

this to be a mere mechanical variation;" and I confess I am disposed to take the view his Lordship does, that in that case the mode of fastening there suggested would have been a mere mechanical variation. His Lordship adds—"Supposing the pumps made by the respondents were intended to be moved round to definite angles by taking out the bolts and changing the bolt-holes, it is a very different question whether a pump so made capable of being turned only to definite angles determined by the number of bolt-holes through which the bolts pass would be a mechanical variation of this design." His Lordship then indicates an opinion that it would not. On that point the leaning of my opinion is different, and I desire to reserve my opinion as to whether that would not be a case of infringement, as being substantially the taking of the whole combination though mechanical equivalents were used for parts of it.

But looking at the case upon the question that is before us, I am of opinion, as I have said, that there is here no case made out of infringement by sale of the particular machines with which we have to deal, and therefore I concur with your Lordship in affirming the judgment of the Lord Ordinary.

LORD ADAM concurred.

The Court adhered.

Counsel for Pursuer and Reclaimer—Lord Adv. Balfour, Q.C.—Guthrie-Smith—Young. Agents—Adam & Sang, S.S.C.

Counsel for Defenders and Respondents—Pearson—Ure. Agents—Yeaman Fodd & Simpson, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Lord Trayner, Ordinary.

MACKINTOSH v. MACKINTOSH.

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

Held, in an action (under sec. 4 of the Conveyancing Act 1874) at the instance of a superior for declarator and for payment of a casualty of composition, that a disponee who had taken infestment upon a disposition contained in a testamentary settlement by the vassal last entered and infest, was only liable in payment of such casualty as regarded one-half of the lands, in respect that to the other half he was heir *alioqui successurus*, and as such entitled to be entered to that half on payment of relief.

This was an action under the Conveyancing Act of 1874, sec. 4, sub-sec. 4, at the instance of Charles Fraser Mackintosh, superior of the lands of Dalmigavie and others, in the county of Inverness, against Campbell Keir Mackintosh, proprietor of these lands, for declarator that in consequence of the defender's infestment therein, and of the death of the vassal last entered and infest under the law as it stood prior to 1874, or of one

or other of these events, a casualty of one year's rent became due to the pursuer as superior on April 28, 1882, the date of the defender's infestment as after mentioned. The pursuer estimated the casualty claimed at £300.

Eneas Mackintosh, the vassal last entered and infest in the lands of Dalmigavie and others, died in 1882 leaving a testamentary settlement by which he conveyed these lands to his nephew, the defender, then called Campbell Keir, upon certain conditions, and, *inter alia*, that he should take the name of Mackintosh. Campbell Keir assumed the name of Mackintosh, and completed his title to the lands of Dalmigavie and others by notarial instrument proceeding upon the testamentary settlement, and recorded in the Register of Sasines 28th April 1882.

In answer to the pursuer's demand the defender stated that Eneas Mackintosh, who was his uncle, died without issue; his heirs in heritage were the defender as eldest son of one sister, and a grand-nephew, the descendant of another sister. If Eneas Mackintosh had died intestate the defender would have succeeded to one-half of his heritage as one of two heirs-portioners.

The accuracy of this averment was not disputed.

The defender pleaded—" (2) The defender is only liable in payment of composition as regards one-half of the said lands, in respect that he is one of two heirs-portioners of the said Eneas Mackintosh, and as such entitled to be entered as regards the other half of said lands upon payment of relief."

The Lord Ordinary (TRAYNER) on 15th July 1885 pronounced an interlocutor, by which he found and declared in terms of the declaratory conclusions of the summons, and appointed the case to be put on the roll for further procedure.

