required a good deal more specification in the claimant's averments. But I see no reason to doubt the relevancy of the claimant's other point, that namely as to the purpose for which and the circumstances under which the document was delivered. It seems to me that that must be matter for proof, and there being to be a proof, I do not see my way to exclude inquiry as to the whole circumstances under which the document was asked or was offered and was signed and delivered. I had a large citation of authorities on this matter, and when the facts are ascertained some of these authorities may be important. But I abstain from saying anything further at present, because I consider it necessary that the exact facts should be first ascertained. I shall accordingly find that on its just construction the document set forth in condescendence 7 constitutes a discharge of the claimant John Scott's claim to legitim, but in respect that he denies that the said document was an operative and binding document I shall allow him a proof of his averments in statement 3 of his claim, and to the other claimants a conjunct probation."

The Lord Ordinary pronounced this interlocutor:—

"Finds that on its just construction the document set forth in condescendence 7 constitutes a discharge of the said John Scott's claim to legitim, but in respect that the said claimant denies that said document is an operative and binding document allows him a proof of his averments in statement 3 of his claim, and to the other claimants a conjunct probation," &c.

Counsel for the Pursuers and Real Raisers—M. P. Fraser. Agent — D. Hill Murray, S.S.C.

Counsel for the Claimant John Scott—Clyde, K.C.—Wilton. Agent—C. Clarke Webster, Solicitor.

Counsel for the Other Claimants—Salvesen, K.C.—J. Harvey. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, November 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

SUTHERLAND *v.* TAIT'S TRUSTEES.

Superior and Vassal — Casualty — Composition—Implied Entry—Heir of Investiture Impliedly Entered Still Alive—Blench Holding—Effect of Non-Payment of Relief — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

When the heir of the investiture, impliedly entered under the Conveyancing Act 1874, has disponed the subjects to a singular successor without having paid relief-duty, the disponee, on taking infeftment, is liable in a composition.

Superior and Vassal—Statute—Retrospective Effect—Entry of Trustees—Conveyancing (Scotland) Acts (1874 *and* 1877), *Amendment Act* 1887 (50 *and* 51 *Vict. cap.* 69), *sec.* 1.

The provisions of section 1 of the Conveyancing (Scotland) Acts (1874 and 1877), Amendment Act 1887, are not applicable to the case where trustees have entered with the superior prior to the Conveyancing (Scotland) Act 1874.

Superior and Vassal—Confirmation—Presumption of Payment of Casualty.

Opinion (*per* Lord Kinnear) that when singular successors obtained an entry from the superior prior to the Conveyancing Act 1874 there is a presumption that any casualty which might be due on their entry was duly paid.

This was an action of declarator and for payment of a casualty at the instance of James Sinclair Sutherland, immediate lawful superior of the lands of Lochend, in the county of Caithness, against George Tait Anderson, William Sutherland Anderson, and David Keith Murray, all residing in Thurso, as trustees acting under the trust-disposition and settlement and relative codicil granted in their favour by John Tait, Esquire, of Lochend, residing at Shrubbery Bank, Thurso, dated said trust-disposition and settlement 16th, and relative codicil 17th, both days of May 1899, and both registered in the Books of Council and Session at Edinburgh on the 15th day of June 1899, proprietors of the said lands of Lochend, concluding for payment of a casualty of composition amounting to £434, being one year's rent of the said lands of Lochend. These lands were held in free blench farm for payment of an annual duty of 1d. Scots, if asked allenarly. The entry of singular successors was untaxed.

The following narrative of the facts in the case is taken from the opinion of the Lord Ordinary (KYLLACHY)—"In this case the facts are a little complicated, but the substance of the position seems to be this—The lands of Lochend, now belonging to the defenders, were at his death in 1855 the property of the late Mr W. J. Sinclair of Freswick. By his trust-disposition and settlement Mr Sinclair disponed the lands to trustees for the purpose (after the payment of debts, &c.) of being conveyed to his heirs-at-law, viz., Miss Sinclair, his sister, and Mr Ferryman, the son of a deceased sister, equally between them. The trustees took infeftment and applied for and obtained an entry from the superior by Charter of Adjudication in Implement and Confirmation; and on that entry they paid a composition. In 1871 they denuded of the trust and conveyed the lands to Mr Ferryman and to the testamentary trustees of Miss Sinclair, who had by that time died. Miss Sinclair's trustees held her estate, subject to certain trust purposes, for Mr Ferryman, who was Miss Sinclair's heir-at-law; and in 1877 they conveyed to him her half of the lands in question. Mr Ferryman was thereupon vested in the whole lands; and it may be taken that he was impliedly entered with the superior,

as regards his original half, on the passing of the Conveyancing Act of 1874, and, as regards Miss Sinclair's half, in 1877, when he recorded the disposition from Miss Sinclair's trustees. He did not, however, pay any casualty to the superior; and, so standing his title, he sold in 1899 to the present defenders, who upon his conveyance were in that year infeft, and became impliedly entered with the superior."

