penses: Grant power to the Lord Ordinary to decern for the expenses now found due; and decern."

Counsel for Pursuers (Reclaimers)—Kinnear—J. D. Dickson. Agents—Davidson & Syme, W.S.

Counsel for Defenders (Respondents)—Asher—Jameson. Agents—Scott, Bruce, & Glover, W.S.

Wednesday, January 23.

SECOND DIVISION.

SPECIAL CASE—LEARMONTH AND SINCLAIR'S TRUSTEES.

Apportionment—Between Heir of Entail and Executor—Where Bond of Annuity granted to Widow of Heir—Apportionment Act (33 *and* 34 *Vict. cap.* 35) *sec.* 4.

The proprietor of an entailed estate by antenuptial contract of marriage provided an annuity of £300 to his widow, the first term's payment whereof after his death was declared to be "for the half-year to follow;" the contract also provided £500 for mournings and interim aliment. Subsequently this annuity, under the Aberdeen Act, 5 Geo. IV. cap. 87, was made a charge upon the entailed estate by bond, wherein the payments were described as "for the half-year preceding." Upon the death of the granter the £500 for mournings and interim aliment was paid.—*Held*, in a question between the succeeding heir of entail and the testamentary trustees, that the first half-year's annuity was a "just allowance" under the 4th section of the Apportionment Act (33 and 34 Vict. cap. 35), and fell to be apportioned between them in the same way as the rents of the entailed estate.

Apportionment—Between Heir and Executor—Interest on Heritable Bond over Entailed Estate.

An heir of entail disentailed his estate, and before re-entailing granted a heritable bond, which was a real and effectual charge against the entailed estate.—*Held* that the interest on the bond for the half-year in the course of which he died was apportionable between the succeeding heir of entail and his testamentary trustees.

Apportionment—Between Heir of Entail and Executor—Drainage Rent Charge.

A proprietor borrowed money for improvements over his entailed estate under the provisions of the Private Money Drainage Act 1849 (12 and 13 Vict. c. 100) repayable capital and interest by half-yearly instalments.—*Held* that the payment due for the half-year in which he died formed a proper deduction from the apportioned rents as between the succeeding heir of entail and the testamentary trustees, both in equity and under the provisions of section 66 of the Improvement of Land Act 1864 (27 and 28 Vict. cap. 114).

Observations on the case of *Lady Maitland*, 1st Feb. 1877, 4 R. 422.

Heir and Executor—Entail—Local Custom.

Where an ancient custom existed that the price of any woodwork added by the tenant in farm-steadings should, unless the work was removed, be repaid to him by the landlord at the ish of the tack—*held* (*diss.* Lord Ormidale) that this custom had the force of law, and that in an entailed estate the obligation fell, not upon the personal representatives of the deceased heir, but upon the succeeding heir of entail.

Observations upon the case of *Bell* v. *Lamont*, June 14, 1814, F.C.

This was a Special Case for Colonel Learmonth of Dean, factor *loco tutoris* to Sir John Rose Sinclair of Dunbeath, of the first part, and Dame Margaret Learmonth or Sinclair, widow of the late Sir John Sinclair of Dunbeath, and others, Sir John's trustees of the second part. The circumstances under which the case arose were as follows:—On 9th July 1821 Sir John Sinclair, and Miss Learmonth executed an antenuptial contract of marriage, by which Sir John obliged "himself, his heirs-male, taillie and provision, his heirs of line, and his heirs, executors, and successors whomsoever, without the benefit of discussion of one heir or heirs for the relief of others which may be claimed or allowed by law, to make payment to the said Margaret Learmonth in case she shall survive him, during all the days of her life after his decease, of a free liferent annuity of £300 sterling, exempted from all burdens and deductions whatsoever, and that at two terms in the year, viz., Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first Whitsunday or Martinmas after his, the said John Sinclair's, decease, for the half-year to follow;" and he thereby obliged himself to infeft Margaret Learmonth in a liferent locality of such parts of the entailed estate of Barrock as would amount to, but not exceed, a third part of the free rent thereof, in the terms of and conform to the disposition and deed of entail thereof; and further "to make payment to Margaret Learmonth, in case she survives him, of the sum of £500 sterling in lieu and place of her claim for mournings, and in full of her claim for aliment from the day of his death to the first term's payment of said annuity," &c.

Sir John Sinclair succeeded to Barrock on the death of his father on 8th June 1820, being infeft upon a deed of entail executed by his grandfather and dated 8th May 1787. Subsequently by bond of annuity dated 28th November 1825, he bound himself on the narrative of the Act 5 Geo. IV. (Lord Aberdeen's Act), granting power to heirs of entail to provide their widows with annuities, and on the further narrative that he was desirous of implementing the obligations incumbent on him in his contract of marriage, to "pay and deliver to the said Margaret Learmonth or Sinclair, my spouse, a free annuity of three hundred pounds sterling yearly, during all the days of her natural life, in case she shall survive me, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas next and immediately following the decease of me the said John Sinclair, for the period preceding, and the next term's payment at the succeeding term of Martinmas or Whitsunday for the half-year preceding."

On 20th December 1849 Sir John Sinclair presented a petition under the Act 11 and 12 Vict. c.

36 (the Rutherfurd Act) to disentail the estate in question, and the disentail, duly approved by the Court, was recorded in the General Register of Sasines 3d July 1851.

Sir John Sinclair obtained the consents of his three sons, John Sinclair, Alexander Young Sinclair, and George Sinclair, to this disentail, on the express condition and agreement that before re-entailing he should have power to borrow upon security of the estate to the extent of £6000 only, which sum was agreed to as an equivalent for the amount of a bond of provision then affecting the estate granted by John Sinclair, father of Sir John, in favour of his younger children for the sum of £1500, and for the amount to which Sir John Sinclair was entitled to burden the estate for improvements effected thereon under the Montgomery Act. He was further to renounce all right to affect the estate with any other sums for improvements, except for such as had been or might be borrowed by virtue of the Drainage Acts made or to be made.

