There is, generally speaking, no duty to fence dangerous places on private property, but a duty to do so may be cast upon a person in consequence of his own acts. There are various instances of this, but they all fall into certain categories. The duty may arise through the owner inviting people to come on his property. Thus, for instance —taking your property as you find it—there may be upon it an excavation which might be a source of danger, yet the mere existence of which casts no duty upon you to fence it. But that duty may arise if by your invitation people are invited to go near that dangerous place. Again—taking your property as you find it—it may be subject to some public right, as, for instance, if it is traversed by a public road, and then if you create a danger in immediate proximity to that public road there may be a duty on you to fence it. But it is a new and unheard-of proposition that, if you have something on your ground as to which there is no duty of fencing, and someone else makes use of his ground in some particular way, a duty is thereby imposed upon you of doing what you were under no duty to do before, a duty, namely, of fencing. I know of no authority for such a proposition. The quarry here was old and disused long before this strip of ground had become open to the use of the children, and that, I think, ends the question. The distinction is very obvious between such a case and the case of a person bringing a dangerous machine of an alluring character upon his ground, or of creating a danger where none existed before. But in the present case, on the simple ground that I have stated, I think that there was no duty on the defenders, and consequently no liability.

LORD KINNEAR—I agree with your Lordship. I think there is no authority for the proposition that there was a duty on the defenders to fence the quarry in question, which was situated in their private ground, inasmuch as it was not in the neighbourhood of a highway and could not be reached save by people trespassing first on the neighbouring ground and secondly on that of the defenders.

I think the present case is different from that of *Cooke*, [1909] A.C. 229, cited to us by the pursuer's counsel, where a railway company was held to have tempted children to play with a machine which would be dangerous if it were set in motion, and to be responsible for negligence in failing to take adequate precautions against mischief. The defenders have done nothing to attract or invite people to come on their ground; and in my opinion are not bound to take care for the safety of persons who come there without invitation. If I had thought that there was any duty on the defenders to fence the quarry for the protection of children I should have had great difficulty in sustaining the Lord Ordinary's ground of judgment, for the primary cause of negligence against the defenders must be that they neglected a duty to take precautions against dangers to children too young to take care of themselves, and if there be such a duty it is no answer to say that parents were negligent, or that a child for whose safety the defenders were bound to take precautions, because it was too young to take care for itself, ought nevertheless to have exercised due care and diligence for its own safety.

LORD PEARSON—I am of the same opinion.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer (Reclaimer)—Crabb Watt, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders (Respondents)—Wilson, K.C.—Mitchell. Agents—Ross Smith & Dykes, S.S.C.

Thursday, June 10.

SECOND DIVISION.

TAIT (SOMERVELL'S TRUSTEE) *v.* SOMERVELL AND OTHERS.

(See *ante*, February 6, 1907, 44 S.L.R. 386, 1907 S.C. 528; and July 2, 1904, 41 S.L.R. 716, 6 F. 926.)

Entail—Bankruptcy—Disentail by Trustee on Sequestrated Estate of Heir in Possession—Provision for Debts Secured on the Estate—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.

By section 18 of the Entail (Scotland) Act 1882 it is provided that a creditor of an heir of entail in possession who has obtained decree for payment and charged upon the decree "shall," in the event of the debt not being paid within a specified time, "be entitled to apply to the Court, and the Court shall," if the debt is not paid within a certain time thereafter, after certain procedure, "ordain the heir to execute an instrument of disentail . . . and after provision is made for the interests of any other creditors whose debts are secured on the estate the creditor aforesaid shall be entitled to affect the estate for payment of such debt." The section also empowers the trustee of an heir of entail in possession whose estates have been sequestrated to apply to the Court for authority to disentail, and enacts that "the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor."

Held that the clause protecting the interests of other creditors had no application to a petition for disentail by a trustee, and that a disentail on such petition was valid where the debts affecting the estate exceeded its value and provision for them had not been made.

Bankruptcy—Entail—Disentail by Trustee—Sale of Entailed Estate by Trustee with Concurrence of Heritable Creditor—"Creditor Holding an Heritable Security with a Power to Sell"—Bond and Disposition in Security in Favour of Next Heir for Value of Expectancy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 113.

The trustee on the sequestrated estates of an heir of entail in possession presented a petition for disentail, and a bond and disposition and security was granted in favour of the next heir for the value of his expectancy in terms of the Entail (Scotland) Act 1882, section 18.

Held that such next heir was in virtue of the bond "a creditor holding an heritable security with a power to sell" within the meaning of section 113 of the Bankruptcy (Scotland) Act 1856, and that the trustee could therefore, on the estate being disentailed, sell it under the said section with his concurrence.

Entail — Bond of Annuity — Arrears — Right to Rank as Secured Creditor.

A duly recorded bond of annuity under the Entail Provisions Act 1824 (the Aberdeen Act) entitles the creditor in it to be ranked as a secured creditor for arrears, due to no fault of the annuitant, on the price of the entailed estate, when it has been disentailed and sold by the trustee on the sequestrated estates of the heir in possession.

Bankruptcy—Entail—Bond of Provision—Consent of Trustee—Right of Heir of Entail in Possession to Grant after Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 4 *and* 111.

A bond of provision under the Entail Provisions Act 1824 (the Aberdeen Act), section 1, by an heir of entail in possession, whose estate has been sequestrated, is a "deed granted by the bankrupt . . . in relation to the estate" within the meaning of sections 4 and 111 of the Bankruptcy (Scotland) Act 1856, and is therefore invalid without the consent of the trustee in terms of the latter section.

The Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), section 18, enacts—"Where any heir of entail in possession is entitled to disentail the estate with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court, any creditor of such heir in possession, in respect of debt incurred after the passing of this Act, who has obtained decree against him for payment and charged upon the decree, shall, in the event of the debt so incurred not being paid for six months after the expiration of the charge, be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs, or his curator *ad litem* appointed in terms of this Act, refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for the amount so ascertained in favour of such heir; and if he refuses or fails to do so the Court shall grant authority to the Clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed shall be as valid as if it were executed by the heir in possession himself; and the Court shall thereafter ordain the heir in possession to execute an instrument of disentail of the estate; and if he refuses or fails to do so the Court shall grant authority to the Clerk of Court to execute such instrument, and, after provision is made for the interests of any other creditors whose debts are secured on the estate, the creditor aforesaid shall be entitled to affect the estate for payment of such debt, and shall have the same rights and interests therein as if an instrument of disentail had been executed and recorded by the heir in possession himself. If the estates of such heir in possession of an entailed estate shall be sequestrated for debt incurred after the passing of this Act, the trustee on his sequestrated estate shall be entitled to apply to the Court for authority to disentail the estate, and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor."

