Friday, June 19.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

GARDINER AND ANOTHER *v.* MURRAY STEWART'S TRUSTEES.

Entail — Lease — Obligation to Purchase Waygoing Sheep Stock at the Valuation of Arbiters Mutually Chosen—Transmissibility of Obligation against Executors of Granter.

The proprietor of an estate, an heir of entail in possession, granted a lease of a sheep farm which contained the following clause:—"And the proprietor binds and obliges himself that he . . . shall purchase the waygoing . . . sheep stock . . . at the valuation of two arbiters mutually chosen, or oversman . . ."

Held that as the lessor had become personally bound and not contracted *qua* heir of entail only, his executors were liable to implement the obligation, and bound to appoint an arbiter.

On April 29th 1908, Robert Gardiner and another, tenants of the farm of Killeron, on the estate of Cally, Kirkcudbrightshire, presented a petition in which they, founding upon the Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13), sec. 3, asked the Court to appoint an arbiter to act along with an arbiter appointed by them for the purpose of certain valuations. The petition was directed against the Hon. W. J. Hewitt and others, the trustees and executors of the deceased H. G. Murray Stewart of Cally.

The following narrative is taken from the opinion (*infra*) of the Lord President:—"In 1896 Mr Murray Stewart let to the petitioners two farms on the estate of Cally, of which he was then heir of entail in possession, for nineteen years, with a break at Whitsunday 1908, on twelve months' prior notice by either party. The said lease contained, *inter alia*, the following clause: 'The tenants hereby undertake to purchase the black-faced hill sheep stock usually kept on the said farms, and also the last crop of grain and the dung on the lands at their entry, and the thrashing-mill, grates, and bells at Killeron, all at the valuation of arbiters or oversman as aforesaid. Further, the tenants bind and oblige themselves and their foresaids to sell, and the proprietor binds and obliges himself that he or the then incoming tenant shall purchase, the waygoing blackfaced hillsheep stock usually kept on the lands at the expiration of this tenancy, and not exceeding nineteen hundred head in all on the farm of Orchars, and two hundred head on the farm of Killeron, and the last crop of grain under this lease, the manure made upon the lands from the time of the input of the last green crop, and the thrashing-mill, grates, and bells at Killeron, all at the valuation of two arbiters mutually chosen, or oversman as aforesaid, at the usual times.'

"Mr Murray Stewart died in May 1905. The respondents are his executors. He was succeeded in the entailed estate by Colonel Murray Baillie, as next heir of entail, who disentailed the estate and conveyed it to trustees, who presently hold it.

"The petitioners gave due notice to the said trustees of their intention to avail themselves of the break in the lease. The said trustees intimated that they did not intend, as representing Colonel Baillie, the heir of entail, to take over the sheep stock at a valuation; and the incoming tenant of one of the farms (the other had not been again let) made a similar intimation. The petitioners then called upon the respondents to take over the stock as representing the late Mr Murray Stewart, and to appoint an arbiter for the purposes of valuation; and on their refusing to do so the petitioners presented this application under the provisions of the Arbitration (Scotland) Act 1894. The petition having been presented before Whitsunday 1908, the petitioners moved for the interim appointment of an arbiter, but the Lord Ordinary held such a motion to be incompetent and refused it, but granted leave to reclaim. As his Lordship's interlocutor was dated 16th May 1908, it followed that Whitsunday was past before the reclaiming note came before your Lordships. The parties then concurred in asking your Lordships to decide the case on the merits instead of sending it back to the Lord Ordinary."

Argued for petitioners—The obligation to take over the sheep stock and to appoint an arbiter was binding on the respondents. It was a personal obligation, and *prima facie* such obligations were binding on the granter's representatives. Such obligations if granted by an heir of entail transmitted against his executors, and not against the succeeding heir—*Tod* v. *Moncrieff & Skene*, January 14, 1823, 2 S. 104 (113), *affd.* May 27, 1825, 1 W. & S. 217; *Fraser* v. *Fraser*, May 29, 1827, 5 S. 673 (722), *affd.* February 25, 1831, 5 W. & S. 69; *Webster* v. *Farquhar* (1792), Bell's Oct. Cas. 207; *Taylor* v. *Bethune*, 1792, Bell's Oct. Cas. 214. An heir of entail in possession could not impose such an obligation on a succeeding heir—*Gillespie* v. *Riddell*, February 20, 1908, 45 S.L.R. 514. It therefore followed either that the respondents were liable or that the obligation fell on the death of the granter. The latter result would not readily be presumed, for no tenant would enter into a lease if the obligations on the lessor determined with the lessor's death. *Esto* that "proprietor" meant (as the respondents contended) the proprietor for the time being, that did not effect the question, for it was an ineffectual attempt to bind a succeeding heir of entail; *Gillespie*, *ut supra*.