He accordingly borrowed the sum of £6000, and on 14th July 1851 he entailed the lands in favour of himself and his three sons—John and his heirs-male, whom failing Alexander and his heirs-male, whom failing George and his heirs-male. The entail was recorded on 5th September 1851. The eldest son predeceased his father unmarried; the second son also predeceased his father, but left three children, of whom the present baronet Sir John Rose Sinclair was the eldest.

Sir John Sinclair died on 21st April 1873, and the £500 for mournings and aliment to the Whitsunday following was duly paid by his trustees to his widow. Colonel Learmonth, the party of the first part, was on 6th June 1873 appointed factor *loco tutoris* to his son.

Under the Apportionment Act (33 and 34 Vict. cap. 35) the trustees and executors of Sir John Sinclair, the parties of the second part, were entitled to a proportion of the rents corresponding to the period that Sir John Sinclair survived, subject to such "just allowances" or deductions as the first party might be able to instruct. It was agreed that the proportion of rents payable to Sir John Sinclair's trustees, without taking into account the deductions after mentioned, was £956, 14s. 5d. But a question arose, whether the first party was entitled to make certain deductions from the sum of £956, 14s. 5d? These were—

I. At Whitsunday 1873, Lady Sinclair became entitled, under the bond of provision in her favour executed as above mentioned, to payment of a half-year's annuity "for the period preceding" that term. The sum of £150, as the amount due at Whitsunday, was accordingly paid to her under reservation of all claims against the trustees. The factor *loco tutoris* maintained that as the annuity to Lady Sinclair did not affect the fee, but only the rents of the entailed estate, he was entitled to deduct from the sum of £956, 14s. 5d. the sum of £130, 2s. 6d., being the proportion of the sum of £150 corresponding to the period from Martinmas 1872 to 21st April 1873, the date of Sir John Sinclair's death. The trustees admitted that if the factor *loco tutoris* was entitled to make any deduction, the sum stated was correct. But they maintained that under the marriage-contract between Sir John and Lady Sinclair the first term's payment of the annuity of £300 was declared to be "for the half-year to follow;" and that they had paid to Lady Sinclair £500 for mournings and aliment from the day of Sir John's death to Whitsunday 1873, when the first term's payment of her annuity fell due, and that they were not liable in repetition.

II. The factor *loco tutoris* had paid at Whitsunday 1873 the sum of £118, 2s. 2d., being a half-year's interest on bond p. £6000 for the period from Martinmas 1872 to Whitsunday 1873, and he claimed to deduct from the proportion of rents payable to the trustees a proportion of this half-year's interest corresponding to the period from Martinmas 1872 to 21st April 1873. The trustees maintained that they were not liable in payment of any proportion of the interest, on the ground that the interest of heritable securities did not vest till the term of payment. Both parties agreed that if the factor was entitled to make the deduction the correct amount was £104, 4s. 1d.

III. Sir John Sinclair had expended large sums in draining and otherwise improving the entailed estate. The amount so expended was borrowed from the Enclosure Commissioners, and on 6th October 1873 the factor *loco tutoris* had paid the sum of £116, 3s. 11d., being the amount of rent charges due to the Enclosure Commissioners for the period from 6th April to 6th October 1873, and he now claimed to deduct from the proportion of rents payable to the trustees proportion of the rent-charges corresponding to the period from 6th to 21st April 1873. The trustees said they were not liable, on the ground that the interest of heritable securities did not vest till the term of payment. Both parties agreed that the deduction, if a proper one, amounted to £9, 11s. 2d.

IV. It was stated in the case that it was the custom in the county of Caithness for tenants to erect and repair at their own expense the houses upon their farms. At the termination of the tenancy the tenant was entitled to payment from the landlord or the incoming tenant of the value of the wood of the houses so erected or repaired by him, excepting the value of such woodwork, if any, as might have been supplied by the landlord, which latter was called "masterwood." The valuation was signed by the landlord at the tenant's entry. If the value was paid for by an incoming tenant, he, in his turn, was entitled to recover the value thereof at the expiration of his tenancy from the landlord or the succeeding tenant. This practice had existed upon the estate of Barrock at least since 1787, the date of the first entail, and there were many tenants on the estate who on the expiry of their tenancies would have claims for tenants' wood. A claim had now emerged, and been made on this account against the first party by Alexander Miller, who held his farm under a verbal lease. At his entry at Whitsunday 1838 the wood upon his house was valued at £2, 11s. 6d., the masterwood being £1, 1s., leaving £1, 10s. 6d. as the value of the tenant's wood, which sum was paid by him to the outgoing tenant. This valuation was initialed by the late Sir John Sinclair. Since his death Miller had removed from his possession, and now claimed payment from the first party of £5, 6s. 6d. as the value of the tenant's wood. The whole wood on and upon his house was valued at the termination of his possession at £6, 7s. 6d., from which £1, 1s. fell to be deducted as masterwood. The parties to the case

were agreed that the valuation was correct, and the question came to be, By whom was it payable—by the heir of entail or by the trustees?

The following questions were accordingly submitted for the opinion and judgment of the Court:—"1. Is the first party in accounting to the second parties for the proportion of rents of the said entailed estate payable to them as the personal representatives of the said Sir John Sinclair, under the provisions of the Act 33 and 34 Vict., c. 35, entitled to make a deduction of the following sums, or any of them, viz.—(1) Of the sum of £130, 2s. 6d., as the proportion of the half-year's annuity payable to Lady Sinclair at Whitsunday 1873, corresponding to the period between Martinmas 1872 and 21st April 1873. (2) Of £104, 4s. 1d., as the proportion of the interest paid on the abovementioned bond per £6000, corresponding to the period from Martinmas 1872 to 21st April 1873. (3) Of £9, 11s. 2d., as the proportion of rentcharges paid upon 6th October 1874, corresponding to the period from 6th to 21st April 1873. 2. Does the liability for the claim of £5, 6s. 6d. made by the said Alexander Miller for wood on the house lately occupied by him, attach to the first party as factor *loco tutoris* for the heir of entail in possession, or to the second parties as the personal representatives of the late Sir John Sinclair?"

