LORD ADAM—I am of the same opinion and have nothing to add.

The Court recalled the interlocutor of the Sheriff-Substitute, of new affirmed the finding of the trustee, and remitted to the trustee to admit the bank's claim.

Counsel for Harvie's Trustees—Mackintosh—Pearson. Agents—Henry & Scott, S.S.C.

Counsel for the Trustee—Napier. Agents—Maconochie & Hare, W.S.

Counsel for the Bank of Scotland—J. P. B. Robertson—Darling. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

EARL OF KINTORE *v.* COUNTESS-DOWAGER OF KINTORE AND ANOTHER.

(*Ante*, vol. xxi. p. 647, 11 R. 1013—20th June 1884).

Parent and Child—Legitim—Entail—Improvement Expenditure—Heritable or Moveable—Entail Amendment Act 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 11.

An heir of entail in possession expended certain sums of money on permanent improvements, and died without having obtained decree from the Court ascertaining the amount of expenditure which he could charge against the entailed estates. The amount was subsequently fixed at £5670, 12s. 2d⅔. in a petition presented under the 11th section of the Act 38 and 39 Vict. cap. 61, by his widow, to whom he had "expressly" bequeathed these sums in terms of said section, and the succeeding heir was ordained to execute a bond of disposition in security over the entailed estates for the ascertained sum, which he did. *Held* (1) that this sum was *in bonis* of the deceased at the date of his death; and (2) (*rev.* Lord Fraser) that as the right bequeathed was in terms of the statute the right to demand an heritable security, it was *sua natura* heritable, and the sum in the bond therefore did not form part of the legitim fund.

By an interlocutor of the First Division, dated 20th June 1884, and previously reported, the Court, adhering to the interlocutor of Lord Fraser, Ordinary, found that the Earl of Kintore was not barred by the terms of his parents' marriage-contract from claiming legitim out of his father's estate, and remitted to the Lord Ordinary to proceed with the cause.

The subsequent procedure was for the purpose of ascertaining the amount of the legitim fund, and with regard to that several questions arose. The only question of importance had reference to certain sums of money expended by the deceased Earl upon improvements, and the facts in connection with this and the judgment of the Lord Ordinary thereon are stated in the following passage of his Lordship's opinion:—"In the inventory of the personal estate given up by the executrix there is an item entered thus—'Sums expended by the deceased since 31st October 1875 on permanent improvements on his entailed estates in Aberdeenshire and Kincardineshire, not charged upon the estates, and specially bequeathed to his executrix, amounting in all to upwards of £9900, of which there may be recoverable £5000 or £6000, but say in the meantime £5000.' At the time of the late Lord Kintore's death he had obtained no decree from the Court ascertaining the amount of improvement expenditure which he could charge against the succeeding heirs of entail and the entailed estates; but this was subsequently done in a petition presented by the defender, his widow—the amount being £5670, 12s. 2d⅔. Lord Kintore died on 18th July 1880. He left a will dated in 1852, and a codicil thereto dated in 1879. By the codicil he narrated that he had appointed the defender to be his executrix and universal legatory, bequeathing to her his whole moveable estate, and he further made this special bequest:—'And seeing that I have expended, and am in the course of expending, and intend to continue to expend, considerable sums of money in executing improvements on my entailed estates, I hereby explain that, in case of my death without having charged the estates with the amount which I was entitled to charge of the sums expended on such improvements, such sums shall form part of my executry estate; and I accordingly hereby expressly leave and bequeath the same to my said executrix and residuary legatee, whom failing, to my younger children.' Being thus a legatee to whom the improvement expenditure had been expressly bequeathed, the defender became entitled under the 11th section of the Act 38 and 39 Vict. cap. 61, to present a petition to the Court praying the Court to find and declare the sums expended on improvements, and that she was in right thereof, and to decern and ordain the heir in possession to execute a bond and disposition in security over the estate for the amount. She accordingly did present such a petition on the 7th of December 1880, and after the usual procedure the Court ascertained the amount to be, exclusive of expenses, the above sum of £5670, 12s. 2d⅔., and ordained the pursuer, as the heir of entail in possession, to execute a bond and disposition in security over the entailed estates for the ascertained sum, which he did on the 20th of April 1882. By this bond the pursuer bound himself, and the heirs of entail succeeding to him, 'to pay to the Right Honourable Madeline Louisa, Dowager-Countess of Kintore, as executrix and residuary legatee of the said deceased Francis Alexander Keith Falconer, Earl of Kintore, her executors or assignees whomsoever,' the various sums of improvement expenditure ascertained by decree of the Court, and the entailed estates were conveyed in security."

