[Decisions in the same terms and to the same effect were given in the following cases which had been appealed to the Magistrates of Leith and brought to this Court on stated Cases, in reference to sums paid as for goodwill, fittings, &c., of public-house businesses, viz., John Ferguson, proprietor, and George Dickson, tenant; John Dalgleish, tenant; Robert Darge, tenant; David Hutchison, tenant; and Robert John Robertson, tenant.]

HOUSE OF LORDS.

Friday, February 5.

(Before Lord Chancellor Halsbury, Lords Watson, Bramwell, and Fitzgerald).

CROSSE *v.* BANKES AND ANOTHER.

(*Ante*, vol. xxi. p. 664, and 11 R. 988, 27th June 1884).

Agreement — Personal or Transmissible — Heirs and Successors.

A brother and sister who were at issue as to which of them had right to succeed to an entailed estate, entered into an agreement that the sister, in case she should be found entitled to have the estates entailed on her, should "allow" to the brother "the one-half of the free rental of the estates during all the days and years of her life, and she binds and obliges herself and her representatives to make payment to him of the said free rental accordingly." The brother entered into a similar obligation, to take effect if he should be found entitled to have the estates entailed on him. The sister was found entitled to have the estates entailed on her, and she paid half the rents to her brother till his death. *Held* (*rev.* judgment of First Division) that she was bound during her life to continue to pay one-half of the rents to his executor.

This case is reported in Court of Session 27th June 1884, *ante*, vol. xxi. p. 664, and 11 R. 988.

The words constituting the agreement the effect of which was in dispute were, "that the said Thomas Holme Bankes, in case he is found to have right to the said estate of Letterewe and Gruinard, shall during his own lifetime allow the said Marian Anne Bankes half of the free rental of said estates, and he binds and obliges himself, his heirs and successors, to make payment to her of the said free rental accordingly; (2) in like manner the said Marian Anne Bankes, in case she is found to have right to the said estates of Letterewe and Gruinard, shall allow to the said Thomas Holme Bankes the half of the free rental of the said estate during all the days and years of her life, and she binds and obliges herself and her representatives to make payment to him of the said free rental accordingly."

The pursuer A. W. Crosse, executor of T. H. Bankes, appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case the real point seems to turn upon the very narrow question of the construction of two or three sentences in this agreement, and I confess that it appears to me to be an extremely plain case. In truth, if one reads the agreement itself, and applies to it the ordinary rule of construction, namely, to read and understand the words in the ordinary and natural sense of the words of the sentences, there is no room for doubt. An obligation is created to pay during the lifetime of the successful party. I use that phrase, because although it is varied in the two obligations, the substance of each is the same; the agreement is to pay during the term agreed upon, and that term is expressly stated to be the lifetime of the successful party.

My Lords, it seems to me that that is the whole case, because I decline to consider what would have been the result or what would have been the construction, if, on the one hand, I had assumed that words which are not in the agreement were there, or if, on the other hand, I had assumed that words were omitted which are there. The ordinary rule of construction of an instrument is, that you should not, except to effectuate the plain intention of the parties, imply words which are not there, and that you should give effect to every word which is there if you can. It appears to me, under the circumstances of this case, that it was a very natural and sensible arrangement for the parties to arrive at, and that it was in truth effectuated by the language understood in its ordinary and natural sense, to divide what I may call roughly the life estate which the successful party should possess. Therefore, with great respect to the learned Judges below, I adopt the language and the reasoning of Lord Shand, which seem to prove beyond all doubt that the natural and ordinary interpretation of these words is what his Lordship contends for.

The result is that I move your Lordships that the interlocutor appealed from in this case be reversed, and that the appellant have the costs of the appeal.

Lord Watson—My Lords, with every respect for the learned Judges in the Court below, I cannot honestly say that I have the least hesitation in coming to the conclusion that their judgment in this case ought to be reversed. My Lords, that judgment appears to be founded to a very great extent upon the word "allow" which occurs in this agreement, as imparting to the consideration which is to be given by the successful party the nature of a bounty or bequest for aliment or sustenance. But this is a deed of contract—an onereous deed of contract—and the word "allow" according to its primary signification means no more than this, that the party who takes the estate which is the subject of contest between the litigants shall permit the unsuccessful party to enjoy substantially one-half of the beneficial interest which falls to the winner.

But even if it were a gratuitous deed, that would not in my opinion alter the construction to be put upon it, because although the word "allow" occurs, we must look to the terms of the deed to see what is the *quantum* of that allowance, and that is expressed in these terms—"one-half of the rental of the entailed estate during the lifetime" of the successful party. To my mind these words are entirely free from ambiguity, and

there is nothing in this deed which can control them with the exception of that somewhat fanciful interpretation which I have already suggested, which may be ingeniously put upon the word "allow."