Argued for the first party—In the recent case of *Lady Maitland*, 4 Rettie 422, no question was raised under the Apportionment Act. The first point here referred to the annuity. The provisions in the marriage-contract could not be looked at so as to affect or control the meaning of the obligation created by the bond of annuity. As to the interest on the £6000 bond, it fell under the same rule. Lord Westbury spoke of both in giving judgment in *Hard* v. *Anstruther*. The Apportionment Act included the interest on heritable securities, and this interest vested in the creditor *de die in diem*. Each day of survivance added to the debt. In *Lady Maitland's* case the question really turned on postponed rents, but the present rents really were the rents of a bygone period. The Apportionment Act here applicable was that of 1834, as the transactions took place in 1851—*Riddell*. As to the matter of drainage money, the statutes of 1849 and 1864 applied. The heir of entail had to keep down the charges, paying them just as though they were interest, during his possession, and a proportional part if he died during the currency of the term. In *Maitland* the executor admitted liability for the proportion of rent and drainage charges due at the time of the predecessor's death, though not payable until after that event if it were within the half-yearly period. There was really nothing settled against the executor for the proportion of the charge falling due at the end of the termly period. [Lord Justice-Clerk—Will an entailed estate disentailed under a contract and again immediately re-entailed be liable for the entailer's debts as though the second entail had been the only one?] We maintain that the liability would be only for those debts incurred while the property was held in fee-simple. As to the custom about tenants' wood, custom was not stronger than express contract—*Bell* v. *Lamont;* and to give effect to the contention of the second parties would be to give a tacit stipulation more force than an express contract. It was necessary in stipulations by contract that they should be such as the heir of entail had power to grant.

Authorities—*Lady Maitland*, Feb. 1, 1877, 4 R. 422; *Hard* v. *Anstruther*, 1 Macph. 14, 2 Macph. H.L. 1 (reported in H. of L. as *Paul* v. *Anstruther*); Apportionment Act 1870 (33 and 34 Vict. c. 35); Apportionment Act 1834; *Pott* v. *Riddell*, Mar. 19, 1859, 21 D. 800; Bell's Principles, sec. 1047 (altered by the Statutes), and sec. 1497; Act 12 and 13 Vict. c. 100, sec. 21 (Private Money Drainage Act 1849); Act 27 and 28 Vict. c. 114, sec. 66 (Improvement of Land Act 1864); *Tod* v. *Moncreiff*, May 27, 1825, 1 W. and S. 216; Bell's Comm. (5th ed.) 69–74; *Webster* v. *Farquhar*, Bell's App. Ca. No. 7; *Taylor* v. *Bethune*, Bell's App. Ca. No. 8; *Mackenzie* v. *Mackenzie*, February 15, 1849, 11 D. 596; *Bell* v. *Lamont*, June 14, 1814, F.C.; Hunter on Landlord and Tenant, ii. 231 (last ed. 220); *Breadalbane* v. *Jamieson*, March 16, 1877, 4 R. 673 (and cases there); *M'Gillivray's Executors* v. *Masson*, July 18, 1857, 19 D. 1099; *Barclay* v. *Earl of Fife*, June 5, 1829, 7 S. 708; *Fraser* v. *Fraser's Trustees*, 5 W. and S. 69; Smith's Leading Cases, i. 606 (7th ed.); *Hutton* v. *Warren*, 1 Meeson and Welsby 466 (Baron Park 474); *Wigglesworth* v. *Dallison*, Dougl. 201.

Argued for the second parties—By the disentail, although the obligation subsisted as a rea burden, matters were thrown back to the position of the marriage-contract of 1821. The obligation which, while the entail remained, would have been under the Aberdeen Act enforceable against the rents, was no longer in that position; no doubt it still remained as a real burden, but as against the rents. The rents of heritable subjects did not vest *de die in diem* formerly, and it might be doubted if recent Acts had altered this rule. The customary rule as to wood in Caithness was binding on an heir of entail as it would be on any heir in heritage. The estate really was relieved of the expense of the wood by the custom.

Authorities—*Marquis of Queensberry's Executor* v. *Duke of Queensberry's Executors*, February 11 1814, F.C.; *Lord Herries* v. *Maxwell's Curator*, Feb. 6, 1873, 11 Macph. 396.

At advising—

Lord Gifford—The late Sir John Sinclair of Dunbeath, heir of entail in possession of the entailed estates of Barrock and others, died on 21st April 1873, leaving a general trust-disposition and settlement in favour of trustees who are the second parties to the present case. He was succeeded in the entailed estates by his grandson Sir John Rose George Sinclair, and his factor *loco tutoris* is the first party to the present case.

By the Apportionment Act of 1870, 33 and 34 Vict. cap 35, which is now the leading and governing Act, the rents of the whole entailed estates legally due for the period from Martinmas 1872 to Whitsunday 1873 fell to be apportioned between the succeeding heir of entail and the testamentary trustees of the late Sir John Sinclair, as at 21st April 1873, Sir John having died of that date between terms. Parties are agreed that the proportion of the said half-year's rent up to 21st April 1873 amounts to the sum of £956, 14s. 5d., and the only questions which have arisen relate to certain deductions which the present heir of entail claims as burdens or just allowances, which according to his contention must be appor-

tioned in the same way as the rents themselves.

