far as the obligation of the Insurance Company was concerned, the other party was set free by the certainty that that obligation would be prestable, and that while up to 1st June 1897 the one party was bound, the other was to cease paying premiums. It seems to me that that would be clearly contrary to the reciprocal obligations to the policy, and the language used as to the risk having ceased and a certainty having occurred seems to me to have no relevancy to the construction of the contract. There is nothing unintelligible or irrational in the particular contract to pay after the risk had been turned into a certainty. It may be illustrated as well by the case of a life policy as by any other. Suppose a policy of insurance binds the insurer to pay a certain sum at a certain date in the event of a particular person failing to survive it, and binds the insured to pay annual premiums down to that date. If the person named in the policy dies before the date in question arrives, it becomes quite certain that the insurer will have to pay on its arrival, but the other party to the contract will none the less have to continue paying the premiums falling due at this date.

Accordingly I think that the Lord Ordinary is wrong.

With regard to the argument on compensation, I think it fails on several points. In the first place, it is directly contrary to the theory and terms of the respondents' claim, which is a demand for payment of money which they now say has been applied with their consent in payment of the premiums due under the policy. Then it is not pleaded in their answers, and there are other reasons which seem to strike with equal force against this contention. I am of opinion that the Lord Ordinary's judgment should be recalled and the deliverance of the liquidators affirmed.

LORD ADAM concurred.

LORD KINNEAR—I also entirely concur. I think this policy is a contract by which the company gave a positive undertaking to pay the sum of £600 on the 1st of June 1897 if the debtor company failed to pay upon that date, and provided the creditor paid certain specified annual premiums as the consideration for the insuring company's obligation. That seems to me the plain and obvious construction of the words of the contract, and it is made clearer by a further and more specific statement of the conditions upon which the policy is to be void, one of which is that it becomes void if the premium is not paid within fourteen days after it becomes due.

Now, I agree with your Lordship that the arrangement made between the creditor and the debtor with the consent of the Insurance Company had no effect either in accelerating the liability of the insurers to pay this sum so as to make it exigible before 1st June 1897, or in discharging the corresponding obligation of the insured to continue to pay the premiums if they desired to retain their right to demand payment. The insurers are barred by their consent to the new arrangement from maintaining that it relieves them of their liability. But they made no new contract with the insured. They are liable under their original contract according to its conditions, and not otherwise. I therefore quite agree in the result arrived at by your Lordship.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary and affirmed the deliverance of the liquidators.

Counsel for the Respondents—W. Campbell—M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Liquidators—Sol.-Gen. Dickson, Q.C.—Lorimer. Agents—Melville & Lindesay, W.S.

Thursday, June 10.

FIRST DIVISION.

EARL OF LAUDERDALE'S TRUSTEES *v.* HOGG AND OTHERS.

Superior and Vassal—Entry—Casualty—Corporation.

By charter of resignation a superior confirmed certain lands "to and in favour of the managers" of a corporation, incorporated by royal letters-patent, with power to buy and sell lands, "and their successors in office, for the use and behoof of the said hospital and their disponees heritably and irredeemably."

In a question with the disponees of the managers of the said corporation, *held* that the superior was not entitled to a casualty of composition from them on the grounds (1) that the entry was the entry of the corporation, which was still in existence, and (2) that, even assuming that not to be so, the entry was not an entry in favour of individual managers upon whose death, and upon the consequent entry of whose successors in office, a casualty of composition would become payable, but an entry of a perpetual succession of managers for the corporation.

Hill v. *Merchant Company*, January 17, 1815 (F. C.), and *Campbell* v. *Orphan Hospital*, June 28, 1843, 5 D. 1273, *followed*.

The Orphan Hospital and Workhouse, Edinburgh, was constituted into a legal incorporation in 1742 by Royal Letters-Patent, which declare that the said corporation "shall have full power and be able and capable in law to purchase, take, hold, and enjoy in fee, heritably and irre-

deemably . . . lands, tenements, houses," &c., as well as to sell and dispose of such lands and other heritages. Provision was also made for the annual election of fifteen managers, who, or any five of them, should have the management, direction, and government of all and sundry the estates and effects, real and personal, or other interests and concerns of the corporation.

