of November 1792. Suppose, then, that we hold that the disposition by Angus Macdonald in favour of the granter of the bond contains no mention of the date of recording at all, still we have in the words I have read a sufficient and complete description of the subject, and therefore I do not think that the words written on the erasures are *inter essentialia*. I therefore think that the Lord Ordinary is right in the conclusion at which he has arrived.

LORD MURE—I agree with your Lordship for the reasons stated, that the words written upon the erasures are not in essential parts of the deed. If we assume that the words after "dated" down to "November" are not in the deed, then the deed will run thus, "being the subjects and others particularly described in the disposition granted by Angus Macdonald, sometime residing at No. 7 Roslin Terrace, Aberdeen, now at No. 4 South Crown Street, Aberdeen, in my favour, dated . . . in the year 1880." And the subjects being sufficiently described elsewhere in the bond, I think that the words written on erasures, are not in an essential part of the deed.

Then the only question is, whether a statement contained in the testing clause, which is incorrect *ex facie* of the deed, but relative to matters not essential, must be held to invalidate the deed? If the deed were good without the words written on erasures, and if it were good without any mention of the erasures in the testing clause, I cannot see how it is not to receive effect. The testing clause states incorrectly that something was done, but if the reference is to a part of the deed which is not essential, then I do not think that invalidates the deed.

LORD SHAND—The decision in this case seems to turn entirely upon the question whether the erasures are in an essential part of the deed. If the words written on the erasures had been essential in order to have a complete description of the subjects, so that without them there would not be a proper description, then I think the trustee would have been right. But if the words are not essential, then I think the deed is good as a security. It appears to me that omitting the date of the execution and recording of the deed in favour of the granter, there is a sufficient description of the subjects, and therefore that these words are not essential.

LORD DEAS was absent.

The Court adhered.

Counsel for Trustee—Shaw. Agent—R. C. Gray, S.S.C.

Counsel for Objector—Keir. Agents—Stuart & Stuart, W.S.

Friday, June 27.

FIRST DIVISION.

[Lord Adam, Ordinary.

CROSSE (BANKES' EXECUTOR) *v.* BANKES.

Agreement — Obligation — Whether Transmissible or purely Personal—Mutual Contract.

A brother and sister who were at issue as to which of them had right to succeed to an entailed estate, entered into a formal agreement that the brother, in case he should be found to have right to the estate, "shall during his own lifetime allow" the sister "one-half of the free rental of the said estate, and he binds and obliges himself, his heirs and successors, to make payment to her of the said free rental accordingly." On the other part, the sister, in case she should be found entitled to the estate, undertook to "allow" to the brother "the one-half of the free rental of the said 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 sister was found entitled to the estates, and paid the brother half the rents till his death. *Held* (*aff.* Lord Adam, —*diss.* Lord Shand), in an action against the sister by his executor, that the obligation in his favour was personal, and did not transmit to his executor.

The late Meyrick Bankes of Winstanley, Lancashire, and of Letterewe and Gruinard, Ross-shire, died on 16th June 1881, survived by his wife and six children. A question arose as to the meaning and effect of Mr Bankes' testamentary writings, in regard to the respective rights of Thomas Holme Bankes, his second son, and Mrs Maria Anne Liot Bankes, his second daughter, that question being whether under his settlements the estates of Letterewe and Gruinard were directed to be entailed on the brother or the sister. The brother and sister accordingly entered into the following agreement:—"We, the parties following, viz., Mrs Maria Anne Bankes, residing in London, daughter of the late Meyrick Bankes, Esquire, of Winstanley, Lancashire, and of Letterewe and Gruinard, Ross-shire, on the first part, and Thomas Holme Bankes, residing in London, second son of the said Meyrick Bankes, on the second part, considering that their said father lately died leaving a trust-disposition and settlement disposing of the estates of Letterewe and Gruinard, in Scotland, which belonged to him, and a will in the English form disposing of his properties in England, and also a codicil, whereby he is said to have made certain alterations on one or both of these settlements, in connection with which codicil a question has arisen whether the estates of Letterewe and Gruinard were intended to be given to the said Thomas Holme Bankes or to the said Maria Anne Bankes, which question, it is intended, shall forthwith be submitted to the Court of Session in Scotland for decision; and seeing that in these circumstances the parties hereto have agreed to enter into these presents: Therefore they do hereby agree as follows, namely—(First) That the said Thomas Holme

Bankes, in case he is found to have right to the said estates of Letterewe and Gruinard, shall, during his own lifetime, allow the said Maria Anne Bankes one-half of the free rental of the said estates, and he binds and obliges himself, his heirs and successors, to make payment to her of the said free rental accordingly: (Second) In like manner the said Maria 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 one-half of the free rental of the said 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.—In witness whereof," &c.

