Wednesday, July 18.

FIRST DIVISION.

[Lord Trayner, Ordinary.

LEITH *v.* LEITH.

Entail—Improvement Expenditure—Bequest—Entail Amendment (Scotland) Act, 1875 (38 *and* 39 *Vict. cap.* 61), *secs.* 8 *and* 11—*Expenses—Sec.* 7, *sub-sec.* 6.

A bequest of improvement expenditure only entitles the legatee, under the 8th and 11th sections of the Entail Amendment Act of 1875, as amended by section 6 of the Entail Act, 1882, to demand from the heir of entail in possession a bond and disposition in security for three-fourths of the amount, and three-fourths of the expenses of the application, under sec. 7, sub-sec. 6, and section 8.

Alexander Leith was at the date of his death on 14th July 1886 heir of entail in possession of the lands of Glenkindie and others, in the county of Aberdeen. By a codicil to his trust-disposition and settlement, dated 21st December 1883, he bequeathed, under section 11 of the Entail Amendment Act of 1875, to his daughter Georgiana Leith all right and interest competent to him to charge his entailed lands of Glenkindie and others with all expenditure on improvements already executed, or which might thereafter be executed by him. He was succeeded as heir of entail in the lands of Glenkindie and others by his brother General Robert William Disney Leith.

This petition was presented by Miss Georgiana Leith, in which the Court was asked "to find and declare that the sum of £1900, or such other sum as may be ascertained by your Lordships to have been expended on the entailed lands and barony of Glenkindie and others, was expended by the deceased Alexander Leith while heir of entail in possession of said entailed lands and barony, on improvements thereon of the nature contemplated by the said Act 38 and 39 Vict. cap. 61; to find that the petitioner is in right thereof; and to decern and ordain the said General Robert William Disney Leith, as heir in possession of the said entailed lands and barony, to execute in favour of the petitioner, or any other person she may think fit, a bond and disposition in security over the said entailed lands and barony of Glenkindie, Morlich, Bellnaboth, and others, other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate, other than as aforesaid, for the whole or otherwise for three-fourths of the said sum of £1900, together with such sum as your Lordships may find to be the actual or estimated amount of the cost of this application and the proceedings therein, and of obtaining the loan and granting security therefor, and so in proportion for any greater or less sum, together with the actual or estimated cost above referred to or a proportion thereof added thereto, with the interest thereof at the rate of £5 per centum per annum from the date of your Lordships' decree in this petition till paid, and with corresponding penalties."

The Entail Amendment Act, 1875 (38 and 39 Vict. cap. 61), by section 8, provides—"It shall be lawful for an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848 (notwithstanding any provisions to the contrary contained in the tailzie), who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge 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 a bond of annual rent, binding himself and his heirs of tailzie to make payment of an annual rent for twenty-five years from and after the date of such authority of the Court; or, where the money has been consigned as aforesaid, from and after the expiration of two years from the date of consignation, such annual rent to be payable by equal moieties half-yearly, and to be at a rate not exceeding £7, 2s. per annum for every £100 so authorised to be borrowed, and so in proportion for any greater or less sum; or, where the improvements were executed before the date of the application to the court in the option of such heir in possession, and in lieu of such bond of annual rent, with a bond and disposition in security over such estate or any portion thereof other than as aforesaid, for two-thirds of the sum on which the amount of such bond of annual rent, if granted, would be calculated, in terms of this Act."

Section 11 provides—"Where any heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie dated prior to the 1st day of August 1848, shall have executed improvements on such estate of the nature contemplated by this or any other Entail Act, as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the court, praying the court, after such inquiry as to the court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate by the deceased heir of entail; and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner, or of any other person such petitioner may think fit, a bond and disposition in security over the said estate other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate other than as aforesaid, for the amount with which the deceased heir of entail himself might, under the provisions of this Act, have charged the estate."

The Entail (Scotland) Act, 1882, section 6, enacts—"(1) Where application is made for authority to borrow and charge for improvement expenditure, the Court or Sheriff may grant authority to execute bonds and dispositions in security for three-fourths of the sum authorised to be borrowed, and whether the improvements shall have been executed at the date of the application or are contemplated."

The petition was opposed by General Leith, who contended that he was only bound to grant

a bond and disposition in security for three-fourths of the improvement expenditure.