By disposition granted in 1806, John Balfour of Balbirnie disponed the eight husband lands of Quixwood in Berwickshire "to and in favour of the managers of the said Orphan Hospital and Workhouse at Edinburgh, and their successors in office, for the use and behoof of the said hospital, and their disponees heritably and irredeemably."

In 1811 Lord Lauderdale, the superior of part of these lands, by charter of resignation, disponed and confirmed the lands held under him to and in favour of the managers in the exact terms of the above disposition, and sasine was taken thereupon.

In 1839 the managers of the Orphan Hospital sold the lands, which, after a variety of transmissions, passed in 1873 to Mrs Margaret Heriot Hogg and others, the second parties to this special case, the first parties being the trustees of the superior, Lord Lauderdale.

The special case stated—"The Orphan Hospital and Workhouse still exist as a corporation. All the managers who held office in the year 1811 died long prior to 1st October 1874. The first parties, who are now vested with the superiority of the said four husband lands of Quixwood, have claimed a casualty of composition, being one year's free rent of the said lands, from the second parties as being impliedly entered by the operation of the Act 37 and 38 Vict. cap. 94, sec. 4. It is admitted by both parties hereto that one year's free rent of the said lands amounts to £345, 7s. 5d., that if any casualty is exigible it is a composition, and that, in the event supposed, the said sum would fall to be paid to the first parties by the second parties. It is contended by the first parties that the last survivor of the vassals entered in 1811, having predeceased 1st October 1874, the second parties, as proprietors of the said four husband lands of Quixwood, were duly entered by the operation of the Act 37 and 38 Vict. cap. 94, sec. 4, and that the casualty of composition is accordingly now due by them to the first parties as superiors of the said lands. The second parties, on the other hand, contend that the intention and effect of the charter of 1811 were to enter the corporation itself as vassal in the said lands, or at all events to bar the superior from claiming any other or further payment by way of casualty during the subsistence of the corporation, and that as the said corporation still exists, the fee is full, and accordingly no casualty is due."

The question of law on which the opinion of the Court was asked was as follows:—"Is the said sum of £345, 7s. 5d., being a casualty of a composition, due by the second parties as proprietors of the said four husband lands of Quixwood to the first parties as superiors thereof?"

Argued for the first parties—The casualty was due. The corporation itself was not entered as vassal by the charter of resignation, which it might properly have been had it been desired to enter it. The entry was to the managers and their successors in office, and the case of *Campbell* v. *Orphan Hospital*, June 28, 1843, 5 D. 1273, *per* L. J.-C. Hope, 1277, decided that when infeftment was taken in these terms the corporation had not been entered. If that were so, the fee was not full, for the original vassals were all dead, and their disponees having been entered with the superior in virtue of the Conveyancing Act 1874, sec. 4, were liable in composition. In the case of *Governors of Heriot's Trust* v. *Drumsheugh Baths Company, Limited*, June 13, 1890, 17 R. 937, it had been assumed by both parties that the infeftment was in favour of the Incorporation of Bakers, and the point was not argued.

Argued for the second parties — No casualty was due. The entry of the managers was the entry of the corporation. *Campbell's* case, *ut sup.*, had decided that no casualty was due to the superior, and the present case was *a fortiori*, as entry was given to no named individuals but to the managers as a body. All that the dictum of the L. J.-C. in *Campbell's* case amounted to was that that was not the proper technical mode of giving infeftment to a corporation. If that view were sound, then no casualty could ever become due so long as the corporation was in existence—*Hill* v. *Merchant Company*, January 17, 1815, F.C.; *Drumsheugh Baths Company, ut sup.* But even assuming that the incorporation was not itself infeft, the entry to managers and their successors in office was quite different in effect from an entry to a trustee and his heirs. Here no casualty was due — *Gardner* v. *Trinity House of Leith*, January 23, 1845, 7 D. 286; *Scottish Amicable Life Assurance Society* v. *Clyde Navigation Trustees*, February 18, 1897, *supra*, p. 676. If the superior's argument were sound, he could demand a casualty of relief every year when the managers went out of office.