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), enacts—Section 4—"In this Act . . . the words 'property' and 'estate' shall, when not expressly restricted, include every kind of property, heritable and moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation or of being affected by diligence or attached for debt. . . ."

Section 111—"All payments and preferences or securities obtained by or granted to prior creditors, and all acts done or deeds granted by the bankrupt after the date of the sequestration and before his discharge out of or in relation to the estate (unless with the consent of the trustee) shall, in the event of sequestration being awarded, be null and void. . . ."

Section 113—"If a creditor holding an heritable security with a power to sell concur with the trustee in bringing the estate to sale, the trustee shall sell the same in his own name. . . ."

On 16th March 1909 John Scott Tait, C.A., Edinburgh, trustee on the sequestrated estates of James Somervell of Sorn, presented a petition for approval of a scheme of ranking and division of the purchase price of the estate of Sorn among the heritable creditors. The estate had been entailed; an instrument of disentail executed by the Clerk of Court and the trustee, the bankrupt having refused to do so, had been approved on April 18, 1907

(the petition for disentail having been presented on June 6, 1901, and the bankrupt ordained on 14th March 1907 to execute a bond for the next heir's expectancy which he declined to do), and recorded May 1, 1907; and the estate had been sold on October 28, 1908.

The scheme submitted proposed to rank the various creditors on the purchase price, £75,200, after deducting (*a*) £391, 18s. 9d. being one-half of the purchaser's agents' expenses, and (*b*) £6808, 1s. 3d., the estimated expenses of the trustee in the sequestration, in the following way:—1. Trustees of John M'Ilwraith in virtue of security over certain farms, £4471, 17s. 3d. 2. Mrs Henrietta Jane Stirling or Somervell, the bankrupt's mother, in virtue of a bond of annuity granted by Graham Somervell of Sorn, constituting a first charge over the castle and policies and a second charge over the farms disponed in security to M'Ilwraith's trustees, (*a*) value of the annuity £2880, and (*b*) arrears of annuity due November 1908, £7006, 5s. 7d., together £9886, 5s. 7d. 3. Mrs Emily Maclaine or Somervell, now Dawes, who had divorced the bankrupt on 20th January 1892, in virtue of a bond of annuity granted by the bankrupt (see *Somervell's Trustees* v. *Dawes*, July 10, 1903, 5 F. 1065, 40 S.L.R. 802), value of the annuity £6700. 4. James Graham Henry Somervell, the bankrupt's son and next heir of entail, in virtue of bond and disposition in security recorded 28th March 1907, for his expectancy as it had been valued, (*a*) amount of bond £30,632, and (*b*) interest £2332, 1s. 4d., together £32,964, 1s. 4d. 5. The Edinburgh Life Assurance Company in virtue of bond and disposition in security granted in December 1899, (*a*) amount of bond £24,500, and (*b*) arrears of interest £5124, 3s. 5d., together £29,624, 3s. 5d., ranked for the balance of the fund, viz., £13,977, 15s. 10d. 6. Mrs Amy Elizabeth Jones, otherwise Somervell, in virtue of an alleged bond of provision by the bankrupt recorded on 18th March 1907. 7. Agnes Marion Somervell and Elizabeth Julia Somervell in virtue of the said alleged bond of provision. With reference to 6 and 7 the petitioner stated in a note that there were no funds to admit a ranking but that as the alleged bond of provision had been granted during the sequestration without the consent of the trustee it could not rank in competition with creditors.

Answers were lodged for James Somervell, the bankrupt, personally and as guardian and administrator-in-law for his pupil children Agnes Marion Somervell and Elizabeth Julia Somervell, and for Mrs Amy Elizabeth Jones or Somervell.

The respondents averred, *inter alia*—"By section 18 of the Act 45 and 46 Vict., ch. 53, it is provided that when an instrument of disentail is executed by the Clerk of Court such instrument is only valid after provision has been made for the interests of all creditors other than the next heirs whose debts are secured on the estates. No such provision has been made. The estate is still entailed. The petitioner had no title to expose for sale or pretend to sell the said estate. The alleged sale is void. Denied that the estate was exposed for sale and sold on the 25th October 1908, in virtue of section 113 of the Bankruptcy (Scotland) Act 1856. The articles of roup and conveyance to the purchaser were not executed by a duly qualified creditor. The trustee is only entitled to disentail and sell when such procedure will result in a benefit to the estate and the creditors. In this case there is a very serious loss. . . . The purchase money has not been properly allocated between the various properties. Mrs Graham Somervell has no charge upon the Castle offices and polices. She is not a heritable creditor in regard to the fee of the estate. Her bond of annuity is a liferent charged on the rents and proceeds of the estate. There is no power to compulsorily commute this charge. There are no arrears chargeable against the estate or the rents or proceeds thereof. . . . The actuary, in valuing the expectancy of James Graham Henry Somervell, on the instructions and with the consent of the petitioner, assumed that the respondent James Somervell would make full provision for widow and younger children under the Aberdeen Act and deducted the value thereof. . . . The actuary in his report stated he had 'taken into account the power of Mr James Somervell to grant family provisions in terms of the Aberdeen Act.' The respondent James Somervell, after notice to the petitioner, duly made such provisions by the bond of provision, dated and recorded 18th March 1907. The petitioner having judicially admitted the right of the respondent James Somervell to grant such a bond, is estopped from disputing its validity. . . ."

A minute was also lodged for Mrs Dawes, who averred her willingness to accept the scheme in the event of its being approved as a whole, but claimed, in view of the answers lodged by Mrs Somervell, that the sum of £6700 for which it was proposed to rank her in respect of her jointure did not correctly represent the value thereof.