Argued for respondents—The respondents were not liable. The question really depended on the construction of the lease, and it was clear from the construction of the lease as a whole that "proprietor" meant the owner for the time being. It was apparent from the nature of the obligation that it was meant to transmit

against the succeeding heir, and therefore the respondents were not liable—*Kerr* v. *Redhead*, February 5, 1794, 3 Pat. App. 309 (Lord Thurlow's opinion); *M'Gillivray's Executors* v. *Masson*, July 18, 1857, 19 D. 1099, *per* Lord Deas, pp. 1105, 1106; *Duke of Bedford* v. *Earl of Galloway's Trustee*, July 8, 1904, 6 F. 971 (Lord Kinnear's opinion), 41 S.L.R. 804. *Esto* that if the lease had said "I (the granter) shall take over the sheep stock," the respondents would have been bound; the lease did not say so. What it said was, "the proprietor binds and obliges himself," and that meant the proprietor for the time being. The obligation was clearly one which ran with the lands. It was analogous to the obligations in a feu-contract which ran with the feu. It would be absurd to suppose that the granter's executors could have come forward and claimed the sheep stock if it had been for their advantage to do so, yet that was the logical result of the reclaimer's argument. The cases of *Tod* and *Fraser* (*cit. supra*), on which the reclaimers relied, were inapplicable, for in both these cases the granter of the obligation was at the time of granting it the debtor therein, whereas the obligation in question here did not become exigible until a future event occurred.

At advising—

LORD PRESIDENT — [*After narrative, ut supra*]—It must be assumed that, in accordance with the judgment recently pronounced in the case of *Gillespie* v. *Riddell*, the refusal of the trustees to take over the stock was justified. We are told that that case is under appeal, but until reversed it remains the law. Nor do I see any advantage in postponing our judgment in this case to await the result of that appeal. The simple question then is—Did the late Mr Murray Stewart become personally bound in the obligation quoted? in which case his executors must fulfil his obligation; or did he contract *qua* heir of entail only—that is to say, contract in such a way that the obligation was prestable by him during his life, but was not exigible from either his heirs or his executors although it was ineffectually sought to be imposed upon his heir of entail.

I do not doubt that such a bargain is a legal possibility. Indeed, all bargains, unless forbidden by positive law or struck at on some such ground as being contrary to public policy, are possible. And there is, so far as I know, no such disability here. Nevertheless, it is I think clear that if a man binds himself he must make it very clear that he does not bind his representatives, for if he fails to make that clear the usual result will follow—that a man's representatives are bound by his obligations.

But further, though not actually decided—for after all each deed must be judged of according to its own terms—I am of opinion that the matter is practically settled by authority. This is not the first time that an obligation intended to fall upon heirs of entail (and if it was not intended so to fall, then *cadit questio*) has missed its mark. In the review which my brother Lord Kinnear gave of the decided cases in *Gillespie* v. *Riddell* (45 S.L.R, 514) he especially mentions *Moncreiff* v. *Skene and Tod* (1 W. and S. 217), which was a judgment of the House of Lords, and which decided that while the heir of entail was free the executor was bound. It was urged that that case was distinguishable from the present by the fact that the debt sought to be imposed on the future heir of entail was a debt which otherwise would have been presently exigible from the granter of the lease, for he had practically borrowed £625 from the tenant, as the tenant put up the steading instead of the landlord; whereas it is said here that the transaction was all *in futuro*. It is a little doubtful whether in substance the present case is truly distinguishable. For the tenant here was taken bound to buy the sheep stock at his entry from the outgoing tenant at that date; and it is not rash to conjecture that the landlord was, or thought he was, liable to that tenant if he could not find some-one else to take up the obligation. But even if that were not so, there are at least two of the earlier cases which are approved in *Moncreiff* v. *Skene and Tod*, which cannot be distinguished in that way, and in which, though no decision could be pronounced, opinions to the same effect were given. I refer to *Webster* v. *Farquhar*, and *Taylor* v. *Bethune*, Bell's Octavo Cases, 207 and 214. I am aware that the opinion that the executor is liable is, in the first of the cases, only to be found in the rubric. But the cases were advised together, and the general question was held to be the same in both. I would also refer to the case of *M'Gillivray's Executors* v. *Masson* (19 D. 1099), and especially to some portions of the opinion of Lord Deas. That was not a case of entail. The landlord had bound himself to pay to the tenant the value of meliorations at the end of the lease. He died during the currency. The executors brought an action to have themselves declared free in a question with the tenant, and the tenant was assoilzied. But the remarks of Lord Deas are very valuable as showing the distinction which falls to be made between different stipulations which may all be included in a lease. He says—"I do not say that although an heir-at-law has entered into possession and drawn the rents, the landlord's executors must nevertheless remain under every obligation undertaken by the landlord to the end of the lease. But in this matter we must distinguish. There are some obligations incumbent respectively on landlord and tenant inseparable from the nature of the right, such as the obligation to pay rent, on the one hand, and to maintain the tenant in possession on the the other, and it may very well be that the heir and the tenant, who assume towards each other the relative position of landlord and tenant, may become alone responsible to each other in such obligations. Nor do I say that no course of dealing between the heir and the tenant

