was of doubtful authority and had never been followed.

At advising—

LORD STORMONTH DARLING—All that the Lord Ordinary has decided at the present stage is that, upon a sound construction of the mutual settlement executed by the deceased George Denholm and his first wife, Mr Denholm did not take a full and unlimited right of fee in and to the whole estate of his said first wife, leaving it to be decided afterwards as the result of future procedure what particular portions of that estate were covered by the conveyance. I think the Lord Ordinary is clearly right, and I am for adhering to his interlocutor.

Taking first the terms of the wife's conveyance as if it stood on a separate deed, I find that it begins by conferring an *ex facie* absolute right on the husband in the event of his surviving her, subject to certain burdens. But then it proceeds to confer certain powers on him which truly imply limitations of his right, for they are powers to consume such parts or portions of the capital *during his lifetime* as he may find or think necessary, and also powers of sale and administration — powers which were quite unnecessary if the intention was to confer an absolute fee. Consistently with what I think was the true intention and effect of the conveyance, Mrs Denholm (whose estate consisted roughly of over £4700 of heritage and £6000 of moveables) went on to assign and dispone to trustees upon the death of her husband her estate, "or such portion as may be unconsumed by my said husband," for certain trust purposes, chiefly for the benefit of her whole children. Taking all these clauses together I think their true effect was to cut down the absolute right of fee originally conferred on the husband, not to a liferent (because a liferent would have been inconsistent with the powers which she wished him to have) but to a right limited to sale, administration, and consumption during his lifetime. Such being, in my opinion, the measure of the husband's right, the wife was free to dispose of any portion of her estate remaining unconsumed at his death by giving it to trustees, as she did.

This view is confirmed by the frame of the deed as a mutual one, and by the wife's conveyance being introduced by the words "in like manner and in consideration of what is before written," thus showing that the wife's gift was the counterpart of the husband's provision of the net income of his estate to her, coupled with a power to pay to her for her own use such portion of the capital as his trustees might deem necessary. When therefore the deed went on to provide that the survivor should have power to alter or revoke only as regards their separate estates, I think that the manner in which each dealt with his or her own estate, including the ultimate destination of the unconsumed portion of it, must be regarded as contractual and irrevocable by the other party.

The view which I take agreeing with the Lord Ordinary is in accordance with the decisions of this Division (affirming Lord Kyllachy) in the cases of *Barr's Trustees*, 18 R. 541, and *Corrance's Trustees*, 5 F. 777.

LORD KYLLACHY and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuers (Respondents)—C. N. Johnston, K.C. — C. D. Murray. Agents—M. J. Brown, Son, & Co., S.S.C.

Counsel for the Defenders (Reclaimers)—Hunter, K.C.—Constable. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, November 13.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

GOVERNORS OF TRADES MAIDEN HOSPITAL *v.* MACKERSY.

Superior and Vassal—Casualty—Composition—Amount—Year—Trustees—Interpretation of section 5 *of Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94)—*Trustees Ceasing to be Proprietors of Lands having Paid a Composition "in terms of this section"—Twenty-five Years Calculated from Date when Composition Paid, not from Date of Implied Entry—Competency of Simple Petitory Action for Recovery of Casualty.*

In 1874 the owners of a feu, the charter of which provided for the payment of an untaxed composition by singular successors, were a body of trustees. In 1880 they paid a composition in respect of their entry, the last entered vassal having died in 1867. In 1905 the subjects had been acquired from them by A who had become infeft, and from whom the superiors forthwith demanded a composition calculated on the rental of 1905, their claim being founded on sec. 5 of the Conveyancing (Scotland) Act 1874 and the fact that twenty-five years had elapsed from payment of the last composition. A having refused to make payment the superiors brought an action against him, the summons containing a simple petitory conclusion for the sum sued for.

The Court *found* the pursuers entitled to a composition calculated on the rental of 1905, and *negatived* the following contentions of the defender:—(1) that the action adopted should have been an action of declarator and for payment of a casualty in the form of Schedule B of the Act of 1874, and that a simple petitory action was incompetent; (2) that the payment in 1880 was not a payment "in terms of" sec. 5 of the Act of 1874; that accordingly the twenty-five years rule provided by that section did not come into operation, so that he could not be liable for a

composition until the death of the last survivor of the trustees; (3) that, at anyrate, the composition fell to be calculated not on the rental of 1905 but on that of 1899, the date from which the twenty-five years fell to be counted being the date at which the composition became exigible from the trustees and not the date at which it was actually paid.

