Drummond Act. That section provides that "No justice of the peace or magistrate in any county or royal burgh, who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors . . . shall act as such justice of the peace or magistrate respectively in the execution of this Act, . . . and everything done by a justice of the peace or magistrate respectively in any case in which he is so disqualified to act shall be null and void."

The appellant argued that this provision was incorporated by section 36 of the Act of 1862, and was to be deemed part of that Act; that the warrant being irregular, the whole proceedings following upon it were illegal, and the conviction ought to be quashed.

The section in question (36) provides that "the provisions and enactments contained in the recited Acts" (including the Home-Drummond Act so far as not repealed) "shall extend and be construed, deemed, and taken to extend to, and form part of, this Act."

At advising—

LORD JUSTICE-CLERK—The first point raised in this appeal is that the search warrant, which formed the preliminary step in these proceedings, was signed by a person who held a licence for the sale of exciseable liquor. It is argued that such a warrant is bad, and the proceedings following on it must fall, because by the Home-Drummond Act no licensed person is allowed to act as magistrate under that Act. Now the Home-Drummond Act deals with the granting of licences, and the punishment of persons holding licences for any breach of certificate. Neither of these has any application to the present case, which is a complaint to have a person punished for keeping for sale a certain quantity of exciseable liquor without having a licence, which is an offence created by the Act of 1862, and if the provisions of the Home-Drummond Act as to the magistrates who were to administer that Act were meant to apply, that would require to have been stated. I cannot hold that it was illegal for the magistrate who signed the warrant to do so.

LORDS YOUNG and TRAYNER concurred.

The Court accordingly dismissed the appeal.

Counsel for the Appellant — Craigie. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Respondent — Dewar. Agents—Irons, Roberts, & Co., S.S.C.

COURT OF SESSION.

Thursday, April 5.

OUTER HOUSE.

[Lord Wellwood.

SPENCE *v.* THE UNION BANK OF SCOTLAND.

Property—Udal Holding—Casualty.

The proprietors of certain lands in Shetland held the lands by a long progress of titles in feudal form, and subject to an annual payment to the granter and his successors under the name of feu-duty. The present successor of the granter raised an action for payment of a casualty of composition against the present holders of the lands. The pursuer founded on a decree of judicial sale of date 1774, by which the superiority of the lands was awarded to his ancestor, and upon a Crown charter of resignation and confirmation of the superiority in 1857, both subsequent to the grant of the lands to the defenders' authors.

Held that the casualty was not due, in respect that the pursuer's authors had no feudal title at the date when the lands were conveyed to the defenders' authors, and that the original grant being of udal lands, the position and obligations of the defenders and their authors could not be affected or the feudal burdens imposed by subsequent charter from the Crown.

Certain lands in Shetland had been transmitted by deeds couched in feudal form since at least the close of the seventeenth century. It appeared that throughout that period an annual payment had been made by the proprietor of the lands under the name of feu-duty. There was, however, no trace of an entry with a superior ever having been demanded or taken, and nothing was known of the original grant by which the feu-duty was created. The representative of the parties to whom this payment had been made raised this action against the proprietor for payment of a casualty of composition in respect of the death of the last entered vassal. The pursuer produced two sasines in favour of the ancestors of his authors, of date about the close of the seventeenth century in which the superiority of the lands in question bore to be conveyed. The next writ produced was a decree of judicial sale of date 1774, by which the superiority of said lands was awarded to pursuer's ancestor. No title was completed upon the decree until 1857, when a charter of resignation and confirmation was obtained from the Crown, whereby the representative of the purchaser at the judicial sale was confirmed in *inter alia* the superiority or *dominium directum* of the lands in question. The charter bore that the said lands had hitherto been held by udal tenure, and had never before been feudalised. There was no trace of any

prior Crown charter in favour of pursuer's author.

The defenders pleaded—"(3) *Esto* that the defenders' lands are identical with these in the pursuer's titles, and are held under writs bearing to create a feudal relationship between pursuer and defenders, the defenders are not feudal vassals of the pursuer, and are not liable in any casualty in respect pursuer's authors had no charter or other feudal grant of the said lands from the Crown at the date of the alleged grant to defenders' authors, and that the said lands were held on udal tenure."

