true character of these decisions, it may be observed, that sometimes, in taking this course, which is quite decisive upon what the meaning of the Court is, there is a saving also added of all objections competent to the claim so reserved; they not only reserve the claim of the superior, but they also reserve all competent objections to such claim, and further than that in one case, the decision in Lockhart *v.* Denham, which is most important, that is the Westshiell case,

is to all appearance criticised, observed upon rather than objected to, still less overruled, but commented upon as it were for having gone further than was necessary, and having disposed of a point which the case before the Court did not require to be disposed of.

This general remark may be thought to suffice upon the cases which the superior relies on. But it is fit that we go further into them; and when we come to examine the authorities, we really do find that, justly considered, the balance is all on one side. It is not at all too much to affirm, notwithstanding all the elaborate and subtle arguments on this case, that there is no one authority either of a text-writer, or a decided case which supports the appellant's contention.

I entirely agree with Lord Moncrieff and other learned Judges, in considering the passage in Erskine as of the greatest importance. It is, as the Lord Justice Clerk well observes, not a single statement of opinion, it is repeatedly given by that very learned author, the Professor of Scotch law, and one intimately acquainted with feudal principles. It is a clear and an unhesitating, and an unqualified opinion, or rather, which augments its weight, it is given as a known principle, and not as a matter of any doubt or controversy, upon which, however, had any dispute existed, his opinion would, as such, have been entitled to the greatest respect. But he states it as known law, and no matter of controversy at all. "The superior," he says, "is not entitled "to the composition for every successive heir of entail who is not "heir of line of him who stood last infeft, *on pretence that he is a* "*singular successor*," as if he had foreseen the present argument, and wished to furnish previously an answer to it. He goes on to say, "he cannot be called a singular successor; he is heir of the "investiture." Now, it is plain that this learned writer would not deny that in one sense he is a singular successor; he is not heir at common law; but what he plainly means is this, that if he be singular successor, he is so in company with all the heirs, who having the blood in them of the last person seized, yet not

being heirs at law, succeed by force of the entail. They are all in one sense heirs, namely as heirs of the investiture. In another sense, they are singular successors, that is, they do not succeed as heirs at law, but in both senses they stand in the self same position and relation to the feu. If one is heir, so is the other—if one is purchaser (singular successor), the other is so too.

But it seems this opinion, or rather this authoritative statement of Mr. Erskine, is entitled to little deference, because it cites as its support the case of Lockhart *v.* Denham, then, it is said, recently decided. The decision was, however, thirteen years old when Mr. Erskine wrote the passage in question. It was not the day before, but for thirteen years it had been known and never quarrelled with, never objected to: it satisfied the profession. Had it not given satisfaction among conveyancers, among the learned feudists of the day, he doubtless would have stated the doctrine which it supports with some qualification. Had it not met with his own full approval and been backed by his high authority, he probably might have expressed himself differently too. But it is to be observed, that he does not lay it down as any new law first declared by that decision. Though he refers to the decision, he does not give it as forming the only ground of his statement.

Then it is said that not only was this a recent decision, but it was afterwards impeached; and one learned Judge, Lord Fullerton, goes so far as to say, that since the decision in the Duke of Argyll *v.* Dunmore, and Mackenzie *v.* Mackenzie, it can no longer be regarded as an authority. I do not at all see that either of these cases overrules the case of Lockhart *v.* Denham. Indeed, Mackenzie *v.* Mackenzie, besides that it makes very much in favour of the respondent's, the vassal's, contention, declaring the first heir of tailzie entitled to his charter *quasi* heir, because heir of the former investiture, adds a reservation of any claim against future heirs, but adds also a reservation to them, the vassals, of all competent defences against the superior's claim. And, as Lord

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Moncrieff has well observed, there was this peculiarity in the case, that the entail never had been acknowledged by the superior, and no composition whatever had been paid for a change of the investiture.

Now in the Duke of Argyll *v.* Dunmore, the other case relied on as not merely shaking, but overturning the Westshiell case, I can find no ground whatever for this assertion. The question arose with the institute, and he offered a composition. The superior required, as a further condition of entering him vassal, that a reservation, or rather an acknowledgment, should be adjected of his not being required hereafter to enter any stranger in blood without a full composition. The superior called therefore for an admission of the right in his favour prospectively, the vassal refused that, but the vassal offered a clause of reservation, that is, he offered a clause to keep the question open, such a clause as the present. But what is most material to observe, is, that the superior, now pursuer before the Court, called for a judgment in his favour, because the question raised by his action, was whether or not this offer of the vassal to insert a saving clause was sufficient. And what was the decision of the Court? That the superior had no right to a declaration in his favour, and was bound to take the saving clause as offered by the vassal. The utmost that can be alleged of this decision is, that it did not consider Lockhart *v.* Denham, the Westshiell case, as having denied all effect to a clause of reservation like the one now before us, and held by the Court to be sufficient, though denied to be so by the superior, whose contention was thus overruled by the Court. Nothing else, as Lord Moncrieff justly observes, was decided, except that the superior was not entitled so to frame his charter.

