understand the principle stated for the decision in the case of *Colquhoun*. It is new to me that where a statute prescribes an offence nobody can be guilty who does not commit it with his own hand. To take the case of coinage as an illustration, are we to be told that no one can be convicted of that crime unless he has made false money with his own hand? In this case the facts are clear. A gang of men with two dogs go to a field for the purpose of capturing game. Some of the men go into the field, and in order that the dogs may be able to secure the hares within the field the others remain outside and whenever the hares attempt to make for the road they force them back. I have no doubt that the men upon the road were just as much guilty of trespass as those in the field. I think therefore that the acquittal was wrong, and that we must so find and remit to the Sheriff.

LORD RUTHERFURD CLARK concurred.

LORD KYLLACHY—I also agree. I think we must follow *Stoddart* rather than *Colquhoun*. I also agree that the decision in the case of *Stoddart* is upon its merits the preferable one.

The Court answered the question in the affirmative, and remitted to the Sheriff-Substitute.

Counsel for the Appellant—Macfarlane. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—Craigie. Agents—

COURT OF SESSION.

Friday, June 13.

FIRST DIVISION.

MORIER AND OTHERS *v.* GILMOUR AND ANOTHER.

Provisions to Husbands, Wives, &c.—Contract of Marriage—Trust—Construction—Wife's Acquirenda subsequent to Dissolution of Marriage.

In contemplation of an intended marriage between William Morier and Susan Gilmour, they, along with Allan Gilmour, the father of Susan Gilmour, entered into an agreement for a settlement in April 1878. By this agreement it was *inter alia* provided that a sum of £10,000 should be paid by Allan Gilmour to certain trustees for behoof of the spouses and their children in manner therein mentioned; and by article 9 it was declared that "All after-acquired property of the said Susan Ewing Gilmour, real or personal, shall be assured and transferred by the said William John Morier and Susan Ewing Gilmour to the trustees, upon the same trusts hereinbefore declared of the said sum of £10,000." The marriage was duly solemnised on 13th June 1878, and the parties not having executed any marriage-settlement as contemplated, it was agreed that the above agreement should, with certain additions and alterations set forth in a minute annexed to the agreement, be held as their marriage-settlement. The minute, *inter alia*, set forth—"*Thirdly*, Miss Gilmour, with consent of her husband, hereby conveys to the said trustees all property, funds, and estate that since the date of the foregoing agreement may have been acquired by her, or that may hereafter be acquired by her by succession or otherwise, to be held and applied by them in trust for the same purposes and with the same powers as the said sum of £10,000.

A decree of divorce bearing to dissolve the marriage was pronounced by a court in Australia in 1883, and William Morier died in 1885, survived by Susan Gilmour or Morier and one child of the marriage.

In April 1888 Susan Morier became entitled, in terms of an uncle's will, to a legacy of £2000 sterling. *Held* (following *Wardlaw* v. *Wardlaw's Trustees*, July 7, 1880, 7 R. 1066) that the legacy of £2000 was not carried by the wife's conveyance of *acquirenda* in the marriage-contract, but that she was entitled to demand payment of it as her own absolute property.

Counsel for the First Parties—G. W. Burnet. Agents—Forrester & Davidson, W.S.

Counsel for the Second Parties—C. K. Mackenzie. Agents—W. & J. Burness, W.S.

Friday, June 13.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

GOVERNORS OF GEORGE HERIOT'S TRUST *v.* DRUMSHEUGH BATHS COMPANY.

Superior and Vassal—Entry—Casualty—Composition — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.*), *sec.* 4.

The 4th sub-section of the 4th section of the Conveyancing Act 1874 provides that "no lands shall after the commencement of this Act be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands . . . may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action."

The superior of certain lands granted a charter of confirmation in 1788 con-

firming the disposition of their lands to an incorporation, setting forth the feu-duty and further providing for the payment to the superiors of the sum of £3 sterling in name of composition every 25 years in lieu of all entries and compositions of heirs and singular successors, "so long as the subjects above-mentioned shall remain the property of the said corporation, and till such time as another vassal shall enter" with the superiors.

Held that the superiors were not entitled to demand payment of a casualty of one year's rent of the lands from a successor of the vassal infeft in the lands, and thus impliedly entered with the superiors under the Act of 1874, in respect that they would not have been entitled but for the Act to sue an action of declarator of non-entry against such successor.

This was an action by the Governors of George Heriot's Trust, as immediate lawful superiors of certain lands described in the summons, against the Drumsheugh Baths Company, Limited, in which the pursuers sought to have it found and declared that, in respect of the terms of the charter of confirmation dated 21st April 1788 granted by the Governors of Heriot's Hospital in favour of the Incorporation of Bakers in Edinburgh, in consequence of that Incorporation having ceased to be proprietors of the subjects a casualty, being one year's rent of the lands described, had become due to the pursuers upon 11th November 1887, and was still unpaid, and that the Drumsheugh Baths Company should be decerned and ordained to make payment to the pursuers the sum of £440, 6s., or such other sum as should be found to be one year's rent of the lands.

