Ordinary (Lord Corehouse) in his Note said—'By the law of Scotland the right of killing game, considered as a real right, is an incident of landed property.' The report of the case bears that the other judges, with the exception of Lord Craigie, concurred in Lord Corehouse's opinion. Mr Bell in his Principles (§ 952), states that 'the right to kill game does not exist as a real right separate from the land by sasine or lease; it is only a personal privilege in respect of the right of property.'

"The respondent maintained that the necessary inference to be drawn from the cases of *Sinclair* v. *Duffus*, Nov. 24, 1842, 5 D. 174; *Menzies*, March 10, 1852, 14 D. 651; *Leith*, June 10, 1862, 24 D. 1059; and *Crawfurd* v. *Stewart*, June 6, 1861, 23 D. 965, is, that the right to the game and shootings of an estate is not now regarded as a personal privilege or as an incident of property, but as a right of property, and that the late Mr Grant was entitled under the deed of entail which allowed leases of the entailed lands and estate, and also as an act of good administration of the estate, not injurious to the succeeding heirs, to grant the lease founded on by him.

"The Lord Ordinary considers that it was not decided in the cases of *Sinclair*, *Menzies*, and *Leith*, that the right to game and shootings must receive effect as a right of property, and not as a personal privilege, but only that the yearly rent or value of shootings, whether let or unlet, was to be taken into computation in fixing the amount of provisions to the widow and children of the preceding heir. He thinks that in none of these cases was the nature of such a right, or of a lease of shootings, decided, or necessary for the decision of the actions. The same remark applies, in his view, to the case of *Crawfurd* v. *Stewart*, where the question was whether the lessee of shootings was liable to be assessed for poor-rates?

"But, even supposing that the right to the game and shootings of an estate were not, as defined by Mr Bell, a mere personal privilege in respect of the right of property, but to some extent a right of property, that does not necessarily lead to the conclusiou contended for by the respondent. The heir in possession has a right of property in the mansion-house, offices, garden and pleasure grounds, and yet he cannot have these except for a year, or for a period to terminate with his life; *Cathcart* v. *Schaw*, 31st January 1755, Dict. 15,403; *Leslie* v. *Orme*, 2d March 1779, Dict. 15,530, 2 Pat. App. 533.

"The Lord Ordinary had the benefit of an able argument from the counsel of the respondent. He has since then carefully considered the cases and the authorities cited. After giving these the best consideration in his power, he is of opinion that the complainers are entitled to the interim interdict craved by them, and to have the note passed, so that the question of law may be fully considered and determined. As at present advised, he considers that the lease of the shootings to the respondent for nineteen years was not within the power of the late Mr Grant; and he thinks that it was not authorised by the entail, and was not an act of ordinary administration and arrangement, not injurious to the succeeding heirs, and practically necessary to enable the grantor to reap the full fruits."

Agents for Complainers—J. & G. Bining, W.S.
Agents for Respondent—Skene & Peacock, W.S.

Thursday, July 14.

FIRST DIVISION.

SPECIAL CASE—BARONESS GRAY AND OTHERS.

Entail—Provisions to Children. The heir in possession, under an entail which allowed certain provisions to children to be granted, bound himself and the heirs of entail, and his heirs and executors, &c., to pay £5000 to trustees for behoof of his eldest daughter, directing that, if she succeeded to the entailed estate, £500 of the provision should be paid to her heirs and assignees, and £4500 to a younger sister. The eldest daughter became heiress of entail in possession. *Held*, the second direction was valid, but not the first.

Entail—Provisions to Children—Fee and Liferent—Destination voided. By bond of provision granted on the occasion of his daughter's marriage, the heir of entail in possession bound himself, &c., to pay £5000 to trustees, with a direction (1) to pay the interest thereof to her during the subsistence of the marriage; (2) if she was the survivor of the spouses, to pay £3000 to her in fee, and the interest of the remaining £2000; and (3) if she was the survivor, and there was no issue of the marriage, to pay the £2000 after her death to her husband and his heirs and assignees. The marriage was dissolved by decree of divorce at the wife's instance, without any children being born of the marriage; and the husband assigned all his rights to any part of the £5000 to the wife's trustees. *Held* she was entitled to receive payment of the £2000 as well as of the £3000 in fee.

