should in these special circumstances hold that there is sufficient reason to subject him to this liability.

The Court approved of the Auditor's report upon the defender's account of expenses, and "on the motion of the defender, no appearance being made for the pursuer or her spouse, decern against the pursuer and her husband William MacGowan conjunctly and severally for the taxed amount of said expenses."

Counsel for the Defender — Cooper. Agent—R. Ainslie Brown, S.S.C.

Tuesday, February 22.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LAURIE, PETITIONER.

Entail—Power to Charge Estate with Payment of Estate-Duty—Expenses Incurred in Settlement of Duty and Application to Court—Entail Amendment Act 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 11—*Finance Act* 1894 (57 *and* 58 *Vict. c.* 30), *secs.* 9 *and* 23.

Section 9, sub-section 5, of the Finance Act provides that a person authorised or required to pay estate-duty, whether the property is or is not vested in him, may raise the amount so paid, and expenses incurred in connection therewith, by mortgage on the property. Sub-section 6 provides that a person having a limited interest in any property who pays the estate-duty on that property, shall be entitled to "the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

By section 23, which applies the Act to Scotland, power is given to apply to the Court to authorise the granting of bonds and dispositions in security, but it is given only in the case of the duties having been paid by a person in whom the property is not vested.

Section 11 of the Entail Amendment Act 1868 gives power to an heir of entail in possession to grant, with the authority of the Court, bonds and dispositions in security for the amount of any debts "which might lawfully be made chargeable by adjudication or otherwise upon the fee of the estate."

Held that an heir of entail in possession who had paid estate-duty and settlement estate-duty was in the position of a creditor to the estate in a debt which might lawfully be made chargeable on the estate, and that accordingly he was entitled to grant a bond and disposition in security over the estate for the amount so paid by him, but that he was not entitled to charge the estate with expenses incurred in the settlement of the duty, or in the application to the Court for authority to grant the bond.

The Finance Act 1894 (57 and 58 Vict. c. 30) provides, section 9, sub-section 5—"(5) A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof. (6) A person having a limited interest in any property, who pays the estate-duty on that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

By sub-section 2 of the same section the Commissioners of Inland Revenue are required to grant a certificate of the estate-duty paid, and of the debts and encumbrances allowed by them in assessing the property. By sub-section 3 such a certificate is declared to be "conclusive evidence that the amount of duty therein named is a first charge on the lands or other subjects of property after the debts and encumbrances allowed as aforesaid."

By the 23rd section, which contains provisions for applying the Act to Scotland, it is provided, sub-section 18—"Where any person who pays estate-duty on any property, and in whom the property is not vested, is by this Act authorised to raise such duty by the sale or mortgage of that property or any part thereof, it shall be competent for such person to apply to the Court of Session (*a*) for an order of sale" . . . or "(*b*) for an order ordaining the person in whom the property is vested, to grant a bond and disposition in security over the property in favour of the person who has paid the estate-duty for the amount of the said duty." . . .

Section 9 of the Entail Amendment Act 1853 (16 and 17 Vict. cap. 94) conferred upon the heir of entail in possession of an entailed estate power to sell for the purpose of paying off debts chargeable upon the fee of the estate.

Section 11 of the Entail Amendment Act 1868 (31 and 32 Vict. cap. 84) provided that "In all cases where there are or shall be entailer's or other debts or sums of money which might lawfully be made chargeable by adjudication or otherwise upon the fee of an entailed estate, the heir of entail in possession of such estate for the time being shall have all the like powers of charging the fee and rents of such estate . . . with the full amount of such debts or sums of money, and of granting, with the authority of the Court of Session, bonds and dispositions in security for the full amount of such debts and sums of money as are by the Acts 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, conferred with reference to provisions to younger children." . . .

Colonel John Craig Laurie was the heir of entail in possession of the estate of

Redcastle, Kirkcudbright, to which he succeeded on the death of his brother on June 16th 1896. Upon his succession to the estate Colonel Laurie paid the duties exigible under the Finance Act 1894 on the value of the estate, viz., estate-duty at 4 per cent., £613, and settlement estate-duty at 1 per cent., £153. In connection with the settlement of these duties he also incurred charges amounting to £16, 10s. 9d., his total outlay thus coming to £782, 10s. 9d.