Mr James Mill, the last survivor of the trustees of Mr W. J. Sinclair of Freswick, who were entered by the superior's charter in 1856, died in 1873.

The pursuer pleaded, *inter alia*—"(2) The defenders as singular successors infeft in the lands of Lochend described in the summons, are, in consequence of the death of the said James Mill, and of no casualty having been paid therefor since his death, and of their implied entry under the 4th section of the Conveyancing (Scotland) Act 1874, liable to the pursuer as superior of the lands of Lochend in payment of composition."

The defenders pleaded—"(1) The statements of the pursuer are irrelevant and insufficient to support the conclusions of the summons. (2) The defenders not being due the composition demanded by the pursuer are entitled to absolvitor. (3) The defenders being in any event not liable except in relief-duty, should be assoilzied. (4) In respect of the provisions of the Act (50 and 51 Vict. cap. 69), sec. 1, the defenders are entitled to absolvitor, and, *separatim*, are not in any event liable for more than composition in respect of the one-half of the subjects which formerly belonged to Miss Janet Sinclair Trail Sinclair."

The Conveyancing (Scotland) Act 1874 enacts:—Section 4, sub-section 2—"Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate Register of Sasines duly entered with the nearest superior whose estate of superiority in such lands would according to the law existing prior to the commencement of this Act have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." . . .

Sub-section 3—"Such implied entry 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;" . . . "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."

The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 enacts:—Section 1—"When by a trust-disposition and settlement, or other *mortis causa* writing, any heritable estate is conveyed to trustees for behoof of or with directions to convey the same to the heir of the testator, whether forthwith or after the expiration of any period of time not exceeding twenty-five years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate, the trustees under such trust-disposition and settlement or other *mortis causa* writing shall not, upon their entering, or by reason of their having prior to the date of this Act entered with the superior, by infeftment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees, and the heir upon thereafter entering with the superior, by infeftment or otherwise, shall not be liable for any further casualty in respect of his entry, but whether the heir shall have been entered or not another casualty shall become exigible upon his death in the same manner as if he had been duly entered with the superior."

On 30th December 1901 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, having considered the cause, finds that the pursuer is entitled to a casualty of a year's rent of the lands mentioned in the summons, estimated at the date of the defenders' implied entry on 9th October 1899: With this finding, appoints the cause to be enrolled for further procedure, and grants leave to reclaim."

Note—[*after stating the facts, ut supra*]—"The superior now demands from the defenders a casualty of a year's rent on the ground that the lands have (apart from implied entries under the statute) been in non-entry since the death of the last survivor of the trustees who took an entry in 1856; and that the defenders being now entered, and being strangers to the former investiture, are liable for a composition.

"The defence, as I understand it, is (1) that as the law stood prior to the Conveyancing Amendment Act of 1887, the defenders' author, Mr Ferryman, was, as heir under the old investiture (that is to say, the investiture under which Mr Sinclair of Freswick held at his death in 1855) entitled to an entry on payment of relief, and that they as his disponees are only liable in the casualty for which he was liable; (2) that assuming the contrary, the Act of 1887 had the effect of putting Mr Ferryman in the same position as if, on his implied entries in 1874 and 1877, he had paid a casualty of relief, and had so excluded the superior's claim for another casualty until his (Mr Ferryman's) death.

"There was a full and able argument in the Procedure Roll, including a full citation of authorities relating (1) to the effect on the superior's right to casualty of conveyances to trustees for behoof of the heir of the investiture; (2) to the defenders' right to claim the benefit of their author's rights as against the superior; and (3) to the principles applicable in considering the retrospectiveness or non-retrospectiveness of statutes like the statute of 1887—

Stuart v. *Jackson*, 17 R. 85; *Duke of Atholl* v. *Stewart*, 17 R. 724; *Duke of Atholl* v. *Menzies*, 17 R. 738; *Rossmore's Trustees*, 5 R. 202; *Lamont* v. *Rankine*, 6 R. 739.