Entail—Provisions to Children—Exemption of next Heir—Interest. Under a bond of provision to one of his children granted by the heir of entail in possession, the next heir of entail was exempted from liability therefor. *Held* this did not invalidate the bond; but interest thereon could only run from the date of the death of the heir of entail so exempted.

Entail—Free Rent—Public Burdens—Annuity to Widow—Assessment for River Protection—Abatements of Tenants' Rents—Feu-duties—Improvement Debt—Montgomery Act. In computing the free rent of an entailed estate, the entail provided for the deduction "of all public burdens, liferents, and interests of debts which may affect the said lands and estates." *Held* an annuity to the widow of an heir of entail, though not payable till after his death, fell to be deducted; but not feu-duties, assessments for protecting the river in close time, abatements allowed to tenants from rental, and the interest of an improvement debt incurred under the Montgomery Act.

Expenses—Special Case. (*Per* Lord President.) In special cases the giving of expenses is a matter of circumstances, and not to be decided, as in ordinary cases, by the amount of pecuniary success.

In the year 1808 Francis Lord Gray, now deceased, granter of the bonds of provision after mentioned, succeeded to the entailed estates of Gray and Kinfauns, and others, in the county of Perth, under a bond of tailzie made and executed

by the deceased William Lord Gray, dated 18th February 1796, in favour of himself and the heirs-male of his body; whom failing to the said Francis Gray, afterwards Lord Gray, his only surviving brother, and the heirs-male of his body; whom failing to a series of heirs-female. This bond of taillie was recorded in the Register of Entails, and duly feudalized.

It contains all the usual and necessary clauses of a strict entail, but the prohibition to contract debt is subject to a declaration that it shall be in the power of any of the heirs of taillie to grant provisions to their wives and children. The power to grant provisions to children is in these terms: "And it shall be in like manner lawful to the said heirs of taillie above mentioned to give suitable provisions to their children, or to the children of their eldest son other than the heir, to affect the rents of the said lands and estates herein contained—the provisions so to be granted by each heir of taillie to his or her said children other than the heir or grandchildren by the presumptive heir of taillie, not exceeding two years' free rent of the said entailed lands and estate, if but one child other than the heir; and not exceeding three years' free rent thereof if two or three children other than the heir; and not exceeding four years' free rent thereof if four or more children other than the heir, and that after reduction of all publick burdens, liferents, and interest of debts which may affect the said lands and estates, as the same shall happen to be at the first Whitsunday or Martinmas after the death of the heir of entail who shall grant such provisions; said provisions, in case of more than one child or grandchild, to be divided as the father or grandfather who grants them shall think fit, and which provisions shall only affect the person of the succeeding heir of entail possessing the said lands and estates and rents thereof to the extent of the one-half of the free rent thereof for the time, after deduction of all public burdens, liferents, and interest of debts for the time, and any estate, heritable or moveable, belonging to them other than the said taillied lands and estates or rents thereof, until the provisions given in manner foresaid shall be satisfied and paid; providing and declaring always, that until the same are satisfied and paid it shall not be in the power of any of the succeeding heirs to grant new provisions to their younger children, at least these new provisions shall only be effectual in so far as the power hereby given to make provisions to younger children or grandchildren has not been exercised by the preceding heirs, or to the extent of what shall have been paid, or otherways extinguished of the provisions given to the children or grandchildren of the former heir and no further, so that the whole provisions shall at no time exceed the said four years' free rent of the said lands and estates, after the deductions foresaid, and it is hereby expressly provided and declared that the said provisions allowed to be given to the child or children or grandchildren of the said heirs of taillie shall not be the ground or foundation of any adjudication or diligence to affect the property of the said lands and estates, or any part thereof, unless adjudication for other debts be led against the said entailed lands and estates; and even in that case or event, any adjudication that shall be led for the said children's provisions shall never expire or the legals thereof run, but shall only remain as a security for the principal sum and annual rents of the said provisions; nor shall it be lawful to or in the power of any of the said heirs of taillie to sell or dispone the said lands and estates, or any part thereof, for payment of said children's provisions or interest of the same."

