13 of the Home Drummond Act, which must be prosecuted at the instance of the procurator-fiscal or some public official appointed by the magistrates.

I therefore think that section 25 applies, and that it is adverse to the course here taken, but reference was also made to 39 and 40 Vict. c. 26 (the Publicans' Certificates (Scotland) Act 1876), section 11, which provides that "no justice of the peace or magistrate of a burgh shall be qualified to be appointed a member of any county licensing committee or joint-committee of a burgh under this Act" unless he is qualified to act under section 13 of the Home Drummond Act, and every such justice or magistrate not being so qualified shall, if he act knowingly and wilfully, be liable to forfeit and pay the same penalty, to be recovered in the same manner as if he had been guilty of an offence against section 13 of the Home Drummond Act.

Now, it appears to me that this does not touch the question at all, because if anyone had in 1876 violated section 13 of the Home Drummond Act he must have been prosecuted at the instance of the procurator-fiscal as provided for by the Act of 1862.

My opinion therefore is that the prosecution in this case not having been in the manner specified in the 25th section of the Act of 1862, viz., at the instance of the procurator-fiscal or other person specially appointed for the purpose, we should sustain the first plea-in-law for the respondent of "No title to sue." I would suggest that we should sustain this plea and affirm the judgment of the Sheriff dismissing the petition.

LORD TRAYNER and LORD KYLLACHY concurred.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of the Lothians dated 2nd December 1901: Sustain the first plea-in-law for the defender: Dismiss the action, and decern: Find the defender entitled to expenses in this and in the Inferior Court, allowing fees to counsel in the Sheriff Court, and remit," &c.

Counsel for the Pursuer and Appellant—Gunn. Agent—Robert Macdougald, S.S.C.

Counsel for the Defender and Respondent—Campbell, K.C.—Dewar. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, July 1.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CORPORATION OF EDINBURGH *v.* IRVINE'S TRUSTEE.

Superior and Vassal — Composition — Implied Entry—Trustee not Holding for Heir of Investiture—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4 — *Conveyancing (Scotland) Acts* (1874 *and* 1879) *Amendment Act* 1887 (50 *and* 51 *Vict. cap.* 69), *sec.* 1.

A vassal infeft in certain lands, and entered with the superior, granted a trust-disposition by which he conveyed these lands to A and himself as trustees. The trustees were directed to hold for the truster's daughter in liferent, for her alimentary use only, and for such of the daughter's lawful children as she should appoint in fee. In the event of the daughter dying without children the trustees were directed to convey the subjects to the "heirs or assignees" of the truster. This disposition was recorded in the Register of Sasines in the lifetime of the truster.

On the death of the truster, survived by his daughter, who was his only child, and was then unmarried, the superiors claimed a composition from the surviving trustee. He maintained that relief duty only was due.

Held (*aff.* judgment of Lord Kincairney, Ordinary) that the superiors were entitled to a composition, in respect (1) that the trustee, not holding for the heir of the last-entered vassal, was a singular successor impliedly entered with the superiors by virtue of section 4 of the Conveyancing (Scotland) Act 1874, and (2) that section 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 was not applicable to the facts of the case.

This was an action at the instance of the Lord Provost, Magistrates, and Town Council of Edinburgh, superiors of certain subjects in Bristo Street, Edinburgh, described in the summons, against James Wright, draper, Leeds, sole surviving trustee under a disposition granted by the late John Irvine, spirit merchant, Edinburgh, the vassal last vest and seized in the said subjects, dated 14th February 1881, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh on 23rd February of the same year.

The pursuers concluded for declarator that in consequence of the death of the said John Irvine a casualty, being one year's rent of the said lands, became due to the pursuers as superiors of the lands upon 7th November 1888, being the date of the death of the said John Irvine, and that this casualty was still unpaid, and for

payment of £778, being the amount of one year's rent of the said lands.

The following narrative of the facts of the case is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—"The facts are few and uncomplicated. The last-entered vassal was John Irvine, spirit merchant, Fountainbridge. On 14th February 1881 he executed a trust-deed, which bears that for the love, favour, and affection which he bore to his wife and daughter, he disponed to himself and the present defender and the survivor, as trustees for the purposes thereinafter written, the property described in the deed, being the property described in the summons, with his whole right, title, and interest, present and future, therein.