"I have come to the conclusion that the pursuer is entitled to have from the defenders a casualty of composition in respect of their (the defenders') implied entry in 1899, and that the year's rent falls to be taken when their implied entry took place and the casualty due under it became payable.

"I assume in the defenders' favour that until 1899 there was no change in the old investiture; that the trusts referred to were mere burdens on the rights of the heirs-at-law; and that by consequence Mr Ferryman might have ignored the trust conveyances and made up his title by service—obtaining in 1871 an entry to his original half of the subjects on payment of relief-duty, and paying afterwards in 1877 a similar relief-duty in respect of his implied entry in Miss Sinclair's half. I assume that this would have been his right at common law, and apart altogether from the Amendment Act of 1887. And that being so I assume, by consequence, that if he (Mr Ferryman) had thus obtained an entry or entries, express or implied, and paid therefor relief-duty as was appropriate, the superior could have had no claim against him or against his disponee until his death. That I think would probably have been the result at common law—that is to say, at common law and under the Act of 1874. At all events I am prepared so to assume.

"But I fail to see how, at least as the law stood before 1887, all this could help the defenders. Mr Ferryman did not obtain any express entry as heir or otherwise, nor did he pay any casualty in respect of his implied entries. Accordingly when he displaced the old investiture and created a new investiture by his disposition to the defenders and by their infeftment and implied entry in 1899, there ceased to be thenceforward any vassal in existence who had paid a casualty, and during whose live therefore no further casualty was payable. In other words, the defenders being liable sooner or later for composition in respect of their entry under the new investiture, there is nothing to postpone their liability to pay that composition; such postponement being only pleadable when there is a previous vassal alive who has either been expressly entered or being impliedly entered has paid a casualty — *Stuart* v. *Hamilton*, 16 R. 1070. All this seems quite clear. And if it is suggested that Mr Ferryman can still demand an entry as heir under the old investiture, and give the defenders the benefit of that entry, I am afraid it is also clear that that is exactly what has been held to be impossible in the series of decisions beginning with *Rossmore's Trustees* and ending with *Lamont* (7 R. (H.L.) 90). The old investiture is displaced by the defenders' entry, and no title can now be made up upon it.

"The defenders' case, therefore, if they have a case, must rest upon the Act of 1887, which provides, stated shortly, that where an estate is conveyed *mortis causa* to trustees for behoof of the testator's heir, the trustees shall not upon their entering, or by reason of their having prior to the Act entered with the superior, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession: 'and the heir upon thereafter entering with the superior, by infeftment or otherwise, shall not be liable for any further casualty in respect of his entry, but whether the heir shall have been entered or not, another casualty shall become exigible upon his death in the same manner as if he had been duly entered with the superior.'

"The question is, whether in virtue of this enactment of 1887 the payment of a casualty (of composition) by the trustees of W. J. Sinclair in 1856 put Mr Ferryman in the position of requiring to pay no further casualty during his life, and puts the defenders in the position of having to pay no further casualty until his (Mr Ferryman's) death.

"I have given the defenders' argument on this point full consideration, but I have not been able to entertain it. The Act of 1887 may be retrospective to the extent of making it immaterial whether the entry for which the trustees are supposed to be still 'liable' is an entry before or after the passing of the Act. But I can discover nothing to make the Act retrospective in any other sense or to any other effect. On the contrary, it appears to me that the hypothesis of the Act plainly is that the trustees to whom it applies are persons who at its date are, or may subsequently become, liable for the casualty. And that being so, two things, in my opinion, follow —(1) that the enactment cannot apply to trustees who, having ceased to be owners, and being only past owners, cannot be 'liable' in any casualty, and (2) that similarly it cannot apply to a casualty which at the date of the Act has been paid, and for which, therefore, 'liability' is impossible.

"On the whole matter, therefore, I think the pursuer is entitled to have it found that he is entitled to a casualty of a year's rent, estimated at the date of the defenders' implied entry on 9th October 1899. As to the precise terms of the decree, and as to the ascertainment of the amount, the case will have to be enrolled for further procedure."

