expressed by the learned Judges in other cases that when a wife takes a derivative residential settlement, and her husband has not lost his settlement by being out of the parish for five years without living in it for one continuous year, she only comes within the operation of the clause if she herself remains away for more than four years. I think, however, that it is better in these cases that a decision should be given at once rather than that we should elaborate decisions on the statute when the only interest is to have the case settled. There is very little substantial interest in these cases. The pauper has little interest as to which parish is to be made chargeable, and the parish has just as little interest, because although we decide the case in one way, the fluctuating accidents of human life, especially in the class of life to which these paupers usually belong, might make what was favourable to-day quite the reverse to-morrow. The only interest is that a judgment should be given, although I could have wished that it might be worked out in a less operose manner. Your Lordships therefore sustain the appeal and recal the judgment.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, Find in fact (1) that the deceased William Arthur removed from the parish of Maybole at Whitsunday 1881, and that he and his wife and family had then a residential settlement in that parish; (2) that neither he nor any of his family ever thereafter resided in said parish of Maybole, and that he died on 23d March 1885; (3) that on 21st September in that year Jane Arthur, his widow, became chargeable as a pauper being a proper object of parochial relief, and obtained relief from the parish of Ayr; and (4) that the said Jane Arthur was born in the parish of Stewarton: Find in law that her settlement by residence in the parish of Maybole was lost by absence from that parish for more than four years, and that the defender, the inspector of poor for the parish of Stewarton, the parish of her birth, is liable in repetition to the pursuer, the inspector of poor for the parish of Ayr, of the advance sued for, and in relief as craved: Therefore sustain the appeal: Recal the interlocutor of the Sheriff-Substitute of 28th March 1887 and the interlocutor of the Sheriff of 4th June 1887: Ordain the defender, James Dunlop, inspector of poor for the parish of Stewarton, to make payment, &c.: Assoilzie the defenders, Alexander Stewart Glass, inspector of poor for the parish of Dalmellington, and John Anderson, inspector of poor for the parish of Maybole, from the conclusions of the action; Find the defender James Dunlop, as inspector of poor for the parish of Stewarton, liable to the pursuer and to the other defenders in expenses in the Inferior Court and in this Court," &c.

Counsel for the Parish of Maybole—Guthrie Smith. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Parish of Ayr—Orr. Agents—Phillip, Laing, & Traill, S.S.C.

Counsel for the Parish of Stewarton—J. A. Reid—J. Clark. Agents—Sturrock & Graham, W.S.

Friday, December 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF HOME *v.* LYELL.

EARL OF HOME *v.* JAMIESON.

Superior and Vassal—Implied Entry—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4—*Trustees, whether Liable as Singular Successors.*

By *mortis causa* trust-disposition and settlement dated in 1836 a truster conveyed certain lands belonging to him to his children *nominatim* and the survivors or survivor of them in trust for the purposes therein specified, and upon the termination of the trust, then to his heir-at-law at that time in fee. The trustees were directed to retain and manage the estate and divide the whole rents among themselves in certain proportions until the termination of the trust. It was provided that the trust should come to an end upon the death of the last survivor of the children, or if it should happen that the last survivor was the truster's heir-at-law, then it was declared that in that event the trust should cease and determine, and that the lands conveyed should belong to the heir-at-law. The deed contained a prohibition against selling or burdening, and the only powers conferred were those of ordinary administration. The procuratory of resignation and precept of sasine authorised the infeftment of the children "in trust, and as trustees for the uses and purposes and under the conditions" specified in the deed, and also authorised infeftment at the end of the trust of the heir-at-law at that time in fee. The truster was infeft in the lands as disponee under a deed executed in 1783, and was entered by charter of confirmation. On the death of the truster in 1852 his eldest son completed a title by infeftment on a precept of *clare constat* in his favour, as heir of provision to his father, under the deed of 1783. In the same year the whole surviving children of the truster, eight in number, took infeftment as trustees upon the precept contained in the trust-disposition and settlement of 1836. The superior of part of the lands demanded from the last surviving trustee a composition of a year's rent in respect of the death in 1875 of the truster's heir, who was the last entered vassal, and of the implied entry of the trustees under sec. 4, sub-sec. 2, of the Conveyancing Act of 1874. He maintained that the trust-disposition and settlement had altered the existing destination, and that the trustees were therefore holding for the heirs of the new destination, which was enfranchised by the implied confirmation of their infeftment. *Held* that the last entered vassal was not divested

of his radical right in the lands by the infeftment of the trustees, which created merely a temporary burden, and that the right passed at his death into his *hæreditas jacens*, and might be taken up by the service of his heir.

Superior and Vassal — Implied Entry — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4—*Trust for Behoof of Creditors—Trustee, whether Liable as Singular Successor.*

In a similar action at the instance of the superior against the judicial factor upon a trust for creditors, constituted by a *mortis causa* conveyance of lands with a power of sale for payment of debts, with a direction to convey to the trustees under the above-mentioned trust-disposition and settlement such part of the lands as might remain unsold—*held* that the case was not distinguishable from the above.

These were two actions at the instance of the Earl of Home, the *first* being at his instance as immediate lawful superior of parts of the estate of Kinnordy, in the county of Forfar, against Sophia Georgiana Lyell, the sole surviving, accepting, and acting trustee of her father the late Charles Lyell, Esquire, of Kinnordy, under his trust-disposition and settlement, dated 28th May 1836, concluding for declarator that in consequence of the death of Sir Charles Lyell, who was the vassal last vest and seised in the said lands, a casualty, being one year's rent of the lands, became due to the pursuer, as superior, upon 22d February 1875, the date of Sir Charles Lyell's death, and for decree against the defender for £5000; the *second* being at his instance as immediate lawful superior of parts of the estate of Glasswell, in the county of Forfar, against George Auldjo Jamieson, C.A., as judicial factor under a second trust-disposition and settlement executed by Charles Lyell, Esquire, also dated 28th May 1836, the conclusions of which were the same, the sum sued for being £1000, as one year's rent of the lands.

I. The facts in the *first* case were these:—The estate of Kinnordy was purchased by Charles Lyell (the first) in 1782, and he was infeft therein by instrument of sasine in the same year. By disposition and settlement dated in 1783 he conveyed the lands to his eldest son Charles Lyell (the second), and the heirs whomsoever of his body, whom failing to the other persons therein named. Charles Lyell (the second) was infeft upon that disposition in 1796, and he was entered by the then superior by charter of confirmation dated 28th December 1802, which specially confirmed the disposition and settlement of 1783 above referred to.

Charles Lyell (the second), by trust-disposition and settlement dated 28th May 1836, on the narrative that he had resolved to execute a new settlement of his lands and estates, conveyed the subjects in question to his wife Mrs Frances Smith or Lyell in liferent for her liferent use allenarly—"And upon the death of the said Mrs Frances Lyell, or in the event of her predeceasing me, to and in favour of Charles Lyell, Thomas Lyell, Henry Lyell, Frances Lyell, Marianna Lyell, Caroline Lyell, Eleanor Lyell, Maria Lyell, and Sophia Georgiana Lyell (being the whole surviving children of the marriage between me and the said Mrs Frances Lyell), and the survivors or survivor of them in trust as trustees for the ends and purposes after mentioned (the majority of the survivors being a quorum for executing this trust), and upon the termination of this trust in the manner and at the period hereinafter expressed, then to and in favour of my heir-at-law at that time in fee." Powers were given to his wife in regard to granting leases for terms not exceeding nineteen years, and for entering vassals.

