founds has no reference to the amount or measure of composition but only to—what is a quite different matter—the mode in which the over-superiors, Heriot's Hospital, are in use to ascertain the net year's rent payable by those vassals who have not subfeued. In other words the reference is only to the deductions allowed for feu-duty, repairs, &c., which Heriot's Hospital are in use to allow.

On the whole I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

The LORD JUSTICE-CLERK, LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced this interlocutor:—

"Having heard counsel on the defender's reclaiming note against the interlocutor of Lord Mackenzie dated 1st February 1906, Refuse the reclaiming note: Adhere to the said interlocutor reclaimed against, and remit the cause to the said Lord Ordinary to proceed therein. . . ."

Counsel for Pursuers and Respondents—Chree—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Defender and Reclaimer—M'Lennan, K.C.—Spens. Agent—W. R. Mackersy, W.S.

Friday, November 10.

SECOND DIVISION.

M'DONALD'S TRUSTEES *v.* M'DONALD'S TRUSTEES.

Succession—Vesting—Heir-at-law—Period when Heir-at-law Ascertained.

A testator directed his trustees to convey his whole estate to his wife in liferent, and on her death to convey certain heritable estate to his son A, "whom failing without lawful issue to my heir-at-law." A survived the testator, and was at his death his heir-at-law, but predeceased the liferentrix unmarried, leaving a settlement.

Held that though A had been called as primary legatee this did not displace the presumption that "heir-at-law" meant the person occupying that position at the date of the death, not of the liferentrix but of the testator, and that in the circumstances the destination had become inoperative and the estate had vested in A *a morte testatoris* and was carried by his settlement.

Peter M'Donald, sometime blacksmith, afterwards feuar in Charlestown of Aberlour, in the county of Banff, died on 11th June 1881, survived by (1) his wife Mrs Margaret Kemp or M'Donald; (2) his natural son John M'Donald, blacksmith; and (3) his only lawful child and heir-at-law James M'Donald, private in the 93rd Regiment of Foot. He left a trust-disposition and settlement dated 9th February 1878, whereby he conveyed to trustees his whole estate, particularly, *inter alia*, (2) a certain specified piece of ground in Aberlour with the houses thereon, marked number twenty on a certain specified plan.

In his settlement the testator, *inter alia*, provided as follows:—"I appoint my said trustees to pay, assign, and dispone the whole of my heritable and real estate above conveyed to the said Margaret Kemp or M'Donald, my wife, in case she shall survive me, in liferent for her liferent use allenarly; . . . and I also appoint my said trustees, on the death of the said Margaret Kemp or M'Donald, to assign and dispone the whole remainder of my heritable estate above conveyed, including the two feu properties second and third above conveyed, being those marked respectively numbers twenty and nine on the said plan, to my son James M'Donald, private in the Ninety-third Regiment of Foot, presently in Ireland, whom failing without lawful issue to my heir-at-law." (Number nine did not form part of testator's estate at his death.)

Margaret Kemp or M'Donald survived her husband, and enjoyed the liferent of the said piece of ground number twenty down to the date of her death in March 1905. James M'Donald died in May 1884 unmarried, leaving a disposition and settlement by which he conveyed to his natural brother John M'Donald his whole estate, and in particular the foresaid heritable property in Aberlour. John M'Donald died in September 1902 leaving a holograph will by which he appointed his wife and his son trustees to carry out his wishes. The heir-at-law of the testator at his own death was his son, the said James M'Donald, but as at the date of the death of his widow was Alexander M'Donald, who was the eldest son of the eldest son of the younger brother of the testator.

Questions having arisen regarding the right to the fee of the property number twenty, this special case was presented for the opinion and judgment of the Court. The parties to the special case were (1) the Reverend John Smith Sloss and others, the trustees acting under the testator's settlement, first parties; (2) the trustees of John M'Donald, who were his widow and son, second parties; and (3) Alexander M'Donald, third party.

The second parties contended that on a sound construction of the testator's trust-disposition and settlement the fee of the said heritable property vested in his lawful son James M'Donald *a morte testatoris*, and was carried by his settlement to his natural brother John M'Donald, and was thereafter carried to the second parties under the last will and testament of the said John M'Donald. The third party contended that the said heritable property did not vest in the late James M'Donald, but that vesting was suspended till the death of the liferentrix, and that the third party as the testator's heir-at-law at that date was entitled to a conveyance of the property. The first parties as trustees of

the said Peter M'Donald senior desired the direction of the Court regarding the said question.

