Thursday, February 20.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GILLESPIE *v.* RIDDELL.

Entail—Lease—Powers of Heirs of Entail in Possession—Sheep Stock on Expiry of Lease—Transmissibility of Obligation Undertaken by One Heir of Entail in Possession against Succeeding Heir of Entail in Possession.

The tenant of a sheep farm upon an entailed estate in right of a lease granted by one heir of entail in possession, cannot enforce against a succeeding heir of entail in possession, as such, an obligation in the lease on the landlord to take over the sheep stock at the expiry of the tenancy.

Process—Summons—Declarator—Entail—Succession—Lease—Subsidiary Conclusions—Action Against Heir of Entail in Possession to Enforce Obligations of Lease—Conclusions Against General Estate of Preceding Heir, or Present Heir as Benefitted Thereby—Competency.

In an action by a tenant in a farm on an entailed estate in right of a lease granted by one heir of entail in possession, against the succeeding heir of entail in possession, to have declared binding on the latter, who was not his predecessor's heir at law or executor, an obligation in the lease, the summons also contained conclusions that the whole estate heritable and moveable of the predecessor, and that the present heir in possession so far as benefitted thereby, was liable for the obligation.

Held that in the absence of the previous heir's general representatives such conclusions were incompetent, inasmuch as no decree would be binding on them; and the beneficiary was not bound to discuss the validity of a claim against the general estate which might or might not affect his particular legacy.

On 7th September 1907 Charles Gordon Gillespie, Ranachan, Strontian, Argyllshire, tenant of the sheep farm of Ardery on the entailed estate of Sunart, Argyllshire, raised an action of declarator against Miss Louisa Margaretta Riddell, 16 Wellington Square, Cheltenham, heiress of entail in possession of that estate. In it he sought declarator (1) that under and in virtue of a lease of the farm of Ardery entered into between the pursuer and the late Sir Rodney Stuart Riddell of Ardnamurchan and Sunart, baronet, Sir Rodney undertook a binding obligation that on the termination of the lease the sheep stock on the farm would be taken over from the pursuer by the proprietor or incoming tenant at the same prices as the pursuer had paid on entry; (2) that the obligation was binding upon the defender as heiress of entail in possession of the estate in succession to Sir Rodney, or otherwise, if she were not so bound, that she was bound to allow the pursuer to displenish the farm prior to Martinmas 1907, or to retain his stock on the farm till such period subsequent to Whitsunday 1908, *i.e.*, the termination of his tenancy, as might enable him to remove it; (3) that the whole heritable and moveable estate of the late Sir Rodney was liable for the obligation in question; and (4) that the defender as Sir Rodney's special legatee, and as beneficially entitled to the income of the residue of his trust estate, was liable for the said obligation to the extent by which she had benefited or otherwise that she was liable *subsidiarie*, and subject to the condition that the deceased's trustees and executors should be first discussed.

The defender pleaded, *inter alia*—"(1) The trustees and executors of Sir Rodney Riddell not being parties to the action the defender is entitled to have the third and fourth conclusions thereof dismissed as incompetent against her. (2) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action, which should be dismissed. . . . (4) There being no obligation to take over the sheep stock at the termination of the lease founded on which is prestable against the defender, either as heiress of entail in possession or *separatim* as an individual, she is entitled to be assoilzied from the conclusions of the action. (5) In respect that the obligation to take over the sheep stock could not be made to affect the entailed estate, it cannot affect the defender as heiress of entail in succession to the granter of said obligation."

The pursuer's lease, entered into between himself as second party and Sir Rodney Stuart Riddell Bart., the then heir of entail in possession of Sunart, first party, provided that the tenant "shall deliver at the end of the lease to the landlord or incoming tenant as far as possible, not more than the same number of sheep and the same classes, as he receives on his entry, and the proprietor agrees that the second party or his representatives shall receive the same prices as he paid on his entry, providing always that the landlord or incoming tenant shall not be bound to take over more ewes, ewe hoggs, or tups than the tenant took over at his entry; and further, the proprietor or incoming tenant will not be bound to take over more than 50 of the following three classes, namely, one, two, or three years' old wedders over and above the number of stock the tenant took over at his entry."

The deed of entail of Sunart was executed by Sir James Milles Riddell, Bart. and Charles Murray Barstow in 1851 and 1852, and contained the usual clauses.

The *facts* of the case and the *nature of the pursuer's* averments are given in the *opinion* of the Lord Ordinary (SALVESEN), who on 4th December 1907 pronounced the following interlocutor:—"Sustains the first plea-in-law for the defender, and dismisses the third and fourth conclusions of the action, and decerns: *Quoad ultra* repels the second plea-in-law for the defender, and allows to the parties a

proof of their respective averments, and to the pursuer a conjunct probation."

Opinion.—"The pursuer in this case is the tenant in possession of the farm of Ardery under a lease entered into between him and Sir Rodney Stuart Riddell. The duration of the lease was fifteen years from Whitsunday 1903, with an option to either party to terminate the lease at the end of the fifth or tenth years thereafter on twelve months' notice. The farm of Ardery is part of the entailed estate of Sunart, in the county of Argyll, to which the defender succeeded on 2nd January 1907 as heiress of entail on the death of her brother Sir Rodney. Shortly after her succession her agents gave notice terminating the lease at Whitsunday 1908, and the pursuer does not deny that the lease will come to an end as at that date.

"When the pursuer entered upon the farm he was required to take over the sheep stock from the outgoing tenant as valued by arbiters; and the total price he paid for it amounted to £1319, 1s. 11d. The lease contains a clause with regard to the delivery of stock at its termination, which is quoted in cond. 2 (*v. sup.*) It takes the tenant bound to deliver to the landlord or incoming tenant as far as possible not more than the same number of sheep of the same classes as he received at his entry, and the proprietor agreed that the pursuer should receive the same prices as he paid on his entry for the stock so delivered. The defender's agents soon after she succeeded to the entailed estate intimated to the pursuer that she repudiated any obligation to take over the sheep stock, and the leading conclusion of the action deals with this matter. The pursuer seeks declarator that the obligation undertaken by Sir Rodney Stuart Riddell is binding on the defender as heiress of entail in possession of the said lands in succession to him. This declarator proceeds on the assumption of the defender surviving the term of Whitsunday 1908, when the obligation, if there be one, becomes prestable. But it is obviously convenient that the question of law should be decided before the actual arrival of the term, so that parties may be able to make arrangements for the disposal of the sheep stock; and although the defender pleads that some of the other conclusions are premature, there is no corresponding plea with regard to the first two conclusions. The argument for the defender was accordingly substantially directed on this point to the second, fourth, and fifth pleas-in-law. These pleas raise the general question whether an obligation by an heir of entail in possession of a sheep farm to take over the sheep stock at the termination of a lease to which he is a party is binding on the succeeding heirs of entail.

