learned Judges who decided it is applicable to the present case, because we do not know what their reasons were. I do not think we are absolved by a decision of which we know so little from the duty of considering the statutes for ourselves and deciding according to our construction.

LORD TRAYNER and LORD KINCAIRNEY concurred.

The Court answered the question in the affirmative.

Counsel for the Appellant—C. N. Johnston, K.C. — Guy. Agents — Russell & Dunlop, W.S.

Counsel for the Respondent — Hunter. Agents—J. & J. Galletly, S.S.C.

COURT OF SESSION.

Wednesday, December 16.

SECOND DIVISION.

MOIR'S TRUSTEES *v.* DUKE OF ARGYLL.

Superior and Vassal—Casualty—Composition — Implied Entry — Trust — Trustees not Holding for Heir of Investiture—Conveyancing (Scotland) Acts (1874 *and* 1879) *Amendment Act* 1887 (50 *and* 51 *Vict. c.* 69), *sec.* 1.

A died in 1871, the fee-simple proprietor of the estate of Milton, and entered as vassal in these lands by a charter of resignation which contained a destination to A and the heirs whatsoever of his body, whom failing to the other heirs whatsoever of A's great grandfather.

A was survived by four sons—B, C, D, and E. The eldest B succeeded to the estate and took infeftment by notarial instrument recorded in 1872, but he never entered with the superior.

B died in 1872 unmarried, and leaving a trust-disposition and settlement whereby he conveyed his whole means and estate, including Milton, to trustees. The trustees were directed, subject to payment of debts, legacies, &c., to hold the trust for the liferent alimentary use of C, B's immediate younger brother, and on his death to make over the whole free trust estate to the heir in heritage of C, being an heir of his body, whom failing to D or his heir in heritage being an heir of his body, whom failing to E or his heir in heritage being an heir of his body, whom failing to the truster's nearest heir in heritage whomsoever. Power was given to the trustees to sell the trust estate and to limit the right of any heir succeeding after C to a liferent.

The trustees completed their title to the estate of Milton by notarial instrument recorded in 1873, and were thus impliedly entered with the superior by virtue of the Conveyancing Act 1874.

Held (*diss.* Lord Young) that the superior was entitled to a composition in respect that the trustees were singular successors impliedly entered with the superior, and that his right was not restricted to payment of a casualty of relief either by the law apart from section 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887, or by the terms of that section.

The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887, sec. 1, enacts—"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."

John M'Arthur Moir (*primus*) died on 16th December 1871, the fee-simple proprietor of the estate of Milton, and infeft and entered as vassal therein by virtue of a charter of resignation dated 5th and recorded on 9th December 1867, granted by his superior the eighth Duke of Argyll. The destination in this charter was to the said John M'Arthur Moir and the heirs whatsoever of his body, whom failing the other heirs whatsoever of the body of his great-grandfather James Moir, the eldest heir-female always succeeding without division through the whole course of succession.

John M'Arthur Moir (*primus*) was survived by four sons—John M'Arthur Moir (*secundus*) and James, Alexander and Edward Moir. He left a general disposition and settlement under which his eldest son John M'Arthur Moir (*secundus*) succeeded to, *inter alia*, the estate of Milton. John M'Arthur Moir (*secundus*) took infeftment in the estate of Milton by notarial instrument recorded in the Register of Sasines on 12th February 1872, but he never took out an entry with the superior.

John M'Arthur Moir (*secundus*) died on 4th December 1872 without issue, leaving a trust-disposition and settlement dated 31st January, and recorded in the Books of Council and Session 16th December 1872, whereby he conveyed to certain persons therein named as trustees his whole heritable and moveable estate, and, *inter alia*, the said lands and estate of Milton.

The purposes of the said trust-disposition and settlement were (*First*) payment of debts, funeral charges, and expenses of

