On February 19, fourteen days after the case had been dismissed, the pursuer presented a note in which, after narrating the course of the action, he stated that he was entitled to compensation under the Workmen's Compensation Act 1897 and was desirous to have it assessed, and prayed the Court to remit the case to the Sheriff to proceed with it under the Workmen's Compensation Act 1897, or to do further or otherwise as should seem proper.

The respondent objected.

Argued for appellant—The appellant was entitled to compensation under the Workmen's Compensation Act 1897, and under sec. 1 (4) such compensation was to be assessed in the action raised independently of that Act and found of no avail to the workman. There ought therefore to be a remit to the Sheriff-Substitute to assess the amount. Such a remit was the competent and proper course—*Quin* v. *John Brown & Company, Limited*, June 2, 1906, 8 F. 855, 43 S.L.R. 643; *Little* v. *P. & W. MacLellan, Limited*, June 16, 1900, 2 F. 387, 37 S.L.R. 287. It was not necessary that the motion for a remit should be made before the Court had pronounced judgment dismissing the action of damages. The section imposed no time limit within which the motion must be made, and the appellant was entitled to reasonable time for consideration before proceeding further. To refuse the application here would cause great hardship, as the accident having occurred on 18th May 1906 it was, under sec. 2 (1), now too late to institute proceedings under the Workmen's Compensation Act 1897. The object of sec. 1 (4) was not to prevent the workman obtaining his remedy save on a strict observance of certain conditions, but to simplify procedure and prevent the multiplication of actions—*Edwards* v. *Godfrey*, [1899] 2 Q.B. 333, and the Workmen's Compensation Act 1897, sec. 1, sub-sec. (2) (*b*).

Argued for respondent—The application came too late—*Baird* v. *Higginbotham & Company, Limited*, March 14, 1901, 3 F. 673, 38 S.L.R. 479. Even were the Court prepared to take a lenient view on the question of time, the application here could not be granted. Section 1 (4) of the Workmen's Compensation Act 1897, relied on by the appellant, only applied to the case where a workman came into Court averring that his employer was liable under that Act as well as for damages otherwise. The appellant had not done so here, and the question of liability for compensation had never been considered. The liability was in fact denied, and the whole question must be included in the remit. That was practically instituting proceedings anew, this time under the Workmen's Compensation Act, and that after the time for such proceedings had expired.

The opinion of the Court (the LORD PRESIDENT, LORD M'LAREN, LORD KINNEAR, and LORD PEARSON) was delivered by

LORD PRESIDENT — The Court are of opinion that this case is ruled by the case of *Baird* v. *Higginbotham & Company* in the other Division. We are not prepared to go back on that decision, and therefore hold that this motion comes too late.

The Court refused the prayer of the note.

Counsel for Pursuer and Appellant—Orr, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defender and Respondent—Orr Deas. Agents—Simpson & Marwick, W.S.

Wednesday, February 6.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

TAIT (SOMERVELL'S TRUSTEE) *v.* SOMERVELL.

Entail—Disentailing—Bankruptcy—Petition to Disentail by Trustee in Bankruptcy—Objection Taken by Bankrupt—Lack of Necessity—Relevancy—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.

A trustee on a sequestrated estate, having brought a petition, under section 18 of the Entail (Scotland) Act 1882, for the purpose of having disentailed, property of which the bankrupt was heir of entail in possession, the bankrupt lodged answers and opposed on the ground that the disentail was unnecessary because sufficient funds would be obtained from the sale of other property already disentailed.

Held that the bankrupt's answers were irrelevant, and fell to be dismissed, the questions sought to be raised not being for this process but for the sequestration.

The Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), sec. 18, enacts—"Where any heir of entail in possession is entitled to disentail the estate, with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court, any creditor of such heir in possession, in respect of debt incurred after the passing of this Act, who has obtained decree against him for payment and charged upon the decree, shall, in the event of the debt so incurred not being paid for six months after the expiration of the charge, be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs or his curator *ad litem* appointed in terms of this Act refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for

the amount so ascertained in favour of such heir, and if he refuses or fails to do so, the Court shall grant authority to the Clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed shall be as valid as if it were executed by the heir in possession himself; and the Court shall thereafter ordain the heir in possession to execute an instrument of disentail of the estate; and if he refuses or fails to do so the Court shall grant authority to the Clerk of Court to execute such instrument, and after provision is made for the interests of any other creditors whose debts are secured on the estate, the creditor aforesaid shall be entitled to affect the estate for payment of such debt, and shall have the same rights and interests therein as if an instrument of disentail had been executed and recorded by the heir in possession himself. If the estates of such heir of entail in possession of an entailed estate shall be sequestrated for debt incurred after the passing of this Act, the trustee on his sequestrated estates shall be entitled to apply to the Court for authority to disentail the estate, and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor."

