terminated) on 11th June 1914, and was at present lying in the James Watt Dock there; that while accordingly the period of payment under the promissory-note had not yet arrived, the petitioner believed and averred that in order to defeat his maritime lien over the said vessel for the amount of the promissory-note the master had made the vessel ready for sea, and unless the vessel was arrested would proceed at once to sea; and that the petitioner had unsuccessfully applied to the master of the vessel and to the agents for the owners for payment.

The petitioner accordingly craved for warrant to messengers-at-arms to fence and arrest the said steamship.

LORD ANDERSON, on the ground that no such application had ever been granted in the Bill Chamber, reported the case to the First Division (LORD PRESIDENT, LORD JOHNSTON, and LORD SKERRINGTON).

In support of the application counsel for the petitioner referred to *Clan Line Steamers, Limited*, 1913 S.C. 967, 50 S.L.R. 771; and *Lucovich*, June 12, 1885, 12 R. 1090, 22 S.L.R. 729.

The LORD PRESIDENT intimated that the Court were of opinion that the Lord Ordinary on the Bills might competently grant the application, and that his interlocutor should be in the form of the interlocutor pronounced in the case of *Lucovich*.

The following interlocutor was pronounced:—

"The Lord Ordinary having reported the petition to the Lords of the First Division, on their instructions appoints the said petition, with a copy of this deliverance, to be served upon W. Grunberg, master of s.s. 'Wm. Eisenach,' and designed in the petition, and allows him to appear at the bar of this Court on Tuesday, 23rd June 1914, at 10 o'clock a.m., and lodge answers to this petition within eight days after service, if so advised: Grants warrants to messengers-at-arms to arrest the steamship 'Wm. Eisenach' *ad interim*, and that on exhibition of a certified copy of this interlocutor, and appoints the execution of arrestment to be reported to the Lord Ordinary within twenty-four hours." [No order was made for intimation on the walls and in the minute book, that not being the practice in the Bill Chamber.]

Counsel for the Petitioner—D. P. Fleming. Agent—Wm. B. Rainnie, S.S.C.

Friday, June 26.

FIRST DIVISION.

[Junior Lord Ordinary.

BAIKIE *v.* GOVERNORS OF KIRKWALL EDUCATIONAL TRUST.

Entail — Disentail — Debts Affecting Entailed Estate—Effect of Disentail—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 6 *and* 32.

A deed of entail bound the succeeding heirs to pay a sum of £200 per annum to a kirk-session, and also to pay certain annuities to other parties. In an application by an heir in possession to disentail the estate, the petitioner contended that the statutory effect of the disentail was to put an end to the obligation to pay the sums in question, for which, therefore no security need be made.

Held that this was not the effect of the disentail, and that accordingly the sums fell to be secured in terms of section 6 of the Entail Amendment Act 1848.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) enacts:—Section 6—"Where any heir of entail in possession of an entailed estate in Scotland shall apply to the Court of Session under this Act in order to disentail such estate, in whole or in part . . . he shall make and produce in such application an affidavit setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the fee of the said entailed estate or the heirs of entail, or, if there are such debts or provisions, setting forth the particulars of the same . . . and it shall be lawful for the Court to order such provision as may appear just to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same. . . ." Section 32—"An instrument of disentail under this Act may be in the form or as nearly as may be in the form set forth in the Schedule to this Act annexed . . . and such instrument, when duly executed, and recorded . . . in terms of this Act, shall have the effect of absolutely freeing, relieving, and disencumbering the entailed estate to which such instrument applies, and the heir of entail in possession of the same, and his successors, of all the prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive of the tailzie under which such estate is held. . . . Provided always that such instrument of disentail shall in no way defeat or affect injuriously any charges, burdens, or encumbrances, or rights or interests, of whatsoever kind or description, held by third parties, and lawfully affecting the fee or rents of such estate, or such heir in possession or his successors, other than the rights and interests of the heirs substitute of entail in or through the tailzie under which such estate is held, but that all such

charges, burdens, and encumbrances, and rights and interests, other than as aforesaid, shall remain at least as valid and operative in all respects as if no such instrument of disentail had been executed or recorded."

On 17th June 1913 Alfred Baikie, Esquire, of Tankerness, heir of entail in possession of the entailed estate of Tankerness and others in the county of Orkney and Zetland, presented a petition for authority to disentail the said lands and to acquire them in fee-simple. Answers were lodged by the Governors of the Kirkwall Educational Trust and others, who were in right of certain annuities imposed by the deed of entail, in which they maintained that the Court should, before granting the prayer of the petition, order such provision as might appear just to be made for the annual payment of these sums, or for the protection of their (the respondents') interests.

The circumstances in which the application was made sufficiently appear from the opinion (*infra*) of the Lord Ordinary (ANDERSON), who on 18th March 1914 pronounced the following interlocutor: — "Finds (1) that the annual sum of £200, directed to be paid to the Session of the United Presbyterian Congregation of Kirkwall, falls to be secured, in terms of section 6 of the Entail Amendment Act 1848, but that only during the lifetime of the petitioner, the present heir of entail in possession, and that on the death of the petitioner and the opening of the succession to a new series of heirs the obligation to pay the said annuity will come to an end; (2) that this ruling applies to the other two annuities referred to in the petition." . . .