The first question, or rather the first branch of the first question, relates to a sum of £130, 2s. 6d., being a proportion of £150, being the first half-year's annuity payable to Lady Sinclair, the widow of the said Sir John Sinclair, in virtue of a bond of annuity granted by Sir John under Lord Aberdeen's Act (5 Geo. IV. cap. 87). By the terms of the bond, the first half-year's payment of this annuity fell due at Whitsunday 1873, about a month after Sir John's death, and by the bond this first half-year's payment is described as "for the period preceding," and the question is, Whether this first half-year's annuity is apportionable or not—that is, Whether the executors who receive a proportion of the half-year's rents due at Whitsunday 1873 must also bear a like proportion of the half-year's annuity payable at that term? I am of opinion that they must. I think the annuity which is payable out of these half-years' rents is just as much a subject of apportionment as the rents themselves—or, what is exactly the same thing, it is a primary and preferable burden upon these rents, and must be paid before any apportionment takes place of the balance. No doubt it is only due for the period after Sir John's death, but this is not of any consequence in considering upon what rents it is really and truly a burden, and by the express terms of the bond it is quite as much a burden upon the proportion of rents effeiring to the period before Sir John's death as upon the proportion of rents effeiring subsequently thereto. It appears to me that this principle was recognised and decided in the second branch of *Hard or Paul* v. *Anstruther*, as decided in the House of Lords 15th February 1864 (2 Macph. H. of L.). In that case the rubric quite correctly lays down the point decided, that the person "entitled under the Apportionment Act to a part of the half-year's rent is bound to allow deduction on account of an annuity to the widow of the heir whom he represented, although the annuity did not commence to run till the death of her husband." Lord Westbury said that the widow's jointure, which became due on the very day that the rents became due, and *simul ac semel* with the rents, was a charge which the party receiving the rents was bound to pay out of the rents which on the same day he received, and that he was entitled to deduction therefrom before apportionment of the balance.

I do not think it makes any difference in the present case that Sir John's testamentary trustees have under his marriage contract, which is a separate deed altogether from the bond of annuity, paid his widow a sum in full of marriage and aliment up to Whitsunday 1873. The widow was entitled to both provisions—that is, both to the £500 provided in the marriage contract and to the annuity under the Aberdeen Act. At all events, as the annuity was made a valid charge upon the half-years' rents which are to be apportioned, leaving to the trustees their pleas in all questions with the widow under the antenuptial marriage contract, I think, therefore, that the first party is entitled to deduct from the trustees' proportion of the divided rents the like proportion of the annuity chargeable thereon.

The same principle, I think, applies to the second branch of question first. The bond for £6000, and interest thereon, is a legal and effectual charge against the entailed estates. The half-year's interest on that bond fell due at Whitsunday 1873 for the half-year preceding—that is, for the half-year from Martinmas 1872 to Whitsunday 1873. Now, it is the rents for that very half-year that are apportionable; and I think it is clear that the executors or trustees, who claim a proportion of the rents, must also bear exactly the same proportion of the interest upon the heritable debt effeiring to the very same period and to the very same rents. It appears to me that this is in every sense carrying out the statute, which bears that "proportionate parts of all just allowances" must be allowed. I think it would be most inequitable if the trustees of the late Sir John, who under the statute take five-sixths of the half-years' rents, should throw the whole interest of the heritable debt from Martinmas 1872 upon the next heir of entail.

The third sub-section of question first relates to a proportion of certain drainage rent charges payable from the entailed estate. It appears that the half-yearly drainage rent-charge was paid by the succeeding heir of entail, the first party to this case, on 6th October 1873, and that this payment was for the half-year from 6th April to 6th October 1873, and the question is, Whether the trustees, who have got a proportion of the rents up to 21st April 1873, must bear a proportion of the drainage charge for the fifteen days from 6th April to 21st April 1873, when the late Sir John died? I think they must, both in equity and according to the provisions of the "Private Money Drainage Act 1849," 12 and 13 Vict. cap. 100, and under the provisions of the Improvement of Land Act 1864, 27 and 28 Vict. cap. 114. By this last statute it is enacted, sec. 66, that when rents are apportioned, the drainage charge applicable to the same period shall also be apportioned in the same manner. This seems to be conclusive. The first-mentioned statute also puts drainage rent charges—that is repayment of sums borrowed for drainage, including interest thereon—on the same footing as interest on mortgages; and as I think it cannot be held that the executor of a proprietor is not entitled to claim an apportionment of rents *de die in diem*, and at the same time refuse to allow a like apportionment of interest on mortgages, it follows under the statute that the drainage rent charge must be apportioned. Apart from the statutes, it might possibly have been otherwise, for the peculiarity of a drainage rent charge is, that it is a termly repayment of a capital sum borrowed, as well as a payment of interest thereon. The recent case of *Lady Maitland*, 1st February 1878, 4 Rettie 422, was referred to as adverse to the opinion I have now expressed. But although the rubric is doubtfully expressed, the question did not really arise in Lady Maitland's case, for Lady Maitland expressly agreed to pay the drainage charge which fell due in September, which was the only drainage payment which could raise any question of apportionment, and in the opinions this is noticed, and it is expressly remarked that Lady Maitland had made concessions which were perhaps greater than in law she was bound to make, but no decision was given as to any point arranged or conceded by the parties.

The only remaining question in the case is the ceond query, and this, although it relates to a very

small sum—only £5, 6s. 6d.—still involves questions of great nicety. It was stated at the bar that the case put is only one of many similar cases which may arise, and which *in cumulo* in respect of their number involve considerable pecuniary value.

The special custom in Caithness as to the woodwork of houses erected by the tenants themselves is set forth and admitted in the case, and I think it is also admitted, or at all events we must take it so, that this custom has the force of law in the districts where it is observed. This seems to have been expressly decided in the case of *Bell* v. *Lamont*, 14th June 1814, F.C.

The true nature of the custom seems to be, that the tenants in the district where the custom rules erect and repair at their own expense the houses and dwellings on their farms, but although the stonework of these houses becomes according to general law the property of the landlord, the woodwork, if put in by the tenant himself, remains the tenant's property, and when he leaves the farm this woodwork, which is the tenant's property, must be paid for either by the landlord or by the incoming tenant. It is admitted that the custom, whatever be its legal nature and effect, was the law of the district from time immemorial, and at least as far back as 1787, the date of the first entail of lands in question.

It was admitted that if the lands had been fee-simple lands this custom must have ruled, and that the wood claimable by an outgoing tenant must be paid for by the proprietor who happened to be proprietor at the date of the ish, and not by the executors or personal representatives of the proprietor by whom the lease or tenancy happened to be granted.