On June 6th 1901 Guy Duke, trustee on the sequestrated estates of James Somervell of Sorn, presented a petition under the above-quoted section of the Entail (Scotland) Act 1882, for the purpose of having disentailed the lands of Sorn, Dalgain, and Daldorch, in the county of Ayr, of which the bankrupt was heir of entail in possession. During the course of the proceedings Duke was succeeded as trustee by Francis More, C.A., and More, by John Scott Tait, C.A., who were in turn sisted as parties to the petition.

The bankrupt Somervell lodged answers to the petition, objecting to the disentail, *inter alia*, on the ground of lack of necessity.

The facts are given in the opinion of the Lord Ordinary on the Bills (Low), who on 7th August 1906 remitted to Lockhart D. Corson, S.S.C., to inquire into the circumstances, and whether the procedure had been regular and proper, to Joseph Harling Turner to value the estate for the purpose of the petition, and to George MacRitchie Low, actuary, to value the interest or expectancy of James Graham Henry Somervell, Agnes Marion Somervell, and Elizabeth Julia Somervell, the next heir and heiresses of entail under the petition.

Opinion.—"The estates of Mr Somervell of Sorn were sequestrated under the Bankruptcy Acts on 12th February 1901. Mr Duke was appointed trustee on the sequestration, and in June 1901 he presented the present petition for the disentail of the estate of Sorn. Mr Duke resigned office in 1902, when the deceased Mr More was appointed, and he in turn was succeeded by the present trustee Mr Scott Tait. The latter was sisted as petitioner in February 1906, and he is now desirous of proceeding with the application. Apparently the long delay which has taken place has been due partly to the opposition of the bankrupt and partly to the unwillingness of the successive trustees, and especially the present trustee, to force a disentail and realisation of the estate of Sorn if it could possibly be avoided. The trustee, however, is satisfied that it is now absolutely necessary that the disentail should be carried through.

"The bankrupt opposes the application upon the grounds set forth in the revised answers which he has lodged, and I have heard counsel upon the petition and answers. . . .

"In his answers the bankrupt in the first place founds upon a reserved power in the deed of entail, and upon a deed of appointment which he has executed purporting to be in execution of the reserved power. . . .

"Now the power reserved to the bankrupt in the entail only comes into operation in the event of James Graham Henry Somervell predeceasing him without issue, an event which has not happened, and which may never happen. The deed of nomination therefore can have no effect unless and until James Graham Henry Somervell predeceases the bankrupt without issue, and in the meantime James Somers Jones (*who was made heir of entail in the said deed of nomination*) is not an heir of entail at all.

"I think that that was practically decided in the case of *Somervell's Trustee* v. *Dawes*, 5 F. 1065, 40 S.L.R. 802, and the judgment in that case also established that in valuing the expectancies of the daughters of the bankrupt, who are called as second and third heirs in the petition, the circumstance that the bankrupt has power to bring the entail to an end in the event of his son predeceasing him without issue is an element to be taken into consideration.

"The bankrupt further contends that it is unnecessary to disentail the estate of Sorn, because there are other funds available for payment of his debts in full. The bankrupt was heir of entail in possession of another entailed estate called Hamilton's Farm which has been disentailed, and which the bankrupt avers may be realised for a sum which will be sufficient to meet all his liabilities. If there were reasonable grounds for believing that that was the case, and if there had been a prospect of the sale of Hamilton's Farm being carried through within a reasonable time, I should have thought that the proper course to follow was to sist the present application to await the result.

"There is, however, no prospect of Hamilton's Farm being sold or even re-exposed for sale for at all events many months to come, and that by reason of proceedings for which I have no doubt the bankrupt must be held responsible. There is at present pending in the Court of Session an action of reduction of the disentail of Hamilton's Farm and of all that has followed thereon at the instance of Amy Elizabeth Jones on behalf of her pupil son James Somers Jones. The bankrupt, I believe, lives with Amy

Elizabeth Jones, and I think that it may be confidently assumed that the action has been brought at his instigation, or at all events with his knowledge and consent. He is therefore not in a very good position to urge that this application should be delayed until Hamilton's Farm is sold.