Section 5 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) provides—"Unless where it has been or shall be otherwise stipulated, corporations shall pay at the date at which the first composition would have been payable if this Act had not been passed, and every twenty-fifth year thereafter, a sum equal to what but for the passing of this Act would have been payable on entry by a singular successor, and where a composition payable on the death of the vassal shall become exigible from any trustee or body of trustees another composition shall be payable at the end of every twenty-five years, so long as the lands shall be vested in such trustee or trustees . . . provided always that in the event of such corporation or of such trustee or trustees ceasing to be proprietors of the lands after having paid a composition or compositions in terms of this section, the successor of such corporation or of such trustee or trustees who shall be duly infeft in the lands at the expiration of twenty-five years where a composition is payable on the death of the vassal . . . from the date of the last payment of composition as aforesaid, shall then pay a composition, and the casualties for and in respect of such lands shall thereafter become due and payable at the same time and in the same manner as if such lands had never been vested in such corporation or in such trustee or trustees. . . ."

The Governors of the Trades Maiden Hospital, Edinburgh, brought an action on 19th December 1905 against William Robert Mackersy, Writer to the Signet, Edinburgh, the summons containing a simple conclusion for payment of the sum of £72, 10s. sterling.

The pursuers, whose over superiors were the Governors of George Heriot's Hospital, were the immediate superiors of certain subjects in Edinburgh, the *dominium utile* of which was owned by the defender, at a yearly feu-duty of £11, 10s., the feu-contract under which he held the subjects (a contract between James Jollie, the pursuer's author, and John Fraser a predecessor of the defender dated October 1808) providing for the payment of casualties, as follows:—"And doubling the said feu-duty at the entry of each heir as use is in name of feu farm to be paid at the first term of Whitsunday or Martinmas that shall happen after the succession to the feu opens to such heir, with a fifth part more of penalty in case of failure, and the lawful interest of double the said feu-duty from and after the said term of payment during the not payment thereof, and the singular successors paying at their entry such composition as the Governors of George Heriot's Hospital, the said James Jollie's superiors, exact from their vassals in similar subjects."

In 1874 the *dominium utile* of the subjects was owned by certain marriage contract trustees, who in 1880 as singular successors paid a composition to the then Governors of the Trades Maiden Hospital, in respect of their entry, on the death of the former vassal Matthew Buchan, which had apparently taken place in 1867. This was the last casualty paid in respect of the subjects. On 9th June 1905 the marriage contract trustees had ceased to be owners of the subjects, and the defender Mackersy had become infeft. The pursuers, the Governors of the Trades Maiden Hospital, thereupon called upon him as a singular successor to pay a composition of £72, 10s., which sum was the rental of the subjects for the year Whitsunday 1905 to Whitsunday 1906, less feu-duty of £11, 10s., and £15 for taxes and repairs, the practice of the Governors of George Heriot's Hospital (the pursuers' own superiors) when claiming a composition of a year's rent being, as the pursuers averred on record, to allow deductions from the year's rent of (1) the current year's feu-duty, and (2) 15 per cent. on the gross rent for taxes and repairs, unless the vassal could instruct deductions of a greater amount by the production of vouchers.

Mackersy refused to pay, and the Governors of the Trades Maiden Hospital raised the present action.

The pursuers pleaded—"(1) The defender as heritable proprietor of the said subjects became liable to the pursuers as his superiors in a composition of £72, 10s. as at 9th June 1905. (2) The defender having failed to pay the said composition should be decerned to pay the sum sued for with interest and expenses."

The defender pleaded—"(1) The action is incompetent as laid. (2) The sum payable by the defender in terms of the feu rights being a year's sub-feu-duty, and the defender having now tendered the same the action should be dismissed with expenses. (3) Alternatively the casualty due by the defender not in any view exceeding the sum originally tendered by the defender—viz., a composition on the basis of a £50 rental—the action should be dismissed with expenses."

The position, however, adopted by the defender in argument differed materially from that which he had adopted on record, and his ultimate contentions (and on these the case was taken) were—"(1) That upon any view the action as laid was incompetent, the only competent action being one of declarator and for payment of a casualty in the form provided by the Conveyancing Act 1874, Schedule B. (2) That looking to the terms of sec. 5 of the Conveyancing Act 1874 no casualty was due. (3) That if any casualty were due the amount was only a year's sub-feu-duty. (4) That at any rate if a casualty were due and if it fell to be calculated upon a year's rental the year to be taken was 1899 and not 1905."