management. "(*Second*) My trustees, subject to payment of the legacies, annuities, and provisions hereinafter mentioned, shall hold my whole estates and property, heritable and moveable, for the liferent alimentary use of my immediate younger brother James M'Arthur Moir, presently commission agent, Dundee, should he survive me, and shall pay over to him during the whole days of his life the whole free yearly income and produce thereof.... (*Third*) On the death of the said James M'Arthur Moir, should he survive me, or as soon thereafter as my trustees shall deem proper, or as soon after my own death as may be found convenient should the said James M'Arthur Moir predecease me, my trustees shall, subject to payment of the whole other provisions, legacies, and annuities hereinafter mentioned, or the providing for and securing the said provisions, legacies, and annuities, and subject to the other directions and with the powers hereinafter written, dispone, assign, and make over the whole free trust estate, heritable and moveable, or the residue thereof which may exist at the time, to and in favour of the heir in heritage of the said James M'Arthur Moir, being an heir of his body, declaring that heirs-portioners are excluded, and that the eldest daughter and her issue shall succeed to the exclusion of younger sisters, one or more: Providing always, that in the event of the son or daughter of the said James M'Arthur Moir, or the issue of their respective bodies, who shall become entitled to the foregoing provision, being under twenty-five years of age at the time, my trustees shall not convey the trust-estate or the residue thereof to him or her till he or she attains twenty-five years of age, but shall pay the free income and produce thereof, under deduction of all current expenses and outgoings as aforesaid, to him or her, or shall apply the same for his or her benefit, and that in such manner and at such times as they may think expedient till he or she shall attain the said age of twenty-five years: And it is further declared that should my trustees be of opinion that from any circumstances it is inexpedient that the party succeeding to my estates under this provision should obtain the control of the said estates or the power of disposing thereof, the trustees shall have full power to continue to hold the estates after the party so succeeding has attained the said age of twenty-five years, and that for any length of time during which they may think it proper to do so, and in that case they shall pay over to the said party the free income of the estates, under deduction of all current expenses and outgoings as aforesaid, or shall apply the same for his or her benefit in such manner and at such times as they may think expedient." (*Fourth*) Payment of an annuity of £500 to James' widow and provision of £20,000 to James' children who did not take the trust-estate under the third purpose. "(*Fifth*) In the event of the said James M'Arthur Moir dying without leaving sons or daughters or their issue, my trustees shall, subject to payment of or securing or providing for the whole other provisions, legacies, and annuities herein contained, and subject to the other directions and with the powers herein expressed, dispone, convey, and make over the whole trust estate, heritable and moveable, or the residue thereof which may remain at the time, to my brother Alexander M'Arthur Moir, Captain in the 99th Regiment of Foot, or his heir in heritage should he have predeceased leaving an heir of his body; whom failing, to my brother Edward M'Arthur Moir, presently in the Indian Forest Department in the North-West Provinces of India, or his heir in heritage should he have predeceased leaving an heir of his body; whom all failing, to my nearest heir in heritage whomsoever." This clause contained declarations similar to those in the third purpose. *Sixth*, *seventh* and *eighth*, payment of sundry legacies, &c.

In said trust-disposition and settlement there was an express provision to the effect that if Alexander should succeed to the lands and estate of Hillfoot, Lawhill, and acres at Bo'ness in virtue of a contingent conveyance or destination in his favour contained in the testamentary settlements of the truster's father, the whole provisions made for him and his issue by the truster's settlement should become void and null. Power was given to the trustees to borrow money on the security of the trust estate for the purpose of providing the legacies, annuities, &c., bequeathed by the truster. By the settlement the trustees were expressly empowered to sell, dispose of, realise, and recover "all or any part of the trust estate, real or personal, at such time or times as they may think right, and that either by private or public sale, in such manner and at such prices as they may consider expedient."

After the death of the truster the trustees accepted office, completed a feudal title to, *inter alia*, the lands of Milton, by notarial instrument, recorded in the Register of Sasines 21st February 1873, and by virtue of the Conveyancing (Scotland) Act 1874 were thereby impliedly entered with the superior.

The truster, who died without issue, was survived by his immediate younger brother James, who was born on 13th July 1843. In 1903 the said James, who was the truster's heir-at-law, was a widower, and had a family of two sons and three daughters. The sons were then about twenty-nine and twenty-two years of age respectively. The elder son was married about June 1901, but the younger one was unmarried. Two of the daughters were married, and one of them had issue. The truster was also survived by two brothers younger than James, namely, Alexander and Edward. Alexander died in 1885 unmarried, but in 1903 Edward was still alive, was married, and had issue. The trustees accounted to the said James M'Arthur Moir for the free surplus income. The trustees never exercised the power of sale in reference to the property of Milton.

In these circumstances the Duke of Argyll, as superior of the lands and estate of

Milton, claimed payment from the trustees as vassals in the said lands and estate of a composition, being a year's rent of the said estate for the year 1874-1875. The trustees denied liability therefor.