The trust purposes were as follows:—The *first* had reference to the occupation of the mansion-house of Kinnordy. The *second* purpose was in these terms:—"With regard to the other trust-lands and estate before described and conveyed (except the said mansion-house and Mains of Kinnordy and others foresaid), I direct my said trustees, and the survivor of them, to retain and manage the same in trust so long as there shall exist either one or more of my said children, trustees foresaid themselves, or one of them, along with my heir-at-law in a different person from my last surviving child, and to divide the whole free rents or annual returns from the estate, after paying all expenses, annuities, and other deductions, into equal shares (excepting only the produce from sales of wood), two of which equal shares I direct to be paid over to my heir-at-law for the time, so long as that character is in a person or persons different from my said daughters, and in the event of my said daughters becoming my heirs-at-law, then the said two shares to be paid to my eldest surviving daughter for the time, and one equal share to each of my said other children, trustees foresaid, during their respective lives." The *third* purpose was in the following terms:—"If it shall happen that the last survivor of my said children shall also be my heir-at-law for the time, then and in that event this trust shall cease and determine, or if that shall not happen, then upon the death of the last survivor of my said children this trust shall cease and determine, and upon the termination of this trust on either of these events, the whole lands and estates before described and disponed shall fall and belong to my said heir-at-law at the period of that event, heritably and irredeemably, with power to my said heir-at-law to expede services, make and grant all deeds, and adopt all proceedings for fully and absolutely vesting the whole of said lands and estates in his, her, or their person, but in no case shall it be competent to dissolve this trust sooner than on either of the events aforesaid, it being my express wish and directions that the same shall be kept up till that period, and that the person or persons possessing at that period the character of my heir-at-law, and no previous heir shall succeed absolutely to the said lands and estates." Powers were then given to the trustees to enter vassals, and to "exercise every proper act of ownership consistent with the true intent and meaning of these presents." There was a prohibition against granting leases in consideration of grassums or premiums, and against selling or burdening any part of the lands. The deed contained a procuratory of resignation and precept of sasine authorising infeftment of "the said Mrs Frances Smith or Lyell, my spouse, in liferent, for her liferent use as aforesaid, under the burdens, conditions, and provisions before written, and upon the death

of the said Mrs Frances Lyell, or in the event of her predeceasing me, to the said Charles Lyell, Thomas Lyell, Henry Lyell, Frances Lyell, Marianna Lyell, Caroline Lyell, Eleanor Lyell, Maria Lyell, and Sophia Georgiana Lyell, and the survivors or survivor of them, in trust, as trustees for the ends and purposes, and under the declarations, burdens, conditions, and provisions before specified (which are hereby appointed to be engrossed in the charters and infeftments to follow hereon), and upon the termination of this trust in the manner and at the period hereinbefore expressed, then to my heir-at-law at that time in fee."

Charles Lyell (the second) died in 1852. In that year the trustees took infeftment in terms of the precept of sasine, and in the same year Sir Charles Lyell applied to the then superior, and obtained a precept of *clare constat* in his favour as the eldest son and nearest and lawful heir of provision to his father Charles Lyell (the second). It did not appear in the case whether his infeftment or that of the trustees was first in date.

Charles Lyell (the second) was predeceased by his wife.

Sir Charles Lyell died on 22d February 1875.

The pursuer pleaded—"(1) A casualty of one year's rent of the lands described in the summons having become due to the pursuer, as superior thereof, by the defender, upon the death of the said Sir Charles Lyell, the previous vassal, the pursuer is entitled to decree as concluded for."

The defender pleaded—"(2) The infeftment of the defender being merely a burden upon the radical and proper title to the estate, and the heir being willing to enter to said radical and proper title with payment of a relief-duty, the defender should be assoilzied. (3) The defender, by the terms of her title, holding only for the heir of the investiture, and having no power of transmission to any but the said heir, the pursuer is not entitled to more than relief-duty.

The following minute was lodged—"GRAHAM MURRAY, for the said Leonard Lyell, hereby offers that the said Leonard Lyell shall enter as vassal with the pursuer in the lands described in the summons by writ of *clare constat* as heir whomsoever of the body of the deceased Charles Lyell, second of Kinnordy, and as such heir of provision of the late Sir Charles Lyell of Kinnordy, the last entered vassal in the said lands, under and in virtue of the disposition and deed of settlement, dated 16th April 1783, granted by Charles Lyell, first of Kinnordy, in favour of the said Charles Lyell, second of Kinnordy, and the heirs whomsoever of his body, whom failing as therein mentioned, or failing the pursuer granting said writ of *clare constat*, that he the said Leonard Lyell shall expede a service as heir of provision in special in the said lands of the said deceased Sir Charles Lyell under and in virtue of the said disposition and deed of settlement of 16th April 1783."

II. The facts of the *second* case were these:—The vassal last entered in the estate of Glasswell previous to the entry of Sir Charles Lyell, was his father Charles Lyell (the second), who was entered with the then superior by charter of confirmation and precept of *clare constat* in 1840.

By trust-disposition and settlement dated 28th May 1836 Charles Lyell (the second), after narrating the previous trust-disposition and settlement, conveyed his estate of Glasswell to his wife and his surviving children *nominatim* in trust for the purposes after specified. The primary purpose of the trust was for the sale of the whole or so much of the lands as would satisfy and pay the truster's debts, and also the provisions for his children therein specified. The truster then directed that so long as the lands or any part of them remained unsold the trustees were to retain and manage the same in trust, and apply the rents in payment of the interest due on the debts, and on the children's provisions. There was a power given to borrow money on the security of the estate. In the event of any of the lands remaining unsold after the purposes of the trust had been fulfilled, the trustees were directed to convey all such lands to the truster's wife in liferent, and in the event of her death to the trustees named in the truster's trust-disposition and settlement, and under the same conditions as therein expressed. The precept of sasine was to infeft the parties named as trustees in trust for the ends, uses, and purposes, and with the powers, and under the conditions, provisions, and declarations before written," &c.

Upon 9th March 1850, none of the trustees having accepted office, Christopher Kerr, town-clerk, Dundee, was appointed judicial factor under the above trust; and upon 30th June 1852 he was authorised by the Court to make up a title to the whole lands under his management as judicial factor, including, *inter alia*, the subjects described in the summons, in the person of the heir-at-law of the truster, and thereafter in his own person.

On 3d August 1852 Sir Charles Lyell (heir-at-law of the truster), in whose favour a precept of *clare constat* had been granted by the superior, executed a disposition and conveyance of, *inter alia*, the subjects in question in favour of the said Christopher Kerr, as judicial factor, upon which the latter took infeftment upon 3d July 1854. Upon Christopher Kerr's death, the defender George Auldjo Jamieson, was appointed judicial factor by interim decree in 1871, which was extracted and recorded, and he was thus duly infeft in the lands.