"Before considering the law it is necessary to advert to the averments which the pursuer makes and of which he asks a proof. He says that an obligation binding the tenant to deliver the sheep stock at the termination of the lease, and a corresponding obligation on the landlord to pay for the stock at a fixed or valued rate, is and has from time immemorial been a universal condition of sheep farm leases in the north and west of Scotland, and is founded on the considerations (1) that sheep stock in that part of the country requires to be acclimatised to a particular farm or district, and (2) that sheep stock habituated to a certain holding does not wander beyond the boundaries, and this enables march fences to be dispensed with. For these reasons the condition is one entirely in the interest of the estate and of the succeeding proprietors, who would find their holdings practically unlettable if the stock were displenished at the termination of each lease. Without this condition the farm could never have been let in terms of the deed of entail for 'the highest rent that could be got from a good and responsible tenant.' The term of entry and the ish of the lease were also fixed in accordance with the condition that the stock was to remain on the ground, as it is impossible to remove sheep from such a farm at the term of Whitsunday when lambs are too young to travel, or to realise sheep stock at that term except at a ruinous loss. He further avers that the leases on the estate of Sunart, including those granted by the entailer, have always contained a similar condition. These averments are denied by the defender, who further maintains that they are irrelevant. She admits that the obligation would have been prestable against Sir Rodney Riddell if he had survived the termination of the lease, and might also possibly be binding on his executors, but maintains that they cannot affect an heiress of entail who takes the estate by singular title and is not liable for the personal contracts of predecessors; and she says that the obligation to take over the sheep stock is merely a personal contract, and not the less so because it occurs in a lease of heritable subjects.

"It is singular that this question has not hitherto been made the subject of direct decision, and I think it may be assumed in the pursuer's favour that heirs of entail in possession have not hitherto disputed the binding character of similar obligations, though undertaken in leases granted by their predecessors. In some cases, perhaps, they might have no interest to do so, but in others, especially during the last thirty or forty years, when such obligations are supposed to have become specially onerous owing to an alleged practice of valuators to overvalue sheep stock in a question with a landlord, it cannot but have been to the interest of heirs of entail in possession to repudiate such obligations if they thought that they could do so successfully; and if the pursuer's averments as to the custom of inserting similar clauses in leases of sheep farms is to be accepted, such cases must have been very numerous.

"I was referred to various authorities, from which I think it appears to be indisputable that a lease granted by an heir of entail as an act of ordinary administration is binding on a succeeding heir if it has been made real by possession before the succession opened. Now, I think if the

pursuer's averments are established the lease in question was an act of ordinary administration in connection with such a subject as a sheep farm. On the same assumption, the obligation which is objected to must, in the general case, be one which it is to the interest of an heir of entail in possession that he should be able to grant, whether he happens to survive the termination of the lease in which it occurs or not. It may be presumed that the rent payable by the tenant depends, at least in part, on the landlord undertaking this obligation, and would have been less if there had been no such obligation—if indeed the subjects would have been lettable at all as a sheep farm for a period of five years. It may be that in certain circumstances a burden may be imposed on a succeeding heir of entail for which he receives no corresponding advantage; but that is not conclusive against the burden being one which runs with the lands. In the case of *Queensberry*, February 18, 1814, F.C., it was held lawful for an heir of entail to stipulate for forehand rents in corn farms, so as to deprive the succeeding heir of the right which would have been otherwise competent to him in preference to executors if the legal and conventional terms had been the same; and the subsequent case of *Breadalbane* v. *Jamieson*, 4 R. 667, shows that an heir of entail may, by an act which is not in contravention of the entail, impose a burden on the succeeding heir from which the latter receives no corresponding benefit. The particular act that had this effect was the destruction of the existing mansion-house, which to the extent of its value must have diminished the value of the entailed estate, and the rebuilding of which had only been commenced when the heir of entail died.

"Other burdens which might be undertaken in a lease by an heir of entail, and yet be made to affect the succeeding heir to his advantage, may easily be figured. In the lease in question, for instance, there is an obligation by the lessor to put the fences and gates in a proper state of repair, and to re-roof the old farm buildings with corrugated iron. This obligation might not have been implemented before the death of the granter, although the tenant had made his right real by entering to the farm; but I apprehend that as an ordinary act of administration the burden would then have fallen to be discharged by the succeeding heir—subject possibly to any right of relief he might have against the executors of his predecessor, if the obligation ought in ordinary course to have been implemented before the succession opened.

"I was referred by the defender to a series of cases with regard to ameliorations which are summarised by Lord Deas in his opinion in the case of *Breadalbane* v. *Jamieson*, at p. 675. In all these it was held that an obligation by a lessor of entailed lands to pay his tenant for buildings erected by him, or meliorations made by him during the currency of the lease, was not binding on a succeeding heir of entail who was in possession when the lease expired. These decisions rest upon the principle that an heir of entail is not bound by the personal contracts of his predecessor; and that such an obligation, although occurring in a lease, is to be treated as 'extrinsic of its character as a real right, and not even essential to its object as a contract.' See Lord Deas' opinion in *M'Gillivray's Executors*, 19 D. 1106. I was also referred to the two recent cases of *The Earl of Galloway* v. *The Duke of Bedford*, 4 F. 851 and 6 F. 971, in which the law on this subject was fully discussed in the First Division. In the earlier of these two cases a lease of salmon and trout fishings by an heir of entail was reduced by his successor on the ground that a grant of trout fishing creates merely a personal obligation upon the granter, and does not therefore affect the lands. But in that case the principle was clearly recognised that a lease which is within the ordinary powers of administration of an heir of entail in possession, when made real by the tenant having entered on the subjects, is binding on succeeding heirs of entail. The decision, therefore, does not affect the present case, unless it be affirmed that an obligation to take over sheep stock at the end of the lease of a sheep farm is necessarily outwith the range of proper administration. Obligations of a similar kind are common in agricultural leases, *e.g.*, obligations to take over dung or straw left by the tenant at the expiry of the lease at a valuation. It may be that a succeeding heir of entail has not the same interest to challenge the validity of such an obligation as he has in the present case; but in principle the two seem to be indistinguishable, and both must be treated either as personal contracts or, as I think, as part of the real right acquired by the tenant in possession under a written lease, and as such binding upon singular successors, including heirs of entail. Accordingly I have come to the conclusion that I must repel the second plea-in-law for the defender, and allow the parties a proof of their averments on this head.

"If the view I have expressed be sound it is probably of small consequence how the third and fourth conclusions are dealt with, but in any event they must be disposed of. The third conclusion seeks a declarator that the whole heritable and moveable estate of the late Sir Rodney Stuart Riddell is liable for the obligation in question; and the fourth seeks a declarator that the defender, as special legatee of certain moveables, is liable for the obligation to the extent of the value of the moveables she has received; or alternatively that she is liable *subsidiarie* and subject to the condition that the trustees and executors of the deceased shall have been first discussed. In my opinion the third conclusion cannot be competently dealt with in the absence of the executors and general representatives of the deceased. No judgment pronounced in this action would be *res judicata* against them; and if the

obligation upon which the pursuer founds be one which cannot be enforced against the heir of entail it follows that the deceased's trustees are the proper parties to convene in a declarator of this kind. The same observation applies to the fourth conclusion, which, as far as I know, is quite unprecedented. If the general representatives are ultimately found liable in the obligation, it follows that the defender will have to make it good to the extent of any moveable estate which she has taken by succession. But I think it would be out of the question that she should have to litigate a matter in which she is not primarily interested, and may not be interested at all if there are sufficient funds to meet the deceased's whole obligations as well as the legacies which he bequeathed. The pursuer's proper course is to sue the trustees and executors in their own *forum;* and if he constitutes his claim against them and fails to recover his debt from want of funds, he may perhaps be entitled to have recourse to the defender to the extent to which she has obtained benefit from the estate, but it will be time enough to decide this when the question is raised. I shall accordingly dismiss these conclusions."

