there is nothing in this deed which can control them with the exception of that somewhat fanciful interpretation which I have already suggested, which may be ingeniously put upon the word "allow."

Well, the deed being in these terms, and there being an obligation to pay one-half of the rental, that is a debt which constitutes an asset of the creditor's estate, and passes by force of law upon his predeceasing the term of payment to his legal representatives.

I need hardly say that in the view which I take, the attempt to put a different construction upon the deed, which has been very ingeniously made at the bar, involves the necessity of introducing into the language of this deed additional words, which so far from elucidating appear to me entirely to contradict its true meaning.

Lord Bramwell—My Lords, I am entirely of the same opinion. It is reasonable in this case to suppose that the sister and brother agreed that what they could divide between them they would divide between them, so that neither of them should, as it were, suffer from the consequences of the decision—that is to say, that if the life estate was given to the brother, he would give to her half of what he should get during his life, and she and her representatives would take it; if she got the life estate owing to the decision being in her favour, she would behave in the same way to him. That seems to me to be a reasonable supposition as the basis of the agreement which was come to. Then what do they say? He agrees and she agrees, and the duration of the agreement is by each respectively for his or her life. That is tolerably manifest. Well then what is it that they agree about? It is that during his life he is to do something in the event of a decision in his favour, and during her life she is to do something. Now, what is it that is to be done? Why, to allow half of the free rent. But to whom? Why, the sister and brother respectively. That to my mind includes executors, administrators, and assigns. It is admitted that assigns are included, and I can see no reason why executors and administrators are not according to the ordinary rule.

Lord Fitzgerald—My Lords, upon reading the agreement in this case before the argument commenced, and the reasons given by the Lord Ordinary, and also by the Judges of the Inner Division of the Court of Session, it appeared to me perfectly plain that Lord Shand was correct in his reasoning, and that his reasoning ought to be adopted. It follows from that that what I call the rather surprising interlocutor pronounced by the Lord Ordinary, and adhered to by the Inner Division, ought to be reversed and an interlocutor pronounced in favour of the pursuer in the terms of the conclusions of the summons.

Interlocutor appealed from reversed, cause remitted with a declaration that the appellant was entitled to have decree in terms of the declaratory conclusion of the summons, viz., that under the agreement the defender was bound during all the days and years of her life to make yearly payment to the pursuer, as executor of T. H. Bankes, of one-half the free rental of Letterewe and Gruinard.

Counsel for Appellant (Pursuer)—Everitt, Q.C. —Horace Davey, Q.C.—Rawlinson—C. N. Crosse. Agents—Crosse & Sons, for C. & A. S. Douglas, W.S.

Counsel for Respondent (Defender)—Cozens Hardy, Q.C.—Dickson. Agents—Waterhouse, Ambletham, & Harrison, for Murray, Beith, & Murray, W.S.

COURT OF SESSION.

Saturday, February 6.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SIR A. D. STEWART, PETITIONER.

Entail—Process—Expenses—Entail Amendment (Scotland) Act 1875 (38 *and* 39 *Vict. c.* 61), *sec. 7, sub-sec.* 6, *and sec.* 9.

An heir of entail craving authority under sec. 9 of the Entail Act 1875 to substitute a bond and disposition in security for the amount of the unexpired portion of a rent-charge created upon the entailed estate by his predecessor in virtue of the Improvement of Land Act 1864, is not entitled under the provisions of section 7, sub-sec. 6, to charge the expenses of the application, and of obtaining the loan and granting the bond, upon the fee of the estate.

Sir A. D. Stewart was heir of entail in possession of the entailed estates of Grantully and others. In 1885 he brought the present petition for authority to substitute a bond and disposition in security, or bonds and dispositions in security, for a sum representing the amount of the unexpired portion of a rent-charge which had been created over the said estates by his predecessor Sir W. D. Stewart in 1870. This rent-charge had been created by an absolute order by the Inclosure Commissioners for England and Wales, charging the fee of the estate with a fixed yearly sum payable for twenty-five years from 1870. The petitioner had paid off upwards of one-fourth of the said rent-charge.