The defenders reclaimed, and argued—It was clear that had Mr Ferryman paid the relief-duty of 2d. before disponing to the defenders no composition could have been demanded during Mr Ferryman's lifetime. The case made by the pursuer was that because Mr Ferryman had failed to pay 2d., which had never been demanded, therefore the defenders must pay a year's rent of the subjects long before they would otherwise have been compelled to do so. So inequitable a result should not be sustained unless it was clearly the result of the provisions of the Conveyancing Act 1874. It was not necessary to arrive at that conclusion. A casualty of relief in a blench

holding was merely a duplicand of the blench-duty, not a separate and independent prestation due by the vassal—Ersk. ii. v. 49; Bell's Prin., p. 716. But the blench-duty here, as in other blench-holdings, was only payable conditionally. The condition was that it should be asked — *si petatur tantum*. It had long been settled that the meaning of that condition was that the blench-duty was only payable if it was asked within a year from the date when it became due—Ersk. ii. iv. 7; Bell's Prin., p. 692. But when you had to pay a duplicand of a conditional payment the payment of the duplicand was due under the same condition. Therefore, as Mr Ferryman had not been asked for payment of relief-duty within a year after it became due it was then no longer exigible, and, not being exigible, must be held to have been paid. If so, no further casualty could be demanded during his life. (2) Even assuming that the defenders would be liable under the law prior to the Conveyancing Amendment Act 1887, the case fell within the provisions of section 1 of that Act (quoted *supra*), because Mr Ferryman was the heir for whom the trustees held when they took entry in 1856. That section provides that in these circumstances no further casualty is due until the death of the heir, if the trustees on entry paid a casualty. It must be presumed that they did so, as the superior granted them a charter. The Act of 1887 was retrospective to the extent of applying to a case where the trustees were entered before it came into operation. The statement in the rubric in *Stuart* v. *Jackson*, November 1, 1889, 17 R. 85, to the effect that the Act was not retrospective, was not correct.

Argued for the respondent—The defenders were singular successors, and must show why they should not like other singular successors be liable for a composition. Apart from the Act of 1887, the argument was that a relief-duty was only exigible if asked for within a year. But a relief-duty, though estimated as a duplicand of the blench-duty, was entirely different, and the character and conditions as to payment of the blench-duty were not applicable to it. It was exigible at any time. (2) Even if the circumstances of the present case fell within the scope of section 1 of the Conveyancing Amendment Act 1887, that Act was not retrospective and did not apply to the case of trustees who were entered prior to the Act of 1874—*Corporation of Edinburgh* v. *Irvine's Trustee*, July 1, 1902, 39 S.L.R. 737; *Stuart* v. *Jackson*, *cit. supra*. The 1887 Act was meant to meet the hardship which might result if the trustees were impliedly entered under the Act of 1874. In case of entry before that Act the result of entry depended on common law.

At advising—

LORD KINNEAR—The question in this case is whether the defenders are liable to their superior in a casualty of a year's rent of certain lands in Caithness by reason of their implied entry on 9th October 1899. The facts are very clearly stated by the Lord Ordinary. The lands were, at his death in 1855, the property of the late Mr Sinclair of Freswick. By his trust-disposition and settlement Mr Sinclair disponed the land to trustees for the purpose, after payment of debts, of being conveyed to his heirs-at-law, viz., Miss Sinclair his sister and Mr Ferryman the son of a deceased sister, equally between them. The trustees took infeftment, and applied for and obtained an entry from the superior by charter of adjudication in implement and confirmation, and on that entry they paid a composition. Both parties admit the accuracy of this statement, except as regards the last sentence which the reclaimers dispute, because they say there is no evidence that a composition was paid. We have no concern in this case with the terms on which the trustees entered. But since the point has been raised, I may say that if it were necessary to decide it I should be disposed to hold with the Lord Ordinary that the charter itself is conclusive evidence of payment. Before 1874 adjudgers could not enter with the superior otherwise than on composition, and the presumption of law is that the terms of the entry which they certainly obtained were settled in accordance with the legal rights of superior and vassal. But all that it is material to observe for the present purpose is that the trustees were in fact duly entered, and that no change had taken place in the investiture so created until the passing of the Conveyancing Act of 1874.