It must be remarked, that supposing the two cases of Mackenzie *v.* Mackenzie, and the Duke of Argyll *v.* Dunmore, to lay down all that they are contended to lay down respecting the previous case of Lockhart *v.* Denham, they only do so upon the

supposition that in that case a positive reservation of the superior's right would be wholly unavailing, not merely a reservation of whatever right he might by law have, which is the reservation in the case at bar, but an express clause that every stranger in blood shall pay a year's full rent. I see one learned Judge, Lord Ivory, seems to have a doubt if the Westshiell case is in this respect correctly reported. But in so far as it differs from the present reservation, the observation is very material, for it is perfectly possible that the Court, in Mackenzie *v.* Mackenzie, and in Argyll *v.* Dunmore, might say it was going too far to hold an express and unequivocal and unconditional reservation of the right of a full year's rent, at all events to be ineffectual against the vassal, who took the charter with it, and yet they might contend, and might most consistently hold, that the superior was not entitled, under a reservation like the one here, namely, a reservation only of all the right which the superior has by law, a reservation which merely keeps the question open.

It is further material with this view to remark the pregnant observation of that great feudal lawyer, Lord Braxfield, as reported by Lord Hailes, in Mackenzie *v.* Mackenzie, for it shows his opinion of the effect of such a reservation being merely the exclusion of a condition. "May not," says his Lordship, "the superior throw in a reservation? If he does not, he cannot afterwards "claim, for the granting of the first charter is the enfranchisement "of all the subsequent disponees." The Court also, in Argyll *v.* Dunmore, in the interlocutor, expressly says, "In respect the "reservation proposed leaves the question entire when it shall "occur." It is quite clear, therefore, that the meaning was to leave the question entire, and no more.

It remains to take notice of the two other cases which have come into discussion. The Duke of Hamilton *v.* Baillie, and the Duke of Hamilton *v.* Hopetoun. The point arose in the first of those actions, and no doubt, as far as the decree goes, it may be said to be in the vassal's favour, the observation of the learned

Lord President especially, being in his favour. But there there had been possession for forty years under the charter, and all the three Judges who decided the case rely upon that; they take notice of that, two of them indeed resting their decision on that alone, and one of them, Lord Gillies, expressly saying that it did not decide the general question. It therefore seems reasonable to lay that case out of view, as an authority either way, in disposing of the present. But although that case may, as a decision, be laid out of view at present, we cannot overlook the great and weighty authority of Lord Corehouse in dealing with the same question. How true soever it be that the general question was not in that case of necessity raised, that most able and learned Judge, that great feudal lawyer, gave it as his clear opinion, that the composition taken by the superior for entering the first disponee enured in favour and in protection of all the subsequent heirs of the investiture, for he says that were it not so, and were each stranger in blood bound to compound over again for his entry, a tailzied fee would more profit the superior than a fee simple.

But the other case, (the case of Hamilton *v.* Baillie, being laid out of view for the reasons I have mentioned, as going upon the special circumstance of forty years' possession,) goes a great deal further for the support of the vassal's claim, and it is incumbered with no special circumstances whatever. Lord Moncrieff justly says that this case did not at all impeach that of Westshiell, Lockhart *v.* Denham, and that the present question did not arise. But I think his Lordship sets the importance of that decision too low as regards its bearing upon the present case, when he merely seeks to get rid of it as an authority against the vassal, and against the side of the question on which his Lordship is ranged. It appears to go a good deal further, and we have the valuable intimation of Lord Mackenzie, one of the learned Judges who side with the appellant and the superior here, and against the vassal, that although the present question was not there raised, yet the Court expressed an opinion, which he calls accidental,

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meaning, I presume, obiter, in giving a general exposition of the law. "I cannot," his lordship says, "deny that it was their "opinion, it was the opinion of myself who wrote the judgment, "and I entertain no manner of doubt that it was the opinion also "of the other Judges who signed that judgment." But let it be borne in mind that there is on the other side nothing to set against this opinion, even if it be only an *obiter dictum* of the Court, any more than there is anything to set against Mr. Erskine's authority, be it only a statement of his adopting the principle of the Westshiell case.