The defender reclaimed, and argued—The defender should be assoilzied. The obligation to take over the sheep stock was merely a personal obligation of the preceding heir to his tenant, and was not binding on succeeding heirs of entail. An heir of entail was the heir of the entailer, not of the preceding heir. *Quoad* the previous heir he was merely a singular successor, and consequently was not liable for his debts or obligations unless they affected the estate. No debt of the preceding heir's was good against the estate unless authorised by the entail or by statute. The pursuer's remedy was to go against the general representatives of the heir with whom he contracted—*Dillon* v. *Campbell*, January 14, 1780, M. 15,432; *Webster* v. *Farquhar*, 1791, Bell's Octavo Cases 207; *Taylor* v. *Bethune*, 1791, Bell's Octavo Cases 214; *Todd* v. *Moncreiff and Skene*, January 14, 1823, 2 S. 113 (104), *affd.* May 27, 1825, 1 W. & S. 217; *Fraser* v. *Fraser*, June 7, 1825, 4 S. 73 (76), May 29, 1827, 5 S. 722 (673), January 29, 1830 8 S. 409, *affd.* February 25, 1831, 5 W. & S. 69; *M'Gillivray's Executors* v. *Masson*, July 18, 1857, 19 D. 1099; *Earl of Breadalbane* v. *Jamieson*, March 16, 1877, 4 R. 667, *per* Lord Deas, 675-8, Lord Shand 684, 14 S.L.R. 420; Sandford on Entails, p. 210. The defender's adoption of the lease did not imply fulfilment of such a stipulation as that in question—*Kerr* v. *Redhead*, February 5, 1794, 3 Pat. App. 309; *Mackenzie* v. *Mackenzie*, February 15, 1849, 11 D. 596. The fact that under the Entail Amendment Act 1878 (41 and 42 Vict. c. 28), sec. 1, provision was made for burdening succeeding heirs with improvement expenditure showed that prior to that Act they would not have been liable. The pursuer on his entry should have seen that the stipulation was binding not only on the granter but also on the estate. In a question between the pursuer and the granter the pursuer had got all he bargained for. The circumstances here were akin to those in the *Galloway* cases—*Earl of Galloway* v. *Duke of Bedford*, June 10, 1902, 4 F. 851, *per* Lord Kinnear, at p. 867, 39 S.L.R. 692; *Duke of Bedford* v. *Earl of Galloway's Trustee*, July 8, 1904, 6 F. 971, 41 S.L.R. 804. Reference was also made to *Panton* v. *Mackintosh*, March 20, 1903 (*v. infra* note). It was not enough to aver that such stipulations were customary. The pursuer must show that they were universal and clearly recognised—*Stewart* v. *Maclaine*, November 24, 1899, 37 S.L.R. 623, *per* Lord Shand at p. 626.

Argued for respondent—The Lord Ordinary was right. The position of parties here was that of landlord and tenant. Under the Entail Statutes fair and ordinary acts of administration were binding on succeeding heirs of entail. The obligation to take over the sheep stock was a fair and ordinary act of administration, and therefore binding on the defender—*Marquis of Queensberry* v. *Montgomery and Others*, February 18, 1814, F.C.; *Lord Herries* v. *Maxwell's Curator*, February 6, 1873, 11 Macph. 396, 10 S.L.R. 273; *Earl of Breadalbane* v. *Jamieson* (*cit. supra*). A stipulation to take over the sheep stock was an essential condition of sheep-farming leases in Argyllshire. Without such stipulations leases in that part of Scotland would be worthless, and they were therefore in the highest degree "*inter naturalia*" of the lease. Obligations which were *inter naturalia* of a lease were binding on succeeding heirs of entail—*Case of the Queensberry Leases*, 1819, 1 Bligh 339, at p. 459, *et seq.*; *Fraser* v. *Maitland*, March 9, 1824, 2 Shaw's App. 37; *Learmonth* v. *Sinclair's Trustees*, January 23, 1878, 5 R. 548, 15 S.L.R. 304; *Waterson* v. *Stewart*, November 22, 1881, 9 R. 155, 19 S.L.R. 130. The cases cited by the reclaimer (*e.g.*, *Dillon* v. *Campbell*, *Tod* v. *Moncreiff*, &c.), were broadly distinguishable by the fact that "meliorations," with which most of these cases dealt, were not ordinary and necessary acts of administration, whereas the stipulation in question was. The pursuer was entitled to prove that such stipulations were reasonable and necessary acts of estate management, and that sheep-farming could not be carried on without them in the particular part of the country—*Bell* v. *Lamont*, June 14, 1814, F.C.; *Maclaine* v. *Stewart*, December 16, 1898, 36 S.L.R. 233, *affd.* November 24, 1899, 37 S.L.R. 623. The Lord Ordinary was wrong in dismissing the third and fourth conclusions. While there was a rule that general disponees must be discussed before special legatees—Erskine iii, 8, 52—that was a matter of convenience only and they had been sued together—*Weir* v. *Parkhill*, 1738, M. 5857—and a declaratory decree of the liability of a special legatee had been granted—*Burnett* v. *Burnett*, March 4, 1854, 16 D. 780. The pursuer in the circumstances of this case should be given such a decree.

At advising—

LORD KINNEAR—This is an action at the instance of the tenant of a sheep farm on

the entailed estate of Sunart in Argyllshire for the enforcement of an obligation undertaken by the lessor, the late Sir Rodney Riddell, the heir of entail in possession at the date of the lease. The lease was for fifteen years from Whitsunday 1903, with an option to either party to terminate at the end of the fifth year. The defender Miss Louisa Riddell, who is now heir in possession, has given notice to terminate at Whitsunday next, and the pursuer maintains that by force of the obligation in question she is bound as heir of entail in possession to take over his sheep stock at the same price as he paid on his entry for the sheep stock then on the farm. The primary conclusions of the summons are thus directed against the present heir of entail. But there are two subsidiary conclusions—for declarator, first, that the whole heritable and moveable estate of the late Sir Rodney is liable for the obligation; and secondly, that Miss Riddell is liable as a special legatee under his will to the extent of the value of her special legacy. These last conclusions, the third and fourth, the Lord Ordinary has dismissed as incompetent; and I believe that all your Lordships are satisfied of the soundness of that judgment. If a debt is to be made good against the estate of Sir Rodney Riddell, the proper contradictors are his testamentary trustees and executors; and an individual legatee cannot be called upon to discuss the validity of a claim against the general estate which may or may not affect her particular legacy, in an action to which the general representatives of the testator have not been made parties. The Lord Ordinary's observation appears to be perfectly just, when he says that the pursuer's proper course, if he has a claim against the estate, is to sue the trustees and executors in their own *forum*.

