properly signed is not competently brought up for decision by this Case. It is not a determination in law by the justices; it relates merely to the authentication of the judgment, to which no objection was at the time taken. We also think the other reasons urged against the conviction by the appellant Leishman are not well founded.

The Court having heard further argument on the appeal for Colquhoun—

At advising—

LORD YOUNG—The penalties for the contravention of the Public-House Statutes are undoubtedly severe, and I should willingly concede to the magistrates a discretion to allow the person who is convicted time to pay, if the Acts permitted that to be done. But looking to the terms of sec. 17 of the Act of 1862 we find it confers no such discretion, and its language is not capable of a construction implying such discretion. I do not say that there may not be exceptional cases where the magistrates might give delay by adjourning the proceedings. But it is the general rule of criminal process that a sentence shall be pronounced which shall take effect on the spot. Thus, in cases of common assault, breaches of the peace, and petty thefts, there is an order for immediate imprisonment. Even in a different class of cases, *e.g.* for breach of statutory regulations, there may be an alternative of fine preceding the penalty of imprisonment on failure, but the order to imprison is immediate. No other course would be convenient or even practicable. If the conviction were to issue in the form suggested, how is the order to imprison to be executed? The man may disappear without bail or caution, and he may not be found till the period of the sentence has expired. I do not think that in this matter there can be any distinction between different classes of offences. Here, no doubt, we have only a *malum prohibitum*, but the Legislature says it is to be punished by fine and imprisonment. I am not surprised that the provision of the Act of 9 Geo. IV., giving four days for payment, has been found inconvenient and unworkable, and has been displaced by sec. 17 of the Act of 1862, which imposes imprisonment in default of immediate payment. That section refers to the previous Act for the amount of fine and the period of imprisonment, but for nothing more. The difference between the two statutes is illustrated by the fact that to order immediate imprisonment would have been clearly illegal under the Act of Geo. IV., but it is not pretended that it would be illegal under the Act of 1862. We shall therefore direct the magistrates to substitute the statutory words.

LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

Counsel for Leishman—Mair.

Counsel for Colquhoun—M'Laren.

COURT OF SESSION.

Tuesday, July 10.

FIRST DIVISION.

[Lord Young, Ordinary.

EDINBURGH ROPERIE AND SAIL-CLOTH CO. *v.* MAGISTRATES AND TOWN COUNCIL OF EDINBURGH.

Superior and Vassal—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15—*Casualty—Entry—Composition.*

Certain subjects had been feued by the Magistrates of Edinburgh, and a writ of confirmation was granted by them in favour of trustees,—an untaxed composition to be payable on the death of one of them, who was named, and in the event of a sale the purchaser to take out an entry on his death. The subjects were thereafter sold—all but a small piece being bought by one purchaser, who was also liable to the superiors in the full sum of feu-duty. The purchaser applied, under section 15 of the "Conveyancing (Scotland) Act 1874," for redemption of the casualties applicable to his portion of the feu upon payment of the highest casualty as at the date of redemption. He did not take into account the rent of the portion of the original subjects of which he was not the purchaser. *Held* that the vassal was entitled to redeem the whole casualties on payment of one year's rent of his part of the feu, and objection by the superior that he must pay the casualties applicable to the whole original feu *repelled.*

This was an action of declarator, &c., at the instance of the Edinburgh Roperie and Sail-Cloth Company, and James Hay, their manager, against the Lord Provost, Magistrates, and Town Council of Edinburgh, in the following circumstances:—

By charter dated 31st January 1750 the Magistrates and Town Council of Edinburgh feued certain lands, and by a charter dated 11th September 1765 they feued certain other lands. Parts and portions of both of the subjects embraced in these two grants were sold and disponed to different parties prior to the year 1851. In that year the whole remainder of the two feus was conveyed to William Waddell, William Wood, George Ritchie, and others, as trustees for the Leith Roperie Company. The portions of ground so conveyed were referred to in the summons as *primo* and *secundo*. The disposition in favour of the Leith Roperie Company trusteees, and the instrument of sasine following thereon, contained this clause—"But excepting always from the foresaid piece of ground the parts and portions thereof already disponed, and particularly the following portions of the same which have been disponed to the respective parties by the respective dispositions following, viz." The disposition and instrument of sasine then contained a specific enumeration and description of nine different parts and portions of the original feus as having been disponed to these parties by the dispositions, which are also therein specified, and "the whole houses and other buildings which have been erected upon the several and respective portions

of ground excepted in the said disposition, and above described."

