recorded title, and at the same time interpose the heir as mid-superior in order to escape payment of composition. But if he abstains from completing a feudal title, and leaves the heir not a barren mid-superiority merely but the *dominium utile* of the estate, his personal right interposes no obstacle, either formal or substantial, to the entry of the heir." Now, I not only concur in the law there stated, but I do not think it could have been better stated, and therefore I abstain from any further observations. I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS—I am of opinion with your Lordship in the chair that the law could not be better stated than it has been by the Lord Ordinary. I am therefore also for adhering.

LORD MURE—I quite concur in the Lord Ordinary's judgment, and have nothing to add to what he has said in his note. I think it is a sound view of the law of Scotland.

LORD SHAND—I am quite of the same opinion, and I think the case a very plain one. The plea for the pursuer is that "a casualty of a year's rent of the lands as described in the summons having become due to the pursuer as superior by the defender as trustee aforesaid on the death of Lewis Potter, the pursuer is entitled to decree." But the sole connection that the defender has with the lands is that he has a personal right and title that has never been feudalised, and therefore there is no liability on the part of the defender. Again, it is said that the defender Mr Guild is not entitled to put forward the heir, or to allow the heir to come forward and take up the title as he has done. I can see no possible ground upon which that contention can be maintained, and I am therefore of the opinion, with your Lordships and the Lord Ordinary, that the demand here made is one which the Court must refuse to concede.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Mackintosh—Guthrie.

Counsel for Minuter (J. A. Potter)—Lang. Agents—Campbell & Smith, W.S.

Friday, July 6.

FIRST DIVISION.

HOPE *v.* DUKE OF HAMILTON.

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

A vassal infeft in lands and entered with the superior, conveyed them by his marriage-contract to himself and his wife and the longest liver of them in conjunct fee and liferent for his wife's liferent allenarly and the children of the marriage in fee. The spouses were infeft on this contract for their respective rights of fee and liferent. No children were born of the marriage. The vassal died, and his heir-at-law claimed to have her entry recognised on payment of relief. The superior demanded a composition on the ground (1) that from the date of registration of the marriage-contract the vassal's title depended on that infeftment, and that therefore the entry of the heir-at-law was the first entry under a destination introducing strangers to the investiture; and (2) that the vassal had left a settlement conveying the estate to trustees, who had conveyed the lands to the heir-at-law, who therefore held not as heir-at-law, but on a singular title. *Held* (1) that the vassal was not by the registration of the marriage-contract infeft of new in the lands, and that his heir-at-law therefore succeeded under the old investiture, and was only liable for relief; (2) that the alleged conveyance to trustees by the vassal's settlement was one which, so long as the heir-at-law came forward and entered, it was *jus tertii* to the superior to inquire into, since he had no interest in merely personal rights granted by his vassals.

This case, which depended on similar considerations to those occurring in *Duke of Hamilton* v. *Guild*, *supra*, was heard and decided along with it.

The late Admiral Sir James Hope, G.C.B., was proprietor of the lands and estate of Carriden and others, in the county of Linlithgow, which were held by him in feu of the Duke of Hamilton as superior. He was infeft and entered in the said lands conform to precept of *clare constat* in his favour from the superior, and instrument of sasine thereon dated and recorded in 1829.

By antenuptial contract of marriage, dated 3d December 1877, Sir James Hope conveyed the lands of Carriden to himself and Lady Hope, and the longest liver of them in conjunct fee and liferent for her liferent use allenarly, and to the child or children of the marriage in fee, and provided Lady Hope during the subsistence of the marriage with a free annuity of £200 in name of pin money, and for her further security bound himself to infeft her during the subsistence of the marriage in a free annuity of £200 upliftable furth of said lands. This contract was recorded in the Register of Sasines on 11th February 1878. The warrant of registration was a warrant to register on behalf of Admiral Sir James Hope and his wife Lady Hope, "for their respective rights of fee and liferent within mentioned, for preservation as well as for publication, in the register of the county of Linlithgow."

