English case of *Ashburner* v. *M'Guire*, July 18, 1786, 2 Brown's C. C. 107, Lord Thurlow referred to the civil law that it was competent for a man after he had changed the subject-matter of a specific legacy to declare by his conduct that such change was no ademption, and proceeds:—"This has not been adopted by our law. There is no ground to say that after a legacy is extinguished a man by his conduct may revive it; it is contrary to common sense." Now, that is a most unusual rule of construing a testamentary writing—that you are to give effect to something not contemplated by the testator. It is a deviation from the civil law, from which our rules of ademption profess to be taken. Ademption is either revocation or it is nothing at all. There must be evinced an intention to revoke. According to the civil law, if a *res specifica* perished, no doubt the direction of the testator became imprestable, but even in that case there was a remedy. But where the subject had not perished, the intention of the testator undoubtedly prevailed." I read in the Institutes (ii. 20, 12)—"If a testator gives his own property as a legacy, and afterwards alienate it, it is the opinion of Celsus that the legatee is entitled to the legacy, if the testator did not sell with an intention to revoke the legacy. The Emperors Severus and Antoninus have published a rescript to this effect, and they have also decided by another rescript that if any person after making his testament pledges immoveables which he has given as a legacy, he is not to be taken to have thereby revoked the legacy; and that the legatee may by bringing an action against the heir compel him to redeem the property. If, again, a part of a thing given as a legacy is alienated, the legatee is of course still entitled to the part which remains unalienated, but is entitled to that which is alienated only if it appears not to have been alienated with the intention of taking away the legacy." (Sandars' Justinian 228). Lord Thurlow thought that this constant reference to the testator's intention was inconvenient, and he founded a rule on the shape of the particular instrument or investment. The same principle has been given effect to in the Scotch cases of *Pagan* and *Chalmers*, both of which I hold to be inconsistent with reason, and I protest in the name of jurisprudence against any such arbitrary rule being applied in a question of testamentary intention. In this case I doubt whether the legacy is specific or even demonstrative. I think it is a legacy of £4000. It was not the legacy of a particular investment which the testatrix might wish the legatee to enjoy, and it was not the legacy of a deposit-receipt. The sum was the balance of a previous transaction, and it remained in bank only for a few weeks. The trustee under the letter of 23d March is in fact directed to uplift the money on deposit and to hold and invest it. But while I doubt whether this can be called a specific legacy, I am not prepared to dissent from the judgment proposed.

The Court adhered, and allowed the costs of all the claimants to come out of the estate, on the ground that the settlement had been very obscurely expressed.

Counsel for Thomsons — Kinnear — Jameson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Glass family—M'Laren—Asher. Agents—Walls & Sutherland, S.S.C.

Counsel for Spencer, &c.—Trayner—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, July 17.

SECOND DIVISION.

[Lord Adam, Ordinary.

PETITION—SIR WILLIAM MAXWELL.

Entail—Entail Amendment (Scotland) Act 1875, *secs.* 11 *and* 12, *sub-section* 3—*Petition.*

An heir of entail in possession applied to the Court under the Entail Amendment Act 1875 for authority to borrow and charge on the estate sums which he had expended on improvements. Pending the proceedings he died, and his son, who was his general disponee and executor, and succeeded him as heir of entail, applied to the Court to be sisted as petitioner in his father's room, in terms of sec. 12, sub-sec. 3, of the said Act. *Held* that he was not entitled to be sisted.

Sir William Maxwell of Monreith, Baronet, on 1st March 1877 presented a petition under the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. c. 61), and secs. 7 and 8 thereof, for authority to borrow on the security of the entailed estate the sum of £8937, the amount expended on improvements of the entailed estate of the nature contemplated by the said Act, and to grant therefor bond of annual-rent or bond and disposition in security in usual form. The petition was one in which it was not necessary to obtain consents.