LORD KINNEAR — The question in this case is whether the casualty of composition is exigible by the superior of certain lands; and the ground upon which his demand is maintained is that the lands have fallen into non-entry by the death of a vassal, who is no more specifically described than by saying that he was the last survivor of a number of persons who were entered as vassals in 1811, and that all of them predeceased the 1st October 1874. It is therefore in consequence of the death of the last survivor of a number of persons entered in 1811 that the superior says that the casualty of composition is now due, inasmuch as the lands are now held by dis-

ponees or the successors of disponees of those last-entered vassals who had not obtained an entry from the superior before the passing of the Act of 1874. The answer is that in 1811 there was no entry of individual persons upon whose death the fee could become vacant, but that there was a good and effectual entry of a corporation which, as it is still in existence, is still the vassal duly entered. Of course if that be so, so long as the corporation exists there can be no composition exigible from the present proprietors, who are still in the position of sub-vassals under the corporation.

Now, the question really depends upon whether the entry in 1811 was or was not the entry of a corporation. Mr Guthrie says, and I think quite rightly, that we are to consider that question upon the footing on which this case is presented, viz., that there was a good and valid infeftment effected at that time. I am of opinion that it was the infeftment immediately under the superior of a corporation. The law with reference to the entry of corporations is perfectly well settled and clear. The superior is not bound to receive the corporation at all, because the perpetual existence of his vassal may deprive him of his right to casualties, but he may get rid of the disadvantage of having a vassal who never dies in two ways, as the writers on conveyancing point out. He may either make a stipulation which will give him an equivalent for the entries he would have enjoyed on the deaths of successive vassals, or he may enter individual persons as trustees. If he does that, the fee remains full so long as the individuals remain in life and no longer, and upon the death of each individual or of the last of a number of individuals so entered, the fee passes to the heir of the entered vassal and must be taken out of his *hæreditas jacens* by his successor, who must complete a title in the ordinary way and on the same conditions as if the person entered as trustee had been proprietor of the fee in his own right. These are two ways in which the superior may obviate the disadvantage of having a corporation for his vassal. He may also if he pleases enter the corporation as such without making any special stipulations in his charter for payments in place of casualties, and the question is, whether that is not what the superior has done in this case. I think it is.

It appears to me that there are only two alternative views possible. Either this is an entry of a corporation, or of a perpetual succession of managers for a corporation, which appears to me to be pretty much the same thing, or it is an entry of individuals as trustees. It was suggested in the course of the argument that there might be some case between these two in the shape of an entry of individual managers for the time being and their successors in office, the effect of which, it was suggested, would be to put the successors of the managers actually in office at the date of the entry in exactly the same position as the heirs of individual persons who might be entered as individuals under an infeftment in favour of an individual and his heirs. It does not appear to me that that is a possible mode of completing a title. The entry must be either that of an individual with a descent on his death to his heirs, or that of a perpetual corporation involving no descent. In the case of an entry in favour of managers of an institution and their successors in office, I am unable to see how any successors in office can make up a title on the assumption that they are in the same position as the heir of an individual proprietor. The terms of the entry itself are such as to exclude the transmission to the heirs of the office-holder. There is nothing which can pass into his *hæreditas jacens* so as to be taken up by his heir, because the title in his favour is so qualified as plainly to exclude his heirs. If that be so, it appears to me to be quite clear that an entry in such terms as we have here is not an entry of individuals as trustees and their heirs, so as to meet the case suggested by Lord Stair, where, with reference to adjudications, he says—"The corporation should pitch upon a person and assign the debt to him that the lands should be adjudged to him and his heirs for the use and behoof of the corporation" (II. 3. 41). I think that upon a plain construction of the words here, even if there were no further authority upon the matter, it would be quite impossible to hold that an entry in favour of the managers and their successors in office is an entry of particular managers as individuals so as to give the superior casualties upon the death or delinquency of these persons.

But then, I think there is perfectly sufficient authority to the contrary, and the case of *Campbell* seems to me conclusive on that question. The question decided there was that an entry in favour of "William M'Lean and his successors in office for the time being treasurers of the said corporation," was not an entry of a trustee on behalf of the corporation on whose death composition was exigible. That is the one proposition on which all the judges are agreed. They differ to some extent as to the true feudal effect and technical character of the entry actually obtained, the Lord Ordinary saying it is the entry of the corporation, and the Lord Justice-Clerk saying that he was quite satisfied with the result of the Lord Ordinary's judgment, but that he could not concur in holding that the corporation had been entered, for he says that "if a society have a corporate style given to it, it cannot be correctly vested with property except by that technical name." Lord Medwyn says that the view of the Lord Justice-Clerk is nearly the same as that of the Lord Ordinary. "He proceeded upon the ground that it was intended to give entry to a corporation. I am quite clear that a conveyance to the treasurer of the institution and his successors is not the same as a conveyance to a trustee and his heirs." Lord Moncreiff gives no opinion as to whether there was an entry to the corporation, but he is quite

clear that there is no entry of individual trustees. Therefore it appears to me that the case of *Campbell* is an authority in favour of the vassals in this case.