"Now, it is contended on behalf of the defender that this sum of £5670, 12s. 2d⅔. is not personal estate, and therefore constitutes no part of the fund out of which legitim is payable. The character of the fund must be looked at as at the date of the Earl's death. At that time it was a claim which he was entitled to make against succeeding heirs and the entailed estate, and which, although he had not obtained a constitution of it by decree of the Court, was just as much *in bonis* of him as

any other pecuniary debt due to him. He was entitled to bequeath it under the 11th section of the statute, and he did bequeath it, expressly making it a portion of his executry estate. No doubt the defender, after the Earl's death, obtained heritable security from the pursuer; and whatever may be the effect of that security in changing the character of the claim from moveable to heritable from its date, it cannot draw back to the Earl's death, at which time there was no such heritable security."

The 11th section of the Act 38 and 39 Vict. cap. 61, is quoted in the opinion of the Lord President, *infra.*

An interlocutor was then pronounced in the accounting giving effect to the view of the Lord Ordinary.

The defender reclaimed, and argued—(1) This sum was not *in bonis* of the deceased Earl. It would not have passed to his heirs *ab intestato.* If not expressly bequeathed in terms of sec. 11 of the Act 38 and 39 Vict. c. 61, the claim would lapse—*Maxwell,* July 17, 1877, 4 R. 1112. Suppose the heir of entail had died and been sequestrated, his trustee could not have made this available as a fund of credit. (2) The fund was heritable and not moveable, and therefore not subject to a claim for legitim. The basis of this agreement was the terms of the statute by which the heir of entail had right to demand a bond and disposition in security, and nothing else—*Breadalbane's Trs.* v. *Campbell,* June 6, 1866, 4 Macph. 775, *rev.* March 12, 1868, 6 Macph. (H. of L.) 43.

Argued for the Earl—(1) This sum was *in bonis* of the deceased Earl. He had a right to bequeath or assign it. He could have raised money upon it, and if he had been sequestrated his trustee would have made it available for the payment of creditors. The effect of intestacy would merely have been to operate an implied discharge in favour of the debtor. (2) The fund was moveable, because the right to demand a bond and disposition in security was not *sua natura* heritable. At the date of the Earl's death there was no heritable security, merely a claim against his estate under the 11th section of the Act of 1875; it was "the sums expended on improvements" that might be "expressly bequeathed, conveyed, or assigned."

At advising—

Lord President—By our judgment on the 20th of June last year adhering to Lord Fraser's interlocutor of 5th February preceding, we found that the present Earl of Kintore was entitled to legitim, and all his brothers and sisters being, by the provisions made in their parents' marriage-contract, barred from legitim, the present Earl became entitled to the whole legitim fund. The judgment then remitted the cause to the Lord Ordinary for the purpose of ascertaining the amount of the legitim fund, and his Lordship has since pronounced an interlocutor dealing with this matter in detail, which interlocutor has been brought under review as regards only one particular item which is said to form part of the executry estate, and therefore to be reckoned in ascertaining the amount of legitim—that is, a sum expended by the late Earl of Kintore in improvements upon the entailed estate. And the question arises, whether under the recent statutes regarding such improvements, and the mode in which they are to be made a charge upon the entailed estate, they can be dealt with as personal property, or whether they must be dealt with as heritable property. That is the point that is decided by the Lord Ordinary. But another question was raised before us in the discussion, namely, whether, under the circumstances, this claim for improvements made upon the entailed estate formed any part of the late Earl's estate at all, either heritable or moveable. Now, in order to fix that question it is necessary in the first place to attend to the facts. These improvements were all made subsequent to the 31st of October 1875, as appears from a statement of the details, and they were entered by Lady Kintore, his executrix, as an item in the inventory of the personal estate, which was given up for confirmation, but at the time of Lord Kintore's death he had not obtained any decree for these improvements. In short, nothing had been done by him in the way of constituting the claim. It stood merely upon this, that the improvements were actually made, and proved to have been made. But if this had been a claim under the original statute—the Montgomery Act—it is needless to say it would have been of no avail at all, because none of the provisions of the Montgomery Act had been complied with, and the claim must have fallen altogether. So that it is entirely by reason of the subsequent statutes that this claim can be said to have any existence at all. Now, when the Entail Amendment Act of 1848 was passed there was a considerable change operated upon the way in which such claims were to be dealt with. In the first place, the Montgomery Act was repealed as regarded all entails executed after the first of August 1848, and as regards what may be called for distinction old entails, the provisions made were, that the claim for improvements should form a charge upon the entailed estates, instead of being, as they had heretofore been, a personal claim against the succeeding heirs of entail and the rents of the estate. And then there comes the statute of 1875, under which necessarily the present claim falls to be made, and which I think is the only thing that creates any difficulty in dealing with this first question—I mean the question whether the claim for improvements formed any part of Lord Kintore's estate during his life or at his death. The section of the statute on which it depends is the 11th, and the provision is this—"Where any heir of entail in possession of an estate in Scotland holden by virtue of a tailzie, dated prior to the 1st of August 1848, 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 to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate, and that the petitioner is in right thereof; and to decern and ordain the heir in possession of the