Well, the deed being in these terms, and there being an obligation to pay one-half of the rental, that is a debt which constitutes an asset of the creditor's estate, and passes by force of law upon his predeceasing the term of payment to his legal representatives.

I need hardly say that in the view which I take, the attempt to put a different construction upon the deed, which has been very ingeniously made at the bar, involves the necessity of introducing into the language of this deed additional words, which so far from elucidating appear to me entirely to contradict its true meaning.

Lord Bramwell—My Lords, I am entirely of the same opinion. It is reasonable in this case to suppose that the sister and brother agreed that what they could divide between them they would divide between them, so that neither of them should, as it were, suffer from the consequences of the decision—that is to say, that if the life estate was given to the brother, he would give to her half of what he should get during his life, and she and her representatives would take it; if she got the life estate owing to the decision being in her favour, she would behave in the same way to him. That seems to me to be a reasonable supposition as the basis of the agreement which was come to. Then what do they say? He agrees and she agrees, and the duration of the agreement is by each respectively for his or her life. That is tolerably manifest. Well then what is it that they agree about? It is that during his life he is to do something in the event of a decision in his favour, and during her life she is to do something. Now, what is it that is to be done? Why, to allow half of the free rent. But to whom? Why, the sister and brother respectively. That to my mind includes executors, administrators, and assigns. It is admitted that assigns are included, and I can see no reason why executors and administrators are not according to the ordinary rule.

Lord Fitzgerald—My Lords, upon reading the agreement in this case before the argument commenced, and the reasons given by the Lord Ordinary, and also by the Judges of the Inner Division of the Court of Session, it appeared to me perfectly plain that Lord Shand was correct in his reasoning, and that his reasoning ought to be adopted. It follows from that that what I call the rather surprising interlocutor pronounced by the Lord Ordinary, and adhered to by the Inner Division, ought to be reversed and an interlocutor pronounced in favour of the pursuer in the terms of the conclusions of the summons.

Interlocutor appealed from reversed, cause remitted with a declaration that the appellant was entitled to have decree in terms of the declaratory conclusion of the summons, viz., that under the agreement the defender was bound during all the days and years of her life to make yearly payment to the pursuer, as executor of T. H. Bankes, of one-half the free rental of Letterewe and Gruinard.

Counsel for Appellant (Pursuer)—Everitt, Q.C. —Horace Davey, Q.C.—Rawlinson—C. N. Crosse. Agents—Crosse & Sons, for C. & A. S. Douglas, W.S.

Counsel for Respondent (Defender)—Cozens Hardy, Q.C.—Dickson. Agents—Waterhouse, Ambletham, & Harrison, for Murray, Beith, & Murray, W.S.

COURT OF SESSION.

Saturday, February 6.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SIR A. D. STEWART, PETITIONER.

Entail—Process—Expenses—Entail Amendment (Scotland) Act 1875 (38 *and* 39 *Vict. c.* 61), *sec. 7, sub-sec.* 6, *and sec.* 9.

An heir of entail craving authority under sec. 9 of the Entail Act 1875 to substitute a bond and disposition in security for the amount of the unexpired portion of a rent-charge created upon the entailed estate by his predecessor in virtue of the Improvement of Land Act 1864, is not entitled under the provisions of section 7, sub-sec. 6, to charge the expenses of the application, and of obtaining the loan and granting the bond, upon the fee of the estate.

Sir A. D. Stewart was heir of entail in possession of the entailed estates of Grantully and others. In 1885 he brought the present petition for authority to substitute a bond and disposition in security, or bonds and dispositions in security, for a sum representing the amount of the unexpired portion of a rent-charge which had been created over the said estates by his predecessor Sir W. D. Stewart in 1870. This rent-charge had been created by an absolute order by the Inclosure Commissioners for England and Wales, charging the fee of the estate with a fixed yearly sum payable for twenty-five years from 1870. The petitioner had paid off upwards of one-fourth of the said rent-charge.

The petition was based on the 9th section of the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. c. 61), which proceeds on the narrative that "it is expedient that where an estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, has before the passing of this Act been duly charged with the cost of improvements executed thereon, and shall continue charged therewith after the passing of this Act, the heir of entail in possession thereof at or after the passing of this Act should be entitled to relief in the matter, but subject to the conditions hereinafter provided: Be it therefore enacted as follows—(1) It shall be lawful for such heir of entail, with the consent of the nearest heir for the time entitled to succeed to the said estate, in case he or any of his predecessors in possession of the estate shall have granted a bond or bonds of annual rent over the estate or any portion thereof, or otherwise imposed or created a rent-charge or rent-charges