During the course of the proceedings in the petition Sir William Maxwell died, and was succeeded in the entailed estate by his only son Sir Herbert Eustace Maxwell. Sir William also left a disposition and settlement in favour of Sir Herbert, whereby he conveyed to him "all and sundry lands, heritages, and heritable subjects, debts heritable and moveable, heirship moveables, goods, gear, and sums of money, and in general the whole means, estate, effects, and property, heritable and moveable, real and personal, of whatever kind or nature, and wheresoever situated, now belonging or that shall belong to me at the time of my decease, excepting only the lands and estate of Monreith, and other lands and heritages held by me under settlement of strict entail, together with the whole writs, evidents, and title-deeds and vouchers and instructions of my said estates, heritable and moveable, real and personal, above conveyed: And I hereby nominate and appoint the said Herbert Eustace Maxwell to be my sole executor."

Sir Herbert immediately after his father's death lodged a minute setting forth the terms of the disposition and settlement, and craving to be sisted as petitioner in the original petition, as general disponee and executor of his father, and also as heir of entail immediately succeeding to him and now in possession of the entailed estate.

The sist was opposed by Mr Latta, the tutor

ad litem to Sir Herbert's son, who had been called as one of the respondents in the petition.

By the 11th section of the Entail Amendment (Scotland) Act 1875, it is provided that where an heir of entail has executed improvements and has died without charging them on the estate, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned, the sums expended on improvements, or part thereof, to apply to the Court, and after procedure on that application the Court may ordain the heir of entail in possession to execute a charge on the estate in favour of the applicant.

By the 12th section of said statute it is provided—"Subject to such rules in regard to the matters in this section mentioned, as the Court are hereby authorised and required to make by Act of Sederunt on or before the 15th day of November 1875, and thereafter from time to time to vary or extend as they shall see fit, the following provisions shall have effect with reference to all applications to the Court under this or any other Entail Act. . . . . (3) Should the applicant die, his personal representative, or his successor in the entailed estate, or his disponee, legatee, or assignee, or any of them, if they any have, according to their respective rights and interests, shall, except in the case of applications in which it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail, be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same."

The Junior Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 26th May* 1877.—The Lord Ordinary having heard counsel for Sir Herbert Eustace Maxwell, and for the tutor *ad litem* to William Maxwell, Refuses to sist Sir Herbert Eustace Maxwell as petitioner in room and place of the petitioner his father, the late Sir William Maxwell.

"*Note.*—Sir Herbert Eustace Maxwell has lodged in process a minute craving to be sisted as petitioner in room and place of his deceased father Sir William Maxwell. He founds on the 3d subsection of the 12th section of the Entail Amendment (Scotland) Act 1875; and he claims to be sisted as his father's general disponee and executor, and also as heir of entail immediately succeeding to him, and now in possession of the entailed estate.

"The petition was brought at the instance of Sir William Maxwell for the purpose of charging on the entailed estates certain sums expended by him on improvements thereon.

"The sub-section in question provides—'Should the applicant die, his personal representative, or his successor in the entailed estate, or his disponee, legatee, assignee, or any of them, according to their respective rights and interests, shall, except in the case of applications in which it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail, be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same.'

"It was not disputed that the general disposition in Sir Herbert's favour was not sufficient to give him a title to the improvement expenditure in question under the 11th section of the Act, which requires that the sums expended shall be "expressly" bequeathed or conveyed. As general disponee, therefore, it appears to the Lord Ordinary that Sir Herbert has no right or interest in the sums in question, and has no title to be sisted in that character.

"The Lord Ordinary is further of opinion that the fact of Sir Herbert having succeeded to and being in possession of the entailed estate does not give him any right or interest in these sums. In that character he is rather in the position of being a debtor than a creditor.

"But the 3d sub-section of the 12th section of the Act provides that parties shall be entitled to be sisted 'according to their respective rights and interests.' In the opinion of the Lord Ordinary Sir Herbert has no right or interest in the sums in question, and therefore has no title to be sisted in room and place of his late father."