But it was contended, and very ingeniously argued, that while this was the law of fee-simple estates, it was not the law of entailed estates, but that in the case of entailed lands the tenant's wood must always be paid for, not by the heir of entail in possession at the time, unless he himself granted the tack, but by the heirs or personal representatives of the deceased heir who had granted the lease, and the case was sought to be assimilated to that of an heir of entail who in the absence of all local custom binds himself and his representatives to pay for tenant's meliorations, in which case such obligation will bind not the next heir of entail, who is a singular successor, but only the heirs and representatives of the granter.

Now, ingenious as is the analogy, and without disputing the general law applicable to tenants' meliorations in entailed estates, I think the argument for the existing heir of entail fails. The real meaning of the custom is, not that the payment of the wood is an implied personal obligation undertaken by the lessor, and with which his successor in the lands has no concern, but it is, that the successor in the lands, whoever he may be, if he claims the tenant's wood must pay for it. I think I may fairly describe the local custom to be an exception to the general law of fixtures—that whereas in general fixtures made by a tenant without special paction pass to the landlord, yet this is not so in Caithness-shire in regard to the woodwork of houses built by the tenant. Such woodwork though fixed remains in that district the tenant's property, and the landlord must pay for it as such—that is, whoever is landlord at the ish must pay for it if he retains it, and if the outgoing tenant does not carry it away.

Now, if this be the true legal meaning and effect of the custom—and though the point is a new one, and perhaps a nice one, I think this is so—then it is applicable to entailed estates as well as to unentailed. In truth and in strictness the tenant's wood is not part of the entailed estate at all. Though a fixture, it is still by custom—that is by law—the tenant's, and if a subsequent heir of entail chooses to take it—and perhaps he is bound to take it—he must pay for it just as an heir or singular successor in fee-simple lands would have to do.

Perhaps this general ground is sufficient to answer the question put. But upon the statement contained in the case the question is attended with specialties which, to say the least of it, create serious obstacles to the claim of the present heir of entail being sustained. The heir now in possession maintains that Alexander Miller's wood, valued at £5, 6s. 6d., shall be paid for not by him, the heir now in possession and in possession at Miller's ish, but by the executors of his grandfather, the late Sir John Sinclair, who he says granted the tack under which Miller possessed.

But, in the first place, Miller at the date of the ish did not possess under any tack granted by the late Sir John. Miller was only a tenant from year to year, and at the date of his ish, Whitsunday 1875, he was possessing not in virtue of any right given by the late Sir John, but in virtue of tacit relocation entered into between him, Miller, and the present heir of entail, or his factor. Sir John died in April 1873, and if Miller's tenancy did not terminate at the Whitsunday following, it at all events terminated a year after Whitsunday 1874. But previous to Whitsunday 1874 tacit relocation took place, not between the tenant and the late Sir John—that was impossible—but between the tenant and the then existing proprietor, the present first party. Relocation means a new location, a new letting—a new contract of lease between the party then entitled to let and the party wishing to become or to continue tenant—and this new contract could only be between Miller and the first party to this case. The late Sir John died more than a twelvemonth before, and he could not be a party either to a contract of location or of relocation. Accordingly, the wood valued and to be paid for might not be the wood existing at Sir John's death in April 1873, but the wood existing at Whitsunday 1875 ; and although by the addition to the case it appears that the wood was actually put in before April 1873, it might have been otherwise. The whole wood might have been renewed during the period when the present heir of entail, and no one else, was the only landlord. In short, whenever Miller became the tenant of the present heir of entail, then the present heir of entail, and not the executors of any former heir of entail, is alone liable under the stipulations of the lease. It cannot be maintained that tacit relocation might go on for forty years and then at the end of that period a claim should emerge against the executors of some former heir of entail, who had been dead forty years, for wood which was not in existence, and had not been grown when that former heir was in life.

But another specialty arises. The estate was validly and effectually disentailed by Sir John on 4th March 1851, and at that time Alexander Miller was a yearly tenant. The estate was not re-entailed under the existing entail till 14th July 1851, and was held, according to the titles and in the eye of the law, in fee-simple from March to July 1851. No doubt it was then validly re-entailed, but all entails are subject to the entailer's debts incurred before the date of the entail, and it does not appear that a bargain to make a new entail could defeat the rights of such entailer's creditors. At least this might be made a very serious question, on which I would rather desire to avoid giving any opinion, as I think I have enough to decide this case without it.

The result is, that in my opinion the first question in all its three branches must be answered in favour of the first party to the case, and the second question, as to the £5, 6s. 6d., must be answered in favour of the second party.

Lord Ormidale—With regard to the first question in this Special Case and its three subdivisions it is only necessary for me to say that I concur in the opinion which has been read by Lord Gifford.

But with all due deference I feel it impossible to concur with him in his opinion in answer to the second question. Although the pecuniary claim more immediately involved in this question is only £5, 6s. 6d., that was explained by the parties to be merely representative of other claims amounting to a much larger sum—about £500, I think, it was said—which will fall to be disposed of according to the decision now to be pronounced.

The claim was resisted by the first party, on the ground generally that it falls to be paid, not by him as the heir of entail succeeding to the entailed estate in question, but by the executors or general representatives of the preceding heir, by whom the obligation on which it is founded was undertaken.