We can therefore express no opinion in this case as to the liability of Sir Rodney's personal representatives. They are not called as defenders, and no judgment we could pronounce in this action would be *res judicata* against them. The only question with which we are concerned is the liability of the heir of entail.

The Lord Ordinary says it is singular that this question has not hitherto been made the subject of direct decision, and observes that it may be assumed in the pursuer's favour that heirs of entail in possession have not hitherto disputed the binding character of similar obligations. This is not perhaps a very safe method of reasoning, because it is as easy to assume that claims against heirs of entail have never been pressed as that they have always been conceded. But the question arose directly for decision in *Panton* v. *Mackintosh v. infra Note*, and was decided by Lord Kyllachy in favour of the heir of entail. This is an authority which we regard with the highest respect; but since it is not binding on this Court it will be proper to consider in the first place how the law stands apart from Lord Kyllachy's decision.

If this question is to be considered a novel one, it is, however, to be solved by principles that are well settled. The general rule is established by a great mass of authority that the personal contracts and obligations of heirs of entail are not binding on their successors in the entailed estate; and this rests on the obvious principle that a succeeding heir who takes his interest in the estate from the entailer alone does not represent a preceding heir from whom he takes nothing whatever. It is true that, subject to certain limitations, leases granted by an heir in possession are binding on his successor. But this does not depend on contract or obligation. It is because the lessor in the lawful administration of his own property has given the lessee a real right which will be effectual against all subsequent owners. But to make it valid it must be made real—or, in other words, the tenant must have entered on possession according to the general rule of law, which is thus stated by Lord Westbury in *Campbell* v. *M'Lean*, 8 Macph. (H.L.) 40, "to make it valid as against the singular successor, the grant must be brought within the operation of the statute of 1449—that is, it must be shown to be a real right. A lease, by the law of Scotland, is a personal contract; and the entry of the intended tenant upon the property intended to be demised is equivalent to seisin, and the right thenceforth becomes a real right." Accordingly, it was held in *Ker* v. *Redhead*, 3 Pat. App. 309, that while a lease followed by possession is effectual, a contract to grant a lease is not binding upon the next heir. "If he had lived," says Lord Thurlow, speaking of the contracting heir, "he must have fulfilled his agreement; but as he did not live it cannot be transferred against a singular successor, which is precisely the character of an heir of entail." So also in his judgment as to the *Queensberry Leases* (1 Bligh 340), Lord Eldon, after showing that a lease containing a covenant to renew from time to time might be perfectly good for the term current at the granter's death, that being otherwise a competent term, goes on to say (p. 404)—"With respect to the covenant for another lease, it is a mere personal contract, upon which it appears to me there could be no possession"; and refers to *Leslie* v. *Orme*, where he says, upon the main question, a lease for four nineteen years was sustained, and yet with regard to a reversionary lease, where no possession had been had, the House held it to be bad. The principle is, and it is trite law, that the heir of entail in possession is fiar of the estate, and as free to deal with it as any other fiar except in so far as he is restrained by the conditions of the entail. It follows that the leases he may have granted, if they have been made real by possession, will be good against his successors in so far, but only in so far, as they do not contravene the cardinal prohibitions. It was at one time a difficulty in the application of this doctrine that, just because it creates a real right in the land, every lease is an alienation, and therefore a contravention of the prohibition to alienate or dispone.

But that problem was finally solved by the judgment of the House of Lords in the *Queensberry Leases*; and it is now settled that while long leases are void as contraventions of the entail, short leases, which may now be taken as those which do not exceed the period allowed by the Rosebery Act or by the deed of entail, may be sustained. But this is a relaxation admitted only because it was held to be indispensable for the reasonable enjoyment of the estate, which the entailer intended for all his heirs in succession; and Lord Redesdale observes (p. 503)—"It seems to me that a power thus yielded to necessity, and yielded only to necessity, ought to be bounded by the necessity which compels it to be yielded—that is, by that which, generally speaking, is compatible with the future as well as with the present enjoyment of the estate." No lease can be sustained, therefore, which exceeds the necessary term, or which infringes otherwise the rights of an heir who may succeed during its currency.

I have dwelt on this point because, as Lord President Inglis has said, the proposition that the heir in possession is fiar of the estate, but subject to the prohibitions and conditions of the entail, is the foundation of all the law applicable to questions of this kind. It follows that each heir in his turn takes the estate subject to the real rights and burdens which have been validly laid upon it by his predecessor, and entirely free from all such as are invalidated by the fettering clauses, and also from all liabilities which stand upon personal obligation and have not been made to affect the estate itself. The point to be determined, therefore, is to which of these classes the obligation in question belongs. There is apparent force in the contention favoured by the Lord Ordinary that if leases are allowed all stipulations which are reasonable and customary as between landlord and tenant must be admitted as conditions without which a good tenant could hardly be obtained. But the conditions of the lease must be controlled by the limitations of the lessor's power to dispose of the estate; and I am unable to assent to the Lord Ordinary's conclusion because it disregards this overruling principle, and is thus, in my opinion, irreconcilable with a long series of decisions which have been accepted by the House of Lords as fixing the law.

The cases, or most of them, are, as the Lord Ordinary observes, collected in the opinion of Lord Deas in *Breadalbane* v. *Jamieson*, 4 R. 667. What he regards as the leading case is *Dillon* v. *Campbell*, M. 15,432. It was stipulated in a lease granted by an heir of entail in possession that the tenant should be entitled at the end of the lease to the value of buildings to be erected by him. The granter of the lease died during its currency, and at its expiration the tenant brought an action for the value of the buildings against the succeeding heir, and pleaded that the estate had benefited by the expenditure. The report bears that the Lords were at first moved by the equitable nature of the demand; but the answer which ultimately prevailed was that no debt could be made to affect the heir of entail which could not also be made to affect the estate, and consequently that to bind the next heir for improvement debts would infer a contravention of the prohibition against the contraction of debt. The ground of judgment is very clearly brought out in the interlocutor of Lord Braxfield, Ordinary, to which the Court in the end adhered, and by which the defender was assoilzied "in respect he did not represent the granter of the lease otherwise than as heir of entail, which entail contained the usual prohibitory, irritant, and resolutive clauses *de non alienando vel contravendo debita*." The same principle received effect in *Webster* v. *Farquhar*, Bell's 8vo Cases No. 7; *Taylor* v. *Bethune of Balfour*, Bell's 8vo Cases No. 8. The question came before the House of Lords in *Tod* v. *Moncreiff & Skene*, 2 S. 113 and 1 W. and S. 217. In that case an heir of entail in possession had granted a lease by which she bound herself or the proprietor of the lands at the end of the lease to pay to the tenant a sum of £625, which the latter had agreed to expend in erecting a new steading on the farm. The tenant brought an action for payment of this sum against the executor of the granter of the lease, who by that time had died, and the executor in his turn brought an action of relief against the new heir of entail who was then in possession. All the parties interested were thus before the Court, and the judgment was that the executor was bound and that no liability attached to the heir of entail. The argument for the executor was the obvious one that the obligation was imposed in terms on the proprietor of the lands for the time being, who, moreover, would alone derive benefit from the expenditure. The answer, which prevailed, was that the obligation being personal must be enforceable against the granter and her personal representatives, and could not affect the heir of entail, because the entail contained a prohibition against contracting debt or burdening the lands with sums of money. The decision of this Court was affirmed in the House of Lords with a variation which does not affect the question in hand, and Lord Gifford says in moving the affirmance—"It is hardly necessary for me to state that in cases of this nature it is certainly not competent for the heir of entail in possession to erect farm houses and other buildings upon the farm and to throw any of the expense to be incurred upon the succeeding heir of entail." He points out that under the Montgomery Act the estate may be burdened with a certain proportion of the expense necessarily incurred, and observes that but for the aid of that statute the incapacity of an heir of entail to build farm houses without taking the whole expense upon himself might be very prejudicial to all the succeeding heirs. But in that case the heir in possession had not resorted to the statute, and Lord Gifford

