fined to the repayment in certain cases to the Town Council of their expenditure in maintaining the street in proper repair. Section 141 of the Act of 1871 imposed upon the owners of Granton Lodge, as the persons who laid out the new street, the duty of constructing the foot-pavement and of macadamising the carriageway within one month after receiving a requisition in writing from the Town Council, but it did not impose upon them any duty of maintenance. The work of construction was carried out partly by the owners of Granton Lodge and partly by their feuars without any requisition from the Town Council. Thereafter the Town Council, in virtue of section 317 of the Act of 1862, had power to repair the street and footways from time to time at their own expense, or alternatively they had power under sections 142 and 143 of the Act of 1871, as amended by the Acts of 1881 and 1900, to repair the carriageway and to reconstruct the footways with certain limited and temporary rights to be reimbursed by the frontagers. These powers were conferred upon the Town Council in the public interest, and in my opinion it was their duty to exercise one or other of them when the subsidence took place. Much argument was directed to the question whether the Town Council had or had not "taken over" this particular foot-pavement. I do not find this phrase in the Aberdeen Acts, but the question which counsel intended to argue was whether the Town Council was bound to maintain this foot-pavement without any relief against the frontagers. Seeing that the foot-pavement opposite Mr Mearns' property had "not been formed of dressed or squared stones," I am of opinion that the Town Council were right in supposing that on a sound construction of section 143 of the Act of 1871 as interpreted by the Act of 1881, sec. 69, and the Act of 1900, sec. 47 (2), they might if they took the proper procedure have a claim against the frontagers for the expense of forming a new footway. But such pecuniary questions have no bearing one way or another on the duty which the Town Council owes to the public in consequence of the enactments referred to.

If I am right in thinking that the Aberdeen municipal statutes cast upon the Town Council the duty of maintaining in a safe condition the 10-foot strip of the foot-pavement, it follows from what I have already said that they failed to perform this duty. In England it would seem that such a failure to perform a statutory duty would not give rise to an action of damages at the instance of the person injured unless the statutory body had been guilty of misfeasance — *Cowley* v. *Newmarket Local Board*, 1892 A.C. 345. In Scotland the distinction between non-feasance and misfeasance has not been recognised, and it is, I think, settled that a statutory body in charge of a street or a road is liable in damages for failure to perform its statutory duty to repair. In regard to this question I refer to and respectfully adopt what was said by Lord President Robertson and Lord M'Laren in *Strachan* v. *Aberdeen District Committee of County Council of Aberdeenshire*, June 19, 1894, 21 R. 915, 31 S.L.R. 761.

The result, in my opinion, is that Mr Mearns and the Town Council are jointly and severally liable to the pursuer. Whether such a decree can be pronounced as the pleadings stand is a matter for after-consideration, as also the amount of damages to be awarded.

The Court pronounced this interlocutor—

". . . Sustain the appeal: Recal the interlocutors of the Sheriff and Sheriff-Substitute, dated 19th March 1910 and 24th January 1910 respectively: *Find in fact* (1) that the pursuer fell and suffered injury and damage while walking on the pavement, time and place condescended on, owing to the dangerous condition of said pavement; (2) that said dangerous condition was due to the fault of both sets of defenders: *Find in law* that both sets of defenders are liable to the pursuer in damages; of consent assess the same at fifty pounds sterling: Therefore decern against the defenders conjunctly and severally to make payment to the pursuer of the said sum of fifty pounds: Find the pursuer entitled to expenses against the defenders conjunctly both in this Court and also on the higher scale in the Sheriff Court. . . ."

Counsel for Pursuer and Appellant—D. Anderson — Macgregor. Agents — Hume, Macgregor, & Company, S.S.C.

Counsel for Defenders and Respondents the Lord Provost, Magistrates, and Town Council of Aberdeen — Dean of Faculty (Scott Dickson), K.C. — Chree. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender and Respondent Mearns—Sandeman, K.C.—Scott Brown. Agent—F. J. Martin, W.S.

Monday, July 17.

FIRST DIVISION.

[Lord Cullen, Ordinary.

KINNOULL *v.* HALDANE.

Entail — Sale of Entailed Estate to Pay Debts — Improvement Expenditure — Extent of Right of Heir of Entail to Pay Improvement Expenditure Out of Price —Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 9—*Entail Amendment (Scotland) Act* 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 8.