As a general principle, established by a whole *series rerum judicatarum*, there can, I think, be no doubt that an heir of entail succeeding is not liable to implement obligations for improvements or meliorations undertaken or authorised by a preceding heir. He may be liable under express conditions or provisions to that effect contained in the deed of entail, and he may also be liable for expenditure on improvements or meliorations in terms of the Montgomery Act, 10 Geo. III. cap. 51. But the claim in question was not said to be authorised by the entail, nor made a burden on the estate or heir succeeding in terms of the Montgomery Act. It was indeed assumed, and expressly admitted by all parties throughout the argument, that the estate in question is and was, when the obligation for the improvements or meliorations in dispute was undertaken, held under strict entail in terms of the Act 1685, cap. 22, and that accordingly the heir in possession was prohibited from alienating or burdening it with debt to the prejudice of the succeeding heirs. And if so, it is difficult, or rather impossible I think, to hold, consistently with the authorities, that while the second parties to this case may, as the personal representatives of the preceding heir, by whom the meliorations in question were authorised, be liable in the present claim for the value, the first party can be liable merely as the heir of entail succeeding to the estate. Not only have the institutional and text-writers so expressed themselves, but the principle has been also recognised and illustrated in numerous decided cases occurring in varying circumstances, from *Dillon* v. *Campbell*, 1780, M. 15,432, to the *Earl of Breadalbane* v. *Jamieson*, so recently as 16th March 1877, 14 Scot. Law Rep. 420, 4 R. 667. Without entering into any minute or detailed examination of the authorities, it is sufficient, I think, to refer to Mr Hunter's Treatise on Leases (book v. cap. 7, sec. 3, p. 220, of 1st ed.), where they, or the more important of them, and especially the decided cases, are referred to, and their import and effect brought out, I believe, with great accuracy and exactness. He refers in particular to the cases of *Taylor* v. *Bethune*, 1791, Bell's Cases, 214, *Tod* v. *Moncreiff and Skene*, 1823, 2 S. 113, affirmed by the House of Lords in 1825, 1 Wilson and Shaw's Appeal Cases, 217, and *Fraser* v. *Mackay*, Feb. 11, 1833, 11 S. 391. The two former of these cases were, in their general character, similar to the present, inasmuch as they related to claims for meliorations arising from the difference, ascertained by neutral persons, betwixt valuations at the commencement and termination of leases; and the last case of *Fraser* v. *Mackay* is remarkable in respect that the principle was very clearly and sharply brought out and given effect to in relation to a farm consisting partly of entailed and partly of unentailed lands let for a yearly rent, one portion of which was declared to correspond to the former and another to the latter, and where a general disponee who succeeded to the unentailed lands was held to be liable for the value of the meliorations applicable to the whole farm—the entailed as well as the unentailed portion. It is obvious that no such decision could have been pronounced if, according to the contention of the second parties in the present case, the heir succeeding to the entailed portion of the lands was liable for the meliorations on that portion of the lands.

It is no doubt true that such a principle may operate in its consequences what would appear to be very inequitable results; for certainly it does seem to be hard and unjust that a party—an heir of entail, for example—succeeding, it may be, to a valuable estate, with all the benefits of highly beneficial meliorations made at great expense by a preceding heir, should not be liable for the value of such meliorations or improvements; but such is the law of entail, differing in this respect from the law as applicable to cases of property held in fee-simple, as was determined in the cases of *Campbell* v. *Douglas*, May 15, 1822, 1 S. 409; *Bell* v. *Lamont and Others*, June 14, 1814, F.C.; and *Stewart and Others* v. *Dunmore's Trustee*, June 2, 1837, 15 S. 1059.

It was accordingly for the purpose of correcting and affording the means of relief from the evil onsequences of the law of entail under the principle referred to that the Montgomery Act, 10 Geo. III. cap. 51, was passed, by which the value or expense of improvements by a preceding heir may to a certain extent, and by observing certain rules specified in the statute, be made

a burden on the entailed estate and the heir succeeding to it. It was not said, however, and is not the fact, that the meliorations or improvements here in question were made in terms or under the authority of the Montgomery Act.

So far, therefore, as general principle goes, there can be no doubt I think—and I did not understand it to be ultimately in the argument disputed—that the first party, as the succeeding heir now in possession of the entailed estate in question, is not liable in the present claim.

But while the second parties, as I understood their argument, did not ultimately question the general rule, they disputed and denied its application here, in respect of the custom referred to as existing in Caithness-shire. That custom, however, as it appears to me, can be no stronger or more effective in its operation against the heir of entail succeeding than an express stipulation in a written lease. And it must be taken as established law, on the authorities and decided cases to which I have referred, that such an express stipulation could not operate against an heir of entail succeeding—the principle being that it is excluded by the entail. Besides, the alleged custom, as stated in the Special Case, does not, in any view that can be taken of it, affect the question whether the liability for improvements under or in respect of it transmits against succeeding heirs of entail? That question is altogether left untouched by it. Accordingly, the liability for such improvements must be held to transmit, not to the first party in the present instance, but to the second parties.

Nor do I see how under the alleged custom the wood which constitutes the substance of the meliorations or improvements in dispute can, after being incorporated with and made to form part of the entailed estate, just as much as the building itself, towards the completion of which it was applied, be separated from the rest of the estate, and freed in any way from the fetters of the entail and the operation of the principle to which I have already referred as resulting from these fetters. It may be true, or at any rate may be so taken, that the custom existed in the county of Caithness, in which the entailed estate is situated, from the date of the entail in 1787, but the law of entail, including the principle whereby the cost or value of meliorations executed by an heir in possession transmits to his general representatives and not to the succeeding heir of entail, must be held to have existed at a much earlier date—from at least 1685. That the custom referred to should therefore control or affect the deed of entail I fail to understand. The custom could not even control or affect a lease framed in such a manner as to exclude it, as was expressly decided by the House of Lords, reversing a judgment of this Court, in the case of *Gordon* v. *Robertson and Others*, May 19, 1826 (2 W. and S. Appeal Cases, 115). And in the subsequent case of *Gordon* v. *Thomson and Others*, June 14, 1831 9 S. 735, this Court, proceeding on the judgment of the House of Lords in *Gordon* v. *Robertson*, went the length of holding that meliorations having been made the subject of express stipulation in a lease, local custom could not be appealed to by the tenant for the purpose of enlarging his claims, although such custom was not inconsistent with the terms of the written agreement.

If indeed the statements regarding the custom in the present case are closely examined, it will be found that it is referred to for the purpose only of affecting, not the deed of entail or the rights arising under it, but merely the lease between the late Sir John Sinclair and his tenant Alexander Miller.

