relevant to his defence, but a fact which did and might exist independent and separate altogether from the innuendo in the pursuer's issue. In these circumstances to reject the evidence tendered by the defender was, I think, wrong. I cannot help observing that the present state of our law, as regards what may or may not be proved by a defender without a counter issue is not satisfactory. A defender should, in my opinion, be allowed to prove anything that is relevant to his defence of which he has given due notice on his record.

I agree, further, in what Lord Young said, that this case, both as regards the first and second issue, was a case of privilege, and in that view I think there was no proof to support the verdict which the jury returned upon the first issue.

LORD JUSTICE-CLERK—At the time of the trial of this case this question came up, and it was certainly one of very great importance. In most cases before juries, objections taken to points of evidence do not really or seriously affect the main question of the case upon record, but this one undoubtedly did. I had an argument before me at the trial which I must say was a very different argument from that which we have had to-day—very meagre compared with what has been put before us to-day—although that does not make any difference to my responsibility in the matter. The cases cited before me seemed to point in the direction of the judgment which I gave, and no case was brought before me pointing in any other direction, although certainly there are some statements in the different cases which are rather confusing and very difficult to expiscate. But had the case of *Shaw* v. *Morgan*, which has been brought up to-day, been brought before me, and had I seen that this matter was dealt with by my learned brother Lord Young, with the assent of his brethren in the Division at that time, I do not think I would have given the judgment upon this objection which I did. I am satisfied—I say it with regret—that I erred in giving the judgment which I did. It is some satisfaction to know, and it has been said by your Lordships—and upon that I agree most emphatically—that whether this case had been rightly decided by me upon this question, or whether your Lordships sustained the bill of exceptions or not, still this verdict could not have stood, because I am very clearly of opinion with your Lordships that the verdict upon the first issue is not a verdict which is in accordance with the evidence, and on the same grounds which have been stated by your Lordships. The result will be that the bill of exceptions will be sustained and a new trial granted.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Allow the exceptions for the defender: Set aside the verdict and grant a new trial: Find the defender entitled to the expenses of the discussion in the Summar Roll, including the expense of preparing the bill of exceptions, and remit to the Auditor to tax the same and to report: *Quoad ultra* reserve the question of expenses, and decern."

Counsel for the Pursuer—Comrie Thomson—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Jameson—Cullen. Agents—David Dougall, W.S.

Wednesday, October 23.

FIRST DIVISION.

TOD AND ANOTHER, PETITIONERS.

Trust—Non-Gratuitous Trustee—Petition for Removal—Trusts (Scotland) Amendment Act 1891 (54 *and* 55 *Vict. c.* 44), *sec.* 2.

The Trusts (Scotland) Amendment Act 1891 (sec. 2) interprets the expression "the Court" to mean "any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried," and contains certain provisions (sec. 8) as to the removal of incapacitated trustees on application to the Court of Session.

A petition was brought before the First Division which contained no reference to the Act of 1891, but in which the Court were asked, in the exercise of their *nobile officium*, to remove an incapacitated trustee. *Held* that the Court, having jurisdiction to deal with the question of his removal, were bound to give effect to the provisions of the Act of 1891, and were not limited to their discretionary powers at common law.

The Trusts (Scotland) Amendment Act 1891 (54 and 55 Vict. c. 44) by sec. 1 enacts that this Act and the previous Trust Acts "may be cited as the Trusts (Scotland) Acts 1861 to 1891, and shall be read and construed together." Sec. 2 enacts—"For the purposes of this Act . . . the expression 'the Court' shall mean any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried." Sec. 8 enacts—"In the event of any trustee being or becoming insane or incapable of acting by reason of physical or mental disability . . . such trustee, in the case of insanity or incapacity of acting by reason of physical or mental disability, shall . . . on application, in manner hereinafter mentioned, by any co-trustee or any beneficiary in the trust-estate, be removed from office upon such evidence as shall satisfy the Court of the insanity, incapacity, &c. . . . of such trustee. Such application in the case of a *mortis causa* trust may be made either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued; and in the case of a marriage-

contract, may be made either to the Court of Session or to the Sheriff Court of the district in which the spouses are or the survivor of them is domiciled; and in all other cases shall be made to the Court of Session."