On 12th June 1888 the Lord Ordinary (TRAYNER) pronounced this interlocutor—"Finds and declares that the sum of £1853, 4s. 10d. has been *bona fide* and properly expended on improvements of a permanent nature, and such as are contemplated by the Entail Amendment (Scotland) Act, 1875, upon the entailed lands of Glenkindie and others mentioned in the petition, by the deceased Alexander Leith (*tertius*), while heir of entail in possession of said lands, and that the petitioner is in right thereof in virtue of a codicil to the trust-disposition and settlement of the said Alexander Leith, dated 21st December 1883, whereby he expressly bequeathed and conveyed the same to her: Decerns and ordains the respondent General Robert William Disney Leith, the heir of entail now in possession of the said lands, to execute in favour of the petitioner, or of any other person she may think fit, a bond and disposition in security over the said lands, other than the mansion-house, offices, and policies thereof, for £1853, 4s. 10d., together with the sum of £136, 14s. 10d., being the estimated cost of the application, and obtaining the loan, and granting security therefor, the said two sums amounting together to the sum of £1989, 19s. 8d., with the interest thereof at the rate of £5 per centum per annum from the date of this decree till repaid, and with corresponding penalties, such bond and disposition in security binding the said General Robert William Disney Leith as heir of entail in possession foresaid, and his heirs of entail in their order successively, to repay the principal sum therein, with interest and penalties as aforesaid, and containing power of sale in ordinary form, and also containing all clauses usual and necessary in bonds and dispositions in security over estates in Scotland held in fee-simple: Provided always, that the said sum shall only be deemed to be a debt against the entailed estate and the heirs of entail therein, and with and under the provisions and declarations applicable to such bonds and dispositions in security contained in the statutes, and decerns: Remits to the reporter to adjust and see executed such a bond and disposition in security, and to report.

"*Opinion.*—The late Alexander Leith was at his death the heir of entail in possession of the lands of Glenkindie and others, and had prior to his death expended a sum of £1853, 4s. 10d. in improvements on the entailed estates, which he would have been entitled to charge thereon under the provisions of the Entail Acts. He expressly bequeathed to the petitioner the said sum, and assigned to her the right and interest competent to him to charge the entailed estates therewith. She now petitions the Court to ordain the heir of entail in possession to execute in her favour a bond and disposition in security over the entailed estate (except the mansion-house and policies) for the foresaid sum. The heir of entail in possession objects to the prayer of the petition being granted, but is ready to grant a bond for three-fourths of the said improvement debt, which he maintains is all the petitioner can demand.

"The determination of the question between the parties depends upon the construction of the 8th and 11th sections of the Entail Amendment Act, 1875. By the 11th section it is provided that any person in the position of the petitioner is entitled to the order or decree of the Court ordaining the heir of entail in possession to execute in his or her favour a bond and disposition in security over the estate, other than the mansion-house, &c., 'for the amount with which the deceased heir of entail himself might under the provisions of this Act have charged the estate.'

"By the 8th section power is given to an heir of entail to charge the estate with improvement expenditure in one or other of two modes. He may charge the estate with the full amount of his expenditure by means of a bond of annual rent, under which the whole expenditure and interest will be paid off in twenty-five years, or he may grant bond and disposition in security in common form for three-fourths of the amount of the improvement expenditure.

"The respondent now contends that as the heir while in possession could not have charged the estate with a bond and disposition in security for more than three-fourths of the improvement expenditure, so now his assignee or representative is not entitled to a bond and disposition in security over the estate for any larger amount. The question is not, however, what the heir while in possession could charge by way of bond and disposition in security, but what he could charge in any way, the statute providing that the assignee of the deceased heir is entitled to a bond 'for the amount with which the deceased heir of entail himself might have charged the estate.' If he could competently have charged the estates in any mode with the whole expenditure, his representative or assignee is now entitled to have that done. The measure of the assignee's right is the amount which the deceased heir could have charged upon the estates irrespective of the mode in which that charge was made.

"The respondent maintains that charging the estate with an annual rent is not charging the estate with the expenditure itself. In my opinion the distinction thus drawn is not a good or sound distinction. The bond of annual rent (Jurid. Styles, i. 440) proceeds upon the narrative that the heir charging has received from the person in whose favour the bond is granted the full amount of the expenditure, which sum he binds himself and the heirs of entail to repay, with interest, in twenty-five years, by half-yearly payments of fixed amount, and in security of these payments the entailed estates are conveyed. The whole expenditure is thus charged upon the estates whenever the bond of annual rent is granted or recorded. No doubt the right of the creditor in one case is limited to insist on repayment of his debt by certain instalments, while in the other he may at once demand payment of his debt in full. But that difference in the right of the creditor does not affect the fact that under the bond of annual rent the heir of entail had validly charged the entailed estates with the full amount of the improvement expenditure, and if he could do that his assignee is entitled to have it done in her favour. This can only be done by means of a bond and disposition in security, for the Act has so prescribed."