There were no children of the marriage. Sir James died on 9th June 1881, leaving a trust-disposition and settlement executed in exercise of a reserved power contained in his marriage-contract, by which he conveyed the lands of Carriden and others to certain trustees. Miss Helen Hope, his sister, the pursuer of this action, was his heir-at-law. She obtained herself duly served and infeft heir in special to him in the whole lands and estate of Carriden, conform to extract decree of special service by the Sheriff of Chancery in her favour dated 2d and recorded in Chancery 3rd November, and with warrant of registration thereon on her behalf recorded in the Division of the General Register of Sasines applicable to the County of Linlithgow 14th December 1881.

This was an action of declarator at the instance of Miss Hope against the Duke of Hamilton, concluding that she should be found to be duly entered with the Duke of Hamilton as superior in the lands of Carriden and others so far as they were held of him, and that the defender was bound to accept the sum of ten pounds and tenpence (which sum included one year's feu-duty (£5, 0s. 5d.) for the year ending at Martinmas 1882) as in full of the casualty or relief-duty payable to him in respect of the pursuer's entry to the lands. The pursuer thus claimed to be entitled to have her entry recognised by the superior on payment of relief.

The defender claimed a full year's rent (being £1300) in name of composition, the composition on entry being untaxed. He averred that the trustees under the settlement of Sir James had conveyed the lands to the pursuer, and called upon her to produce the trust-disposition and settlement which he alleged to be her title.

The pursuer pleaded—The pursuer being served heir-at-law to her deceased brother in the said lands and others, and being duly entered with the defender by her infeftment condescended on, she is entitled to have her entry recognised by the defender on payment of relief-duty.

The defender pleaded—The pursuer having acquired right to the said lands, not as heir, but by singular title from the trustees of the late Sir James Hope, is liable in composition to the superior.

The Lord Ordinary found and declared conform to the conclusions of the libel.

"*Opinion.*—The pursuer in this case seeks to have it found and declared that she is duly entered with the defender as superior in the lands and estate of Carriden and others described in the summons. There is no question, as I understand, as to the amount payable by the pursuer for entry if she is entitled to enter as heir; but the defender maintains that she is truly a singular successor, and must pay composition as for an entry in that character. The defence is maintained on two grounds.

"I. It is said that the pursuer is not the heir of the investiture, and that the service by which she claims to have made up a title is inept, and carries no right to the estate. It is not disputed that she is the heir-at-law of the late Sir James Hope, who was infeft and duly entered in the lands under a precept of *clare constat* granted by the defender's predecessor in the superiority in 1829. But it appears that by antenuptial contract of marriage Sir James Hope conveyed the lands and estate of Carriden to himself and Lady Hope, and the longest liver of them, in conjunct fee and liferent, for her liferent use allenarly, and to the child or children of the marriage in fee. No children were born of the marriage, but the contract was recorded in the Register of Sasines, being registered on behalf of the spouses. And the defender maintains that this registration, which is equivalent to an infeftment, operated under the Act of 1874 a change in the investiture, so that the pursuer, as heir of the investiture recognised by the precept of *clare constat* in 1829, is no longer in a position to enter. The argument is in my opinion untenable. The registration appears to me to have had no other effect in law except that of infefting Lady Hope in a bare liferent, as Sir James was already infeft in the fee, and the effect of a conveyance by a proprietor infeft in the terms quoted is too well settled to be the subject of argument. It left the fee in Sir James precisely as it was before, and gave a bare liferent to Lady Hope, and a right of succession to the children of the marriage. It is suggested that by the operation of the Act of 1874 the spouses have been entered in room of Sir James in the same manner as if their infeftment upon the conveyance in the marriage-contract had been confirmed by charter. But Lady Hope could not be entered in this way, because she is a mere liferenter. If Sir James could be held to have been entered of new it would not aid the defender's case, because the only effect of the alteration would be to take the fee to himself and the heirs of his marriage instead of to himself and his heirs-general; and it has never been held that where an investiture is altered in the lifetime of the vassal, and the fee taken to him and the heirs of his body, or the heirs of a particular marriage, or any other limited class of heirs, the superior could claim anything but relief upon an entry.