For the settlement of the question a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees, and (2) the Duke of Argyll.

The first parties contended that they held the estate of Milton for the heir under the investiture enfranchised by the said charter of resignation, which had not been evacuated by their infeftment, or otherwise that they held the said estate for the heir-at-law of the testator, who was himself the heir-at-law of the last entered vassal, and that accordingly they were not liable in payment of a composition, but only of relief-duty.

The second party contended that by the statutory entry of the trustees the prior investiture had been evacuated and a new investiture had been created, and that therefore the first parties were bound to pay composition to him as superior.

The question of law was—"Are the first parties liable to make payment to the second party of a composition of one year's rent and feu-duties of the lands and estate of Milton for the year 1874-1875, or are they liable in payment of relief duty only?"

Argued for the first parties—This case came within the exception to the rule that singular successors must pay a casualty of composition. The trust in the present case was a burden on the fee for the purpose of protecting the interests of the real vassal. In the trust-disposition and settlement there was no substantial departure from the original investiture; the interest in the estate was kept within the same class of individuals. The purposes of the trust were substantially to hold the estate "for behoof of" the heir of the investiture. In such a case the proper casualty payable was relief under section 1 of the Conveyancing Act of 1887, which merely carried out the principle of the common law as stated in *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85, 27 S.L.R. 178, and cases following thereon.

Argued for the second party—He was entitled to composition. Apart from the Conveyancing Act of 1887 the first parties had no case. That Act did not apply here. The heir had only a liferent right to the estate. The only chance of his getting the fee was in the event of the whole of the sucessive heirs under the trust-disposition dying and his succeeding as "the nearest heir in heritage whomsoever." Such a remote chance could not be designated an ultimate beneficial interest in the estate. The old investiture had been broken, and composition was therefore due—*Magistrates of Edinburgh* v. *Irvine's Trustees*, July 1, 1902, 4 F. 937, 39 S.L.R. 737.

At advising—

LORD YOUNG—The facts on which the parties are agreed are distinctly stated in the special case, and I therefore proceed at once to the question of law on which they differ. That question is thus stated—"Are the first parties liable to make payment to the second party of a composition of one year's rent and feu-duties of the lands and estate of Milton for the year 1874-1875, or are they liable in payment of relief duty only?"

It was, as I understood, admitted by the *second* party, and certainly in my opinion it is clear, that if the trust-disposition and settlement of John M'Arthur Moir (*secundus*) is such that the provisions of section 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 apply to it, the *first* parties are liable to the *second* for relief duty only?"

The deed which is specified in the clause as that to which its provisions apply is termed "a trust-disposition and settlement," and the author of it is styled "the testator." Such a deed is necessarily voluntary, the trustees therein named and thereby entrusted with the estate of the testator for the execution of his will respecting it, take it not by an "active title" merely, but also by a "passive title," whereby they are subjected to the debts and deeds of the testator to the extent of the whole property conveyed to them. I make this observation only to call attention pointedly to the character and quality of the testamentary trust to which the clause of the statute applies, viz., a general testamentary trust settlement which comprehends, by conveyance to the trustees, a heritable estate (or any number, in this case three such estates), with directions for the administration and disposal of it. To bring a settlement containing such conveyance within the operation of the clause, it must appear that the conveyance was made "*for behoof of or* with directions to convey the same" (the heritable estate) "to the heir of the testator, either 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 first parties maintain that the trust settlement of John M'Arthur Moir (*secundus*) satisfies this requirement, while the second party maintains that it does not, and this is really the question in dispute between them. The facts on which it depends are not in dispute. The testator died a bachelor, survived by several brothers and sisters, the eldest brother (his immediate younger brother) being married and having a family of sons and daughters. The testator, who was at his death head of the family, seems to have thought it prudent, in the interest of all who might survive and come after him as his heirs under the investiture on which he held the estate of Milton (and also two other land estates), to make special provision for the event of James (his immediate younger brother) surviving him and so becoming his heir, whereby his interest or "*behoof*" in these estates should be limited to a liferent, but with the fee secured to his legal heir. This is what he

