LORD KINNEAR—I agree.

LORD MACKENZIE—I am of the same opinion. I think that, in the circumstances stated here, we are quite justified in drawing the inference and coming to the conclusion which your Lordship proposes.

LORD JOHNSTON was sitting in the Lands Valuation Appeal Court.

The Court answered in the affirmative the first question, and the second question, branch (*a*).

Counsel for the First and Fourth Parties—Chisholm, K.C.—D. Anderson. Agent—Lewis Jack, Solicitor.

Counsel for the Second Parties—Macmillan, K.C.—C. H. Brown. Agents—Maclachlan & Mackenzie, S.S.C.

Counsel for the Third Parties—Chree, K.C.—A. R. Brown. Agents—Gordon, Falconer, & Fairweather, W.S.

Saturday, November 16.

FIRST DIVISION.

[Lord Cullen, Ordinary.

SHEPHERD'S EXECUTORS *v.* MACKENZIE AND OTHERS.

Entail—Improvement Expenditure—Obligation by Heir in Possession to Repay Cost of Improvements Executed by Lessee—Action by Lessee's Executors against Succeeding Heir—Competency—Extent of Charge—Date at which Improvements Fall to be Valued—Interest—Entail (Amendment) (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 28), *secs.* 1 *and* 2.

A, an heir of entail in possession, granted a lease of the mansion-house, &c., to B, who undertook to execute a variety of improvements thereon, A binding himself and the succeeding heirs, and *subsidiarie* his own heirs and executors, to repay as at his (A's) death three-fourths of the certified cost thereof. By a subsequent agreement the limit of improvement expenditure for which A was to be liable was fixed at £6700. On the expiry of the lease B's executors brought an action against, *inter alia*, C, the succeeding heir (who alone lodged defences), to enforce A's obligation to repay, as having devolved on him in virtue of section 1 of the Entail Amendment (Scotland) Act 1878. C pleaded that the action, so far as laid against him, was incompetent.

Held (1) that the action was competent; that the limit of £6700 effeired to the statutory improvements only, and did not fall to be divided proportionally between statutory and non-statutory improvements, and that, accordingly, C was bound to repay the certified cost thereof as at A's death, that being the date when the obligation to repay became prestable; but (2) that the pursuers were only entitled to decree for three-fourths of that sum, that being the extent to which A himself could have charged the estate.

Held further that the pursuers were not entitled to interest from the date of citation, but from the date of decree only, C not being in *mora* till the amount due had been proved against him.

Entail—Process—Improvement Expenditure—Agreement by Heir to Repay Cost of Improvements Executed by Lessee—Petition to Charge at Instance of Lessee's Executors—Competency—Entail Amendment (Scotland) Act 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 11—*Entail Amendment (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 28), *sec.* 1.

A, an heir of entail who had granted a lease of the mansion-house to B, arranged with the latter that he (B) should execute a variety of improvements, A binding himself and the succeeding heirs of entail to repay to B as at his (A's) death three-fourths of the certified cost thereof. In security of the obligation A expressly bequeathed and assigned to B and his executors the aforesaid sum. On A's death B's executors presented a petition under section 11 of the Entail Amendment (Scotland) Act 1875 for authority to charge the estate with this sum. The succeeding heir of entail objected to the competency of the application.

Held that, as the petitioners were not, and did not represent, an heir of entail who had executed or paid for improvements, they were not entitled to the charge craved, and petition *dismissed* as incompetent.

The Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. cap. 61), section 11, enacts—"Where any heir of entail in possession of an estate in Scotland . . . shall have executed improvements on such estate, of the nature contemplated by this or any other Entail Act, as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the Court, praying the Court, after such inquiry as to the Court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate by the deceased heir of entail; and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner, or of any other person such petitioner may think fit, a bond and disposition in security over the said estate, other than the mansion-house, offices, and policies thereof, or over some

sufficient portion of the said estate other than as aforesaid, for the amount with which the deceased heir of entail himself might, under the provisions of this Act, have charged the estate . . . provided always that the said sums shall only be deemed to be a debt against the entailed estate and the heirs of entail therein, and shall only bear interest from and after the date of the decree of the Court pronounced in such petition."

The Entail Amendment (Scotland) Act 1878 (41 and 42 Vict. cap. 28) enacts—Section 1—"All obligations undertaken, whether prior or subsequent to the passing of this Act, by an institute or heir in possession of an entailed estate in Scotland, in any lease granted by him as proprietor of such estate, or in any agreement with reference to such lease, for the execution by the proprietor, or with reference to the execution by the tenant, of any improvement of the description contained in the third section of the Entail Amendment (Scotland) Act 1875, shall, in case of his death after the passing of this Act, and before complete fulfilment of such obligations, and to the extent to which, if he had himself made and paid for said improvements and had survived till payment is actually made, he would have been entitled to charge them upon the estate (if the estate had been an entailed estate under the said Act), devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors or other personal representatives of such obligations, so far as unfulfilled, and to repay to such executors, or other personal representatives, any sums of money which they may be called upon to pay, and may have paid in virtue of such obligations: Provided that this enactment shall not apply to any case in which the granter of the obligation has in express terms, either in the obligation itself or in any separate writing, declared his intention to impose the obligation upon his executors to the relief of his heirs of entail." Section 2—"The heir succeeding to such institute or heir in possession as aforesaid, shall, in like manner as above provided, be bound, unless otherwise expressly directed by him, to relieve to the extent aforesaid his executors or other personal representatives of all liabilities which he may have undertaken in any contracts or agreements for or with reference to the execution of improvements of the description aforesaid on the mansion-house and offices of the entailed estate, or any other parts of the estate not under lease, and to repay to the extent aforesaid to such executors or other personal representatives any sums of money which they may be called upon to pay and may have paid in virtue of such contracts or agreements."