On 20th March 1909 the Court remitted to the Lord Ordinary on the Bills to proceed during the vacation, "with authority to him to make such orders, *interim* or otherwise, as he may consider just: And to consider, and, if satisfied therewith, to interpone authority to any agreement which may be arrived at and submitted to him by the creditors who may substantiate their claims to a ranking to his satisfaction."

On 26th April 1909 the Lord Ordinary officiating on the Bills (SALVESEN) pronounced an interlocutor reporting the proceedings to their Lordships of the Second Division.

Opinion.—"This petition was presented to the Second Division on 17th March, and was then appointed to be served on the creditors in the sequestration of Mr Somervell and on the bankrupt himself. On 20th March their Lordships remitted the petition and any answers which might be lodged 'to the Lord Ordinary on the Bills to proceed therewith in the ensuing vacation, with authority to him to make such

orders, *interim* or otherwise, as he may consider just.' Answers were thereafter lodged by Mr Somervell, as an individual and as guardian and administrator-in-law for his pupil children, and by Mrs Somervell, the bankrupt's wife. None of the creditors, preferable or ordinary, have lodged answers.

"As the petition relates to the distribution of a sum of £74,000, which is at present lying on deposit-receipt bearing interest at one per cent. only, the trustee is naturally desirous of obtaining an order under which he can distribute the sum in question; and the case was brought before me in the Bill Chamber with that object. I appointed a hearing, and parties were heard at great length, Mr Somervell appearing on behalf of the respondents who lodged answers. It appeared from the discussion that there were certain important and by no means easy questions which fell to be determined before the distribution could be authorised, and I came in the end to the conclusion that it would not be proper that these should be disposed of by the Lord Ordinary on the Bills, as the only appeal from his decision would be one to the House of Lords. Construing the remit, I came to be of opinion that the intention of the Court in authorising the Lord Ordinary on the Bills 'to make such orders, *interim* or otherwise, as he might consider to be just' was not to constitute him a Court of Appeal on legal questions, but simply to authorise him to deal with formal or ministerial matters. As, however, I heard a long argument, I think it right to report the case with this opinion, in the hope that it may be of some assistance in focussing the points which appear to require consideration.

"The consigned sum represents the price of the estate of Sorn, the sale of which has been carried through by the trustee, with consent of the commissioners on the sequestrated estate and of all the creditors whom he proposes to rank upon the consigned fund. Mr Somervell challenged the validity of the disentail and the regularity of the sale on various technical grounds, which I think are without substance. The instrument of disentail has already been recorded under authority of the Court, and this being so I can see no possible objection to the trustee selling the estate, although in so far as he has not agreed that the price shall be applied in clearing off the burdens upon it, these may still affect the lands in the hands of the purchaser. Mr Somervell, however, appeared to me to be *in titulo*, as having the reversionary interest in the estate, to object to the proposed distribution of the proceeds, and the first question he raises is whether the persons, or some of them, amongst whom the trustee proposes to distribute the proceeds are creditors for the amounts set forth in the appendix to the petition as due to them. He contends—and in this I think he is well founded—that if authority is granted by the Court to the trustee to pay these persons the sums in question he will be precluded from afterwards challenging the propriety of such payments. It appears that the Edinburgh Life Assurance Company have been in possession of the rents of Sorn under a decree of maills and duties, and the bankrupt alleges that the rents received by them were more than sufficient to pay the interest on the loan which he received from them and the premiums on the policies of life assurance by which the loan was secured. He accordingly disputes the right of that company to be ranked as the trustee proposes.

"There is already pending before your Lordships a petition at the bankrupt's instance to have the accounts connected with the administration of his estate investigated. This petition has been sisted meanwhile until he pays the trustee the expenses incurred in a previous petition of the same nature, which was dismissed with expenses; and it was argued that by his answers here the bankrupt was endeavouring to obtain the same investigation which he had already been refused, except on condition of payment of the expenses referred to. This is no doubt so, but it is one thing to impose a condition upon a petitioner and it is another to refuse to hear a respondent who has lodged a relevant answer to a proceeding to which he has been convened as a party. One would be inclined to assume that the administration which meets the approval of Mr Tait is not likely to be open to serious objection, but on the other hand the bankrupt is entitled, if he can, to prove the contrary. His interest to do so is manifest, because the claims of his ordinary creditors only amount to some £3000, and if he can reduce the claims of secured creditors by more than that amount, there may be a reversion payable to him. If it rested with me, therefore, I should appoint the petitioner to lodge in process the accounts of his administration as factor for the secured creditors, and also as trustee on the sequestrated estate.

"The respondents do not dispute the claim of M'Ilwraith's trustees as stated by the petitioner, nor the claim of the next heir of entail. The sums due to these two creditors amount to about half the whole sum consigned, and I think payment of these sums might immediately be ordered, so as to prevent further accumulations of interest. As the Court is, however, to meet so shortly, I do not feel myself justified in making this order in opposition to the bankrupt's contention.

"The respondents also object to Mrs Somervell senior being ranked for £7006, 5s. 7d. as the arrears of an annuity of £800 granted by the heir of entail then in possession of Sorn under the Aberdeen Act. The bankrupt argued that these arrears could not be charged against his estate at all, as Mrs Somervell had postponed her right to her annuity to the claims of the Edinburgh Life Assurance Company, and an heir of entail was only personally liable for an annuity as a debt if he drew the rents of the entailed estate. There is an obvious confusion of ideas here. It is true that the bankrupt did not himself receive the rents,

because he had assigned his right to uplift them to the Edinburgh Life Assurance Company, but this does not alter in any way the liability of his estate. Mrs Somervell senior did not discharge her right to her annuity, but only postponed it at the bankrupt's request, and there seems to me no question but that it is a good claim against his estate.

"It does not follow, however, that these arrears are a good charge upon the fee of the entailed estate now that it has been disentailed, and it was strenuously maintained by the bankrupt that they were not. His argument was, that just as an heir of entail who succeeded to the estate would not be liable to make good arrears of such an annuity, although liable for future payments, so the price of the entailed estate, except in so far as the reversion formed an asset in his sequestration, would not be liable for this debt. The bankrupt may have an interest to maintain this, so as to swell the dividend to ordinary creditors, even though there be no reversion, and I think his argument is worthy of consideration.

