conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration, or other deed or procedure, and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor."

On the 30th October 1889 the Lord Ordinary (LORD WELLWOOD) pronounced the following interlocutor:—"Finds that the complainer not having completed a title to the heritable subject over which the bond and disposition in security condescended on was granted by his father the deceased Thomas Lamb, he has not taken the said estate by succession within the meaning of the 47th section of the Conveyancing Act of 1874: Therefore finds that the personal obligation in the said bond and disposition in security has not transmitted against the complainer and that the charge sought to be suspended was incompetent and illegal: Therefore sustains the first and third pleas-in-law for the complainer, and suspends the said charge and whole grounds and warrants thereof: Finds the complainer entitled to expenses, &c.

"*Opinion.*—The legality of the charge which is sought to be suspended depends upon whether the complainer has, in the sense of the 47th section of the Conveyancing Act of 1874, 'taken by succession' the estate over which the bond and disposition in security condescended on was granted by his father. It appears to me that on a sound construction of that clause it is unnecessary, in order that the personal obligation in a bond and disposition in security granted by the ancestor should transmit against an heir, that the heir should have completed a title to the estate by the service or otherwise, which admittedly the complainer has not done. The object of the 47th section was simply to obviate the necessity of constituting the debt against the heir or obtaining a bond of corroboration from him. The language used in the 47th section and in Schedule K bears out this view. After providing that an heritable security shall, together with any personal obligation contained in the deed whereby the security is constituted, transmit against any person taking the estate by succession, it is provided that it "shall be a burden upon his title in the same manner as it was upon that of his ancestor or author without the necessity of a bond of corroboration or other deed or procedure." And in Schedule K, which contains a form of minute for warrant to charge an heir or disponee under a personal obligation by his ancestor or author, the person sought to be charged is designed as 'the present proprietor of the said lands, and as such the present debtor in the said bond and disposition in security.' It appears to me, therefore, that as a condition of the transmission of the obligation, followed as it will be by the serious consequences of summary diligence, it is contemplated that a formal title must have been made up to the subjects by the person sought to be charged.

"I do not think that this question is affected by the provisions of the 9th and 12th sections of the statute. The 9th section simply provides that the personal right to an estate in land shall vest without service; but this alone does not involve the transmission against the heir of the personal obligation in his ancestor's bond. Vesting which takes place without the heir's consent and perhaps without his knowledge is not equivalent to taking up the succession. Again, in section 12 it appears to be comtemplated that the heir may intromit with the ancestor's estate and yet be entitled to renounce, subject to liability to the extent of his intromissions. It would thus appear that mere intromission with the estate does not constitute 'taking by succession' in the sense of the statute.

"I express no opinion as to the validity of the respondent's claims against the complainer in respect of his intromissions, either with the heritable or moveable estate of his father. Those may be made good in another process. I only decide, for the reasons above stated, that the charge sought to be suspended was incompetent and illegal."

Counsel for the Complainer—Strachan. Agent—W. T. Sutherland, S.S.C.

Counsel for the Respondents—Wilson. Agents—Somerville & Watson, S.S.C.

Saturday, November 30.

OUTER HOUSE.

[Lord Kincairney.

CARRUTHERS, PETITIONER.

Entail—Provision for Younger Children—Free Rental.

By a deed of entail power was given to the heirs of entail "to provide their children, one or more, other than and beside the heir succeeding thereto, in portions or provisions not exceeding in whole three years' free rental of said lands and estate, to be computed and as the same shall extend at the decease of the heir of entail granting such deed of provision." An heir of entail having made a provision for his daughter by virtue of this power, the succeeding heir of entail presented a petition for power to charge the estate with the amount of the provision, in which he alleged that the amount of the provision was within three years' rental of the estate unless he were entitled to deduct "one-third of the clear rents assigned or about to be assigned by him to a creditor in respect of Montgomery improvements under section 16 of the Montgomery Act." The debt in question consisted of improvement expenditure made during the lifetime of the preceding heir, but had not been consti-

tuted by decree. *Held* that the one-third of the rents about to be assigned by the petitioner in respect of this debt did not fall to be deducted from the free rental of the lands in estimating whether the amount of the provision to the daughter of the preceding heir was within the power granted by the deed of entail.

This was a petition by Richard Hetherington Carruthers, heir of entail in possession of the entailed estate of Denbie, in the county of Dumfries, under a deed of entail dated 20th September 1819, and recorded in the Register of Tailzie 14th November 1832, praying, *inter alia*, for authority to charge the fee and rents of the estate other than the mansion-house, offices, and policies thereof, with a provision of £1400 in favour of Horatia Barbara Carruthers, only daughter of John Hetherington Carruthers, the immediately preceding heir of entail, by granting a bond and disposition in security or bonds and dispositions in security over the estate.