On February 15, 1910, Mrs E. K. Shepherd and others, executors of the late J. A. Shepherd of Bombay and London, latterly residing at Delvine, Perthshire, *petitioners*, presented a petition under the Entail Amendment (Scotland) Acts, 1875 and 1878, and the Entail (Scotland) Act 1882, for authority to charge the estate of Delvine with improvements expenditure. Answers were lodged by Sir Robert Smyth Muir Mackenzie of Delvine, Bart., the heir of entail then in possession of the estate, *respondent*, who objected to the competency of the application.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 19th March 1910 dismissed the petition.

Opinion.—"The late Sir Alexander Mackenzie, heir of entail in possession of the lands and barony of Delvine and others, let the mansion-house, &c., of Delvine to Joseph Augustus Shepherd from 15th January 1901 until—in the event which happened—Sir Alexander's death.

"By an agreement dated 7th March 1901, entered into between Sir Alexander and Mr Shepherd, the latter undertook to execute a variety of improvements. Sir Alexander, on the other hand, bound 'himself and the heirs of entail succeeding to him in the said estate of Delvine, and *subsidiarie* his heirs, executors, and representatives whomsoever,' to repay to Mr Shepherd the cost of the improvements to a certain extent, the extent being dependent on the period of Sir Alexander's survivance and the corresponding endurance of the lease. In the event (which happened) of Sir Alexander dying between the expiry of five years and the expiry of ten years from 15th January 1901, the obligation was to pay three-fourths of the cost.

"The scheme of the agreement thus was (1) to enable Mr Shepherd to improve the subjects for his own benefit as tenant, and (2) to provide repayment to him of what may be called the unexhausted value of the improvements at the expiry of his lease, on a conventional scale. The obligation for repayment only became prestable on Sir Alexander's death, and by the terms of the agreement it was conceived as an obligation prestable primarily against the succeeding heirs of entail. It would appear to be an obligation of the class to which the first section of the Entail Amendment Act of 1878 applies, subject to the conditions of that section.

"In addition to the obligation for repayment above mentioned, the agreement contained the following clause:—'4. Without prejudice to the foregoing obligation, but in corroboration and security thereof, and to ensure fulfilment of the same by the heirs of entail succeeding to him in the said entailed estate of Delvine, Sir Alexander expressly bequeaths, conveys, and assigns to Mr Shepherd, and his executors and assignees whomsoever, the amount to be repaid as aforesaid of the cost of the said improvements to be executed by Mr Shepherd.' This clause is apparently intended to be an exercise of the power of bequest which the eleventh section of the Entail Amendment Act of 1875 confers on an heir of entail in possession of an entailed estate who 'shall have executed improvements on such estate of the nature contemplated by this or any other entail Act, as the case may be, and shall have died after the passing of this Act without

having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements.' Sir Alexander, however, did not himself execute any such improvements, nor did he expend any sums thereon, and the obligation for repayment to Mr Shepherd which became prestable on his death devolved on the succeeding heirs of entail in relief of Sir Alexander's executors.

"By a subsequent agreement between Sir Alexander and Mr Shepherd, dated in November 1901, it was agreed that the total amount of Mr Shepherd's expenditure falling under the obligation given by Sir Alexander should be £6700.

"Sir Alexander died on 25th June 1909. Mr Shepherd predeceased him. The present petition is presented by the trustees and executors of Mr Shepherd, and the object of it is to obtain a charge on the entailed estate for £5025, being three-fourths of the sum of £6700 above mentioned. The authority assigned for it by the petitioners is the eleventh section of the 1875 Act already referred to relative to the bequest by an heir of entail in possession who has executed improvements of the sums expended by him. The petition is opposed by the present heir of entail in possession who succeeded Sir Alexander. He maintains that the petition is incompetent, and that any recourse which the petitioners may have is upon the devolved obligation contained in the agreement, and not by way of a petition to charge.

"I am of opinion that the respondent's contention is well founded. Sir Alexander never executed or expended money on improvements. What he did was to enter into a bargain with his tenant that the latter should execute improvements, and should, on the expiry of the lease at Sir Alexander's death, have right to repayment of a certain proportion of the cost primarily from the succeeding heirs of entail and *subsidiarie* from Sir Alexander's executors. The obligation for repayment is not yet fulfilled, and so far as the improvements made were of the kind contemplated by the Entail Acts, and such as could have been charged by Sir Alexander had he himself made them, the obligation would appear to have devolved on the respondent by virtue of the Act of 1878. The petitioners' argument seems to involve that they have two concurrent rights—(1) to enforce the unfulfilled obligation against the respondent as having devolved on him under the 1878 Act; and (2) to treat the expenditure made by Mr Shepherd as if it had been actually made by Sir Alexander, and to obtain a charge for it on that footing by virtue of the eleventh section of the Act of 1875. These alleged rights seem to me to be contradictory. I am unable to see that the petitioners are entitled to a charge for the cost of improvements which Sir Alexander did not make and never paid for, and the liability for which has now devolved on the respondent. I am accordingly of opinion that the petition falls to be dismissed."

Mr Shepherd's executors having reclaimed, the Court on 24th May 1910 sisted the petition in order that the petitioners, if so advised, might take proceedings for the enforcement of the obligation which they alleged had devolved on Sir Robert in virtue of section 1 of the Entail Amendment (Scotland) Act 1878. Thereafter on 28th May 1910 Mr Shepherd's executors, *pursuers*, brought this action against Sir Robert, and also against Sir Alexander's executors, for any interest they might have, *defenders*, in which they sought to have it declared that Sir Robert as heir of entail in possession was bound to fulfil the obligations undertaken by the late Sir Alexander when heir in possession, with regard to the execution of improvements by the late J. A. Shepherd, that such improvements had been executed to the maximum amount, viz., £6700, and that £5025, being three-fourths thereof, was the amount which the late Sir Alexander might have charged, and to obtain decree against Sir Robert for the said sum of £5025.

