locutor: Find that the pursuer, as heir of entail in possession of the estates of Easter St Martins and Drumcudden, is entitled to the whole income of the free residue of the trust-estate in the hands of the defenders, the trustees of the late Colin Mackenzie of Newhall, which had accrued since the 1st October 1863, with any interest which may have accrued on the said income in the hands of the said trustees: To the above extent and effect, decern in terms of the declaratory conclusions of the libel, and remit to the Lord Ordinary to proceed further as shall be just."

Counsel for the Pursuer (Reclaimer)—Balfour—Guthrie. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Colin Mackenzie's Trustees and Miss Mackenzie (Defenders)—Rutherfurd. Agents—Murray, Beith, & Murray, W.S.

Counsel for Colin Lyon Mackenzie jr. (Defender)—Moncreiff—Keir. Agent—J. W. Moncreiff, W.S.

Saturday, June 30.

FIRST DIVISION.

NASMYTH *v.* NASMYTH'S EXECUTORS, *et e contra.*

Entail — Improvement Expenditure — Rutherfurd Act (11 *and* 12 *Vic. c.* 36), *secs.* 15 *and* 18.

An heir of entail obtained from the Court a decree entitling him to charge three-fourths of a sum expended in Montgomery improvements against the heirs of entail, but died before doing so. *Held* that the succeeding heir of entail was bound, under the Rutherfurd Act, secs. 15 and 18, to execute a bond of annual-rent over the estate when called upon to do so by the executors of the deceased heir, and that it was not in his option to grant a bond and disposition in security for two-thirds of the three-fourths.

Sir John Murray Nasymth of Posso, while heir of entail in possession of the entailed estate of Posso and others, executed various improvements of the nature contemplated by the Montgomery Act (10 Geo. III., cap. 51). He afterwards obtained a decree from the Court declaring three-fourths of the sum expended in the execution of the improvements (which were all prior to the date of the Rutherfurd Act, 14th August 1848), amounting to £4982, 18s. 3d., to be a debt against succeeding heirs of entail. The debt contained in that decreet was, on 16th February 1838, assigned to certain trustees acting under a deed of assignation granted by Sir John in security of a sum of £2500 advanced by them to Sir John. Sir John died on 16th July 1876 without executing a bond of annual-rent or bond and disposition in security over the entailed estate in respect of the improvements.

Thereafter, on 9th March 1877, Erskine Campbell Colquhoun of Killermont, and others, his executors, presented a petition to the Junior Lord Ordinary praying that Sir James Nasymth, the heir of entail who succeeded to Sir John, should be ordained to execute over the entailed estate a bond of annual-rent in respect of the improvement outlay, in terms of the statute. Section 15 of the Rutherfurd Act provides—"That where any heir of entail in possession of an entailed estate in Scotland shall have executed improvements on such estate prior to the passing of this Act, and recorded the same in terms of the said last recited Act, and died without having executed a bond of annual-rent as hereinbefore authorised, or having charged the estate as hereinafter authorised, and where decree shall have been obtained, in terms of the said last recited Act, for three-fourth parts of the sums expended thereon, it shall be lawful for the executor or personal representative of such heir of entail, or for any party to whom such heir may have conveyed or assigned such debt, to make application by summary petition to the Court of Session, praying the Court to decern and ordain the heir in possession of such entailed estate to execute, in favour of any party such petitioner may think fit, a bond of annual-rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual-rent during the period of twenty-five years from the date of the death of the heir of entail who shall have executed the improvements, such annual-rent not exceeding the sum of £7, 2s. for every £100 of such three-fourth parts aforesaid, and so in proportion for any greater or less sum . . . . which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court.'

Sir James Nasmyth lodged answers to that petition, and also himself brought a petition asking for authority to execute a bond and disposition in security, in respect of the outlay over the estate, in favour of Sir John's executors, or in favour of a creditor advancing him two-third parts of the whole sum of £4982, 18. 3d. He set forth section 18 of the Act—"That in all cases in which it may be competent for an heir of entail in possession of an entailed estate in Scotland, or in which such heir of entail may be called upon, to grant a bond of annual-rent in terms of this Act, it shall be lawful for such heir of entail, and such heir of entail may be called upon to charge, under the authority of the Court of Session as after mentioned, the fee and rents of such estate, other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with two-third parts of the sum on which the amount of such bond of annual-rent, if granted, would be calculated in terms of this Act, by granting in favour of any creditor who may advance the amount of such two-third parts, bond and disposition in security over such estate, or any portion thereof other than aforesaid, for such amount, with the due and legal interest thereof from the date of such advance till repaid, and with corresponding penalties."