The petition set forth—"By the foresaid deed of entail power was given to the heirs of entail thereby called in succession to the said estate, 'to provide their children, one or more, other than and beside the heir succeeding thereto, in portions or provisions, not exceeding in whole three years' free rental of said lands and estate, to be computed and as the same shall extend at the decease of the heir of entail granting such deed of provision to younger children, which provisions shall be payable at such time or times . . . as the granters of such provisions respectively shall direct or appoint.' . . .

"By general disposition and settlement, dated 14th September 1849, executed by the said deceased John Hetherton or Hetherington Carruthers, uncle of the petitioner, heir of entail then in possession of the said estate of Denbie, he, upon the narrative of the said power in the deed of entail, bound and obliged himself and the heirs of entail succeeding to him in the estate of Denbie, to content and pay to Horatia Barbara Carruthers, his only daughter, now residing in Constantinople (being a younger child of a prior heir, within the meaning of the entail and the Entail Statutes), the sum of £1400 sterling, and that at the first term of Whitsunday or Martinmas after his death, with interest and penalty, but under the declaration that in case the sum of £1400 should at his death be found to exceed three years' free rent of the entailed estate, then it should be reduced to a sum not exceeding three years' free rent at the time of his death.

"The said John Hetherton or Hetherington Carruthers died on 3d November 1887, and was succeeded in the said entailed estate by the petitioner.

"The free yearly rental of the said estate for the crop 1887, being the year in which the said John Hetherton or Hetherington Carruthers died, amounted to £495, 1s. 1d., and accordingly the provision of £1400 will be within three years' rental of the estate, unless the petitioner be entitled to deduct one-third of the clear rents assigned or about to be assigned by him to a creditor in respect of Montgomery improvements under section 16 of the Montgomery Act (10 George III. c. 51). No part of the said principal sum of £1400 has been paid to the said Horatia Barbara Carruthers."

The debt referred to in respect of Montgomery improvements was a debt of £1534, 7s. 8d. due to the said Horatia Barbara Carruthers as executrix of the said John Hetherington Carruthers, and was thus described in the schedule of debts deponed to by the petitioner—"This charge has not yet been formally constituted by decree. It consists of several items of improvement expenditure made under the Montgomery Act (10 Geo. III. cap. 51) during the years from Martinmas 1855 to Martinmas 1858, and from Martinmas 1875 to Martinmas 1878. These sums cannot be made to affect the fee of the estate, and the heir of the entail, in terms of the Montgomery Act, is entitled to a discharge on assigning one-third of the free rents of the estate, which he is now about to do."

The Lord Ordinary (KINCAIRNEY) on 6th July 1889 remitted to Mr David Philip, S.S.C., to inquire into the circumstances in the usual form and to report, and Mr Philip reported, *inter alia*, as follows:—"The reporter has to observe that the provision conceived in favour of Miss Carruthers is one properly constituted under the deed of entail and said general disposition and settlement and bond of provision, and is one such as is contemplated by the statutes, and does not exceed three years' free rent of the entailed estate according to the amount thereof at the decease of the heir of entail granting such deed of provision.

"The schedule of debts deponed to by the petitioner is in terms of the statutes. The person in right of the first debt therein disclosed is the said Horatia Barbara Carruthers, as executrix of the said John Hetherington Carruthers. The amount is £1534, 7s. 8d. This charge, it is stated, has not yet been formally constituted by decree. It consists of several items of improvement expenditure made under the Montgomery Act (10 George III. c. 51) during the years from Martinmas 1855 to Martinmas 1858. The petitioner says—'These sums cannot be made to affect the fee of the estate, and the heir of the entail, in terms of the Montgomery Act, is entitled to a discharge on assigning one-third of the free rents of the estate, which he is now about to do.' It thus appears that the petitioner has assigned, or is about to assign, one-third of the free rents which he claims to be entitled to do in terms of section 16 of the Montgomery Act (10 George III. c. 51) for a discharge of the claim for improvement expenditure above referred to. That section is as follows, viz.—'That when any heir in possession is sued for the money due on account of improvements made upon an entailed estate under the authority of this Act, he shall be discharged in all cases from such suit upon his assigning and effectually conveying to the creditor or creditors one-third part of the clear rents of the entailed

estate during his life, or until the money so due shall thereby be paid off and discharged.' The free yearly rent of the estate for crop 1887 amounted to £525 or thereby, and the proposed provision of £1400 was within three years' rent of the estate; but if the petitioner be entitled to deduct one-third of the clear rents assigned or about to be assigned as aforesaid, the rental will fall to be reduced by one-third, and the provision of £1400 would fall to be reduced in a corresponding manner.

