ments upon the entailed estate would be made at the expense of personalty.

It was therefore right that the personal estate should get a security over the entailed lands after the heir's death. For that the 15th section provides. It gives the executor or personal representative of an heir of entail an active title to apply to the Court to have the heir in possession ordained to execute a bond of annual-rent, "which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court." No enacting words can be more clear or distinct than the words of that section. They confer on the executors, in the circumstances of the present case, an absolute right to demand and impose on the heir an absolute obligation to grant such a bond of annual-rent.

I do not say that it would be impossible that the Legislature should introduce qualifications from subsequent sections of the statute upon the absolute right and obligation given by that section, so as to allow one or other of the parties, and possibly both, an option. But where both the right and the obligation are created by distinct enactment, it will require something very distinct to take away from or modify the binding nature of the provisions of the section.

The 18th section is the only one that is said to do so. The construction put upon it by the heir is, that it gives him the right to answer the executor's petition by tendering a bond and disposition in security for two-thirds of three-fourths of the whole sum. As I read the clause, it contemplates two cases which are dealt with by the preceding sections. The first is where an heir of entail who has executed improvements for his own behoof makes a security over the estate for the amount of his debt. The second is, where he has executed improvements, but has created no security during his life, and his executor is entitled to demand a security from his successor after his death. Accordingly, the words of the 18th section are alternative—"Be it enacted that in all cases in which it may be competent for an heir of entail in possession of an entailed estate in Scotland, or in which such heir of entail may be called upon, to grant a bond of annual-rent." The alternative is very distinctly expressed. Construing the clause according to the view I take, the result is—(1) that where it is competent for the heir of entail to grant a bond of annual-rent, it shall be lawful for him to substitute a bond and disposition in security; and (2) where he may be called upon to grant a bond of annual-rent, he may be called upon to grant a bond and disposition in security. This reading seems to me to be supported by the other sections to which I have referred, and it is still further recommended by its being the sound and legitimate construction of the 18th section taken by itself.

I cannot say that I entertain any doubt that the heir of entail has no option but to grant the bond of annual-rent for the whole three-fourth parts of the improvement expenditure.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming-note for E. C. Colquhoun and others, Nasmyth's executors, against Lord Adam's interlocutor of 28th May 1877, Recal the interlocutor, and remit to the Lord Ordinary to repel the first and third pleas stated for the respondent Sir James Nasmyth; to sustain the title of the petitioners; and to proceed in the matter of these petitions as shall be just: Find the petitioners entitled to expenses since the date of the Lord Ordinary's interlocutor; and remit to the Auditor to tax the account of said expenses and report to the Lord Ordinary, with power to his Lordship to decern for said expenses."

Counsel for Sir John W. Nasmyth's Executors —Balfour — Pearson. Agents — Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Sir James Nasmyth—Kinnear. Agents—Gibson & Strathern, W.S.

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*Saturday, June 30.*

## SECOND DIVISION.

[Lord Adam, Ordinary.

### DUNCAN AND OTHERS *v.* MAGISTRATES OF ABERDEEN.

*Process—Relevancy—Reparation.*

Circumstances in which an action of damages at the instance of the widow of a man who was drowned by the capsizing of a ferry-boat, against the magistrates of a burgh who were proprietors of the ferry, which they had let to a tacksman, was dismissed as irrelevant.

This was an action at the instance of Mrs Duncan, widow of Archibald Duncan, shoemaker, Aberdeen, against the Magistrates and Town Council of Aberdeen, concluding for payment of £1000 in name of reparation for the death of the said Archibald Duncan, who was drowned by the capsizing of the ferry-boat across the Dee from Aberdeen to Torry on 5th April 1876. The defenders were owners of the ferry, landing-places, and boats.

The pursuers averred that the defenders had been in the habit of letting the ferry-boats and machinery by auction to the highest bidder, irrespective of his possessing any qualifications for the management of boats. No means were provided to protect against overcrowding. The channel of the river Dee had recently been diverted into a new channel, 138 yards wide at spring tides, and the old ferry system of coble and oars had been changed on this new channel for a boat worked by a wire rope fastened to each bank, passing along the length of the boat, and doubling over a wheel or winch in the centre of the boat. Although the current in the new channel ran much more strongly than in the old channel, no new regulations had been made by the defenders, either as owners of the ferry or as Magistrates of Aberdeen, and the old regulations were applicable only to the old channel, where dead water prevailed, and were manifestly dangerous for a strong tideway. The old regulations provided that the boat should start within eight

minutes after being called for by any person or persons, and made no provisions for the boat ceasing to ply in dangerous states of the water. The tacksman since 1875 was a stone-mason. When the accident occurred on 5th April 1876 the river was much swollen and the boat much overcrowded, and in consequence the wire rope broke and the ferry-boat was capsized.