"The only other matter that raises a question of law of some importance has reference to the claim made by Mrs Somervell and by the bankrupt on behalf of his two younger children, in virtue of the bond of provision set forth in the petition. This bond was put upon record before the disentail was actually carried out. The argument was that Mr Somervell's bankruptcy could not prevent him from making provision for his wife and younger children to the extent allowed by the Entail Statutes, for such provision would not be in relation to his estate, nor would it diminish the amount falling to the trustee in sequestration, but would simply go to reduce the value of the interest of the next heir. He referred, in support of this view, to the report of Mr Low, upon which the next heir's interest was fixed at £30,632, where the reporter says that in fixing this interest he has taken into account the power of Mr James Somervell to grant family provisions in terms of the Aberdeen Act. If this view is sound, provision would now have to be made for Mrs Somervell and the younger children's contingent provisions in priority to the claim of the Edinburgh Life Assurance Company, and possibly also to the arrears of Mrs Somervell senior's annuity.

"The argument on this question appeared to me to be worthy of attention. Bankruptcy only affects a man's right to do anything in relation to his own estate, and it would be a strong thing to hold that a bankrupt heir of entail cannot make a provision for his wife and children payable only after his death, and thus not in any way affecting his interest in the entailed estate. If this is so, the whole scheme of distribution would require to be reconsidered."

Argued for the respondents (James Somervell, &c.)—1. The alleged disentail and sale of the estate were null and void, and the present application was therefore incompetent. By section 18 of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53) a creditor could secure the disentail of an entailed estate and effect it for his debt only on provision being made for the interests of any other creditors whose debts were secured on the estate. The same section directed that on an application by a trustee for disentail the Court should proceed in the same manner as in the application by a creditor, and the same condition therefore attached to the application by the trustee. That condition had not been complied with, for on the trustee's statement the debts secured on the estate exceeded its value, and provision had thus not been made for them. Further, section 113 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), under which the alleged sale had been made, was no warrant for the sale. That section required the concurrence of a creditor with a "power to sell." A creditor with a "power to sell," as distinguished from "a power of sale," which was used in section 114, must be taken to mean a creditor who had served the notarial intimation, requisition, and protest in the form of Schedule FF No. 2 annexed to the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), and had complied with the provisions of that Act with regard to sale by a heritable creditor. It was only then that the creditor could bring the security subjects to sale. The sale here was admittedly made without the concurrence of any such creditor. Further, the trustee had sold the estate without the concurrence of any creditor with even a power of sale, for the annuities of Mrs Somervell and Mrs Dawes were secured only on the rents, and that of Mrs Dawes was contingent; the bonds in favour of the Edinburgh Life Company and of M'Ilwraith's trustees did not embrace the whole estate, while that in favour of the next heir was in security of a debt contracted subsequently to the bankruptcy. 2. In any event the scheme ought not to be approved. Mrs Somervell was not entitled to be ranked for the arrears of her annuity. If that were done, the burden on the estate would exceed the maximum amount sanctioned by the Act under which her bond of provision was granted—Entail Provisions Act 1824 (the Aberdeen Act) 5 Geo. IV, cap. 87, section 1. The case of *Boyd* v. *Boyd*, July 5, 1851, 13 D. 1302, was not in point. Further, the annuities could not affect the castle and policies. The Edinburgh Life Company had been drawing the rents of the estate, and if properly managed they would have been sufficient to pay the interest on their bonds and the annuities. The bond of provision granted in 1907 was valid and effectual, and provision ought to have been made for it in the scheme. The respondent would undoubtedly have been entitled to grant such a bond if the Entail Act of 1882 had not been passed. That statute contained no express alteration of the law on the point, and the presumption was against any alteration of the law not explicitly disclosed — Maxwell, Interpretation of Statutes, 4th ed. p. 122, 3rd ed. p. 113. The right to

make such provisions was not affected by section 111 of the Bankruptcy (Scotland) Act 1856. It was not "estate" within the meaning of section 4. But in the particular circumstances of this case the trustee could not challenge the validity of the bond. In valuing the expectancy of the next heir in the disentail proceedings instituted by the trustee, a deduction had been made in respect of the power to make such provisions. If there were no such power, then the amount of the bond in favour of the next heir should be increased. The next heir had accepted the amount as ascertained, and the difference could not accrue to the benefit of the other creditors. In any event the validity of a duly recorded bond could not be considered in the present process. [*Earl of Glasgow*, November 12, 1886, 14 R. 59, 24 S.L.R. 51, and *Leith* v. *Leith*, June 10, 1862, 24 D. 1059, were also referred to.]

Argued for petitioner—1. The consent of the next heir was sufficient to empower the sale. He was a creditor before the sale, though not until the disentail proceedings. The disentail and the sale were in all respects properly and competently carried out, and the statutory requirements complied with. 2. The only question before the Court was whether the scheme which was presented for approval in compliance with section 116 of the Bankruptcy (Scotland) Act 1856 ought to be sanctioned. The bankrupt had no interest in that question as the debts greatly exceeded the value of the estate, and there could be no reversion. There was no doubt that Mrs Somervell was entitled to be ranked for the arrears of her annuity—*Boyd* v. *Boyd*, *cit.* The Edinburgh Life Company were of course bound to account for the rents uplifted by them, but not in this process. The bond of provision granted by Mr Somervell in 1907 after his sequestration was null and void—Bankruptcy (Scotland) Act 1856, section 111; *Obers* v. *Paton's Trustees*, March 17, 1897, 24 R. 719, 34 S.L.R. 538. The Aberdeen Act never contemplated provisions by the same heir of entail in favour of two widows.

At advising—

LORD LOW—This is a petition by Mr Tait, the trustee on the sequestrated estate of Mr Somervell, who at the date of his bankruptcy was heir of entail in possession of the estate of Sorn, in Ayrshire, and that estate has been disentailed and sold, and the object of the petition is to obtain the approval of the Court to a scheme of Ranking and Division of the price. Various objections to the scheme and to the proceedings which have led up to it were stated by the bankrupt, and these objections now fall to be disposed of.