The pursuers averred—The subjects belonging to the defenders, of which the pursuers were the superiors, were conveyed by David Hutton to the Incorporation of Bakers of Edinburgh by disposition dated 27th August 1767. The Governors of Heriot's Trust granted a charter of confirmation of, *inter alia*, this disposition dated 21st April 1788. After setting forth the feu-duty the *reddendo* clause of the charter proceeded as follows—"As also paying to us and our successors in office, and to the Treasurer of the said Hospital for the use thereof, so long as the subjects above mentioned shall remain the property of the said Corporation, and till such time as another vassal shall enter with the Hospital, the sum of £3 sterling in name of composition at and against the term of Martinmas 1812, and the like sum of £3 sterling at the end of each twenty-five years thereafter, and that in lieu and place of all entries and compositions of heirs and singular successors to the subjects above mentioned during the said period."

The subjects were disponed in 1870 by the Incorporation of Bakers to William Hay in liferent and his son William Home Hay in fee; in 1880 by the trustees for the creditors of Messrs Hay to Edward Blyth, C.E., Edinburgh, and others, in trust for themselves; in the same year by Mr Blyth and his co-trustees to Messrs Watherston, builders; and by the latter to the defenders by disposition dated 21st July and recorded 11th October 1883.

Each of the compositions of £3 falling due in 1812, 1837, and 1862, in terms of the charter of 1788, was duly settled by the Incorporation of Bakers. The last of these payments was for the period of twenty-five years ending at Martinmas 1887.

Before Martinmas 1887 the subjects mentioned in the summons had ceased to be the property of the said Incorporation of Bakers, and the defenders had entered as vassals with the pursuers, the taxation of the compositions provided in the charter of 1788 having previously come to an end on the passing of the Conveyancing Act 1874, when the said Messrs Hay became entered as proprietors under their recorded disposition of 1870 above mentioned. At Martinmas 1887 a casualty, consisting of one year's rent, became payable by the defenders to the pursuers. The amount of said casualty, based on the above rental, as claimed by the pursuers on 23rd July 1888, is £440, 6s., subject to deduction of feu-duty.

The pursuers pleaded—"(1) The subjects libelled having ceased to be the property of the said Incorporation of Bakers, and another proprietor having entered as the pursuers' vassal therein, the entries of singular successors in said subjects are now untaxed. (2) The pursuers, as superiors of said subjects, are entitled to payment of a casualty of one year's rent from the defenders, as proprietors in possession, and the casualty became exigible as at Martinmas 1887 by virtue of the charter of confirmation of 1788."

The defenders pleaded—"(1) The statements of the pursuers are irrelevant and insufficient to sustain the conclusions of the summons."

Sub-section 3 of section 4 of the Conveyancing (Scotland) Act 1874, provides that the implied entry introduced by the previous sub-section "shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice or under the conditions of any feu right for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutem canonem*, and all the obligations and conditions in the feu rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu right have required the vassal to enter or to pay such casualty irrespective of his entering."

Sub-section 4 provides—"No lands shall,

after the commencement of this Act, be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry, according to the now existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses (if any) contained in said decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree, nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same; and the summons in such action may be in or as nearly as may be in the form of schedule B hereto annexed."

On 16th July 1889 the Lord Ordinary (KINNEAR) sustained the first plea-in-law for the defenders as amended, and dismissed the action.

"*Opinion.*—This action is framed in the form prescribed by section 4, sub-section 4, of the Conveyancing Act for the statutory action in lieu of a declarator of non-entry; and there appears to be no other provision of the statute on which it can be supported. The pursuers can take no benefit from the saving clause contained in the third sub-section, because that is applicable only to casualties or feu-duties exigible at or prior to the date of entry; and no casualty was exigible at or prior to the date when it is alleged that the defenders were entered by force of the statute. The defenders deny that they have entered in terms of the statute. But I think it unnecessary to determine whether their plea-in-law to this effect should be sustained, because, assuming that they are well entered, the pursuers' averments are not in my judgment relevant to support the conclusions of the summons.

"The condition on which the action is maintainable under the statute is that 'but for the Act' the superior would have been 'entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands.' But if the Act had not passed, so as to enter the defenders as the pursuers allege, no action of declarator of non-entry could have been maintained against anyone as the successor of the last-entered vassal. When the Act came into force the fee was full by the prior entry of the Incorporation of Bakers. But it is elementary that lands cannot fall in non-entry as long as the fee is full, and therefore 'it is obvious that there can be no place for non-entry where a community or corporation is vassal, for a corporation never dies, and consequently, after seisin is once given to a corporation, the fee must continue full as long as the corporate body subsists—Erskine ii., 5, 43.' It is not alleged that the Incorporation of Bakers is not still a subsisting corporation.