entailed estate to execute in favour of the petitioner, or any other person the petitioner may think fit, a bond and disposition in security over the said estate," and so on. Now, it is said that the Earl was not really in right of this sum at all; that it was not *in bonis defuncti;* that in truth it was the petitioner alone here—Lady Kintore—in consequence of a bequest by him, who for the first time had a right to this sum, or to the bond and disposition in security which she was entitled to demand. That is a little subtle, and at first sight the reasoning may appear somewhat plausible which supports the objection. But I think a consideration of this clause makes it pretty clear that the plea is not well-founded. It is quite clear on the face of this clause that in the first place the Earl himself might have made this a charge against the estate, and therefore there must have been a right vested in him under the statute. In the second place it is also made clear that he could dispose of this either by an assignation, *inter vivos*, or by a bequest. It required to be a special bequest, or, as the statute rather improperly calls it, an express bequest, but, except that a general will would not carry it, it seems to me that he was *in titulo* to dispose of this claim in any way he pleased. Now, if it can be disposed of by him either by a bequest or by an assignation *inter vivos*, it seems to me to follow of necessity that it would be open to the diligence of his creditors, and might be attached by adjudication, and also that it would fall within the title of the trustee in a sequestration. And if that be so, it is difficult to see the meaning of the contention that it did not belong to the late Earl or form part of his estate. If it did not—if it was not vested in any way whatsoever—I am unable to see how it could be conveyed by him, or how it could be attached by the diligence of his creditors; and therefore I think there is no foundation for that argument, that it was not vested in any way in the improver.

But then there remains the more serious question—What is the character of this right? Is it heritable or moveable? The executrix, as I said before, has included it in the inventory, but that is not at all conclusive. There are many things included in the inventory of the personal estate of a person deceased which do not go to form part of the legitim fund. Under recent legislation heritable bonds form part of the executry estate of an intestate, but they certainly will not form part of the legitim fund, for they are expressly excepted from that clause of the Act of 1868 which makes them moveable *quoad* succession. There are other things—it is needless to enumerate them—which in like manner will not fall within the legitim fund, and yet may form part of the estate given up in the inventory, therefore that is by no means conclusive of the matter. It is said, however, that this claim could not be given *mortis causa* except by bequest according to the language of the statute. But here again I think the answer is plain that in modern legal and statutory language heritable right may be so given, and therefore saying that it can only go by bequest is determining nothing as to its real character, whether it be heritable or moveable. We must therefore, I think, look beyond these things altogether in order to settle what is the character of this right. Now, one thing I think is quite clear, that in order to make it available against the entailed estate it must be put into an heritable form. There is no personal claim against the heir. That is put an end to by the statute. There is no claim against the rents, properly speaking, at all. The only right which the improver or his successor can obtain under the statute is an heritable security over the estate; and while that is the condition of the right as long as it remains vested in the person of the improver himself, it assumes exactly the same character when it comes into the person of his legatee, because Lady Kintore could do nothing else but what she actually did in the present case—present a petition to the Court to have it found that this claim is well-founded, that the improvements were made, and to ordain the succeeding heir of entail to grant to her or her nominee a bond and disposition in security over the entailed estate. In short, no one can ever obtain an available right to this claim for improvement expenditure except in the form of an heritable security. Upon that ground it appears to me that this must be dealt with as a claim or interest heritable in its character, and therefore cannot form part of the legitim fund; and upon that ground, therefore, I differ from the Lord Ordinary in the conclusion he has come to as regards this particular item of the fund.