Lord Gray had four children—John Lord Gray, who succeeded to the estates on his father's death in 1842; Madelina, afterwards Baroness Gray; Margaret, wife of John Grant, Esquire of Kilgraston, who predeceased her father, and left a daughter, now Baroness Gray; and Jean Ann, sometime wife of Captain Ainslie, but whom she divorced in 1843. Lord Gray was also survived by his wife Mary Ann Lady Gray, who died in 1858.

By bond of provision and annuity, dated December 13th, 1832, Lord Gray, on the narrative of his power under the said entail to grant provisions to his younger children, and that he had of that date, in virtue of the powers in the said entail, granted a provision to Jean Ann Gray, his youngest daughter, bound himself and the heirs of entail succeeding to him in the said estates, to pay to certain trustees therein named, for the uses and purposes, with the powers, and under the provisions and conditions thereinafter written, the sum of £5000 at the first term of Whitsunday or Martinmas after his death, with the legal interest from the term of payment, but under the declarations applicable to such provisions specified in the bond of taillie. By this bond of provision and annuity Lord Gray also bound and obliged himself and his heirs, executors, &c., to make payment to the trustees of an annuity of £350 for the purposes therein mentioned. The purposes of the trust, so far as regards the sum of £5000, were as follows, viz.:—"In the *first* place, that my said trustees may pay the expenses attending the execution of this trust. In the *second* place, that my said trustees may receive, uplift, and discharge not only the yearly interest of the said principal sum, and the annuity hereby granted, but also uplift and discharge, or convey and assign, the said principal sum itself if they shall see fit, and invest the same, or such part thereof as they shall receive, in manner after directed, and pay over the said annuity and yearly interest or produce of the said principal sum to or for the use and behoof of the said Madelina Gray until her death or marriage, or until she shall succeed to my said entailed lands and estates by the failure of the said John Master of Gray and his issue, whichever of these events shall first happen. In the *third* place, in case the said Madelina Gray shall marry, that my said trustees may and shall hold the interest or annual produce of the said principal sum for the use of the said Madelina Gray during her life, or until she shall succeed to my said entailed estates; and that they may and shall hold the fee or capital of the said sum to and for the use and behoof of the children of the said Madelina Gray, and that free from and exclusive of her husband's *jus mariti* or right of administration, which is hereby expressly debarred from the interest as well as the principal of the said sum: Declaring that the said sum shall be divisible among the said children in such proportions as the said Madelina Gray shall appoint by a writing under her hand, and failing any appointment by her, equally among them, but the same shall not vest in the said children during the life of the said Madelina Gray; and in case the said Madelina Gray shall leave no issue at the time of her death, or in case she shall succeed to my said entailed lands and estate, that my said trustees may and shall, upon her death, or upon her succession to

the said entailed estates, whichever of these events shall first happen, pay and make over £500 of the said principal sum of £5000 to her heirs and assignees, and the balance thereof to the said Jean Ann Gray and her heirs and assignees."