An heir of entail in possession of an entailed estate obtained a decree to charge a sum of improvement expenditure on the entailed estate in terms of the Entail Amendment (Scotland) Act 1875, sec. 8. In a petition by him to sell the entailed estate to pay debts, in

terms of the Entail Amendment (Scotland) Act 1868, sec. 9, *held* that the petitioner was not entitled to pay the whole amount of the improvement expenditure out of the price, but only three-quarters of it, because the improvement expenditure was a debt "affecting or that may be made to affect the fee of the estate," within the meaning of section 9, only to the extent of three-quarters of its whole amount.

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), sec. 9, enacts—"It shall be competent for the Court of Session, where any entailed estate is subject to or may be charged with debt affecting, or that may be made to affect, the fee of the estate, on a petition to be presented by the heir of entail in possession of such estate, to approve of an agreement to sell by private bargain the whole or any portion of such estate for payment of the whole or any part of such debt; and the Court may authorise such sale under such agreement where they are satisfied, after making such inquiry as they consider necessary, that the sale is advantageous and beneficial for the heir of entail in possession of such estate, and not detrimental to the interests of the succeeding heirs of entail. . . ."

The Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. cap. 61), sec. 8, enacts—"It shall be lawful for an heir of entail in possession of an entailed estate in Scotland . . . who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annual rent, binding himself and his heirs of tailzie to make payment of an annual rent for twenty-five years from and after the date of such authority of the Court, or, where the money has been consigned, as aforesaid, from and after the expiration of two years from the date of consignation, such annual rent to be payable by equal moieties half-yearly, and to be at a rate not exceeding seven pounds two shillings per annum for every one hundred pounds so authorised to be borrowed, and so in proportion for any greater or less sum; or where the improvements were executed before the date of the application to the Court, in the option of such heir in possession, and in lieu of such bond of annual rent, with a bond and disposition in security over such estate or any portion thereof, other than as aforesaid, for two-thirds"—altered by the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), sec. 6, to three-fourths—"of the sum on which the amount of such bond of annual rent, if granted, would be calculated in terms of this Act. . . ."

On 17th June 1910 the Right Honourable Archibald Fitzroy George Earl of Kinnoull, heir of entail in possession of the entailed lands and estate of Balhousie, Dupplin, Newton, and others, situated in the county of Perth, presented a petition for approval of an agreement to sell by private bargain to Sir John Alexander Dewar, Bart., M.P., residing at Abercairney, Crieff, the lands and estate of Dupplin and Newton of Condie, subject to the exceptions therein mentioned, part of the said entailed lands, and to apply the price, less expenses, in payment *pro tanto* of debts affecting the fee of the said lands and estate of Balhousie, Dupplin, Newton, and others, and craving warrant to serve the petition upon (1) the Right Honourable George Harley Hay, commonly called Lord Hay of Kinfauns, residing with his mother the Right Honourable Gladys Luz Harley Bacon or Hay, commonly called Viscountess Dupplin, at Theobald's Park, Waltham's Cross, Hertfordshire, grandson of the petitioner and heir-apparent, being the only son of the late Right Honourable Edmund Alfred Rollo George Hay, commonly called Viscount Dupplin, eldest son of the petitioner; (2) the Honourable Alistair George Hay, residing at 46 Hanover Gate Mansions, Regent's Park, London, the petitioner's immediate younger brother; and (3) the Honourable Claude George Hay, residing at No. 5 Connaught Square, London, the petitioner's next younger brother.

The following *narrative* is taken from the opinion of the Lord President, *infra*—"The Earl of Kinnoull, heir of entail in possession of the estates of Dupplin and Balhousie, presented a petition, under the 9th section of the Act 31 and 32 Vict. cap. 84, to sell the lands of Dupplin for the payment of debt. The lands of Dupplin and the lands of Balhousie were both burdened with a great many debts in ordinary form. The bargain the Earl of Kinnoull had made with another gentleman as to the sale of Dupplin at a certain price was approved of by the Court in the course of the proceedings. While the investigations necessary for the disposal of the petition were going on, the Earl of Kinnoull presented a petition in the Sheriff Court at Perth for authority to charge the combined estates of Balhousie and Dupplin with a certain sum. That petition was remitted *ob contingentiam* to the Court of Session, and eventually decree was given in it finding that the sum of £1924 odds had been expended on improvements of the class under the Acts, granting warrant to and authorising the pursuer to execute in favour of any person who might advance the sum of £2120 (which was the said sum of £1924 odds with the expenses of the application added) a bond or bonds of annual rent in ordinary form over the said estates during a period of twenty-five years from and after the date of the decree, payable by equal moieties half-yearly at the rate of £6, 7s. 4d. per cent. per annum; or otherwise, in the option of the pursuer, granting warrant to and authorising the pursuer to charge the fee and rents of the said estates with the sum of £1590, being three-fourths of the said sum of £2120, by granting a bond and disposition in security, or bonds and dispositions in security in ordinary form, over the said estates for the said sum of £1590.