By writ of confirmation dated 21st August 1862, granted by the Magistrates and Town Council of Edinburgh, they confirmed the above-named instrument of sasine in favour of William Wood and George Ritchie, as surviving trustees for the Leith Roperie Company. In the writ of confirmation there was this clause—"But declaring, as it is hereby expressly provided and declared, that if the subjects hereby confirmed shall pertain and belong to the said trustees at the death of the said George Ritchie, then and in that event we, the said Lord Provost, Magistrates, and Council, shall be entitled to demand a composition of a year's rent or value (over and above the feu-duty for the current year) in lieu of an entry, and the same is hereby declared to be then due and payable; and in case of the said trustees selling or disponing the said subjects prior to the death of the said George Ritchie, then and in that event the purchaser or purchasers shall be bound and obliged to take out an entry from us, the said Lord Provost, Magistrates, and Council, immediately upon the death of the said George Ritchie, whensoever that event shall happen after the date of the purchase; and the said subjects are accordingly hereby declared to be in non-entry upon the said death taking place, under which express condition and declaration these presents are granted and to be accepted of by the said trustees, and not otherwise." The entry of singular successors in relation to the subjects included in the writ of confirmation was untaxed.

The portions of the original feus so confirmed were, with the exception of a small piece of ground after mentioned, disponed by William Wood and George Ritchie, as trustees foresaid, to the pursuer, by disposition dated 5th and 6th, and recorded 15th, May 1876. The only portion not so conveyed was disponed to the Leith Commissioners of Police by disposition dated 11th and 13th May 1867. The proportion of the *cumulo* feu-duties payable under the charters of 1750 and 1765, allocated upon the portions of the ground contained in the above writ of confirmation, and levied from the pursuers' predecessors by the defenders, amounted to £1, 10s. 7d. By the disposition by Messrs Wood and Ritchie in favour of the pursuers, the whole of that feu-duty of £1, 10s. 7d. was declared to be payable to the city by the pursuers, with certain rights of relief to the pursuers against third parties. No part of the feu-duty was allocated upon the ground sold to the Commissioners of Police under the above mentioned disposition in their favour, the full sum being payable to the city by the pursuer.

The pursuers on 13th August 1851 further acquired from Messrs Wood and Ritchie certain subjects (referred to in the summons as *tertio*) forming part of a piece of ground originally feued by the city by charter dated 27th July 1720, and to which a charter by progress was granted dated 7th January 1795. A writ of confirmation was on 21st June 1864 endorsed on the sasine to these subjects by the Magistrates of Edinburgh, likewise in favour of Messrs Wood and Ritchie, as surviving trustees for the Leith Roperie Company, and it was provided that on the death of George Ritchie the Magistrates should be entitled to demand a composition which, by the charters of 1720 and 1795, was taxed at a duplicand of the feu-duty. These subjects, with those beforementioned, were the whole subjects held of the Magistrates and Town Council of Edinburgh by the pursuers.