Lord Mure—I agree with your Lordship that there are two points raised in the determination of this question. The first of them is, whether such a claim as that which is made competent under the Act of 1875 is to be dealt with as part of the estate of the heir of entail who makes the improvements, and thereby incurs the expense which the late Lord Kintore did. I agree with your Lordship that it is a subtle point rather at first sight, but having regard to the terms of the 11th section of the statute, I have not much difficulty in coming to the conclusion that it is in the general sense only part of Lord Kintore's estate, and considered to be so because the statute expressly gives the heir of entail who makes such improvements a right to bequeath the claim, whatever it may be, for the value of these improvements, to anybody he likes, either to his own children or to anybody else, and the party so getting it can, by taking the necessary proceedings under this statute, have a bond and disposition in security over the entailed estate for it, and the succeeding heir is bound to grant such bond if, upon the usual steps being taken before the Court, the claim is found to be of a nature that can competently be dealt with against the entailed estate. I quite agree with your Lordship that this claim is of a nature that may be made against the entailed estate. Whether it is to go into the legitim is I think a much more difficult question, and it is one that I have had considerable difficulty in making up my mind upon, for this reason, that being in its origin a claim of a description contemplated by the Montgomery Act, it was evidently intended to be a debt the value of which was to go into executry, for the benefit of the other children of the heir of entail. That is plain from the phraseology of the Act 10 George III. [Montgomery Act] relative to these matters. The enacting clause proceeds upon this, that it would be for the benefit of the entailed estate

and the heirs generally if there was some such power given to the heir of entail in possession to improve the estate by laying out money in this way and by making it a claim against the rents when the estate gets into the hands of the succeeding heir, and putting it into his executry account for the other children. And if the question had been raised under proceedings taken in virtue of the provisions of the Act of George III., I should have had very great difficulty indeed in holding that the money did not go into legitim if a question were to be raised about it. But the case we have to deal with does not depend on the provisions of the Act of 10 George III., although as I read the claim it is a claim with reference to improvements very much of the same description as those that are made competent under the Act of George III., with this difference only, that the form of proceeding which by the Act of George III. is made essential in the making of the claim, has not been complied with. And therefore the claim is made under the statute of 1875. Now, as your Lordship has pointed out, that statute does not authorise a demand on the rents of the entailed estate, nor make it a claim against the succeeding heir personally, but it is simply a right to have a heritable security over the estate for the interest of the money or a certain proportion of it, no more than the interest which would enable the party to clear off the debt at a certain time. Now, that is not new in so far as the Act of 1875 is concerned, because the Entail Amendment Act of 1848 contains a clause to enable heirs of entail, where they have not complied with the terms of the Montgomery Act, to prove the debt under the 16th section of the Act of 1848, and then to get a bond of annual rent or a bond and disposition in security for the amount. Therefore where the debt has not been created by the application of the rule in terms of the Act of George III. during the lifetime of the proprietor, he can only get it by bringing the 16th section into operation, and that section contains no provisions by which it is made a personal claim against the next heir, or by which the rents of the estate can be attached for it. Under the 16th section—in opposition as I read it to the provisions of the 15th section—you are restricted to a bond of annual-rent or a bond and disposition in security as the case may be. Therefore the provisions of the Act of George III. as to the debt being made a personal claim against the heir being put an end to, I am unable to see how we can apply the same rule that we should have done if it had been a claim made under the 10th of George III. alone; because here there is certainly under the 16th section nothing to be got by the executor of the succeeding heir but the bond of annual rent over the estate, or the bond and disposition in security. Now, looking at the 11th section of the Act of 1875, I find that there is in that respect a similar provision, for although it speaks of the "sums expended" and uses expressions applicable to moveable estate, when it comes to provide what is to be got by the party representing the original heir of entail who made the improvement, all that is to be got is a heritable security over the estate, and I do not think that can be looked upon as a part of the executry in the sense of being put into the fund of legitim claimable by the next heir. I do not see sufficient reason for holding that it is moveable estate to that extent, and as your Lordship has remarked, under the Titles to Lands Act 1868 these bonds, even though they are made moveable as matter of succession, are expressly excepted from that rule in making up the estate with a view to the ascertainment of the legitim fund. And therefore, although I think the point is one of very great nicety, I concur in the result which your Lordship has arrived at.