By bond of provision and annuity, dated April 7th, 1834, Lord Gray, in view of the marriage then intended, and which was immediately afterwards solemnized between his daughter Jean Ann Gray and Captain Charles Philip Ainslie, and in virtue of the powers conferred on him by the entail of the estates, bound and obliged himself and the heirs of entail succeeding to him in the lands and estates, and also his heirs, executors, successors, and representatives whomsoever, but that *subsidiarie* only, to pay the sum of £5000 at the first term of Whitsunday or Martinmas after his death, with the legal interest of the same from the said term of payment during the not payment, to the Honourable John Master of Gray and others, as trustees for the uses and purposes, with the powers, and under the conditions and provisions thereinafter written. Lord Gray also thereby bound and obliged himself, until the first term of Whitsunday and Martinmas after his death, to make payment to the said Jean Ann Gray of an annuity of £200. The purposes of the trust applicable to this provision of £5000 were as follows, viz., "In the *first* place, out of the interest or annual proceeds of the said principal sum to pay the expenses of managing this trust. In the *second* place, to pay to the said Jane Ann Gray, in case she survive me, the said interest or annual proceeds, deducting expenses during the subsistence of the said marriage, and until the first term of Whitsunday or Martinmas thereafter, upon her own receipt therefor, exclusive of her husband's *jus mariti*. In the *third* place, in case the said Jane Ann Gray shall survive the said Charles Philip Ainslie, her future husband, to pay or make over to her at the first term of Whitsunday or Martinmas that shall happen after the death of the longest liver of me and the said Charles Philip Ainslie, £3000 of the said principal sum, and to pay to her the free interest or annual proceeds of £2000, being the remainder of the said principal sum of £5000, during her life. In the *fourth* place, in case the said Charles Philip Ainslie shall survive the said Jane Ann Gray, and in case there shall be a child or children of the said marriage, to pay to the said Charles Philip Ainslie during his life from the first term of Whitsunday or Martinmas that shall happen after the death of the longest liver of me and the said Jane Ann Gray, the free interest or annual produce of the said principal sum of £5000, and to pay the capital thereof to the said child or children, at the terms, in the proportions, and under the conditions and declarations after written. In the *fifth* place, in case the said Jane Ann Gray shall survive the said Charles Philip Ainslie (in which event, as hereinbefore provided, she will become entitled to £3000 of the said principal sum and the interest of the remaining £2000), and in case there shall be a child or children of the said marriage, to pay to such child or children the said sum of £2000, being the remainder of the said principal sum of £5000, at the terms, in the proportions, and under the conditions and provisions after written." . . . . "And in the *sixth* and last place, in case there shall be no child or children of the said marriage, or in case they and their issue shall all fail before the foresaid periods of their provisions vesting, then, if the said Jane Ann Gray shall predecease the said Charles Philip Ainslie, the said sum of £5000 shall be paid to him or his heirs and assignees at the first term of Whitsunday or Martinmas that shall happen after the death of the longest liver of me and the said Jane Ann Gray, and if the said Jane Ann Gray shall survive the said Charles Philip Ainslie, the said sum of £2000 shall at the said term be paid to his heirs and assignees, and in either of these events this trust shall cease and determine." The bond of provision and annuity further contained the following declaration: "And I hereby declare that the provisions hereinbefore granted are and shall be accepted by the said Jane Ann Gray, as in place of all that she could ask, by virtue of any deed or deeds heretofore executed by me in her favour, or as legitim or bairns' part of gear, or otherwise, saving my own good will only." In consequence of the dissolution of the marriage, an arrangement was entered into by which the £5000 and interest from Martinmas 1842 were repaid to the marriage-contract trustees.

By bond of provision and annuity dated December 13th 1832, Lord Gray granted a provision to his daughter Jean Ann Gray, in which he bound himself and the heirs of entail in these terms:—"I do therefore hereby bind and oblige myself and my said heirs of entail succeeding to me in the said lands and estates of Gray and Kinfauns, to make payment to the said Jean Ann Gray and her heirs and assignees at the first term of Whitsunday or Martinmas after my death, of such a sum as, with the two foresaid sums of £5000 contained in the bonds of provision before mentioned, shall amount to and shall not exceed three years' free rent of the said entailed estates, after deduction of all public burdens, liferents, and interests of debts which may affect the said entailed estates, as the same shall then happen to be, with a fifth part more of penalty in case of failure, and the legal interest of the same from the said term of payment during the not payment; but under this declaration always, that if my said son or heirs of his body shall, upon my death, succeed to my said entailed estates, then, during his or their possession thereof, it shall not be in the power of the said Jean Ann Gray or her foresaids under these presents, to demand payment from him or them of any part of the sum herein provided to her or interest and penalty corresponding thereto, without prejudice to her and her foresaids having right to demand full payment of the whole provision hereby granted from the heirs of entail succeeding to my said entailed estates in the event of the failure of the said John Master of Gray, and the heirs of his body, either before or after my decease; my meaning and intention being, that in the event of the failure of the said John Master of Gray and his issue, after he or they shall have succeeded to and possessed the said entailed estates, the said entailed estates, and the heirs of entail succeeding therein, shall be burdened in favour of my younger children to the full extent of three years' free rent of the said entailed estates, including the two foresaid sums of £5000 contained in the bonds of provision before mentioned, in the same manner as if the said John Master of Gray had predeceased me without issue." The bond also contained an obligation by Lord Gray, his heirs, executors, &c., for an annuity of £300.