In defence Sir Robert, *inter alia*, pleaded —"(1) The action so far as directed against this defender is incompetent. (2) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed, with expenses. (3) On a sound construction of the Entail (Scotland) Act of 1878, the pursuer has no right of action against this defender and the succeeding heirs of entail for the sums sued for. (5) The defender is not liable in the sum sued for, in respect that the pursuers could not have maintained an action therefor against Sir Alexander Mackenzie if he had survived."

The *circumstances* in which the action was raised are set forth in the opinion (*infra*) of LORD CULLEN (Ordinary), who on 3rd January 1911 repelled the defender's first, third, and fifth pleas-in-law, sustained his second plea in so far as it related to the first declaratory conclusion of the summons, which he dismissed, and *quoad ultra* continued the cause.

Opinion.—"By lease, dated 7th March 1901, the late Sir Alexander Mackenzie, heir of entail in possession of the lands and barony of Delvine and others, let the mansion-house, &c., on the estate to Joseph Augustus Shepherd from 15th January 1901 until—in the event which happened—Sir Alexander's death.

"By an agreement of even date with the lease entered into between Sir Alexander and Mr Shepherd, the latter undertook to execute a variety of improvements. Sir Alexander, on the other hand, bound 'himself and the heirs of entail succeeding to him in the said estate of Delvine, and *subsidiarie* his heirs, executors, and representatives whomsoever, to repay to Mr Shepherd, and his executors and assignees whomsoever, but only to the extent after mentioned, the cost of execution of the said improvements to be executed by Mr Shepherd, as such costs shall be certified as aforesaid, and that at the date of Sir

Alexander's death if he shall die before the expiry of ten years from and after the 15th day of January 1901, and at the expiry of the said ten years if he shall survive such ten years, but only to the following extent —that is to say, if Sir Alexander shall die before the expiry of five years from and after the 15th day of January 1901, then to the full extent of the cost certified as aforesaid, and if Sir Alexander shall die between the expiry of such five years and the expiry of ten years from and after the 15th day of January 1901, then to the extent of three-fourths of the cost certified as aforesaid, and if Sir Alexander shall survive the said ten years then to the extent of one-half of the cost certified as aforesaid.'

"Under this agreement no definite limit of the improvement expenditure to which Sir Alexander's obligation applied was fixed beyond this, that the improvements were to be carried out at the sight and to the satisfaction of a Mr George Mackay, and the cost of execution was to be certified by him.

"By subsequent minute of agreement, dated 8th and 12th November 1901, between the same parties, it was provided 'that notwithstanding the estimated cost of the said improvements, according to plans and specifications submitted by Mr Lake Falconer, architect, Blairgowrie, is shown to be £7393, 0s. 6d., the total amount of the expenditure on the said improvements, for which Sir Alexander and his heirs and his representatives, or his estate, shall have any responsibility under the said agreement and lease, including such repairs as may be necessary to put the premises in proper tenantable condition at Mr Shepherd's entry, shall be £6700, which sum shall be held to be the limit of expenditure for the improvements thereunder, and shall include the alterations to windows already carried out, compensation to tenants in connection with said works, and any extras arising on the contracts, and that any expenditure on improvements beyond said limit, which Mr Shepherd may deem expedient, shall be borne by him without any claim upon Sir Alexander or his estate in respect thereof.'

"Sir Alexander Mackenzie died on 25th June 1909. The proportion of Mr Shepherd's improvement expenditure which falls under the obligation for repayment given by Sir Alexander is in these circumstances three-fourths of £6700. . . .

"The pursuers of the present action are the executors of Mr Shepherd, who has died. They aver that, following on the said agreements, Mr Shepherd expended £9564 on improvements during the lifetime of Sir Alexander, and that these improvements are improvements of the nature contemplated by the Entail Acts.

"The defenders called are (1) Sir Robert Smyth Muir Mackenzie, the heir of entail who succeeded Sir Alexander, and (2) Sir Alexander's executors, for any interest they may have. The conclusions of the summons are operatively directed against Sir Robert Smyth Muir Mackenzie, who alone compears. The object of them, generally stated, is to enforce against Sir Robert, as the heir of entail succeeding Sir Alexander, the obligation of repayment to Mr Shepherd undertaken by Sir Alexander Mackenzie, under the said two agreements, to the extent allowed by the Entail Amendment (Scotland) Act 1878, in the cases falling within its scope. . . . . .

"The first conclusion of the summons is for declarator that the defender Sir Robert S. Muir Mackenzie, as heir of entail aforesaid, is 'bound to fulfil the obligations so far as not already fulfilled,' undertaken by Sir Alexander under the two agreements already mentioned, 'in so far as said obligations refer to the execution of improvements on the said entailed estate of the description contained in the third section of the Entail Amendment (Scotland) Act 1875 and the cost thereof.' This is a faulty conclusion. Sir Robert is not bound by the agreement *per se* to fulfil Sir Alexander's obligation. The Act of 1878 does not, in any view, subject him to liability to fulfil Sir Alexander's obligation under the agreement *in toto*. On the pursuers' view the Act throws on him liability to a limited extent defined in the Act. But this conclusion does not import the statutory limit.

"The second conclusion is for declarator that Mr Shepherd spent at least £6700 on the contemplated improvements, and that 'under and in terms of said agreement and minute of agreement the sum of £5025, being three-fourths of said sum of £6700, is the extent to which the said Sir Alexander Muir Mackenzie, if he had himself made and paid for said improvements and had survived till payment was actually made, would have been entitled to charge them upon the estate.'