Lord Shand—I hold the same opinion upon both points. It has been objected by the reclaimer that this claim for improvements cannot be looked at at all, on the ground that it was not a part of the estate of the deceased. As to that I can only say that while it may have the quality of subtlety, it has no substance. I think the claim is necessarily a part of the property of the person who has made the improvements. The money having been expended, the person who expended it—the heir of entail—is entitled to recover it to the extent of three-fourths. During his own lifetime he may recover it to the extent of three-fourths by presenting a petition to the Court for authority to charge the estate with the amount. And if he has not done that timeously during his own life, he may assign or bequeath the right so that his assignee or legatee has the right after his death in like manner to make the claim good by calling upon the heir of entail in possession, under the authority of the Court, to give him a security for that amount. It appears to me, therefore, that the claim for reimbursement to the extent of three-fourths of expenditure on improvements has all the qualities of any other right of property. It may be vindicated during the creditor's life, it may be assigned so as to be vindicated after his death, and I do not know any other attribute of a right of property that can more distinctly mark it out than the possession of these qualities. If an heir of entail having expended a large sum of money for improvement on an entailed estate should become bankrupt, I cannot doubt that his creditors would be entitled to require that he should give them the benefit of his name for the purpose of constituting these improvements, and of obtaining a security in respect of them. Section 102—the vesting clause of the Bankrupt Act—expressly transfers the whole right of the bankrupt in his property, heritable and moveable, to the trustee for creditors. And section 82 provides that he shall execute all deeds and give every facility in his power for vindicating that right. And so I cannot doubt that as he has a claim to reimbursement of three-fourths of the expenditure, that is a valuable right which may be sold in the market, and therefore a right of property which the creditors would be entitled to vindicate, and would vindicate under the Bankrupt Act. And as I have said, while until the recent statute there was no power of keeping up that claim after death, it is now provided that it may be assigned or transferred or bequeathed; in like manner it is a right which may be dealt with as succession by the heir of entail in possession, and so in every sense it is a right of property. But the question remains whether it is a right to moveable estate such as will fall into a legitim fund, and be a part of the subject for division as part of the moveable estate of the deceased. Now, upon that point I am also agreed with your Lordship in holding that although undoubtedly

it is a right to estate, it is not a right that can be regarded as a right to moveable estate so as to fall under legitim. It is true that if an heir of entail taking advantage of the provisions of the Montgomery Act, having in the first place given a previous notice to heirs that improvements were to be made in terms of that Act, and in the next place recorded the vouchers for the expenditure year after year, should have so constituted his claim against the heirs under that statute, the right in the case of an heir dying having made that expenditure vests in his executors, and is a right I take it of a moveable nature, for this reason, that the claim under the Montgomery Act expressly given by the statute is not a claim for heritable security, but it is a claim upon the next heir succeeding to the estate for payment of money. The heir himself, or his executors rather, has a right to raise a personal action against the heirs of entail, and claim payment of that as a moveable fund. It is true the heir in possession may defend himself against that action by saying, I shall only assign one-third of the rents to you, your claim must be measured by that at the outset, and I offer that. That is a protection to him, but the claim in its own nature under the Montgomery Act would be a claim to moveable estate, and if these improvements had been so constituted, and the claim had so arisen, I should have held that as a fund that would fall under the legitim. But in this case the improvements are not of that kind. Lord Kintore did not execute them under the powers of the Montgomery Act; there was no notice given; there was no recording of the expenditure, and the result is that no benefit could have been taken under that statute, and we are therefore restricted to a consideration of the provisions of the later statutes. Now, what do these come to in regard to expenditure not under the Montgomery Act? — Simply to this, that in the event of an heir expending money in improvements, he shall be entitled to create a burden for the recovery of the money expended on these improvements to the extent of three-fourths by executing a bond and disposition in security or bond of annual rent on the estate. The only mode in which he can make his claim good during his lifetime is by creating a heritable security; in short, his security for that claim is heritable property. And in like manner if he dies his assignee is in exactly the same position. He cannot call on anybody to pay him money; he cannot, as under the Montgomery Act, claim from succeeding heirs payment of money as for a personal debt. He can claim only a heritable security. So that taking it either in the person of the heir himself entitled to charge the estate, or in the person of his successor entitled to demand a bond and disposition in security on the estate, in either case I think that is plainly heritable property in his person, and accordingly I do not see that these improvements, which give rise to a claim for a heritable security only, can be regarded as moveable estate in the person of the representative of the deceased. And so I am of opinion with your Lordship on the second point, that the reclaimer must succeed.