"But further I am satisfied that there is practically no chance of Hamilton's Farm being realised for an amount which will be sufficient or anything like sufficient to pay the bankrupt's debts. The estate was valued in July 1906 by Mr Barr, a gentleman of great experience, at £26,500, but although the fact that the estate was for sale appears to have been brought very prominently before the public, it has been found to be impossible to sell it at that figure, or at a reduced price of £25,000, and further I understand that there have been practically no inquiries (I think one was mentioned) in regard to the property.

"Now if the estate could be realised at the full amount of Mr Barr's valuation, that would, so far as I can judge, give funds very nearly sufficient to pay the bankrupt's debts and the expenses of the sequestration, if a debt of £26,616 to the Clydesdale Bank were left entirely out of view.

"It is, however, impossible to disregard that very large debt. It has been decided (I think by the First Division) that in a question with the Clydesdale Bank the bankrupt is debtor for the full amount, and I am informed that the Court have actually ordained the trustee to give the bank a ranking for the amount. It is true that there are several co-obligants liable along with the bankrupt, but so far as I can judge upon the extremely vague information furnished to me, the liability of the bankrupt estate must be regarded as amounting to a very large sum.

"In these circumstances I think that the trustee is justified in asking that some progress should now be made with the proceedings for disentail. His counsel moved that I should find that the answers for the bankrupt are irrelevant and dismiss them. I do not think that it would be safe for me to follow that course, because some of the questions which are raised would probably necessitate inquiry, and would demand, in any view, more consideration for their disposal than I am in a position (acting temporarily as Lord Ordinary on the Bills) to give to them.

"I think, however, that without disposing of the answers considerable progress may be made before the Winter Session, and accordingly I shall remit to a man of business to make the usual report in regard to procedure, to an actuary to value the expectancies of the next three heirs, and to a man of skill to value the estate."

Reports by Corson and Low having been received, the Lord Ordinary (MACKENZIE) heard parties and made avizandum, and on 15th January 1907 pronounced this interlocutor:—"Repels the answers for James Somervell designed in the petition . . .: Finds that the procedure has been regular and proper and in conformity with the statutes and relative Acts of Sederunt: Ascertains and fixes the value in money of the expectancy or interest of James Graham Henry Somervell mentioned in the petition in the entailed estates of Sorn, Dalgain, and Daldorch mentioned in the petition at the sum of £30,632 sterling, the value in money of the expectancy or interest of Agnes Marion Somervell mentioned in the petition in said entailed estates at the sum of £7 sterling, and the value in money of the expectancy or interest of Elizabeth Julia Somervell mentioned in the petition in the said entailed estates at the sum of £1 sterling: Ordains the bankrupt James Somervell, as heir of entail in possession of said entailed estates to execute and deliver a bond and disposition in security over the said estates of Sorn, Dalgain, and Daldorch in favour of the said James Graham Henry Somervell for said sum of £30,632 sterling, the said bond and disposition in security to be executed also by John Scott Tait, Chartered Accountant, Edinburgh, as trustee on the sequestrated estates of the said James Somervell as consenting and concurring therein, and as a party to the disposition in security therein contained for his interest in the said estates: Remits to Mr Corson to adjust the terms of the said bond and disposition in security, and to see the said bond and disposition in security in favour of the said James Graham Henry Somervell executed and recorded in the appropriate register of sasines: Of consent of parties ordains the said John Scott Tait, as trustee of the said James Somervell, to lodge on deposit-receipt with the Bank of Scotland in name of the said Agnes Marion Somervell the sum of £7 sterling, and to lodge on deposit-receipt with the said bank in name of the said Elizabeth Julia Somervell the sum of £1 sterling, and decerns: *Quoad ultra* continues the petition."

Opinion.—"By the interlocutor of 7th August 1906 consideration of the amended answers for Mr Somervell was superseded, and remits were made to a man of business, a man of skill, and an actuary. These gentlemen have now reported, and the question for determination is whether an interlocutor should be pronounced in terms of Mr Corson's report. Before such an interlocutor can be pronounced it is necessary that the amended answer for Mr Somervell should be disposed of. Two questions are raised in those answers. The first is as to the effect of a reserved power in the deed of entail and of a deed of appointment which Mr Somervell has executed purporting to be in execution of the reserved power. An opinion was pronounced upon this by the Lord Ordinary on the Bills (Lord Low) with reference to the interlocutor of 7th August 1906, and in view of this opinion I was not asked by the counsel for Mr Somervell to deal with this question.

"The second point raised by the amended answers is that it is unnecessary to disentail the estate of Sorn, because there are other funds available for payment of the bankrupt's debts in full. This question was reserved in the opinion given by Lord Low.