The other facts in the case appear from the statement in the first action.

The pleas were similar to those in the first action.

The Lord Ordinary (KINNEAR) on June 14th 1887, pronounced this interlocutor in the first action:—"Finds that Sir Charles Lyell, the last entered vassal, was not divested of his radical right in the lands libelled by the infeftment of the trustees under his father's trust-disposition and settlement; that the said right passed at his death into his *hæreditas jacens*, and may be taken up by the service of his heir: And in respect of the minute for Leonard Lyell, supersedes farther consideration of the cause for one month, and grants leave to reclaim."

In the second action the interlocutor was the same with this difference:—And in respect it is stated that Mr Leonard Lyell is about to expede a service as heir-at-law or heir of provision to the said Sir Charles Lyell, supersedes farther consideration of the cause for one month.

"*Opinion.*—The question in this case is, Whether the defender has been entered with the superior, by force of the Conveyancing Act of 1874, as a singular successor of the last vassal, so as to exclude the heir of the standing investiture, and to incur liability for a composition of a year's rent? and it depends for its solution on the feudal effect of a trust-disposition executed in 1836 by the father and predecessor of the last entered vassal.

"The truster, Charles Lyell (the second), of Kinnordy, was infeft as immediate disponee under a trust-disposition and settlement executed by his father, Charles Lyell (the first), in 1783, and was entered with the superior by charter of confirmation, confirming the disposition and the infeftment following upon it in 1802. The disposition and settlement so confirmed is in favour of a series of heirs, varying in some respects from the legal order of succession; and the destination which it contains was undoubtedly the rule of the existing investiture, as regards succession, when the Act of 1874 came into operation. It was, however, a simple destination which Charles Lyell (the second) was at liberty to defeat; and it is said that he altered it by his trust-disposition and settlement of 1836, so that the implied entry of the trustees under that deed has effected a change in the investiture, and entitled the superior to a composition as for the entry of a singular successor. The answer is, that the trust right is a mere temporary burden, and that the infeftment of the trustees is therefore no feudal impediment to the entry of the heir.

"The trust-disposition and settlement contains a conveyance to the granter's wife in liferent, and on her death to his children, who are called *nominatim* in trust, and upon the termination of the trust to the granter's heir-at-law at that time in fee. The trust is created for the sole purpose of making provision out of the rents of the estate for the children of the truster, and upon the death of the last child, who shall not be heir-at-law, the trust is to come to an end, and the right of the heir-at-law is to become absolute. The deed contains procuratory of resignation and precept of sasine, authorising the infeftment of the children who are specially named 'in trust, and as trustees for the uses and purposes, and under the conditions' specified in the deed; and also authorising infeftment at the end of the trust of the heir-at-law at that time in fee.

"On the death of the truster in 1852 his eldest son, Sir Charles Lyell, completed a title by infeftment on a precept of *clare constat* in his favour, as the eldest son and nearest and lawful heir of provision to his father under the settlement of 1783; and in July 1852 the whole surviving children of the truster, eight in number, took infeftment as trustees, upon the precept contained in the trust-disposition and settlement of 1836. It is not stated whether the sasine of the heir or of the trustees was first in date, and it is immaterial, because in either case the feudal effect of the two infeftments will be the same. The pursuer maintains that by their infeftment upon the precept the trustees divested the truster and his heirs of the *dominium utile*, leaving a bare mid-superiority, which was well taken up by Sir Charles Lyell; that they continued to hold base under Sir Charles until the passing of the Act of 1874, when by the operation of the 4th section of that statute the mid-superiority was extinguished, and the trustees were entered with the pursuer as their immediate superior. If this was in truth the effect of the trustees' infeftment, it follows, upon the authority of *Lamont* v. *Rankin*, that there is now no room for the entry of Sir Charles Lyell's heir, and that the defenders must pay a composition as singular successors.

"The first question therefore is, Whether the truster and his heirs have been divested? It is settled law that a mere trust infeftment does not divest the granter, but operates merely as a burden upon his title. But the pursuer says that this is not a mere trust infeftment, because the disposition and settlement was intended to alter the existing destination, and is effectual for that purpose; and the trustees are therefore holding for the heirs of the new destination, which, according to the argument, has been already enfranchised by the implied confirmation of their infeftment.

"The whole case appears to me to depend upon the soundness of this proposition, and I am of opinion that it cannot be sustained. I am unable, however, to assent to the first point which the defender takes in answer to it. It is said that there is no change in the destination, because the words heir-at-law, as used in the trust-disposition and settlement, must be construed to mean heir of the investiture. But 'heir-at-law' is a technical term, which means, in its ordinary acceptation, the heir *provisione legis*, as distinguished from the heir of a particular destination. There is nothing in the deed to indicate that it was intended in any other than its technical sense, and I think it would be contrary to settled rules of construction to force upon it a meaning which it does not naturally bear merely because the title of the granter of the deed contains a destination differing from the legal order of succession.

"There may have been cases where the word 'heir,' when used in relation to accessory rights, has been interpreted by reference to other deeds, but in the construction of a special settlement such as the present the technical meaning of words descriptive of the class of heirs who are to succeed must prevail, unless it can be controlled by other words occurring in the same deed. This was decided in the case of the *Duke of Hamilton* v. *Douglas*, M. 4369, and the decision rests upon principles that are applicable to the construction of all written instruments.

"Nor does it appear to me to be very material to the present question that the characters of heir-at-law and heir of the investiture are at present united in the person of Mr Leonard Lyell. He may or may not be the heir-at-law at the time the trust comes to an end; and it is a sufficient foundation for the pursuer's argument if at the time when the trustees are said to have been entered it was possible, according to the conception of the trust, that they might be holding for an heir who should not be the heir of the investiture. Now, there appears to be only one event—but still there is an event—in which the characters of heir of the investiture and heir-at-law might be in different persons at the termination of the trust. The heir-at-law of the truster at that time must be either his last surviving child or the direct descendant of a predeceasing

child. But by the destination of the settlement of 1783 heirs-portioners are excluded, and they are not excluded by the settlement of 1836. It follows that by the latter settlement the estate might be carried to persons who are not the heirs of the investiture, and it is of no importance to the question whether this is a probable or a possible result in the event which has actually happened.

"But, whatever may be the character of the heir who shall take at the termination of the trust, the important question is, whether the full fee of the estate to which he will then have right is now vested in the trustees? I am not sure that this is exactly what is meant by the defender's proposition that the trustees are 'holding for the heir.' That is a very vague phrase, and the defender's counsel did not define with any precision the meaning which he attaches to it. But if it does not mean that the fee which the heir is ultimately to take is now in the last surviving trustee it has no bearing upon the question of the heir's right to enter. If it does mean this, it would appear to me to follow that the heir when his right emerges must take it through or from the trustee by conveyance or by succession; and the best way of testing the soundness of the proposition will therefore be to inquire whether it is possible for the heir to complete a title by either of these methods?