The bankrupt in the first place contended that the disentail of the estate of Sorn, and the subsequent sale of that estate, had not been carried through in conformity with the statutory enactments under which the trustee purported to proceed, and accordingly he argued that the Court should refuse to sanction the scheme of division of the price of the estate. If the bankrupt had been able to show that the procedure in the petition to disentail and in the sale of the estate had, in material respects, been disconform to the requirements of the statutes, a delicate question might have arisen as to the course to be followed, but I am of opinion that the bankrupt's argument was not well founded.

The petition for disentail of the estate proceeded upon the 18th section of the Entail Act 1882. By that section it is provided that "any creditor" of an heir of entail in possession "in respect of debt incurred after the passing of this Act, who has obtained decree against him for payment, and charged upon the decree," shall, if the debt be not paid within a certain period, be entitled to have the estate disentailed, and the procedure to be followed by the Court is specified in detail. When the estate has been disentailed it is provided that "after provision is made for the interests of any other creditors whose debts are secured on the estate, the creditor aforesaid shall be entitled to affect the estate for payment of such debt."

The section then proceeds to empower the trustee upon the sequestrated estate of an heir of entail in possession to disentail. The enactment is in the following terms—[*reads last portion of section, v. sup.*].

Now the bankrupt founded upon the provision in the previous part of the section that where the application to disentail is made by a creditor, that creditor shall only have right to affect the estate after it has been disentailed, for payment of his debt, if he makes provision for the debts of other creditors secured upon the estate. The trustee in this case made no such provision, and accordingly the bankrupt argued that the subsequent proceedings—the exposure and sale of the estate—were bad and without statutory warrant.

It seems to me to be plain that the part of the section upon which the bankrupt founds has no application when the petition for disentail is presented by the trustee upon the sequestrated estates of the heir of entail in possession. When a creditor is the petitioner, it is necessary for him after the estate has been disentailed to take such steps as may be necessary to make the estate available for payment of his debt, and accordingly he is required, as a condition of his being allowed to do so, to make provision for the interests of secured creditors. When, however, the trustee is the petitioner, the moment the estate is disentailed, it is fee-simple estate of the bankrupt vested in the trustee for behoof of the creditors. It is to be remembered that an heir of entail in possession of an entailed estate is a fiar, subject only to the fetters of the entail, and when his estates are sequestrated under the Bankruptcy Acts, his right vests in his trustee. Accordingly when the estate is disentailed the fetters fly off, and the estate in which the trustee is vested becomes a fee-simple estate, and is in the same position, so far as the trustee's powers to deal with it are concerned, as if it had never been entailed. I therefore read the concluding words of the sec-

tion, namely, that when the petition is presented by the trustee "the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor"—as referring only to the procedure, culminating in the execution of an instrument of disentail, which the Court is directed to follow. The enactment that if a creditor is the petitioner he shall make provision for the interests of other creditors, refers to a matter with which the Court has nothing to do. It is only after the functions of the Court are, for the purposes of the section, exhausted by the execution of an instrument of disentail, that the petitioning creditor has to make provision for the interests of other secured creditors.

The bankrupt further maintained that the procedure under which the estate was exposed for sale was irregular and incompetent. The sale was carried through with the concurrence of heritable creditors under the 113th section of the Bankruptcy Act 1856. The creditors who concurred were the Edinburgh Life Assurance Company, and the *curator bonis* to the bankrupt's son, the value of whose expectancy was ascertained in the disentail proceedings, and a bond and disposition in security over the estate granted for the amount in terms of the 18th section of the Entail Act 1882. The bankrupt argued that these concurrences were not sufficient, because the Insurance Company was only secured over a part of the estate (which is the case), and his son was not a creditor at the date of the sequestration. It seems to me that the answer to that argument is that an heir of entail whose expectancy is valued in an application for disentail of the estate under the 18th section of the Act of 1882, and to whom in terms of that section a bond and disposition in security for the amount is granted, is a statutory creditor, who by virtue of the Act becomes a creditor of the bankrupt with a security over the disentailed estate. He therefore answers the description in the 113th section of the Bankruptcy Act of "a creditor holding an heritable security with a power to sell," with whose concurrence the trustee is authorised to bring the estate to sale.

I am therefore of opinion that the bankrupt's objections to the procedure leading up to the sale of the estate are not well founded, and it therefore becomes necessary to consider his objections to the scheme of ranking and division of the price of what the trustee asks the Court to approve.

The bankrupt, in the first place, objects to the sum, £6808, which is entered in the scheme as the outlays and expenses incurred by the trustee. That, however, is a mere estimate which is subject to adjustment and taxation, when any objections to the charges in the account may be considered and disposed of.

The first creditor whom the trustee has ranked upon the price, to whose claim the bankrupt objects, is Mrs Somervell, the bankrupt's mother, who is a heritable creditor in respect of a bond of annuity granted by her husband when heir of entail in possession of the estate of Sorn. The valuation of the debt at £2880 is not challenged, but the bankrupt objects to Mrs Somervell being ranked for arrears of the annuity amounting to £7006. The objection, if I understood it aright, was to this effect—The Aberdeen Act empowers an heir of entail in possession to infeft his wife in an annuity of a certain amount and no more. While, therefore, Mrs Somervell is entitled to be ranked upon the price for the actuarial value of the annuity, she cannot be ranked for arrears, because that would be to impose upon the estate a greater burden than that which the statute authorises. I am of opinion that that objection falls to be repelled. The bond of annuity in favour of Mrs Somervell was in the usual terms of a bond granted under the Aberdeen Act. Her husband provided and disponed to her a free yearly annuity of £800 to be uplifted and taken furth of the lands of Sorn, or furth of any part or portion thereof, or the readiest rents and profits of the same. Upon that bond Mrs Somervell was duly infeft, and she thereby obtained a complete title to uplift her annuity, and the whole of her annuity, furth of the lands, and it seems to me that her right is in no way affected by the fact that through no fault of hers the annuity has fallen into arrear. It seems to me that she is just as much entitled to rank for the arrears of her annuity as the creditor in a bond and disposition in security would be to rank for arrears of interest.

The case of *Boyd* v. *Boyd*, 13 D. 1302, is entirely in favour of that view. There a lady whose husband had granted a bond of annuity in her favour did not take infeftment until three years after her husband's death, and during that period the heir succeeding to the entailed estate did not pay the annuity. It was held, however, that when the widow did take infeftment she obtained a valid security for the arrears, and that her claim was preferable to that of an adjudging creditor of the succeeding heir. I am therefore of opinion that Mrs Somervell has been properly ranked for the arrears of her annuity.