In reference to the duty of the defenders, the pursuer averred—"(Cond. 7) In particular, it was the duty of the defenders not to let the ferry to a tacksman without taking measures to secure the working of the boat by a person or persons acquainted with the management of boats. They ought also to have provided him with effectual means of securing the boats from overcrowding, particularly on fast-days and holidays. The defenders, by putting on policemen or otherwise, ought to have provided the tacksman with means for controlling the traffic, which was manifestly otherwise out of his power to accomplish. It was their duty as owners of the ferry to provide a perfectly safe means of transit across the ferry, and to have the boats and wires properly inspected, and the wires protected against public interference therewith at the fastenings on the river side. It was their duty, when departing from the ordinary method of ferrying by coble and oars, to make rules and regulations for the new method by wire ropes, and particularly to provide that in rough water or strong currents during ebb tide the boat should not be worked by the rope, but by oars, or not be put on at all. The defenders failed in these duties, and to use said precautions and means for securing the safety of passengers; and by their failure in these respects, or one or other of them, the said Archibald Duncan lost his life."

The defenders stated that by the lease the tacksman was specially bound to supply the wire rope and all other appliances necessary for the proper working of the ferry.

The defenders' first plea in law was that the pursuer's statements were irrelevant.

The Lord Ordinary pronounced the following interlocutor:—

"19*th June* 1877.—The Lord Ordinary sustains the defenders' first plea in law, dismisses the action as irrelevant, and decerns, &c.

"*Note.*—Archibald Duncan was drowned while crossing the ferry between Aberdeen and Torry on 5th April 1876, by the capsizing of the ferry-boat in which he was a passenger.

"This action is brought by his widow and children against the Magistrates and Town Council of Aberdeen, as owners of the ferry, to recover damages for his loss.

"The ferry was not at the time being worked by the defenders themselves, but by a tacksman, Archibald Kennedy. It was let to Kennedy by public roup for three years from June 1875. The articles and conditions of roup under which he held the ferry are produced, and are founded on by both parties.

"The boat was worked by means of a wire rope secured to the bank on either side of the river, and which passed round a wheel in the centre of the boat—the boat being propelled by the turning of the wheel.

"It was a condition of the tack that the tacksman should be at the whole expense of supplying the wire rope and all other appliances which might be requisite and necessary for the proper and convenient working of the ferry.

"The accident is said to have been caused by the overcrowding of the boat, by the wire rope having been interfered with by unauthorised persons standing there (it is not said in what way), and by the insufficiency of the rope in the strength of the current and stress put upon it.

"The particular duties alleged to have been incumbent on the defenders, and which they failed to fulfil, and in respect of which failure it is sought to make them liable in damages, are set forth in article 7 of the condescendence.

"With reference to these, the Lord Ordinary does not think that any legal duty lay upon the defenders not to let the ferry to a tenant without taking measures to secure the working of the boat by persons acquainted with the management of boats. It appears to the Lord Ordinary that it was the duty of the tenant to see that the persons whom he employed were qualified for the work. So, also, he thinks it was the duty of the tenant, and not of the defenders, to take the necessary means to prevent the boat from being overcrowded, or the fastenings of the wire rope being interfered with by unauthorised persons, and to see that the means of transit across the ferry were perfectly safe. Nor does the Lord Ordinary think that any duty lay upon the defenders to have the boats and wires properly inspected. Having regard to the situation of the ferry, in the immediate neighbourhood of a populous city, and to the position of the defenders as Magistrates of the city, these are matters which might very properly have been attended to by them. But that is a different matter from a legal obligation incumbent on them, for failure to perform which they can be made legally responsible. As owners of the ferry, the Lord Ordinary does not think any such legal obligations lay upon them.

"It is said, however, that although in an ordinary case the owner of a ferry may not be liable for the consequences of the fault of his tenant in working it, yet that in this case the defenders are liable, because they kept their tenant under their control.

"The tenant was taken bound by his lease to observe certain rules and regulations enacted by the defenders, and such other rules and regulations as the defenders might from time to time think necessary to make.

"Had the accident been in any way attributable to the rules and regulations so enacted—if it had been caused by the tenant acting on them,—the defenders would probably have been liable.

"It is said that the rules and regulations provided that the boat should leave either side within eight minutes after having been called for by any person, and that no provision is made for the boat ceasing to ply in certain states of the water. The Lord Ordinary does not think that this rule can be read as an imperative injunction on the tenant to ply across the ferry in all states of the water, or was intended at all to interfere with his discretion in ceasing to do so if he thought the water in a dangerous state. It is not alleged that it was in consequence of the tenant's acting in obedience to this regulation that the accident happened. The Lord Ordinary was referred to the case of *Steven* v. *The Police Commissioners of Thurso*, 3d March 1876, 3 Ret. 535, but he thinks the circumstances of the case are quite different."

The pursuers reclaimed.