The object of this action was to have it found and declared (*in the first place*) that in terms of the provisions contained in the 15th section of "The Conveyancing (Scotland) Act 1874," the pursuers were entitled, on payment to the defenders, as superiors of the subjects, of the amount of the highest casualty estimated as at the date of redemption, with an addition thereto of 50 per cent., to redeem either (1) the whole casualties of superiority incident to the whole subjects above described, and payable to the defenders as its superiors; or (2) that the pursuers were entitled to redeem the whole casualties of superiority incident to and payable from the parts and portions of said subjects which are referred to above (severally specified as *primo*, *secundo*, and *tertio*): And further (*in the second place*), that the pursuers, under the intimation in writing given by them, and by William Wood and George Ritchie (who were then feudally vested in said whole lands, subjects, and others), dated 9th February 1876, did competently and validly exercise the said right and power of redemption, and thereby became entitled to insist upon the defenders granting and delivering to them, but always at the expense of the pursuers, either (first) a discharge, in terms of said statute, of all such casualties incident to the whole lands above described, and payable to the defenders therefrom, subsequently to the said 9th February 1876, upon the pursuers making payment to the defenders of the sum of £214, 13s. 3d., being the amount of the highest casualty owing and exigible therefrom, as fixed by the defenders, including the said addition of 50 per cent.; or of such other sum as shall be found to be the true amount of said highest casualty, with such addition of 50 per cent., with interest from 9th February 1876 till payment to the defenders, or till consignation in bank subject to the orders of Court of said sum; or (secondly and alternatively) a discharge in terms of said statute of all such casualties incident to the parts and portions of said subjects specified as *primo* and *secundo*, on payment of the highest casualty exigible from them as aforesaid, &c.: Or otherwise, and alternatively, irrespective of the intimation, they were entitled to one or other of the above-described discharges. It was put in the defenders' option to commute the casualties into an annual payment, in terms of the statute.

The 15th section of the Conveyancing and Land Transfer (Scotland) Act 1874 (37 and 38 Vict. cap. 94), provided that "The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable; and failing agreement, all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu in respect of which the same are payable on the following terms, viz., in cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed

on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent." &c.

The pursuers averred that on 9th February 1876, when the fee of the subjects was full in the person of George Ritchie, in virtue of the above-mentioned writs of confirmation, an intimation and requisition was served upon the defenders, by which the pursuers made offer to redeem the whole casualties of superiority affecting the subjects therein particularly described, and tendered payment of the highest casualty as at the date of redemption, as narrated in the conclusion of the summons. The amount of the rental in the whole of the subjects was communicated to the defenders, to enable them to strike the casualty, payable in the portions *primo* and *secundo*, where the entries were untaxed. The portion of land sold to the Leith Commissioners of Police as above mentioned was not included in the rental upon which they proposed to pay.

The defenders answered that they were not bound to accept a casualty incident to less than the whole of the subjects included in the writ of confirmation of 21st August 1862, nor to accept a partial commutation of their rights to the casualty. They declined to entertain an application for the redemption of the casualties unless the subjects belonging to the Leith Police Commissioners were included.

There was no difference between the parties as to what was payable in respect of the subjects *tertio*, where the entry was taxed. There was no dispute that if the pursuers' view of their rights was correct, the redemption value should be held to be £214, 13s. 3d.

It was further arranged between them, in order to avoid questions which might arise through the death of the existing entered vassal, and to stop the currency of interest at 5 per cent., that the date of the redemption should be the date of intimation, and that interest should run on the sum that might be found to be the price of redemption at 5 per cent. to 7th April 1876, and thereafter at 4 per cent.

The pursuers pleaded, *inter alia*—"(1) Under the provisions of the statute libelled, the proprietor of any land held in feu under a feu-right granted prior to the passing of the Act, is entitled, where the fee is full at the date of redemption, to redeem the casualties of superiority incident thereto (not being of fixed amount) on payment of one highest casualty with 50 per cent. added, and that whether or not such land may form the whole of the land contained in the original feu-right or other right flowing from the superior, under which such land is held. (2) At all events, and *separatim*, in respect the lands, subjects, and others *primo* and *secundo* described in the libel, are held separately from any other lands, under the instrument of sasine of 13th August 1851 and writ of confirmation of 21st August 1862, both above set forth, and in respect that casualties are by the said writ of confirmation specially declared and fixed to be payable on account of the lands contained therein, irrespective of any other lands, the pursuers are entitled to redeem the casualties of these lands, subjects, and others, apart from and without redemption of the casualties of any other lands which may now belong to other parties."