did by the direction to his trustees in the second and third purposes of the trust. The second is in these terms—"*Second.* My trustees, subject to payment of the legacies, annuities, and provisions hereinafter mentioned, *shall hold* my whole estate and property, heritable and moveable, for the liferent alimentary use *of my immediate younger brother James M'Arthur Moir*, presently commission agent, Dundee, should he survive me, and shall pay over to him during the whole days of his life the whole free yearly income and produce thereof." And the third is in these terms —"*Third.* On the death of the said James M'Arthur Moir, should he survive me, or as soon thereafter as my trustees shall deem proper, *or* as soon after my own death as may be found convenient should the said James M'Arthur Moir predecease me, my trustees shall, subject to payment of the whole other provisions, legacies, and annuities hereinafter mentioned, or the providing for and securing the said provisions, legacies, and annuities, and subject to the other directions and with the powers hereinafter written, dispone, assign, and make over the whole free trust estate, heritable and moveable, or the residue thereof which may exist at the time, to and in favour of *the heir in heritage of the said James M'Arthur Moir*, being an heir of his body," &c., &c. That the estate of Milton, to which alone this case refers, is comprehended in this conveyance with these directions, is admitted, and the question in dispute is, "Was it for *behoof* of *or* with directions to convey the same to *the heir* of the testator"—"*or* by virtue of which the heir of the testator has the ultimate beneficial interest in such estate?" To answer it we must consider the meaning and import of, *first*, the expression "for behoof of" as it occurs in the enactment, and, *second*, of the words "*the heir of the testator*" as there used. In dealing with the first point I shall assume that the heir referred to is the heir of the testator at his (the testator's) death without regard to the period of his (such heir's) survivance. What, on this assumption, is the meaning of the words "*for behoof of*"—"the heir of the testator?" It must mean some *behoof*, *i.e.*, beneficial interest, in the estate, different from and necessarily *short of* (for nothing *can exceed*) the property or fee of the estate. I have tried, but unsuccessfully, to conjecture or imagine any beneficial interest, short of property, in a landed estate held by testamentary trustees which is more substantial or likely to have been contemplated by the framer of this enactment and by the Legislature, than a protected liferent of the whole with a fee to the legal heir of the liferenter, exactly such as the testator here provided and secured to his brother James. To hold otherwise would, on the assumption that the "heir of the testator" means only the individual who was heir at the testator's death, necessarily imply that this clause of the statute could not apply to any trust settlement which did not direct the trustees to invest the testator's heir at his death with the fee of the heritable estate. It is not, I think, doubtful that such heir could not by virtue of anything short of this have "the ultimate beneficial interest in such estate."

In considering the meaning and import of the expression "*for behoof of*" the heir of the testator, I have assumed, as I said I would, that the heir meant was only the individual who happened to be the testator's heir at his death. That assumption is in accord with the contention and argument submitted to us on behalf of the second party, but not with my opinion. The expression of course includes the individual who was heir at the testator's death, and the question whether or not it extends to others does not, as I think, necessarily affect the question regarding the meaning of the words "for behoof of." It is stated in the case that James "is the truster's heir-at-law, is a widower, and has a family of two sons and three daughters." He is now over sixty years of age, and since the testator's death in 1872 the trustees (the first parties) have held the estate of Milton for his behoof in liferent and that of his heir in heritage in fee. Until his death it cannot be known to what individual the fee of the estate is to be conveyed, but he must be "the heir in heritage of James, being an heir of his body," or "the truster's nearest heir in heritage whomsoever." It is therefore clear that according to the direction of the testator an heir of his must have "the ultimate beneficial interest in such estate." I think it is proper to observe that although John M'Arthur Moir (*secundus*) was, in my opinion, the heir of investiture of the estate of Milton, and also entered with the superior, I do not consider it necessary for the decision of the case before us to determine whether or not he was both or either.

The case presents no question of title for our determination. It is admitted that in February 1873 the first parties were impliedly entered with the superiors, and the only question submitted to us for decision is whether composition, or relief duty only, is payable to the superior in respect of that implied entry in 1873. There is, I repeat, no question of title submitted to us. The first parties are disponees of the heritable estate in question duly entered with the superior, and their entry can have no effect upon prior investiture other than the similar entry of all or any testamentary trustees such as clause 1 of the Act of 1887 provides for —that is to say, no effect whatever on the question submitted to us—whether composition or relief duty is due by the first parties to the second. When the first parties come, on the death of James Moir, to convey the fee of the estate as directed by the testator, a question may arise how their disponee, most probably James' eldest son or grandson, is to complete his title. It does not occur to me how such a question attended with any difficulty can arise, but it is sufficient to say that no such question is presented by this case.

