composition. As the Conveyancing (Scotland) Act 1874 did not provide whether the casualty of relief or composition should be exigible on the implied entry of trustees, the result was, prior to the Conveyancing Act 1887, that we were referred to the common law to determine all questions of amount. It was held that where the heir had no substantial right the superior was not bound to receive him for the purpose of evading a casualty of composition. In *Stuart* v. *Jackson* (17 R. 85) it was determined that if the heir had the substantial interest, he was entitled to enter on payment of the casualty of relief, although for convenience infeftment had been taken in favour of a body of trustees. The test proposed by the Lord President was, whether the interest of the heir was only postponed, say to a liferent, or whether his right was merely contingent. So far as I can see, the Act of 1887 made no alteration as to this rule although it defined it and gave the rule the authority of statute law.

Now, I think this section can only be read as meaning that the heir should have at the time when entry is demanded the substantial right to the estate, subject, it may be, to usufructuary rights. The section does not apply where the heir succeeds only on the failure of other heirs or as a conditional institute. I have every sympathy with the reclaimer, but I am unable to see that the truster's daughter here had the ultimate beneficial interest in this estate. She has a liferent, and is conditional institute in the event of her having no issue. That is not the case which will bring the statutory exception into operation, and therefore I agree in the conclusion at which your Lordship and the Lord Ordinary have arrived.

LORD KINNEAR—I am of the same opinion. I think it is clear that the trustees are singular successors, because they are strangers to the investiture, and could not have made up a title either under the old law or now except upon the condition of payment of a composition. The reclaimer's argument on *Stuart* v. *Jackson* (17 R. 85) comes to this, that a trust deed is a mere burden on the fee, and therefore that trustees who are holding for the person who is heir of investiture are entitled to enter on payment of a casualty of relief. I think that is an entire misconception of that case. There is no absolute rule applicable to trust deeds in general. The question depends upon the nature and operation of the trust. The principle of the decision in *Stuart* v. *Jackson* was that the trust-disposition which had been granted by the last-entered vassal had failed because its provisions had become quite unworkable, and therefore that it did not operate to exclude the heir from making up a title by service as heir to the disponer if he chose to do so. It was then open to the heir to serve himself as heir to the last-entered vassal, although for convenience he had taken a conveyance from the trustees in the disposition which had turned out to be unworkable. Thus the Lord President says (p. 96)—"It appears to me that if there was by virtue of that trust-disposition a disinherison of the defender he could not now serve as heir in special to his father, although by the operation of the trust and subsequent events it has come to be a resulting trust in favour of the heir as a beneficiary under the trust. If the heir can now claim the estate only as a beneficiary under the trust, then his character as heir is gone. But if his rights as heir have only been suspended or burdened by the operation of the trust, and all the purposes of the trust have failed, then his radical title of heir has not been extinguished."

Accordingly, the Court held in that case that the vassal who was entitled to be served as heir, although he chose to take a conveyance from trustees whose infeftment could not have stood in his way, was only liable in a casualty of relief. But in the present case it could not be maintained, and in fact was not maintained, that the truster's daughter is entitled to be served as heir to him, and therefore the decision in *Stuart* v. *Jackson* lends no countenance to the reclaimer's case.

The only other question which was argued was the effect of the Conveyancing Amendment Act 1887. On that point I entirely agree with your Lordship, and have nothing to add.

The Court adhered.

Counsel for the Pursuers and Respondents—Guthrie, K.C.—Cooper. Agent—Thomas Hunter, W.S.

Counsel for the Defender and Reclaimer—Dundas, K.C.—Macfarlane. Agents—P. Morison & Son, S.S.C.

Tuesday, July 1.

SECOND DIVISION.

[Sheriff-Substitute at Dumfries.

CROSBIE *v.* CROSBIE.

Sheriff—Appeal—Competency—Civil Imprisonment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 42), *sec.* 4.

A husband against whom a decree for aliment had been pronounced in the Court of Session was cited personally in Dumfries to appear before the Sheriff-Substitute in answer to an application under the Civil Imprisonment (Scotland) Act 1882. At this time his usual residence was in Carlisle, and he pleaded that he was not subject to the jurisdiction. The Sheriff-Substitute pronounced an interlocutor dismissing the application, and gave as his reason that although he might have jurisdiction, and despite the personal citation, the present application was inexpedient. *Held* that the Sheriff-Substitute having exercised his discretion in refusing the application, an appeal against his inter-

locutor to the Court of Session was incompetent.