Colonel Laurie proposed to charge the entailed estates with the estate-duties and relative expenses, and accordingly he presented a petition in which he craved the Court "to grant warrant to and authorise the petitioner to execute a bond and disposition in security . . . in ordinary form over the said entailed estates, and that for the said sum of £782, 10s. 9d., and for the expenses of the present application."

In the petition as it was originally presented the petitioner founded upon sub-sections 5 and 6 of section 9 of the Finance Act, and stated that no special form of procedure was provided by that Act, but submitted that the procedure should be analogous to that provided in section 12 of the Entail Act 1875 (38 and 39 Vict. cap. 61) for petitions under the Entail Acts.

The Lord Ordinary (PEARSON) remitted the petition to Mr Donald Mackenzie, W.S., who reported with reference to the 23rd section of the Finance Act, as follows:—"The Act makes no provision for any application to the Court except in the case of a person 'in whom the property is not vested.' It appears to regard any person in whom the property is vested as requiring no authority beyond that given in section 9, the provisions of which (expressly worded as they are) seem to be viewed, in the case of such a person, as of themselves sufficient. On a perusal of section 23, sub-section (18), it appears to your reporter that the petitioner must be held to be the person in whom, in the view of the Act, the property in the present case is vested. Your reporter therefore feels great doubt as to the competency of the petition, and on the whole he is humbly of opinion that it should not be granted. He has, however, formed this opinion with considerable difficulty. He does not believe that the petitioner could raise the money on bond without some judicial sanction, to obtain which a petition seems the appropriate procedure. The question of competency is respectfully submitted for your Lordships' determination."

The petitioner thereupon amended his petition by adding the following clause—"The petitioner founds upon section 9 of the Entail Amendment Act of 1853 (16 and 17 Vict. cap. 94), and section 11 of the Entail Amendment Act of 1868 (31 and 32 Vict. cap. 84), and avers that the amount of the said estate-duty and settlement estate-duty paid by the petitioner is a debt which might lawfully be made chargeable by adjudication or otherwise upon the fee of the entailed estate."

He produced certificates from the Commissioners of Inland Revenue of the duty paid by him.

The Lord Ordinary remitted the amended petition to Mr Mackenzie, who reported that he was satisfied that the petitioner was entitled to avail himself of the provisions of the Entail Acts founded upon, and to charge the estate by bond and disposition in security under section 11 of the Act of 1868.

The reporter stated that he was of opinion that the petitioner was not entitled to include in the sum to be charged the expenses of the present application.

The Lord Ordinary reported the petition to the First Division.

Note.—"The petitioner is heir of entail in possession of an entailed estate, to which he succeeded on the death of his brother in 1896. In respect of his succession he has paid £612 of estate-duty, and £153 of settlement estate-duty, in terms of the Finance Act 1894. In connection with the settlement of these duties he incurred charges amounting to £16, 10s. 9d. The duty and charges amount in all to £781, 10s. 9d. He now proposes to charge this sum on the entailed estate by bond and disposition in security.

"By section 9 (subs. 5 and 6) of the Finance Act 1894 it is provided as follows:—[*quotes*].

"I assume, and it appears to be clear, that the expression 'estate-duty' in this section includes the settlement estate-duty imposed by section 5.

"The petition, as originally presented, assumed that these provisions, taken in connection with section 23, which applies the Act to Scotland, warranted an application to the Court for authority to grant a bond over the estate; and that as no special form of procedure is provided by the Finance Act, the procedure clause (sec. 12) of the Entail Act 1875 could be extended by analogy to the present case.

"It was, however, pointed out by the reporter (Mr Donald Mackenzie, W.S.), to whom the petition was remitted, that the 23rd section of the Finance Act specially provides for application to the Court to authorise bonds and dispositions in security, but that it does so only in the case of the duties having been paid by a person in whom the property is not vested. The order sought is to be an order on the person in whom the property is vested to grant the bond. In the words of the reporter, the statute 'appears to regard any person in whom the property is vested as requiring no authority beyond that given in section 9, the provisions of which (expressly worded as they are) seem to be viewed in the case of such a person, as of themselves sufficient.' He therefore reported against the competency of the petition, though with reluctance, as he did not believe that the petitioner could raise the money on bond without some judicial sanction.

"The petitioner thereupon amended the petition to the effect of founding on sec. 9 of the Entail Act of 1853, and sec. 11 of

the Entail Act of 1868, and averring that he is within the conditions of these sections.