"Another view was maintained, which is equally without foundation. It is said that the feudal fee is now in Lady Hope, because there was a conveyance to her in liferent for her liferent use allenarly and the children of the marriage in fee. That is said to create a fiduciary fee in her, which has been feudalised by registration in the Register of Sasines. But Lady Hope's infeftment is merely as liferentrix; and she could not have been infeft in any other character. There is no room for the supposition of a fiduciary fee for the children, because, as already observed, the destination imports a continuance of the fee in Sir James; and if there had been a child of the marriage he would have taken up the estate on Sir James' death, as heir of provision to him, and neither as disponee nor as heir of Lady Hope.

"I can see no reason to doubt therefore that Sir James Hope was the vassal last infeft, and that the pursuer as heir-at-law has been validly and effectually served heir in special to him in the lands in question.

"II. But secondly, it is said that although the pursuer be the heir of the investiture, the superior is entitled to a composition, since she holds by singular title from Sir James' trustees, for it is said that Sir James left a trust-disposition by which he conveyed the lands to trustees, who have conveyed them to the pursuer.

"Assuming this to be so, it appears to me that these are conveyances with which the superior has no concern. The superior can have no interest in personal rights that are granted by his vassals. So long as they remain personal they do not affect him; and the notion that the heir of the last entered vassal who is in a position to complete a title as heir is bound to pay composition on entry because he has also a personal right under a *mortis causa* conveyance is entirely without foundation. But then it was suggested that under these deeds the pursuer may not be the true owner of the estate, but merely a trustee for others who have the true beneficial interest; that she is thus put forward by Sir James' trustees for the mere purpose of protecting them from the superior's claim for composition; and this is a device for delaying or defeating the superior's just claims which is no longer available

since the Act of 1874. I am of opinion that this argument also is unsound. It has been decided by a series of cases that a disponee infeft can no longer put forward the disponer's heir-at-law to protect him from composition, but the ground of judgment in all these cases was that the heir could not be put forward, because there was no longer any estate to which he could enter. The ancestor's disponee being already entered by force of the statute, there was no longer, as under the former law, a mid-superiority which might be taken up by the heir. But in the present case the fee is vacant by Sir James Hope's death, and his heir-at-law has a right to be entered, not to a barren mid-superiority but to the *dominium utile*, unless anyone comes forward and establishes a better right, to the exclusion of the heir. It may be that Sir James's trustees might have a preferable title if they thought fit to maintain it But that is a matter with which the superior has no concern. He cannot compel his vassal's disponees to take up the right given them by his disposition if they prefer to abandon it to the heir; and if they think fit to lie by and allow the heir-at-law to take up the fee, it is *jus tertii* to the superior to inquire into their reason for doing so. There can be no question that under the old law the pursuer could have compelled the superior to give her entry by precept upon a retoured service. The statute enables her to enter herself without the superior's intervention, and it does not appear to me to contain any provision upon which he can found as either excluding her right to serve or as preventing her from completing a title by recording the service."

The defender reclaimed. Argued for him—In a question with the superior the pursuer must be viewed as a singular successor, and as such liable in a composition. The question depended upon the construction of sec. 4, sub-sec. 4, of Conveyancing Act 1874 (37 and 38 Vict. c. 94). The previous cases under this section, when a similar question arose, were —*Ferrier's Trs.* v. *Bayley*, May 26, 1877, 4 R. 738; *Rossmore's Trs.* v. *Brownlie*, November 23, 1877, 5 R. 201; *Sivright* v. *Straiton Estate Co.*, June 12, 1878, 5 R. 922; *Rankin* v. *Lamont*, February 28, 1879, 6 R. 739, *aff.* 7 R. (H.L.) 10. In these cases there had been a base infeftment which by the operation of the Act became public In the present case by the infeftment on the marriage-contract the investiture was altered and strangers could be brought in; therefore the superior was entitled to a composition. The words "whom failing" were of considerable importance in this destination, which was to the children of the marriage, and not to the heirs of the marriage. See *Wilson* v. *Glen*, 3 Ross' Leading Cases, Land Rights, 716; *Houlditch* v. *Spalding*, June 9, 1847, 9 D. 1204; also *Falconer* v. *Wright*, January 22, 1824, 2 S. 633. This was just a tailzied infeftment. The Act had given a right of action and a right to a casualty, which by the old law might have been evaded.—Ross' Leading Cases, Land Rights, ii. 316; Bell's Conveyancing, ii. 812; Titles to Lands Consolidation (Scotland) Act 1868, sec. 25. The statute had operated a change; the "successor" was the person who had the real interest in the lands, and that "successor" might be a trustee, or, as in this case, one who really took his right from a trustee.