This was an appeal against an interlocutor of the Sheriff-Substitute at Dumfries dismissing an application at the instance of Mrs Helen M'Kay or Crosbie, residing in Edinburgh, wife of John H. Crosbie, for a warrant of imprisonment, under the Civil Imprisonment (Scotland) Act 1882, sec. 4, against her said husband, in respect of his failure to implement a decree for aliment.

The facts of the case were as follows:—In an action of adherence and aliment at the instance of the pursuer against the defender decree was pronounced in the Court of Session on 30th October 1897 ordaining the defender to pay to the pursuer the sum of £50 sterling yearly for aliment during the joint lives of the spouses.

The defender having failed to pay the aliment regularly, on 11th May 1901 he was charged under pain of imprisonment to make payment of the balance of aliment due by him for the preceding four years, amounting to £119.

The defender allowed this charge to expire without payment.

The Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. c. 42) enacts as follows:—Section 4—"Subject to the provisions hereinafter contained, any sheriff or sheriff-substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment and expenses of process decerned for, or such instalment or instalments thereof as the sheriff or sheriff-substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent court: Provided . . . (2) that the application shall be disposed of summarily and without any written pleadings; (3) that the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor." . . .

On 22nd November 1901 the pursuer made the present application to the Sheriff-Substitute at Dumfries, in which she prayed the Court to grant warrant for the apprehension and imprisonment of the defender, whom she designed as "now or lately residing at No. 43 Westmoreland Street, Crosshill, Glasgow," and on the same date the Sheriff-Substitute ordered service of the petition to be made on the defender, and ordained him to appear to answer thereto on 3rd December following.

The defender had formerly resided in Glasgow, but was now usually resident in Carlisle.

The petition and deliverance were duly served upon the defender in Dumfries personally during a visit there on business, and he appeared in answer to the citation.

On 3rd December 1901 the Sheriff-Substitute, in respect that an agent who appeared for the defender stated that the defender was not subject to the jurisdiction of the Court, adjourned the diet in order that the pursuer's agent might consider this plea.

Thereafter the Sheriff-Substitute (CAMPION) having heard parties, on 17th December 1901 pronounced this interlocutor—"The Sheriff-Substitute having considered the petition, after a hearing thereon, dismisses the application as presented, and decerns."

Note.—"As to the broad question of jurisdiction, I think Mr Dove Wilson fairly sums up the decisions on this point—'The application where practicable should be presented to the sheriff to whose jurisdiction the respondent is subject, but it would seem competent to present it also to any sheriff within whose territory the respondent is found.' Further, it has been settled that persons who have no fixed place of abode must be cited where they can be found—that is, the pursuer must follow his debtor when it is all he can do—*Linn* v. *Casadinos*, 8 R. 849, 18 S.L.R. 603, and the case of the emigration agent referred to at the debate.

"The objection to this application seems to me that we have no averment of any attempt being made to cite the respondent at his late or present place of abode, or that after reasonable inquiry it has not been possible to find him.

"The respondent is stated to be a commercial traveller, lately residing at No. 43 Westmoreland Street, Crosshill, Glasgow, but to have moved to Carlisle in the ordinary course of business. Now, I should doubt the Supreme Court approving the personal citation, say of a Glasgow commercial traveller, with may be a business and residential address in Glasgow, who happened to arrive by steamer on business at Lerwick, in order to render him subject to the jurisdiction of the Sheriff Court there, and enforce the decree of the Supreme or any other competent court. The present is not of course such an extreme case, but the present application to have the respondent apprehended may be productive of great hardship. So while conceding the general principle of jurisdiction, I am of opinion that despite the personal citation the present application is certainly inexpedient and doubtful without further detail of reasons for making such application to this Court."

The pursuer appealed, and argued—The Sheriff-Substitute had jurisdiction to deal with the matter and ought to have ordered inquiry. A sheriff had power to enforce such a decree by imprisonment, provided the party liable under the decree had been found in Scotland, although at the time he was usually resident in England—Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. c. 42), sec. 4. The case of *Strain* v. *Strain*, June 26, 1886, 13 R. 1029, 23 S.L.R. 739, was distinguishable from the present case, as there the Sheriff-Substitute had dealt with the merits of the case, and so an appeal was incompetent. Here the Sheriff-Substitute had refused to exercise his jurisdiction, and his judgment could therefore be made the subject of appeal—*Penny* v. *Scott*, October 23, 1894, 22 R. 5, 32 S.L.R. 9.