But then it was suggested, that supposing it to be so, the tenant at the termination of his tenancy was, if not otherwise reimbursed for his outlay in the meliorations, entitled to carry away the wood and other materials of which they consisted, in respect they belonged to him at first, and continued to be his till paid for; and on this assumption my brother Lord Gifford seems, unless I have misapprehended him, to hold that they are not now, and never have been, part of the entailed estate. I cannot help thinking that this reasoning proceeds on an entire fallacy. It is inconsistent with the statement in the Special Case, where the claim of the tenant is distinctly said to be one for payment of the cost or value of his meliorations, and nothing else. And besides, to hold that the tenant would be entitled, failing payment, to take away the wood or other materials of which his meliorations consisted, would be inconsistent with law. There is no doctrine better or more firmly established than that meliorations executed by a tenant on the lands or other subjects of his lease pertain to and becomes part of that estate by accession. Accordingly, Mr Erskine (ii. 1, 15) says—"If one shall, even with his own materials, build an house on my ground, the house is mine, because the ground is mine on which it is built, and the builder cannot so much as sue upon an action to have the materials separated from the ground that they may be restored to himself, for public policy will not suffer buildings once finished to be pulled down. This rule of accession," the deceased author goes on to say, "is so strong that though I should build a house on my own property with materials which I know to belong to another, the house, and consequently all the materials of which it consists, are mine notwithstanding my *mala fides*." And in another part of his work Mr Erskine (ii. 6, 39), treating of the reciprocal obligations of landlord and tenant, after stating that the tenant is bound to keep the houses and fences on his farm during his lease in an equally good condition as he received them, adds—"The tenant, though he should enlarge the house, or should build new offices, as stable, barn, coach-house, &c., during the lease, is entitled to no abatement of rent on that score without a previous agreement with the landlord."

What recompense a party, whether tenant or not, may be entitled to for meliorations on the property of another is a different matter, about which it is unnecessary to say anything, as the only question here is—Against whom is such a claim available?—whether the general representatives of Sir John Sinclair, the heir of entail in possession, by whom they were authorised, or the heir succeeding, who had nothing to do with their authorisation; and on that question I have already expressed my opinion.

Nor can I entertain any doubt that the wood used, as stated in the Special Case, in the roofs, windows, and doors of houses on the

estate, must be held to be of the nature of fixtures, and forming part of the entailed estate just as much as the foundation and walls or any other part of the houses themselves, for unquestionably they were from their very nature requisite to render the buildings entire and complete; and clearly they could not be removed without destroying the character and object of the buildings. I cannot, therefore, doubt that the roofs, windows, and doors must in the present case be dealt with as fixtures, and would be so dealt with as between heir and executor, fiar and liferenter, heritable and personal creditors, or lessor and lessee, which are the usual relations of parties between whom such a question occurs.

With reference to the further specialties, which have been suggested as taking the present case from under the operation of the general principle which might otherwise be applicable, it was argued that the first party, the succeeding heir of entail, is liable for the cost or value of the ameliorations, or in respect, first, of the four months which intervened in 1851 between the disentail and the new entail as referred to in the Case as presented to us, during which it may, in a certain sense, be said that the estate was held in fee-simple; and second, of the renewal of the lease to Miller by tacit relocation by the first party as now the heir in possession. But it is, I am disposed to think, a satisfactory answer to those views, to remark that there was no renewal of the authority to execute the meliorations in question, either during the four months referred to or afterwards, or of the obligation to pay for them. It is obvious that the meliorations could not have been authorised to be executed either during the four months, or afterwards, because, as stated in the marginal additions made to the Special Case, they had been all previously completed. And neither was it said at the debate, nor is it said in the Special Case, that any obligation, implied or expressed, was subsequently come under by the first party. The obligation, whatever it was, or whatever may be its effect now, was undertaken by the late Sir John Sinclair when the lease was first entered into in 1837, and they were made and completed prior to his death in 1873.

The result is, that while I concur with Lord Gifford in the opinion he has expressed in regard to the first question in the Special Case and its three sub-divisions, I feel myself obliged to differ from him in regard to the second question, and, for the reasons I have stated, to hold that it ought to be answered favourably to the first party.

Lord Justice-Clerk — I concur in Lord Gifford's opinion in regard to the question as to the instalments falling due under the Drainage Acts, but I wish to make an observation on the case of *Lady Maitland*, 4 R. 422. The construction of the 66th section of the later of these statutes (Improvement of Land Act, 1864) did not in that case arise for judgment, as Lady Maitland undertook to make the disputed payment. I see that I am reported to have said, and the remark was just in the abstract, that these instalments were composed of both principal and interest. But it is only right to add that, however true the observation may be, it cannot affect the construction of the statute in this case. The clause is so expressed as to leave no room for question.

The only remaining matter on which I shall make an observation is one of some novelty and importance. It seems there is a customary rule in Caithness that an agricultural tenant builds his own house, receiving at the end of the tenancy from the landlord a certain proportion of the value of the woodwork. The question is whether this obligation transmits as against a succeeding heir of entail, or as against the personal representative of the original lessor?

Now, as regards the present case, I think this question is entirely excluded, for this simple reason, that the deceased heir of entail never undertook any obligation whatever to the outgoing tenant in regard to the only right of tenancy on which the claim is founded. The tenant was a yearly tenant, possessing on tacit relocation. The last year of the tenancy under the deceased heir of entail was 1873–4. The last heir of entail died before Whitsunday 1873, and the present heir, on his succession, was as free to continue or to terminate the tenancy as his predecessor had been. He elected to continue it, and assumed all the obligations to the tenant which that year's tenancy carried with it. Therefore the executor of the last heir has no responsibility in this matter.