"The purposes were—(1) for payment of the expenses of executing the trust; (2) for payment to his wife of the rents of the subjects, which liferent should be strictly alimentary to her and not 'attachable' by the creditors of her or of him or of any other husband whom she might marry; (3) after her death for payment of the rents to Mary Isabella Irvine, the truster's daughter, during her life, which payments should also be strictly alimentary and exclusive of the *jus mariti* of any husband whom she might marry; (4) it was provided that the truster's wife and daughter should be entitled to require the trustees, in place of making these payments, to put them in possession of the subjects or part of them and 'maintain them therein.'

"The fifth clause provides as follows:—'Upon the death of my said daughter, should she survive my said wife, my trustees shall be bound at once to denude themselves of the said subjects and to convey the same, . . . to such of my said daughter's lawful children, or to such of said children's direct descendants, and in such proportions as she may appoint by any writing under her hand, without necessity for the consent or concurrence therein of her husband, and failing such appointment then to the heir-at-law of the body of my said daughter;' then follows a provision to the effect that in the event of the person or persons entitled not being of full age, the trustees should hold the subjects until the youngest should attain the age of twenty-one, and should then denude.

"The sixth and last purpose is, 'Sixth, in the event of my said daughter dying without issue, or of the failure of said issue, prior to my trustees denuding in their favour as aforesaid, my trustees shall, on the termination of the said liferent in favour of my wife, should it not have previously ceased, convey the said subjects hereby disponed to me or to my heirs or assignees, with warrandice as above mentioned.'

"The deed contains the unusual condition that the truster only should, during his life, have the power to appoint new trustees.

"The deed contains a power to invest and to borrow, and also a power to 'sell, feu, and dispose of all or any part of the trust-estate.'

"It is declared that a certain part of the subjects conveyed is to be held of the granter and the other subjects of his superiors. But it has not been argued that that circumstance affects the case.

"I do not know the object of this singular deed, and do not care to speculate on that subject. But it was almost immediately registered in the Register of Sasines.

"There is no account on record of what followed on the deed.

"On 7th November 1888 John Irvine died, and the defender then became the sole trustee. He avers that Irvine's widow and daughter Mary Isabella Irvine are both alive, and that she is the truster's only child. . . .

"This action was raised on 21st January 1901. It is in the form of Schedule B in the Conveyancing Act 1874."

The defender pleaded, *inter alia*—"(3) There being no change in or interruption of the deceased Mr Irvine's investiture created by the disposition executed by him on the 12th February 1881, the defender ought to be assoilzied. (4) In respect the defender's title is merely a temporary burden on the fee, created for the purpose of continuing the deceased Mr Irvine's investiture in the subjects libelled, and not affecting the character and right of Mary Irvine as the said deceased's heir, the defender ought to be assoilzied."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4, enacts—"Where lands have been feued, whether before or after the commencement of this Act" . . . Sub-section 2—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." . . . Sub-section 3—"Such implied entry 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," . . . "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 by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

Section 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 is quoted in the opinion of the Lord Ordinary, *infra*.

On 4th December 1901 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds, decerns, and declares that, in consequence of the death of John Irvine, spirit merchant, Fountainbridge, the vassal last vest and seized in

the lands described in the conclusions of the summons, a casualty, being one year's rent of the said lands, became due to the pursuers as superiors of the said lands upon the 7th November 1888, being the date of the death of the said John Irvine, and that the said casualty is still unpaid, and that the full rents, maills, and duties of the said subjects after the date of this interlocutor belong to the pursuers as superiors thereof until the said casualty be otherwise paid to the said pursuers, and finds it admitted that the sum of £778, 1s. 4d. is the amount of one year's rent of the said subjects: Decerns and ordains the said James Wright, as sole surviving trustee acting under the trust-disposition granted by the said John Irvine, dated 12th and 14th February 1881, to make payment to the pursuers of the said sum of £778, 1s. 4d.: Finds the pursuers entitled to expenses," &c.

Opinion.—"This case raises a question of some novelty and importance in reference to the Conveyancing Act 1874 and the Conveyancing Amendment Act 1887. It is directed against the trustee appointed by the vassal last entered in the subjects described, and the question is whether the superiors, the Magistrates of Edinburgh, are entitled to decree for £778, 1s. 4d., the admitted amount of a composition, or only to a very small sum, stated to be 2s. 2d., as relief duty. If I am right in thinking that my judgment must be for the pursuers, then I think also that this is one of those cases in which the Conveyancing Act 1874 has led to consequences very different from what the truster anticipated.