Against this interlocutor Sir Herbert Maxwell reclaimed. The Second Division appointed the case to be argued before seven Judges.

Authorities—*Breadalbane's Trustees* v. *Campbell*, June 6, 1866, 4 Macph. 790; *Glendonwyn* v. *Gordon*, July 20, 1870, 8 Macph. 1075, and May 19, 1873, 11 Macph. (H. of L.) 33.; *Robertson*, June 10, 1874, 2 Macph. 1178; Duff on Entails, 72.

At advising—

Lord Justice-Clerk—In dealing with the question involved in this petition it is necessary to keep clearly in mind what was rather overlooked in the course of the argument—the precise position of an heir of entail in possession who has expended money in improving his estate. He only occupies a position different from a fee-simple proprietor who has improved his landed property in this, that while a fee-simple proprietor may burden his heir or his heritage with sums so expended as he pleases, the heir of entail can only do so through the intervention of the Court under the entail statutes. But if in either case the proprietor takes no step to make the expenditure a burden on the land, the estate has the benefit, the money is spent, and that is the end of it; and in neither case has the personal representative of the proprietor who spent the money any claim against an estate which never belonged to him, or for repayment of money which never became a debt affecting that estate. In both cases the expenditure can only be raised into a debt by the voluntary act of the proprietor of the landed estate, and if he do no act for that purpose no debt is ever created.

It is therefore clear that a general settlement containing no express reference to the power which the granter had to make these sums a burden on the entailed estate could not possibly fulfil the conditions of the 11th section of the recent Entail Act, because such a settlement would be perfectly consistent with the absence of all intention on the part of the heir in possession to burden his entailed estate with the expenditure. Any power he had to do so arose, not from his expenditure of the money only, but from his having expended it as heir in possession, and this is clearly a power which was personal to him, and which ceased when he ceased to possess.

But the 11th section introduces an equitable remedy for cases in which the heir in possession clearly evinces his intention that the sums ad-

vanced for improvements shall burden, not his personal representatives, but the entailed property, although he has not adopted the statutory procedure. The words of the section are as follows—[*reads*].

I think the word "express" quite sufficient for the purpose of the clause, and indeed more suitable than "special." Any words bearing express reference to the sums in question which are sufficient to evince a testamentary intention to bequeath them will be due compliance with the requisites of this clause.

Express words stand in legal contrast to general words; nor do I think there is any obscurity in the meaning which should lead us to interpolate words into this clause which are not to be found in the statute. In the present case the sums in question have not been expressly conveyed to the petitioner, and therefore no right has accrued to him under this clause. The general conveyance which he holds bears no reference to the sums in question, and neither expressly nor by implication conveys them.

It will, however, be observed on the privilege here given that its quality is peculiar. The last heir in possession never was the creditor of the entailed estate in these sums, and therefore there was no debt constituted in his person, and thus none which he could convey or assign. What he had to bequeath was not a debt, but the privilege created by this clause of the statute; and that is not the right or faculty which he himself had, for that could only be exercised by the proprietor of the land, but a distinct representative power different from any which the heir in possession ever had, and one to be made effectual not by the heir in possession, but against him. This last consideration leads me to doubt whether, whatever the true meaning of the 3d sub-section of section 12 of the statute may be, the provisions of the 11th section can ever be carried into effect by the representative sisting himself as a party in a petition like the present. The true remedy is pointed out and provided for in the statute; and the application by the representative therein provided will contain a prayer entirely different from that of the present petition, where the applicant is not the proprietor of the estate and has no control over it.