Argued for respondent—The casualty payable in this case was relief. All that the superior had to do with here was the marriage-contract, which was feudalised, it was *jus tertii* that a personal right might exist under the settlement of Sir James. Sir James Hope was full fiar under the then standing investiture; this consisted of the precept of *clare constat* in favour of himself, and he took as heir of the last vassal. The marriage-contract was registered, and the result of this infeftment by the Act was as if the superior had granted a writ of confirmation *in favorem*. Infeftment on such a destination did not in a question with the superior operate any new investiture—*M'Kenzie*, 1777, M. 15,053; *Marquis of Hastings* v. *Oswald*, 1859, 21 D. 871. It was impossible, *ab ante*, to say whether composition was due or not—*Stirling* v. *Ewart*, February 14, 1842, 4 D. 684; *Wilson* v. *Reid*, December 4, 1857, 6 S. 198; *Monteith* v. *Inglis*, February 6, 1869, 7 Macph. 523. No feudally operative infeftment had passed except that of Lady Hope for her liferent, and no new fee was created as far as Sir James was concerned. The rights of children in such a case as this would have been a protected succession.

In the course of the discussion the defender was allowed to add this plea—"The effect of the registration of the contract of marriage being by the Act of 1874 to enter Sir James Hope, as if a charter of confirmation had been granted of the disposition contained in the said marriage-contract and infeftment thereon, and the disposition so confirmed containing a destination introducing strangers to the investiture, the casualty due upon entry given in respect of said registration, being the first entry enfranchising the new investiture, is that of composition."

At advising—

Lord President—This case depends upon the same principles as that which we have just disposed of (*The Duke of Hamilton* v. *Guild*), but it comes before the Court in a somewhat different form. The action is an action of declarator at the instance of Miss Hope of Carriden, the vassal; and here the action is not a statutory action; it is an action of declarator to have it found that she is entitled to be entered, or rather that she has been impliedly entered upon the footing of being an heir, and that the defender is bound to accept of relief-duty as in full of all casualty he is entitled to demand in respect of her entry. The pursuer's brother Sir James Hope of Carriden was the vassal last entered. He died on 9th June 1881. He was infeft in the lands in 1829 under a precept of *clare constat* from the then Duke of Hamilton. The pursuer is his only sister and heir-at-law, and upon these facts, of course, there can be no question that this lady is entered as vassal as heir of the late vassal. But then the defence stated is this, that Sir James Hope by his marriage-contract conveyed the lands in question to himself and his promised spouse and the longest liver of them in conjunct fee and liferent for her liferent use allenarly, and for the child or children of the marriage in fee. That contract of marriage, it is said, was recorded in the Register of Sasines on the 11th February 1878. Now, no doubt it was; but it was recorded for a limited purpose. The warrant for recording was this—"Register on behalf of Sir James Hope of Carriden and Miss Elizabeth

Reid Cotton, now wife of the said Admiral Sir James Hope, for preservation as well as for publication, in the register of the county of Linlithgow." Now, the defender maintains that the effect of that was to infeft Sir James Hope of new in the estate of Carriden, and that his title thereafter depended on that infeftment; that there was a reservation in that marriage-contract for him to execute a conveyance of this estate failing children of the marriage, and that he has actually made such a settlement of the estate, and that Miss Hope acquired a right to the estate by virtue of that settlement and conveyance from the trustees there appointed.