"Now, it is certain that he cannot obtain a title by conveyance from the trustees, because they have no power to convey; and except in the event of the characters of heir-at-law and of last surviving child of the truster being combined in the same person, the trust is to be extinguished by the death of the last trustee before the right of the heir-at-law can be ascertained. A conveyance from the trustee, therefore, to the heir-at-law would be altogether inept and ineffectual. But then it is suggested that the trustees are infeft as the first members of a destination, and that upon the death of the last trustee the heir-at-law may make up a title by special service as heir of provision to her. I think it a sufficient answer that the infeftment of the trustees is expressly qualified as an infeftment in trust, which is to come to an end upon the death of the last trustee. It has long been settled law that where a trust expires with the last survivor of the trustees, the feudal title cannot be taken up by his heir even for the purpose of a re-conveyance to the truster—*Drummond*, M. 16,206; *Gillespie* v. *Robertson*, 2 Sh. 795. But this is a much stronger case, for not only is the trustee's title to be extinguished on the death of the last survivor, but the whole purposes of the trust and all the rights created by it are to be exhausted upon the occurrence of that event. It appears to me to be altogether contrary to the most elementary principles to represent the estate in the trustees as an estate of inheritance which can pass by succession to their heirs; and it is just as impossible that it should be taken up by heirs of provision as by heirs of law. The truster's heir-at-law is not to take an absolute right in the estate until the trust is at an end. But when that event happens, he is to take in his own right as a disponee, and not by way of succession to the trustees.

"But if it be clear that the trustees were infeft in trust only, and under a trust so qualified that the fee of the estate cannot pass to their heirs, it follows of necessity that their infeftment left the fee in Sir Charles Lyell, the last entered vassal. It has been settled law, ever since the case *Campbell* v. *Edderline's Creditors* (Morr. Adjud. App., No. 11), that an infeftment in trust for special purposes does not completely divest the granter, but leaves the radical fee in him, so that on his death it may be adjudged as in *hæreditate jacente*, or taken up by the service of an heir in special. The rule has been applied in a great variety of cases, the most important of which are cited in the opinion of the Lord Justice-Clerk in *Gilmour* v. *Gilmour*, 11 Macph. 856; and the legal principles on which it rests are fully expounded in two very weighty judgments of Lord Moncreiff in the cases of *M'Millan* v. *Campbell*, 9 S. 551, 7 W. & S. 441; and *Giles* v. *Lindsay*, 6 D. 771. But the present is even a clearer case for the application of the rule than *Campbell* v. *Edderline* or *M'Millan* v. *Campbell*. For in these cases the trust-deed might have become the regulating instrument for the investiture of the estate, and in the present case, although a change of the investiture may be intended by the truster, the trust infeftment can never be made available for the purpose of effecting the change. The trust is to subsist only so long as shall be necessary for securing provisions out of the estate to children other than the heir-at-law; when that purpose is served it is to be extinguished *ipso facto*, without the necessity for any conveyance or re-conveyance; in the meantime the trustees are to have no other powers, even of management, than are indispensable for the execution of the trust; and not only have they no power of conveyance, but they are expressly prohibited 'from taking grassums or premiums for leases, and from selling or disponing any part of the estate and from burdening it with debt.' And all due precaution is taken to secure that the conditions and limitations upon their title shall be effectual, because by the terms of the procuratory and precept they are to be infeft 'in trust as trustees, for the purposes, and under the conditions and provisions before specified, which are appointed to be engrossed in the charters and infeftments to follow hereon.' The series of decisions to which I have referred leaves no room for question as to the feudal effect of an infeftment in these terms. As a trust for special and temporary purposes it left the granter undivested of the radical right, so that his heir might be served heir in special upon his original title, or adjudication might be led against his *hæreditas jacens*.

"It follows that the right vested in Sir Charles Lyell by his infeftment on the precept of *clare constat* was not, as the pursuer supposes, a bare mid-superiority, but the substantial right of property in the estate, under burden of the disposition and settlement. The fee must necessarily have been in him, because it was not in the trustees, and there was no other person in existence who could have it. But for the passing of the Act of 1874 therefore there could be no question that upon his death the fee passed into his *hæreditas jacens* and was open to be taken up under the same burden as it stood in him by his nephew Mr Leonard Lyell as his heir of provision. But the 4th section of the Act of 1874 makes no difference if the fee in Sir Charles was not a bare

mid-superiority. It enters the proprietor infeft with the nearest superior whose estate of superiority in the lands would not have been defeasible at the will of such proprietor. But the trust infeftment makes no real division of the truster's estate, so as to separate the *dominum utile* from a mid-superiority. It leaves the entire estate in him as it stood before, or in the heir who takes it up from his *hæreditas jacens*, subject only to the transient burden of the trust; and no part of the estate is defeasible at the will of the trustee, whether the form by which the trust is made real is an *a me* or a *de me* holding.

"It appears to be very doubtful therefore whether the Act of 1874 is applicable to the case, so as to put the trustee in the position of holding directly of the superior. But if they do hold directly of him they hold only to the extent of their right, and their infeftment is still nothing more than a burden upon the substantial fee. It is of no consequence to the rule as laid down in *Campbell* v. *Edderline* whether trustees hold of the truster or of his superior. The principle is that their infeftment in whatever form does not evacuate the infeftment of the granter, and therefore cannot exclude the infeftment of the granter's heir. This is brought out very clearly in the opinion of Lord Corehouse in *Melville* v. *Preston*, 16 S. 457. It was a question in that case whether trustees under a trust-disposition which had been executed by Sir Robert Preston of Valleyfield, under the burden of an entail, could make up a feudal title to the lands notwithstanding that the entail had been already feudalised in the person of the institute. And upon that question Lord Corehouse observes—'As to the feudal difficulty pleaded by the defender it is without foundation. It is true there cannot be two co-existing and co-ordinate infeftments in fee-simple in one and the same estate; but nothing is more common than to have an infeftment in fee-simple burdened either with an entail or a trust. . . These are not cases of co-ordinate and co-existing infeftments in the same fee.' And accordingly the completion of the one title by infeftment interposes no feudal impediment to the completion of the other by infeftment also.

"It is argued, however, that although the infeftment of the trustee might not exclude the heir if the deed contained nothing more than the conveyance in trust, the conveyance to the granter's heir-at-law will have a very different effect, because it necessarily operates a change in the investiture. But the change has not yet been effected, and it is very doubtful whether it could ever be effected without the intervention of the heir of the existing investiture. I assume that the beneficial interest is well given to the heir-at-law if that character shall belong to a different person from the heir of the investiture when the trust comes to an end. But taking that for granted, the question is whether the conveyance is of itself effectual as a feudal transmission of the estate. The 20th section of the Titles Act of 1868 and the 27th section of the Conveyancing Act of 1874 have no application to a disposition executed in 1836, and coming into operation by the death of the granter in 1852. The feudal effect of the deed therefore must be determined according to the law as it stood before the passing of these Acts, and by the law as then established a proprietor infeft could only infeft a disponee by the warrants contained in a *de presenti* conveyance in favour of a person capable of taking an immediate right. A precept for the infeftment of persons who cannot be ascertained, and who may not be in existence when the deed comes into operation, was altogether inept and ineffectual. It appears to me therefore that there is only one method by which the disponee, if he has a good right at all, will be able to combine his right with the feudal title. He cannot obtain a conveyance from the trustee, because she has no power to convey; he cannot serve heir of provision to her, because she has no right that will pass into her *hæreditas jacens;* he cannot execute the precept in his own favour. The only means by which he can feudalise his right is by adjudication in implement directed against the heir of the investiture. But that means that he can charge the heir to enter by treating the disposition in his own favour as an obligation upon the heir. And if the heir can enter when the trust is at an end, in order to give effect to his ancestor's conveyance, it follows that the investiture has not been changed, and that he can enter now, because the fee is vacant by the death of the last vassal.