"A criticism directed by the defender Sir Robert S. Muir Mackenzie to this conclusion is that on a proper construction of the second agreement the amount which Sir Alexander was bound to pay to Mr Shepherd in the event which happened was three-fourths of £6700, viz. £5025, and that the amount with which he could have charged the estate on the hypothesis stated in the conclusion would have been three-fourths of £5025, viz. £3768, 15s. This criticism, for the reasons already stated, appears to me to be sound. It goes, however, only to the *quantum* of the conclusion, and does not entirely displace it.

"The third conclusion is that the defender Sir Robert S. Muir Mackenzie should be ordained to pay to the pursuers the said sum of £5025, with interest. Assuming the pursuers' case to be otherwise well founded, the defenders' criticism on the second conclusion applies here also to the effect of reducing the amount claimable from Sir Robert to £3768, 15s.

"The main question, however, arising at the present stage of the case is whether, assuming the truth of the pursuers' averments, the Act of 1878 gives the pursuers a ground of action against Sir Robert for the £3768, 15s. or £5025, as the case may be. The pursuers' debtors under the agree-

ments are Sir Alexander's executors. Sir Alexander, under the agreements, professed to conventionally bind the heirs of entail succeeding him; but it is conceded that he had no power to do so, and that, in the result, his obligation is, apart from the Act, one binding himself and his representatives only.

"This being so, the pursuers appeal to section 1 of the 1878 Act, and say that, to the extent permitted by the Act (not correctly reflected in their conclusions according to my view), Sir Alexander's obligation under the agreements has 'devolved upon' Sir Robert.

"*Prima facie* the Act would seem to apply, this being a case of an obligation undertaken by an heir of entail in possession in an agreement with reference to a lease granted by him with reference to the execution by the tenant of improvements alleged to be of the description contained in the third section of the 1875 Act, and where the heir in possession so undertaking has died before 'complete fulfilment of such obligation.' The words of section 1 are perfectly general, and the obligation undertaken by Sir Alexander seems *prima facie* to answer to them.

"The defender, however, advances a variety of grounds for displacing the application of section 1. He also contends that, *esto* section 1 otherwise applies to the case, it does not give the pursuers the direct right of action against him in which they now insist.

"In the first place, the defenders say that section 1 does not apply because the subject-matter of the agreements between Sir Alexander and Mr Shepherd was the executing of improvements on the mansion-house. He points to section 2, which specially mentions the mansion-house. Now the scheme of section 1 is to deal with obligations undertaken to tenants under leases, or agreements relative to leases, while the scheme of section 2 is to deal with liabilities for improvements undertaken with regard to subjects not leased. The mansion is, under section 2, specifically mentioned as a case falling under it. The reason of this probably was to make it quite clear, in view of certain decisions, that section 2 applied to an unlet mansion-house as well as to 'any other parts of the estate not under lease.' I cannot see anything in section 2 sufficient to limit the general terms of section 1 by importing into it an exception of the case of a leased mansion-house and an obligation undertaken by the heir in possession granting the lease with reference to improvements which the tenant under the lease has undertaken. Improvements on a mansion-house are one of the kinds of improvements described in the third section of the Act of 1875 referred to as a standard in the first section of the Act of 1878.

"In the second place, the defender says that inasmuch as the obligation undertaken by Sir Alexander was, in the event which happened, an obligation prestable only at his death, it was not an obligation of the kind referred to in section 1 of the 1878 Act. I have difficulty in appreciating the *ratio* of this objection. The obligation undertaken by Sir Alexander, taken as a whole, was one which might or might not become prestable during his life. The object of the Act is to throw on the succeeding heirs of entail liability for the same amount as the preceding heir undertaking the obligation contemplated by the Act could have charged on the estate if, instead of undertaking the obligation, he had himself made and paid for the improvements to which the obligation applies. Now this object and the generality of the terms of section 1 seem to include the case of an obligation prestable at the death of the granter just as much as that of an obligation prestable during his life. In either case the succeeding heir has to bear only the proportion of the improvement expenditure falling under the obligation which the preceding heir could have charged if he had made and paid for it himself.

"In the third place, the defender says that section 1 only applies to obligations undertaken in or given with reference to leases of which the currency extends beyond the life of the granter, so that after his death the tenant and the succeeding heir are related to one another under a continuing contract. He thus excludes the case of an ordinary agricultural lease, the ish of which is contemporaneous with the death of the granter or at any time prior thereto. I am, however, unable to find this qualification in the Act.

"In the fourth place, the defender says that section 1 does not refer to obligations to pay money to a tenant, as distinguished from obligations *ad facta præstanda*, such as obligations to erect buildings or fencing. Now section 1 includes (1) the case of an obligation for the execution by the proprietor of improvements, and (2) the case of an obligation by the proprietor 'with reference to the execution by the tenant' of improvements. In the latter case the normal form of the proprietor's obligation would be to reimburse the tenant for the improvements executed by him. It does not, therefore, seem to me that this objection is well founded. If the proprietor agrees to so reimburse the tenant, his obligation, under the conditions and limitations prescribed by the Act, seems to be one which it is in consonance with the object of the Act to devolve on the succeeding heir, who is thereby only burdened with such part of the improvement expenditure to which the obligation applies, as the preceding heir could have charged on the estate had he made and paid for it himself.

"The defender further contends that, *esto* Sir Alexander's obligation is one of the class contemplated by section 1, the pursuers are nevertheless not entitled to the direct right of action against him on which they here insist.

"What the Act says is that the obligations of the heir in possession shall to the statutory effect 'devolve upon the heirs

succeeding to the estate after him, who shall in their order be bound to relieve his executors or other personal representatives of such obligations, so far as unfulfilled, &c.'