The defenders, *inter alia*, pleaded—"(2) The right of the superiors was not diminished or altered in character by their having granted charters or writs by progress to disponees of parts of such original feus; and the successors of such disponees could not prior to the Statute of 1874 obtain an entry except upon payment of a casualty applicable to the entire original feu. (4) The provisions of the statute relating to the redemption of casualties are in sound construction referable to the rights and obligations of the superior and vassal at common law, and the vassal is not entitled to redeem merely on payment of the redemption money applicable to his part of the feu, but only on redemption of the whole casualties stipulated in the deed constituting the relation of superior and vassal."

The Lord Ordinary found in favour of the pursuers, and decerned the defenders to execute and deliver to the pursuers, at the pursuers' expense, a discharge of all the casualties of superiority incident to the lands described in the summons, and payable to the defenders as superiors, on payment of £214, 13s. 3d., "but reserving always to the defenders, notwithstanding such redemption of the casualties and superiority, full right and title to levy the future feu-duties payable from the said subjects, in the same manner and to the same effect as they have heretofore been and are at present entitled to do," &c.

The defenders reclaimed, and argued—The question between them was, whether the rent of the subjects sold to the Leith Police Commissioners was to be included, in order to entitle the pursuers to redemption? That was the only footing on which the writ of confirmation of 1862 proceeded—the payment of composition attached to the feu-right. If a vassal did not divide the obligations of the feu-right when he divided the feu, there was no difference between the nature of feu-duty and relief and composition. Composition might be said to be statutory, but that was only because it was of later date than relief, and required the aid of a statute, which was obtained.

Authorities—*Wemyss* v. *Thomson*, Jan. 19, 1836, 14 S. 233; *Gilmour* v. *Balfour*, Jan. 22, 1839, 1 D. 403; Bell's Lectures on Conveyancing, i. 598.

The pursuers answered—Composition was a statutory enactment. Relief, on the contrary, was an incident of the feu as much as the feu-duty was. It was a *debitum fundi*, which composition was not. The case of *Wemyss* v. *Thomson* was not applicable. There was there an express obligation to pay, and no question about the vassal's right to obtain an entry on payment of composition applicable to the subjects held in feu by the vassal. If the pursuers could have forced an entry prior to the Conveyancing Act of 1874, which was conceded, that Act gave them a right of redemption co-extensive with their right to demand an entry. In so far as the superiors were concerned, the portion sold to the Leith Police Commissioners was still vested in the Leith Roperie Company, as the Commissioners were not infeft.

Authorities—*Stirling* v. *Ewart*, 4 D. 684 (L. J. C. Hope's opinion, p. 715); *Cockburn Ross* v. *Heriot's Hospital*, June 6, 1815, F. C. (Lord

Meadowbank's opinion); *Paterson* v. *Murray*, M. 15,055.

At advising—

LORD PRESIDENT—This is an action brought under the authority of the 15th section of the Conveyancing Act of 1874, for the purpose of redeeming casualties of superiority. The lands embraced in the summons consist of three different parcels. With regard to the first two, the entry of singular successors is untaxed, but with regard to the third parcel, the entry is taxed at a duplicand of the feu-duty. There is no dispute between the parties as to the terms upon which the pursuer is entitled to redeem in so far as regards the third parcel of lands, where the entry is taxed, and the dispute therefore refers to the lands distinguished as *primo* and *secundo* in the conclusions of the summons, of which the entry is untaxed. The 15th section of the statute provides—[*reads ut supra*]. That is the class of cases to which the present belongs, and the question between the parties is what is demandable by the superior under the words "the amount of the highest casualty estimated as at the date of redemption, with an addition of 50 per cent."

The feus as originally given out by the town of Edinburgh consisted of a larger estate than that which is now vested in the pursuers of this action, and it may be necessary to observe somewhat in detail what is the precise history of these feus; but the ground maintained by the defenders in the present case as superiors is that the vassal, the pursuer of this action, is not entitled to redeem the casualty except upon payment of a whole year's rent of the subject, meaning by the subject the original feu as given out by them. The pursuer, on the other hand, maintains that the casualty is to be estimated as a year's rent of the subjects held by him in feu.