"*Opinion.*—[After stating the facts and the defender's contention]—The title under which the defender holds is a singular title. He might have made up a title to one-half of the lands in question as heir, and claimed an entry in that character. If he had done so and registered his service, it would not have been open to the superior to object that the defender had also a title by conveyance, or the defender might have got his co-heir to make up a title with him to the whole subjects, and both have entered as heirs of the deceased on payment merely of relief without the superior being entitled to object that this was merely a device, to be followed after the entry by a conveyance by the co-heir in favour of the defender. Or again, if the defender had chosen to hold on the conveyance as a personal title until the superior made his demand, he might then have claimed on production of his service to enter as heir to one-half of the lands. But the defender did not adopt any of these courses. He made up his title as a singular successor and took infestment in that character, and it is a singular title which he now (by implication) presents to the superior for confirmation. I think the superior is entitled to take the title as presented to him and to make the demand which that title infers, but as the superior is not entitled to object that an heir claiming an entry has a title also by conveyance, so in my view he is not bound to give effect to the statement by one whose title is that of a singular successor, that he has also a title as heir which he has not

thought proper to use. It is a somewhat anomalous position which the defender takes up when he asks confirmation of his title as a singular successor (for that is really what is being asked), and at the same time insists that he shall only be liable for the casualties of superiority under a totally different character. In short, *quoad* casualties he is an heir; *quoad ultra* a singular successor. The defender by completing his title as he has done has prevented himself from offering to enter as heir. There is nothing now to enter to—the fee is full.

“I have not lost sight of the defender’s argument that whatever may be the form of his title, the fact is that the defender is the heir of the late Æneas Mackintosh in one-half of the lands in question; that the superior is losing nothing which he could have claimed had the defender made up his title as he might have done in a different manner; and that the superior’s right is not to be enhanced merely by the conveyancer’s mode of making up the title, that being a matter with which the superior has no direct concern. I think there is great force in the view thus presented, but the views I have already expressed seem to me more forcible. I have not reached the conclusion to which I have given effect in my interlocutor without considerable hesitation.”

The defender reclaimed, and argued—It was conceded that a composition was due *quoad* one-half of the lands, but *quoad* the other half the defender was entitled to be entered on payment of relief-duty as one of two heirs-portioners, and so *alioqui successurus*. By the operation of the 1874 Act the defender had got public infetment, and the question was—what casualty could the pursuer have exacted prior to 1874? Could the superior have refused to confirm a disposition to a person who was also heir except upon payment of a composition? According to the decisions the matter would have been regulated not by the form of the title but by the character of the person taking.—*Mackenzie*, 1777, M. App., Superior and Vassal, No. 2, 2 Ross L.C. 398; *Magistrates of Musselburgh v. Brown*, 1804, M. 15,038; *Marquis of Hastings, &c. v. Oswald*, May 27, 1859, 21 D. 871; *Duke of Argyll v. Earl of Dunmore*, 1795, M. 15,068; Service of Heirs Act (10 and 11 Vict. c. 47), sec. 21; Transfer of Lands Act (10 and 11 Vict. c. 48), sec. 6; *Stirling v. Ewart*, 4 D. 684, Lord Moncreiff p. 735, aff. 3 Bell’s App. 128, 2 Ross L.C. 369; Bell’s Prin., secs. 712, 717, 718. These cases, and especially the case of *Mackenzie*, showed that the superior had no interest in the character in which the vassal made up his title, so that his pecuniary rights were not prejudiced. The reservation which was formerly expressed in the charter was now contained in sec. 4, sub-secs. 2 and 3, of the Conveyancing Act 1874. The fact that the defender was heir to one-half of the estate only made no difference in principle.

Argued for the pursuer—The defender was only heir *alioqui successurus* to one-half of the estate, and he could not say that he was entitled to be entered *quoad* one-half as heir and *quoad* the other half as singular successor. Moreover, the Court were bound to look at the form of the title, and not merely at the substantial relation. When the fee was full by infetment on a disposi-