"The defender does not say that the statutory devolution imports only an obligation of relief towards the executors in all cases to which the Act refers, without giving the tenant a right of action against the succeeding heir. He concedes that in cases where the devolved obligation is an obligation *ad factum præstandum* under a continuing lease, such as an obligation to erect farm buildings, the meaning of the Act in devolving the obligation on the succeeding heir is that the tenant shall have a direct right to demand fulfilment from him, instead of being confined to an action against the executors of the preceding heir, who have no relation to the lands and no power to enter on them. The defender, however, says that when it is a question of paying money to the tenant, the obligation to pay does not 'devolve' on the succeeding heir in the same way as an obligation *ad factum præstandum*, and that in such a case the succeeding heir is not placed by the statute under any relation of liability towards the tenant, but only towards the executors of the deceased heir, whom he is bound to relieve. I am unable to find that this distinction is made by the terms of the Act. In all the cases to which it refers the obligation 'devolves upon' the succeeding heir. If, as the defender concedes, the devolution makes the succeeding heir the direct debtor of the tenant on one case—the obligation *ad factum præstandum*—I do not see how he avoids a similar liability in the other case—that of money payment. As already pointed out, obligation to pay money to the tenant seems to be the normal form of obligation by the proprietor in the cases (expressly contemplated in section 1) of an agreement with reference to improvements executed by the tenant. The object of section 1 of the Act in all the cases within its scope is the same—that is to say, to burden the succeeding heir with improvement expenditure for which the preceding heir obliged himself to a tenant to the same extent as if the preceding heir had made and paid for the improvements himself. The object being the same, I do not think that the Act expresses a distinction in the form of the succeeding heir's liability as between the case of an obligation *ad factum præstandum* and the case of an obligation to pay money to the tenant for improvements executed by him.

"Following these views I shall repel the first, third, and fifth pleas-in-law for the defender. I shall sustain his second plea-in-law so far as it is directed to the first declaratory conclusion of the summons. This second plea is also directed, *inter alia*, to the *pluris petitio* under the other conclusions, but as the facts relating to the making of the alleged expenditure and the nature of it have yet to be ascertained, it will be more convenient not to deal with this aspect of the plea at the present stage."

Thereafter on 18th January 1911 his Lordship remitted to Mr Ralston, Philipstoun House, Winchburgh, to report on the said improvements and the amounts expended thereon. On 14th March 1911 Mr Ralston lodged a detailed report in which he, *inter alia*, stated—"After fully considering the whole matter, the reporter is of opinion—

"(1) That the improvements are of the description contemplated by the Entail Amendment (Scotland) Act 1875, if they had been necessary and had been carried out on a reasonable and moderate scale.

"(2-3) The reporter is also of opinion that the expenditure was of a substantial nature and beneficial to the estate, and properly made by the late Mr Joseph Augustus Shepherd in said improvements, but only to the extent, as at February 1911, as follows—

(1) Sanitary improvements	£1200 0 0
(2) Water supply . . .	855 0 0
(3) Stables, &c. . . .	650 0 0
(4) Gardens and kennels .	550 0 0
(5) Electric Light . . .	800 0 0
	£4055 0 0

and that an heir of entail who had himself made and paid for said improvements would have been entitled to charge that amount as for improvements, to the extent of three-fourths thereof, under the Entail Acts, being £3041, 5s.

"The great bulk of the work carried out at Delvine was unnecessary and extravagant, and outwith the powers of an heir of entail."

Appended to the report was a statement in tabular form from which it appeared that the value of the improvements when carried out, and when Sir Alexander died, were as follows:—

	Expenditure	Improvements when works carried out	Improvements at 25th June 1909, when Sir Alex. Mackenzie died
1. Sanitary improvements, &c., at Delvine House . . .	£3,076 10 4	£1,400 0 0	£1,250 0 0
2. Delvine water supply	1,282 4 0	1,282 0 0	962 0 0
3. Partial re-building and modernising of Delvine stables . .	2,522 0 3	650 0 0	650 0 0
4. Renewals and improvements at gardens and kennels . .	1,456 10 0	550 0 0	550 0 0
5. Electric lighting installation	1,709 5 2	1,400 0 0	955 0 0
	£10,046 9 9	£5,282 0 0	£4,367 0 0
	Amount agreed to be the limit of expenditure, £6,700 0 0		
Three-fourths thereof . . .	£5,025 0 0	£3,961 10 0	£3,275 5 0

After hearing parties on the report, his Lordship on 12th September 1911 dismissed the second conclusion of the summons as unnecessary, but under the last conclusion ordained the defenders to pay to the pursuers the sum of £1542 with interest thereon at 5 per cent. from the date of citation till payment.

Opinion—"Mr Ralston, the reporter to whom, of consent of parties, I remitted by my interlocutor of 18th January 1911, has now returned his report, and various questions as to the rights and obligations of parties on the basis of it formed the subject of a recent discussion.

"The first of these relates to the electric light installation. The defenders take the objection that there is no certificate of the cost by the man of skill appointed under the agreement of 7th January 1901. . . .

"As the pursuers are suing on a devolution of Sir Alexander's obligation, it seems to me that this branch of the expenditure must be left out of account, in respect that Sir Alexander's obligation related only to the cost of execution, as duly certified in terms of the contract. On this footing the total of the certified cost of Mr Shepherd's operations was £8337. Sir Alexander's obligation, in the event which happened, was to pay three-fourths of £6700 of this, viz., £5025, as at the date of his death.