On James' death the trust administration must continue, but for behoof of his heirs in heritage, until the trust purposes

relating to the estate are fulfilled by execution of the disposition thereof by virtue of which the then existing heir in heritage of the testator will have the ultimate beneficial interest in the estate. I understand the statement in the case to import, and certainly the argument to us proceeded on the footing, that the testator's debts were all paid at the commencement of the trust, and that there is no unfulfilled trust purpose which can delay the conveyance of Milton to James' heir, who must of necessity, in my opinion, be the heir of the investiture on which the testator held it at his death.

It is I think obvious that on the death of the testator's brother James, his heir in heritage, whether of his body or not, will, and indeed must, be also the testator's heir in heritage, the testator having died a bachelor. Further, I think that not only the heir in heritage of James, but every one who is within the scope of the direction in the third purpose of the trust regarding the disposition of Milton on James' death, and to one of whom the trustees must dispone it, will, and indeed must, at the date of the disposition, be the heir of the investiture on which the testator possessed the estate.

The purpose of all that I have said hitherto has been to express and explain my opinion to this effect, that the intention of the testator, and the import of his will respecting the estate of Milton (and also the two other heritable estates included in his will), was and is not merely that the estate should not be alienated to strangers or singular successors, but that the heirs of the testator and the investiture or destination should have such protection against alienation as the testator thought might be beneficently afforded by the direction to his trustees to retain and hold the estate if and so long as his immediate younger brother survived him, and on his decease to dispone it to his brother's heir, who would then be his own heir — the heir of the unaltered investiture or destination, and so the individual who would have been the heir entitled to succeed had the estate not been included in the trust.

It was contended for the second party that as payment of the testator's debts and the satisfaction of all legacies and annuities specified in his will being antecedent to the provisions and directions in favour of his heirs must be satisfied before the heirs can benefit by these provisions and directions, the settlement cannot fall within section 1 of the Act of 1887, even though it should appear, as it in fact does, that the estate of Milton is not and never has been used or needed to pay debts or to satisfy such antecedent provisions. I have already pointed out, I hope satisfactorily, that this argument would apply to any voluntary testamentary trust, and that as such a trust-deed certainly may (and probably no other can) fall under section 1 of the Act of 1887 it would if sound cancel that clause as being practically inoperative.

The only contention of the second party in support of his claim is thus stated in the case—"The second party contends that by the statutory entry of the trustees the prior investiture has been evacuated and a new investiture has been created, and that therefore the first parties are bound to pay composition to him as superior."

That the trustees were entered with the superior prior to the Act of 1887 is distinctly stated in the case, and for anything I have yet said, and possibly for anything I may yet say, it may be assumed that—but for the provisions of the Act of 1887—this entry would have created a new investiture entitling the second party to composition.

In February 1873, when the first parties (or their predecessors) recorded the notarial instrument of their infeftment in the Register of Sasines, they could have no intention or thought of thereby entering with the superior of Milton. They were not thereby impliedly so entered until the passing of the Act of 1874, which did not come into operation till October 1874, nearly two years after the testator's death, by which time they might have completely executed their trust with respect to Milton and been divested of it by disposition to James Moir's heir in heritage. Prior to the Act of 1874 a vassal could not be entered with the superior to the effect of extinguishing the old and constituting a new investiture, or to any effect without the knowledge and concurring intention of both parties; and it was not for some time after the passing of that Act that the whole effect of the provision in clause 4 thereof was realised professionally or judicially. It may, I think, be regarded as certain that in February 1873, when the first parties recorded their infeftment, they had no intention of thereby or otherwise entering with the superior or of ever constituting a new investiture of which they themselves should be the only heirs. Certainly no testamentary trustees would then have considered such a proceeding proper or consistent with their duty, it being plain that the effect of it would be to impose upon the trust a debt to the superior amounting to a year's rent of the estate under their administration, which might not continue for a year or even a month, and another year's rent on the truster's heir (possibly his eldest son), to be paid by him to the superior in respect he had been made a singular successor by a second new investiture constituted by the necessary registration of the disposition to him on the termination of the trust. It is also certain that in this case the superior (or, I should say, his legal advisers) had no thought of such a thing any more than the trustees had. Even after the passing of the Act of 1874 the idea of such entry and constitution of a new investiture having been thereby effected does not seem to have occurred to either superior or vassal for a long while. This case, which presents the superior's claim for our decision, is dated May 1903—thirty years after the date of the implied entry on which it is founded.