General Leith reclaimed.

At advising—

LORD PRESIDENT—The petitioner here is a legatee of the last heir in possession of the entailed estate in question, and her legacy consists of the sum expended on improvements by

that heir while in possession, which sum he had not constituted or made a burden on the estate in his lifetime.

The right which the petitioner now seeks to enforce is conferred by section 11 of the Entail Amendment Act of 1875, and the demand which she makes is that the heir now in possession should be ordained to execute a bond and disposition in security over the entailed lands for the whole amount so laid out on improvements.

But it is contended for the heir in possession that the petitioner is entitled only to three-fourths of the sum so expended, and not to the whole outlay. The question between the parties therefore comes to depend upon the interpretation which is to be put upon certain clauses in sections 8 and 11 of the statute—[*reads section* 11.]

Now, the way in which the estate is to be charged in favour of the legatee is by a bond and disposition in security, and such bond and disposition in security, which is to be granted by the heir in possession can only be for two-thirds, or as it has been altered by a subsequent statute, for three-fourths, of the sum expended on improvements, and not for the whole sum. But the petitioner contends that she is entitled to have a bond and disposition in security granted to her for the whole sum so laid out, because the heir who executed the improvements might have charged this whole sum against the estate under a bond of annual rent. But there is a fallacy in this reasoning. A bond and disposition in security (unless of course it is paid off) remains a permanent burden on the lands, whereas a bond of annual rent is a burden which according to statutory regulations terminates in twenty-five years. It is extinguished by payment of annual instalments.

But we are carried back in section 11 to the provisions of section 8, which gives to the heir making the improvements alternative modes of charging his outlay on the lands—[*reads section* 8.] Now, these are the alternative methods which are offered to the heir in possession, and we can easily see why in the one case he is only allowed to charge three-fourths of the outlay against the estate, while, if he adopts the other method, he can charge the whole amount.

The bond and disposition in security is, as I have already pointed out, a permanent burden on the land, while the bond of annual rent is terminable, and it might happen that before the death of the heir who executed the improvements the whole sum he had laid out might, under a bond of annual rent, be paid up; in any event some of it would be paid up, and year by year the burden on the lands would be diminishing; and so, by adopting this mode of charging the outlay, the heir is allowed to charge the whole amount. In the present case it is impossible to have a bond of annual rent, because the lady is not heir of entail and can never contribute towards the extinction of an annual rent. It is only an heir of entail who can do that, and so when the Court ordains that a bond and disposition in security is to be the form of security which the legatee is to get over the estate, it must necessarily be confined to the amount for which the heir in possession would have been entitled to charge the estate in that form of security.

I am sorry therefore that I cannot agree with the Lord Ordinary, and I think the bond must be restricted to three-fourths of the sum expended on improvements.

Lord Mure—I am of the same opinion as your Lordship. We are here dealing with a statutory matter, and must follow strictly the provisions of the Act of Parliament. Now, section 11 carries us back, as your Lordship has pointed out, to section 8, in which two alternative modes of charging improvement expenditure are set forth. The position of the petitioner here is certainly not more favourable than that of the heir who carried out the improvements, and he could not have charged under a bond and disposition in security more than three-fourths of the sum he had expended.

Upon that simple ground, and looking to the words of the statute, I do not think the proposal of the petitioner can be entertained.

Lord Adam—The Lord Ordinary has found that the sum of £1853, 4s. 10d. was properly expended by the late heir in possession of the entailed lands of Glenkindie on permanent improvements such as were contemplated by the Entail Amendment Act, 1875, and he has ordained the heir of entail now in possession to execute a bond and disposition in security for £1989, 19s. 8d., which is the full amount of the improvement expenditure laid out by the late heir, together with £136, 14s. 10d., the expenses of this application, and the question we have to determine is, whether the petitioner is entitled to have this whole debt constituted against the estate by means of a bond and disposition in security, or whether her claim must not be restricted to three-fourths of the amount.

The petitioner's contention is, that as the heir in possession could have constituted this whole sum as a debt against the estate by a bond of annual rent, so she, as coming in his place, is entitled to have a bond and disposition in security for the full amount so laid out. But your Lordship has pointed out the distinction between a bond of annual rent and a bond and disposition in security, and as it is clear by a reference to the statute that the heir in possession could not have charged the estate with the full amount of this improvement expenditure under a bond and disposition in security, but must have restricted his claim to three-fourths of the outlay, so the petitioner coming in his place cannot be in a better position than her author. The Lord Ordinary in his note refers to the language of a bond of annual rent as found in the style given in the Juridical Styles. I am not prepared to say that I approve of the style given by that learned society, and I think that perhaps it was the language there used which induced the Lord Ordinary to take the view he has done in this case. I cannot imagine that it was the intention of the Legislature that by mere delay the cedent should be put in a better position than the original heir, and accordingly I think this bond and disposition in security must be restricted to three-fourths of the sum expended on improvements.