"Sir Alexander's obligation was not conditioned on the improvements being of such a nature as to found a right to charge the estate under the Entail Acts had he made them himself. The pursuers are suing upon a statutory devolution of Sir Alexander's obligation on the succeeding heir, not *simpliciter*, but only so far as the obligation relates to 'any improvements of the description contained in the 3rd section of the Entail Amendment (Scotland) Act, 1875,' and only 'to the extent to which, if he had himself made and paid for said improvements and had survived till payment is actually made, he would have been entitled to charge them upon the estate.' According to Mr Ralston's report, the expenditure by Mr Shepherd (excluding the electric light) was of the class falling within the 3rd section of the 1875 Act to the value of £3882. The difference between this sum and the foresaid total of £8337 (£4455) was for expenditure of a kind outwith that section, and the succeeding heir incurs no liability in relation to it. But Sir Alexander's obligation for payment related to it in part. It was to pay £6700 —or three-fourths or one-half thereof—of the cost of the whole work generally, whether of the kind falling within that section or not. In order, therefore, to ascertain how far his obligation related to expenditure on improvements of the statutory class, it seems to me that the £6700 (wholly or partly) must be regarded as having been payable in respect of both classes of improvements, and divided proportionally between the £3882 of statutory improvements and the £4455 of non-statutory improvements. This brings out £3120 as the part of the £6700 ascribable to the statutory improvements, three-fourths of which is £2340. Liability for this amount has devolved on the defender to the extent to which Sir Alexander, 'if he had himself made and paid for said improvements and had survived till payment is actually made, would have been entitled to charge them on the estate.' Two questions arise here. The first relates to the period which is to be taken as that of the hypothetical charge by Sir Alexander, for in the case of an actual application to charge improvement expenditure the amount of the charge depends on the value of the improvements when the application is made. The alternative periods contended for by the parties respectively were (1) the time when Mr Shepherd's improvements were executed; and (2) the date of Sir Alexander's death, when his obligation for payment became prestable. It appears to me that the latter is the proper period. According to Mr Ralston's report, the statutory improvements (excluding the electric light), which originally were of the value of £3882, were, at Sir Alexander's death, of the value of £3412, and the proportion of this effeiring to the sum of £2340 already mentioned is £2056.

"The next question arises on the words of section 1 of the 1878 Act, 'to the extent to which he would have been entitled to charge them upon the estate.' The pursuers say that this means the whole sum in question, in respect that Sir Alexander might have obtained authority to charge the whole by way of bond of annual rent. The defender says it means only three-fourths as the proportion chargeable by way of bond and disposition in security. I was referred to the recent decision of the First Division in the case of *Earl of Kinnoull*, petitioner, which, it seems to me, is affirmative of the defender's contention. On this footing the amount payable by the defender under the devolved obligation is three-fourths of £2056 or £1542."

The pursuers reclaimed, and argued—(1) The Lord Ordinary was in error in holding that the sum of £6700 effeired partly to statutory and partly to non-statutory improvements, for Sir Alexander clearly intended to burden the succeeding heirs of entail with the whole of the improvement expenditure to the relief of the executors. The sum expended was clearly "improvement expenditure" in the sense of section 3 of the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. cap. 61), and that being so he was entitled to charge it on the estate. (2) His Lordship was also in error in thinking that the pursuers could only recover three-fourths of the certified amount. Sir Alexander's obligation was to pay the whole, provided it did not exceed £6700, and that obligation had now devolved on Sir Robert—Entail Amendment (Scotland) Act 1878 (41 and 42 Vict. cap. 28), sec. 1. (3) The date at which the improvements fell to be valued was that of their execution, and not, as the Lord Ordinary had held, the date of Sir Alexander's death, for he could have charged

them as soon as they were made. (4) The Lord Ordinary had also erred in dismissing the petition as incompetent. The petitioners were Sir Alexander's assignees, and that being so they were entitled to a charge on the estate—Entail Amendment (Scotland) Act 1875, sec. 11.

Argued for respondent—[The respondent took advantage of the reclaiming note to dispute the competency of the action, and argued]—The action was incompetent, for the pursuers had no right of action against the present defender, with whom they had no contract, and *quoad* whom they were in no better position than the tradesmen who had executed the work in question. Their remedy was to sue Sir Alexander's executors—Entail Amendment (Scotland) Act 1878 (*cit. sup.*), sec. 2. Section 1 of that Act, on which the reclaimers relied, was not in point, for it referred to leases other than those of the mansion-house, which this was. No obligation, therefore, had devolved on the present heir which would entitle the pursuers to raise this action. Assuming, however, that the action was competent, the respondent further contended *quoad* the point raised by the reclaimers—(1) The Lord Ordinary had rightly allocated the improvement expenditure proportionally between the statutory and non-statutory improvements, for that was plainly the meaning of the agreement. (2) The Lord Ordinary was also right in holding that only three-fourths of the expenditure could be charged on the estate—*Leith* v. *Leith*, July 18, 1888, 15 R. 944, 25 S.L.R. 671; *Earl of Kinnoull* v. *Haldane*, 1911 S.C. 1279, 48 S.L.R. 969. (3) His Lordship was also right in fixing the value of the improvements at the date of Sir Alexander's death, for that was the date when the obligation for payment became prestable. (4) The petition had been rightly dismissed, for the petitioners did not represent the late heir of entail. Their remedy was to enforce the obligation which had devolved on his successor in the entailed estate.

At advising—

LORD PRESIDENT—[*After narrating the terms of the agreement above referred to*]—The present action is raised by the executors of Mr Shepherd against the present heir of entail in possession for this expenditure. The Lord Ordinary before whom the case depended, by his interlocutor of the 3rd January 1911, disposed of certain preliminary and prejudicial pleas stated by the defender, and he also disposed of the first declaratory conclusion of the pursuer, which he considered too wide. The preliminary pleas of the defender, three in number, which were disposed of, although rather varying in phraseology, really all go practically to the competency of the action. Having disposed of those pleas, the Lord Ordinary granted leave to reclaim. Leave to reclaim was not taken advantage of, and the Lord Ordinary then remitted to a reporter, Mr Ralston, to examine the improvements and to report as to what extent they could have been charged upon the estate if they had been made by an heir in possession himself. Thereafter upon receiving a report from that reporter the Lord Ordinary found that it was unnecessary to dispose of the second declaratory conclusion; but under the petitory conclusion he has granted decree for £1542 sterling, with interest thereon at the rate of 5 per cent. per annum from the date of citation till payment.