In connection with the third contention the defender stated upon record—"In said *reddendo* clause it is declared that singular successors in the subjects so sub-feued by the said James Jollie shall 'pay at their entry such composition as the Governors of George Heriot's Hospital, the said James Jollie's superiors, exact from their vassals in similar subjects,' viz., a year's sub-feu-duty. The expression 'similar subjects' refers to similar sub-feus existing at the date of said contract of feu. The pursuers as successors of the said James Jollie are by said *reddendo* clause not entitled to demand from the defender more than a year's sub-feu-duty, £11, 10s., in name of composition under the usual deductions, payment of which sum the defender hereby offers to make."

On 1st February 1906 the Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—"Repels the first and second pleas-in-law for the defender; finds that the rent upon which the composition is to be calculated is £99 sterling; continues the cause that parties may have an opportunity to adjust the deductions to be made therefrom; reserves all questions of expenses; and grants leave to reclaim."

The defender reclaimed, and argued—(1) A plain petitory action was incompetent, the only form of action competent being that prescribed by Schedule B of the Act of 1874. Under the old law a petitory action was unheard of, an action for declarator of non-entry being always necessary; accordingly if now competent it must be so in virtue of the Act of 1874, but there was nothing in the Act to suggest this, section 5 merely prescribing the times and amounts of casualties but conferring no new powers or remedies on superiors. Further, the words [*or otherwise as the case may be*] in Schedule B clearly referred to the cases dealt with in section 5, viz., casualties due on the lapse of 15 or 25 years from the last payment. But (2) no casualty was yet due. Section 5 provided that the successor of trustees was to pay a composition 25 years after the last composition *only where the trustees had paid a composition or compositions in terms of section* 5. Looking however to the language of section 5 it was obvious that the payment in 1880 was not a payment in terms of the section, but under the old law. The 25 years' rule therefore could not apply to this case, so that no composition could be exigible until the death of the last-entered vassal, viz., the trustees who for anything disclosed on record might all or some be still alive. (3) Even, however, assuming that a casualty was due under section 5 the pursuers were mistaken as to its amount. Assuming further for the moment that it was a year's rent, the pursuers had chosen the wrong year. The trustees were impliedly entered at the date of the passing of the Act of 1874. A casualty became then due. The next casualty would accordingly fall due in 1899, 25 years later, and that was the year's rental upon which the composition must be calculated, it being unfair that the defender should be prejudiced by the fact that there had been delay in making the demand—*Houston* v. *Buchanan*, March 1, 1892, 19 R. 524, 29 S.L.R. 436. But (4) In no event was the composition a year's rent, because upon a proper interpretation of the clause of *reddendo* it was limited to a year's sub-feu-duty—see *Governors of Heriot's Hospital* v. *Ross*, 1815, 6 Paton's Appeals, 640.

Argued for the pursuers and respondents—(1) The form of action was competent. Section 5 gave an express statutory right to a casualty on the lapse of twenty-five years from the last payment; they were not therefore concerned with any questions of entry or non-entry, but were simply enforcing a statutory right to a sum of money by the ordinary form of petitory action. Had they brought an action of declarator of non-entry as suggested by the defender it would have been objected that the lands were not in non-entry as the trustees might still be alive. See *Dick Lauder* v. *Thornton*, June 23, 1890, 17 R. 320, 27 S.L.R. 455; *Governors of Heriot's Trust* v. *Drumsheugh Baths Company*, June 13, 1890, 17 R. 937, 27 S.L.R. 751; *Church of Scotland* v. *Watson*, December 24, 1904, 7 F. 395, 42 S.L.R. 299; *Christie's Trustees* v. *M'Dougall*, June 8, 1905, 7 F. 756, 42 S.L.R. 625. (2) The defender's construction of section 5 was obviously wrong. It involved a meaningless distinction between corporations and trustees. On a fair reading of the section it was plain that the trustees' payment in 1880 was a payment "in terms of this section" and that being so another payment became due twenty-five years later, viz. in 1905. (3) As to the suggestion that the year's rental should be 1899, it was well settled that a composition was not due until demanded, and under section 5 it was *payment* of the first composition that was the *terminus a quo*—*Governors of Heriot's Trust* v. *Caledonian Insurance Company*, February 20, 1904, 6 F. 442, 41 S.L.R. 313. (4) As to the defender's last argument, the clause did not refer to the amount of the composition, but only to the mode in which the over superiors ascertained the year's rent in the matter of deductions, &c. Had it been meant to limit the composition to the amount of the feu-duty, the clause would have been "doubling the said feu-duty at the entry of each heir *and singular successor*."

LORD KYLLACHY—The pursuers in this action conclude for payment of a composition said to be due by the defender as the successor of certain trustees who were impliedly entered with the pursuers in 1874, and who paid a first composition on 9th June 1880—a composition due and exigible at that time, and so far as appears paid when or soon after it was demanded. The question is whether the pursuers are now entitled to demand a second composition—a composition said to have become due on 9th June 1905, by the lapse of twenty-five years from the payment of the first composition in 1880.