The remaining creditor whom the trustee has ranked on the price is the Edinburgh Life Assurance Company. The capital sum due to the company amounts to £24,500, and the trustee states that arrears of interest are also due to the amount of £5124.

The bankrupt objects to any ranking being given in respect of the arrears of interest, on the ground that rents have been uplifted by the company or by the trustee on their behalf to an amount which if properly administered was sufficient to pay the whole interest.

Now, of course, the company and the trustee must account for all rents ingathered, but I do not think that that is a matter which can conveniently be dealt with in the present petition. The price of the property has been consigned in bank and is lying at deposit rates of interest, while interest at a much higher rate is accumulating upon the heritable debts. It

is therefore desirable in the interests of all concerned that the price should be distributed among those entitled thereto with as little delay as possible. Now, after setting aside the sum of £6808 for expenses, and ranking the creditors who are preferable to the Assurance Company, there only remains for that company a sum of £13,977, or little more than one-half of the capital sum due to them. That being so, it is immaterial for the purposes of the present application whether upon a proper accounting for rents ingathered the company have or have not a claim for arrears of interest.

The only other question which requires to be disposed of relates to a bond of provision in favour of his wife and two younger children which the bankrupt executed and recorded after the petition for the disentail of the estate had been presented by the trustee.

According to the scheme of ranking and division there is no balance of the price available to admit of a ranking of any claim in respect of the bond of provision; but the trustee further expresses the opinion that as the bond of provision was granted by the bankrupt during his sequestration without the consent of his trustee, it cannot in any way rank in competition with creditors.

The bankrupt's contention is that until the entail was brought to an end by the recording of the instrument of disentail, he as heir of entail in possession was entitled to make provisions for widow and children under the Aberdeen Act; that the making of such provisions was not struck at by the Bankruptcy Acts, because they did not affect his (the bankrupt's) estate, but the estate of succeeding heirs of entail; and that the bond of provision having been recorded before the bond and disposition in security for the amount at which the expectancy of the next heir had been valued, the claim of the widow and younger children was preferable to that of the next heir.

The material facts are these—The bankrupt's estates were sequestrated under the Bankruptcy Acts on 12th February 1901; the petition for disentail was presented on 6th June 1901; on 14th March 1907 the Court ordained the bankrupt to execute a bond and disposition in security for £30,632 in favour of his son; the bankrupt having refused to execute the bond and disposition in security, the Court on 19th March authorised and ordained the Clerk of Court to do so; the bond and disposition in security was accordingly executed by the Clerk of Court on 25th March; and the Court having interponed authority thereto on 27th March the bond and disposition in security was duly recorded on 28th March. The bond of provision in question was executed by the bankrupt and recorded on the 18th of March.

In these circumstances I am of opinion that it was not competent for the bankrupt to grant the bond of provision, and that no effect can be given to it.

By the 111th section of the Bankruptcy Act 1856 it is enacted that "all acts done or deeds granted by the bankrupt after the date of the sequestration and before his discharge, out of or in relation to the estate (unless with the consent of the trustee), shall be null and void." I think that that enactment is applicable to this case. The word "estate" has a very wide meaning in the Bankruptcy Act. By section 4 it is defined as meaning "every kind of property, heritable and moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt." Now by the 11th section of the Rutherfurd Act any creditor of an heir of entail in possession who is empowered to disentail without any consents can affect the estate for payment of debt; and by the 18th section of the Entail Act of 1882 a similar remedy is given to creditors or to the trustee where consents to a disentail are required.

The fee of an entailed estate may therefore, subject to the statutory conditions, be affected by the diligence and attached for the debts of the creditors of the heir of entail in possession, and therefore he cannot after sequestration grant any deed "in relation" to the estate without the consent of his trustee, and I think that a bond making provisions for widow and children under the Aberdeen Act is plainly a deed "in relation to" the estate.

It was argued, however, that in the special circumstances of this case the bond of provision should be held to be effectual, because it appears that in valuing the expectancy of the next heir the power of the bankrupt to make provisions for wife and children was taken into account. The bankrupt's argument was to the following effect—The result of the way in which the expectancy had been valued was that the amount to which the next heir was found to be entitled was diminished by the estimated value of such provisions. The valuation therefore was made upon the assumption that it was still in the power of the bankrupt to grant a bond of provision. If, however, the trustee was right in holding that the bankrupt's sequestration deprived him of that power, the value of the heir's expectancy should have been correspondingly increased. Therefore either the next heir was entitled to an additional sum equivalent to the value of the provisions, or effect should be given to the bond of provision. In no case were the creditors entitled to benefit. The heir, however, had acquiesced in the value put upon his expectancy, and had settled with the trustee upon that footing, and therefore the value of the provisions which ought, *ex hypothesi*, to have gone to the heir, was available for the widow and children, who ought to be ranked for the amount.

That argument is ingenious, but I am of opinion that it cannot be sustained. Even assuming that the actuary was wrong (which I do not suggest that he was) in taking into account, in fixing the value of the next heir's expectancy, the power of the bankrupt as heir in possession to grant

provisions under the Aberdeen Act, that error can in no way affect the question of the competency of the bankrupt granting the bond of provision at the time when he did so; nor, assuming that the next heir has been underpaid, can that fact raise up a right on the part of bankrupt's wife and children to claim under an incompetent bond.

I am therefore of opinion that the scheme of division should be approved, and authority granted to apply the price in payment of the heritable creditors in terms of the scheme. I think it was also understood that there should be a reservation of the bankrupt's right to take any objections which he may have to the amount of the expenses to be charged against the price, and the alleged arrears of interest said to be due to the Edinburgh Life Assurance Company.

LORD ARDWALL—This petition is presented by Mr John Scott Tait, C.A., trustee on the sequestrated estates of James Somervell, in order to obtain approval of a scheme of Ranking and Division of the claims of the heritable creditors of the bankrupt upon the price of the heritable estates of Sorn and others which belonged to the bankrupt and which have been sold under the provisions of section 18 of the Act 45 and 46 Vict. cap. 53 (1882).