appears to have had no doubt that except in the mode prescribed by the statute she could throw no part of the burden, and even with the aid of the statute could not throw the whole burden, on the succeeding heir. "On the general point," he says, "the decisions appear to be conclusive." A similar decision was pronounced, and the determining principle was again affirmed, in *Fraser* v. *Fraser*, 4 S. 73, 5 S. 722, 8 S. 409, and 5 W. and S. 69. But I may observe, in passing, that this case, while it is entirely in accordance with previous decisions, brings out very clearly a distinction which, however obvious, was I think overlooked in the discussion of the authorities—the distinction between obligations created by an entailer and those created by an heir of entail. General Fraser, the maker of an entail, granted or, which is the same thing, authorised his trustees to grant, leases containing obligations on the landlord to pay the tenant for meliorations. His brother Archibald Fraser succeeded as first heir of entail while the leases were still current. There could be no question that as a gratuitous taker he was liable for the entailer's debts and obligations, and among the rest for the stipulated payment for meliorations. But instead of performing his obligation according to its terms at the end of the lease, he made an agreement with the tenants by which he granted new leases for nineteen years on their renouncing the existing leases and postponing their claims for meliorations till the expiration of the new period, when he bound himself and his heirs to pay these and also certain other meliorations to be undertaken by the tenants. In an action at the instance of a tenant against the next succeeding heir, it was held that Archibald Fraser had no power to transfer to the next heir obligations created by the entailer which had become exigible during his own possession, nor to burden either that heir or the estate with the new obligations undertaken in the leases granted by himself.

The obligation in question in *Mackenzie* v. *Mackenzie*, 11 D. 596, was of a somewhat different character, but it fell within the same rule. An heir in possession bound himself in a lease of a farm to trench, drain, and lime a part of it. This was held to be a personal obligation which did not transmit against subsequent heirs of entail. It was not considered as a contravention, because it neither was nor could have been made a real burden on the land, and it made no difference that it was inserted in a lease, because the real right acquired under a lease is a right to possession of the land, and stipulations engrafted on the lease by which the landlord undertakes to pay money or perform an obligation are purely personal. The decision therefore illustrates another aspect of the general doctrine laid down in *Dillon* v. *Campbell*, that an heir of entail is not bound by the obligations of a preceding heir except in so far as they may have been made validly to affect the entailed estate without involving a contravention.

Three cases were cited by the pursuer's counsel for the purpose of showing that what he described as ordinary acts of management customary in a district are binding on subsequent heirs of entail, even to their prejudice. This is exactly the argument which was urged unsuccessfully in the House of Lords against the heir of entail in *Fraser* v. *Fraser*, except that in that case the transaction was said to be beneficial. But there is nothing in the cases cited inconsistent with the general doctrine as I have stated it. In the case of *Lord Queensberry* v. *Montgomery*, February 18, 1814, it was held competent for an heir of entail to stipulate for forehand rents in corn farms, so as to secure for his own executor a term's rent, which if the legal and conventional terms had been the same would have gone to the next heir. But the point of the case is that the system of management under which corn farms were forerented was not introduced by the deceased heir but had been established before his succession by the entailer. The Lord Ordinary observes that the succeeding heir was deprived of a benefit which would otherwise have belonged to him. But the argument for the successful executors was that the deceased heir would have lost half-a-year's rent if he had altered the entailer's system; and it is evident that if when a deed of entail comes into operation the farms are let for forehand rents, the only possible way of equalising the interests of all the succeeding heirs is to continue the system unaltered, because the heir during whose possession the rule might be changed could never recover a half year's rent which had been paid to the entailer's executors. The argument in the case of *Lord Queensberry* therefore was that the rule as to forehand rent is regulated by the will of the entailer, and an heir of entail is not bound to alter the rule to his own prejudice and against the entailer's practice. It was conceded that "an heir of entail is not entitled to alter the terms of payment of rent and to substitute others so as to give a privilege to his executors over the heir;" and the law is distinctly laid down to that effect by Lord President Inglis in *Lord Herries* v. *Maxwell*, 11 Macph. 396. The case related to the apportionment of rents under the Act of 1870, and it was necessary to determine whether a rent payable at a certain term "for the half year preceding," during which no crop had been sown or reaped, belonged to the heir or to the executors. The Lord President, after laying down the rule that rents which were due and exigible must go to the executor, whether forehand or not, goes on to say—"This rule would not have been applicable to an entailed estate if forehand rents were a novelty on that estate—if, for example, the last heir who died had introduced forehand rents, having found a different system in existence at his succession. That would have been taking undue advantage of the next heir of entail, but that is not the case here, for it is stated that forehand rents were the law of the estate. It was both the custom of the district and the rule had

been adopted by the entailer and continued in all subsequent leases." The principle seems to me to be very clear, that while an absolute owner may choose between his heir and his executor, an heir of entail cannot in any way prejudice the succeeding heir's right.

Sinclair v. *Learmonth*, 5 R. 548, is in my opinion inapposite. It was held that an heir of entail was liable by virtue of a custom having the force of law to pay the tenant the value of certain woodwork on houses erected by him. But the liability was not rested upon contract but upon a general rule of law applicable to all landlords, whether their lands were entailed or not, and whether they were heirs or singular successors. Lord Gifford treats it as a question of tenant's fixtures. He says—"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." Lord Justice-Clerk Moncreiff thought the question whether the obligation to pay transmitted against a succeeding heir of entail or against the executor of the original lessor did not arise, *firstly*, because in the particular case the deceased heir of entail never undertook any obligation whatever to the outgoing tenant in regard to the right of tenancy on which the claim was founded; and *secondly*, because the immemorial custom or usage in the county of Caithness, which the Court held to be effectual, operated not by implied paction or contract, but by law, and therefore, said his Lordship, "is as good against the landlord, whether he be owner in fee simple or under an entail, as if a statute had been passed to that effect." The case is therefore no authority on the transmissibility of obligations between heirs of entail.

