Lord Shand—The title of the defender to the property in dispute rests upon a decree of adjudication followed by infeftment, along with a charter of confirmation which was granted by the superior. Each one of these documents appears on the very face of it to be a redeemable and not an irredeemable title to land; and that being so, it is quite clear that the 34th section of the Conveyancing Act of 1874 can have no application in the present case, because the provisions of that clause relate only to *ex facie* valid irredeemable titles to land, which the present clearly is not. As to the case of *Buchanan*, it is enough to say that the Court were there dealing with *ex facie* valid irredeemable titles to land, and the opinions in these cases must be read with reference to that class of title. In these circumstances the defenders cannot resist the present action by a plea of the positive prescription. But can the decree in absence which was taken in 1859 be maintained? It certainly can be challenged any time within the forty years. It is, however, maintained that the pursuers in the action of constitution had no title to sue. Now they derived what title they had from the postnuptial marriage-contract of James and Janet Young. Part of the property conveyed by this contract consisted of a bill for £100, and by the terms of the deed James Young appointed his wife his sole executrix. But this document, in addition to being a postnuptial marriage-contract, was also a will, for by it he "assigned, disponed, conveyed, and made over" to his wife "all goods, sums of money, and furniture, ... which may belong to me at the time of my death;" and also a sum of £100 contained in a bill dated 1801, and at the death of the longest liver the goods in communion were to be divided equally among the children of the spouses. It was under this provision that the action of adjudication was raised, and the pursuers in that action assumed that they had a right to one-half of the £100 contained in the bill conveyed to their mother. They accordingly raised the action. But they clearly had no right to sue upon that bill. What they were entitled to was the residue after payment of the testator's debts. Somebody was needed for the office of executor, and confirmation also was required; but there was no executive title in the pursuers of that action, and they had no right to sue upon that bill. The initial step in the proceedings was bad, and what followed upon that falls therefore to be reduced. I think therefore that the Lord Ordinary's interlocutor should be recalled to that extent. It is possible also that the debt upon which these proceedings took place may have been ere this extinguished by intromission with the rents of the heritable property.

The Court sustained the second plea-in-law for the pursuers, and reduced the decree of adjudication and all that had followed upon it.

Counsel for Pursuers—Gloag—Low. Agent—R. H. Christie, S.S.C.

Counsel for Defender — Trayner — Goudy, Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, July 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF HAMILTON *v.* GUILD (POTTER'S TRUSTEE).

Superior and Vassal—Entry—Casualty—Right of Trustee on Sequestrated Estate of Last Entered Vassal—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4.

The last-entered vassal in lands, the entry of singular successors in which was untaxed, having died bankrupt, the superior raised against his trustee, whose only title was his act and warrant, an action of declarator and for payment of a casualty of one year's rent in terms of sub-sec. 4 of sec. 4 of the Conveyancing (Scotland) Act 1874. The vassal's heir offered to complete his title and enter with the superior. *Held* that the personal right of the trustee interposed no obstacle, formal or substantial, to the entry of the heir, and that the superior was therefore not entitled to the casualty.

Lewis Potter, merchant in Glasgow, was the vassal last vest and seised in the lands of Netherhouses, and part of the lands of Whistleberry, in the parish of Lanark, conform to instrument of sasine in his favour dated 28th November 1865. He was entered with the superior, the Duke of Hamilton. The entry of singular successors was untaxed.

In November 1878 Potter's estates were sequestrated, and James Wyllie Guild, chartered accountant, Glasgow, was confirmed as trustee, conform to act and warrant of the Sheriff of Lanark, dated the 16th and recorded in the Register of Abbreviates of Adjudications the 20th day of November 1878.

Lewis Potter died on 11th June 1881, and upon the 18th November 1882 an action of declarator and for payment was raised by the Duke of Hamilton, in terms of sec. 4, sub-sec. 4, of the Conveyancing (Scotland) Act 1874, against Guild as his trustee, concluding that in consequence of the death of Lewis Potter, who was the vassal last vest and seised in the lands, a casualty, being one year's rent of the lands, became due to the pursuer as superior of the lands on the 11th June 1881, being the date of Lewis Potter's death; that the rents from and after the date of citation belonged to the pursuer till the casualty and expenses should be paid; and that the defender as trustee should be decerned and ordained to make payment to the pursuer of £2000, or such sum as should be ascertained to be a year's rent of the said lands.

The defender denied that he was successor of Potter as vassal in the lands, and averred that he possessed the said lands on a personal and unfeudalised title, viz., his act and warrant as trustee, and that John Alexander Potter, the only surviving son of Lewis Potter, was his heir in the said lands, and that he was ready to enter with the pursuer as his vassal, and had offered to do so.