The bankrupt has lodged answers to this petition and appeared personally in support of them. He objects to the whole proceedings as being disconform to the 18th section of the Act in respect that the trustee has failed to make provision for the interests of other creditors whose debts are secured on the estates. I would, however, point out that this provision occurs in the first part of the 18th section, whereas in the second part, under which the sale in question has taken place, it is the trustee who acts as seller, and of course he represents all creditors, both secured and unsecured, the Bankruptcy Statutes making provision for the manner in which the secured creditors are to be dealt with in the case of a sale of heritable property belonging to the bankrupt's estate.

This being so, the rights of all creditors are secured, provided that a proper ranking of the creditors on the price is carried out, and it accordingly now falls to be decided in what order and to what amounts the various heritable creditors "whose debts are secured on the estate," to use the words of the Act, are to be ranked.

It was, however, further argued by the bankrupt that these debts could not be, and at all events were not, all secured before the sale, and that they cannot be secured now by being satisfied out of the proceeds of the sale, for the reason that the amount of the heritable debt at present secured on the estate is, on the trustee's own showing, of greater amount than the price realised for the estate; and upon this state of matters he founded the somewhat strange argument that the whole proceedings were and are inept and that the sale must be treated as void. Were this argument to be given effect to, it would amount to this that in every case where the debts heritably secured on an entailed estate exceeded the value of it, that estate could never be sold under the powers of the Act in question. This would be a strange result and one quite contrary to the intention of the statute, as such cases are just those in which it would be useful and expedient to put the powers of the statute in force.

It accordingly appears to me that up to the present the proceedings have been in order and in proper form, and that all that has to be done by the Court at present is to decide whether the scheme of ranking proposed by the trustee is a sound one.

It will be convenient to take the various debts ranked in the order in which they stand in the petition.

(1) Ranking of M'Ilwraith's Trustees - - - - - £4471 17 3

No objection is taken to this ranking, nor to the ranking of

(2) Mrs H. J. Stirling or Somervell for - - - - - - £2888 0 0

(3) Objections, however, are taken to the ranking of the same lady for - - - - - - £7006 5 7 in respect of arrears of interest.

The first objection is that it is illegal to burden the estate with these arrears, as they bring up the burden in favour of a widow of a former heir of entail in possession to more than the amount to which an entailed estate may legally be burdened under the Aberdeen Act. It was contended that therefore it was not a debt which should be held to affect the entailed estate or the proceeds thereof. I am of opinion that this contention is ill founded, and that the case of *Boyd*, 13 D. 1302, is an authority in point.

(4) The ranking in favour of Mrs Dawes of - - - - - - £6700 0 0

is not disputed, nor is the ranking of

(5) James Graham Henry Somervell, the next heir of entail, for £32,964 1 4

(6) With regard to the claim of the Edinburgh Life Assurance Company, which is stated at £29,624, 3s. 5d., and ranked to the extent of £13,977 15 10

it was maintained that if the income of the estate had been properly administered by the petitioner and his predecessors in office these arrears would not have accumulated, and the suggestion is either that they should be treated as ordinary debts, or that the successive trustees, in respect of mal-administration, should be made personally liable for them.

It is, I think, unnecessary to consider this matter at present, as the amount for which it is proposed to rank the Assurance Company at present is £13,977, 15s. 10d., being much less than the capital sum of £24,500 contained in their bond. Accordingly, there is no difficulty in ranking them for that amount at present, leaving all questions as to proper or improper administration for after consideration should they be raised.

The trustee makes no provision for paying anything to the beneficiaries under a bond of provision by the bankrupt, *dated*

and recorded in the Division of the General Register of Sasines applicable to the county of Ayr on 18th March 1907. It was maintained that the bankrupt had a right to execute this bond of provision at the time when he did; that he did not require the consent of the trustee thereto, in respect that it affected not his own estate, but the estate of the succeeding heirs of entail, and this being so, that it is a valid burden on the estate; and that Mrs Jones or Somervell should be ranked in respect of it preferably to the debt of the next heir of entail, whose interest was arrived at after deduction of possible burdens to be imposed, and preferably to the claim of the Edinburgh Life Assurance Company.

The question thus raised is one of some novelty, and I think depends upon whether in the circumstances the bankrupt was entitled to execute the bond of provision or not. By section 111 of the Bankruptcy Act of 1856 it is provided that all "acts done and deeds granted by the bankrupt after the date of the sequestration and before his discharge out of or in relation to the estate (unless with the consent of the trustee) shall, in the event of sequestration being awarded, be null and void."

It was said that this bond of provision was not granted out of or in relation to the bankrupt's estate, because in its terms it is a charge upon succeeding heirs of entail, but in the circumstances which arise here I cannot avoid holding that it was in relation to the sequestrated estate, and the best of all possible proof of that is, that if the contention of the bankrupt is given effect to, the estate available for division among other heritable creditors would be enormously reduced in value, as the present Mrs Somervell is a comparatively young woman, and the annuity in her favour is an ample one. It is technically correct to say as a matter of entail law that these Bonds of Provision are a charge upon succeeding heirs, but the law of entail has been altered so much, especially by the Act of 1882, that I think it can no longer be predicated that the granting of such a deed as this Bond of Provision was not "in relation" to the bankrupt estate, and if it was so, it is void as not having been granted with the consent of the trustee.

But further, it appears to me that it would be contrary to the provisions of the Act of 1882 that after the Court had ordered the bankrupt to execute a bond and disposition in security of the estate with a view to disentail, he should delay doing so, and in place thereof should create a new burden upon the estate which, so far as the Court is concerned, has been ordered to be disentailed, and which had accordingly become an asset to which creditors were entitled to look for payment of their debts under the provisions of the Act of 1882.

I am therefore of opinion that no ranking ought to be given in respect of this bond of provision.

There remains only the question of the deduction of £6808, 1s. 3d. of outlays and expenses which is stated as a deduction from the price.

I do not think that this is a convenient process to go into that matter, and there are really no relevant grounds stated by the bankrupt in his answers for an inquiry either into this matter or of the question of arrears, but I think any difficulty can be got over by reserving the bankrupt's right to object to the expenses of administration or the methods of administration at some other stage in the sequestration, and subject to such reservation, approving of the scheme of division.