On February 27th 1836, Lord Gray executed a codicil annexed to the first of the bonds of provision and annuity above mentioned granted in

favour of trustees for behoof of Madeline Gray and Jean Ann Gray, which codicil, proceeding on the narrative of the bond of provision last mentioned and the declaration therein contained, contains a declaration in the following terms:—"And now seeing that it was not my intention, in executing the said recited bond, to revoke or annul the provision of £4500, made in favour of the said Jean Ann Gray by the within bond in the event of the Honourable Madeline Gray dying without issue, or succeeding to my entailed estate," "do hereby declare, that notwithstanding the foresaid declaration in the said recited bond the within provision of £4500 payable to the said Jean Ann Gray in the event foresaid, shall subsist and be effectual to her and her heirs and assignees, to all intents and purposes, as fully as if the foresaid declaration had not been made in the said recited bond, or as if the within bond had been specially excepted from the foresaid declaration."

On the same day Lord Gray executed another codicil annexed to the second of the bonds of provision and annuity mentioned, granted in favour of the said Jean Ann Gray, which codicil, proceeding on the narrative of the last of the bonds of provision above mentioned, and the declaration therein contained, contains a declaration in the following terms:—"And seeing it was not my intention, in executing the said recited bond, to revoke or annual the provision made by the within bond in favour of the said Jean Ann Gray, and charged against my heirs in my entailed estate," "do hereby declare, that notwithstanding the foresaid declaration in the said recited bond, the within provision payable to her by the heirs in my entailed estate shall subsist and be effectual to her and her heirs and assignees to all intents and purposes as fully as if the foresaid declaration had not been made in the said recited bond, or as if the within bond had been specially excepted from the foresaid declaration, providing alwise that in calculating the amount of the said provision the said recited bond shall come in place of a bond within referred to, granted by me to the said Jean Ann Gray, for the same principal sum, and which is now revoked."

By a bond of provision and annuity dated December 13th 1832, Lord Gray, under the powers conferred on heirs of entail by the Act 5 Geo. IV., c. 87 (Aberdeen Act), bound and obliged himself and the heirs of entail succeeding to him in the entailed lands and estates, duly and validly to infeft and seise Mary Ann. Lady Gray, his wife, in an annuity or liferent provision of £2000 yearly, free of all burdens and deductions whatsoever, during all the days of her life from and after his disease, in case she should survive him, to be uplifted and taken at the terms therein specified, furth of the entailed lands and estate, but subject always to the provisions therein mentioned, and to the provisions of the foresaid Act.

By a private Act of Parliament Lord Gray was authorised to borrow £35,000 upon the security of the entailed lands for their improvement; and the balance of this improvement debt was fixed by decree of the Court in July 1844 at £26,950, 0s. 1d., and the question was, whether at the death of Lord Gray interest thereon lay against the estate, which was to be deducted in computing the free rent of the estate? The question was also raised whether feu-duties, assessments for protecting the river in close time, and abatements allowed to tenants from rental fell also to be deducted under the dedeductions prescribed in the entail?

The questions for the opinion of the Court were:—

"1. Whether Margaret Baroness Gray, as heiress of entail in possession of the estates of Gray and Kinfauns, is liable to the said Sir William Stirling Maxwell, as trustee foresaid, for the sum of £5000 contained in the bond of provision by Francis Lord Gray in favour of Robert Smythe and others, as trustees, dated 15th December 1832, with interest from 31st January 1867, or any part thereof?

"2. Whether Margaret Baroness Gray, the heiress of entail foresaid, is liable to the said Mrs Jean Ann Gray or Ainslie for the sum of £5000 contained in the bond of provision by Francis Lord Gray in favour of John Master of Gray, afterwards Lord Gray, and others, as trustees, dated 7th April 1834, assignation thereof by the said trustees in favour of Mrs Ainslie, and bond of corroboration and disposition in security thereof, by John Lord Gray, in her favour, with interest from 11th November 1869, or any part thereof?