Now as it had been found in the original petition that Lord Kinnoull's bargain was correct, it next became necessary for him to put in a scheme of the debts which he proposed to pay off with the sum which was now paid by the purchaser; and having got the decree which I have last mentioned, he proposed, as part of the debts which he proposed to pay off, to pay to himself the said sum of £2120. Appearance was made for the next heir of entail, who is a minor. He did not object to the regularity of any of the steps in the petition, but he does object to Lord Kinnoull being paid this sum of £2120. He says that he is only entitled to be paid £1590, that being the whole sum which by interlocutor it was decided that he could charge by way of bond and disposition in security."

On 1st May 1911 the Lord Ordinary pronounced the following interlocutor:—". . . Finds that the petitioner is entitled to payment out of the said price of the said lands and estate of Dupplin and Newton of Condie and others of the sum of £2075 (being the amount of the improvement expenditure and relative costs amounting in all to the sum of £2120, which the petitioner was authorised to charge on the said entailed lands and estate of Balhousie and others by the interlocutor dated 18th March 1911, pronounced in the said application by him for the purpose of obtaining such authority, under deduction of £45, being the estimated amount of the cost of obtaining the loan and granting security therefor which has not been and will not be incurred)."

The respondent, William Stowell Haldane, W.S., Edinburgh, who had been appointed *curator ad litem* to Lord Hay, reclaimed, and argued—(1) It was incompetent for the Lord Ordinary to authorise payment to the petitioner of the improvement expenditure, because the petition to charge was subsequent in date to the petition to sell, and improvement expenditure was not a debt within the meaning of section 9 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), until a charge for it had actually been created over the estate. Under section 7 of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), in fixing compensation to the next heirs in applications for disentail, improvement expenditure might be deducted from the value of an estate, but only after the Court had declared such expenditure to be properly chargeable upon the estate. The existence of this provision showed that improvement expenditure did not of itself partake of the nature of a debt. Similarly, under section 11 of the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. cap. 61), improvement expenditure might be conveyed or bequeathed and thereafter charged on the estate, but it was only to be deemed to be a debt after the date of the decree of the Court sanctioning the charging of it—*Maxwell* July 17, 1877, 4 R. 1112, 14 S.L.R. 659, *per* Lord Justice-Clerk; *Lord Advocate* v. *Earl of Moray's Trustees*, August 4, 1904, 7 F. (H.L.) 116, 42 S.L.R. 839. (2) In any event, the petitioner was only entitled to payment of three-quarters of the amount of the improvement expenditure, being the amount which he was entitled to charge on the estate by a bond and disposition in security. It was true that the petitioner could charge the estate with a bond of annual rent for the whole amount, but while the arrears of interest would thus become *debita fundi* the capital expenditure itself would not become a *debitum fundi*. A bond of annual rent was not a charge in the sense of the Entail Acts—*Leith* v. *Leith*, July 18, 1888, 15 R. 944, 25 S.L.R. 671, *per* Lord Adam. It was true that in *Pringle* v. *Pringle*, June 28, 1892, 19 R. 926, 29 S.L.R. 820, in valuing the expectancies of next heirs a disentailer was held entitled to deduct the whole of the improvement expenditure, but that was because a disentailer took over the whole debt. The present petition on the other hand was a petition for power to sell in order to extinguish debt.

Argued for the petitioner—The improvement expenditure incurred by the petitioner was exactly the sort of expenditure contemplated in sec. 9 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84). It was a heritable debt against the estate—*Earl of Kintore* v. *Countess Dowager of Kintore*, June 19, 1885, 12 R. 1213, 22 S.L.R. 762. The whole amount of the improvement expenditure fell to be paid out of the price of the estate, because by section 8 of the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. c. 61) the whole of the improvement expenditure might be charged on the estate by a bond of annual rent—*Pringle* v. *Pringle* (*supra*), Jur. Styles, fifth ed., vol. i, 440.

