but I am equally clear that such facts and circumstances must be set out on the record, and there are no such facts here. Nothing of the kind is set out either against Mr Miller or the pursuers. Therefore I think that both the defences for Lord Kinnaird sought to be embodied in the issues fall to be repelled. The one founded on compensatory supply falls because it is bad in law, and the other because there is no relevant averment to support it.

The other Judges concurred.

The Court accordingly disallowed the issues for the defenders.

Saturday, Dec. 16.

FIRST DIVISION.

PET.—KEITH MACALISTER OF GLENBARR.

Entail—Bond of Provision. Petition to charge an entailed estate with a bond of provision refused (diss. Lord Deas) as contrary to the intention of the maker of the entail and the granter of the bond.

Counsel for Petitioner—Mr Gifford and Mr M'Ewan. Agent—Mr George Cotton, S.S.C.

Counsel for Tutor *ad litem* to Petitioner's son—Mr Blair. Agent—Mr James Finlay, S.S.C.

This was an application for authority to charge an entailed estate with debt under the following circumstances: — The petitioner's father, the late Colonel Matthew Macalister of Barr, in the year 1813 executed a bond of provision for £6000 in favour of his wife in liferent, and his only son Keith in fee, payable after the granter's death. This deed contained clauses reserving power to revoke, and dispensing with delivery. In 1829 the Colonel, who held the estate of Glenbarr in fee-simple, executed a deed of strict entail in favour of himself in liferent and of the petitioner, his only son, and the heirs whomsoever of the petitioner's body in fee; whom failing, a series of substitutes therein specified. The deed contained, *inter alia*, the following clauses:—"And also to render this taillie and settlement the more effectual, I hereby bind and oblige me and my heirs-at-law, executors, and successors whomsoever, to free and relieve my lands and estate before disponed, and the heirs named and to be named to succeed thereto, of and from the payment and performance of all the debts and obligements to which I for myself, or as representing any of my ancestors, am or shall be liable, and of and from all claims and demands whatever whereby the said lands and estates, or any part thereof, may be evicted or affected. And I hereby revoke and recall all former deeds of entail and settlements, or other conveyances of any of the said taillied lands executed by me, excepting always the provisions executed or to be executed by me in favour of my spouse."

The Colonel died in the same year, after having executed the deed. His general executry, which was considerable, was applied almost entirely in payment of a large debt incurred on a cautionary obligation, and there was not enough to pay the bond.

In terms of a remit from the Lord Ordinary, Mr Webster, S.S.C., reported on the application; and after hearing parties, his Lordship reported the case to the Inner House with a note, on account of the importance of the case, and the difficulty raised.

The case was argued fully on Wednesday, and the Court delivered judgment to-day. In support of the petition it was mentioned that the bond of provision constituted a valid and effectual debt against the granter on account of the nature of the deed; that the clause of revocation in the deed of entail did not apply, as it was only directed against "all former deeds of entail, and settlements or other conveyances of any of the said taillied lands," and did not extinguish or revoke the bond, which was a personal obligation; further, that the clause above quoted as to burdening the heirs with an obligation to relieve the estate of all debts which might be made to affect it, was intended against the maker of the deed himself and his general estate apart from the entailed lands; and lastly, that the debt was not extinguished *confusione*, because although the petitioner was the grantee in the bond as well as institute in the entail, the two characters were quite different.

The Lords President, Curriehill, and Ardmillan thought the question raised was attended with very great difficulty, but were of opinion that both deeds being *mortis causa*, the Colonel's intention and desire was that the entailed estate should not be burdened with any provision such as this. They considered the bond a good obligation against the general estate, but not against the entailed lands which had been destined specially.

LORD DEAS dissented. The petitioner was not liable for the bond himself, either as executor or heir of his father, and yet it was a good obligation, and if it had been in favour of a daughter unquestionably might have been enforced. It could make no difference that the petitioner was the creditor in it as well as institute in the deed of entail.

The petition was therefore refused.

Friday, Dec. 15.

ANDERSON *v.* GLASGOW AND SOUTH-WESTERN RAILWAY CO. (*ante*, p. 68.)

Process — Act of Sederunt — Court of Session Act. Is section 12 of the Act of Sederunt of 12th July 1865 inconsistent with section 4 of the Court of Session Act of 1850?

Counsel for Pursuers — The Solicitor-General and Mr Anderson. Agents—Messrs Marshall & Stewart, S.S.C.

Counsel for Defenders—Mr D. Mackenzie. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

In this case Lord Kinloch on 29th November last ordered issues to be lodged in six days. On 4th December, before the expiry of the six days, the defenders gave a written consent to the time fixed being prorogated. On 5th December (being the sixth day) the pursuers enrolled the case, and moved the Lord Ordinary to prorogate the time, or otherwise then to allow issues to be received. Lord Kinloch refused the motion in respect of section 12 of the Act of Sederunt of 12th July 1865, which enacts—"All appointments for the lodging or adjusting of issues shall be held to be peremptory, and if the issue or issues be not lodged within the time appointed, it shall be competent to the opposite party to enrol the cause and to take decree by default, which decree by default shall not be opened up by consent of parties, but only on a reclaiming-note" The pursuers reclaimed.

The SOLICITOR-GENERAL, for them, maintained that the Lord Ordinary ought to have received the issues, because section 4 of the Court of Session Act, which could not be repealed by an Act of Sederunt, enacts — "That the periods appointed for lodging any paper may always be prorogated by written consent of parties; and the periods appointed for lodging any paper may always be once prorogated by the Lord Ordinary without such consent on special cause shown." Here there was a written consent; but the Lord Ordinary held that an issue was not a paper in the sense of this section. An issue, however, was a paper, and was always treated as such.

The LORD PRESIDENT suggested that before disposing of the reclaiming-note they should consult the other judges. A most important matter of practice, he said, was involved. The greatest abuse in the Outer House is the system of granting prorogations. Parties need not consent to prorogate unless they please, but without a strict rule such as was intended to be laid down in the Act of Sederunt, agents cannot resist the solicitations of other agents to give their consent. The thing in fact has become a matter of courtesy through which litigants suffer, and so does the credit of the Court. The case was continued till Tuesday.