It appears to me, after hearing a full argument from counsel, that the bankrupt has no title to raise this question with the trustee for his creditors. Under the Bankruptcy Statute the trustee has a duty to realise and ingather the assets of the bankrupt and to pay the creditors. The view now taken by the trustee and the commissioners is that it is necessary that the estate of Sorn should be disentailed and sold in order that the debts may be paid. What the bankrupt proposes is that the disentail proceedings should be indefinitely delayed. He maintains that the trustee must first of all enter into an accounting with him and justify to the Court the view taken by him and the commissioners that the disentail and sale of Sorn is necessary. I am unable to find any warrant in the Bankruptcy Statute for this position. It may be that under section 86 of the Bankruptcy Act the bankrupt has a title to present a petition to call the trustee and commissioner to account for their intromissions and management. I am unable to hold that he has a title to prevent the realisation of the estate by raising such a question.

"The present petition for disentail is under sec. 18 of the Entail Act of 1882, which appears to me to give an absolute right to the trustee in a sequestration to disentail. The language of the section is imperative, and there is no statutory requisite which has not been complied with. In these circumstances I think the bankrupt has no title to object.

"A motion was made by Mr Somervell's counsel that he should be allowed to put in fresh answers dealing with the state, which has been put into process since the amended answers were lodged. In these answers it is proposed to raise just the same point. As I consider the bankrupt has no title to raise such a question I am of opinion this motion should be refused. Nor do I consider it necessary to go into the figures, as I consider the trustee has a statutory right to proceed. . . .

"I am accordingly of opinion that an interlocutor should be pronounced in terms of Mr Corson's report."

Somervell, respondent in the petition, reclaimed, and argued—The Lord Ordinary had erred in looking to the Bankruptcy Statutes for authority for the reclaimer's position—*v. opinion.* The petition was not under the Bankruptcy Statutes, and indeed the estate was no longer bankrupt, but under the Entail Acts. These Acts did not contemplate any sale of an entailed estate save where absolutely necessary, *e.g.*, Entail Act 1848, sec. 30. There was here no necessity, for sufficient to pay the debts would be realised from other property. The result of the Lord Ordinary's judgment was to allow anyone with a judgment debt unpaid six months after expiry of a charge, to bring about the disentail of an estate. That would be inequitable.

The petitioner (respondent) was not called upon.

LORD PRESIDENT — This is a petition which is presented under section 18 of the Entail Act 1882 (45 and 46 Vict. c. 53). By that section it is for the first time made possible for a creditor of an heir of entail in possession to initiate disentail proceedings. By the last sentence of the section a trustee in bankruptcy is put in the same position as a creditor. The section enacts that a creditor of such heir in possession, in respect of debt incurred after the passing of the Act, who has obtained decree for payment and charged upon the decree, shall, if the debt is not paid within six months, be entitled to apply to the Court, "and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required, or must be dispensed with by the Court in an application for disentail by the heir in possession." In the event of any of the said heirs refusing to give his consent, the Court shall ascertain the value in money "of his expectancy, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for the amount so ascertained in favour of such heir, . . . and the Court shall thereafter ordain the heir in possession to execute an instrument of disentail of the estate," &c. The result is that the creditor or the trustee in bankruptcy is on the instrument of disentail being registered to have the same rights as if the debtor were proprietor of the estate in fee-simple.

In this petition, which, as I have said, is at the instance of a trustee in bankruptcy, all the steps of procedure have been properly and regularly gone through. Answers were lodged by the debtor. These answers have been repelled by the Lord Ordinary, and there is now before us a reclaiming note against his interlocutor. The answers really amount to this:—The trustee has already disentailed another portion of my estate—Hamilton's Farm—and if he goes on and sells that portion of my estate sufficient funds will be got to pay my debts in full, and the proposed disentail of the other portions of my estate will be unnecessary.

The Lord Ordinary has gone into the merits of the question, but I think it quite unnecessary to do so, for I do not think that the answers are relevant. The petitioner here is a trustee in bankruptcy; there are unpaid debts; and accordingly the provisions of the section are directly applicable. The class of question which Mr Somervell desires to raise is not the class of question which can be raised in this petition. They can be raised in the sequestration, and are questions proper to be dealt with in the sequestration.

LORD M'LAREN—I am of the same opinion. I think it is perfectly clear that the question whether the trustee can be restrained from selling the estate does not arise in this process because he cannot sell until this process is at an end. It would therefore be contrary to elementary principles of justice that Mr Fraser's client should be disabled from raising this question in the bankruptcy.