The action is, of course, brought under the 5th section of the Conveyancing Act of 1874—a section which, as we know, pro-

vides what may be described as a special code for casualties becoming due by corporations or bodies of trustees; two classes of persons whom, under the old law, superiors were not bound to enter except upon special terms, and who were thus in an exceptional position. The pursuers contend that their demand is within the express terms of the section, and the Lord Ordinary has so decided.

The defender, however, states several defences, some of which seem to have been urged in the Outer House while others were urged for the first time under the present reclaiming note.

The first defence is that the action is incompetent—the incompetency being said to consist in the summons being an ordinary petitory summons and not a declarator in the statutory form—that is to say, in the form set out in Schedule B of the Act of 1874.

The Lord Ordinary has repelled this defence on a ground which I think is obvious, and with which I entirely agree, namely this—that one or more of the trustees (the defender's authors) being, so far as appears, still alive, an action of declarator under the statutory form would have been quite inappropriate—the only action possible, where the pursuer's claim rests entirely, as it does here, on the 5th section of the Act of 1874, being a petitory action, just such an action as has been in fact brought.

The defender's second ground, if I rightly understood it, came to this, that upon the just construction of the 5th section, and particularly the "proviso" towards its close, he, being the successor of still living trustees duly entered, cannot be liable in a casualty until the death of the last survivor of those trustees. He appeared to contend that the latter part of the section (the part which deals with a change of ownership after a composition has once been paid) applies (in the case of trustees) only when in addition to the first composition paid by the trustees after the Act passed, they (the trustees) have paid a second composition after the lapse of twenty-five years. That appeared to be the contention, and it was, as I understood, rested entirely on the words "in terms of this section" as used near the middle of the proviso which, as as I have said, forms the last part of the section.

Now, perhaps it may be enough to say that the defender does not on record plead that no casualty is due, but on the contrary admits that a casualty is in fact due. It may perhaps also be thought that the futility of the defender's contention appears sufficiently from two considerations—(1) That it (the defender's contention) would establish, with respect to the working of the said proviso, a distinction between the successors of corporations and the successors of trustees—a distinction of which the language does not admit, and which besides could have no object, and would be contrary to the whole scheme of the section; (2) that it would also confer on the defender a benefit (or it might be cause him a detriment) which his authors, the trustees, if they were still in possession, could neither claim nor be obliged to submit to.

But waiving those considerations, and examining, even critically, the language of the 5th section, it appears to me to be sufficiently clear that the use in the proviso of the words "in terms of this section" has no such significance as the defender suggests. No doubt the section begins by directing expressly, with respect to what I may call the first composition, that corporations "shall pay" the same, and having done so shall pay another composition in twenty-five years. No doubt also when it goes on in the next sentence to deal with trustees the phraseology is slightly varied. The words being—"And where a composition payable on the death of the vassal shall become exigible from any trustee or body of trustees, another compositien shall be payable at the end of every twenty-five years, so long as the lands shall be vested in such trustee or trustees," &c. But this cannot, as it seems to me, be read as meaning that the first payment by corporations is a payment "in terms of this section," while the corresponding first payment by trustees is not a payment "in terms of this section." The expression may be correct or faulty but the meaning I think plainly is that *in both cases* the section contemplates (1) a first composition paid so soon as it would have been payable under the former law; and (2) a series of subsequent compositions paid at intervals of twenty-five years.

I am therefore of opinion that there is no substance in the defender's point, and that the casualty sued for is now due. I need only add—what perhaps is obvious—that the twenty-five years' rule may operate as events fall out favourably or adversely to the trustees or their successors. The trustees may all die within the twenty-five years, or one or more of them may survive that period. In the first case the rule will operate adversely to the superior. In the second case it will operate adversely to the vassal.

The defender further seemed to contend that in any view the present casualty became due not in 1905 but in 1899, the suggestion being that the twenty-five years ran from the passing of the Act of 1874, at which date, and not in 1880, the first composition became it was said payable by the trustees. As to this it seems sufficient to say that it has been more than once held that a composition is not due until it is demanded, and further that upon the terms of the 5th section it is payment of the first composition which appears to be made the *terminus a quo*.