"But if, contrary to the opinion I have indicated, it should be held that the precept is a good warrant for the infeftment of the disponee, that will not in the slightest degree affect the present title of the heir of the investiture as in a question with the superior. The right of the disponee will still be purely personal until he chooses to take infeftment, and if he should be content to stand on his personal title, and to leave the fee vacant for the heir of the investiture, there will be nothing in the state of the titles, or of the substantial rights of the parties, to prevent the heir from entering. It is said that the deed is confirmed, and that the superior cannot but be entitled to found upon a conveyance which the statute supposes him to have recognised. But assuming the implied confirmation to have taken effect, I cannot read the statute as importing a confirmation of anything in the title of a proprietor infeft, excepting only the infeftment and its conditions, and the rights and titles which are necessary to support it. If the deed contains two several rights, upon one of which infeftment has passed, while the other remains personal, the implied confirmation of the feudalised right can have no operation upon the personal. The infeftment of the liferenter alone under a conveyance to one in liferent and another in fee is a familiar illustration, and there can be no question that such an infeftment, either before or after the passing of the Conveyancing Act, leaves the fee remaining upon the old investiture. This was well settled under the old law, and it was held by the majority of the Judges in *Hope* v. *Hamilton*, 10 R. 1127, to be equally clear in a question under the Conveyancing Act of 1874. Lord Shand in that case proceeded upon a different ground, but I do not understand his Lordship to have dissented from the opinion of the other Judges, or to indicate any doubt of the soundness of the distinction between an unfeudalised right which may import a change in the destination, and the feudal operation which changes the investiture. The material point is that the superior has no con-

cern with the rights which may be created by his vassal until the persons in whose favour they may be conceived are brought into direct relation with him by infeftment or a demand for infeftment of and under him. On the same principle it would appear to follow that the implied confirmation of a trust infeftment can have no operation whatever upon the unfeudalised right to the substantial fee. And therefore, if Sir Charles Lyell had been the last surviving trustee, and the character of heir-at-law and heir of the investiture had been in different persons at his death, I see no ground upon which the superior would have been entitled to plead upon the disposition to the heir-at-law as against the demand of the heir of the investiture for an entry if the heir-at-law were content for whatever reason to waive his right. The case of the *Duke of Hamilton* v. *Guild*, 10 R., would have been directly in point. But if that be so, the heir of the investiture must be equally entitled to enter to the fee left vacant by Sir Charles' death when the right of the heir-at-law has not yet been ascertained.

"The cases of *Hill* v. *Grindlay* and of *Lamont* v. *Rankine* are in my opinion inapplicable. In these cases the deeds which were confirmed, actually or by implication, were deeds creating a new investiture. As Lord Curriehill points out—'The trustees on obtaining the charter which they demanded might have used it to create the direct relation of superior and vassal between the superior and a third party, even after the death of the heir, without any further payment being made to the superior.' In the present case the trustee can never, by the exercise of any right in her, bring any new vassal into feudal relation with the superior, the infeftment of the trustee is a mere burden which has no effect upon the investiture, and if the investiture should be changed at all by the operation of the trust-disposition and settlement it will be in virtue of a right which has not yet been feudalised. The superior may be entitled to a composition when the change takes place if the fee is then vacant. But in the meantime he must in my opinion be content with relief-duty on the entry of the heir."

"The other case at the instance of the same superior against the judicial factor upon a trust for creditors depends upon the same considerations. There is a power of sale for payment of debts, but the same power existed in the case of *Edderline*, and in many of the long series of decided cases which followed it, and it is perfectly well settled that until the power is exercised the trust for creditors is still a mere burden. A more material point of distinction is that there is no conveyance of such part of the lands as may remain unsold, by which the rights of the heirs of the investiture can be affected. The trustee for creditors is to convey to the trustees under the trust-disposition and settlement, but when the purposes of this last trust have been served there is no further conveyance, and no direction or power to the trustees to convey. The heir of the investiture therefore is not divested."

Between the date of the Lord Ordinary's judgment and the discussion in the Inner House on the reclaiming-note the Conveyancing Act of 1887 (50 and 51 Vict. cap. 69) was passed. The defender and respondent was allowed to add the following additional plea-in-law founding on this Act—"(5) In respect of the provisions of the Act 50 and 51 Vict. cap. 69, sec. 1, the defender is only liable in relief-duty."

Section 1 is as follows—"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 expiration 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; and the heir upon thereafter entering with the superior, by infeftment or otherwise, shall not be liable for any further casualty in respect of his entry, but whether the heir shall have been entered or not, another casualty shall become exigible upon his death in the same manner as if he had been duly entered with the superior."

The pursuer reclaimed, and argued in the *first* case:—

(1) The Act of 1887 does not apply, as it is not retrospective—*Urquhart* v. *Urquhart*, July 14, 1853, 1 Macq. 658, Cranworth, L.C., at p. 662; *Gardner* v. *Lucas*, June 13, 1877, 15 S.L.R. 359, 4 R. 885, and March 21, 1878, 5 R. (H.L.) 105, Cairns, L.C., at p. 109. When an Act affects existing interests, it will not be held to be retrospective unless it is expressly said to be so, or unless that is clearly implied—*Ker* v. *Marquis of Ailsa*, June 12, 1854, 1 Macq. 736. But even if retrospective, the Act does not apply, because the word "heir" in section 1 must mean "heir-at-law," whereas in the present case the person selected is not properly an heir-at-law at all. (2) The trust-disposition and settlement of 1836 evacuated the existing investiture. This was clearly the intention of the truster. The destination is the same as if the estate had been destined to a third party, and a composition is therefore due. The case of *Lamont* v. *Rankin's Trustees*, February 28, 1879, 6 R. 739, rules the present—*Murray, &c.* v. *Gregory, &c.*, January 21, 1887, 14 R. 378; *Grindlay's Trustees* v. *Hill*, January 18, 1810, F.C.; *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738; *Rossmore's Trustees* v. *Brownlie, &c.*, November 23, 1877, 5 R. 201; *Sturrock* v. *Carruthers' Trustees*, May 21, 1880, 7 R. 799. *Grindlay's Trustees* v. *Hill* settled the law before the Act of 1874, and *Lamont* v. *Rankin's Trustees* settled it in view of that Act—that trust disponees must enter as singular successors. If in the deed in the present case there had been a power to convey to the ultimate disponee, or a destination to the heir of the surviving trustee, the case admittedly would have been ruled by *Lamont*. There was here a new settlement of the estate which divested the granter. If Mr Leonard Lyell predeceases the defender leaving daughters, the question will arise between the eldest daughter and her sisters which deed is to prevail. The following