In arriving at this figure his Lordship thought that the pactional amount of £6700 should be held as effeiring partly to the non-statutory improvements. I am of opinion that his Lordship was in error in so doing, and for this very simple reason: Sir Alexander by his original agreement undoubtedly meant to impose all that he could legally impose upon the heir of entail to the relief of his executor. When he made the subsequent agreement with Mr Shepherd—that in no case should his whole estate of any sort be subjected to more than £6700—he did not, I think, wish for one moment to alter what he had expressed his *enixa voluntas* to be, namely, to free his executor so far as he could at the expense of the heir of entail. Accordingly the heir of entail in possession has to pay all that he can legally be made to pay, and the executors have to pay the rest; but, taking the whole estate as represented by both executors and heir of entail in possession, it can never be subjected to a demand for more than £6700.

In the next place, I would call your Lordships' attention to this, that inasmuch as this action is at the instance of Mr Shepherd's executors against the heir of entail in possession, with whom of course directly Mr Shepherd never had any contract whatsoever, it is quite clear—and it is common ground between the parties—that the action is really based upon the provisions of the Entail Act of 1878, which provides by the first section that all obligations (I am leaving out some words) in any lease granted by an heir of entail in possession as proprietor of an estate, "or in any agreement with reference to such lease, for the execution by the proprietor, or with reference to the execution by the tenant, of any improvements of the description contained in the third section of the Entail Amendment (Scotland) Act 1875, shall, in the case of his death"—that is, the death of the heir of entail in possession—"after the passing of this Act and before complete fulfilment of such obligations, and to the extent to which if he had himself made and paid for said improvements, and had survived till payment is actually made, he would have been entitled to charge them upon the estate, ... devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors." Now I may say at once that so far as the Lord Ordinary's dealing with the prejudicial pleas in the interlocutor of 3rd January is in question, I am entirely of the same opinion as the Lord Ordinary, and I have really nothing to add to what his Lordship has said in his very careful

note upon the subject. I think this is a case where clearly the Act applies. This is a case where an heir of entail in possession bound himself — and of course his whole estate—for repayment to a tenant in respect of improvements executed by that tenant, and I think that in terms of that Act he gets thereby a good action against the heir of entail in possession, but, of course, only to the extent to which, if he had made the improvements himself and had lived to charge them, he could have charged them.

Now we have a very clear and able report from Mr Ralston, with a very convenient table of how the improvements stand. The table gives in the first column the original expenditure. The original expenditure was altogether £10,000 odd, but, as I have already said, that is pactionally reduced to £6700. Three-fourths of the original £6700 would be £5025, and accordingly it is quite clear that Mr Shepherd's claim—and now his executors' claim—against the massed estates of Sir Alexander is £5025, and that, so far as Sir Alexander could, he, by the obligation expressed, imposed that payment upon the heir of entail in possession. But, of course, he could not impose the whole payment upon the heir of entail in possession, because his power to do so is cut down by the condition in the statute which says that the criterion is to be the extent to which, if he had himself made the improvements and had survived until payment was actually made, he would have been entitled to charge them on the estate.

The first question, therefore, that arises upon that is—What is the date at which we are to see what the improvements are which he could have charged? I think, with the Lord Ordinary, that it is quite clear that the date is when the payment fell to be made, namely, at Sir Alexander's death. Therefore I turn to the column where Mr Ralston gives what the improvements were worth at the time of Sir Alexander's death. I need hardly say that Mr Ralston only puts down what you may call proper entail improvements—that is to say, things that could be charged as being an improvement to the estate in an ordinary petition. That column of Mr Ralston's gives a sum total, as on 25th June 1909, of £4367. But from that there must be struck off a sum of £955, being the cost of the "electric lighting installation," and for this simple reason, that by another clause in the agreement (which I do not read at length) nothing was to be paid for except upon the production of certain certificates, and no certificate for electric lighting has been produced. Accordingly I do not think that Mr Shepherd can ever succeed in claiming from any portion of Sir Alexander's estate anything for the electric light. That, however, does not interfere with Mr Shepherd's right to recover £5025, for this very simple reason, that if you strike off the original cost of the electric lighting installation, namely, £1709, from the total of £10,000, you still have a sum that is greater than the pactional sum of £6700. Accordingly I am of opinion that the executors are entitled to recover, as against the heir of entail in possession, that proportion which they can recover of the third column after deduction of £955. Now the third column is £4367, and if you deduct £955 from that it leaves £3412. But according to our decision in the case of the *Earl of Kinnoull* v. *Haldane* (1911 S.C. 1279) an heir of entail cannot charge the whole of that, he can only charge three-fourths, and therefore the outcome of the whole matter is that the executors are entitled to recover as against the heir of entail in possession three-fourths of £3412, which, as a matter of fact, is £2559, and for that sum I am of opinion that they should have decree.

The other question that remains is the question of interest. The Lord Ordinary has given interest at the rate of 5 per cent. from the date of citation till payment. I do not think this is a case where interest can be given from the date of citation, because the heir of entail in possession is due only what can be, so to speak, proved against him in terms of the Act of Parliament, and until that is settled he cannot be considered in *mora* in not paying, and accordingly I think that this sum of £2559 for which we propose to give decree should bear interest only from the date of the decree and not from the date of citation.