Lord Adam—The question in this case is, whether a sum of £5670, 12s. 2d. which might have been charged by the late Earl of Kintore on the entailed estates in his possession as improvement expenditure, but which he did not charge, forms part of his legitim fund. The right which the Earl of Kintore had under the 16th section of the Rutherfurd Act was to grant a bond of annual rent for three-fourths of that sum, or, under the 18th section, to grant a bond and disposition in security for two-thirds of the three-fourths of the sum so expended by him. These were his rights under the Rutherfurd Act, and it appears to me that under that Act this right or claim could come into existence only in a heritable form either in the shape of a heritable bond of annual rent or in the shape of a bond and disposition in security. That was the only form in which it could be constituted. The Act of 1875 under which this more particularly comes, made I think two changes, and two changes only, in the matter. In the first place, it gave the heir of entail power to charge an estate in a certain way, not with three-fourths of the sum expended, but with the whole sum expended, for it gave him a right to borrow to the extent of the whole sum expended, and it also made this change, that it extended very largely the kind of improvements which might be made charges upon an entailed estate, the improvements which might be charged under the Act of 1875 being far more extensive than those allowed under the Montgomery Act. It made these two changes, but on the matter with which we have to deal I think it made no change, and the power of the heir of entail remained just as before, either to grant a bond of annual rent for the sum expended by him, or to grant a bond and disposition in security for two-thirds of the sum for which a bond of annual rent would have been granted. But under the Act of 1875, just as before, the right was a heritable right, and no other. It could only be made an heritable charge upon the estate. That was the nature of the right in the person of the late Earl, and these were his powers. Now, under the 11th section of the Act if he had not during his life made it a charge on the estate, power was given to him to dispone and bequeath it expressly. The only difference was that the party to whom it was expressly bequeathed had the right of obtaining a heritable bond for two-thirds of the amount, but had not the power of getting a bond of annual rent charged over the estate. But this made no change on the nature of the right as being heritable or moveable.

Upon these grounds I come to the conclusion that this from first to last is of the nature of a heritable right, and not of the nature of a moveable right, and that being so I do not think that it formed any part of the legitim fund. As to the other point, viz., whether or no this was a part of the estate of the late Earl at all, I confess I have had some little doubt arising from the peculiar nature of the fund, and the peculiar way in which it is treated by statute, but on the whole matter I have come to agree with your Lordship that it did form part of the estate of the late Earl.

The Court pronounced this interlocutor—

"Having heard parties on the reclaiming-note for the Countess-Dowager of Kintore

and others against the interlocutor of Lord Fraser of 14th March and 14th May last, and considered the cause, Recal the interlocutors reclaimed against, and find that no part of the improvement expenditure bond entered in the amended objections for the pursuer at the sum of £5670, 12s. 2¾d. falls to be computed in the legitim fund: Find the total charge against the defender, the Countess-Dowager of Kintore, to be £115,346, 15s. 9d., and the total discharge to be £66,130, 15s. 10d., thus leaving of free personal estate £49,215, 19s. 11d., one-half of which is legitim, but these findings are made subject to the deductions from the one-half forming legitim of the sums after mentioned." . . .

Counsel for Pursuer (Respondent)—J. P. B. Robertson—Darling. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders (Reclaimers)—Pearson—Guthrie. Agents—Morton, Neilson, & Smart, W.S.