"By the former section the heir in possession obtained the like powers to sell for the purpose of paying off debts chargeable upon the fee, as were conferred by the Rutherford Act (sec. 25) with reference to the payment of debt which is already charged on the fee of the estate. By the later section (1868 Act, sec. 11), this is extended to the granting of bonds and dispositions in security for such debts.

"The debts which may be so charged by bond are described as 'entailers' or other debts or sums of money which might lawfully be made chargeable, by adjudication or otherwise, upon the fee of an entailed estate.' The question is whether the statutory charge held by the petitioner is a debt falling within that category. The reporter is of opinion that it is; and I agree with him. But as the case marks the beginning of a practice under the Finance Act, which will doubtless become common, I think it right to report the matter.

"In addition to the provisions of the Finance Act founded on in the petition, it is to be noted that by section 9, sub-sec. 2, the Commissioners of Inland Revenue are required to grant a certificate of the estate-duty paid, and of the debts and incumbrances allowed by them in assessing the value of the property. And by sub-sec. 3 that certificate is (subject as therein mentioned) declared to be 'conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid.'

"In this respect the Finance Act seems to carry the scheme of making the duty a 'first charge,' a stage further than was done by the Succession Duty Act. By the Succession Duty Act (sec. 42) the charge was in favour of the Crown as a security for unpaid duty. By the later Act it is carried forward as a charge in favour of the person paying the duty; and the certificate of the Commissioners, although apparently not the only evidence, is to be 'conclusive evidence' of the charge.

"In one view that might be taken of the terms of the Finance Act the petition is unnecessary. But it seems clear from the provisions of the Act that the words used are not meant to supersede, or at least cannot be held to supersede, the ordinary requirements of our system of land rights. To begin with, the charge is (by sec. 9, sub-sec. 1) declared not to be valid against a *bona fide* purchaser for valuable consideration without notice; and there is no provision for registration or publication of the certificate. Moreover, the certificate is blank in the creditor's name; and in one important particular it is regarded by the statute (sec. 9, sub-sec. 3) as a certificate 'to bearer.'

"Accordingly, the statutory description of the debt as 'a first charge on the lands,' while it defines the beneficial right of the creditor and the nature of his remedies, does not raise the debt above the category of 'debts chargeable upon the fee.' But it seems clearly to be a debt within that category.

"There remains the question, what expenses, if any, are to be included in the sum to be charged.

"First, there is the sum of £16, 10s. 9d., being expenses incurred by the petitioner in connection with the settlement of the duties. This stands in a somewhat peculiar position. For while by sec. 9, sub-sec. 5, the person paying the duty has power to raise the amount of such duty 'and any interest and expenses properly paid or incurred by him in respect thereof,' by sale or mortgage of the property, I do not find that such expense, or indeed anything besides the bare estate-duty itself, is elsewhere dealt with by the statute as a charge on the property. And accordingly the certificate of charge does not include any such expenses. It is further to be observed that in the section which provides for an application to the Court of Session by a person who has paid the duty, but in whom the property is not vested (sec. 23, sub-sec. 18), there is no provision for anything being charged except the duty itself, although that section plainly refers back to the case dealt with in sec. 9, sub-sec. 5, being the sub-section which allows expenses.

"I see no sufficient reason why anything should be allowed where the property is vested in the person paying, and disallowed where it is not, though if they are disallowed in both cases, it is not easy to figure the case in which the allowance of such expenses in sec. 9, sub-sec. 5, will be available.

"The petitioner further asks that the sum to be charged should include the expenses of the petition. I agree in the reasons given by the reporter for holding that this cannot be done. His reference to the case of *Maclaine* (1878, 5 R. 1053) was criticised by the petitioner on the ground that the Entail Act of 1882 (sec. 4) has removed one of the objections to which the Court there gave effect. But that fact has no bearing on the point made by the reporter in his reference to that case, namely, that (as was there decided) sec. 12, sub-sec. 6, of the Entail Act 1875 does not warrant the addition of the petitioner's expenses of the sum to be charged. That objection has not been removed."

The arguments of the petitioner sufficiently appear in the Lord Ordinary's note.