But this may not be the state of fact in other cases, and I should desire to put my judgment on broader grounds. This claim is founded on an immemorial custom of usage followed in the county of Caithness. Now, custom, whether general or local, when it is effectual operates not by implied paction or contract but by law. Custom is older and stronger than statute, and therefore this claim by the tenant is as good against the landlord, whether he be an owner in fee-simple or under an entail, as if a statute had been enacted to that effect. It is an old and well-known controversy, whether custom be itself the law or only the remains or echo of some defunct and forgotten written law; but this only shows that custom, when it has force, has the force not of implied contract but of law. It was expressly decided in the case of *Bell* v. *Lamont* that a similar custom in Argyllshire was binding on a singular successor because it did not take effect by reason of any implied extrinsic and personal obligation, but was a consuetudinary regulating law. If this be the true principle, it is wholly immaterial whether the lands be entailed or not. The cases referred to entirely proceed upon specific and personal obligations.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find—(1) That the first party in accounting to the second parties for the proportion of rent of the entailed estate payable to them as the personal representatives of Sir John Sinclair, under the provisions of the Act 33 and 34 Vict. cap. 35, is entitled to a deduction of the sums embraced under the three branches of this query; (2) That the liability for the claim of £5, 6s. 6d., made by Alexander Miller for wood on the houses already occupied by him, attaches to the first party as

factor *loco tutoris* for the heir of entail in possession: Find no expenses due to either party, and decern."

Counsel for First Party—Kinnear—Lorimer. Agents—H. & H. Tod, W.S.

Counsel for Second Parties—Gloag—Rutherfurd. Agent—James Mason, S.S.C.

Wednesday, January 23.

SECOND DIVISION.

[Bill Chamber, Lord Adam.

COOPER *v.* BAILLIE AND OTHERS.

Bankruptcy—Recal of Sequestration under the Act 23 *and* 24 *Vict. cap.* 33, *sec.* 2—*Circumstances where Scotch Sequestration recalled.*

A party obtained sequestration of his estates in Scotland. A petition for recal was presented by a creditor under the 2d section of the Act 23 and 24 Vict. cap. 33, which provides for such a recal "if it shall appear to the Court of Session . . . that a majority of the creditors in number and value reside in England or in Ireland, and from the situation of the property of the bankrupt or other causes his estate and effects ought to be distributed . . . under the bankruptcy or insolvent laws of England or Ireland." The bankrupt had been a partner of a Bristol firm till two years before his sequestration. When he applied for that he resided in Scotland, and it was proved he had not come there for the purposes of sequestration. His debts were almost entirely English, and what assets he might have were situated there.—*Held*, in the circumstances of the case (*rev.* the Lord Ordinary, Adam), that the sequestration must be recalled, notwithstanding the fact that the majority of the creditors both in number and value, and who were English creditors, resisted the prayer of the petition.

On 20th June 1877 William Montague Baillie, described as "now or lately residing in Oban," obtained sequestration of his estates in the Bill Chamber in common form under the Bankruptcy (Scotland) Acts. His application was made with concurrence of Anderson & Macdonald, solicitors in Inverness, as creditors to the required amount.

The sequestration proceedings were remitted to the Sheriff of the county of Edinburgh, and on 2d July 1877 Mr Jackson, accountant in Glasgow, was elected trustee.

The sequestration was being duly proceeded with when this petition was presented under the Act 23 and 24 Vict. cap. 33, at the instance of John Robert Cooper, a creditor of W. M. Baillie, for the purpose of having the sequestration recalled in order that it might proceed in England.

Section 2 of the above statute was as follows:—"If in any case where sequestration has been or shall be awarded in Scotland, it shall appear to the Court of Session or to the Lord Ordinary, by a summary petition by the Accountant in Bankruptcy, or any creditor or other party having interest, presented to either Division of the said Court or to the Lord Ordinary within three months after the date of the sequestration, that a majority of the creditors in number and value reside in England or in Ireland, and from the situation of the property of the bankrupt or other causes his estates and effects ought to be distributed among his creditors under the bankruptcy or insolvent laws of England or Ireland, the said Court, in either Division thereof, or the Lord Ordinary, after such inquiry as to them may seem fit, may recal the sequestration."

The facts alleged by the petitioner as the grounds for his application (to what extent they were held to be proved will be seen from the opinions of their Lordships) were as follows:—W. M. Baillie had come to live at Oban, in Scotland, with his family, in March 1877. He was the son of Mr Baillie of Dochfour, in Inverness-shire, who was partner of a bank in Bristol, which traded under the names successively of Baillie, Cave, Baillie & Company, and Cave & Company. About the year 1851 Mr W. M. Baillie entered his father's bank as a clerk, and some years subsequently he was made a partner. Until 1874 Mr Baillie resided with his wife and family in or near Bristol, and took an active part in the management of the bank. During this time he also acted as his father's commissioner on the estate of Dochfour, but there was also a resident factor under him. In consequence of various speculations, which turned out unfortunately, the bankrupt, about June 1874, was obliged to leave the bank. From 1874 to 1876 the bankrupt resided abroad. He returned to England in 1876, and settled for some time in the neighbourhood of St Neots, Hants. The bill on which the concurring creditors Messrs Anderson & Macdonald founded their claim was dated St Neots, 29th July 1876, and addressed to the bankrupt at Leamington, Hants, and the bankrupt was also drawer of four bills for large sums dated from Bristol in October and December 1876. The bankrupt had shortly after this proceeded to Scotland, and at the time of these proceedings resided in Oban, as above stated.

It was further averred that all the bankrupt's debts had had their origin in England (with the exception of a small claim for house-rent in Oban), and that with two or three exceptions the creditors resided there. The debts amounted to £81,333, 12s. 5d., and the largest creditors were the Credit Foncier Company of England and the bankrupt's father.

The fifth article of the petitioner's condescendence (a record had been made up and closed) contained, *inter alia*, the following allegations:—"The bankrupt's liabilities consist entirely of borrowed money or money received in trust, with the exception of a few accounts due to solicitors and accountants. . . . . The bankrupt's object in trying to obtain sequestration in Scotland is to escape the provisions of the bankruptcy laws in England, to which he is subject. According to the Bankruptcy Act of England (32 and 33 Vict. cap. 71, sec. 48), the bankrupt cannot obtain a discharge without paying 10s. per pound, unless the creditors certify that his inability to pay that composition arose from causes for which he is not responsible. The English Court has no power to grant a discharge on any other terms. He has in view also to escape the 49th section of the same Act, which provides that the discharge of a bankrupt