I think the case of *Hill* must be taken as an authority also, for although the question does not appear to have been expressly decided there was no doubt expressed in that case that a superior would be entitled to refuse an entry to and in favour of the managers of a corporation and their successors in office for behoof of the corporation, just because that would be an entry in favour of the corporation. And the same point was assumed in the case of the *Drumsheugh Baths Company*.

I am therefore of opinion that the question put to us in this case ought to be answered in the negative, and that no casualty of composition is due, inasmuch as the present vassals are still holding under the corporation of the Orphan Hospital as mid-superiors between them and the over-superior, and, that being so, the fee is full as it was when that corporation was first entered.

LORD ADAM—The second parties to this special case are proprietors of certain subjects called Quixwood. They are duly infeft and they completed their title in March 1873. The superior now comes forward and claims a casualty of composition on the ground that they are impliedly entered with him by the operation of the Conveyancing Act 1874, section 4. The superior's right to demand a composition depends on whether or not he could have brought an action of declarator of non-entry. That, again, depends on whether or not the fee is full, and to answer that question it is necessary to see what were the terms of entry of the original vassals. We find that by charter of resignation dated 27th December 1811, James, Earl of Lauderdale, disponed and confirmed the lands in question "to and in favour of the managers of the Orphan Hospital and Workhouse at Edinburgh and their successors in office, for the use and behoof of the said hospital and their disponees heritably and irredeemably." The precept of sasine directs sasine to be given to the "said managers of the Orphan Hospital and Workhouse at Edinburgh and their foresaids," and infeftment was taken in these terms. The question is whether the managers of the Orphan Hospital still hold the fee of these subjects. I have no doubt that the title might have been taken direct to the Corporation, but I am not surprised that it was taken to the managers, for I see that by the constitution of the hospital any five of them—[*quotes regulation*]. These being their duties, it was natural enough that they representing the corporation should be put into the title. However that may be, the question for us to decide is whether a destination in the terms I have mentioned is to be read as a gift to the Hospital, and whether or not the entry given is to the corporation *qua* corporation. I agree with Lord Kinnear that both on principle and authority it is so. The destination was intended to be and is in fact taken for the use and behoof of the corporation, and that being so the entry is of the corporation. It is not necessary to go over the authorities again, but they clearly show that that is the legal effect of such a destination. If that be so, then *cadit quæstio*—any further question falls, for as we know a corporation never dies. Even if this were not the correct view, there is another, namely, that if we were to read the terms of the destination as one to the managers and their successors in office the result is the same.

It matters not whether they are called trustees, the question is, whether the destination implies a perpetual succession. I think it does. When you get a destination to successors in office then so long as there are successors in office the fee remains full, and it is only when and if all die, and there comes *de facto* to be no successor that the superior's right to a composition can arise.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court answered the question in the negative.

Counsel for the First Parties—Sol.-Gen. Dickson, Q.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Guthrie—Dundas. Agents—H. & H. Tod, W.S.

Saturday, June 12.

SECOND DIVISION.

[Sheriff of Forfarshire.

STIVEN *v.* NATIONAL BANK OF SCOTLAND, LIMITED.

Sheriff—Jurisdiction—Action to Set Aside Illegal Preference—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 10—*Bankruptcy (Scotland) Act* 1857 (20 *and* 21 *Vict. cap.* 19), *sec.* 9.

An action raised in the Sheriff Court prayed the Court to find that a payment by a debtor was null and void at common law and also under the Act 1696, cap. 5, and to find the said transaction to be an illegal preference, and to set aside the same and to grant decree ordaining the defenders to repay the said sum to the pursuers.

Held (*dub.* Lord Trayner) that the action was competent.

Opinion (by Lord Young) that, under the Bankruptcy Acts 1856 and 1857, an action of reduction is not necessary in order to challenge a preference as being contrary to the Act 1696, cap. 5, or contrary to the rule of common law, and that the proper conclusion of such an action in the Sheriff Court is a