At advising—

LORD ADAM—The petitioner is heir of entail in possession of an entailed estate to which he succeeded on the death of his brother in 1896. In respect of his succession he has paid £612 of estate-duty and £153 of settlement estate-duty in terms of the Finance Act 1894. In connection with the settlement of these duties he incurred charges amounting to £16, 10s. 9d. The question which has been reported to us by the Lord Ordinary is, whether he is entitled to charge all or any, and if so, which, of these sums on the entailed estate by bond and disposition in security.

By the 5th sub-section of the 9th section

of the Finance Act a person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when paid, have power, whether his property is vested in him or not, to raise the amount of such duty and any interest or expenses properly incurred by him in respect thereof, by the sale or mortgage of, or a terminable charge on, that property or any part thereof; and by the 6th sub-section, which more immediately applies to this case, it is provided that a person having a limited interest in any property, who pays the estate-duty on that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him.

The petitioner is a person who has a limited interest in the property in question, and he has paid the estate-duty on that property. He is therefore entitled to the like charge as if the estate-duty had been raised by a mortgage to him,—the word "mortgage" is not of course a term of Scotch law, but I understand it to mean that the creditor in a mortgage has the security of the estate over which it is granted for payment of his debt. If that be so, then the petitioner is in the same position as if he was a creditor in a bond and disposition in security over the estate for the amount of estate-duty paid by him. I agree with the Lord Ordinary that "estate-duty" includes settlement estate-duty, but does not include the expenses incurred by the petitioner in connection with the settlement of the duties.

By the 2nd sub-section of the 9th section of the Act the Commissioners are required to grant a certificate of the estate-duty paid, and of the debts and incumbrances allowed by them in assessing the value of the property; and by sub-section 3 that certificate is (subject as therein mentioned) declared to be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed by the Commissioners.

I do not know how it may be in England, but it is quite foreign to all our ideas of conveyancing that a sum should form a charge on lands without its appearing on the records, so that a person searching the records would have notice of the existence of such charge. It may be that the declaration in the Act of Parliament that the amount of duty named in the certificate is a first charge on the property may be sufficient to make it so without any farther procedure. But it is reported to us that the petitioner can find no one to lend money on that security, and he very legitimately, I think, desires to have the amount contained in the certificate constituted a charge on the lands in conformity with the requirements of the law of Scotland.

For this purpose he founds on the 11th section of the Entail Amendment Act of 1868, which enacts that in all cases where there are or shall be entailer's or other debts or sums which might be made lawfully chargeable by adjudication or otherwise upon the fee of the entailed estate, the heir of entail in possession shall have power to grant, with the authority of the Court of Session, bonds and dispositions in security for the full amount of such debts. It may be that the Entail Statutes did not contemplate a debt of this nature, but I am of opinion with the Lord Ordinary that it falls within the description of debts specified by the statute, that the petitioner is the creditor in a debt which may be lawfully made chargeable upon the fee of the entailed estate, and therefore that the petition is competent and ought to be granted to the extent I have indicated, viz., the amount of the estate-duty paid, including therein settlement-duty, but not including expenses incurred in connection with the ascertainment of these duties.

The petitioner is not entitled to charge on the estate the expenses of this petition.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Find that the petitioner is entitled to charge the sum of £765, being the amount of estate-duty and settlement estate-duty paid by him on his succession, upon the fee of the entailed lands and estate of Redcastle by way of bond and disposition in security in favour of himself or such other person or persons as may advance to him the said sum; and remit the said petition to the Lord Ordinary to proceed further, and decern."

Counsel for the Petitioner—C. K. Mackenzie. Agents—F. & J. Martin, W. S.

Wednesday, February 23.

FIRST DIVISION.

BABERTON DEVELOPMENT SYNDICATE, LIMITED, PETITIONERS.

Company — Winding-up by the Court — Appointment of Liquidator.

It is competent for the Court in pronouncing an order for the winding up of a company having its registered office in Scotland, to appoint a liquidator residing outwith its jurisdiction, but it is not the general practice to make such an appointment unless valid reasons can be shown for doing so.

Application for appointment of liquidator residing outwith jurisdiction *refused.*

A petition was presented by the Baberton Development Syndicate, Limited, 4 Picardy Place, Edinburgh, for an order for the winding up of the Finance Corporation of Western Australia, Limited, which was incorporated as a company in October 1894, and had its registered office at 4 Picardy Place, Edinburgh.