tion, that barred the heir from offering to serve, or from claiming an entry on payment of relief-duty—*Ferrier’s Trustees v. Bayley*, May 26, 1877, 4 R. 738; *Rossmore’s Trustees v. Brownlie*, Nov. 23, 1877, 5 R. 201; *Lamont v. Rankin’s Trustees*, Feb. 28, 1879, 6 R. 739, aff. Feb. 27, 1880, 7 R. (H.L.) 10. In *Rankin’s Trustees* it was observed in the House of Lords that compositions were now exigible in circumstances in which they would not have been exigible before the Conveyancing Act of 1874. The distinction between this and the case of *Mackenzie supra* was, that there the superior’s rights were not held by the reservation in the charter, but under the implied entry operated by the Conveyancing Act there was no such protection—*Grindlay’s Trustees*, Jan. 18, 1810, F.C.; *Wallace v. Earl of Eglington*, March 2, 1836, 14 S. 599; *Cargill v. Muir*, Jan. 21, 1837, 15 S. 408; *Governors of Caivin’s Hospital v. Falconer*, July 13, 1863, 1 Macph. 1164; *Duke of Hamilton v. Guild, &c.*, July 6, 1883, 10 R. 1117; Ersk. Inst. iii. 8, 71–79; Stair’s Inst. iii. 5, 26; Menzies on Conveyancing, 814; 2 Geo. II. c. 50, secs. 12 and 13; 10 and 11 Vict. c. 48, sec. 11.

At advising—

LORD PRESIDENT—This is an action at the instance of the superior of the land of Dalmigavie for the recovery of a casualty which is claimed to be a casualty of composition of one year’s rent of the lands, and is directed against the defender Mr Campbell Keir Mackintosh in respect of his having taken infetment upon a disposition granted by his ancestor, and having thereby become entered as a vassal of the pursuer.

The last vassal, Mr Æneas Mackintosh of Dalmigavie, died without issue, but he left a settlement by which he conveyed the lands in question to his nephew the defender, under certain conditions which it is not material to notice, because they do not amount to an entail. The defender expedite a notarial instrument upon that testamentary settlement of his ancestor, which was recorded in the Register of Sasines on 28th April 1882. Thereby of course the defender became entered as vassal by implication, but he alleges as regards one-half *pro indiviso* of the lands so conveyed to him that he was the heir *alioqui successurus*, and therefore he contends that as regards this one-half the casualty ought to be relief-duty and not composition.

The state of the succession to Mr Æneas Mackintosh if there had been no conveyance of the estate, would have been this—the defender was the eldest son of Mr Æneas Mackintosh’s sister, but there was also a grand-nephew, descended from another sister, and accordingly these two would have been entitled to succeed to the estate as heirs-portioners. It is from these circumstances that the defender gathers his title of heir *alioqui successurus* to one-half of the lands which he now holds. The implied entry by the Conveyancing Act of 1874 is that the infetment shall operate “to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.” Now, the pursuer contends, and the Lord Ordinary has adopted his view, that this case must be determined on the same footing as if the superior had granted a writ of confirmation, or as if the defender were demanding a writ of confirmation, and were seeking to make up his title in that

way. It was maintained that in the circumstances a casualty of composition must be paid, even supposing the defender was *alioqui successurus* to the whole estate. As regards the distinction between the defender being proprietor of the whole estate or only one-half, I do not see that there is any room for difference. If in the case of the defender being proprietor of the whole estate he would be entitled to refuse to pay a composition, and tender only a duplicand of the feu-duty, then I think that in the case of his being proprietor only of one-half he would be entitled to a proportionate deduction.

The real question is, what is the effect of the implied entry, keeping in view that it is to have the same effect as if a writ of confirmation had been granted? The Lord Ordinary is of opinion that whenever an heir entered by charter of confirmation, and equally, I presume, when he entered by charter of resignation, as a singular successor, he could not as regards the casualty payable be dealt with as an heir.

I rather think that the Lord Ordinary had fallen into a mistake with regard to the law upon that point, for I think it is clearly established by the cases to which I shall refer that the form of the title is not conclusive, and that an heir entering by confirmation or resignation may still have the benefit of his character of heir.

The leading case is that of an institute under an entail, the case of *Mackenzie v. Mackenzie*, M. Appx. Superior and Vassal, No. 2, and I think that this case, when properly understood, is altogether conclusive of the matter. In that case Sir Hector Mackenzie was the proprietor of the estate of Kinloch, and he had succeeded to it as institute of tailzie under an entail executed by his father, Sir Alexander Mackenzie. The tailzie was a strict deed of entail with the usual fetters under the Act of 1685, and therefore in order to comply with its conditions Sir Hector, as institute or disponee, was bound to make up a title either by instrument of sasine following upon the precept, or by resigning upon the procuratory of resignation in the disposition, and whichever of those modes he adopted the form of the title would undoubtedly be that of a singular successor or disponee. But in that case the Court held that he was entitled to an entry upon payment of relief-duty because he was heir *alioqui successurus* to his father, and it is to be observed that the form of entry there was necessarily that appropriate to a singular successor, and yet the institute under the tailzie obtained the full benefit of his character as heir.