cases quoted by the Lord Ordinary, viz., *Campbell* v. *Edderline's Creditors*, *M'Millan* v. *Campbell*, and *Giles* v. *Lindsay*, are not in the same category as the present. The purposes of the deeds in these cases were purely of a temporary nature, whereas in the present case the purpose was to completely divest the granter. *Gilmour* v. *Gilmour*, also quoted by the Lord Ordinary, is an authority for the proposition that in the case of a *mortis causa* trust for third parties, differing from an *inter vivos* trust, there is an absolute divestiture of the granter—also *Macdouall and Selkrig* v. *Russell*, February 5, 1824, 2 Sh. (old ed.) 682, (new ed.) 574. The trust is only a burden when the beneficial interest is in the truster. The mere fact that the trustees have no machinery given them for passing the estate makes no difference. There was nothing left for the heir to take up after the infeftment of the trustees. The fee is in the trustees, to hold for the person ultimately entitled to the estate, as in *Grindlay's Trustees* and *Lamont*. It is important that this trust is for the behoof of all concerned, as well as for the liferentrix—*Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627; *Cumstie* v. *Cumstie's Trustees*, June 30, 1876, 3 R. 921. In the whole series of decisions there is no case where the clear intention of a truster to constitute a fee has not been given effect to merely because a liferent has been created, and the fee was not intended to take effect till after the termination of the liferent—*Douglas* v. *Thomson*, January 7, 1870, 8 Macph. 374. The truster conferred larger powers than those necessary for mere administration. There was here a fiduciary fee in the trustees—*Mein* v. *Taylors and Others*, February 23, 1830, 4 W. & Sh. 24; *Ramsay* v. *Beveridge*, March 3, 1854, 16 D. 764, Lord Wood, 779. It has never been held that if a change in the investiture is possible the superior can be denied his composition. The same argument urged against the pursuer on this point would have been equally applicable in *Rankin*. (3) The difficulty of the completion of the title of the ultimate fiar is at once got over when the fiduciary fee is admitted. The only difference between the present case and *Grindlay's Trustees* is the want of machinery provided in the deed for the trustees conveying to the ultimate fiar. But he could make up his title by adjudication and implement against the heir of the last trustee—Bell's Prin. sec. 2001; *Drummond* v. *Mackenzie*, 1758, M. 16,206, which was followed in *Gordon's Trustees* v. *Harper*, December 4, 1821, 1 S. 185, also in 1 Ross' L.C. (Land Rights) 199; *Gillespie* v. *Robertson*, March 11, 1824, 2 S. 795. There is therefore no necessity to go back to the *hæreditas jacens* of the truster. Now, the same thing can be done by the 43d section of the 1874 Act or the 14th section of the Trusts Act of 1867. But even assuming the view of the Lord Ordinary to be right on this point, the omission by the granter of the deed to supply the machinery requisite to pass the property to the ultimate fiar cannot alter the character of the deed. The substance of a deed and not the mere form must be looked at—*Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692. The trustees are entered, and the question comes to be, if, under the old law, the trustees had gone to the superior and asked for a charter of confirmation, could he have refused to give it? This must be answered in the affirmative, on the ground that the substance of the deed was to create a new investiture.

The pursuer argued in the *second* case:—

It is entirely left to the discretion of the trustees to sell when they please. There can be no question that the purpose and effect of the deed in the case was to divest the truster at any rate of land which the trustees might sell. The difference between this case and the other is that the direction to the trustees to sell is the main purpose of the trust. The superior is entitled to say that the defender holds the estate for the purpose of selling it, and that being so, the superior is entitled to his composition on the authority of *Lamont* v. *Rankin's Trustees*.

The defender replied in the *first* case:—

(1) The Act of 1887, sec. 1, applies in the present case. Admittedly *in dubio* provisions in an Act will not be held to be retrospective—Maxwell on Statutes (2d ed.) 266. But the 1887 Act expressly bears to deal with rights which have vested in the superior by the implied entry under the 1874 Act. It therefore expressly bears to be retrospective. The question is as to the meaning of the word "heir" in the Act. Trustees may be said to hold for an heir-at-law, although he only possesses that character at the termination of the trust. (2) The trust-disposition and settlement of 1836 merely operated as a temporary burden on the fee, and did not evacuate the existing investiture. The dispositive and executive clauses clearly recognise a separate conveyance to the trustees from that to the heir-at-law, just as if there had been two deeds. The fallacy of the argument on the other side is that they have treated the infeftment as that of the heir-at-law, whereas it is a burdening and not an evacuating infeftment. *Grindlay's Trustees* v. *Hill* is distinguishable from the present case in four points. In that case there was a power of sale, while here there is none; also, the trustees were holding there for others than the heir. There was also a direction to convey, and lastly what the trustees were asking was an assignable charter. These distinctions appear from Lord Curriehill's note in *Lamont* v. *Rankin's Trustees*, and in *Sturrock* v. *Carruthers*, both *supra cit.* — *cf.* Sess. Papers, 1880, vol. 681, No. 136. The trust in the present case is very similar to the one in *Melville* v. *Preston*, cited by the Lord Ordinary, being merely for a temporary purpose. *Melville* v. *Preston* displaces the distinction sought to be drawn between an *inter vivos* and a *mortis causa* trust. The real question is, whether the truster divested himself of the fee? There could not be any divestiture unless there was a public infeftment of the disponee. The argument on the other side was that it was only necessary to create a fiduciary fee. But the right of the disponee must be feudalised also —*Duke of Hamilton* v. *Guild* and *Duke of Hamilton* v. *Hope*, cited by the Lord Ordinary. The trustees' right is wholly irrespective of that of the heir. The trustees' infeftment is limited to the purposes of the trust. There is no infeftment of the trustees on behalf of the heir as in the case of *Barstow* v. *Steuart, &c.*, February 1858, 20 D. 612. The question whether there is a fiduciary fee is therefore quite irrelevant. The Court always takes the view that the pre-

sumption is against divestiture where the trust is for a temporary purpose, and that it is of this nature appears from the terms of the infeftment itself. This case is therefore *a fortiori* of *Campbell* v. *Edderline's Creditors* and similar cases. Moreover, the disposition to the heir is bad, because there is no authority for holding that a good disposition can be granted to a person not presently existing. But even assuming it is good, there is no infeftment of the trustees in the fee. (3) As to the completion of the heir's title. The pursuer has to admit that there is a direct conveyance to the heir, and precept in his favour. The Lord Ordinary is perhaps right in holding that the precept in favour of the heir is bad, although the authorities are not at one on this matter — Menzies' Lectures on Conveyancing (3d ed.), p. 561; Bell's Prin. sec. 876; Ross' Leading Cases, ii. (Land Rights), p. 18. If the precept is to the heir at a certain time, he will not get a good sasine unless he satisfies the notary that he is the heir-at-law. The precept here was really unexecuted, and the heir has not been infeft at all. All that has been confirmed by the 1874 Act is the sasine of the trustees. (4) If the pursuer is right on the main question, another arises. Does the heir in the deed mean somebody different from the heir of the investiture? It is admitted that Mr Leonard Lyell is at present both heir-at-law under the deed and also the heir of investiture. The only possible event in which he would not hold both characters would be his predeceasing the defender. The superior would only therefore be entitled to relief-duty in the meantime.