Now, I entirely concur with the Lord Ordinary in the view he takes of this, namely that the effect of that infeftment was not to destroy or invalidate or affect in any way the previous infeftment of Sir James Hope in the fee of this estate, and that down to the day of his death this estate depended upon his infeftment taken in 1829. The effect of the registration of the contract was merely to secure the liferent interest of Lady Hope, and that was its only effect. As to the circumstance that this estate may have been conveyed by the trust-disposition and settlement of Sir James Hope, and that Miss Hope may have a personal title under and in virtue of that trust-disposition and settlement, that is no affair of the superior's; it is a matter into which I think he is not entitled to inquire at all. These are personal titles which he has no right to see. What is presented to him is a good service of this lady as heir of her deceased brother, who was vassal last entered, and in my opinion the superior is bound to be contented with a casualty of relief.

Lord Deas—I am very clearly of the same opinion.

Lord Mure—The basis of this claim is rested upon this title said to have been made up by Sir James Hope on his marriage. I concur in the view the Lord Ordinary has taken of this matter, that by anything done at that time there was no superseding of the title made up by Sir James Hope at a much earlier period in 1829, and that he stood invested under that title at the day of his death. In these circumstances I think we must adhere to the Lord Ordinary's interlocutor.

Lord Shand—I am of the same opinion. The case upon the defence, as it was originally stated, of the Duke of Hamilton was contained in the first plea-in-law—[*reads*]. That was the full defence pleaded; and it was maintained entirely on the ground that Sir James Hope had exercised the power reserved to him in the marriage-contract, and left the trust-disposition and settlement of 1878 by which he conveyed the lands to certain trustees, and that the pursuer had acquired the lands by a conveyance from these trustees. The Lord Ordinary has disposed of that point in the second branch of his judgment, and there was no argument maintained against it—the point was abandoned at the bar. The argument thereafter was maintained only upon a plea-in-law which was added in the course of the discussion, to this effect—[*reads*]. Now, without going into the grounds upon which your Lordships have proceeded, I think there is a complete and obvious answer to that plea, and it is this—that whatever may be the destination in that marriage-contract, this lady who proposes now to take up the property, and has taken it up, is the heir of line of the last vassal Sir James Hope; and it is quite settled by a series of cases that if the heir of line is presented to the superior or demands entry from the superior, that is at once an answer to any claim for composition. I refer in support of that to the elaborate opinion of Lord Wood in the case of *The Marquis of Hastings*, which was referred to in the course of the discussion, reported in 21 Dunlop, 871; and to the old case of *Mackenzie* which was very fully discussed in that opinion. These two cases settle the law beyond question, and upon that ground, and that ground alone, I desire to base my opinion on this part of the case. I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Pearson. Agent—John Hope, W.S.

Counsel for Duke of Hamilton—Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 6.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

AITKEN AND OTHERS *v.* MUNRO AND OTHERS.

Heritable and Moveable—Conversion—Discretionary Trust for Sale.

A testator by his trust-disposition and settlement conferred upon his trustees, with the view of enabling them to execute the purposes of the trust, "the most ample powers which any proprietor whatever can possess and enjoy, or which if in life I could exercise in the sale and disposal of my lands, heritages, and moveable means and effects, with power to them . . . . to convert the whole of my estate, heritable and moveable, into money." He also gave them power, if they should see fit, to continue to hold and retain the heritable subjects. The trustees, in the administration of the trust, retained a portion of the heritage unsold for many years in order that the truster's widow might enjoy a liferent bequeathed to her of part of it, and to provide for an annuity also bequeathed to her. In a question between the heirs and the next-of-kin of certain of the beneficiaries after the widow's death, relating to the heritage retained to meet the annuity, *held* (*aff.* judgment of Lord M'Laren—*dub.* Lord Deas) that as the exercise of the power to sell was entirely in the discretion of the trustees, the heritage, so long as not actually converted by them into money, was not constructively converted by the will.

By deed of settlement dated 18th June 1827, and duly recorded, Robert Aitken, builder in Glasgow, who died in August 1827, disponed in favour of certain trustees named therein, for the purposes