The feus, portions of which belong to the pursuer, were originally given out by the Magistrates in the last century—one of them by a charter dated the 31st of January 1750, and the other by a charter dated the 11th of September 1765. Now, it is averred, and not disputed, that prior to the year 1851 these feus had come to be separated into parts. Parts and portions of both these original feus had been sold off, and in that year, 1851, the whole remainder of the two feus were conveyed to William Waddell and others, as trustees for the Leith Roperie Company; and in that conveyance there were excepted nine different parts or portions of the original feus as having been already disponed to other people; so that in the year 1851 the feus had been separated into parts, and were from that date held by different vassals. We are concerned with the portion which remained vested in the trustees for the Leith Roperie Company. Now, the Leith Roperie Company's trustees were entered by writ of confirmation dated the 21st of August 1862, and in that writ of confirmation it was expressly provided and declared—[*reads clause quoted supra*]. Now, the defenders originally pleaded in their second plea-in-law—[*reads second plea-in-law*]. That plea was not maintained in argument, and indeed it was quite untenable, because, as applied to that very writ of confirmation to which I have just referred, it is plainly inconsistent with what is agreed between the parties as superior and vassal on the occasion of granting that writ. It is the subject which is vested in the trustees—that is, the portion of the original feus then belonging to them—with reference to which the arrangement is made that George Ritchie is to be held to be the last entered vassal. His death is to have the effect of putting these lands in non-entry, and on that occasion a composition of a year's rent of these subjects is to be payable to the superior. Now, that which is expressed in this writ of confirmation would really have been the legal effect of such a proceeding if there had been a single individual vassal, in which case there would have been no occasion for that particular agreement to which I have adverted.

But it appears to me that if this plea was ill-founded before the Statute of 1874, it follows of necessity, when we take into consideration what are the other enactments of the Statute of 1874, that the plea must be bad as applicable to this case. The plea is this—[*reads 4th plea-in-law*]. It seems to me that the 15th section of the statute, upon which this action depends, applies only to the case of an entered vassal, and if that be so, it is in vain to consider whether, if a person has obtained a mere personal right by disposition to a feu or portion of a feu, he is entitled to go to the superior and say—I shall have the casualties of this portion of the feu redeemed by payment of a year's rent. The answer of the superior to such a party would be—I know nothing of you; you are not my vassal, and I cannot be asked to deal with you. And I think that answer would be conclusive.

Now, how do the facts stand as regards the pursuer? He has acquired from the trustees of the Leith Roperie Company the greater part of what they had acquired under the two original feus, and in which they were entered by writ of confirmation in 1862, but he has not acquired the whole of them. There is a portion—apparently not a very large portion, but still a portion—of that which belonged to the Leith Roperie Company's trustees that is still vested in their persons in so far as the superior is concerned. It is said, no doubt, that the Leith Roperie Company's trustees have sold that remaining portion of the feu to the Police Commissioners of Leith, but then their right stands upon a bare disposition, and the superior has nothing to do with them, and they have no claim against the superiors. Therefore, as in a question between superior and vassal, the matter stands thus—The Edinburgh Roperie Company, represented by Mr Hay, are now the disponees of the greater part of that which belonged to the Leith Roperie Company, and formed the subject of the writ of confirmation in 1862; the remainder of it still stands in the persons of the trustees of the Leith Roperie Company.

Now, it is in these circumstances that the defenders maintain that the pursuer, to entitle him to a redemption of the casualty, must pay a year's rent, not only of that which they have acquired and now possess, but of that portion also of the subject which remains in the trustees of the Leith Roperie Company. I think that contention proceeds on a total misunderstanding of the Conveyancing Act of 1874. It is conceded by the defenders that if Mr Hay had been entered by them in the same way as they entered the Leith Roperie Company's trustees in 1862, they could not have made this demand. But