Whether he would succeed is another matter as to which we say nothing. I am afraid that unless the heir of entail proposes to pay the debts due to the charging creditor or the trustee, there is no answer to an application for disentail under this statute, because I do not think I ever saw a statute in which so little discretion is left to the Court. The imperative "shall" runs through the whole tenor of the section. If the debt exists and the necessary procedure is followed it is difficult to see that there can be any answer to the application for disentail. I therefore agree that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I am of the same opinion. The only question we decide is whether the condition of the statute which gives the trustee power to apply for a disentail has been satisfied. I am satisfied that he is in a position to follow out the procedure for obtaining a disentail. I do not think the granting of the application prejudices in any way the right of the bankrupt to prevent the sale of any estate beyond what may be necessary for payment of his debts. The right of a creditor is quite clearly defined by the 30th section of the 1848 Act (11 and 12 Vict. cap. 36) to exclude the possibility of selling land in manifest excess of what is necessary or proper in order to payment and extinction of the debt, principal and interest, and whole expenses appertaining thereto. The statute provided for suspending any sale in manifest excess of that amount in order to secure that only the necessary amount of land was being sold. And therefore I do not think the heir in possession is prejudiced in any way.

LORD PEARSON — I am of the same opinion.

The Court adhered.

Counsel for the Petitioner (Respondent) — Dean of Faculty (Campbell, K.C.) — Horne. Agents — Simpson & Lawson, W.S.

Counsel for Respondent (Reclaimer) — M. P. Fraser. Agents—Bruce & Black, W.S.

Saturday, February 9.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

JONES *v.* TAIT (SOMERVELL'S TRUSTEE).

Process—Parent and Child—Title to Sue—Private International Law—Lex fori—Mother of Illegitimate Child, both Domiciled in England, Suing on its behalf—"Next Friend"—Relevancy of Averring English Rules of Procedure.

The mother of an illegitimate son, the domicile of both being in England, raised "as his tutrix and administratrix-in-law" an action in which she neither averred that an English Court had given her such an appointment nor that by English law she, as a matter of status, possessed such a character. In the Inner House pursuer asked leave to amend the record to the effect that in England by certain Rules of Supreme Court she could competently sue on her son's behalf as "next friend."

Held—aff. Lord Ordinary (Salvesen)—that the pursuer had no title to sue, and that such an amendment, being merely as to procedure in a foreign court, would be irrelevant.

Process — Reclaiming Note — Printing — Failure of Reclaimer to Print the Lord Ordinary's Opinion.

Opinion per Lord Stormonth Darling that failure of a reclaimer to print the opinion of the Lord Ordinary is sufficient ground for refusing the reclaiming note.

Amy Elizabeth Jones, otherwise Somervell, residing at Spittal, Berwick-on-Tweed, "as tutrix and administratrix-at-law, and on behalf, of her son James Somers Jones, otherwise Somervell," brought an action of reduction of "a pretended bond," "a pretended instrument of disentail," and "a pretended decree obtained from the Lord Ordinary officiating on the Bills." The action was defended by John Scott Tait, Chartered Accountant, trustee on the sequestrated estates of James Somervell of Sorn.

The averments of parties regarding the pursuer's title to sue were as follows:—"(Cond. 1) The pursuer is the mother and tutrix and administratrix-at-law and guardian of James Somers Jones, otherwise Somervell, who is a pupil, and resides with her at Spittal, near Berwick. Admitted that said James Somers Jones, otherwise Somervell, is not the legitimate son of the pursuer. *Quoad ultra* the statements in answer are denied. (*Ans.* 1) Denied that the pursuer is tutrix and administratrix-at-law or guardian of the said James Somers Jones. *Quoad ultra* not known and not admitted. Explained that the said James Somers Jones is not a legitimate son of the pursuer. The pursuer is a domiciled Englishwoman. She has not been appointed tutrix and administratrix of the said James Somers Jones, and she is not by the law of England his tutrix and administratrix. Neither does she hold that position by the law of Scotland."

The defender pleaded, *inter alia*:—(1) The pursuer has no title to sue, in respect that she is not tutrix and administratrix of her said son, and is not entitled to sue on his behalf."

On 1st December 1906 the Lord Ordinary (SALVESEN) sustained the first plea-in-law for the defender John Scott Tait, dismissed the action, and decerned.

Opinion.—"The pursuer here sues in the character of 'tutrix and administratrix-at-law and on behalf of her son' James Somers Jones, who is a pupil. The child is admittedly however illegitimate, and at