The defender in the *second* case maintained that it was not distinguishable from the first case.

At advising—

In the *first* action:—

Lord President—This is an action at the instance of Lord Home, superior of the lands of Kinnordy, against Miss Sophia Georgiana Lyell, who is the last survivor of certain trustees who became infeft in the lands in question in 1852. It is maintained by the pursuer that on the passing of the Conveyancing Act of 1874, the infeftment of 1852 had the effect of entering the defender with the superior as his vassal, and he now therefore demands a composition of a year's rent from the defender as being a singular successor. The Lord Ordinary has found that "Sir Charles Lyell, the last entered vassal, was not divested of his radical right in the lands libelled by the infeftment of the trustees under his father's trust-disposition and settlement, that the said right passed at his death into his *hæreditas jacens*, and may be taken up by the service of his heir," and he has superseded further consideration of the cause in order that Mr Leonard Lyell, as heir of provision, may enter on completing his title either by precept of *clare constat* or by service.

To determine the question at issue it is necessary to go back into the history of the estate, and of the titles to it. The estate was purchased in 1782 by Mr Charles Lyell, who by *mortis causa* deed dated in 1783 settled it upon his eldest son Charles Lyell, second of Kinnordy, and a series of heirs, the destination being one which departed in some respects from the legal order of succession. The second Mr Charles Lyell was infeft upon that disposition and settlement in 1796, and he was entered with the then superior by charter of confirmation on payment of a year's rent as composition, which of course had the effect of enfranchising the series of heirs named in the destination of the disposition of 1796. Upon the death of the second Mr Charles Lyell in 1852 his eldest son Sir Charles Lyell, third of Kinnordy, entered as heir of investiture by precept of *clare constat* obtained from the superior in 1852. He died in 1875, and the next heir of the investiture is Mr Leonard Lyell, who is also heir-at-law of the heir of the investiture last infeft.

If the destination in the charter of 1802, to which I have referred, is not evacuated, it is not easy to see how the pursuer's contention can be maintained, because in that case the person clearly entitled to enter as heir is Mr Leonard Lyell, who, as I have said, is the next heir of the investiture. But it is said that the destination has been evacuated by a deed which was executed by the second Mr Charles Lyell in 1836, upon which the trustees therein named were infeft in 1852, the same year in which Sir Charles Lyell entered as vassal under the investiture.

It is manifest that the whole question turns upon the terms of the deed of 1836, and the infeftment thereon by the trustees in 1852. If that deed had the effect of transferring to the trustees the fee and property of the estate, then their infeftment operated to divest the truster and his heirs of the *dominium utile* of the estate, leaving a bare mid-superiority, which was well taken up by Sir Charles Lyell; and the Conveyancing Act of 1874, by its 4th section would have the effect, according to the decisions, of extinguishing the mid-superiority and making the defender hold direct of the superior, Lord Home. On the other hand, if the *dominium utile* was not vested in the person of the defender as the last survivor of the trustees, then the pursuer has no claim to the composition he now seeks.

The deed of 1836 is a very peculiar one. The granter dispones, conveys, and makes over, in the first place, in favour of his wife, his estate of Kinnordy, "in liferent, for her liferent use allenarly, during all the days of her life after my death, in the event of her surviving me," but as the lady predeceased her husband that portion of the deed never came into operation. The second part of the conveyance is as follows—"And upon the death of the said Mrs Frances Lyell, or in the event of her predeceasing me, to and in favour of Charles Lyell, Thomas Lyell, Henry Lyell, Frances Lyell, Marianna Lyell, Caroline Lyell, Eleanor Lyell, Maria Lyell, and Sophia Georgiana Lyell (being the whole surviving children of the marriage between me and the said Mrs Frances Lyell), and the survivors or survivor of them in trust as trustees for the ends and purposes after mentioned (the majority of the survivors being a quorum for executing this trust), and upon the termination of this trust in the manner and at the period hereinafter expressed, then to and in favour of my heir-at-law at that time in fee."

I do not think there is any difficulty in understanding the meaning and intention of the maker of the deed. His intention is that the estate shall be held in trust for a certain period by his whole children, and at the termination of the trust—on the death of the last survivor—the estate is to go in fee to the person who may then be in the position of heir-at-law of the truster. The nature of the trust must be ascertained from the other portions of the deed, and may be shortly expressed thus—That the whole of the children are to enjoy among them the rents of the estate so long as they, or any of them, survive—they are all to take possession of and to administer the property, and divide the rents equally among them, and the survivors and survivor are to do the same. But as soon as the last survivor dies, the trust is to come to an end. The trustees have no power of sale under the deed, nor can they burden the subjects. They have nothing but ordinary powers of administration, and the enjoyment of the rents for their own lives and those of the survivors and survivor. That being the nature of the trust the question is, what is the effect of it?

But before answering that question it is desirable to keep in view what is to take place when the trust comes to an end. The estate is then to fall and belong to the person who shall be the truster's heir-at-law at that date. He is not named in the deed for the reason that he cannot be ascertained until the event occurs, and the expiration of the trust has come about. Further, the trustees are not authorised to convey to that heir. His right depends upon a direct conveyance to him by the granter of the deed on the expiration of the trust. What the effect of that provision is may possibly give rise to a question some day, although it is not necessary to decide the point now. Again, the deed provides that if the last surviving trustee happens to be the heir-at-law of the granter, then he is to take the fee of the estate under the operation of this clause, but if he be not so, then the person must be found who answers the description of the granter's heir-at-law at that time.

It is clear that under this deed no proper fee and no property ever vested in the trustees at all. The trust is perhaps more than any other trust which we have had before us of the nature of a mere temporary burden; it is not even like a trust for creditors, where the trustees have powers of sale, and where the granter is not divested of the radical fee unless that power is exercised. There has been no operating upon the estate here by the trustees, excepting only so far as ordinary administration and the enjoyment of the rents for their own benefit is concerned. I can therefore come to no other conclusion than that this trust created a mere temporary burden upon the estate, and that the fee remained in the *hæreditas jacens* of the son of the granter of the deed—I mean of Sir Charles Lyell, who was himself entered as heir. It may happen in a certain not very likely event that the heir-at-law of the truster will not be the heir of investiture when the trust comes to an end. They may be different persons, and a question may then arise which is to be preferred, whether the heir of investiture is to take, or the person who has got a right to the formal conveyance, which may be effective as an obligation in his favour though there is no conveyance. It is out of the question to determine that point now, because in all human probability the necessity of determining it will never arise. All we have to decide now is, whether Miss Sophia Georgiana Lyell, who is the sole surviving trustee, is clothed with the right of fee in the lands in consequence of which she can be made to enter with the superior as a singular successor. I am of opinion that there is no such fee in her, and that there never was, and therefore upon the same grounds as the Lord Ordinary I am for adhering to his interlocutor.