In the meantime, however, Mr Sinclair's trustees had denuded of the trust, and in 1871 had conveyed the lands to Mr Ferryman and to the testamentary trustees of Miss Sinclair, who was then deceased. Miss Sinclair's trustees were directed after payment of debts and certain legacies to convey and make over the residue to Mr Ferryman, who was her heir-at-law, on his attaining the age of twenty-five, and in performance of that duty they conveyed to him her half of the lands in question in July, and their disposition in his favour was recorded on the 19th of October 1877. When the Act of 1874 therefore came into operation the persons infeft in the lands, and so entered with the superior by force of the Act, were Mr Ferryman and the trustees of Miss Sinclair, and in 1877 the trustees were displaced by the infeftment of Mr Ferryman in their half as well as his own, and he thereupon became the sole vassal vest and seised as of fee in the entire estate. But by that time the lands had fallen into non-entry, or into the position which would have been non-entry under the old law, in consequence of the death in June 1873 of Mr James Mill, the last survivor of the trustees entered under the superior's charter in 1856. On the passing of the Act of 1874, therefore, the superior might have claimed a casualty from Mr Ferryman and Miss Sinclair's trustees, who then held the lands *pro indiviso*, and having made no such claim he might have demanded a casualty in 1877 from Mr

Ferryman as the only entered vassal. But he made no claim against either, and consequently no casualty has been paid for the lands since the death of Mr Mill in 1873. He now therefore brings his action against the defenders as the proprietors who are now infeft, and who have entered with him by force of the statute. They hold by virtue of a disposition by Mr Ferryman in favour of John Tait, merchant in Thurso, and a trust-disposition in their own favour, on which they were infeft by recording a notarial instrument in October 1899; and the pursuer's demand for a casualty of a year's rent from vassals in that position seems at first sight to be unanswerable. He is entitled to this action for a casualty under the statute, because but for the statute he would have been entitled to sue a declarator of non-entry; he has not brought his action sooner than he could have brought his declarator under the old law, because the last entered vassal died in 1873. The action is properly brought against the defenders because they are the persons actually in right of the land, the intermediate entries make no difference to the superior's right, because no implied entry can be pleaded in defence to the statutory action, and the casualty payable is composition and not relief, because the defenders are not the heirs of the last investiture, but singular successors after a series of transmissions.

It is maintained, however, that the defenders are only liable for relief-duty on two grounds. The first is rested on a somewhat complicated argument which, so far as I have been able to follow it, comes to this—If a claim had been made against Mr Ferryman he would have been entitled, on the authority of *Stuart* v. *Jackson*, to enter for relief-duty, because the various trust-dispositions upon which he actually made up his titles involved no disinherison but were mere temporary burdens on his right as heir, so that notwithstanding the existence of the trusts he might have completed a title of service first to his own half of the estate in 1871, and afterwards to Miss Sinclair's half in 1877. But the lands are held in free blench farm for payment of a penny Scots if asked allenarly, and the relief-duty payable by an heir is double the feu-duty. But a feu-duty payable *si petatur tantum* must be exacted within the year for which it becomes due, and as this is said to be an inherent quality of the feu-duty it must also be an inherent quality of the relief, which is double the feu-duty, and therefore as the pursuer failed to demand a casualty from Mr Ferryman within a year of the death of Mr Mill, or within a year after the passing of the Act of 1874—for I am not sure which is the date preferred by the argument—he must be held to have discharged his claim for a casualty on Ferryman's entry, and is thus in exactly the same position as if he had made his demand and Mr Ferryman had paid it, and if that had been done no further casualty could have been demanded during Mr Ferryman's life. The defenders are therefore in the same position as if their author, who is still in life, had paid a casualty on entry, or as if he had been duly entered under the old law and nothing had occurred since to vacate the fee. This is the first argument, and in the mere statement of its successive propositions it is evident that there is no logical connection whatever between them. Because the amount of the relief-duty is fixed by custom at double the amount of the feu or blench-duty as the case may be, it by no means follows that the legal character or, as the reclaimer's counsel put it, the inherent quality of the two payments are identical. The truth is that in their legal character they are entirely different. The one is the annual return for the lands, and the superior has a direct personal action to enforce payment of the sum due in each year. The other is the consideration which the vassal on entering gives to the superior for receiving him, and under the old law the superior recovered payment of it not by any personal action against the vassal but by withholding a charter until it was paid. The liability, therefore, always arose on the vassal's demand and not upon the superior's, and there was no room for the plea that it had fallen into arrear and was irrecoverable by reason of its not having been demanded within a year, because the right of the vassal's heir to a renewal of the investiture was not cut off by delay to apply for an entry, and therefore his liability for a casualty was not cut off either, because the right and the liability were coincident. The vassal might stand out unentered until he was compelled to come in by the superior's declarator or forfeit his estate, and when he did come in, after whatever delay, he had to pay relief or composition as the consideration for the superior's recognition. It seems to me, therefore, that to say that a casualty of relief is of the same nature and subject to the same conditions as a blench-duty payable *si petatur tantum* is to use words without meaning. The Act of 1874 makes no difference, except that it gives the superior an action for payment as a counterpart of the benefit which it confers upon the vassal by entering him at once without the superior's intervention. The superior must bring his action against the vassal in right of the lands, and he cannot bring it during the lifetime of a previous vassal who has paid a casualty on entry. But although the conditions of procedure for enforcing the liability are altered in this way, the legal character and ground of the liability are still the same. It is said to be unreasonable that a superior, who must have been content with an illusory duty, if he had made his claim against the disponer, should by postponing the claim enable himself to recover a year's rent from the disponee. But that is just the difference between an heir and a singular successor, and it is perfectly well known to every purchaser of land. I cannot see that this involves any special hardship in the present case. A purchaser must be assumed to know the liabilities which in the ordinary course of things will attach