I am therefore of opinion that we should recal the Lord Ordinary's interlocutor in so far as it ordains Sir Robert Mackenzie to pay £1542, and in lieu thereof decern and ordain him to make payment to the pursuers of the sum of £2559, with interest at 5 per cent. from the date of this decree, and that *quoad ultra* we should adhere to the Lord Ordinary's interlocutor.

As regards the petition, I concur with Lord Mackenzie. I think the petition was incompetent. The Lord Ordinary so decided it, and upon the reclaiming note I think we should adhere. I am afraid the pursuer here mistook his remedy, and I think that Sir Robert is entitled to his expenses in the petition in both the Inner and the Outer Houses.

LORD KINNEAR—I agree with your Lordship, and for the reasons which you have given.

LORD MACKENZIE—The Lord Ordinary has dismissed the petition presented by the executors of the late Mr Shepherd for authority to charge the entailed estate of Delvine with a proportion of the sums expended on improvements thereon by him. I agree with the view taken by the Lord Ordinary, and that upon the short ground that the petitioners are not and do not represent an heir of entail who executed or paid for the improvements.

The action at the instance of the executors is in a different position. The agreements which the late Sir Alexander Muir Mackenzie made with Mr Shepherd profess to bind the heirs of entail. No doubt Sir Alexander was not liable during his lifetime, but in my opinion the terms of section 1 of the 1878 Act are sufficient to

make the obligations contained in these agreements devolve upon the heirs of entail. Its terms are general and are not limited by the phraseology of section 2. It is a different question and one with which we are not concerned in the present proceedings, whether the lease granted by Sir Alexander Mackenzie would be struck at by the principles laid down in such cases as those relating to the Queensberry leases. The pursuers therefore have a title to sue the defender Sir Robert Mackenzie, who is called as heir of entail in possession of Delvine. It is not necessary for them to sue Sir Alexander's executors, who in their turn would have to go against the heir of entail. So far, therefore, I take the same view as the Lord Ordinary. Upon the question of the amount which the pursuers are entitled to recover, it appears to me that the figure £6700, the amount specified in the second agreement, is to be read into the third article of the first agreement, and is to be held as a limitation of the amount therein contracted to be paid. The amount to be paid must be regulated by the 1878 Act, section 1, and the Entail Amendment (Scotland) Act 1875, section 3. The cost of the execution of the improvements must further be certified by the man or men of skill appointed in terms of article 2 of the first agreement. An argument was submitted on the concluding words of the second agreement. I think the effect of this clause was merely that Sir Alexander agreed to sanction the plans, specifications, and estimates so that the works might be proceeded with without delay, but that still left it necessary to obtain the certificates required under article 2 of the first agreement as and when the improvements were executed. It is admitted that the cost of the electric lighting was not certified, and therefore this cannot form a charge against the defender. We have a report from Mr Agnew Ralston as to the value at various dates of the improvements so far as falling under the third section of the 1875 Act. In my opinion the date at which their value should be taken is the date of Sir Alexander'e death, when the obligations became prestable. This is the view of the Lord Ordinary. I am, however, unable to agree with the way in which the Lord Ordinary has divided proportionally the £6700 between different classes of improvements. I think there should be taken first of all the figure at which Mr Ralston brings out the amount of the improvements on 25th June 1909, the date of Sir Alexander's death, viz., £4367. From this there must be deducted the amount of the electric lighting installation, £955. This leaves £3412. Sir Alexander bound himself and the heirs of entail succeeding to him to make payment under the agreement in the event which has happened of three-fourths of the £6700 or £5025. The actual amount is therefore less than that sum. Then arises the further question what the extent was to which Sir Alexander might have charged the entailed estate with this sum of £3412. This point is I think settled by the case of the *Earl of Kinnoull*, referred to by the Lord Ordinary, at three-fourths. The obligation therefore devolves upon the defender under section 1 of the 1878 Act to the extent of three-fourths of £3412, viz. £2559.

The Lord Ordinary has held that interest should run from the date of citation. This is, however, different from an ordinary litigation. Looking to the terms of the eleventh section of the 1875 Act, I think interest should only run from the date of decree.

LORD JOHNSTON was absent.

The Court pronounced these interlocutors:—

[In the action]—"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Cullen dated 12th September 1911 . . . recal said interlocutor, but only in so far as it decerns and ordains the defender Sir Robert Smyth Muir Mackenzie to make payment to the pursuers of the sum of £1542 sterling, with interest thereon at the rate of 5 per cent. per annum from the date of citation till payment; in lieu thereof decern and ordain the said defender to make payment to the pursuers of the sum of £2559, with interest thereon at the rate of 5 per cent. per annum from the date hereof until payment: *Quoad ultra* adhere to said interlocutor and decern . . . ."

[In the petition]—"The Lords having considered the reclaiming note for the petitioners against the interlocutor of Lord Cullen dated 19th March 1910 . . . adhere to said interlocutor, refuse the reclaiming note, and decern . . ."

Counsel for Pursuers and Petitioners—Macphail, K.C.—Skelton. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders and Respondents in the Petition—Blackburn, K.C.—Jameson. Agents—Carmichael & Miller, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, November 19.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.)

LOCKWOOD *v.* THE CHARTERED INSTITUTE OF PATENT AGENTS.

Justiciary Cases—Complaint—Instance—Statutory Offence—Private Prosecutor—Patents and Designs Act 1907 (*7 Edw. VII, cap.* 29), *secs.* 84 (1) *and* (3).

The Chartered Institute of Patent Agents being entitled to charge fees for registration, has sufficient interest to prosecute a person who, not registered, describes himself as a patent agent, and the instance of a complaint in the name of the Institute and its