Another illustration of the same rule is contained in a case that was cited to us, *The Magistrates of Musselburgh v. Brown*, M. 15,038. There a certain Captain Dobie had acquired land in the neighbourhood of Musselburgh, and he executed a disposition of these lands in favour of his son Adam containing procuratory of resignation and precept of sasine. Upon his father's death the son succeeded but died without having made up a title, and was succeeded by his sister Wilhemina. She sold the property to Alexander Brown, and in order to complete her title she expedite a general service to her brother. By that means she took up the unexecuted procuratory of resignation in the disposition by her father, and then she applied to the superior for a charter of resignation, which was prepared by the

superior's man of business, but was not delivered until it should be explained in whose person infestment was to be taken. This charter she assigned to Brown, who insisted on getting delivery of the charter that he might infest himself thereon, avoiding the payment of a casualty of composition by taking the benefit of Wilhemina Dobie's character of heir. In that case the Lord Ordinary, who I see was Lord Bannatyne, a very distinguished Judge, pronounced an interlocutor in favour of the purchaser, which was in these terms—"In respect that Adam Dickson Dobie, as only son and heir-at-law of his father Captain Richard Dobie, was entitled to be entered in the subject in question as heir to him, under the disposition in his favour as an heir, and not as a singular successor, finds, first, That the late Wilhemina Dobie, his only sister, and heir-at-law both to his father and him, had, as carrying right to the procuratory in that disposition by general service, the same right with her brother to have obtained delivery of the charter made out in her favour, on payment of a double feu-duty as heir, and could not have been obliged to pay a composition as a singular successor; and secondly, That as the defender obtained an assignation to that charter, the precept in which is a sufficient warrant for infesting him in the subject as her assignee, he has, as thus standing in her right, a title to obtain delivery thereof on the same terms on which such delivery must have been made to her, that is, on paying the dues of the same, according to the account thereof in process, and the duty exigible under the original grant from the person entering as heir." Now, that interlocutor was recalled, and it was found that the purchaser was bound to pay the usual composition as a singular successor; it appears to me plain that the reasoning of the Lord Ordinary is unsound. But in altering the Lord Ordinary's interlocutor no doubt was entertained that Wilhemina Dobie would have been entitled to get the charter of resignation on paying a duplicand, and in that case an entry would have been obtained applicable to a disponee or singular successor on payment of a duplicand.

Again, so late as the year 1859 there was a case when I was in the other Division, *The Marquis of Hastings v. Oswald*, 21 D. 871, in reference to the institute under a tailzie, and Lord Wood, who delivered the opinion of the Court, in deciding that case in favour of the heir, said that the law was firmly settled by the cases which had been already decided, and in his Lordship's opinion there is a most lucid statement of the law applicable to this point, in which the case of *Mackenzie* is set out as being the leading authority.

Therefore I think it is quite settled as matter of law that the form in which the title is made up is of no consequence, and that if the party who enters either by confirmation or resignation is *de facto* heir, he is entitled to enter on making payment of a duplicand of the feu-duty, and if he is heir to one-half of the land, then he is entitled to an entry on payment of a duplicand as regards that one-half.

LORD MURE—I am of the same opinion, and would not add anything except with reference to the observations made by me in *Rossmore's Trustees*, 5 R. 201, on the earlier case of *Ferrier's*

Trustees. It is evident that the point which is now raised was not considered in *Ferrier's Trustees*; it seems to have been omitted. Therefore the point is quite open, and there is nothing in *Ferrier's Trustees* which decides it one way or the other.

LORD SEAND concurred.