The questions of law put to the Court were as follows:—"Did the heritable property second conveyed by the testator in his said trust-disposition and settlement vest in his son, the said deceased James M'Donald, *a morte testatoris*, and are the second parties as trustees foresaid now in right of the same; or was the vesting of the said property suspended till the death of the testator's widow, and is the third party, as the testator's heir-at-law at that date, now in right of the same."

Argued for the second parties—The fee of the property in question vested in James *a morte testatoris*, by whom it was conveyed to his natural brother John, who in turn conveyed it to the second parties. There was nothing here to displace the general rule that heir-at-law meant heir-at-law at the date of the testator's death—*Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269, 19 S.L.R. 217; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Taylor and Others* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776. As James was himself the heir-at-law there was in effect no destination-over and vesting was not suspended.

Argued for the third party—Vesting was suspended till the death of the liferentrix, and the third party as heir-at-law of the testator at her death was entitled to the property. There was no gift here other than the direction to convey, just as in *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103, and the fact that the destination-over was to my heir-at-law and not to some person *nominatim* made no difference. My heir-at-law meant my heir at the time when, the primary institutes having failed, the succession opened. There was not here vesting subject to defeasance; that would be to carry that doctrine further than it had ever been carried—*Gardner* v. *Hamblin*, February 28, 1900, 2 F. 679, Lord M'Laren at 685, 37 S.L.R. 486; for here there was between the ultimate legatee and the gift not merely the possibility of children but the existence of James. The persons primarily called in *Haldane* (*cit. supra*), and *Gregory's Trustees* (*cit. supra*) were called not as fiars but as liferenters; all that stood between them and the gift was the contingency of children being born.

LORD JUSTICE-CLERK—I do not think that it is now possible to entertain any doubt that when in a deed such as we have before us there is a bequest to an heir-at-law, that means the heir-at-law at the time of the testator's death. This will be held unless there is strong ground from the mode of expression in the deed for holding that a different time was intended. Now, in this case, the question whether there is any ground for hesitating to give effect to the presumption is easily answered. There is, I think, no difficulty in understanding the direction here. The truster seems to have desired to secure the benefit of the bequest to his son's issue, if the son died and left children. If that event did not occur he intended that it should go to his heir-at-law, as it would have done had he not disposed of it by bequest at all. He provided against contingencies which did not occur. As it happened that the testator's son was heir-at-law at the time of his death, and afterwards died leaving no issue, the whole destination became inoperative, as the events against which the testator desired to guard did not occur.

LORD KYLLACHY—The question in this case is a very short one, and depends entirely on one point, viz., this, whether the "heir-at-law" to whom the heritable property in dispute is destined, failing James M'Donald (the truster's son) and his issue, is the truster's heir-at-law at the date of his death, or is *per contra* the person who possessed that character at the death of his (the truster's) widow. I am of opinion both upon principle and authority that while it may not be impossible to reach the latter construction upon the terms of some particular instrument, the presumption—the strong presumption—is that by heir-at-law is meant the person who possesses that character at the truster's death. And that being so, it does not appear to me that there is anything in this particular deed to displace that presumption and to instruct that what the truster meant was not merely to invoke the law of intestate succession, but to make an operative destination in favour of the person who would have been his heir-at-law if he, the truster, had died contemporaneously with his widow. It is true that, as events occurred, the primary legatee (the truster's son) was himself at the truster's death his heir-at-law, and that as he (the son) left no issue, the whole destination becomes thus practically inoperative. But it might have been otherwise. The son might have died before the truster, and the heir-at-law at the latter's death would thus of course have been a different person. Similarly, the son might have left issue, and if so such issue would, if surviving, have taken as conditional institutes. The destination therefore might have been operative, and was quite intelligible—meaning in effect really this, that the truster desired to secure the succession to his son's issue if his son died leaving issue, but failing that desired simply to invoke the law of intestate succession.

LORD LOW—I am of the same opinion. I have had the advantage of reading the opinion which has been read by Lord Kyllachy, and it so entirely expresses my views that I do not think I can usefully add anything.

LORD STORMONTH DARLING was absent.

The Court answered the first alternative in the affirmative and the second in the negative.

Counsel for the First Parties—Kemp. Agents—Sharpe & Young, W.S.

Counsel for the Second Parties—Cullen, K.C. — Hamilton. Agents — Sharpe & Young, W.S.

Counsel for the Third Parties—The Dean of Faculty (Campbell, K.C.) — Constable. Agent—Donald Smith, S.S.C.