The action in the Court of Session, in contemplation of which this agreement was entered into, resulted in a decree of declarator in favour of the sister Maria Anne Liot Bankes; and the trustees of the late Meyrick Bankes were accordingly instructed to execute a deed of entail in terms thereof. Maria Anne Liot Bankes accordingly entered on, and at the date of the present action still possessed the estates of Letterewe and Gruinard. Thomas Holme Bankes, the other party to the agreement, died in England on 2d October 1882, leaving a will dated 9th August 1882, under which he appointed certain parties named in the deed to be his executors. Arthur Wilson Crosse, the pursuer of this action, was—the other having declined—sole executor. He called upon Mrs Maria Anne Liot Banks to pay to him as executor one-half the free rental of the estates during "all the days and years of her life," in terms of the agreement. She maintained that he was not entitled thereto, since the right of Thomas Holme Bankes was personal and did not descend to heirs. He then raised this action of declarator of his right under the agreement, and for payment of one-half the rents since the death of Thomas Holme Bankes.

He pleaded—"(2) The period during which the defender Mrs Liot Bankes bound herself by said agreement to pay one-half of the free rental of the said estates being the period of her own life, she is not entitled to refuse to make said payment in respect of the decease of Thomas Holme Bankes."

The defender pleaded—"(1) No title to sue. (2) On a sound construction of the agreement, the pursuer, as executor of the deceased Thomas Bankes, is not entitled to payment of any part of the rents of Letterewe and Gruinard accruing after the death of Thomas Bankes, and the defender is entitled to absolvitor, with expenses."

The Lord Ordinary upon 26th January 1884 assoilzied the defender from the conclusions of the action.

"*Opinion.*— . . . The whole question before me is on the interpretation of this agreement, and may be thus stated—Whether it is one by which, after the death of the unsuccessful party in the litigation, his heirs and successors are to be entitled during the lifetime of the successful litigant to one-half of the rents? That is the whole question. Now, we must turn to the agreement to see what actually are its terms. The agreement indicates the cause of the dispute or of the question between the parties, and then goes on in two clauses, which appear to me to be almost identical—the first clause to meet the case, which has not occurred, of Thomas Holme Bankes being the successful litigant; and the second, to meet the case, which has occurred, of the defender Maria Anne Bankes being the successful litigant. What, then, is the proper construction of this second branch of the agreement? The words are—'In like manner the said Maria 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 one-half of the free rental of the said 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.' Now, practically the contention on the part of the pursuer is this, that the agreement shall be read thus:—'In like manner the said Maria Anne Bankes, in case she is found to have right to the estates of Letterewe and Gruinard, shall allow to the said Thomas Holme Bankes, *and his heirs and representatives*, the one-half of the free rental of the said estates during all the days and years of her life, and she binds and obliges herself,' &c.

"That is the result of the contention on the other side, for Mr Jameson has argued to me that the law supplies the words I have emphasised, for the reason that this is an onerous obligation undertaken by the granter, and being onerous it transmits to heirs and representatives. That is so far quite true, but that observation applies to what is peculiarly an obligation. The question is thus raised, Is this an obligation personal to Thomas Holme Bankes? If it was personal to him, there was nothing to transmit. There can, I need not say, be no difficulty about the law on the subject. I quite admit, and everybody will admit, that if the obligation is to pay for more than the lifetime of Thomas Holme Bankes, then of course it will transmit. An obligation to pay down a sum to Thomas Holme Bankes will of course transmit to heirs and representatives, for the plain reason that it was an obligation that vested in Thomas Holme Bankes. But still the question remains, What is the obligation? Now, it humbly appears to me that the obligation here was meant to be personal to Thomas Holme Bankes. I think it is an obligation of the nature of the payment of an annuity, and that it was not intended to transmit to the representatives. The whole case lies there. Was that the nature of the obligation? Was it an obligation on her to pay during the time she possessed the property? I think her obligation was to pay to Thomas Holme Bankes, and there is no mention of an obligation to pay or allow a division of the rents between her and anybody else. Accordingly, I think the real nature of the agreement was, that she was to pay one-half of the rents of the estate to Thomas Holme Bankes just in the same way as if it had been an agreement on her part to allow him a liferent of one-half of the rents. Of course it is subject to observation that it is necessary or desirable to stipulate as to what the rights and duties of representatives shall be. I think that is dealt with here, because it is obvious, on the state of the facts before us, that if the lady died there might be an unpaid balance of rent due to the brother. In that case there is a clear obligation on her heirs and successors to pay, for the obvious reason that the obligation had vested in Mr

Bankes during her life, and he would be entitled to enforce that. But there is no clause saying that she shall pay to Thomas Bankes or his representatives. The obligation on her part to pay is limited strictly to him, and to no one else.