Lord Shand was absent on circuit during the discussion.

On the 18th of July the petition again came before the Court on the question of the amount

of the expenses of the application to be charged on the estate under the bond and disposition in security.

The Entail Amendment (Scotland) Act, 1875, provides by sec. 7, sub-sec. 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 and granting security therefor."

The petitioner argued that the intention of the Act of 1875 (as amended by the Act of 1882, sec. 6) was not to restrict the amount of expenses chargeable under a bond and disposition in security to three-fourths of the whole amount. The expenses of the application were the same whether the charge on the estate was by bond of annual rent or by bond and disposition in security. The petitioner, as a legatee, could only charge by bond and disposition, but should be allowed to include therein the whole amount of the expenses.

The respondent argued that under section 8 of the Act of 1875, as amended, the total amount to be charged by bond and disposition in security was three-fourths of the sum for which the amount of a bond of annual rent could be granted. By sub-sec. 6 of sec. 7 of the Act of 1875, that sum was arrived at by adding together the cost of the improvements and the cost of application. Only three-fourths of the expenses could therefore be charged on the estate by the legatee.

Lord President—I think the 6th sub-section of the 7th section and the 8th section of the Entail Amendment Act, 1875, must be taken together. I think without doubt, especially after what has fallen from my brethren in the course of the discussion, that the conclusive answer to the contention of the petitioner is contained in section 8. The 6th sub-section of the 7th section provides that "in every case the Court shall, in fixing the amount to be borrowed under their authority, add to the actual or estimated cost of the improvements the actual or estimated amount of the cost of the application and the proceedings therein." That directs two sums, the cost of the improvements, and the cost of the application to be added together. Then the 8th section, dealing with the amount to be charged on the estate where the heir of entail grants a bond and disposition in security over the estate in place of a bond of annual rent, provides that such bond is to be for two-thirds of the sum on which the amount of the bond of annual rent, if granted, would be calculated; that would be two-thirds of the aggregate sum of the improvement expenditure and of the expenses of the application. It distinctly lays down that a bond and disposition in security is to be for two-thirds of the aggregate sum, and it is very clear that the expenses form part of the sum so to be dealt with. Consequently only two-thirds, or as it is under the later statute, three-fourths of the expenses can be charged under the bond and disposition in security.

Lord Mure—I am of the same opinion.

Lord Shand—The expenses incurred by the heir of entail are the same whether he ultimately charges the whole or only two-thirds of them upon the estate—that is, whether he makes use of a bond of annual rent or of a bond and disposition in security. If I could have found any reading of the statute which would have justified me in allowing the whole expenses to be charged under a bond and disposition in security I should have taken it. I see no reason why the whole sum of expenses should not be charged upon the estate, when in all other applications heirs of entail are allowed to charge the whole amount of the expenses upon the estate. Section 8, however, is too strong. It expressly provides that the two sums should be taken together and treated as one, and that two-thirds of the whole sum only is to be charged upon the estate, and therefore two-thirds only of the expenses.

Lord Adam—The statute, I think, is perfectly clear in the direction which your Lordship has indicated.

The Court altered the interlocutor of the Lord Ordinary to the following effect:—

> "Recal said interlocutor in so far as it decerns and ordains the respondent (reclaimer), the heir of entail now in possession of the lands of Glenkindie and others mentioned in the petition, to execute in favour of the petitioner, or of any other persons she may think fit, a bond and disposition in security over said lands, other than the mansion-house, offices, and policies thereof, for £1853, 4s. 10d., together with the sum of £136, 14s. 10d., said two sums amounting together to the sum of £1989, 19s. 8d., with interest thereof at the rate of £5 per centum per annum from the date of said decree till repaid, and with corresponding penalties: *Quoad ultra* adhere to said interlocutor, and decern and ordain said respondent to execute in favour of the petitioner, or of any other person she may think fit, a bond and disposition in security over said lands, other than the mansion-house, offices, and policies thereof, for the sum of £1492, 9s. 9d., being three-fourths of said sum of £1989, 19s. 8d., with interest upon said sum of £1492, 9s. 9d., at the rate of £5 per centum per annum, from the date of the Lord Ordinary's interlocutor till repaid."

Counsel for the Petitioner—Jameson—Graham Murray. Agent—D. Lister Shand, W.S.

Counsel for the Respondent—Cheyne. Agents—Mackenzie & Kermack, W.S.