LORD ADAM—The Lord Ordinary says in his note—“The title under which the defender holds is a singular title. He might have made up a title to one-half of the lands in question as heir, and claimed an entry in that character. If he had done so, and registered his service, it would not have been open to the superior to object that the defender had also a title by conveyance;” and no one can doubt that that is good law. But then a little further on the Lord Ordinary goes on to say that the defender “made up his title as a singular successor, and took infestment in that character, and it is a singular title which he now (by implication) presents to the superior for confirmation. I think the superior is entitled to take the title as presented to him, and to make the demand which that title infers;” and then “The defender by completing his title as he has done, has prevented himself from offering to enter as heir. There is nothing now to enter to, the fee is full.”

I think the Lord Ordinary is there quite wrong in point of law, because the question is just whether or no if a vassal had prior to 1874 tendered such a title to the superior he would have been bound to enter him by charter or writ of confirmation, on payment of relief-duty only. I agree with your Lordships that it has been settled by the cases that the superior would have been so bound to confirm the vassal.

The case of *Mackenzie v. Mackenzie*, M. App. Superior and Vassal, No. 2, decided in 1777, is quite in point. There the last-entered vassal executed a new deed of entail, and called under it certain of the heirs of the existing investiture and also stranger heirs. The institute in the new entail, who was heir of the last-entered vassal, claimed to enter under the new disposition, that is to say, in respect of the new disposition in the entail, and the question arose whether he was entitled to an entry on payment of relief-duty only. It was said in that case that if the superior confirmed the entail, then strangers to the previous investiture might come to succeed, and compel an entry on payment of relief-duty only. But nevertheless the Court held that the heir was entitled to enter on paying relief-duty.

The case of the *Marquis of Hastings*, 21 D. 871, seems to me to raise precisely the same point. There the heir of entail in possession executed a new deed of entail calling the first two of the heirs under the existing investiture, and after them stranger heirs. The institute took as donee under the new deed, and the Court held that he was entitled to an entry from the superior on payment of relief. This case is in my opinion *a fortiori* of the case of the *Marquis of Hastings*, because there the heir could not have made a title as heir, but was bound to take as donee in order to comply with the terms of the deed of entail.

The state of the law therefore prior to 1874 was that the superior was bound to grant confir-

mation of such a title as we have here on payment of relief-duty. But though it was held prior to 1874 that a superior could not refuse to enter an heir in such a way, yet the superior was not obliged to grant a charter or writ which would prejudice his right to claim a casualty of composition when that right should emerge. Therefore in the two cases I have noticed there was inserted a reservation of the superior's right to claim a composition upon the entry of the first substitute under the new investiture who should not be the then existing heir under the former investiture. Except for this reservation it would have been pleaded against the superior's claim that by granting a charter of confirmation he had enfranchised the new investiture; and accordingly the Court in these cases said that the act of the superior was not to free those who would but for the new disposition have been strangers to the investiture, from any claim for composition that might be made against them. That was the reason of the reservation in the charter granted by the superior, and by it the question was left open. But that did not touch the question whether the heir of entail was entitled to enter under the disposition for payment of relief-duty only? On that point I think the cases are conclusive in favour of the heir. I am further agreed that the argument that the defender was only heir to one-half of the lands is really a subtlety, and makes no difference in the result.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second plea-in-law for the defender, and remitted to the Lord Ordinary.

Counsel for Pursuer—Gloag—Kennedy.
Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender—Mackintosh—Low.
Agents—Skene, Edwards, & Bilton, W.S.

Friday, March 5.

FIRST DIVISION.

SCHUMANN v. SCOTTISH WIDOWS' FUND.

Husband and Wife—Insurance—Life Insurance—Policy on Husband's Life for Wife's Separate Use—Surrender—Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26), sec. 2.

Held that a policy of assurance effected by a husband on his own life for the separate use of his wife, under section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880, was capable of being surrendered during the joint lives of the spouses.

Marcus Schumann, domiciled in Hamburg, obtained on 12th August 1882, from the Scottish Widows' Fund and Life Assurance Society, a policy of assurance on his life for £1000, for the benefit of his wife Mrs Clara Leon or Schumann, which bore to be in pursuance of the Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26).

The policy proceeded on the narrative that Mr Schumann desired to effect an assurance on his own life for the benefit of his wife, for her separate use in pursuance of the said statute, and