The petition was based on the 9th section of the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. c. 61), which proceeds on the narrative that "it is expedient that where an estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, has before the passing of this Act been duly charged with the cost of improvements executed thereon, and shall continue charged therewith after the passing of this Act, the heir of entail in possession thereof at or after the passing of this Act should be entitled to relief in the matter, but subject to the conditions hereinafter provided: Be it therefore enacted as follows—(1) It shall be lawful for such heir of entail, with the consent of the nearest heir for the time entitled to succeed to the said estate, in case he or any of his predecessors in possession of the estate shall have granted a bond or bonds of annual rent over the estate or any portion thereof, or otherwise imposed or created a rent-charge or rent-charges

thereon, in respect of improvements executed under the Act of the 10th year of the reign of His Majesty King George the Third, chapter 51, or under the Act of the 11th and 12th years of the reign of Her present Majesty, chapter 36, or any Act amending either of these Acts, or under the Improvement of Land Act 1864, or any Act amending the same, or any other Act authorising the loan of money for the improvement of land, and in case such bond or bonds of annual rent or rent-charge or rent-charges continues or continue to affect the estate at the time, to agree with the creditor in any such bond of annual rent or rent-charge for the substitution therefor of a bond and disposition in security over the estate or any portion thereof, other than as in the preceding section mentioned, for the portion then remaining unpaid of the sum on which the amount of such bond of annual rent or of such rent-charge was calculated, or otherwise to obtain from any person willing to advance the same money on loan to pay to the creditor the portion of such sum then unpaid as aforesaid, under such bond of annual rent or rent-charge if the creditor will consent to receive the same, and having obtained the sanction of the Court to such agreement to grant bond and disposition in security in terms thereof, in favour of such creditor or other person, and such bond and disposition in security if in favour of the creditor shall operate as an absolute discharge by him of such bond of annual rent or rent-charge. (2) Bonds and dispositions in security granted in terms of this section shall set forth the rate of interest stipulated to be paid from the date of the advance until repayment, with corresponding penalties, and may be in the form, and shall have the effect and operation and be subject to the conditions and provisions as to keeping down interest which are mentioned in the preceding section."

The Entail Amendment (Scotland) Act 1882 (45 and 46 Vict. c. 53), sec. 6, sub-sec. 4, was also set forth, which provides—"When at least one-fourth part of a capital sum borrowed for improvements on an entailed estate upon the security of a terminable rent-charge, in manner provided by the Entail Acts, shall have been defrayed by the heir in possession, it shall be lawful for such heir, without the consent of the nearest heir being required, and whether the cost of such improvements shall have been charged prior or subsequent to the passing of the Entail Amendment Act 1875, to avail himself of the provisions of the said Act for the substitution of a bond or disposition in security over the estate for the remainder of such capital sum."

The prayer of the petition craved, *inter alia*, that "such sum as your Lordships may find to be the actual or estimated cost of this application and the proceedings therein, and of obtaining the loan, and granting security therefor," should be included in the sum for which the proposed bond and disposition in security was to be granted.

The Lord Ordinary (Trayner) remitted to Mr H. B. Dewar, S.S.C., to examine the procedure and to report.

Mr Dewar in his report submitted to the Lord Ordinary the question, *inter alia*, whether the above-mentioned expenses could be properly charged on the fee of the estate.