Saturday, June 20.

SECOND DIVISION.

[Sheriff-Substitute of Renfrew and Bute.

BOYLE, PETITIONER.

Bankruptcy — Sequestration — Discharge—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 146—*Bankruptcy and Cessio (Scotland) Act* 1881, *sec.* 6—"*Circumstances for which Bankrupt cannot justly be held Responsible.*"

A bankrupt whose estate had failed to yield a dividend of five shillings in the pound, presented a petition for discharge at the end of two years after the decree awarding sequestration. The trustee in the sequestration and the Accountant in Bankruptcy both reported in favour of the bankrupt's discharge. The Sheriff, on the ground that the deficiency arose from a balance against the bankrupt of £800 on certain bill transactions with another person in the same line of trade, which though originally ordinary trade bills had become accommodation bills, and but for which the estate would have realised five shillings in the pound, refused discharge. *Held* that discharge should be granted.

In February 1883 the estates of Boyle & Tonner, contractors, Johnstone, and of Francis Boyle and John Tonner, the individual partners of that firm, were sequestrated under the Bankruptcy Acts by the Sheriff of Renfrew and Bute. Andrew Gibson, accountant in Glasgow, was appointed trustee.

The bankrupt estate on being realised failed to yield a dividend of five shillings in the pound.

In March 1885, being more than two years after the award of sequestration, Francis Boyle presented a petition to the Sheriff praying for discharge. The trustee reported that the bankrupt had not, so far as known to him, been guilty of any collusion; that he believed that the bankrupt had made a fair discovery and surrender of his estate, and that his bankruptcy had arisen from misfortune in business, and not from culpable or undue conduct. The Sheriff-Substitute having ordered intimation of the petition to creditors, and appointed a copy thereof and the trustee's report to be transmitted to the Accountant in Bankruptcy to report whether the bankrupt had fraudulently concealed any part of his estate, or whether he had wilfully failed to comply with any of the provisions of the Bankruptcy Act, allowed to him a proof that his inability to pay five shillings in the pound had arisen from innocent misfortunes for which he could not justly be held responsible. No creditor appeared to object.

The trustee deponed—He had made an inventory of the valuation of the estate of the firm, which showed the claims of trade creditors to amount to £1035, 16s. 10d., there being other liabilities made up of contingent claims on bills on which the bankrupts are obligants. The assets were £345, 18s. 3½d. "Had it not been for the contingent claims referred to, and the loss that was sustained in realising the stock, and wages incurred in the partial completion of contracts, the estate showed more than 5s. per £1. The bills in connection with M'Lay (another contractor) appear to me to have arisen originally through work being done by the one party for the other. The bankrupts did work for M'Lay and drew on M'Lay, and M'Lay did work for the bankrupts and drew on the bankrupts. My investigation into the matter led me to the belief that if M'Lay had retired the bills when they ought to have been met, the estate would have paid more than 5s. per £1. *To the Court:*—Interrogated—Were these in any sense accommodation bills? Depones—It is somewhat difficult to say either yes or no to that; to some extent they were. The bills arose through work actually done by each of the parties for the other. Interrogated—How did they come to be accommodation bills in a sense? Depones—Because when the bill which ought to have been paid by M'Lay fell due, M'Lay was unable to retire it, and they got the bankrupts to retire it on the promise that when the bankrupts' bill became due they, M'Lay's people, would retire it, but this M'Lay failed to do. The bills that were in that position amounted altogether to about £800. *Examination resumed*—That is fully more than one-third of the whole liabilities. It was that that brought about the suspension."

One of the commissioners gave similar evidence. He attributed the losses of the bankrupts to some of their contracts having been taken at too low a price, in one instance to the severity of the weather. From the statement submitted by the bankrupts he was quite satisfied that the estate showed 5s. in the pound if M'Lay's bills had been arranged. He understood that these bills took their rise out of *bona fide* transactions. M'Lay did work for Boyle & Tonner for which he drew upon them, then Boyle & Tonner did work for M'Lay for which they drew upon him, and he did not pay his bills, which came back on Boyle & Tonner as the drawers. Witness did not consider any of these bills to have been accommodation bills.

James Rankin, cement merchant, a creditor,