[*The Lord Ordinary here stated the facts*, ut supra, *and the pleas for the defenders.*]

"The pursuers maintained that the trustee was liable as the vassal in the subjects entered by virtue of the 4th section of the Conveyancing Act 1874, and being a singular successor was liable in composition. They rested their claim mainly on the case of *Rankin's Trustee* v. *Lamont*, February 28, 1879, 6 R. 739, *aff.* February 27, 1880, 7 R. (H.L.) 10, 16 S.L.R. 387, and 17 S.L.R. 416.

"The defender maintained that the case fell under the 1st section of the Conveyancing Amendment Act 1887 (50 and 51 Vict. cap. 69), and that in virtue of that section he was only liable in relief duty. If that section applies, it is not disputed that the defence must be sustained. But the pursuers maintained that it does not apply, and that is the chief question in this case. The Act is entitled 'An Act to explain and amend the Conveyancing (Scotland) Act 1874,' and the first section purports to relate to limitations of liability of trustees for casualties, and it provides that the trustees shall not be liable in the cases specified for any different casualty than would have been payable by the heir if he had taken the estate by succession. The application of the section is thus expressed, 'Where by a trust-disposition and settlement, or other *mortis causa* writing, any heritable estate is conveyed to trustees for behoof of or with directions to convey the same to the heir of the testator, whether forthwith or after the expiry of any period of time not exceeding twenty-five years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate, the trustees under such trust-disposition and settlement, or other *mortis causa* writing, shall not, upon their entering, or by reason of their having prior to the date of this Act entered, with the superior by infeftment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees.'

"I do not see that any question arises about the limitation of time here expressed, but the section relates only to trust-dispositions and settlements or other *mortis causa* deeds, and the first question is whether the deed under consideration is a deed of that character, and I am unable to hold that it is. It is mainly, if not entirely, an *inter vivos* deed. It was registered almost immediately, and took immediate effect. I see no reason to suppose the contrary. The truster reserved no power to recall or modify it, although according to its terms it was possible for the property to return to the truster on the failure or exhaustion of its purposes. It is true that it provided for events that might take place after the testator's death, and for one event which must have done so, namely, the event on the occurrence of which the property is vested in his heir. But of course *inter vivos* trust-deeds may frequently have application, and may be in force after the truster is dead. I think it impossible to regard this deed as in any sense a testamentary deed. Perhaps it might have been reasonable that the benefit of the section should have been extended to deeds such as this, but all that can be said is that that has not been done.

"Further, I incline to think that the deed otherwise does not comply with the provision of the Act. It is not a deed necessarily for behoof of the heir, or by virtue of which the heir will necessarily have the ultimate beneficial interest, because the estate might, in virtue of the deed, be carried to more children than one of the truster's daughter, or to one who was not her heir or heir of the truster. It is true that in the present state of matters, as averred by the defender, the subjects could not be carried past the truster's daughter unless she had children. But, besides, under the powers of the deed the subjects might have been sold and carried to total strangers. Miss Irvine is not, in my opinion, in the present state of matters, effectually disinherited, but the subjects seem to have been taken out of the estate of the truster, and to have been vested in the trustee, from whom, I suppose, she must get the estate if she becomes entitled to demand delivery of it. I refer on that point to *Balderston* v. *Fulton*, 23rd January 1857, 19 D. 293, and to *Blackwood* v. *Dykes*, 26th February, 1833, 11 S. 443, in which latter case the effect of a similar destination in a disposition and settlement was considered, and it was held that, although the

heir was not at the date of the judgment effectually disinherited by the deed, yet the trustees could not be called on to denude in his favour absolutely so long as it was possible that persons called in the deed might come into existence and exclude him. On the whole, I am unable to hold that the Act of 1887 applies, or that the defender can take any benefit from it.