"I must therefore assoilzie the defender."

The pursuer reclaimed, and argued—The obligation was onerous, and being so, although executors were not mentioned it transmitted to representatives. The only period mentioned in the agreement was the lifetime of the party succeeding—*Hamilton* v. *M'Gie*, June 7, 1828, 6 S. 932. The period during which payment was to continue was in the case of the defender, "all the days and years of her life," and being fixed, the right to it transmitted to representatives of the person to whom it was undertaken. This being an entailed estate there was no need to insert the period, except to limit the time of payment.

Argued for respondent—There was no presumption that either party intended to make a provision for heirs. What the pursuer asked the Court to do was to read into the agreement "during the joint lives" of the parties. The word "allow" used in the agreement showed that the benefit was to be personal and alimentary.

At advising—

Lord President—The question raised by this case relates to the construction of certain words in an agreement which was entered into by the second son and the second daughter of the late Mr Bankes of Letterewe. The agreement was dated 8th October 1881, and the cause for which it was entered into is sufficiently explained in the opening clauses. It appears that Mr Bankes had made a provision in his trust-deed for the settlement of his estates in Scotland upon his second son Thomas Holme Bankes. This trust-deed he recalled by a codicil to his last will, which was made in English form, and the question comes to be, whether this codicil was an effectual recal of his trust-disposition? It was necessary to have this question determined, for if Mr Thomas Bankes was not entitled to succeed to the Scottish estates, then his sister was. Accordingly, the parties came to terms in the agreement now under consideration, the substance of which was that whoever should be found entitled to the estates of Letterewe and Gruinard should make to the other an allowance of one-half of the free rental of the said estates.

Mrs Bankes was the successful party in the litigation which ensued. She according entered into possession of the estates, and gave to her brother Thomas Bankes the stipulated share of the rents of these estates during the remainder of his life. He (Thomas Holme Bankes) died upon the 2d October 1882, and the present pursuer Mr Crosse is his executor. He contends that by the terms of the agreement he is entitled to receive, as executor of Thomas Bankes, one-half of the rents of the estates during Mrs Bankes' lifetime. The lady disputes this, and maintains that all that the party who entered into possession of the estates undertook to do was to make the stipulated payment during the lifetime of the unsuccessful party. One thing I think is quite certain, and that is, that whatever the intention of the parties was, that intention was capable of being clearly expressed. This, however, has not been done, and accordingly we are compelled to construe the deed. The agreement between the parties is thus expressed—"(First) That the said Thomas Holme Bankes, in case he is found to have right to the said estates of Letterewe and Gruinard, shall during his own lifetime allow the said Maria Anne Bankes one-half of the free rental of the said estates;" and then follows the counter part of the agreement—"(Second) In like manner the said Maria Anne Bankes, in case she is found to have right to the said estates of Letterewe and Gruinard, shall allow to the said Thomas Holmes Bankes the one-half of the free rental of the said estates during all the days and years of her life." Now, although the language used in these two clauses is not exactly the same in both, yet it is clear that what was intended was, that they should be counterparts of each other. It comes to be this, I think, that whichever of the contracting parties succeeds, he or she is to pay the agreed upon sum so long as his or her possession of the estates continues. But the agreement provides that the successful party is to "allow" this sum to the unsuccessful party—that is to say, the sum is to be of the nature of an allowance. Now, I attach great importance to these words, for when a father makes an "allowance" to his son, or an uncle makes an "allowance" to his nephew, the idea conveyed by the use of such a word certainly is that the gift is personal to the recipient. In the case of a father giving an allowance to his son either to assist him in his profession, or to enable him to subsist without a profession, what is understood by the term is that the gift is continued only so long as the son lives or requires it. When, in the present case, either the brother or sister agree to make the other an allowance, I cannot see how these words can be interpreted to mean anything but this—an intention that the unsuccessful party shall participate in the entailed estate. But there are other words in this agreement to which attention must be paid. In that part of the deed in which provision is made for Thomas Bankes being successful in the litigation these words occur—"and he binds and obliges himself, his heirs and successors, to make payment to her of the said free rental accordingly;" and on the other part the lady, in the event of her being the successful party, "binds and obliges herself and her representatives to make payment to him of the said free rental accordingly." Now, these are words of present obligation to pay, but we must take along with them the bearing and effect of the other words of the agreement. If there had been simply an obligation to pay, without anything else, the argument would have been different, because if a person simply binds and obliges himself to pay a certain thing or sum to A, that has a recognised meaning. But here there is a reference back to what is already provided. Each party agrees to pay to the other "accordingly," that is, according to the arrangement as to an allowance which had been already made. The word "accordingly" naturally refers to the provisions of the preceding arrangement. The nature of the allowance also is a matter which must be carefully kept in mind. The agreement is that one-half the income of a particular estate shall be given to the party unsuccessful in the litigation. I think that the leading idea in the minds of the parties when

this arrangement was entered into was, that whichever of the two results contemplated occurred, the successful party was to make an allowance to the unsuccessful party. That being the nature of the agreement, it follows that this allowance was personal to the late Thomas Bankes, and does not transmit to his representatives. I therefore agree with the Lord Ordinary.