Argued for them—The defenders had let an unsafe subject without making proper regulations. *Weston* v. *Tailors of Potterow*, July 10, 1839, 1 D. 1218; *Black* v. *Cadell*, Feby. 9, 1804, Mor. 13,905; *Dunn* v. *Hamilton*, March 11, 1832, 15 Sh. 853; *Kerr* v. *Magistrates of Stirling*, Dec. 18, 1858, 21 D. 169.

At advising—

LORD JUSTICE-CLERK—It is clear that if a landlord lets a subject to a tenant, and the tenant by his fault and negligence causes injury to a third party, the tenant alone is liable. The case of *Weston* merely implies that if there be fault on the part of the landlord, he also is liable. No doubt if a landlord lets a subject which is notoriously unsafe and dangerous, he is not freed from liability for the dangerous condition of the subject merely by taking his tenant bound to keep the subject in a safe condition. In that case a liability may remain with the landlord, especially if the landlord be a trustee for the public, as the present defenders are. Therefore, had it been averred that this ferry was dangerous in whatever manner it might be worked, and whether the provisions of the lease were observed or not, I am not prepared to say that such an averment might not be relevant. But on this record it is clear that the melancholy accident which resulted in the death of the pursuer's husband was really partly caused by the overcrowding of the boat and partly by the flood which was then coming down the river. The tenant had the fullest discretion as to starting his boat in that state of the water, or of using another boat worked by oars. The immediate occasion of the swamping was the state of the wire rope, and this the tenant was expressly bound to keep in a state of repair. We must recollect that this system had been in operation for two years. The landlord, after he had obtained an available obligation to repair, was surely not bound to inspect the rope. It seems to me that there was some looseness in the arrangements, for unquestionably there ought to have been regulations applicable to the new system of drawing the boat along a wire rope. But I can see no grounds on this record for inferring liability against the defenders.

LORD ORMIDALE—It is not disputed that the defenders were entitled to let the ferry, and the question is, whether they have relieved themselves from liability by the lease? That depends on the terms of the lease, for if the terms of the lease led to the wrong complained of, the authorities shew that in that case the lessor would be liable. But if the subject be let for a lawful purpose, and if the lease does not expressly or by implication permit any injurious act to be done, the lessor would not be liable. Here it is not said seriously that the lessee was incompetent, and he was taken bound to have fit workmen and to supply the wire rope. The pursuers assume that working the ferry by a wire rope is a safe system, and the faults they find with it are faults of the tenant's, not of the landlords.

LORD GIFFORD—I concur. It is not said that this was a public ferry which the Magistrates were bound to work themselves. They were entitled, like any private proprietor, to let the ferry. There would have been nothing illegal in a stipulation that the tenant was to provide everything. Here the boat belonged to the Magistrates, but nothing is said against the boat. The charge is made against the rope, which the tenant was bound to supply and maintain. There is a want in this record of any precise fault which could be put in issue against the defenders. I could understand a case that the ten ant was a mere pretence, and was really the servant of the defenders, but that is not the case here.

The defenders pointed out that the Lord Ordinary had dismissed the action, and asked decree of absolvitor. This was refused, and the Court adhered.

Counsel for Pursuers—C. Smith—Mair. Agent—Wm. Spink, S.S.C.

Counsel for Defenders—Balfour—Jameson. Agent—T. J. Gordon, W.S.

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*Tuesday, July 3.*

## SECOND DIVISION.

[Lord Rutherfurd Clark Ordinary.

### HARRIS AND OTHERS *v.* HAYWOOD GAS COAL COMPANY.

*Ship—Demurrage—Charter-Party.*

It was stipulated in a charter-party that three days' notice should be given to the merchants before the ship was ready to receive the cargo at the port of shipment. The ship not having arrived until after the day notified in terms of the charter-party, and having in consequence been unable for some time to get a loading berth—*held*, in an action for demurrage, that the shipowner was not entitled to calculate the lay-days from the date of the ship's actual arrival.

*Ship—Charter-party—Notice.*

Notice of time of ship's arrival, which, under the above charter-party, *held* to be insufficient.

*Charter-Party—Lay-Days.*

*Opinions* as to whether a clause in a charter-party excepting from the running hours allowed for loading any delay caused by riots, hands striking work, accident to machinery, or any other hindrances beyond control, which might impede the ordinary loading of the vessel, covered the case of delay occasioned by a crowd of shipping in the harbour preventing the vessel obtaining a loading berth.

This was a claim for demurrage by Harris and others, residing at Middlesborough, owners of the steamship "Stentor," against the Haywood Gas Coal Company, carrying on business at Glasgow and Granton.

On 7th August 1876 the pursuers entered into a charter-party with the defenders, whereby it was agreed that the pursuers' steamship "Vulcan" or "Stentor," in their option, should proceed to Granton, and there load coals for London at a