Saturday, November 17.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

RUTHERFORD *v.* THYNE.

Administration of Justice — Law-Agent —Law-Agents and Notaries Public (Scotland) Act 1891 (54 *and* 55 *Vict. cap.* 30), *sec.* 2—*Pretence of being Law-Agent—Relevancy.*

Circumstances which were *held* not to involve a pretence of being a duly qualified law-agent.

The Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), sec. 2, provides—"Any person, being neither a law-agent nor a notary-public, who, either by himself or in conjunction with others, wilfully and falsely pretends to be, or takes or uses any name, title, addition, or description implying that he is duly qualified to act either as a law-agent or as a notary-public, or that he is recognised by law as so qualified, shall be guilty of an offence under this Act. . . ."

Robert Sinclair Rutherford, solicitor, Edinburgh, Secretary and Fiscal of the Society of Procurators of Midlothian, brought a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, in the Sheriff Court at Edinburgh against David S. Thyne, Agent of the Union Bank of Scotland, Limited, at Murrayfield.

The complaint set forth:—

"That the respondent, being neither a law-agent nor a notary-public, has been guilty of an offence within the meaning of section 2 of the Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), in so far as in or about the month of March 1906, having entered into a contract of copartnership with Forbes T. Wallace, solicitor, Edinburgh, for the purpose of carrying on a law-agent's business within the premises of the said branch bank and elsewhere to the prosecutor unknown, he did (*First*), on or about 12th March 1906, issue to the customers of the said bank dealing at said branch, to other members of the public whose names are to the prosecutor unknown, and in particular to James Smith, 8 Coltbridge Avenue, Edinburgh, and James Crowe, joiner, Murrayfield, Edinburgh, a printed circular in the following terms:—

'The Union Bank of Scotland, Limited,
'Murrayfield Branch,
'Edinburgh, 12th March 1906.

'Dear Sir,—I beg to inform you that Mr Forbes T. Wallace, solicitor, will, on and after the 12th March 1906, be associated with me in business under the firm name of Thyne & Wallace. Mr Wallace has had upwards of seven years' legal experience in the offices of Messrs Wallace & Shepherd, solicitors, Leven, Fife, and Mr Thomas Henderson, W.S., Edinburgh, and while I shall continue to take entire charge of the bank business, Mr Wallace will attend to all law matters, and will, I am confident, at once commend himself as a man of business and legal adviser. I am, yours faithfully, DAVID S. THYNE.'

(2) That from and after the said 12th March he did affix to the door of said premises two brass plates, placed in juxtaposition, and bearing the following words—

'THYNE & WALLACE.
'F. T. WALLACE,
'Solicitor.
'Law Office Hours, 9·30 to 5.'

And (3) That he has, during the period subsequent to the 12th March 1906, carried on the business of a law-agent in copartnership or in conjunction with the said Forbes T. Wallace, whereby he, either by himself or in conjunction with the said Forbes T. Wallace, wilfully and falsely pretended to be duly qualified to act as a law-agent contrary to the said section of said Act, and whereby he is liable to a penalty not exceeding £10, together with the costs of prosecution and conviction. . . ."

On 12th October 1906 the Sheriff-Substitute (MILLAR) sustained objections taken to the relevancy of the complaint and dismissed it.

On the application of the complainer a case was stated by the Sheriff-Substitute for appeal to the Second Division of the Court of Session.

After narrating the complaint the Sheriff-Substitute continued—"Objections were taken to the relevancy of the complaint on the 8th day of October 1906, and after hearing counsel thereon, on said 12th October, I delivered judgment, in which I stated that it seemed to me clear that the circular merely intimated to the public that the respondent and Wallace had entered into partnership to carry on two businesses, one that of a bank agent, and the other that of a law agent in Edinburgh, and that the one partner would give his exclusive attention to the one business, and the other partner his attention to the other business. If the partners continued to act as set forth in the circular, in my view there would be no breach of the statute, as the representation was that the respondent would not do any of the law-agent's work. Under the second head of the complaint it was agreed by both counsel that as matter of fact there were two door-plates, one with 'Thyne & Wallace' upon it, and the other with the words 'F. T. Wallace, Solicitor, Law Office Hours 9.30 to 5' upon it. I held the separation of the two businesses was here continued and that there was here no relevant case. Under the third head of the complaint I asked the counsel for the prosecution whether he was prepared to aver and to prove that the respondent himself did, as a matter of fact, carry on business as a