Answers were lodged for Sir John's executors, objecting to this petition on the ground, *inter alia*, that the 18th section did not confer any option upon the heir of entail in possession. The proposal to charge two-thirds of the said sum of £4982, 18s. 3d. upon the estate by way of bond and disposition in security would, it was stated, if carried out, have the effect (1) of changing the nature of the security from a charge upon the

heirs of entail and the rents of the estate to a charge of smaller amount upon the fee; and (2) of diminishing by one-third the amount recoverable by the executry estate out of the entailed estate, or, in other words, of making the executry estate pay for the improvements to the extent of one full half thereof.

The trustees, John Gibson jun., W.S., and John Turnbull, W.S., acting under the assignation mentioned above, had, in virtue thereof, prior to the dates of the two above-mentioned petitions, also presented a petition asking, as Sir James did afterwards, that two-thirds of the outlay should be charged by way of bond and disposition in security over the estate. In their answers Sir John Nasmyth's executors stated that the right of the petitioners was a right merely in security, and also stated that they were ready and offered "to make payment to the present petitioners before extract of such sums as may be due to them under the said assignation dated 16th February 1838."

The Lord Ordinary (ADAM), in the petition at the instance of Sir James Nasmyth, found that the petition was competent, and that the petitioner had a title to insist therein. His Lordship added the following note:—

"*Note.*—The question in this case is, whether an heir of entail in possession of an entailed estate, who has been called upon to grant a bond of annual-rent for a sum expended by his predecessor on improvements on the estate, has, under the 18th section of the Rutherfurd Act, the option in lieu thereof of charging the fee and rents of the estate with two-third parts of the sum on which the amount of such bond of annual-rent would be calculated by granting a bond and disposition over the estate?

"The expenditure in question was made by the petitioner's predecessor and father, the late Sir John Murray Nasmyth, who obtained decree for the amount under the Montgomery Act.

"The petitioner is in the position of having been called upon by petition, dated February 22, 1877, presented by John Gibson junior and John Turnbull (who claim to be in right of the debt in virtue of an assignation by Sir John of the decree), to grant a bond and disposition over the estate, and of having been called upon by petition, dated March 9, 1877, presented by the executors of Sir John (who claim to have the radical right to the debt, the foresaid assignation having been merely in security), to grant a bond of annual-rent over the estate.

"It appears to the Lord Ordinary to be unnecessary to decide at present which of these two parties has the best right to call upon the petitioner to charge the estate with the foresaid improvement expenditure, or to determine whether it shall be charged by way of bond and disposition in security or of bond of annual-rent, because the Lord Ordinary is of opinion that the petitioner, being heir of entail in possession of the estate, has, under the 18th section of the Rutherfurd Act, the right of deciding for himself which mode of charging the debt upon the estate shall be adopted.

"It is obvious that if the Lord Ordinary is right in his reading of the statute, and if the debt shall be charged upon the estate under this petition, it will be unnecessary and incompetent to proceed with the petitions at the instance of the assignees and executors of Sir John respectively. The Lord Ordinary has therefore sisted these petitions *in hoc statu*. But if this petition be not proceeded with, it may become necessary to proceed with one or other of these petitions. In the meantime, it does not appear to the Lord Ordinary to be necessary to decide which of the two had the best title to present a petition."

Procedure was accordingly sisted in each of the other two petitions, and leave was given to Sir John's executors to reclaim in each petition.

At advising—

LORD PRESIDENT—We have three petitions before us, which are all intended to create a charge against an entailed estate for three-fourths of a sum of improvement debt constituted in the lifetime of the last heir of entail. One is by Sir John Nasmyth's executors, another is by the heir of entail in possession, and a third is by certain trustees who had a right in security over the debt in the person of Sir John Nasmyth during his lifetime. The sum of debt due is £2500, and if that debt is paid the interest of these third parties is at an end. Sir John Nasmyth's executors have consented that ample provision shall be made for the payment of it before extract. That therefore puts an end to the title of these trustees to come as petitioners, and leaves the case to be decided as between the heir of entail and the executors of the late heir.

The result of the Lord Ordinary's judgment is, that the heir has it in his option to grant a bond and disposition in security for two-thirds of three-fourths of the improvement debt, or to grant a bond of annual-rent for the entire three-fourths. This depends upon the construction of the Rutherfurd Act, but certainly not upon the 18th section of the statute alone, but a great deal more upon the 15th section, under which the executor's right to call on the heir in possession to grant a bond of annual-rent is dealt with. Taking the 15th and 18th sections together, and not leaving out of view the provisions of the 14th section, I am of an opposite opinion to the Lord Ordinary. I think that under the circumstances of this case, which fall to be dealt with under the 15th section, the heir in possession when called on by the executors of the late heir to grant a bond of annual-rent, has no option to substitute therefor a bond and disposition in security for two-third parts of the three-fourths.