But Hamilton *v.* Hopetoun, goes further still. The decision is matured on the question here raised respecting the difference between heirs connected by blood and mere strangers. The Court confined its judgment to heirs of the blood or line, because there was no question before them of any other, and any declaration going beyond that would have been obiter and unnecessary and not called for. But then they laid down, in the clearest manner, that no heir of the blood, be he a five hundredth or a five thousandth cousin, could be considered a singular successor, with a view to the question of his entry, under the investiture. Therefore, as Lord Ivory well observes, there is an end of the appellant's contention, that any heir of entail not in the direct line, is to be regarded as a singular successor, though an heir of the investiture.

In conclusion, it must be observed, that the utmost extent to which the argument goes in favour of the superior, is to shew that he has not the Westshiell case against him. Now, I never gave more attention to any case than the present, on account of the peculiar circumstances in which it comes before us, and the great feudal importance of the question. I have examined most minutely all the arguments, both at the Bar, and proceeding from the Bench, and I find that the whole of the contention resolves itself into an attempt, which I think a failing attempt, to displace the Westshiell case. But supposing that case is displaced, this

only shews that one of the authorities for the respondent is taken away from him, but it does not set up any authority against him. Now the burthen lies on the superior to prove his title against the vassal, first, because he claims, and secondly, because he is actor; and he has adduced no authority whatever in his behalf. He has to maintain a distinction between one class of heirs of investiture and another class, calling the one heirs, the other purchasers, or he has to separate singular successors into two classes, one connected by blood, the other strangers in blood. He has to introduce as to entails or tailzied successions, a new law; to make two laws for the same investiture, the one such as relates to all relations out of the direct line, however remote from the legal, that is the common law successor, even a five hundredth cousin, and the other a law applicable to strangers in blood. Those two kinds of law he has to prove, belong to the law as to heirs of investiture. In a word, he has to show that an entail savoring in all its parts of inheritance where there is blood, though it is all purchase, and in all its parts savoring of purchase, is heritable, even though it relate to a five hundredth cousin, and that where blood is out of the question, though it is under the same investiture. He has not given any such authority; all the authority is only used to shew that this is a case of the first impression; but be it such a case, the principle is all for the respondent.

My Lords, upon these grounds, which I have entered into at greater length than I should otherwise have done, on account of the peculiar importance and difficulty of the case, I am clearly of opinion that this decision ought to be affirmed.

LORD COTTENHAM.—My Lords, the very equal division of opinion which has existed in this case amongst the learned Judges of the Court of Session, upon a question of purely Scotch law, makes it a painful duty to have ultimately to decide it, but the elaborate manner in which the subject has been discussed by those learned Judges, and the learning they have brought to bear upon it, have very much relieved the case from the difficulty naturally

belonging to it. Having maturely considered those very learned opinions, I do not feel much hesitation in adopting the reasoning upon which the majority of the Judges have rested their judgment, and therefore in coming to the conclusion that the interlocutor appealed from ought to be affirmed.

Whatever might be the state of the law as between the superior and the vassal, upon entails made by the latter prior to the Act of 1685, it is certain, that under that Act the latter had the right and power of substituting heirs in his lands by tailzie; that is, of substituting persons in the succession, whether strangers in blood or not, and who were designated as heirs. The superior was bound, under this Act, to give effect to such entails; he could not refuse because strangers in blood were introduced into the succession. If, therefore, the right of the superior before the Act to require payment of a composition of one year's rent, arose from, and depended upon, his right of refusing to give effect to the proposed entail or alienation, it is obvious that the Act very materially altered his position. Certain rights of the superiors were not overlooked by the Act, for it provided that the Act should not prejudge the superiors of the casualties of superiority which might arise to them out of the tailzied estates, and that those fines and casualties should impart no contravention of the irritant clauses. The fines and casualties spoken of were obviously claims which were to arise and become payable *out* of the estate after the completion of the entail. If the composition claimed be not a casualty of superiority which was due and demandable out of the estate before the Act, it cannot be included in the reservation, and the Act would in that case be conclusive against the appellant's claim.

For the reasons stated by the Lord Justice Clerk, there seems to be much ground for holding that the composition was not a casualty of superiority, and was not payable out of the estate. If, before the passing of that Act, the superior was not bound by common law to give effect to an entail in which strangers were

included in the succession, then the composition of a year's rent, when paid, was not a casualty of superiority, but a sum agreed upon as the price of the charter; and if the superior was so bound upon payment of this composition, then this common law right will be found in the authorities antecedent to 1685.