"3. Whether Margaret Baroness Gray, the heiress of entail foresaid, is liable to the said Mrs Jean Ann Gray or Ainslie for such a sum as, with the two foresaid sums of £5000, shall amount to, and shall not exceed three years' free rent of the said entailed estates as at Martinmas 1842, after deduction of all public burdens, liferents, and interest of debt affecting the said lands and estates at Martinmas 1842, or for such a sum as shall be found to be due in terms of said additional bond of provision by the said Francis Lord Gray in favour of Mrs Ainslie, 1st December 1832, with interest thereof since Martinmas 1842, or any part thereof? and whether, in the event of the said Margaret Baroness Gray being so liable, the deductions before mentioned, claimed by her, amounting to £4879, 18s. 7¼d., or any and what part thereof, fall to be deducted from the rental in fixing the three years' free rent?

"4. Whether, in the event of the said Margaret Baroness Gray being liable in interest on the principal sum of £5000 specified in the first question from 31st January 1867, or in interest on the additional provision, making up three years' free rent specified in the third question, from Martinmas 1842 or from 31st January 1867, she is entitled to relief of any and of what part of such interest from the executrix of Madelina Lady Gray, who possessed the said estates as heiress of entail, from 31st January 1867 to 20th February 1869?

WATSON for Baroness Gray.

SHAND and KEIR for Mrs Ainslie and Others.

At advising, the opinion of the Court was delivered by

LORD KINLOCH—The questions put to us under this Special Case regard the validity and extent of certain bonds of provision executed by Francis Lord Gray, as heir of entail in the estates of Gray and Kinfauns, in favour of one of his younger children, the Hon. Jean Ann Gray, afterwards Mrs Ainslie.

1. The first question relates to a bond dated 13th December 1832, and payable at the first term after Lord Gray's death, granted for the sum of £5000, in favour of trustees for certain specified trust purposes. These purposes were, in the first

place, payment of the interest to an elder daughter, Madelina, afterwards Baroness Gray, till her death or succession to the entailed estates, and to her children in fee in the event of her marriage; "and in case the said Madelina Gray shall leave no issue at the time of her death, or in case she shall succeed to my said entailed lands and estates, that my said trustees may, and that upon her death or upon her succession to the said entailed estates, whichever of these events shall first happen, pay and make over £500 of the principal sum of £5000 to her heirs and assignees, and the balance thereof to the said Jean Ann Gray and her heirs and assignees."

We had a great deal of elaborate argument as to the supposed invalidity of this bond under the entail, as a bond to a large extent in favour of grandchildren, which it was said the entail does not allow, except in the case of children of an eldest son other than the heir. I conceive that we are not called on to pronounce on this question, which practically never arose, Madelina Gray never having been married. The only question truly before us is, whether Lord Gray was entitled so to settle a sum of £5000, as in the first place to provide a yearly aliment to his elder daughter Madelina, and on her succeeding to the entailed estates to be paid, to the extent of £4500, to the younger daughter, Jean Ann Gray? I cannot doubt of the competency of such a provision; and Madelina Gray having succeeded to the entailed estates, and so the condition in favour of Jean Ann Gray having been purified, I am of opinion that the sum of £4500 in question is, with interest from 31st January 1867, the date of Madelina's succession, due by the existing heir of entail. The sum of £500, payable not to Madelina Gray herself, but to her heirs and assignees, I am of opinion was not competently so settled, and cannot now be enforced.

2. The second question relates to another bond for £5000 granted by Lord Gray on the occasion of the marriage of his daughter Jean Ann Gray to Captain Ainslie in 1834. This sum was also payable to trustees at the first term after Lord Gray's death, and was directed to be applied in various different ways in different contingencies. The interest was declared payable to Mrs Ainslie during the marriage. What was to be done with the capital is only necessary to be taken into view in the present question so far as it applied to the case of Mrs Ainslie surviving her husband. In that case it was provided that £3000 should be paid to Mrs Ainslie at the first term after her husband's death. The remaining £2000 was, failing children, to be liferented by Mrs Ainslie during her survivance of her husband, and on her death to be paid to Captain Ainslie's heirs and assignees.