As to the 3d sub-section of section 12, if it had stood by itself as a substantive enactment, it cannot be denied that its words admit of being read as if it conferred a universal right on representatives of all kinds—heirs, disponees, executors, asignees—to take up and follow out for their own benefit any petition presented under the Entail Statutes which had not been carried through in the lifetime of the person who presented it. A little consideration, however, will show that even on its own terms this could hardly be its meaning, for the indiscriminate power thus supposed to be given to representatives, according to their respective rights, might lead to most anomalous and inextricable consequences. The application may in many instances be such as an heir of entail in possession could alone act on if the petition were granted, of which indeed the case now under consideration is a good example; and if we are to assume that the object of the clause was to devolve on some or other representative or successor the substantial title and interest in every such petition which may be depending at the death of an heir in possession, it would certainly require a very different set of provisions to define the persons to whom these rights are to descend with any chance of effectual application.

But when the context of this clause is considered, all substantial difficulty as to its true meaning is removed. It is obviously a procedure clause merely, and it is only meant to provide that when the substantial interest in any such application does descend to representatives, or is capable of being and has been assigned, the representative may take up the depending petition, and need not be put to a new application.

This, I apprehend, may be fairly inferred from the fact that the 12th section is wholly a clause regulating procedure, so much so that its provisions are liable to be subject to rules made by the Court by Act of Sederunt—a consideration entirely inconsistent with the idea that it was intended to confer new and valuable patrimonial rights.

Lord Deas—I concur in the result, but on much narrower grounds than those stated by the Lord Justice-Clerk. This is purely an application to be sisted, under sub-section 3 of section 12. We have nothing to do with section 11, which requires a substantive petition. Now, sub-section 3 obviously relates to procedure, and it is preceded and followed by sections relating to procedure. It is subject to be extended or varied by the Court. I cannot hold, therefore, that it confers a right to be sisted where none formerly existed.

Lord Ormidale—I concur in the opinion of the Lord Justice-Clerk, and generally in the views which he has expressed. I only desire to make one observation with regard to section 12. I understood his Lordship to have said that this Court had the power to vary the provisions in the sub-sections. I doubt whether that is so. It rather appears to me, upon consideration of the words of the section, that the rules of Court or Acts of Sederunt which the Court may pass are what can be varied, and not the provisions in the sub-sections of the statute itself. With that observation, I entirely concur in the proposed judgment.

Lord Mure concurred.

Lord Gifford—I concur in the result at which all your Lordships have arrived, and I have only a single observation to make.

On first reading sub-section third of section twelve of the statute of 1875, I formed an impression that the object of the Legislature was to enact that entail petitions should not fall as formerly by the death of the petitioner, but that in all cases the presentment of such petitions, and the commencement of proceedings under them, should create in the petitioner a vested and transmissible right, which should pass by the petitioner's deeds, either deed *inter vivos* or *mortis causa*, and which, if the petitioner should die intestate, will pass to his heir or to his personal representative according to the nature of the right itself as heritable or moveable. I may say I have still an impression that something like this was intended by the framers of the statute.

But although this may have been the intention of the Act or of its framers, I do not think it

has been carried out so that effect can be given to it. The words in question—sub-section 3 of section 12—are found only in a procedure clause, which regulates proceedings, but which is not the appropriate place for creating rights—especially rights so important as those here alleged. For if the claim applies at all, it will apply to all entail petitions of every kind, and in many cases very great difficulties and anomalies would arise. But still further, and what perhaps is more material, the words of the statute, instead of *in terminis* conferring a new right or new rights, refer back to rights as previously existing. I therefore concur in thinking that this sub-section 3 of section 12 does not confer any right on Sir Herbert Eustace Maxwell to take up his father's petition.

Lord Shand—I concur. It must be kept in view that, prior to 1875 at least, the heir in possession had nothing but a faculty to charge. If he desired to raise a debt against the future heirs he might record his vouchers under the Montgomery Act, but if he did not do that, then he must carry through to decree his petition under the Rutherfurd Act. In this state of the law I think section 11 of the recent statute was intended to confer a valuable power of bequeathing or conveying by express terms what was formerly an intransmissible right. But it is said that sub-section 3 of section 12 confers a right on the next heir apart from conveyance to be sisted in the petition and to complete it. That section, however, is qualified by the words "according to their respective rights and interests," and cannot be held to confer a new right. The existing evil was that when the petitioner died his petition necessarily lapsed—a most inconvenient result in such cases as feuing applications, or for current improvments, or for the application of consigned money. In many such cases the heir of entail may have a right to be sisted under this sub-section.