"It rather appears to the reporter that the petitioner is entitled to purchase a discharge of the claim for improvement expenditure referred to if the claim therefor be pressed as indicated in the section above quoted, by assigning one-third of the free rents in lieu thereof, but it will be for your Lordship's consideration whether this is so. It would have been competent for the last heir to have charged this improvement expenditure either by way of bond and disposition in security for three-fourths of the amount thereof, or by way of bond of annual-rent for the whole, repaying principal and interest by instalments, in which case the interest on the said bond and disposition in security, or the instalments payable in respect of the bond of annual-rent, would probably have formed a deduction from the free rental of this estate in calculating the amount to be charged for a younger child's provision. It has been explained to the reporter that there is no formal agreement between the executrix and the petitioner with reference to the assignation of one-third of the rents, but that an assignation to the third of the rents is in draft, and is being adjusted with the agents for the executrix, and that the relative discharge to be granted by the executrix in exchange has been executed although not delivered. The reporter has been informed that the parties have agreed to fix one-third of the free rents at the sum of £172, 6s. 9d. If the heir is to assign one-third of the rents to the executrix the provision to Miss Horatia Barbara Carruthers under the general disposition and deed of settlement before mentioned will fall to be reduced to the sum of £1057, 19s. 7d., or thereby, being three years' free rental as thus reduced, in place of £1400 as claimed by Miss Carruthers, but the precise amount of the rental upon the basis of which the provision is to be calculated must, as suggested by the petitioner, form the subject of further inquiry. The question therefore which the reporter thinks it right to submit to your Lordship is, whether this sum of £172, 6s. 9d., being one-third of the free rents, is deductible from the rental on the basis of which the said provision is to be calculated?"

The Lord Ordinary (KINCAIRNEY) on 30th November 1889 pronounced an interlocutor approving of the report and authorising the petitioner to charge the estate with the full amount of the provision in favour of Horatia Barbara Carruthers.

"*Opinion.*—The late John Hetherington Carruthers when heir of entail in possession of the estate of Denbie bound himself and the succeeding heirs of entail to pay to his only daughter Miss Horatia Barbara Carruthers the sum of £1400, under the declaration that the sum should suffer reduction in case it should be found to exceed three years' free rent of the estate. The provision was made expressly under the powers of the deed of entail of the estate which authorised provisions to children 'not exceeding in whole three years' free rental of said lands and estate, to be computed and as the same shall extend at the decease of the heirs of entail granting such deed of provision.'

"This petition has been presented for authority to charge the entailed estate with this sum of £1400 or such other sum as may be ascertained to be three years' free rental of the estate at the death of Mr Hetherington Carruthers.

"Mr Hetherington Carruthers died on 3rd November 1887, and it appears from the report returned by Mr Philip to whom a remit was made to inquire into the procedure that three years' free rental of the estate at that date did in fact exceed £1400.

"But then it appears from the report that between 1855 and 1858 a considerable sum was expended by Mr Hetherington Carruthers on improvement expenditure, This sum is said in the schedule of debts deponed to by the petitioner to amount to £1534, 7s. 8d., but it has not been constituted by decree, and the amount which may be allowed as proper Montgomery expenditure has not been judicially ascertained.

"The important question which has been raised by the petitioner is, whether this amount ought to be taken into account in ascertaining the free rent at Mr Hetherington Carruthers' death? If it is not to be taken into account then the provision of £1400 was within the granter's powers. If it is to be taken into account as a debt or burden diminishing the rent at that date, then the sum of £1400 is in excess and an abatement must be made on it.

"The petitioner refers to the 16th section of the Montgomery Act under which he is entitled to be discharged from any suit for the amount due for improvement expenditure on conveying to the creditor one third part of the clear rent of the entailed estate during his life or until the money so due shall thereby be paid. He says that he means to avail himself of this right and to assign one-third of his free rents to the creditor in this improvement debt, who happens to be Miss Carruthers, the daughter of Mr Hetherington Carruthers, in whose favour the provision of £1400 has been made. The petitioner maintains that in order to ascertain the free rents at the death of Mr Hetherington Carruthers the actual free rent must be diminished by one-third.