Lord Mure—I am of the same opinion. The question is, whether these trustees were proprietors of this estate at the time when they took infeftment, for sub-section 4 of section 4 of the Conveyancing Act of 1874, in dealing with implied entry is only applicable to proprietors who shall be "duly infeft." Now, were the trustees in the case before us so infeft, *i.e.*, infeft in the fee of the estate of Kinnordy? I am of opinion that they were not, and for the reasons so fully explained by your Lordship. They had only authority to take possession of the estate in trust. There was no express conveyance to them at all, and I can find no intention on the part of the truster to vest the fee in the said trustees. On the contrary, it is most anxiously provided that they shall not act as proprietors of this estate. On this simple ground—that they are not infeft in the fee of the estate—I concur with your Lordship that the Lord Ordinary has taken a sound view of the case, and I agree substantially in the reasons he has given in his opinion.

Lord Adam—A great many questions were argued in this case, but I agree that the grounds of decision are narrow. It is common ground that Sir Charles Lyell was the vassal last entered in fee by the infeftment of 31st August 1852, following on the precept of *clare constat* obtained from his superior. That being so, on his death in 1875 the fee passed into his *hæreditas jacens*. It still remains there unless it can be shown to have been taken out by the infeftment in fee of someone else. That raises the question as to the nature of the infeftment taken by the trustees in 1852. Is it an infeftment in fee? We have not had the infeftment itself produced, but we are told that it is exactly in the terms of the precept. If so, then it is an infeftment in trust for the ends, uses, and purposes expressed in the deed. That takes us back to consider the trust purposes. It is perfectly clear that they are of a very temporary nature. The whole trust purposes are to come to an end on the death of the last survivor of the children, or in the event of the last survivor being also the truster's heir-at-law for the time. That being the nature of the trust, it appears to me as clear as possible that it is only a burden on the fee. There is no conveyance to the trustees; it is direct to the heir-at-law. If that is so, it is impossible to say that the last surviving trustee is infeft in the subjects, and if that is so, the effect of the statutory entry can never enter the surviving trustee in fee, and if she is not a vassal holding the estate in fee, it follows she is not liable for the composition due by a singular successor.

On that short ground I have come to the conclusion that the Lord Ordinary is right.

In the *second* action:—

II. LORD PRESIDENT—The difference between the two cases is stated in the note of the Lord Ordinary in the first case. I quite agree with him when he says—[*reads last paragraph of note*]. Therefore in this case we will follow the course taken in the former.

LORDS MURE and ADAM concurred.

LORD SHAND was absent from illness.

The Court adhered in both actions.

Counsel for the Pursuer (Reclaimer)—Darling—Low. Agents—Gibson & Strathern, W.S.

Counsel for the Defender (Respondent)—D.-F. Mackintosh—Graham Murray. Agents—Dundas & Wilson, W.S.

Wednesday, December 14.

SECOND DIVISION.

[Lord Trayner, Ordinary.

BRIDGES *v.* POLICE COMMISSIONERS OF FRASERBURGH.

Property—Way-leave for Water Supply—Repairs on Pipes—Interdict.

The commissioners of police for a burgh gave notice to an adjoining proprietor, in pursuance of the Public Health Acts, with which the Lands Clauses Acts are incorporated, of their intention to bring in a supplementary water supply, and convey the same by means of an aqueduct through his lands. An agreement was entered into by which it was, *inter alia*, agreed that the pipes for the aqueduct should be of a certain size and description, and thereafter the police commissioners laid down fire-clay pipes for the purpose, and paid compensation to the proprietor. Finding these inefficient, they subsequently laid down iron pipes in the same line without removing the fire-clay pipes. The proprietor presented a note of suspension and interdict against this being done, which the Court (*dub.* Lord Rutherfurd Clark) *refused*, holding (1) that the operations were of the nature of repairs on the existing aqueduct, and (2) that the proprietor could suffer no damage from the fire-clay pipes being allowed to remain.

In 1881 the Commissioners of Police of the burgh of Fraserburgh, finding it necessary to increase the water supply for the burgh, gave notice on the 23d December to the Rev. Alexander Henry Bridges, of Ardlaw, Aberdeenshire, that they intended, in pursuance of the Public Health Acts, with which the Lands Clauses Acts are incorporated, within three years after 15th November 1881, to bring a supplementary supply of water to Fraserburgh through the lands of Ardlaw by means of an aqueduct. The Commissioners further gave notice of their intention "to take and use for the construction of the said aqueduct, conduits, branch drains, and other works, or some one or other of them, those portions of the said lands shown on the line" (marked and coloured on the plan), "measuring one acre one rood and five poles or thereby, in regard to which there is to be taken and acquired from you a servitude right, privilege, and tolerance of way-leave, for the purpose of opening up the surface thereof, and constructing and laying the said aqueduct, conduits, branch drains, and other works, or some one or other of them." The notice further bore that certain portions of the land would be required for temporary occupation, and would be restored, except at three points, where the ground would be permanently occupied, and manholes constructed for the purpose of examination and repair of the aqueduct and other works; also that it would be necessary to obtain access to the aqueduct and other works for carrying material to or from the works "during their construction or subsequent repair;" and that compensation would be made for all damages sustained by or through the construction of the works, in terms of the Lands Clauses Acts.

Thereafter, in August and September 1882, the Police Commissioners entered into an agreement with Mr Bridges, under which it was stipulated that the pipes to be laid by them in the ground in question for the purposes of the aqueduct should be 18 inches in diameter, and "should be open pipes, *i.e.*, a covered drain, the pipes of which are not sealed together," except where the aqueduct crossed certain ditches and a burn. The aqueduct was to extend over ground of the width of 13 feet 4 inches. In virtue of this agreement, and a Provisional Order obtained on 22d January 1883, which was confirmed by the Local and Personal Act 46 and 47 Vict. cap. 98, the Commissioners laid the pipes, and paid Mr Bridges what he was found entitled to on account of land occupied either permanently or temporarily by the operations. The pipes laid down for the aqueduct were made of fire-clay, and were sunk at a depth of about 14 feet below the surface.

In 1887 the Commissioners found that owing to the character of the soil through which their pipes were carried it would be destructive of their whole water supply to leave the pipes "open" at that part. They therefore proposed to open up the ground and lay cast-iron pipes there in place of the fire-clay pipes. Mr Bridges objected to this, and raised the question in a note of suspension and interdict, in which he prayed that the Commissioners should be interdicted from entering on his lands, "through or near to which the aqueduct ran, and from staking off the line of or executing any works on the said lands in connection with the new line of pipes proposed to be laid down by them through his lands, reserving to the respondents right as hitherto to enter on the said lands and have access to the existing aqueduct for the purpose of examination or repair." The complainer stated that the respondents had materially deviated from the authorised line in the notice and agreement, and that the proposed operations were not of the nature of repair of the existing aqueduct, but formed an addition to or substitute therefor, and were moreover without any statutory or other authority. The respondents in answer, while