Lord Mure—I am of the same opinion, and think with your Lordship that what the parties meant to do by this agreement was to secure to the party unsuccessful in the impending action an allowance during his or her life, and not to come under any obligation that the annual sum thus provided was to be transmissible to heirs and representatives. The allowance which is here agreed to be given is half the annual rental of an entailed estate. Now, these rents would not, after the death of the heir in possession, belong to his general representatives, but would, on the contrary, pass to the next heir of entail. In my opinion, though the wording of this agreement is far from clear, yet I think the intention of the parties was to divide the rents of these estates during their joint lives, but that neither party intended that these payments should be continued to the general representatives of the predeceaser.

Lord Shand—I much regret that in this case I cannot agree with your Lordship in the construction which you have put upon the terms of this agreement. I fail to find in the words used anything to indicate that it was the intention of the parties that in the event of Mrs Bankes being successful in the litigation, then that the obligation on her part was to be personal only to Thomas Bankes. I think, on the contrary, that this obligation was onerous on the parties. Both Mrs Bankes and her brother laid claim as heirs of entail to the estates of Letterewe and Gruinard, and each intended to insist to the utmost in their respective claims. But each of the parties saw that it was impossible that both could succeed, and accordingly, while the result was yet uncertain they stipulated that the unsuccessful party should gain a certain advantage, and that the rents of these two estates should be halved, and each consented to pay that amount to the unsuccessful party. I do not think that an agreement of this kind is to be dealt with as if it were a testamentary deed, where great latitude of construction is sometimes allowed in order to get at the true intention of the parties. It is a contract, and what we are called upon to decide is, what is the true meaning and effect of the obligatory terms which have been made use of? What the parties really intended was, I think, that the successful party should make payment to the other of one-half of the rents which they acquired—in other words, that the rents drawn were to be divided. That I think is the ordinary effect of the language used, and which is as follows—"In like manner, the said Maria Anne Bankes, in case she is found to have right to the said estates of Letterewe and Gruinard, shall allow to the said Thomas Holmes Bankes the one-half of the free rental of the said 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." Now, the measure of that obligation is in my opinion to be the whole lifetime of the party who makes it. The Lord Ordinary bases his judgment upon this, that in his opinion the payment was to be to Thomas Bankes and not to his heirs and representatives. Of course, if it was essential that these words "heirs and representatives" be added to an obligation in order to prevent it being personal in its nature, then the Lord Ordinary would be right.

Your Lordship in your opinion proceeded upon a circumstance of which the Lord Ordinary does not take any notice, namely, the existence in both parts of the argument of the word "allow," and you considered that the effect of that word was to make the payments to Mr Bankes, by his sister, of the nature of an allowance. I cannot take that view of the use of this word, but think, on the contrary, that it is a most appropriate expression in corroboration of what I consider to be the true reading of the agreement. In the case suggested by your Lordships, of a father making an allowance to his son, that would be done from paternal affection, and the provision would in such circumstances be so expressed as to be personal to the son. In the present case, however, I cannot see, in the absence of the words "heirs and representatives" or in the existence in this agreement of the word "allow," anything to take from the obligatory nature of the words used. The Lord Ordinary reads this document as if it were an agreement to pay an annuity, but that is just the question which has to be determined. The idea of an annuity implies some limitation, and that naturally the lifetime of the grantee. The true reading of this agreement is, I think, that one-half of the rents was to be paid by the successful party, and that that payment was to be continued during his or her lifetime.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Jameson. Agents—C. & A. S. Douglas, W.S.

Counsel for Defender—Trayner—Guthrie. Agents—Murray, Beith, & Murray, W.S.

Friday, June 27.

FIRST DIVISION

[Lord Adam, Ordinary.

DOBBIE *v.* WILLIAMS, *et e contra.*

Ship—Charter-Party—Excepted Risks—Damage to Cargo by Sea Water—Dunnage—Onus.

A vessel was chartered to carry a cargo of cement. The average length of the voyage for which she was chartered was about fourteen days. The vessel reached her destination after being about eight weeks on the voyage, and on discharging her cargo a portion was found to be damaged by salt water. In an action by the owner of the cargo for damages for the loss so caused, it was proved that the weather the ship met with was extremely stormy, and it was not proved that the vessel was insufficiently sup-