they seem to forget that that which they might have been called upon to do prior to the Statute of 1874 has been done for them by the statute, because the 4th section of the statute, in the second sub-section, provides that infeftment shall imply entry with the superior, and therefore when Mr Hay, on behalf of the Edinburgh Roperie Company, took infeftment in that part of the subject which he had bought from the Leith Roperie Company's trustees, he became thereby the entered vassal of the defenders. No doubt the effect of that entry was somewhat different from what would have been the effect of his taking an entry before the statute. He did not require to take an entry according to the old law when he bought this subject from the trustees of the Leith Roperie Company, because there was an entered vassal, viz., Mr Ritchie. But the statute implies the entry at once, and it provides also for what is to be the effect of that implied entry as regards the rights and obligations of superior and vassal. The third sub-section of the same section (fourth) provides that it is not to affect the rights of the superior as regards duties or casualties. In short, it provides that, as regards the casualties of superiority, they shall not be payable at any other time or on any other conditions than they would have been if this Act had not been passed. So that the effect is, that while Mr Hay was made the entered vassal as soon as he took infeftment by force of the statute, he did not require to pay a composition on that entry, his liability to pay the composition being postponed until the death of the last entered vassal, and the right of the superior to demand a casualty being in like manner postponed. The pursuers being the entered vassals of the defenders, and seeking to have the casualty redeemed under the terms of the 15th section of the statute, it appears to me quite unreasonable and beyond all intelligible construction of this statute to say that this party, who is entered with the superior and is now the superior's vassal in this particular part of the original feu as distinguished from the other, is to pay anything more by way of composition than one year's rent of that subject in which he is the vassal of the superior. I am therefore of opinion that the Lord Ordinary's interlocutor is well founded. There is no dispute as to the figures.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Pursuers—Kinnear—Mackintosh. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders — M'Laren — Mackay. Agent—Wm. White Millar, S.S.C.

Saturday, July 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'GIBBON *v.* THOMSON.

Process—Appeal—Sheriff Courts Act 1876 (39 *and* 40 *Vic. cap.* 70), *sec.* 20—*Failure of Party to attend Diet.*

Sec. 20 of the Sheriff Courts Act 1876 provides—"Where in any defended action one of the parties fails to appear by himself or his agent at a diet . . . . it shall be in the power of the Sheriff to proceed in his absence, and unless a sufficient reason appears to the contrary, he shall, whether a motion to that effect is made or not, pronounce decree as libelled or of absolvitor . . . with expenses," &c. *Held* (1) that that section is imperative upon the Sheriff; (2) that where a party appeals against an interlocutor so pronounced, to entitle him to succeed the default must have been due to an innocent mistake not amounting to neglect; and (3) that the Court will not lightly decide against the view taken by the Sheriff where the appeal had in the first instance been to him from his Substitute.

Process—Appeal—Reponing.

Circumstances in which the Court *refused* to repone a pursuer who had failed to appear at a diet appointed by a Sheriff-Substitute.

This was an action in the Sheriff Court of Lanarkshire, in which the Sheriff-Substitute (Lees) on 2d May 1877 pronounced the following interlocutors:—"The Sheriff-Substitute having heard parties' procurators, and the defender having stated that he has no other witnesses in attendance, but that he intended to examine the pursuer, who he thought would be present, Discharges the diet of proof assigned for to-day, and in lieu thereof assigns Wednesday, the 23d day of May, at ten o'clock forenoon, as a diet for proof in the cause, at which diet allows the defender to examine himself as a witness, and the pursuer if duly cited for that diet." On 23d May—"In respect of no appearance by or for the pursuer at the diet of proof to-day, Holds him confessed as not insisting in the action; and, on defender's craving, sustains the defences: Assoilzies the defender from the conclusions of the libel, and decerns: Finds the defender entitled to expenses," &c.

The defender had not cited the pursuer as a witness for the proof on 23d May.

The pursuer appealed to the Sheriff (Clark) who on 15th June adhered to the interlocutor of 23d May. He added this note:—"In this case it was strongly urged for the pursuer that his non-attendance on 23d May 1877 arose from an innocent mistake, and it may be that something might be said in that respect. I do not, however, consider myself at liberty, unless some very strong ground indeed is made out, to recall an interlocutor such as that under review, pronounced by the Sheriff-Substitute after a full knowledge of the facts. Sec. 20 of the present Sheriff Court Act is very specific in its provisions, and if every excuse were to be taken as a ground