The question depended on the terms of the Entail Act of 1875, already cited, the 7th section of which provides, *inter alia*, that "from and after the passing of this Act it shall be lawful for the Court, on the application of the heir of entail in possession of an entailed estate in Scotland, holden by virtue" of an "old" entail [the benefit is extended to "new" entails also by the Act 41 and 42 Vict. c. 28, sec. 3], "to grant authority to such heir of entail to borrow money to defray the cost of improvements on such estate, whether the same have been already executed by him or are in the course of execution, or are merely contemplated at the date of the application, and whether the same, if executed prior to the date of the application, were executed before or after the passing of this Act, and to grant security therefor to the lender in the manner hereinafter provided, such heir of entail having paid the cost of such improvements as may have been executed prior to the date of the application, or being liable for the same so far as unpaid: Provided as follows: . . . . . (6) In every case the Court shall, in fixing the amount to be borrowed under their authority, add to the actual or estimated amount of the cost of the improvements the actual or estimated amount of the cost of the application and the proceedings therein, and of obtaining the loan or granting security therefor." . . . .

The Lord Ordinary pronounced the following interlocutor: — "Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt: Interpones authority, sanctions the agreement for the substitution of a bond and disposition in security, or bonds and dispositions in security, for the amount due under the rent-charge mentioned in the petition as at 11th November 1885, being £1093, 19s. 2d.: Authorises and empowers the petitioner to execute in favour of any person or persons who may advance the said sum of £1093, 19s. 2d. a bond and disposition in security in ordinary form over the fee of the entailed estates of Grantully, Murthly, Strathbraan, and others other than the mansion-house, offices, and policies thereof, or over such portions thereof as are contained in the said rent-charge for the said *cumulo* sum of £1093, 19s. 2d., with interest thereon at the rate of £5 per centum per annum from the date of the said bond and disposition in security, or bonds and dispositions in security, binding the petitioner, and his heirs of entail in their order successively, to repay the principal sum therein, with interest and penalties as aforesaid, and containing a power of sale in ordinary form, and all clauses usual in bonds and dispositions in security over estates in Scotland held in fee-simple, but always subject to the like conditions and provisions as to keeping down interest as are made and provided by the Act 11 and 12 Vict. cap. 36, and any Acts amending the same in regard to bonds and dispositions in security in respect of provisions to younger children: *Quoad ultra* refuses the prayer of the petition, and decerns: Remits to Mr Dewar to see such a bond and disposition in security prepared and executed, and to report.

"*Opinion.*—I have refused the prayer of the petition in so far as it craves authority to burden the entailed estates with the expenses of this application and the proceedings therein, and also

with the expenses attending the substitution of a bond and disposition in security for the existing rent-charge. The petitioner bases this part of the prayer of the petition on section 7 (sub-section 6) of the Entail Amendment Act of 1875. I am of opinion that that section of the Act does not apply to the case before me. It will be observed that by section 7 of the Act of 1875 the Court is empowered to authorise an heir of entail to borrow money to defray the cost of improvements, but this is limited to the cost of improvements made by the heir who seeks power to borrow. The words of the section are, 'that it shall be lawful for the Court, on the application of the heir of entail in possession, . . . to grant authority to such heir of entail to borrow money to defray the cost of improvements on such estate, whether the same have been already executed by him, or are in the course of execution, or are merely contemplated at the date of the application.' The improvements in question in respect of which the rent-charge was created (now sought to be replaced by a bond and disposition in security) were not executed by the petitioner, but by a previous heir of entail, and therefore it appears to me that the section quoted does not apply to the present case. Sub-section 6 is a provision qualifying the leading clause, and will not come into effect if the leading clause is not applicable. Even if clause 7 of the Act did apply I have great doubt whether sub-section 6 would avail the petitioner. It refers to the expense attending the borrowing of money. I am not asked to authorise the petitioner to borrow money in the strict sense to defray the expense of improvements made, making, or to be made by him. If I were, I should have to inquire into the character of the alleged improvements in order to see whether they were such that their cost could be charged on the entailed estates. I should also require to be satisfied of the amount of such cost. But none of these things are before me. There is an existing rent-charge for the cost of improvements executed before 1870, and I am asked to authorise the substitution therefor of another form of security without any inquiry into the circumstances under which the rent-charge was created. The petitioner says that he is in effect asking power to borrow money to pay off the rent-charge. If he is (although that is not the form of the petition), that is not asking power to borrow money to pay for the cost of improvements made by him.