The Statute of 1469, which allowed land to be apprized by creditors, obliged superiors to give an entry to the apprisers for payment of a year's rent, but there does not appear to be any ground for supposing that the appriser was restrained as to the disposition of the interest he took under the statute, and if he was at liberty to make the investiture in favour of such heirs as he chose, then succession of strangers in blood could not be subject to another payment of one year's rent, the statute only requiring one such payment. So, when the Courts assumed the jurisdiction of making dispositions effectual by adjudication, they did not require the vassal to pay the composition of a year's rent, that proceeding not being within the Statute of 1469, and it must be assumed that the superior was not considered as entitled to it until the Act of 1669 in terms gave him that right.

This history of the law appears plainly from the first volume of *Stair*. The Act of the 20th George II. compelling the superior to enter all disponees, on payment of the usual dues and casualties, gave no new right to the superior. From this and the other authorities referred to, it appears to me to be well established that before the Statute of 1685, all vassals had the means of changing the investiture, and of making what declarations they pleased; but as those means were under the Acts of 1469 and 1669, the superior was entitled to a composition of one year's rent, but as this was due only by virtue of those statutes, and as those statutes gave it only upon the entry of the apprisers or adjudgers, he was not entitled to it upon the succession of any one claiming under such entry. Nothing, therefore, in the nature of the claim now made was a casualty of superiority at the time of passing the Act of 1685. That statute,

therefore, 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, and certainly was not given by that Act, there cannot be any legal foundation for it.

Upon general reasoning, this would appear tolerably clear, but it must be ascertained what decisions there are affecting this question, and the answer to that inquiry strongly confirms this view of the case. The case of Denham in 1760 appears to be a decisive authority. The very point was raised and decided against the superior, although there was a reservation of the supposed right. The acknowledgment of the entail is stated in terms only to have consisted in granting the charter and infeftment thereon, which all exist in the present case. Erskine thought this decision conclusive, and I do not find any subsequent case displacing the authority of this decision. That of Mackenzie, indeed, in 1777, confirms it, and particularly the observation of Lord Braxfield, that the granting of the first charter was an enfranchisement of all the subsequent disponees. There was no question in that case of paying a second composition.

The case of the Duke of Argyll *v.* Lord Dunmore, in 1798, may show that the superior was not willing to consider the case of Denham as conclusive against his claim, but it proves no more. There was no decision, and as it was probable that the fact necessary to raise the question would never arise, the parties were willing to keep it open. But the case of the Duke of Hamilton *v.* Lord Hopetoun is of more importance, though in that case, as in the preceding, the precise question did not arise, and was therefore reserved; but in that case it was held that a purchaser was entitled to substitute all his own heirs in any order he chose, without the superior's consent, and consequently, the first in the succession being the purchaser's son and his heir male, that the superior had then no claim. Now if the vassal

is not bound to preserve the order of succession which was originally the nature of such grants, but may substitute any persons of the blood of the first taker, without reference to their order or their probability of inheriting according to the rules of inheritance, the only principle upon which the claim can be supported seems to be removed, for whether the party named be a perfect stranger, or so remotely connected in blood, and with so many before him as to make his chance of inheriting absolutely hopeless, must be perfectly indifferent to the superior. The ancient rules of inheritance by this decision do not regulate the superior's claim.

In the Duke of Hamilton *v.* Baillie, in 1827, the superior having granted the charter without any reservation, was held bound to enter, that is, he was held to be precluded by his own act from raising the question. That case, therefore, is directly in point with the present.

These cases, on the part of the respondent, are not met by any contrary decisions; I think, therefore, that upon authority, as well as upon principle, the decision of the Court below was right, and that the interlocutor appealed from ought to be affirmed.

LORD CAMPBELL.—My Lords, I was present when this case was argued, and I think that after the very ample discussion which it has undergone, it is unnecessary for me to say more than that I entirely concur in the view taken of the subject by my noble and learned friends who have preceded me. I think it is quite clear that the onus lies upon the appellant to lay down the rule; and if he has not laid down any certain rule, nobody can tell exactly what he contends for. But, at all events, he must substantiate his claim. Now, he does not substantiate it, the statute does not give him what he claims, nor is there any decision in his favour, nor any general doctrine upon which he has relied. I think therefore that he fails. I do not see that the respondent in the first instance is called upon to repel the

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claim; there is no *primâ facie* case made out on the part of the appellants. As this question is of very great importance to the law, and both my noble and learned friends have gone into it so very elaborately, I trust that what they have said will have a very salutary effect in settling the law upon the subject.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor therein complained of be affirmed with costs.

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE, Agents.