Counsel for defender was not called upon.

LORD JUSTICE-CLERK—I am of opinion that we should not interfere—indeed that we cannot interfere—with what the Sheriff-Substitute has done in this matter. This is a somewhat peculiar Act of Parliament. It is framed with the object of giving means for enforcing payment of alimentary decrees, and it gives facilities for having the debtor under such a decree imprisoned in any part of Scotland by the sheriff. Now, what may be necessary to entitle a sheriff to exercise his jurisdiction under this statute we need not at present determine. It would be natural to suppose that the person against whom the sheriff is asked to grant warrant of imprisonment should be subject to the jurisdiction of the sheriff—that is to say, his jurisdiction in ordinary matters. In the present case it is not disputed that the man here in question is resident in England, and that it was only when he happened casually to be in the county of Dumfries that an effort was made to have him apprehended. I am not surprised therefore at the doubt which the Sheriff-Substitute felt as to his jurisdiction. But he says that, conceding that he has jurisdiction, he is of opinion that the application is inexpedient, and accordingly he refuses the application. It appears to me therefore that the Sheriff-Substitute has exercised the discretion conferred on him by the statute, and with his exercise of that discretion this Court cannot interfere.

LORD YOUNG—I concur.

LORD TRAYNER—I am of that opinion too. The view presented to us by the appellant is that this appeal is competent, because it is a case in which the Sheriff-Substitute has refused to exercise his jurisdiction. I do not see anything in the Sheriff-Substitute's interlocutor to support that view. It is true that it appears from his note that he had some doubt as to his jurisdiction, and also as to whether there is a sufficiency of averment in the petition, but he does not say that these are the sole or the main grounds on which he proceeds in disposing of the application. I think we have here an exercise of his discretion by the Sheriff-Substitute, and that with that exercise of discretion we cannot interfere. I express no opinion on the question of jurisdiction.

LORD MONCREIFF was absent.

The Court dismissed the appeal, and of new dismissed the application.

Counsel for the Pursuer and Appellant—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Defender and Respondent—J. A. Christie. Agent—Alexander Wyllie, S.S.C.

Wednesday, July 2.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

WILKIE *v.* HAMILTON LODGING-HOUSE COMPANY, LIMITED.

Contract — Building Contract — Schedule Rates or Lump Sum—Error Calculi.

A joiner, who had been supplied with a schedule for the erection of a house, filled in the rates at which he was prepared to execute the various items of work, adding a calculation of the total cost of each item and of the whole work, and offered to execute the work for the sum so brought out. In the schedule power was reserved to make alterations, and it was provided that the work should be measured and charged at the schedule rates. Thereafter an agreement was entered into, whereby, upon the narrative that the joiner had offered to execute the work, conform to plans and specifications, for the sum of £1333, 3s. 4d., and that this offer had been accepted, he agreed to execute the work, and the employers bound themselves to pay the sum of £1333, 3s. 4d. in certain instalments. One of the items in the schedule was 1100 square yards of pine lining at 3s. per yard. The joiner inadvertently calculated this at 3d. per yard instead of 3s., with the result that his offer was £152 lower than it ought to have been.

Held that the contract was a contract to execute work according to schedule rates and not for a lump sum, and that the joiner was not barred by his contract from claiming the full sum due to him on a correct calculation of the amount due at schedule rates.

Jamieson v. *M'Innes*, October 29, 1887, 15 R. 17, 25 S.L.R. 32, *followed*.

Seaton Brick and Tile Company, Limited, v. *Mitchell*, January 31, 1900, 2 F. 550, 37 S.L.R. 400, *distinguished*.

This was an action at the instance of Alexander Wilkie, joiner, Lamb Street, Hamilton, against the Hamilton Lodging-House Company, Limited, incorporated under the Companies Acts 1862-1898, and having its registered office at 47 Almada Street, Hamilton, in which he sued, *inter alia*, for a sum of £150, being part of a balance which he alleged to be due under a contract for joiner work done by him.

The facts in the case were as follows:—In 1900 the defenders resolved to build a lodging-house on a piece of ground belonging to them in Hamilton, and plans and schedules were prepared therefor by an architect in Hamilton and a firm of measurers in Glasgow. The pursuer amongst others was supplied with a schedule for the joiner, glazier, and ironmongery work. He filled in the rates at which he was prepared to execute the work, adding a calculation of the total cost of each item, and of the