Should it afterwards be found that the expenses ought to be less than £6808, 1s. 3d., the benefit of that will accrue to the Edinburgh Life Assurance Company.

LORD JUSTICE-CLERK—I have had an opportunity of reading the opinions of my learned brethren. I entirely agree with them, and have nothing to add.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Repels the said answers for the said James Somervell and others: Approve of the scheme of ranking and division: Grant warrant to and authorise the petitioner and Thomas Walker M'Intyre, Esq., of Sorn, to endorse the deposit-receipt for the consigned sum of £74,808, 1s. 3d., and to uplift said sum with interest accrued thereon, and to pay thereon on presentation to them of an extract of this interlocutor the sum for which the following heritable creditors are respectively ranked in the said scheme of ranking, viz., to the trustees of John M'Ilwraith mentioned in the said scheme of ranking, £4471, 17s. 3d., with interest thereon to Martinmas 1909, to the said Mrs Henrietta Jane Stirling or Somervell, £9886, 5s. 7d. to Mrs Kathleen Emilie Maclaine or Somervell, now Dawes, £6700, to James Graham Henry Somervell and his *curator bonis* Donald Mackenzie, £32,964, 1s. 4d., with the respective proportions of deposit-receipt interest accrued applicable to three last-mentioned sums, to the Edinburgh Life Assurance Company the balance of the consigned fund and interest accrued thereon under deduction of the sum of £6808, 1s. 3d. after mentioned, and also any balance of the said sum of £6808, 1s. 3d., which may remain after meeting the outlay, expenses, and others after mentioned: Further, ordain the petitioner to lodge the sum of £6808, 1s. 3d. on deposit-receipt with the Bank of Scotland, George Street, in his name as trustee on the sequestrated estates of the said James Somervell to meet the whole outlays and expenses incurred by or to him and his predecessors in office, and all Government duties outstanding, all as the same may be found to be due upon a report by the Accountant of Court, and remit to the Accountant of Court

to report *quam primum* what outlays, expenses, and Government duties form a proper charge upon said sum of £6808, 1s. 3d., reserving nevertheless to the bankrupt any right to object before the Accountant to the expenses or any part thereof in so far as it is proposed to pay same out of the sum of £6808, 1s. 3d.: Find the petitioner and the said minuters also entitled to the expenses of and incidental to this petition out of the said sum of £6808, 1s. 3d. . . . . as between agent and client. . . . ."

Counsel for the Petitioner — Chree — Horne. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Heritable Creditors (excepting M'Ilwraith's Trustees) — Cullen, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

For Respondents, the Bankrupt, James Somervell, and Others—Party.

Thursday, May 20.

FIRST DIVISION.

[Lord Dundas, Ordinary.

JAMES GILLESPIE & SONS AND ANOTHER *v.* GARDNER.

Agent and Client—Law-Agent—Responsibility to Client—Bargain between Law Agent and Client—Fairness of Bargain—Fairness Called in Question after Lapse of Years.

In 1895 a firm of slaters and plasterers, who had previously done no building, and who possessed no capital, desired to take advantage of the then flourishing condition of the building trade in a certain town, and to buy up certain pieces of ground covered with old buildings, to pull these down and erect new tenements. For this purpose they sought the pecuniary assistance of their law agent. A bargain was entered into in accordance with which the law agent bought for his clients certain property, advanced the whole of the money and took the title in his own name. They then agreed to grant him a ground-annual, on the basis of 25 years' purchase, calculated upon the price so advanced and on certain other prior debts of small amount, and the property was reconveyed to them under burden of the ground-annual. The new tenements were built and occupied, and thereafter the law agent was able to sell the ground-annual for 31 years' purchase. In 1907, and after the firm had been dissolved by the death of one of the partners, the surviving partner raised an action against the law agent for payment of the difference between 25 and 31 years' purchase.

Held that in the circumstances the bargain was a fair one, and that the defender must be assoilzied.

Observations by the Lord President on bargains between law agents and clients.

On 7th February 1907 James Gillespie & Sons, builders, Paisley, and James Gillespie, sole surviving partner thereof, as such partner, as an individual, and as executor of his deceased brother Thomas, who died in 1905, the only other partner of the said firm, raised an action against James Gardner, a writer in Paisley. The pursuers sought to have the defender account for his intromissions as law agent for (1) the said James Gillespie & Sons, (2) the said James Gillespie *qua* partner of the said firm and as an individual and executor foresaid, and (3) the said deceased Thomas Johnston Gillespie *qua* partner of the said firm and as an individual. The accounting went back to 1895.

Accounts were ordered and put in, and objections and answers thereto were lodged.

The pursuers' objection 2 was — "The defender's said account fails to credit the pursuers with the true value of the ground-annuals and feu-duty mentioned in Cond. 4. The true value thereof was, as stated, at least £3822, 19s. 6d., at which price they were sold by the defender, whereas the pursuers have only received credit for £3094, 10s. 3d. The pursuers are accordingly entitled to credit for the sum of £728, 7s. 3d. as from the dates of the creation of the said ground-annuals and feu-duty, with compound interest thereon at the rate of 5 per cent. per annum from said dates."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DUNDAS) (*v.* also opinion of the Lord President), who on 7th July 1908, after a proof, found, *inter alia*, that the transactions between the pursuer James Gillespie and his late brother Thomas J. Gillespie, and the defender, referred to in objection 2, were fairly gone about, and were understood by, and were to the interests of, the Messrs Gillespie, repelled the whole objections, and assoilzied the defender.

Opinion. — ". . . The pursuer's case presents several adverse features. It was not until October 1905 that he raised the principal question now in controversy, which relates to events occurring in the years 1895 to 1897. He and his brother Thomas dissolved their copartnery about 1899, and its affairs were wound up, and their accounts with the defender adjusted, upon a footing inconsistent with the pursuer's present attitude. The brother died in 1902, in full knowledge, so far as appears, of the material facts involved, without having made any complaint or claim of the nature now put forward. His executry estate was wound up by the pursuer as his executor on the footing above indicated. The pursuer is unable to give any satisfactory explanations of his long delay in raising his present contentions. . . . . .

"Obj. II. raises the most important point in the case. It does not seem to me to be, properly speaking, an item of accounting; but the matter has been fought out with