I make these observations not to signify any doubt that the decision of this Court, affirmed by the House of Lords in the case of *Lamont* v. *Rankine's Trustees*, February 27, 1880, 7 R. (H.L.) 10, is conclusive authority regarding the construction and import of the 4th clause of the Act of 1874, and that the claim of the second party and liability of the first must be decided on that footing if the remedial statute of 1887 is inapplicable. The purpose of the observations is to call attention to the just and equitable considerations which had struck me, I own somewhat forcibly, as leading to the passing of that remedial statute. The consequence of the construction finally put on section 4 of the Act of 1874, taken of course to be right, was not reached without diversity of judicial opinion, and led to the subjection of vassals to claims by superiors created by the mere registration of sasines which had theretofore created or led to no such claims. This was shown very distinctly by the judgment of the Lords to which I have referred, the diversity of judicial opinion in this Court, and I think I may add the explanation in Parliament by those who were responsible for carrying through the Act of 1874, that such a result was not intended. This led to the introduction and passing of the remedial Act of 1887, upon the application of which to the special case before us I put my judgment. The counsel for the second party cited and relied on the case of *Lamont* v. *Rankine's Trustees* as an authority in support of the claim, which it may be assumed it would be but for the Act of 1887. On the construction and application of that remedial Act, reference to that case is, I think, adverse to the claim—inasmuch as it presented the most recent and notable instance of the evil which was thought such as required remedial legislation.

This case, indeed, presents a similar—perhaps grosser—instance of the same evil, but fortunately for the first parties, after the passing of the remedial Act.

The most recent authority cited and relied on in support of the second party's claim was the case of the *Magistrates of Edinburgh* v. *Irvine's Trustees*, July 1, 1902, 4 F. 937. But the trust deed there in question was not testamentary or *mortis causa*, or the truster a testator, and so not such as could come within clause 1 of the Act of 1887. This opinion is very pointedly expressed by the Lord Ordinary, and is, I think, concurred in by all the Judges—though they also express their opinion—necessarily *obiter* if the first is sound—that the provisions of the deed are not such as would bring it within the clause. It is enough for me to say that they are in my opinion substantially and in all important respects different from those in the trust we have to deal with.

I have said enough to explain my reason for not specially referring to the case of *Lamont* v. *Rankine's Trustees*, February 28, 1879, 6 R. 739, and some other authorities cited and founded on by the counsel for the second party which can have no possible bearing on the construction and application of the Act of 1887, on which alone I rest my judgment.

Lord Trayner—According to the statement in the case before us John M'Arthur Moir (*primus*) was the proprietor in fee-simple of the lands of Milton at the date of his death in 1871. He had entered with the superior. His son John (*secundus*) succeeded to said lands under a trust-disposition and settlement by his father, and was infeft in 1872. He did not enter with the superior. John (*secundus*) conveyed his whole estate by trust-disposition and settlement dated in 1872 (in which year he died) to the first parties to this case in trust for the purposes therein set forth. Upon that trust settlement the first parties made up their title to said land in common form by notarial instrument recorded in the Register of Sasines in 1873, and were by virtue of the provisions of the Conveyancing Act 1874 entered with the superior. The question we are asked to decide is, whether in respect of such entry the first parties are liable to the superior in payment of composition or only relief-duty. As the first parties cannot and do not pretend to the character of heirs of any vassal recognised and entered by the superior they can only be singular successors, and singular successors (their entry not being taxed) are liable for a year's rent as composition. But the first parties maintain that their liability is limited to relief-duty by virtue of the provisions of the Amending Act of 1887. By section 1 of that Act it is provided that where heritage is conveyed to trustees by a trust-disposition and settlement "for behoof of or with directions to convey the same to the heir of the testator, . . . or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate," the trustees shall not be liable in respect of their entry for any other casualty than could be exacted from the heir himself. Now, I think it clear that the trust-disposition and settlement of John (*secundus*), under which the first parties are acting, is not of the description to which the statute refers. The heir-at-law of John (*secundus*) was his brother James. But to him—"the heir of the testator"—the trustees are not directed to convey the estate. On the contrary, the trustees are directed to give James a liferent of the estate and nothing more. The fee is destined to the heir of James' body, whom failing to other persons called in order to the succession. There is no one called to the succession in the character of the truster's heir, and it is at this moment quite uncertain who will take the fee or ultimate beneficial interest in the lands. The persons called as possible heirs are merely named as beneficiaries under the trust. The whole scope and tenor of the trust-settlement in question shows that it was not primarily intended to provide the lands in question to any particular heir. It is an ordinary trust-settlement by which the truster, dealing with his whole estate, both heritable and moveable, directs his trustees to distribute

that estate according to his wishes. If therefore the first parties cannot bring themselves or the trust-settlement under which they are acting within the provisions of the Act of 1887, their character of singular successors with their obligations as singular successors remains untouched. I think this conclusive of the question before us.