The marriage was dissolved by decree of divorce being obtained against her husband by Mrs Ainslie. And as one of the consequences of this divorce, Captain Ainslie made over to the marriage-contract trustees the whole rights acquired by him through the marriage in this sum of £5000. The marriage-contract trustees thereon executed an assignment of the whole amount of the provision in favour of Mrs Ainslie.

The question now arises, To what extent, if any, is the bond by Lord Gray contained in the marriage-contract available to Mrs Ainslie? As to the sum of £3000, payable to her in the event of her surviving her husband (who must be considered, in respect of the divorce, to be the same as dead), I can have no difficulty. The payment of the interest on this sum during the marriage, and of the capital at the husband's death, seem to be the most unexceptionable mode possible of disposing of such a provision. The difficulty arises as to the balance of £2000, and mainly lies in the fact that although Mrs Ainslie is entitled to the interest of it during her lifetime, and her children, if she had had any, would have got the capital of this sum, the capital is nowhere in the marriage-contract directly declared payable to Mrs Ainslie, but only to her husband at her death. But I think it still must be regarded as belonging to her in the proper sense of the term. The whole sum of £5000 was included in the bond of provision as money to be raised for her behoof. This £2000 was substantially part of her fortune, to be paid, in respect of the marriage, to her intended husband at a certain postponed period. It was hers by her father's provision, made over by her, with her father's consent, to her intended husband, in consideration of the obligations on his part. The husband forfeited his right through the divorce, and his assignation only gave back what he was in law bound to restore. I am therefore of opinion that the capital of this sum must, as well as the interest, be considered legally to be the property of Mrs Ainslie. The only alternative is, that the capital sum must be considered as reverting to the heirs of entail, which is an alternative I do not think legally to hold.

3. The third question relates to a bond dated 13th Dec. 1832, by which Lord Gray bound himself in payment to Mrs Ainslie, at the first term after his death, of such a sum as, with the other sums given to her, should make up her provision to three years' free rent of the estates. The only objection, as I understood, stated to this bond was, that it exempted from demand the son of the granter, John Master of Gray, and the issue of his body, in the event of their succeeding to the entailed estates, and only burdened the heirs of entail succeeding on the failure of these. This, it was contended, was incompetent, and the incompetency, it was said, vitiated the bond.

The point might have been attended with some difficulty except for the decision in the case of *Howden* v. *Porterfield:* for it does certainly appear anomalous to throw payment of a bond of provision on a remote series of heirs of entail exclusively, so that the aliment of the younger child might possibly come to be provided by an heir of entail who did not exist for a century after the child had died. But the very point was raised in the case of *Howden* v. *Porterfield*, and this circumstance was found not to destroy the validity of the bond, by a judgment of this Court, affirmed by the House of Lords. It is true that the bond of provision in that case was somewhat different from the bond in the present, being a bond affecting the fee of the estate, while the present only affects the rents, and heirs of entail. But the cases are the same in the essential point of postponement of the prestability of the obligation till after the failure of an intermediate body of heirs. I consider the decision in *Howden* v. *Porterfield* to form a precedent for the present case, and on this account I think we must sustain the validity of the bond in question. But I think interest cannot be held to run on it till the death of John Lord Gray, without issue, on 31st Jan. 1867, for it was only then that the bond became legally exigible.

Under this question is raised the inquiry, what shall be the deductions to be made in ascertaining the free rent of the estate, three times the amount of which is to measure the liability under the bond. The deductions prescribed by the entail are "public burdens, liferents, and interest of debts which may affect the said lands and estates."

(1) The public burdens to be deducted admit of scarcely any controversy, now that it has been explained that the "assessment for protecting the river in close time" was imposed by a public statute. Feu duties, though usually deducted in consequence of special enumeration, cannot be called public burdens. No more can "abatements allowed to tenants from rental."

(2) Under the head of liferents comes the annuity of £2000 payable to the widow of Francis Lord Gray, beneath a bond of annuity, with warrant of infeftment, dated 13th December 1832. Though the first payment of this annuity seems not to have been due till the first term after the granter's death, I consider the liferent to have been a burden on the lands at the date of his death, and therefore to be estimated in the deductions. But the interest of the two bonds of provision, of £5000 each, in favour of Mrs Ainslie herself, and going to make up the very amount for which her provision is to stand, are clearly not to be deducted; and this deduction was not pressed.