will extend the same rule even to an obligation like the present." And then he goes on—"In entail law, accordingly, all leases are regarded as, strictly speaking, alienations, and agricultural leases of ordinary endurance are held excepted only because they are necessary acts of administration. But obligations may be engrafted upon a lease (as upon any other deed) which are extrinsic to its character as a real right, and not even essential to its objects as a contract. Such obligations are not necessarily to be dealt with in the same manner with the proper and inherent subject-matters of the tack. It is said there is no case affirming the liability of executors. But there is the express authority of Lord Braxfield in *Taylor* v. *Bethune* (1 Bell's 8vo Cases, p. 214), and there is no case or authority the other way. Lord Braxfield's opinion goes even to the executor's ultimate liability, and I am not to be understood to question its soundness to that extent, although it is not necessary to go into that point here. The case of *Webster* v. *Farquhar*, decided about the same time with the case of *Taylor* (*ibid*, p. 207), and following the case of *Blythswood*, goes deep into the principle. It was there held that an obligation to pay at the end of the lease for the houses built by the tenant was not prestable from the next heir of entail, but solely from the representatives of the granter of the lease, although the houses were quite necessary for the estate, and went to increase its value. Now this could only have been because the obligation was deemed extrinsic to the lease, for the heir in possession had full power to grant a lease with all clauses and obligations properly incidental to a lease."

The authority on which the respondents really relied was the *Duke of Bedford* (6 F. 971). That, however, does not seem to me to aid them. In the first place, it was decided strictly upon its own words of obligation, "himself and his foresaids," when all the Judges held that "foresaids" must from the context mean heirs of entail, whereas here the expression is merely "himself" without any addition of foresaids to qualify or restrict it. In the second place, the question there was of warranty of what was contained in a lease as a composite contract, whereas here there is no question of warranty, but a question of who is bound to perform an obligation, with the possibility, and I think necessity, of distinguishing between different sorts of obligations, as was pointed cut by Lord Deas.

My opinion, therefore, is that the petitioners are entitled to hold the respondents bound. Inasmuch, however, as the respondents have intimated through their counsel their willingness, if such is our opinion, to appoint an arbiter, I think they may be allowed to do so, and if they do so by minute it will be unnecessary *hoc statu* to grant the prayer of the petition. The petitioners, however, must I think have their expenses.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Recal said interlocutor: Appoint W. J. Sproat, Borgue House, Kirkcudbrightshire, to act as arbiter along with George G. B. Sproat, Boreland of Anworth, Kirkcudbrightshire, in the reference mentioned in the petition, with the same powers as if the said arbiters had been duly nominated by the parties to the lease referred to in the petition, and decern. . . ."

Counsel for the Petitioners (Reclaimers) — Hunter, K.C. — Macmillan — Jameson. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Respondents—Dean of Faculty (Campbell, K.C.)—Hon. W. Watson. Agents—Scott & Glover, W.S.

Thursday, June 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

JOHNSTONE *v.* JAMES SPENCER & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13, *and First Schedule* (8)—*Jurisdiction of Arbiter—Dependants—Illegitimate Child—Competency of Arbiter Deciding whether Claimant Illegitimate Child of Deceased Workman.*

In an arbitration under the Workmen's Compensation Act 1906 it is competent for the arbiter to decide incidentally, for the purposes of the arbitration, whether a claimant to compensation is the illegitimate child of a deceased workman.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts—section 1 (3)—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

Section 13—"In this Act, unless the context otherwise requires . . . 'dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . . and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, shall include such an illegitimate child . . ."

First Schedule (8)—"Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act. . . ."