"I am of opinion that this deduction cannot be made. For, not to mention that the amount of the debt has not been ascertained even now, and that the third of the rent was not assigned at the granter's death—indeed has not been assigned yet—it is to be noticed that the share of the rent so assigned will pay not only the interest

of the improvement money, but will gradually pay the capital also. A case might be figured in which the improvement expenditure was no greater than the third of the rent, so that it would be paid by payment of a third of one year's rent. It would in that case, it is thought, be impossible to hold that the rent of the estate was diminished by a third. The assignation of a third of the rents is a mode of paying the improvement expenditure, but cannot be justly held to involve the diminution of the rental to that extent.

"But improvement expenditure incurred by a deceased heir of entail and not charged by him on the estate may be made to affect the estate and the rents in another way. By the Entail Act of 1875, sec. 11, it is made competent for any person to whom a deceased heir of entail who has made improvements but not charged them on the estate has bequeathed the amount which he was entitled to charge, to pray the Court to ascertain the amount expended and chargeable, and to ordain the heir in possession to grant a bond over some sufficient part of the estate for the amount with which the deceased heir of entail might have charged the estate. And in this manner this expenditure, when ascertained by the Court might be charged on the estate. But then there is at the close of the section the important proviso—'that the said sums shall only be deemed a debt against the entailed estate and the heirs of entail therein, and shall only bear interest from and after the date of the decree of the Court pronounced in such petition.' So that it appears that if the procedure sanctioned by this clause of the Act of 1875 were adopted, it would be impossible to say that the estate was burdened with the improvement money, or that interest diminishing the rental was running on it at the date of the death of the heir of entail who granted this provision.

"In short, seeing that the proper amount of this improvement expenditure has not been ascertained, that it has not been charged on the estate, and that it is not a sum bearing interest, I do not see that it can be said to diminish the rental to any extent at the date of the granter's death; and therefore I think the rental must be taken, without any such deduction, as it actually stood at the granter's death, and that it therefore follows that the provision of £1400 was not in excess of the granter's power.

"I arrive at this conclusion with some hesitation, for it seems somewhat anomalous and not altogether just to allow an heir of entail, by merely abstaining from charging the estate with improvement expenditure during his life, to charge it with provisions to a larger amount than would have been in his power had he constituted and charged the improvement expenditure. But the provisions of the entail and of the statutes seem to necessitate this conclusion.

"Reference was made to the first and fourth sections of the Aberdeen Act as affording some guide to the meaning of the words "free rental" as used in the deed of entail. But the legitimacy of the reference for that purpose seems doubtful, and it does not appear that any material assistance is obtained from the language of the Aberdeen Act.

"Reference may be made to the case of *Hamilton of Pinmore*, March 11, 1857, 19 D. 723, where a question arose as to the amount of free rental supposed to be the measure and limit of Montgomery expenditure, and where opinions were expressed to the effect that the interest of unconstituted improvement expenditure could not be deducted.

"The petition contains, besides, a conclusion for charging the estate with a sum of improvement expenditure laid out by the petitioner. The proper amount of this improvement expenditure has been ascertained by the reporter, and on that point all that need be said is, that only three-fourths of the expenses can be included in the bond—*Leith* v. *Leith*, July 18, 1888, 15 R. 944."

Counsel for the Petitioner—J. Campbell—Lorimer. Agents—Menzies, Coventry & Black, W.S.

Thursday, January 9, 1890.

FIRST DIVISION.

HENDERSON (LAWRIE'S TRUSTEE) *v.* HENDERSON AND OTHERS.

Succession—Lapsed Share—Conditio si sine liberis—Accretion.

A testator directed his trustees to divide the residue of his estate into six parts, and to convey one part to each of his nephews and nieces *nominatim*. He also directed that the issue of the residuary legatees who might predecease him should have right to their parent's share, and that if any of the beneficiaries predeceased him without leaving issue, that the share "provided to such deceaser shall be divided equally among his or her brothers and sisters."

Held that the children of a niece who predeceased the testator were entitled to the original share of residue destined to their mother by the trust-deed, but not to any accretions from the lapsed shares of other beneficiaries who predeceased the testator. *M'Nish* v. *Donald's Trustees*, 7 R. 96, followed.

John Lawrie, innkeeper, Bellsquarry, who died on 16th December 1888, by the third purpose of his trust-disposition and settlement directed his trustees as follows:—"My trustees shall divide the residue of my estate and effects into six equal shares, and shall pay one-sixth share to each of Archibald Henderson, Jessie Leishman Henderson, John Henderson, Robert Lawrie Henderson, and James Lawrie Henderson, the children of my sister Mrs Jessie Lawrie or Henderson now Cribbes, wife of