The pursuer pleaded—A casualty of one year's rent of the lands described in the summons having become due to the pursuer, as superior thereof, by the defender as trustee upon the death of the said Lewis Potter, the previous vassal, the

pursuer is entitled to decree as concluded for.

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

A minute of compearance was lodged for John Alexander Potter, and the Lord Ordinary superseded consideration to allow him to make up his title. Thereafter the Lord Ordinary assoilzied the defender.

"*Note.*—There can be no question that prior to the Conveyancing Act of 1874 the heir of the last entered vassal might, notwithstanding the sequestration of his ancestor, but by arrangement with the trustee on his estate, have completed a title and entered with the superior for payment of relief. But the pursuer maintains that under the law introduced by that statute this is no longer possible, because the heir is no longer in a position to protect the singular successor from the superior's claims by entering to a mid-superiority, so that if the singular successor completes his title at all he must do so by a process which involves an entry with the superior, and so must subject himself to liability for composition; while, on the other hand, if, in order to escape such liability, he abstains from completing a title, the superior may, in terms of the fourth sub-section of section 4 of the Conveyancing Act, sue an action of declarator and for payment of a casualty against him as the successor truly interested in the lands, 'whether he shall be infeft or not.'

"It is true that a singular successor of the last entered vassal cannot evade his liability for composition by holding out uninfeft, if he does not permit the heir, or if the heir does not choose to take up the fee. For the new action which the statute has introduced in lieu of a declarator of non-entry may be maintained whether the successor is infeft or not; and the superior who has obtained decree in such an action has the same remedies for making his decree effectual by entering into possession and uplifting the rents, as if he had obtained a decree of declarator of non-entry. But the action cannot be maintained except by a superior, who but for the statute would have been entitled to sue a declarator of non-entry; and therefore it cannot be maintained if the heir of the last vassal, being in a position to complete his title by service to his ancestor, effects an entry by recording his service in the Register of Sasines and tenders payment of the appropriate casualty. There is nothing in the Conveyancing Act to prevent a purchaser holding a merely personal right from abandoning his right if he thinks fit, and leaving the fee vacant for the benefit of the heir. And if the heir in these circumstances desires to take up his ancestor's estate, the superior can have no title to inquire into the conditions upon which the purchaser has waived his right. It is settled by a series of decisions that since the Act of 1874 a singular successor cannot have the benefit of a 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. And if the heir of the investiture demands an entry, or, as the law now stands, effects an entry by recording his service, the superior cannot refuse to acknowledge him on the ground that a stranger to the investiture might have taken up the fee in his room if he had thought fit to feudalise a personal right, for the superior is in no way concerned with the rights which may have been derived from his vassal so long as they remain personal.

"It can make no difference that, as in the present case, the person who might have established his right as the singular successor of the last vassal is the trustee on a sequestrated estate, provided he has abstained from completing a feudal title. A trustee may have various reasons for abandoning the feudal estate of the bankrupt. He may think the estate too heavily burdened to justify his incurring the liabilities of a vassal, or, trusting in the solvency and honesty of the heir, he may think it safe to leave the estate in his hands on his personal obligation to account for the rents. Whether it is a prudent course for these or other reasons to abstain from making his right real is a question of administration for the trustee and the creditors. But to the superior it is *res inter alios* with which he has no concern.

"The pursuer maintained, on the authority of the *Magistrates of Musselburgh* v. *Brown*, M., 15,038, and *Grindlay* v. *Hill*, 19th January 1810, F.C., that the superior was not bound under the law as it stood prior to the Act of 1874 to enter even the heir for payment of relief-duty if the persons truly interested in the estate were strangers to the investiture. In the case of the *Magistrates of Musselburgh*, the heir, instead of entering by service and precept of *clare constat*, demanded a charter with an assignable precept, in virtue of a disposition containing procuratory of resignation in his favour by his ancestor, the last vassal. It was held that he could not enter in that form except on payment of a singular successor's composition, because if he obtained an assignable charter he would be enabled to introduce a singular successor in his place without further payment. In the case of *Grindlay* it was held that trustees under a general conveyance who had adjudged in implement from the heir of the truster, were not entitled to a charter of adjudication except for payment of composition as singular successors. These cases, therefore, are illustrations of the well-settled doctrine that the superior could not be compelled to enter strangers to the investiture, except on payment of the fees and casualties due by law, in terms of the statutes, and that he could not be compelled to enter the heir except by a precept which should not be assignable, and upon which he alone could be infeft—Ersk. iii. 8, 29. But they have no application where the heir proposes to enter by service in that character, so as to make no change on the investiture.