"It has been argued that the deed, in respect it does not, as matters have turned out, disinherit Miss Irvine, was ineffectual to convey the subjects, so that the trustee was truly not proprietor in the sense of the fourth section of the Act 1874, and that on that account he was not entered by the implied entry. I am unable to hold that. No authority was quoted in support of it. I think that he was infeft and was entered by implied entry, at least so far as related to the subjects except the subject as to which it was provided that he should hold of the truster. But it was not argued, and I have been unable to see that that fact affects the conclusion of the present action. Had the pursuers not demanded composition from the trustee, and had the estate devolved on the daughter, I am inclined to think that in an action against her the case of *Stuart* v. *Jackson*, 15th November 1889, 17 R. 85, 27 S.L.R. 178, would have warranted a judgment that the pursuers were entitled only to relief duty from her. But as they have proceeded against the trustee, I think the authorities necessitate the conclusion that the pursuers must prevail. The parties are not at issue on any question of fact which necessitates inquiry, and therefore decree must be pronounced for the sum concluded for."

The defender reclaimed, and argued—The case fell within the principle of *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85, 27 S.L.R. 178, which was followed in *Duke of Atholl* v. *Stewart*, March 20, 1890, 17 R. 724, 27 S.L.R. 590, and *Duke of Atholl* v. *Menzies*, March 20, 1890, 17 R. 733, 27 S.L.R. 595. That principle was that composition was not due on the implied entry of trustees when the trust was merely a mechanism for conveying the estate—subject, it might be, to liferents—to the heir of the investiture. When the time arrived for the trustee to convey the subjects under the trust here, it must be to the heir of the investiture, *i.e.*, either to the issue of the truster's only daughter, or, if she had no issue, to the truster's heir. The mere fact that it was possible under the provisions of the trust that these subjects should be conveyed to one who was not the heir of the investiture should not entitle the superior to a composition. If that event should happen they could then claim. The heir was entitled to enter on payment of relief, even although the form of his title was a disposition either from the last-entered vassal or his trustees—*Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692, 23 S.L.R. 471. The first section of the Conveyancing Amendment Act of 1887 was really declaratory of the law laid down in *Stuart* v. *Jackson*, *cit. supra*. The present case fell within its provisions, because the trust-deed, though granted *inter vivos*, was in its provisions testamentary.

Counsel for the respondents were not called upon.

LORD PRESIDENT—We have had a very good argument in this case, but I consider that the conclusion at which the Lord Ordinary has arrived is correct, and, as he has stated the case very fully, I do not propose to enter into details. The points made for the reclaimer were firstly on the case apart from the Conveyancing Amendment Act 1887, and secondly, on the terms of that Act. On the first point it appears to me that before the reclaimer could prevail he must show either that he is the heir of investiture, which he clearly cannot do, or, if the fee is in the hands of trustees, that they hold it for the heir of investiture and for nobody else. In short, he must show that either in form or in substance the reclaimer is heir of investiture, and as neither of these conditions can be fulfilled I agree with the conclusion arrived at by the Lord Ordinary.

But it is said that under the Act of 1887 a right arises which limits the liabilities of trustees for a casualty of composition. I understand the object and effect of that Act to be to prevent superiors obtaining an undue advantage, because by the form of the title a body of trustees are singular successors. The superior in that case might say that the trustees being singular successors are liable in composition even although they were holding for the heirs. The Legislature thought that this was increasing the rights of superiors and giving them an undue advantage from the form of the title, and it in effect provided that where lands were conveyed to trustees by what was practically a *mortis causa* disposition, the superior should not obtain the undue advantage, founded on the accidental form of the title, of obtaining a casualty of composition instead of relief. And accordingly it provided that if the heir is the beneficiary the trustees shall not by reason of their entry with the superior "be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees." The whole Act on that view works intelligibly and justly, and without going into details it is enough to say that I agree with the Lord Ordinary in thinking that the Act does not apply to this case.

LORD ADAM concurred.