The third case relied on by the pursuer, *Breadalbane* v. *Jamieson*, 4 R. 667, in so far as it has any bearing, is only another illustration of the general principle. The Marquis of Breadalbane had pulled down the old house of Ardmaddy in order to build a new mansion house more suitable to the estate, and died before the new house was finished. It was held, in an action at the instance of the next heir, that his executors and his general estate were not liable to a pecuniary claim of an amount requisite to complete the mansion. It is true, as the Lord Ordinary observes, that this left the heir of entail under a disadvantage. But the ground on which it was found that he could not be relieved at the expense of the executors is perfectly consistent with the former decisions. To destroy or alienate the mansion house would have been a contravention of the prohibitions, but to pull it down in order to reconstruct it was a lawful exercise of the powers of a fiar who was not in that particular subject to any restriction. The deceased Marquis had therefore done no wrong, and if he died before his purpose to rebuild had been carried out, the succeeding heir took the estate in a condition which had been brought about without any contravention. In those circumstances the Lord President says there can be no implied obligation between the successive heirs, and no liability except what is created by the fetters of the entail. The only measure of their rights and liabilities is the deed of entail, and no pecuniary liability can be imposed either on a subsequent heir or on the general estate of his predecessor except what the deed of entail authorises.

I may add to this discussion of the authorities that of the two recent cases between the Earl of Galloway and the Duke of Bedford, to which the Lord Ordinary refers. The first is, in my judgment, entirely in accordance with the whole series of decisions from *Dillon* v. *Campbell* downwards. The second is, I think, distinguishable from *Moncreiff and Skene* and the other cases in which liability has been fixed upon executors. But, however that may be, it has no bearing on the question now to be decided.

If my view of the general rule of law is correct, its application to the particular contract before us is evident. The obligation which the pursuer seeks to enforce is that the tenant "shall deliver at the end of the lease to the landlord or incoming tenant as far as possible not more than the same number of sheep and the same classes as he receives on his entry, and the proprietor agrees that the second party," *i.e.*, the tenant, "or his representatives, shall receive the same prices as he paid on his entry." The question is whether such a stipulation as that can be made good against the defender on the only ground which could enable the grantee of the lease to create any liability as against the next heir of entail, to wit, that he was in his time the proprietor of the land, and free to deal with it, except in so far as he was restrained by the fetters. By a restricted construction of the fetters he was enabled to grant a lease which might be valid as a real right. But that will not support an obligation which, although contained in a lease, cannot be made real. It appears to me impossible to make such an obligation as this a real burden upon land consistently with the principles laid down in *Coutts* v. *The Tailors of Aberdeen*. But if it were possible it would involve a contravention, because it is a stipulation for the payment of money, or, in other words, it would affect the estate with debt, and therefore it would be made void and null by force of the irritant clause. But in its true character it is, in my opinion, a personal contract over and above the lease, and therefore it is ineffectual as against the defender, who does not represent the contracting owner. It is, as Lord Kyllachy points out in *Panton* v. *Mackintosh*, very much more onerous than the obligations for meliorations, which have over and over again been found to be ineffectual against heirs of entail. There would seem to be two ways, in one or other of which it must be performed. Either the heir must find a new tenant at whatever cost, ready to take over the sheep stock at the pursuer's price, or else he must pay the price and

take the stock himself. In the first view, the heir in possession undertakes to regulate the terms of a lease to be granted by his successor after his own possession has come to an end, and that cannot be supported consistently with the decisions of the House of Lords in *Ker* v. *Redhead* and in the *Queensberry Leases*. In the second view, it imposes upon the heir a contract to purchase a stock of sheep at a price which the pursuer alleges upon record is above their value; and that is just as inconsistent as the first alternative with the principles which have regulated such questions for more than a hundred years. For these reasons I agree entirely with the judgment of Lord Kyllachy in *Panton* v. *Mackintosh*, and I think we ought to follow his decision.

We ought not, however, to pass unnoticed the argument for the pursuer, that in equity his claim ought to be sustained. If he is right in his allegation that he has a good claim in law against the general estate of the lessor, I am unable to see any equity in imposing upon the defender a liability which does not properly attach to her in order to relieve him of the inconvenience of suing his true debtor in another Court. But if it were assumed that the executors are not liable, the equity is by no means so obvious as in the cases with reference to meliorations, for in these cases the heir of entail had benefit from the expenditure on farms and buildings. The defender, on the other hand, does not take the sheep stock, for which she declines to pay. But the true answer is to be found in the opinion of Lord Thurlow in *Ker* v. *Redhead*, and in accordance with that judgment we must hold that the tenant has no right in equity if he has no right in law.

LORD PRESIDENT—I agree entirely with the opinion which my brother Lord Kinnear has just delivered, and as he has gone into the matter so fully I only intend to add a few words. The key to the solution of this question seems to me to consist in one or two well-known and old-established propositions. When you seek to enforce the personal contract of one man against another man you must show that that other man represents him. An heir of entail taking in succession to another heir of entail does not represent the prior heir of entail at all; he takes from the entailer. A lease in its origin is a personal contract, and accordingly a lease entered into by the proprietor of an estate, whether he was heir of entail or whether he was a person holding the estate in fee simple, would not be binding upon anyone who did not represent that man,—and so of course it would not be binding against an ordinary purchaser or singular successor—were it not for the old statute which made leases of a certain duration real rights. Accordingly, the efficacy of a lease against a person who does not represent the granter of the lease is always due to the fact of its being made a real right by statute, and not to the fact of its being a personal contract. Now, when you come to deal with leases in the case of heirs of entail you of course come athwart the conditions of the entail itself. There is no doubt that a lease is an alienation of the estate, because in so far as it is a real right it is a giving away of the estate, no doubt temporarily, but still a giving it away for the time being to someone else. Accordingly, if the matter had been treated *strictissimi juris* there can, I think, be no doubt that no lease would have been good as against an heir of entail as being an alienation. It was held to be an alienation in the well-known set of cases which are known by the general name of the *Queensberry Leases*, but it was held at the same time that it was a necessity of the situation that a certain relaxation should be made, and the rule of relaxation that was made was that a lease should not be treated as an alienation where it was of such duration that it could be held to enure to the benefit, not of one heir of entail, but of the whole heirs of entail as a body. I think it is quite clear, when you come to a stipulation of this sort that we are dealing with here, that it will not fall within that exception; and I entirely agree with what Lord Kinnear said in the course of his opinion, that there arises a very necessary difference between the obligation upon an heir of entail where all that the heir of entail for the time being has to submit to is the taking away of his land for a temporary period under the condition of being paid therefor, and where the thing he has to submit to is not the enforcement of a real right but the payment of a sum of money. I agree with the doubt which his Lordship indicated, but which he passed over—namely, the doubt whether anything that is a payment of money of uncertain amount to be recovered as being a real right, can ever square with the well-known canon of rules which Lord Corehouse laid down in the *Tailors of Aberdeen*, 2 S. & M'L. 609. Accordingly I also agree with the conclusion which Lord Kinnear came to, that you will find, on looking at the sum total of the cases, that nothing has ever been enforced against an heir of entail except the mere giving up of land—nothing in the way of making him perform some other obligation which may mean more than the giving up of land.