"But it is maintained that in the present case the entry of the heir for payment of relief will operate precisely in the same way as if he had obtained an assignable precept under the old law; for it is said that as soon as his title is completed and the casualty discharged he will be in a position to convey to the trustee in the sequestration, who may then complete a feudal title and take the benefit of the entry implied by the statute without paying composition as a singular suc-

cessor during the survivance of the heir. Whether, in the event supposed, the trustee will be liable for composition, depends on the construction and effect of the proviso that an implied entry 'shall not entitle a superior to demand a casualty sooner than by the prior law or by the conditions of the feu-right he could have required the vassal to enter, or to pay such casualty irrespective of his entering.' But that is a question which does not arise in the present action. If, when it does arise, it should be found that no casualty is payable until the death of the heir, the singular successor will obtain an advantage; but the argument assumes that it is an advantage conferred upon him by statute. If, on the other hand, it should be found that he cannot resist payment, the superior will be in no way prejudiced by the entry of the heir. In the meantime the test of the heir's right to enter upon payment of relief is the production of a service; and that test being satisfied, and the fee being full by the entry of the heir, the superior cannot under the statute demand a casualty from the defender in anticipation of a possible entry, upon a title not yet completed, because by the prior law he could not have required the defender 'to enter or to pay a casualty irrespective of his entering.'

"It is said that no implied entry is 'pleadable in defence against' the action (sub-section 4). The provision referred to will prevent 'a successor in the lands' from whom a casualty is exigible, from pleading that the claim is discharged by force of his entry under the statute. But if the question is whether the casualty exigible is relief from the heir or composition from a disponee, it is equally material, under the present as under the prior law, to consider whether the fee is not filled by the entry of the heir. The defence is not that an implied entry excludes the superior's demand for payment of the appropriate casualty, but that the heir having entered and paid, or tendered payment of the duty exigible on entry, the superior can have no further claim for a casualty, so long at least as the heir remains undivested of the fee.

"The pursuer maintained that the heir had no title to compear, and that the action should proceed irrespective of his compearance, on the ground that where the last vassal has been entirely divested so as to leave no interest in the heir, it is unnecessary to call the latter in a process of declarator of non-entry. There is authority for the proposition that when the last vassal has entirely divested himself, as by disposition with procuratory and precept, it may not be necessary to call the heir.—*Magistrates of Dundee* v. *Kyd*, 7 S. 801; *Magistrates of Hamilton* v. *Swan*, 16 D. 437; *Cauvin's Hospital* v. *Falconer*, 1 Macph. 1164. But the ground on which this has been held is that the heir had admittedly no interest in the matter, not being in a position to demand an entry. In the present case the heir has a material interest, and in a question with the superior he has the only interest, because by consent of the defender he is to take up the estate and enter as vassal."

The pursuer reclaimed, and argued that the "successor" of the vassal in the lands was the trustee, for he was the person who had the real interest in them. [The whole argument for the pursuer appears from the opinion of the Lord Ordinary. See also the case of *Hope*, *infra*, which was argued along with the present].

At advising—

Lord President—This is an action raised by the Duke of Hamilton, as superior of certain lands, against Mr Wyllie Guild, as trustee on the sequestrated estate of Lewis Potter, who was the vassal last vested and seised in these lands. It is a statutory proceeding authorised by the 4th sub-section of the 4th section of the Conveyancing Act of 1874. The 3d sub-section provides that the implied entry introduced by the statute "shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry," and all his remedies otherwise for recovering casualties and feu-duties are reserved; but "provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering." And then the 4th sub-section gives the remedy for enforcing the superior's rights:—"No land shall after the commencement of this Act be deemed to be in non-entry; but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action;" and then the effect of a decree of payment is provided for, which is not of importance in the present action.

Now, this action is strictly in terms of that 4th sub-section, and it is met with this defence,—that Mr Wyllie Guild, as the trustee on the sequestrated estate of the deceased vassal, has no intention of entering; he stands merely upon the personal title contained in the act and warrant in his favour, and he desires not to take up this estate on behalf of the creditors but to leave it to the son and heir of the deceased Lewis Potter; and accordingly this heir is prepared to enter. He has asked the superior to give him a precept of *clare*, and failing that he will serve and so enter—that is to say, he will take infeftment, which will have the effect of an entry with the superior. The practical question of course is, whether the Duke of Hamilton is to have a composition or is to be satisfied with relief? Now, I think the Lord Ordinary has disposed of this question in so satisfactory a manner in one passage of his note that it would really be a waste of time to do more than just say that I entirely concur in this view of the law. "There is nothing," he says in the second paragraph of his note, "in the Conveyancing Act to prevent a purchaser holding a merely personal right from abandoning his right if he thinks fit, and leaving the fee vacant for the benefit of the heir. And if the heir in these circumstances desires to take up his ancestor's estate, the superior can have no title to inquire into the conditions upon which the purchaser has waived his right. It is settled by a series of decisions that since the Act of 1874 a singular successor cannot have the benefit of a

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.