The remaining defence may be dealt with in a word. It is this, that by a clause in the defender's feu-contract (which constituted a sub-feu) the feuar's composition is, it is said, measured by the sub-feu-duty which he (the feuar) pays to his superiors, that being, as has been decided, the measure of the casualty which his said superiors (the pursuers) pay to Heriot's Hospital, their over-superior. It appears to me however, as it did to the Lord Ordinary that the clause on which the defender

founds has no reference to the amount or measure of composition but only to—what is a quite different matter—the mode in which the over-superiors, Heriot's Hospital, are in use to ascertain the net year's rent payable by those vassals who have not subfeued. In other words the reference is only to the deductions allowed for feu-duty, repairs, &c., which Heriot's Hospital are in use to allow.

On the whole I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

The LORD JUSTICE-CLERK, LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced this interlocutor:—

"Having heard counsel on the defender's reclaiming note against the interlocutor of Lord Mackenzie dated 1st February 1906, Refuse the reclaiming note: Adhere to the said interlocutor reclaimed against, and remit the cause to the said Lord Ordinary to proceed therein. . . ."

Counsel for Pursuers and Respondents—Chree—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Defender and Reclaimer—M'Lennan, K.C.—Spens. Agent—W. R. Mackersy, W.S.

Friday, November 10.

SECOND DIVISION.

M'DONALD'S TRUSTEES *v.* M'DONALD'S TRUSTEES.

Succession—Vesting—Heir-at-law—Period when Heir-at-law Ascertained.

A testator directed his trustees to convey his whole estate to his wife in liferent, and on her death to convey certain heritable estate to his son A, "whom failing without lawful issue to my heir-at-law." A survived the testator, and was at his death his heir-at-law, but predeceased the liferentrix unmarried, leaving a settlement.

Held that though A had been called as primary legatee this did not displace the presumption that "heir-at-law" meant the person occupying that position at the date of the death, not of the liferentrix but of the testator, and that in the circumstances the destination had become inoperative and the estate had vested in A *a morte testatoris* and was carried by his settlement.

Peter M'Donald, sometime blacksmith, afterwards feuar in Charlestown of Aberlour, in the county of Banff, died on 11th June 1881, survived by (1) his wife Mrs Margaret Kemp or M'Donald; (2) his natural son John M'Donald, blacksmith; and (3) his only lawful child and heir-at-law James M'Donald, private in the 93rd Regiment of Foot. He left a trust-disposition and settlement dated 9th February 1878, whereby he conveyed to trustees his whole estate, particularly, *inter alia*, (2) a certain specified piece of ground in Aberlour with the houses thereon, marked number twenty on a certain specified plan.

In his settlement the testator, *inter alia*, provided as follows:—"I appoint my said trustees to pay, assign, and dispone the whole of my heritable and real estate above conveyed to the said Margaret Kemp or M'Donald, my wife, in case she shall survive me, in liferent for her liferent use allenarly; . . . and I also appoint my said trustees, on the death of the said Margaret Kemp or M'Donald, to assign and dispone the whole remainder of my heritable estate above conveyed, including the two feu properties second and third above conveyed, being those marked respectively numbers twenty and nine on the said plan, to my son James M'Donald, private in the Ninety-third Regiment of Foot, presently in Ireland, whom failing without lawful issue to my heir-at-law." (Number nine did not form part of testator's estate at his death.)

Margaret Kemp or M'Donald survived her husband, and enjoyed the liferent of the said piece of ground number twenty down to the date of her death in March 1905. James M'Donald died in May 1884 unmarried, leaving a disposition and settlement by which he conveyed to his natural brother John M'Donald his whole estate, and in particular the foresaid heritable property in Aberlour. John M'Donald died in September 1902 leaving a holograph will by which he appointed his wife and his son trustees to carry out his wishes. The heir-at-law of the testator at his own death was his son, the said James M'Donald, but as at the date of the death of his widow was Alexander M'Donald, who was the eldest son of the eldest son of the younger brother of the testator.

Questions having arisen regarding the right to the fee of the property number twenty, this special case was presented for the opinion and judgment of the Court. The parties to the special case were (1) the Reverend John Smith Sloss and others, the trustees acting under the testator's settlement, first parties; (2) the trustees of John M'Donald, who were his widow and son, second parties; and (3) Alexander M'Donald, third party.

The second parties contended that on a sound construction of the testator's trust-disposition and settlement the fee of the said heritable property vested in his lawful son James M'Donald *a morte testatoris*, and was carried by his settlement to his natural brother John M'Donald, and was thereafter carried to the second parties under the last will and testament of the said John M'Donald. The third party contended that the said heritable property did not vest in the late James M'Donald, but that vesting was suspended till the death of the liferentrix, and that the third party as the testator's heir-at-law at that date was entitled to a conveyance of the property. The first parties as trustees of