I think this will become even more clear if one tests it for the moment by the remedy. Supposing that an heir of entail in possession against whom an obligation of this kind was sought to be enforced was entirely impecunious, how are you going to work it out by diligence? Of course as far as ordinary possession upon a lease is concerned that is simple enough. All you have got to do, supposing the new landlord drove forth the tenant by force out of his farm, would be to interdict the heir of entail, and the tenant would be restored to the occupation of his farm. That is the protection which the Court would give. But supposing the heir of entail refuses to pay the sum which is the true value of the sheep, and has no money, what is to be done? If you set to work by adjudication,

which on the expiry of the legal might take away the estate altogether, that surely would be alienation with a vengeance. In other words, it would be a sort of alienation which certainly would not fall within the exception which was laid down by the House of Lords in the *Queensberry Lease* cases. If you did not proceed by adjudication, but proceeded by the other well-known diligence of poinding the ground, you would not get any more satisfactory result, because it is perfectly clear that the consequences of poinding the ground would fall entirely upon the back of one heir of entail in the succession of heirs taking the land, whereas the whole idea of the exception laid down in the *Queensberry Leases* is that the thing is for the benefit of the whole heirs of entail. Upon these grounds, and I have merely added a very few words to what was so well explained by Lord Kinnear, I am of opinion that the Lord Ordinary's judgment here cannot stand.

LORD M'LAREN—I cannot usefully add anything to the opinion which Lord Kinnear has delivered, and in which I concur on all points. In listening to the opinion one observation did occur to me, not altogether independent but rather supplementary to what has been said, to the effect that however this claim is put—if it were clearly expressed as a real burden in the lease—it would amount to an alienation of the estate, and therefore to a contravention of the prohibitions in the entail. In the record the material clauses of the lease are set out, and in the clause in question the obligation is "that the proprietor agrees that the second party or his representatives shall receive the same price for the sheep as he paid on entry." It is not said from whom he is to receive the money. The obligation may either mean that the granter of the lease binds himself and his heirs and executors to pay this price at the expiration of the lease, or it may mean that he proposes that his successor in the entail shall pay the price of the stock out of his private means, or it may mean that he would transmit this obligation, supposed to be for the benefit of the estate, as a real burden affecting the entailed estate. As to the first alternative I need say nothing, for the reason expressed by the Lord Ordinary and Lord Kinnear, that neither the heir-at-law nor the personal representatives are parties to this action. As to the second alternative, the conclusion of the summons is just as ambiguous as the lease itself is in regard to the nature of the obligation of the persons affected by it. We are asked to make a declaratory finding that the obligation is binding on the defender as heiress of entail in possession of the said lands, and that may either mean that she is to pay the money out of other sources than the estate, or that she is in some way or other compelled to fulfil the obligation out of the estate. I agree with your Lordship that the real test, or a very convincing test, of the efficacy of the obligation is to bring it to the test of diligence. Supposing that the pursuer had taken the view that the heiress of entail was personally liable, and had concluded for payment of the same price or value of the sheep stock as he had himself paid to the tenant on his entry to the farm, if he had gone on to formulate a petitory conclusion for the payment of that sum of money what would the answer of the defender be? She would say—"I am not confirmed in the personal estate, nor have I made up a title by service as heir in general; what I have done is to obtain service as heir of provision, which has the effect of establishing that I am the person pointed out in the destination as heir of entail, and entitles me to have an entry from the Crown, or the superior as the case may be, which will put me in possession of this estate." There is nothing in such an entry that could possibly subject the defender to take over the debts of the previous heir in possession, and I do not suppose that such a proceeding was contemplated by the pursuer, because nothing was suggested in argument about it. What was really maintained to us was that in some way or other the obligation was one attaching to the estate and for the benefit of the estate, the fulfilment of which was therefore obligatory on the heirs of entail in their order. Supposing that the defender takes up a position of passive resistance, as she is quite entitled to do, then there is no other way of making the pursuer's theory effective and recovering the money out of the land than by adjudication of the entailed estate. If the adjudication had been brought in the lifetime of the granter of the obligation, could it for a moment be doubted that this would be a contravention of the prohibition against contracting debt, whereby the estate should be evicted? Is it less so when the proceeding is taken after his death with relation to the same subject and with the same result? I think when the case is looked at in this way the essential unsoundness of the argument becomes very evident, because it is then seen that what has been done or attempted is really a diminution of the capital value of the estate to all future heirs of entail, and therefore a contravention of the conditions of the entail. I do not add anything further, except that I agree that it is wholly unnecessary that there should be a proof in this case, because such a proof, in the view I take, could not possibly affect our decision. Subject to anything that may be said as to the form of the judgment, I think we must reverse the decision of the Lord Ordinary upon the main question, but of course I agree that we should adhere as to the conclusions involving the liability of the personal representatives.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Assoilzie the defender from the first alternative of the second conclusion of the summons: *Quoad ultra* dismiss the other conclusions, and decern," &c.

Counsel for the Pursuer (Respondent)—Hunter, K.C. — Constable. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for the Defender (Reclaimer)—Scott Dickson, K.C.—Hon. W. Watson. Agents — Hamilton, Kinnear, & Beatson, W.S.

Note.—The case of *Panton* v. *Mackintosh* was decided by Lord Kyllachy, Ordinary, on 20th March 1903. John Panton was tenant in the farm of Dalmunzie, an entailed property, in virtue of a lease dated October 1883 and expiring Martinmas 1902, which contained this clause—'And the said John Panton is bound, as he hereby binds and obliges himself, to take over from the said James Small (*previous tenant*) the sheep stock on the lands hereby let at the valuation of two men mutually chosen, or of an oversman in case of difference, the said Charles Hills Mackintosh (*then heir of entail in possession lessor*) binds and obliges himself, at the expiry of this lease, to bind the next or incoming tenant to take from the said John Panton the stock of sheep on the said lands hereby let at the valuation of two men. . . .' Panton's widow and executrix brought an action of declarator against the heir of entail in possession, who had in 1893 succeeded Charles Hills Mackintosh in the estate, to have it declared that he was bound in virtue of the lease granted by his predecessor either to secure a new tenant in the farm whom he should bind to take over the pursuer's sheep stock at valuation as at Martinmas 1902, or else himself to take the stock over.

Lord Kyllachy, in granting the defender absolvitor on the ground that the pursuer's averments were irrelevant, said —"In this case I am not satisfied that even if the estate of Dalmunzie had been unentailed and the defender had succeeded his uncle the lessor as heir-at-law or gratuitous disponee, he (the defender) could have been held liable in terms of this summons either to secure a tenant who should take over the sheep stock at valuation or else to take over the sheep stock himself on the same terms. The obligation in the lease (differing from that in the former lease to Mr Small) imposes on the lessor no obligation in any event to take over the sheep stock. It simply requires that he will take the next or incoming tenant bound to do so. And I doubt much whether that implies any undertaking applicable to the case of the lessor taking the farm into his own hands, or at all events applicable to the case, which apparently has happened, of his doing so after ineffectual attempts to let the farm—attempts not said to have been other than honest—but which have not resulted in any offer of any kind being received.