"It is maintained, however, that although the lands be not in non-entry, or in the position which would have been non-entry under the former law, the pursuers are entitled to a casualty by reason of the Incorporation of Bakers having ceased to be proprietors of the subject. There can be no question that a superior may lawfully stipulate for a casualty on every change of ownership. But I do not find such a stipulation in the charter of 1788. It is true that there is nothing in that charter which would enable a purchaser to enter on a conveyance from the Corporation, without payment of a year's rent. But there is no obligation to pay irrespective of entry. And if it could be held that such obligation to pay is either expressed or implied in the charter, that would not enable the pursuers to maintain the present action. Their remedy in that case would be an action for payment founded upon the charter. But the statutory action is to have the effect of and operate as a decree of declarator of non-entry. The decree, therefore, would not be enforceable against the defenders personally as a decree for payment of money; but would enable the pursuers to enter into possession and draw the rents on the assumption, which the statute requires to be made, that the lands have fallen in non-entry and that no one has come forward to take up the fee.

"If the pursuers have a good claim against the defenders as entered vassals in respect of the special conditions of the feu-right, it may be enforced by an action properly laid for that purpose, notwithstanding the dismissal of the present summons."

The pursuers reclaimed, and argued—The effect of the implied entry introduced by the Act of 1874 was that the entry of the Corporation of Bakers was evacuated by the infeftment of their disponees. The taxed entry was only due while the Corporation was entered with the superior—Jurid. Styles (4th ed.), 410. Sub-section 3 of section 4 of the 1874 Act entitled a superior to make the claim here made though the lands were not in non-entry. Sub-section 4 dealt simply with the remedy, and could not derogate from the right given.

The defenders were not called on.

At advising—

LORD PRESIDENT—This action is raised under the authority of the 4th sub-section of the 4th section of the Conveyancing Act of 1874, and it appears to me that the reasoning of the Lord Ordinary on the effect of that sub-section is unanswerable. The provision is that "No lands shall after the commencement of this Act be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands . . .

may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action." . . . . Now it is quite clear that nobody is entitled to bring an action under that sub-section except a superior who would but for the Act be entitled to sue a declarator of non-entry. Now suppose that the Act of 1874 had not been passed, it is quite clear that the superior here could not have raised a declarator of non-entry for the simple reason that the fee was full, and the lands were not in non-entry. The vassal in the lands at the time was the Corporation of Bakers, a vassal which never dies, and therefore there never would cease to be a vassal as long as the Corporation existed. It appears to me accordingly that there is no answer on the terms of the sub-section to the reasoning of the Lord Ordinary.

Counsel for the pursuer, however, presented an argument on part of the 3rd sub-section of the same section of the Act, which it was said was inconsistent with the 4th sub-section, on which the Lord Ordinary founded. The enactment in question is that the implied entry introduced by the previous sub-section "shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties, which may be due or exigible in respect of the lands at or prior to the date of such entry, and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu right for recovering, securing, and making effectual, such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming;" and appended to that enactment is the proviso "that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering." That is a negative provision, but the converse affirmative proposition is necessarily involved in it, and that is, that the superior shall be entitled to demand a casualty as soon as he could by the law in force before the Act or by the conditions of the feu-right.

Now, it seems to me that that sub-section is perfectly consistent with the provision of the sub-section which follows in so far as regards the time at which a superior can demand a casualty by law, that is, the law prior to the Act of 1874. The occasion on which the superior can demand the casualty is when the fee becomes empty and not sooner, and then as regards the other occasion, it arrives when the superior could "by the conditions of the feu-right" have required the vassal to pay such casualty. That depends not on the law prior to 1874, but on the provisions of the feu-contract, and one can understand that a superior and vassal may contract by feu-contract or by feu-charter which the vassal accepts that on the occurrence of some event a casualty shall be due though the fee is full. For example, we have seen it contracted that change of ownership shall be the occasion for a new entry or payment of composition. To give effect to such a stipulation it would not be necessary to resort to the remedy given by the 4th sub-section at all. The action would be one at common law, on contract, and not under the 4th sub-section. We had an instructive instance of that recently in the case of *Dick Lauder* v. *Thornton*, January 23, 1890, 17 R. 320. The action there was at common law to enforce a particular stipulation in the feu-contract that a casualty of the nature of composition should be held payable on a certain event though no new investiture was required at all. I think therefore the alleged inconsistency between sub-sections 3 and 4 has no existence, and that the 4th sub-section must apply to and regulate every action brought under its authority.

The present action confessedly would have no place but for the provisions in the 4th sub-section, and therefore I think we should adhere to the Lord Ordinary's decision.