LORD M'LAREN—I think the starting point in this inquiry is the rule of law as it existed before the modern conveyancing statutes were passed. The heir might then choose whether he would enter by precept of infeftment or by charter, because the superior could be compelled to give an entry by charter on payment of customary dues, which in this case would be the relief-duty, and therefore if the heir chose to apply for a charter the superior had no legal ground for demanding a

composition. As the Conveyancing (Scotland) Act 1874 did not provide whether the casualty of relief or composition should be exigible on the implied entry of trustees, the result was, prior to the Conveyancing Act 1887, that we were referred to the common law to determine all questions of amount. It was held that where the heir had no substantial right the superior was not bound to receive him for the purpose of evading a casualty of composition. In *Stuart* v. *Jackson* (17 R. 85) it was determined that if the heir had the substantial interest, he was entitled to enter on payment of the casualty of relief, although for convenience infeftment had been taken in favour of a body of trustees. The test proposed by the Lord President was, whether the interest of the heir was only postponed, say to a liferent, or whether his right was merely contingent. So far as I can see, the Act of 1887 made no alteration as to this rule although it defined it and gave the rule the authority of statute law.

Now, I think this section can only be read as meaning that the heir should have at the time when entry is demanded the substantial right to the estate, subject, it may be, to usufructuary rights. The section does not apply where the heir succeeds only on the failure of other heirs or as a conditional institute. I have every sympathy with the reclaimer, but I am unable to see that the truster's daughter here had the ultimate beneficial interest in this estate. She has a liferent, and is conditional institute in the event of her having no issue. That is not the case which will bring the statutory exception into operation, and therefore I agree in the conclusion at which your Lordship and the Lord Ordinary have arrived.

LORD KINNEAR—I am of the same opinion. I think it is clear that the trustees are singular successors, because they are strangers to the investiture, and could not have made up a title either under the old law or now except upon the condition of payment of a composition. The reclaimer's argument on *Stuart* v. *Jackson* (17 R. 85) comes to this, that a trust deed is a mere burden on the fee, and therefore that trustees who are holding for the person who is heir of investiture are entitled to enter on payment of a casualty of relief. I think that is an entire misconception of that case. There is no absolute rule applicable to trust deeds in general. The question depends upon the nature and operation of the trust. The principle of the decision in *Stuart* v. *Jackson* was that the trust-disposition which had been granted by the last-entered vassal had failed because its provisions had become quite unworkable, and therefore that it did not operate to exclude the heir from making up a title by service as heir to the disponer if he chose to do so. It was then open to the heir to serve himself as heir to the last-entered vassal, although for convenience he had taken a conveyance from the trustees in the disposition which had turned out to be unworkable. Thus the Lord President says (p. 96)—"It appears to me that if there was by virtue of that trust-disposition a disinherison of the defender he could not now serve as heir in special to his father, although by the operation of the trust and subsequent events it has come to be a resulting trust in favour of the heir as a beneficiary under the trust. If the heir can now claim the estate only as a beneficiary under the trust, then his character as heir is gone. But if his rights as heir have only been suspended or burdened by the operation of the trust, and all the purposes of the trust have failed, then his radical title of heir has not been extinguished."

Accordingly, the Court held in that case that the vassal who was entitled to be served as heir, although he chose to take a conveyance from trustees whose infeftment could not have stood in his way, was only liable in a casualty of relief. But in the present case it could not be maintained, and in fact was not maintained, that the truster's daughter is entitled to be served as heir to him, and therefore the decision in *Stuart* v. *Jackson* lends no countenance to the reclaimer's case.

The only other question which was argued was the effect of the Conveyancing Amendment Act 1887. On that point I entirely agree with your Lordship, and have nothing to add.

The Court adhered.

Counsel for the Pursuers and Respondents—Guthrie, K.C.—Cooper. Agent—Thomas Hunter, W.S.

Counsel for the Defender and Reclaimer—Dundas, K.C.—Macfarlane. Agents—P. Morison & Son, S.S.C.

Tuesday, July 1.

SECOND DIVISION.

[Sheriff-Substitute at Dumfries.

CROSBIE *v.* CROSBIE.

Sheriff—Appeal—Competency—Civil Imprisonment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 42), *sec.* 4.

A husband against whom a decree for aliment had been pronounced in the Court of Session was cited personally in Dumfries to appear before the Sheriff-Substitute in answer to an application under the Civil Imprisonment (Scotland) Act 1882. At this time his usual residence was in Carlisle, and he pleaded that he was not subject to the jurisdiction. The Sheriff-Substitute pronounced an interlocutor dismissing the application, and gave as his reason that although he might have jurisdiction, and despite the personal citation, the present application was inexpedient. *Held* that the Sheriff-Substitute having exercised his discretion in refusing the application, an appeal against his inter-