In support of this plea they argued—On the assumption that the liability for the alleged feu-duty was created by a deed purporting to be a feu-charter, the contract was nevertheless truly one of ground-annual, the lands being held at the time by the disponer by udal tenure, the Crown charter could not create feudal tenure between the disponer and the disponee, because the disponer could not innovate upon the original contract, and subject the disponee to the incidents of feudal tenure by obtaining a charter from the Crown.

The Lord Ordinary (WELLWOOD) sustained the third plea-in-law for the defenders and dismissed the action.

"*Note.*—The pursuer seeks to have it declared that she is entitled to a casualty, being one year's rent of the lands described in the summons, in consequence of the death of the vassal who was last vest and seised in the said lands, of which the defenders are now the proprietors. The lands are thus described in the summons—'All and whole a property near the middle of the town of Lerwick called Braewick's House, with the kailyard, waste ground, and shops thereon on the south-west side of Main Street, now called Commercial Street, in the town of Lerwick.'

"The pursuer alleges that she is lawful superior, and that the defenders are her vassals in the subjects thus described, and in describing the mode in which her predecessor acquired right to the superiority, she states that in 1774 her predecessor acquired right by decreet of judicial sale to the *dominium directum* of certain subjects in Lerwick, including the subjects described in the summons, the subjects being described in the decreet as 'a house in Lerwick liferented by Anna Margaretta Nicolson, relict of Lawrence Bruce of Braewick, and possessed by William Erasmuson, boatter in Lerwick.'

"It will be seen that it lies upon the pursuer to identify the subjects described in the decreet with those described in the summons, and this no doubt, when the action was first raised, seemed to be the main if not the only difficulty in the pursuer's way. But in the defences the defenders, in addition to calling in question the identity of the subjects, plead that the relations of superior and vassal do not exist between the pursuer and themselves, in respect that, assuming the identity of the subjects, the lands, at least at the date of the grant of the defenders' authors, were udal lands, and not subject to the ordinary incidents of feudal tenure. The defenders' third plea-in-law is—[*His Lordship read the plea-in-law*]. After carefully considering the whole case, I have come to the conclusion that this plea is well-founded, and must be sustained.

"There can be no feudal tenure where lands are not held ultimately of the Crown. Now, originally the land rights of Orkney and Shetland were all udal. They were not held of the Crown, and the proprietors never applied to the Crown for charters, and the lands might be transmitted and enjoyed without any infeftment, investiture, or other right or writ—Erskine, iii. 3, 18; Stair, ii. 3, 11.

"In the present case there are two grave objections to the pursuer's claim. The first is, that until the Crown charter of resignation and confirmation in favour of Gideon Scott, obtained in 1851, there is no trace as regards these lands of any title or writ flowing from the Crown, and in particular there is no trace of any Crown writ prior to the date of the original grant to the defenders' authors. The second objection, which is even more significant, is that there is no trace of any entry ever having been taken.

"The action is brought—and necessarily brought—on the footing that the last entered vassal is dead. But when it is asked, Who was the last entered vassal? and when did he die? the reply is, that so far as appears no entry has ever been taken. On these grounds I am forced to the conclusion that notwithstanding the form of the writs the tenure of the subjects was was not feudal but udal, and that while by contract certain annual payments which were called feu-duties were payable and were paid by the disponees, the lands were not held subject to the incidents of feudal tenure.

"The pursuer's answer to the defenders' plea is twofold. The pursuer relies, first, upon the feudal form of the writs, and secondly, upon the Crown charter of 1851. While both points demand careful consideration, neither of them, in my opinion, sufficiently meets the defence. Although no writing was originally required for the constitution and transmission of udal land rights, it is clear that at an early period the existing feudal forms of conveyance were adopted as affording convenient evidence of the constitution and conditions of the rights. These forms often contained clauses which were inappropriate and inapplicable to udal property, and while they were simply held *pro non scripto*, their presence in the writs gave them the appearance of proper feudal deeds. But no length of time could by itself convert the tenure of lands so held from udal to feudal—*Beatton* v. *Gandie*, 10 S. 286, and *Rendal* v. *Robertson*, 15 S. 265. The only means by which this could be effected was to connect with the Crown by obtaining a fresh grant from it. This could be, and I believe was often done by the proprietor—that is, the full proprietor—of udal lands resigning them in the hands of the Crown and obtaining a Crown