A petition was presented in July 1895 to the First Division of the Court of Session, by James Tod, 16 Royal Terrace, Edinburgh, and J. B. M'Intosh, S.S.C., Edinburgh, the sole surviving trustees acting under the trust-disposition and settlement of the late John Marshall, S.S.C., Edinburgh, praying the Court to authorise Mr Tod to resign, or alternatively to remove him from office. The petition set forth that Mr Tod, not being a gratuitous trustee, could not resign without the sanction of the Court, but that, even if such sanction were given, he was incapable from physical and mental disability of attending to any business, and a medical certificate to that effect was produced.

Answers were lodged by one of the beneficiaries under the trust, objecting to the petition being granted until the other trustee had made arrangements for the assumption of suitable persons as new trustees.

Argued for the petitioners—When the petition was lodged it was thought that Mr Tod could have resigned upon receiving authority to do so, but his health now precluded him from executing any deed whatever. Although no reference was made in the petition to the Trusts Act 1891, it was competent for, and indeed incumbent upon, the Court, before whom the present petition had been properly presented, to have respect to the provisions of that Act, and in terms of section 8 to remove Mr Tod.

Argued for the respondent—It was incompetent for the Court to remove Mr Tod under this petition, which made no reference to the Trusts Act 1891, and which was an application to the Court for the exercise of their *nobile officium*. If advantage were to be taken of the Trusts Act 1891, a petition should have been presented to the Junior Lord Ordinary. This appears from section 16 of the Trusts (Scotland) Act 1867, which provides that applications under that Act are to be brought, in the first instance, before the Lord Ordinary. Section 1 of the Act of 1891 provides that that Act and the Act of 1867 are to be construed together, and section 16 of the earlier Act therefore applies to applications under the later Act.

At advising—

LORD PRESIDENT—The Trusts Act of 1891 gives certain powers to and imposes certain duties upon the Court, and then it says in section 2 that "the expression 'the Court' shall mean any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried." Now, we have here an application which *prima facie* looks to be founded on common law, for it appeals to the *nobile officium* of the Court, upon grounds which preclude all idea of the application being disregarded as foreign to that jurisdiction. Accordingly this Court is competent to deal with, and is vested in, that application. That being so, it seems to me that this Court is affected by the alteration of law set out in the Act of 1891 in this regard, and that it is impossible for us to ignore the prescribed duty which is imposed on the Court by that Act—the duty which is imposed upon any competent court dealing with the question of the removal of a trustee. The Legislature has really relieved the Court of the duty of exercising any discretion in the matter, and has bidden the Court remove the incapacitated trustee. I am therefore prepared to grant the prayer of the petition.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court granted the prayer of the petition and removed the trustee as craved.

Counsel for the Petitioners — Wilson. Agents—Mylne & Campbell, W.S.

Counsel for the Respondent — Chree. Agents—John Clerk Brodie & Company, W.S.

Wednesday, October 23.

FIRST DIVISION.

WATT AND OTHERS, PETITIONERS.

Trust — Charitable Bequest — Petition for Scheme by Trustees Named but not Vested in Trust—Competency—Title to Sue.

A testator by trust-disposition and settlement, dated 1879, left a sum of £3500 to be held in trust by the minister and kirk-session of a church for the purpose of applying the free income in maintaining a male missionary of not less than fifty years of age, and a female missionary of not less than forty years of age. In 1895, when the sum fell to be paid, the minister and kirk-session, before accepting the trust, presented a petition to the Court to have the scheme altered to the effect of authorising them to expend £1000 in the erection of a mission-hall, and to use the income of the residue of the bequest in maintaining one male missionary without restriction as to age. The church had no mission-hall, and the income of the capital was, in the petitioners' view, insufficient for the payment of two suitable missionaries. They further stated that their acceptance of the trust would depend upon the petition being granted.

Held that the petitioners, not having accepted the trust, had no title to sue, and that the petition was incompetent.

Opinion that, apart from the question of competency, no sufficient reasons had been stated for sanctioning such a departure from the scheme laid down by the testator as was proposed.

The late William Hunter, merchant, South Bridge, Edinburgh, who died on 26th July