The 13th and 14th sections provide for the case when an heir of entail, who has executed improvements and has obtained decree for the sum expended, himself proposes to create a security over the estate for the money expended, and these sections authorise him during his lifetime to grant a bond of annual-rent to subsist during his own life and for twenty-five years thereafter. The annual-rent may be calculated at £7, 2s. for every £100, which in its result will give the creditor in the bond full payment of three-fourths of the original debt, with the corresponding interest for the twenty-five years. But it might often happen that the heir of entail who had expended the money would omit to create a security over the estate in his own lifetime, and it was thought expedient and just that in that event the right which he had should pass to his executor, because otherwise the improve-

ments upon the entailed estate would be made at the expense of personalty.

It was therefore right that the personal estate should get a security over the entailed lands after the heir's death. For that the 15th section provides. It gives the executor or personal representative of an heir of entail an active title to apply to the Court to have the heir in possession ordained to execute a bond of annual-rent, "which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court." No enacting words can be more clear or distinct than the words of that section. They confer on the executors, in the circumstances of the present case, an absolute right to demand and impose on the heir an absolute obligation to grant such a bond of annual-rent.

I do not say that it would be impossible that the Legislature should introduce qualifications from subsequent sections of the statute upon the absolute right and obligation given by that section, so as to allow one or other of the parties, and possibly both, an option. But where both the right and the obligation are created by distinct enactment, it will require something very distinct to take away from or modify the binding nature of the provisions of the section.

The 18th section is the only one that is said to do so. The construction put upon it by the heir is, that it gives him the right to answer the executor's petition by tendering a bond and disposition in security for two-thirds of three-fourths of the whole sum. As I read the clause, it contemplates two cases which are dealt with by the preceding sections. The first is where an heir of entail who has executed improvements for his own behoof makes a security over the estate for the amount of his debt. The second is, where he has executed improvements, but has created no security during his life, and his executor is entitled to demand a security from his successor after his death. Accordingly, the words of the 18th section are alternative—"Be it enacted that in all cases in which it may be competent for an heir of entail in possession of an entailed estate in Scotland, or in which such heir of entail may be called upon, to grant a bond of annual-rent." The alternative is very distinctly expressed. Construing the clause according to the view I take, the result is—(1) that where it is competent for the heir of entail to grant a bond of annual-rent, it shall be lawful for him to substitute a bond and disposition in security; and (2) where he may be called upon to grant a bond of annual-rent, he may be called upon to grant a bond and disposition in security. This reading seems to me to be supported by the other sections to which I have referred, and it is still further recommended by its being the sound and legitimate construction of the 18th section taken by itself.

I cannot say that I entertain any doubt that the heir of entail has no option but to grant the bond of annual-rent for the whole three-fourth parts of the improvement expenditure.

Lord Deas, Lord Mure, and Lord Shand concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming-note for E. C. Colquhoun and others, Nasmyth's executors, against Lord Adam's interlocutor of 28th May 1877, Recal the interlocutor, and remit to the Lord Ordinary to repel the first and third pleas stated for the respondent Sir James Nasmyth; to sustain the title of the petitioners; and to proceed in the matter of these petitions as shall be just: Find the petitioners entitled to expenses since the date of the Lord Ordinary's interlocutor; and remit to the Auditor to tax the account of said expenses and report to the Lord Ordinary, with power to his Lordship to decern for said expenses."

Counsel for Sir John W. Nasmyth's Executors—Balfour—Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Sir James Nasmyth—Kinnear. Agents—Gibson & Strathern, W.S.

Saturday, June 30.

SECOND DIVISION.

[Lord Adam, Ordinary.

DUNCAN AND OTHERS *v.* MAGISTRATES OF ABERDEEN.

Process—Relevancy—Reparation.

Circumstances in which an action of damages at the instance of the widow of a man who was drowned by the capsizing of a ferry-boat, against the magistrates of a burgh who were proprietors of the ferry, which they had let to a tacksman, was dismissed as irrelevant.

This was an action at the instance of Mrs Duncan, widow of Archibald Duncan, shoemaker, Aberdeen, against the Magistrates and Town Council of Aberdeen, concluding for payment of £1000 in name of reparation for the death of the said Archibald Duncan, who was drowned by the capsizing of the ferry-boat across the Dee from Aberdeen to Torry on 5th April 1876. The defenders were owners of the ferry, landing-places, and boats.

The pursuers averred that the defenders had been in the habit of letting the ferry-boats and machinery by auction to the highest bidder, irrespective of his possessing any qualifications for the management of boats. No means were provided to protect against overcrowding. The channel of the river Dee had recently been diverted into a new channel, 138 yards wide at spring tides, and the old ferry system of coble and oars had been changed on this new channel for a boat worked by a wire rope fastened to each bank, passing along the length of the boat, and doubling over a wheel or winch in the centre of the boat. Although the current in the new channel ran much more strongly than in the old channel, no new regulations had been made by the defenders, either as owners of the ferry or as Magistrates of Aberdeen, and the old regulations were applicable only to the old channel, where dead water prevailed, and were manifestly dangerous for a strong tideway. The old regulations provided that the boat should start within eight