to the right he is acquiring, and to take them into account in estimating the price he can afford to pay, if he cannot provide against them otherwise. In the present case the purchaser must have known that he would be liable for a casualty, as the Lord Ordinary says, "sooner or later." If he desired to postpone that payment until the death of the vendor, it was perfectly open to him to stipulate that the latter should make payment of the relief-duty, and so put things in the same position as if he had been duly entered under the old law. If he failed to do so the superior is not responsible for that omission. The result is that the trustees have no answer to the demand except that Mr Ferryman was entered by implication under the statute, and the statute provides that that shall not be a good answer.

2. The second ground of defence is that under the Act of 1887 no casualty will become exigible until the death of Mr Ferryman as heir of the last investiture, because Mr Sinclair's trustees, who were entered in 1856, held for behoof of the truster's heir. On this ground also I agree with the Lord Ordinary. I think the Act has no application to transactions carried out and completed under the law in force before 1874, by the entry of trustees under a charter from the superior. The legal effects of such entry were perfectly fixed and indisputable long before the Act of 1887 was passed, and I see nothing in the statute to alter them. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD ADAM concurred.

LORD M'LAREN — I have had serious doubt about the decision to be given in this case, but on the best consideration I have been able to give to it I think the legal considerations developed by Lord Kinnear in his judgment ought to prevail over the equitable considerations which would obviously lead to a different conclusion. My doubt arose upon the first line of defence founded upon the argument that an illusory feu-duty or casualty is not intended to be exacted, and that it ought to be held as paid. The name "blench-holding" rather suggests this construction. Under the older feudal law a superior could not have brought a declarator of irritancy *ob non solutum canonem* because a blench-duty of one penny Scots had run into arrear, and this on the principle of the common law, which after all is only common sense, that a man is not to be deprived of his property because he has failed to make an illusory payment—that is, to satisfy a condition of the holding which the superior has no interest to enforce.

It was argued that by a reasonable extension of this doctrine all payments due by way of relief or other casualty of an illusory nature should be held as paid if not asked for and refused. The argument has much to recommend it. At the same time there is a difficulty in extending the common law to this effect, for this ought to have been done by statute, but it is not done by the Act of 1874, which enters the vassal automatically, and I do not see my way to make a rule infringing on the statutory rights of a superior. The question is by no means confined to blench-duties, for the same considerations would apply to cases where there was a real but small feu-duty with an untaxed entry.

The lesson which conveyancers should draw from this case is, when a client dies to tender payment of 2d. Scots on behalf of the heir, so that he may not be called on to pay a year's rent when the property comes to be sold.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Respondent—Craigie—Laing. Agents—Laing & Harley, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Hunter. Agents—Russell & Dunlop, W.S.

Saturday, November 29.

FIRST DIVISION.

[Sheriff Court at Hamilton.

DUNCAN *v.* MAGISTRATES AND TOWN COUNCIL OF HAMILTON.

Reparation—Liability of Local Authority for Acts Done in Exercise of Statutory Power—Limitation of Time for Bringing Actions — Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 166.

Section 166 of the Public Health (Scotland) Act 1897 is in these terms:—"The local authority and the Board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act; and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected; and every action or prosecution against any person acting under this Act, on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen."

A child who, under the powers conferred by the Public Health (Scotland) Act 1897, had been removed by a local authority to a burgh fever hospital, was injured by upsetting over himself a bottle of acid left within his reach by a servant in the course of cleaning the ward. Ten months after the accident his father, as his administrator and tutor-in-law, brought an action in the