It was suggested rather than argued that James might ultimately take right to the lands in question as heir under the destination in his brother's settlement to "heirs whomsoever" who are called to the succession failing all the persons and their descendants previously called. But this view was rejected in the case of the *Magistrates of Edinburgh* v. *Irvine's Trustee*, 4 F. 937, where Lord M'Laren said "that the heir should have, at the time when entry is demanded" (and therefore at the time the casualty is payable), "the substantial right to the estate," and further that the Act of 1887 "does not apply where the heir succeeds only on the failure of other heirs or as a conditional institute."

No one can now enter with the superior under the investiture which existed in 1871. That investiture no longer exists. The infeftment of John (*secundus*) in 1872 and the infeftment of his trustees in 1873 created a new investiture. Of that investiture James is not the heir.

I am of opinion therefore that the question put to us should be answered to the effect that the first parties are liable to make payment to the second party of a composition and not only of relief-duty.

LORD MONCREIFF—I am of opinion that the first parties, the trustees of John M'Arthur Moir (*secundus*), are liable to make payment to the superior, the second party, of a composition of one year's rent and feu-duties of the lands and estate of Milton for the year 1874-75, the year of their implied entry with the superior.

The nearest heir in heritage of John M'Arthur Moir (*secundus*) is his brother James M'Arthur Moir, who is also heir of the last-entered vassal who paid a casualty—viz., John M'Arthur Moir (*primus*). He is the heir of the investiture enfranchised by the charter of confirmation of 1867. I assume, therefore, that if John M'Arthur Moir (*secundus*) had died intestate, his heir James M'Arthur Moir would have been liable in relief-duty only.

But John M'Arthur Moir (*secundus*) left a trust-disposition and settlement, and we have to consider the effect of that deed. If the trust is simply a burden upon the right of the heir—if the first parties hold for him and are bound sooner or later to convey the lands to him in preference to any other beneficiary, then both under the old law and under the 1st section of the Conveyancing Act of 1887 the superior is entitled to no more than payment of relief-duty, that being the casualty which "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."

But if, on the other hand, the trust deed creates a new investiture, and the trustees do not hold for the heir, and are not bound to convey the lands to him, although he may have rights under the deed as a beneficiary, they are liable in payment of a composition of a year's rent and feu-duties.

Now, the effect of the trust which still subsists is to alter the existing investiture to this extent at least, that under it the heir's interest in the truster's estate, including the lands of Milton, is limited to a strictly alimentary liferent. The deed contains wide powers of sale, which would, if necessary for the purposes of the trust, enable the trustees to sell the lands of Milton and convey them to a singular successor. Further, they are directed on the death of James M'Arthur Moir to make over the whole free trust estate, heritable and moveable, including the lands of Milton, if not sold, to James M'Arthur Moir's heir in heritage, being an heir of his body. Failing his leaving issue, they are directed to convey the estate to a series of heirs therein named, and the heirs of their bodies respectively, whom all failing, to the truster's nearest heir in heritage whomsoever.

Thus under the trust deed the trustees could not convey the lands of Milton to James M'Arthur Moir, except indeed in the very improbable event of the whole destination contained in the trust deed failing, in which case, if he survived, they would be bound under the deed to convey to him as heir in heritage whomsoever of the truster.

Now, under the old law trustees holding under such a trust would, I cannot doubt, have been dealt with as being both in point of form and substance singular successors and liable in payment of composition. Neither in my opinion does the Act of 1887 aid them. They do not hold the estate for behoof of or with directions to convey the same to the testator's heir. And the testator's heir has not in the sense of that statute the ultimate beneficial interest in the estate. My understanding of that enactment is that it only applies when trustees hold from the first for an existing heir who has a vested right in the fee of the estate, although he may not be entitled to a conveyance of it until certain trust purposes have been fulfilled—for instance, certain liferents terminated. It does not apply where the testator's heir has merely a chance under the trust deed of succeeding as a conditional institute on the failure of heirs called before him. The case which was cited to us of *Magistrates of Edinburgh* v. *Irvine's Trustees*, 4 F. 937, is a decision on that point.