At advising—

LORD PRESIDENT—[*After the narrative supra*]—Now the disposition was presented under the Act (31 and 32 Vict. cap. 84), and section 9 of the Act says this—"It shall be competent for the Court of Session, where any entailed estate is subject to or may be charged with debt affecting, or that may be made to affect, the fee of the estate, on a petition to be presented by the heir of entail in possession of such estate, to approve of an agreement to sell by private bargain the whole or any portion of such estate for payment of the whole or any part of such debt. . . ." Therefore really the question is whether the whole of this £2120, at the date of the granting of the first petition, was a debt which might be made to affect the fee of the estate. I am of opinion that it was not. I think the case is truly governed, though not in terms, yet practically governed, by the argument in *Leith* v. *Leith* (July 18, 1888, 15 R. 944, 25 S.L.R. 671). The actual question in that case arose out of a different section—the 11th section of the Act of 1875. That section provides that where an heir of entail has executed improvements but has died without charging the estate, any person to whom he has bequeathed his right may obtain decree against the heir in possession ordaining him to grant a bond and disposition in security for the amount with which

the deceased heir of entail himself might have charged the estate.

Now there the deceased heir had executed certain improvements, and the argument turned upon this—Could he have charged the estate with the whole of those improvements, or only with three-quarters? Their Lordships of the First Division held that in the proper sense of the statute he could only have charged the estate with the three-quarters; and I particularly direct your Lordships' attention to these words of Lord Adam—"I have no doubt that the effect of the granting of a bond of annual rent is not to charge the estate with the amount on which the bond is calculated, but only with the sums as they periodically become due. A person in right of such a bond could take no proceedings so as to affect the fee or rents of the estate for anything more. It is in the power of the heir of entail, when he has obtained authority to charge the estate, to go into the market with the bond of annual rent, and to sell it at any price he can get. He is not bound to sell it for the amount on which the annual rent has been calculated. If money is cheap at the time he will probably get a larger sum for the bond than the amount of the expenditure; if money is dear, he may get less. The sum, in short, which he gets for it may not be the same as the sum on which the bond is calculated, and in no sense does the bond of annual rent charge the estate with the amount of the improvement expenditure."

I think that judgment really rules this case, because although the improvements are not the same the question is really the same. It seems to me that the sum here of £2120 could never in the proper sense of the statute have been made to affect the fee of the estate. A bond of annual rent calculated upon that sum could be made to affect the fee of the estate from time to time as the periodical payments became due; whereas, on the other hand, the three-quarters for which he could grant a bond and disposition in security could be made to affect the fee of the estate as a capital sum.

But considerations of justice all point the same way. It has already been pointed out in many of the cases what was the true view of the distinction—it was long before 1875, because it began with the provisions of the Rutherfurd Act—between granting a bond of annual rent calculated upon the full sum and granting a bond and disposition in security for two-thirds of the amount (as fixed by the Rutherfurd Act but afterwards increased to three-quarters by subsequent legislation). And the reason of the distinction is a very simple one. If the man chose to pay off the burden by means of an annual rent—that is, by a terminable rent charge—unless he died the next day he himself had to pay out of his income, which otherwise went into his own pocket, a large portion of the capital; whereas if he raised the money by way of bond and disposition in security he never needed to pay a penny of the capital; all he had to do was to keep the interest paid, and leave the whole of the capital to be taken out of the interest of his heirs. Accordingly it seemed to be a mere matter of justice that he should not be allowed to charge the estate with the full sum for which a bond of annual rent could have been taken. It would certainly be a very peculiar result if by the accident of a sale going on at the same time you could put an end to that distinction.

And in another way, if the argument for Lord Kinnoull were right, you could really, to use an old expression, drive a coach and four through the provisions of the Act of Parliament, because all you would need to do in order to get payment in full would be at the same time to sell a portion of the estate. No doubt in the case of some estates the selling of a portion might not be easy, but many estates possess feuing facilities, and in a great number of cases all the heir of entail would need to do in order to put the whole of the money he had spent on improvement into his pocket would be to start a petition for authority to sell a portion of the estate of that value.

This is perhaps not conclusive, but if correct it points strongly to the condition of affairs such a result would lead to. In this very case the possible effect of it comes out very clearly. Supposing there had not been a petition for the sale of Dupplin going on at the moment, what would have been the result? Lord Kinnoull would have had to charge his estates with the whole sum by way of annual rent or with only three-quarters by way of bond and disposition in security. Then when the sale came there could be no question. There is no way of getting rid of a bond of annual rent by tabling the capital upon which the bond was originally calculated. You cannot buy the grantee out in that way, whereas you can buy him out in that way if he is in possession of a bond and disposition in security. And we must look at the result of Lord Kinnoull's contention. If he is right, he takes out of the price of Dupplin the whole of this £2120, and the heirs of entail of Balhousie are left to bear the bonds which still exist over that estate. On the other hand, if the contention of the curator is right, the sum which is represented by the difference between £2120 and £1590 will be available to pay off debts on the estate of Balhousie.