"I admit that my construction of the statute is a strict one, but if sound it must be applied. The next heir of entail (through the reporter) has asked that this shall be done."

The petitioner reclaimed, and argued — The sections which gave authority to substitute a more advantageous form of security for an existing rent-charge were silent as to expenses. The Court must therefore look to section 7 of the Act of 1875, subsec. 6. This application was in substance, though not in form, one for the purpose of borrowing money (for the petitioner was to borrow from his new creditor under the bond) "to defray the cost of improvements on the estate" (for the rent charge in question was created in respect of money which was advanced by the commissioners for the express purpose of executing improvements, and was so expended). The section was therefore directly applicable. The improvements need not have been executed by the petitioner himself, nor, as here, the rent-charge created by him. The Lord Ordinary's view of these words was too strict—*Maxwell*, July 17, 1877, 4 R. 1112. The estate in this case had not had to bear a previous set of expenses, for the debt was originally created in 1870, *i.e.*, prior to the Act of 1875. It was equitable that it should now bear the cost of this procedure. Section 12, subsec. 6, of the Act of 1875 was also referred to, but was not strongly relied on, looking to the decision in *Maclaine* v. *Ranken*, July 12, 1878, 5 R. 1053.

At advising—

Lord President—I think the Lord Ordinary's decision in this case is a sound one, and that we should adhere to it. This application is made under the 9th section of the Entail Amendment Act of 1875, and its object is to obtain authority to establish one form of security for another as regards a debt affecting an entailed estate of which the petitioner is presently in possession as heir of entail.

But the petitioner asks also that the actual or estimated cost of the application, and the proceedings therein, and of obtaining the loan and granting the security therefor, should be made a burden on the fee of the entailed estate. Now, it is clear that this cannot be done, unless there is a statutory provision for such a proceeding, and accordingly the petitioner refers to section 7 of the Act of 1875 as containing the necessary power to enable him to do what he now asks should be done. I do not so read that section. I think it provides for the case of improvements, which have been executed by the heir of entail in possession, and it empowers such an heir to charge the cost of these improvements against the entailed estate. This section I think clearly applies to improvements made by the heir in possession, and charged for the first time on the entailed estate. In the case before us the debt was originally created by the predecessor of the petitioner, who obtained from the commissioners in the year 1870 an advance of money in terms of the Improvement of Land Act 1864.

I think this 7th section of the Act is entirely different, and apart from the 9th section, under which this petition has been mainly presented. That section merely authorises the substitution in the manner therein set forth, of a bond and disposition in security for a bond of annual rent or rent-charge. Looking to the provisions of the two sections, I do not see how it is possible for anyone taking the benefit provided by the 9th section, at the same time to bring himself under the provisions of section 7. I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Mure concurred.

Lord Shand—I am of the same opinion. I think the 7th section of this Act in dealing with expenses clearly refers to the first imposition of a charge on the estate for purposes of improvement, and not to those incurred in connection with the transference of an existing burden in the manner contemplated by the petitioner here.

Lord Adam—This matter is of course entirely

statutory. I think nothing has been said to show us how the expenses incurred in connection with the transfer of this burden can in any way be made a proper charge against the fee of the entailed estate.

The Court adhered.

Counsel for Petitioner—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Tuesday, February 16.

SECOND DIVISION.

MACROBBIE *v.* THE ACCIDENT INSURANCE COMPANY.

Insurance—Accident Insurance—Warranty.

In an action on a policy of assurance against accidents, which provided that it should not "extend to any injury happening while the assured was under the influence of intoxicating liquor," the Court found it unnecessary to decide whether the accident was caused by the insured being drunk, it being sufficient breach of the warranty that he was the worse of drink at the time he was injured, and further found that in point of fact the insured was the worse of drink when injured, and therefore was not entitled to recover any sum under the policy.