The truth is that there is no authority to support the contention of the first parties. In *Stuart* v. *Jackson*, 17 R. 85, the whole of the trust purposes had failed before the trust opened, because they were framed on the assumption that the truster might leave more than one child, whereas he left only one child, a son, to whom the trustees conveyed the estate on his attaining majority. The *ratio* of the judgment, as

appearing from the opinions of the majority of the Court was that before the superior made his claim, if not indeed immediately on the truster's death, the trust purposes had become inapplicable and unworkable. And that therefore the trustees held simply for the heir; and that, even supposing they were bound to hold until he attained majority, that condition was purified before the superior made his claim.

Again, in *The Duke of Athole* v. *Stewart*, 17 R. 724, the trustees were directed to convey the lands to the truster's eldest son alive at his death, and the heirs of his body, and they did so. It was held that the heir was not liable in a composition, because the trust was truly one for continuance of the existing investiture.

In *The Duke of Athole* v. *Menzies*, 17 R. 733, the trustees were directed to convey the estate to the testator's only son on his attaining majority, and failing him to certain other heirs. On the eldest son attaining majority the trustees disponed the estates to him and he was infeft. The superior having claimed a casualty of a year's rent from the heir it was held that he was only liable in a casualty of relief, the trust conveyance being regarded as one for him as heir and not as affecting his radical right as heir. It will be observed that in that case the Court disregarded the circumstance that at the outset of the trust it was not certain that the trustees would have to convey to the heir as he had not at that time attained majority.

These cases, however, differ very widely from the present, in which the heir's interest is expressly confined to a liferent, and where the only circumstances in which he could demand a conveyance would be in the event of the total failure of the new investiture.

The case in my opinion falls under the decisions of *Grindlay* v. *Hill*, January 18, 1810, F. C.; *Lamont* v. *Rankine's Trustees*, 6 R. 739, and 7 R. (H.L.), 10; and similar cases.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law by declaring that the first parties were liable to make payment to the second party of a composition of one year's rent and feu-duties of the lands and estate of Milton for the year 1874-75, and found and declared accordingly.

Counsel for the First Parties—Macfarlane, K.C. — Macmillan. Agent — J. P. Watson, W.S.

Counsel for the Second Parties — H. Johnston, K.C.—Macphail. Agents—Lindsay, Howe, & Co., W.S.

Tuesday, December 15.

FIRST DIVISION.

THE COUNTY COUNCIL OF MIDLOTHIAN *v.* THE PUMPHERSTON OIL COMPANY, LIMITED, AND THE OAKBANK OIL COMPANY, LIMITED.

(*Ante* July 15, 1902, 4 F. 996, 39 S.L.R. 797, and March 19, 1903, 40 S.L.R. 519.)

River—Pollution—Proceedings by Sanitary Authority—Prescription—Manufactories Discharging before and after 1876—*Rivers Pollution Prevention Act* 1876 (39 *and* 40 *Vict. c.* 75), *secs.* 4 and 16.

In proceedings at the instance of a local authority, for the prevention of the pollution of a river by discharges from a manufactory, under the provisions of sections 4 and 16 of the Rivers Pollution Prevention Act 1876 (quoted *infra*), *held* (1) that it was no answer to aver pollution for forty years by defenders or their authors; (2) that in the case of a manufacturer who had commenced to discharge into the river since the Act came into operation, the only relevant defence was that he was not in fact polluting; and (3) that in the case of a manufacturer who had discharged into the river prior to the Act, and continued to do so by the same channel, it was a relevant defence to aver that he was using the best practicable and reasonably available means for rendering his discharge harmless.

River—Pollution—Prescription.

Opinion (*per* Lord Kinnear) that a right to pollute a river cannot be acquired by prescription.

These cases are reported *ante ut supra.*

The Rivers Pollution Prevention Act 1876 enacts (section 4)—"Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act."

"Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow, or to be carried, shall not be deemed to have committed an offence against this Act if he shows to the satisfaction of the Court having cognisance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream." Section 16—"The powers given by this Act shall