Accordingly I am of opinion that the contention of the curator is the right one, and that Lord Kinnoull cannot be authorised to repay himself more than three-quarters of the sum expended by him.

LORD MACKENZIE—This question arises in a petition to sell the entailed lands and estate of Dupplin, Newton, and others by private bargain for payment of debt.

The petition is presented under section 9 of 31 and 32 Vict. cap. 84, which provides—". . . [*quotes, v. sup.*] . . ." The Lord Ordinary has found that the petitioner is entitled to payment out of the price of the lands and estate of Dupplin and Newton of Condie and others, of the sum of £2075, being the amount of the im-

provement expenditure and relative costs, amounting in all to the sum of £2120, which the petitioner was authorised to charge on the entailed lands and estate of Balhousie and others by interlocutor dated 18th March 1911, pronounced in the application by him for the purpose of obtaining such authority, under deduction of £45, being the estimated amount of the cost of obtaining the loan and granting security therefor, which has not been and will not be incurred.

The effect of this is that the petitioner will obtain repayment of the whole sum expended, *i.e.*, the amount which he would have been entitled to charge under the statutes by bond of annual rent, and not merely three-fourths, which is all he would have been allowed to charge by bond and disposition in security. The sum involved is thus about £500. A preliminary point was raised that, as the petition to charge was subsequent to the petition to sell, the proposed application of this part of the price was incompetent. This is not, in my opinion, well founded. The price realised for the lands sold—£249,000—is not sufficient to pay off the debt which affected the whole properties, sold and unsold, and deeds of restriction have been granted as regards the debts not discharged.

If the argument for the reclaimer, the curator *ad litem* to Lord Hay of Kinfauns, the next heir, is sound, then the sum of £500 will be applied towards further reducing the debt which still affects the lands destined to him under the entail. If the petitioner's contention, which has been given effect to by the Lord Ordinary, prevails, then debt to the amount of £500 will not be paid, and will thus continue to affect the unsold portion of the entailed estate.

The position of an heir of entail in possession with reference to charging the estate by way of bond and disposition in security or bond of annual rent, is explained by Lord Adam in *Leith* v. *Leith*, July 18, 1888, 15 R. 944, 25 S.L.R. 671. A bond and disposition in security is a permanent charge of a capital sum upon the fee of the entailed estate. Each heir in possession pays out of the rents an annual sum in respect of the debt, but this is for interest only, and does not reduce the capital amount. In the case of a bond of annual rent each heir in possession pays an annual sum in respect of the debt, but this is so calculated as to include not only the termly interest, but also a portion of the capital. The debt is thus worked off by instalments.

This is the reason why, under the entail statutes, an heir of entail in possession is allowed only to charge by way of bond and disposition in security a proportion of the amount which he may charge by bond of annual rent. Under the Rutherfurd Act, section 13, the bond of annual rent might have been for three-fourths of the sums expended; and, under section 18, the bond and disposition in security might have been for two-thirds of the sum on which the amount of the bond of annual rent would have been calculated. Under the 1875 Act, section 8, the bond of annual rent might have been for the whole, and the bond and disposition in security for two-thirds of the sum on which the bond of annual rent, if granted, would be calculated. Now under section 6 (1) of the 1882 Act, the bond and disposition in security may be for three-fourths. Section 7 of the same Act provides for the amount of improvement expenditure chargeable on the entailed estate being deducted from the valuation in disentail proceedings. The theory of this legislation is plain. It is that each successive heir of entail shall, during his period of possession, discharge a certain amount of the debt out of the income of the estate which he draws, and that then when he has done this, but not until he has done it, he can take the necessary steps, by putting on a bond and disposition in security, for making the balance of the debt a permanent charge descending as a burden upon his successors in the entailed estate. This view is confirmed by the interpretation put upon section 11 of the 1875 Act in the case of *Leith*.