charter in proper feudal form, in virtue of which he became entitled to all the rights of a proper subject-superior in the event of his thereafter parting with the *dominium utile* of the lands. But while the proprietor of udal lands might by this process make them subject to the incidents of feudal tenure with regard to future dispositions of his property, one who had previously parted with what for convenience I may call the *dominium utile* of the lands, could not, I apprehend, thereby affect the position and obligations of those with whom he or his authors had already contracted in regard to the property and possession of the lands. Having no proper estate of superiority, and being possessed at most of right to an annual rent, he could not subject the disponee, the true proprietor of the lands, against his will, to feudal casualties or incidents which he had never contracted to pay or comply with; yet this is what is said to have been effected by the Crown charter of 1851. The grantee of that charter had at its date right only to the feu-duties acquired under the judicial decreet of sale of 1774, although his right is described as the *dominium directum* or superiority of the subjects.

"I may observe in passing that so far as I can see no title was made up on the decreet of sale of 1774." . . .

Counsel for the Pursuer—Sym. Agent—F. J. Grant, W.S.

Counsel for the Defenders—C. N. Johnstone. Agents—J. & F. Anderson, W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

DALRYMPLE AND OTHERS *v.* THE COUNTY COUNCIL OF ROXBURGH.

Road—County Council—Determination that Road should Cease to be a Highway—Appeal—Competency—Sheriff—Reduction—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51)—*Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. cap.* 50).

The 42nd section of the Roads and Bridges (Scotland) Act 1878 provides that the road authority may determine that a road shall cease to be a highway within the meaning and for the purpose of the Act. The 43rd section provides that where three ratepayers are dissatisfied with such decision, they may appeal to the "sheriff" (which includes the sheriff-substitute), whose decision shall be final.

The County Council of Roxburgh, as the road authority in virtue of the Local Government (Scotland) Act 1889, having determined that a road should cease to be a highway, three ratepayers who were dissatisfied with the decision brought a petition in the Sheriff Court to have the County Council ordained to retain this road in their list of highways. They averred that under the 42nd section of the Roads and Bridges Act the decision of the County Council by themselves was incompetent, as the road in question was part of a road which extended outside the county; and further, that the decision was unwise and would cause inconvenience. A record was made up, and the Sheriff-Substitute appointed parties to debate on "the preliminary pleas," and having heard parties thereon, he dismissed the action by an interlocutor which disposed of the whole merits. The pursuers appealed to the Sheriff, who recalled the Sheriff-Substitute's judgment and appointed parties to be heard.

In an action by the County Council to reduce the note of appeal and interlocutors following thereon, the Court *held* that the appeal was competent, and dismissed the action as incompetent.

The Roads and Bridges (Scotland) Act 1878 provides, by section 3, that for the purposes of that Act "sheriff" shall include "sheriff-substitute," and by section 42 that the road trustees may, after certain procedure provided in the Act, declare that any highway shall cease to be a highway within the meaning and for the purposes of the Act. "43. The determination of the trustees under the preceding section shall be final, and not subject to review in any court, or in any process or proceedings whatsoever, unless any three ratepayers who shall be dissatisfied with such determination shall, within fourteen days after the date thereof, appeal to the sheriff, who shall hear and determine the appeal in a summary way, and the decision of the sheriff shall be final, and not subject to review," &c.

By the 11th section, sub-section 2, of the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) the whole powers and duties of the county road trustees were transferred to the County Council instituted by that statute.

At a general meeting of the County Council of Roxburgh, held upon 25th October 1892, the Council, after consideration of a written report from the County Road Board, declared, in virtue of the powers conferred by section 42 of the Roads and Bridges (Scotland) Act 1878, that a certain highway within the Melrose district should cease to be a highway within the meaning and for the purposes of the Act.

Certain ratepayers within the county being dissatisfied with this decision, in November presented a petition in the Sheriff Court at Jedburgh against the County Council of Roxburgh to have the defenders ordained to retain on their list of roads, highways, &c., the piece of road in question.

The pursuers averred that the decision would cause inconvenience, as the road extended beyond the county, and pleaded—"(1) Under the 42nd section of the Roads and Bridges (Scotland) Act 1878, when construed along with the other sections