This was an action to recover a sum of money under a policy of the Accident Insurance Company (Limited) under the following circumstances:—The company by the policy had undertaken with the pursuer, the assured, James MacRobbie, that if during its being in force the insured should sustain any personal injury within the intention of the policy, and provisions and conditions thereof, which should not be fatal, then, on proof of such injury, and of incapacity thereby caused, the company should be liable to pay compensation for total disablement at the rate of £3, 12s. per week while the incapacity should last. The policy contained a condition that it "should not extend to any injury . . . happening while the assured is under the influence of intoxicating liquors or drugs."

On the 12th of June 1885 MacRobbie took the 11 p.m. train from Glasgow to Cambuslang, where he was at that time living. He got out at Cambuslang. He averred that in doing so he severely injured his ancle upon the platform in stepping down from the railway carriage, owing to an inequality in the platform, that his injury grew worse as he endeavoured to proceed home, and it subsequently proved that his leg had been fractured.

The defence at first stated was that the pursuer had failed to comply with the provisions of the policy. But on adjustment of record it was averred that the pursuer met his accident when under the influence of intoxicating liquor; that he was assisted out of the train without accident, and subsequently received his injury in some way which was never explained to the directors, as required by the conditions of the policy, so that he was not entitled to relief under the conditions of the policy.

The Lord Ordinary (FRASER) allowed a proof, of which the import was as follows:—The pursuer swore that although he had had some drink that 12th of June, after business hours, he was quite sober when he entered the train at Glasgow, that he got down from the train at Cambuslang without assistance, and that he hurt his foot owing to some inequality in the platform, that he thought at the time that he had sprained his ancle, but as he endeavoured to walk home he became worse, and eventually fainted, and was conveyed home by two policemen who found him. A railway porter at Cambuslang deponed that he saw the pursuer, whom he knew, that night, and that (although he did not take any particular notice of him) he did not think he was intoxicated. Two policemen who found pursuer also swore that when they found him at three o'clock a.m. he was sober, although with the smell of drink on him.

For the defence the guard of the train from Glasgow to Cambuslang swore that he put another passenger into the same carriage with pursuer, that pursuer was then lying on the floor of the carriage, and that he locked the door, as he did not think pursuer was fit to take care of himself; that on the arrival of the train at Cambuslang the pursuer was assisted from the carriage by the guard and the booking-clerk; that he (witness) was not prepared to say that the pursuer would have been able to get down without assistance; and that he was of opinion that the pursuer was under the influence of liquor. This was corroborated by the booking-clerk at Cambuslang, who deponed that he and the guard had helped pursuer to alight, that he needed assistance, and was not sober.

The Lord Ordinary decerned against the defenders in terms of the conclusions of the summons.

"*Opinion.*—The only defence insisted in against the claim of the pursuer is that he was 'under the influence of intoxicating liquor' when he sustained the injury for which he now asks compensation under the policy of insurance. These words are very loose. Literally interpreted they would be held to justify this Insurance Company in not paying under their policy if the assured had had a glass of wine. But this cannot be the meaning of a contract of this nature, and the defenders did not conduct their case on that footing. They endeavoured to show that the assured here was in such a state of intoxication as to be incapable of taking care of himself, and to be very liable to suffer a fracture of the leg. Now, if one witness, David M'Walter, a railway guard, can be believed, there can be no doubt that the pursuer was in such a state of intoxication as the defenders have attempted to establish, for his evidence goes this length, that he saw the pursuer lying upon the floor of a railway carriage when he, the guard, opened the door of the locked compartment to let in another passenger; and he further says that when the train arrived at Cambuslang he and the booking-clerk helped the pursuer out of the carriage in a state of intoxication. The clerk does not quite corroborate this, and there is no further corroboration of M'Walter. The person who entered the compartment of the railway carriage in which the pursuer was at the Central Station in Glasgow has not been produced, perhaps because his name was unknown. His evidence would have been conclusive upon the subject.