A bond and disposition affects the fee of the estate. It contains a power of sale and may be the ground for adjudication. A bond of annual rent under section 13 of the Rutherfurd Act bound the granter and the succeeding heirs of tailzie to make payment of an annual rent. The 17th section of the same Act provided that so long as any entailed estate remained subject to the entail no bond of annual rent should be made the ground of adjudication or eviction of the estate or any part thereof. The language of section 8 of the 1875 Act is that it shall be lawful for an heir of entail in possession with the authority of the Court to charge the fee and rents of the estate (other than the mansion-house, &c.) with a bond of annual rent for twenty-five years, such annual rent to be at a rate not exceeding £7, 2s. for every £100 authorised to be borrowed. I apprehend that such a bond of annual rent would not be the ground of adjudication any more than a similar bond granted under the Rutherfurd Act. It contains no power of sale, and the only way to enforce its provisions would be by the forms of diligence appropriate to recovery of payment out of the rents. Though the fee of the estate is mentioned, this in my opinion was in order that the bond might be constituted a real burden on the estate.

The words of section 9 of the 1868 Act, the section under which the petition is presented, are "debt affecting, or that may be made to affect, the fee of the estate." It provides that "such debt" may be paid in whole or in part out of the price. For the reasons already indicated, I think that only three-fourths of this improvement expenditure might be made to affect the fee of the estate. The remaining one-fourth was payable by the petitioner or his successor in the entailed estate. Suppose there had been no sale, he would have had to pay this one-fourth. If he had died before charging the estate he could only have bequeathed a right to charge three-fourths by bond and disposition in security, although the whole benefit of the expendi-

ture would have enured to his successors in the entailed estate. In the same way, when his connection with the estate is ended by the sale, I think the price must go to relieve succeeding heirs in the unsold portion of the entailed estate of one-fourth of the capital of the debt. The rents of the portion of the entailed estate which is unsold and which the petitioner will continue to draw are as liable for his obligations as the rents of the portions sold would have been. These obligations include the reduction of the improvement expenditure debt by one-fourth.

The case of *Pringle*, June 28, 1892, 19 R. 926, 29 S.L.R. 820, was cited as contrary to this view. There it was held that the whole sum remaining unpaid at the date of the execution of the disentail should be deducted from the valuation of the estate in calculating the values of the expectancies of the next heirs. That decision, however, did not turn on a construction of the statutes but on a point of substance. If the heir whose expectancy was being valued succeeded, the value of his succession would be the whole estate minus the whole debt unpaid. Here the question is, What do the statutes authorise the heir in possession to do?

I am of opinion that the petitioner is only entitled to payment of three-fourths of £2075, and that one-fourth should be applied in extinction of debt still remaining unpaid.

LORD KINNEAR and LORD JOHNSTON concurred with the Lord President.

The Court pronounced this interlocutor—

". . . Find that the petitioner is only entitled to payment of three-fourth parts thereof in full of his claims for improvement expenditure and relative costs mentioned in the interlocutor reclaimed against, and recal the said interlocutor reclaimed against in so far as it finds the petitioner entitled to payment of any further or other sum out of the purchase price of Dupplin, Newton of Condie, and others, in respect of said improvement expenditure and relative costs; and with this finding remit the cause back to the Lord Ordinary to proceed as accords. . . ."

Counsel for Petitioner (Respondent)—Sandeman, K.C.—Chree. Agents—Dundas & Wilson, C.S.

Counsel for Respondent (Reclaimer)—Blackburn, K.C.—Maitland. Agents—W. & F. Haldane, W.S.

Monday, July 17.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

SALAMAN (TOD'S TRUSTEE) *v.* TOD AND OTHERS.

Bankruptcy—Foreign—Jurisdiction—Spes successionis — Adjudication of Bankruptcy in England — "Property" of Bankrupt—Bankruptcy Act 1883 (46 *and* 47 *Vict. cap.* 52), *secs.* 44, 54, *and* 168.

An English trustee in bankruptcy brought an action of declarator in Scotland to have it declared that a *spes successionis* which the bankrupt had under a settlement had vested in him as trustee.

Held that the Court had jurisdiction to grant the decree sought—that the *spes successionis* being an interest assignable by the bankrupt was "property" within the meaning of section 168 of the Bankruptcy Act 1883, and that it had vested in the trustee.

The Bankruptcy Act 1883 (46 and 47 Vict. c. 52) enacts—Section 2—"This Act shall not, except so far as is expressly provided, extend to Scotland or Ireland."

Section 44—"The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, . . . shall comprise the following particulars—(1) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and (2) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice."

Section 54—"(1) . . . Immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee. . . . (4) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly."

Section 168—"(1) In this Act, unless the context otherwise requires—. . . 'Property' includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

On 26th October 1910 Frederick Seymour Salaman, chartered accountant, London, the trustee in bankruptcy, conform to Order