Lord President—I am of opinion that the whole of section 12 relates to procedure. That opinion is based on the introductory words, which give this Court a power to vary by Act of Sederunt. With regard to the observation of Lord Ormidale, I agree that it is quite possible that everything contained in section 12 is not subject to alteration by the Court. For instance, we could not apply sub-section 3 to cases excepted by the statute from its operation where consents are required. But sub-section 3 merely gives a right to be sisted to persons who have otherwise a right and interest to be sisted. As to section 11, it is true, as Lord Deas has said, that it is not necessary in disposing of this minute to give an opinion on it. But the point has been argued, and I shall therefore repeat what I said during the argument, that if the word "expressly" is to be taken as meaning "specially," the section proceeds on an inaccurate use of language. An express conveyance is opposed to an implied conveyance, and a special conveyance is opposed to a general conveyance.

The Court adhered.

Counsel for Reclaimer—Kinnear—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Respondent — Lee — Moncrieff. Agent—John Latta, S.S.C.

Wednesday, July 18.

FIRST DIVISION.

SPECIAL CASE—SINCLAIR AND FLETCHER'S TRUSTEES.

Teinds—Interim Locality—Relief—Bona fides.

In a claim of relief by an overpaying heritor against an underpaying heritor, under an interim scheme of locality—*held* (1) that the fact that the underpaying heritor had, for upwards of forty years before the claim was made, ceased to be an heritor in the parish, was not a good defence; and (2) that a plea of *bona fide* consumption could not be maintained in defence, although based on a finding by a Lord Ordinary in a process of augmentation in 1708, "that the said lands, in respect of the writs produced, and that they were never in use of payment, could not be made liable in any part of the stipend" — this finding not having been brought under review, but having had effect given to it in the decreet of locality finally pronounced, by which no part of the stipend was allocated on the said lands.

This was a Special Case presented by the trustees of the late Sir John Gordon Sinclair of Murkle and Stevenson, Baronet, of the first part, the trustees of the late General Fletcher Campbell of the second part, and Andrew Fletcher of the third part. The question for the judgment of the Court was as to a claim of relief by the first party against the second and third parties for overpayments of stipend from 1808 to 1833. These overpayments had been made by the first party in consequence of the lands of Wester Monkrigg, in the shire of Haddington, not having been localled on. In 1808 the second parties acquired right to the lands of Wester Monkrigg, and in 1825 they conveyed them to the third party, Mr Fletcher. In 1833 Mr Fletcher sold the lands.

The ministers of Haddington obtained a decreet of augmentation in 1797, another in 1807, and a third in 1826. The augmentation of 1797 was paid under interim schemes of locality, prepared on 9th July 1800, until 3d July 1816, when new interim schemes, applicable also to the augmentation of 1807, were made up and approved of. And on 6th March 1830 both these schemes of 1800 and 1816 were superseded by a new interim locality, embracing the augmentation of 1826 as well as the two previous augmentations. These interim localities were appointed in ordinary form to be the rule of payment of the stipend until final decreets of locality should be adjusted, and by them no part of the stipend was allocated on the teinds of the lands of Wester Monkrigg. Schemes of locality of the stipends awarded by the said augmentations were on 22d November 1861 approved as final, and by the final schemes there was allocated on the lands of Wester Monkrigg certain amounts of stipend. By the interim localities there were allocated upon the lands of Stevenson, in the parish of Haddington, which belonged from 1808 to 1833 to Sir John Gordon Sinclair, an amount of stipend considerably in excess of what would have been allocated had the lands of Wester Monkrigg been allocated upon,