"But it is not I think necessary to determine finally any question as to the construction of this obligation. For the defender is an heir of entail, and while the lease, being a lease of ordinary duration, may as a title of possession have been good as against him, it is, I think, conclusively settled that he is not liable in performance of any obligation undertaken by a preceding heir of entail, although relating to the entailed lands and contained in a lease, which is in itself a contravention of the entail. That principle is perhaps best illustrated by the cases upon melioration which are to be found collected and commented upon in *Jamieson* v. *Earl of Breadalbane* (March 16, 1877, 4 R. 667, 14 S.L.R. 420), and *Learmonth* v. *Sinclair* (January 23, 1878, 5 R. 548, 15 S.L.R. 304). And in view of the doctrine of these cases I am not, I confess, sure whether the pursuer's position would be worse or better according as his construction or the defender's construction of the obligation was preferred. For if the lessor is to be held as having himself undertaken to take over the sheep-stock that is an obligation considerably more onerous then any involved in most obligations for meliorations, while, on the other hand, if the lessor is to be held to have undertaken for himself and his heirs of entail to let the farm at all cost, and do so at such rent, if any, as could be got with such a burden attaching to the tenancy, the interference with the heir of entail's rights would be of a kind which would be certainly novel, and I think very difficult to support.

"It is said that in the case of a fee-simple estate the obligation would have been good as against purchasers and singular successors, and perhaps it might (I do not know), but so also would be an obligation to pay meliorations. And yet, as I have said, there is no doubt as to the heir of entail's freedom in that matter, or rather as to his freedom prior to the recent statute (Entail Amendment (Scotland) Act 1878, 41 and 42 Vict. cap. 28). The truth is that the considerations which determine the liability of, for instance, a purchaser, are wholly different from those which determine the liability of an heir of entail. With a purchaser the question is as to the terms, express or implied, of his disposition. With an heir of entail, on the other hand, the question is as to the effect of the fetters of the entail.

"It is also urged that there is here an averment that the clause in question is usual and customary in similar cases. But I do not see my way to allowing a proof upon that point. If the averment had been that, apart from all stipulation, the obligation in question was effectual by force of custom having the force of law, such an averment might have required consideration. For, although not perhaps necessary to the decision, there are opinions upon that subject expressed by judges of eminence in the case of *Learmonth* v. *Sinclair* (*cit. sup.*), which would require to be reckoned with. But the averment here falls obviously far short of anything of that kind. All that is said is that such clauses are usual and customary in similar leases. And I am afraid that there are many clauses not unusual in leases which are yet beyond all doubt contraventions of a strict entail. I do not, therefore, see my

way to allowing a proof of the averment referred to. And perhaps I may add, although it may not be in strictness relevant, that if the averment is intended to apply to the particular and, as it strikes me, somewhat peculiar clause which is here in question, I should have had some difficulty in thinking it credible. Clauses of the kind are of course common. But apart from the circumstance that the obligation to take over is not laid on the landlord directly, or indeed at all, the clause differs from that which was before the Court in the case of the *Duke of Argyll* v. *Macarthur* (November 28, 1889, 17 R. 135, 27 S.L.R. 87) and from any other clauses of the kind I have yet seen, in respect that it is entirely one-sided. The landlord is bound to some effect, but the tenant is left free at his outgoing to sell off the whole stock if he chooses; and although it may not generally be his interest so to choose, the very possession of the power gives him a hold over his landlord which might be extremely serious. All this, however, is by the way. What I decide simply is that the pursuer's averments are not relevant to support his conclusions, and the defender is therefore entitled to absolvitor with expenses."

Thursday, February 27.

SECOND DIVISION.

ZIEGLER *v.* HAMILTON.

Parent and Child—Husband and Wife—Access to Child—Divorce for Adultery—Discretion of Husband to Regulate Access to Child by Divorced Wife—Guardianship of Infants Act 1886 (*49 and 50 Vict. cap* 27).

"In Scotland the law is settled by the case of *Bowman* (*Bowman* v. *Graham*, July 17, 1883, 10 R. 1234, 20 S.L.R. 816), which had reference to a case of access alone, that where the wife has been divorced for adultery the matter of access to the children ought in general to be left in the husband's hands."

Circumstances in which the Court *refused* to interfere with the discretion of the husband, a Scotsman, in declining to allow his divorced wife, resident in America, access in this country to the only son of the marriage.

On December 13, 1907, Mrs Suzanne Van Valkenburg or Hamilton or Ziegler, wife of Edward Ziegler, journalist, New York City, U.S.A., and at one time the wife of James Neilson Hamilton, merchant, of Hamilton von Glehn & Company, Limited, London, E.C., presented a petition in which she craved the Court to find that she was entitled to free access at all reasonable times to James Hamilton, the only son of her marriage with Hamilton.

Hamilton lodged answers.

The petitioner, who was then a domiciled American, and the respondent, a domiciled Scotsman, were married in New York on 11th April 1898. There were born of the marriage two children—the son James, born 15th November 1900, and a daughter, Alice Suzanne, born 13th October 1903. The Superior Court of the State of Indiana, U.S.A., on 8th June 1905, pronounced a decree dissolving the marriage, at the instance of the petitioner, and, as stated, on the ground of cruel conduct on the part of the respondent. This decree awarded the custody of the daughter to the petitioner and the custody of the son to the respondent, and the defender in that action did not oppose, the matter having been arranged previously. On 11th September 1905 the petitioner married Ziegler and was living with him as his wife in America. In 1907 the respondent Hamilton raised in the Court of Session an action of divorce on the ground of adultery against the petitioner, now Mrs Ziegler, and, the action being undefended, obtained decree on 20th July, the Lord Ordinary in the case holding that the American decree was no bar to the action, as it proceeded upon the ground of cruelty, not recognised by the law of Scotland, and stating in his opinion—"The adultery which is the basis of the summons is said to have taken place during a period prior to 30th September 1904, and to have only come to the pursuer's knowledge subsequent to the divorce proceedings. I think the adultery during the period is sufficiently proved." The Scotch decree did not deal with the custody of the children. The son James, with the consent of the respondent, was taken charge of for some time—said to be up to 15th June 1906—by the petitioner's mother Mrs Peirce, in America and in England, and subsequently by the respondent's relations in Glasgow, where he still was, and where he was being educated at the Glasgow Academy.

The petitioner made general averments of neglect on the part of the respondent from early in their matrimonial life, of his long and frequent absences, more particularly at the time of the births of the children, of his failure to supply sufficient maintenance, of his want of affection for the children, and of cruel and harsh treatments towards the boy, and stated—"(5) The petitioner, who has always been devoted to her children, who have returned her affection, desires to have access to her son, but the respondent refuses to allow her any access at all. The petitioner is willing to come to this country for the purpose, and to see her son at such times and places and under such conditions as may seem suitable to your Lordships."

The respondent denied the petitioner's general averments, and explained his absences and his having left the son with Mrs Peirce to his having had to go on business and remain at Bussorah in Arabia. He averred that the petitioner had never cared for or taken any interest in the son, and that the petition was presented in the interest of Mrs Peirce, who was anxious for his custody, but under whose influence,