(3) Lastly is to be considered the interest of an alleged improvement debt incurred by Francis Lord Gray under the Montgomery Act, and alleged to amount to £26,950, 0s. 1d., being part of a sum of £35,000 charged on the lands under an Act of Parliament obtained after the death of Francis Lord Gray, by his son and successor, John Lord Gray. The question raised is, whether, at the death of Francis Lord Gray, which is the point of time to be regarded, there lay against the estate the interest of a debt affecting the lands, in respect of this improvement expenditure?

I am of opinion that this question must be answered in the negative. The provisions of the Montgomery Act do not in any correct sense create a debt affecting the lands. The lands are expressly protected against all adjudications for repayment of the money expended. The whole result of the expenditure, if made in terms of the statute, is to constitute the person expending it a creditor of the succeeding heirs for three-fourths of the amount, each heir being no further liable than to the extent of one-third of the clear rents during his life. The executors or assignees of the proprietor making the expenditure are authorized to pursue the next succeeding heir for the amount due, or such part as falls on him, within a year after the death of the expending proprietor; and if they fail to do so, they are declared, to the extent to which they ought to have made recovery, to have forfeited their claim against the subsequent heirs. There is no provision for interest being recovered on the debt except in so far as it may become due by any individual heir in respect of delay in the payment of what falls on him. It is thus not due by the estate, but due by any individual heir for his own default. I cannot therefore consider that at the death of Francis Lord Gray there subsisted any "interest of a debt affecting the lands and estates" in respect of this improvement expenditure; and I think no deduction can be made from the rents on this account in estimating the amount of provision due to Mrs Ainslie.

4. The fourth question asks whether, in the event of the present Baroness Gray being liable in interest on these bonds, she has relief against the executrix of her predecessor, Madelina Lady Gray, for the two years of the latter's possession of the estate. It was conceded, as I understood, that she was so entitled; and so no discussion on this point took place before us.

In these circumstances, the first and second questions are to be answered in the affirmative, except that under the first question only £4500 are to be sustained as due. The third question is to be answered in the affirmative so far as the liability is concerned, except that the interest is to be sustained as due only from 31st January 1867. The deductions are to be authorized as before stated. The fourth question is to be answered in the affirmative.

SHAND asked for expenses.

WATSON maintained no expenses should be granted, as Mrs Ainslie had asked £20,000 more than the Court had given her, and this was the larger half of the money at stake.

The Court gave no expenses, the Lord President observing that the mode of deciding questions of expenses in special cases is not the same as in ordinary cases; the test is not to be the measure of exact pecuniary success.

Agents for Baroness Gray—Hope & Mackay, W.S.

Agents for Mrs Ainslie and Others—Dundas & Wilson, C.S.

Thursday, July 14.

EISTENS *v.* NORTH BRITISH RAILWAY.

Title to Sue—Reparation—Contract. Collaterals have no title to sue for reparation for the death of a brother.

Per Lord President—Such reparation is only granted where the relationship was near, and a mutual obligation of support existed between the claimant and the deceased.

It is the contract of carriage that makes a railway company liable for the death of a passenger whilst its train is on another company's line.

The pursuers are the two sisters of the deceased Mr Eisten, who was killed in the collision at Thirsk Junction in May 1869. The accident occurred on the North-Eastern line; but the defenders admitted that they would be responsible in damages if the pursuers could show that they had a title to ask for them. Mr Eisten was at his death about forty years of age, and was the only surviving brother of the pursuers. Their father and mother were dead; and as their father, at his death six years ago, had left no means, the pursuers would have been destitute but for their brother's support. He was the principal bill-clerk of the City of Glasgow Bank at Glasgow, and in receipt of a salary of £215, with a prospect of increase. He left about £185, from which his funeral and outstanding debts fell to be deducted. The pursuers said they had been led to believe they would receive reparation from one or other of the railway companies, but they had received nothing. They had lived with their brother, and as they had now no means of subsistence, they claimed damages to the extent of £2000, as reparation for his loss, and *solatium* for their feelings. The Lord Ordinary (ORMIDALE) dismissed the action, in respect