LORD SHAND and LORD ADAM concurred.

LORD M'LAREN—From the facts of the case before us there is no question raised in this case except with regard to the construction of the statute, and a consideration of the statute can, I think, lead to no other conclusion than that at which the Lord Ordinary has arrived.

If the defenders had not taken infeftment, beyond all question the lands would not have been in the state in which a casualty could have been demanded, because the fee would have been full. As the defenders took infeftment, however, and were impliedly entered thereby under the statute, it is contended that they have thereby been rendered liable to a casualty. It seems to me that the statute, while entering every disponee who is infeft, and thus rendering it impossible that the lands should be in non-entry, established a hypothetical case of non-entry for the purpose of establishing the liability of vassals for casualties, but the hypothetical non-entry is just the real non-entry of the older law, and therefore we have only to consider what would have been the rights of the superior if the Act had not been passed, and in that case I cannot doubt that the fee would have been full, and no casualty would have been exigible by the superior, because till the dissolution of the Corporation of Bakers or the entry of their disponees the fee would have remained vested in the Corporation, and therefore the right of the superior to have a vassal would have been fully satisfied.

On these grounds I agree that we should adhere to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Comrie Thomson—Lorimer. Agent—John Tawse, W.S.

Counsel for the Defenders and Respondents—H. Johnston—Dundas. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, June 13.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EVANS AND OTHERS *v.* HARKNESS.

Succession—Testament—Testamentary Provisions—Deed of Discharge—Modification of Testamentary Provisions by Deed of Discharge—Obligation on Heir to Sell House and Divide Proceeds "whenever required"—Claim for Back Rents against Heir's Representative.

A testator directed his executors to pay the annual income of half his moveable estate to his widow, who also was to have a power of apportionment over the capital of this half. The income of the other half and the capital if necessary was to be expended equally in the maintenance and education of each of his children till they respectively attained the age of twenty-one, when their shares were to be paid to them. The testator further declared it to be his intention by separate deed to provide that his wife should have the liferent use of the house in which he lived, and to provide for its sale at her death, so that the proceeds should be equally divided among his children in manner before mentioned, and declared that should he omit to carry this intention into effect and his eldest son succeed as heir-at-law, and refuse to account for the value to the other children, such son should forfeit all benefit or advantage under the will.

The testator was survived by a widow and two children, a son and a daughter. Before the children came of age the whole of the capital of the shares of their moveable estate had been expended in their maintenance and education. After the youngest child had come of age, the children along with their mother granted a deed of discharge, in which after reciting the provisions of the testament, and declaring that the whole of the executry funds had been paid to the granters of the discharge entitled to receive them, they discharged the testator's executors of all their intromissions. The deed further provided that the son should be bound "whenever required" to make up a title to the house as heir of his father, and to sell and dispose of the same in terms of the directions in the will.

After the mother's death the son, and after his death his widow, remained in beneficial possession of the house for twenty-six years before a demand was made by the children of the daughter for payment of their share of the value of the house.

Held that they were not entitled to demand from the son's widow the back rents of the house, in respect that under the deed of discharge the son had a right to the beneficial possession of the house till required to sell it in terms of the will.

Bona fide Consumption.

Observed by Lord Shand that there might be room for a plea of *bona fide* consumption where a person had possessed on a title which might be reasonably construed as giving him the right to possession.

Opinion per Lord M'Laren that the question of *bona fide* consumption could only arise between parties contending on competing titles.

Mr Thomas Harkness, writer in Dumfries, died on 31st October 1832. He was survived by a widow Mrs Janet Harkness and two children, William and Catherine. Another son Thomas James Harkness, who was blind, was born after his father's death on 29th November 1832. By his last will and testament, dated 24th August 1831, and recorded 15th May 1833, Thomas Harkness, "in the second place, directed his executors to allow his wife, Mrs Janet Comrie or Harkness, but for her liferent use only, his household furniture, including plate and linens of all kinds. In the fifth place, he directed his executors to invest the residue of his moveable and personal estate and effects, and to pay one-half of the annual income to his wife during all the days of her life for her own use and support, and the other half was to be expended in the upbringing, maintenance, and education of all his children, and that as equally as circumstances would permit, until they respectively arrived at the age of twenty-one years complete, when their several shares were to vest and become payable to them. In respect of the other half of his estate, which was to be liferented by his wife as aforesaid, he empowered her to divide and proportion one moiety thereof among his children as she might think proper and direct by any writing under her hand, and failing such appointment, then he directed that the same, as well as the other moiety of said half, should at her death vest and be equally divided among all his children, share and share alike, and be paid to them as they respectively attained the age of twenty-one years complete. The settlement then proceeds thus:—'Further, it is my intention by a separate deed to provide my said dear wife in the liferent of the house in which I now live, or such other as may belong to and be occupied by me at my death, . . . and to provide for the sale there-