Opinion.—"This is a petition by the heir of entail in possession of the entailed lands and estate of Tankerness in Orkney and Zetland for authority to disentail these lands and to acquire certain trust money in fee-simple. Several questions of importance fall to be determined in connection with this application, and the first I shall consider arises under the answers which have been lodged by certain respondents. These respondents are (1) the Governors of the Kirkwall Educational Trust, and (2) the minister and office-bearers of the Paterson Congregation, Kirkwall, of the United Free Church of Scotland. It is averred in the answers that by the original deed of entail, which is dated 17th April 1860, the entailer, by article 10th of the said deed, declared it to be a condition of the entail that the heirs of entail should pay to the session of the United Presbyterian Congregation of Kirkwall the sum of £200 per annum, one-half to be devoted to educational purposes and the other half to religious purposes. The said annual sum was regularly paid by the heirs of entail to the session of the United Presbyterian Congregation of Kirkwall, between the years 1869 and 1889. Since the year 1889, the one-half of this annual sum which is directed to be applied by said session to educational purposes has been paid to and administered by the Governors of the Kirkwall Educational Trust, who are a body incorporated by Order in Council under the provisions of the Educational Endowment (Scotland) Act 1882. The other half of said annual sum continued to be paid to the session of the United Presbyterian Church of Kirkwall, until the union of the Free Church of Scotland and the United Presbyterian Church in 1900, after which union the said half was paid to and administered by the session of the Paterson Church, Kirkwall, of the United Free Church of Scotland.

"The said annual sum was not made a real burden on the entailed estate, and no security was provided for its due payment beyond what is involved in that payment being made a condition of the entail.

"The respondents now maintain that the Court, as a condition of the disentail, should order the said annual payment to be charged upon the said lands, or should order such provision as may appear to be just to be made for said annual payment. The respondents, in short, maintain that security should now be provided for payment in perpetuity of said annual sum.

"The petitioner, on the other hand, contends that he and those who may succeed him in the disentailed lands, as well as these lands, should be freed, on disentail, of all further payments to the respondents. He maintains that the statutory effect of disentail is to put an end to the conditions of the entail as formulated in the entailing disposition, and that the obligation to the respondents is one of these conditions.

"I had an excellent argument from both sides of the Bar, with an exhaustive citation of authority. I have come to be of opinion that the true solution of the question is to be found in a *via media* between the extreme contentions urged by the parties.

"The point is ruled by the provisions of the 6th section of the Rutherfurd Act (11 and 12 Vict. cap. 36). Shortly stated, that section provides, where there is an application for disentail, for disclosure of debts which affect or may be made to affect the fee of the entailed estate or the heirs of entail, in order that the Court may make provision for the payment of such debts. If therefore the section applies to the foresaid annual payments, the petitioner can only obtain the order to disentail which he desires on condition of making provision for the subsisting debt.

"The petitioner maintained that the section did not apply. He contended at the outset that there was no debt in existence. I am of opinion that there is a subsisting debt. The respondents have a *jus quæsitum* to the said annual payment, whereby they could compel payment from each successive heir of entail.

"The petitioner's next point was that the debt did not fall under any of the kinds or classes of debt dealt with by the section. There are three of these classes — (1) entailer's debts, (2) other debts, and (3) provisions to husbands, widows, and children. The debt is not the entailer's debt, as it did not become exigible until after the entailer's death, nor does it fall under the third of the above classes. But it is clearly covered by the general words of the second class, and it affects or may be made to affect the

heir of entail—that is, the heir of entail in possession, who is the petitioner.

"The petitioner founded strongly upon the case of *Dalgleish*, 25 R. 225. That case is distinguished from the present in these respects—(1) there the burden was only prospective, here it is actual; (2) there the creditors' right was dependent on the succession of a particular heir who, because of the disentail, could not succeed, here the creditors' right has vested and is operative. The case of *Dalgleish*, accordingly, does not seem to apply.

"The respondents urged, and I think rightly, that the part of the deed of entail which deals with this matter is testamentary. They contended that the entailer contemplated a payment in perpetuity of this annual sum. That may be so, but only because the entailer intended the entail to be perpetual. The entailer has made no provision, and probably he could not do so, to obviate the statutory effects of disentail. If I gave effect to the respondents' contention, I apprehend I should be making a new testamentary disposition on behalf of the entailer, which I have no power to do. I should (1) be providing a real security for payment of the annuity as to which he made no provision, and (2) I should be laying the obligation of paying this sum on a different series of obligants from that fixed by the entailer. I should really be imposing the whole of the original obligation on the petitioner, and the entailer never contemplated or intended that this should be done.

"I must accordingly limit any condition I impose on the petitioner to the extent of the debt due by him. What is the extent of his obligation to the respondents? It is to pay them £200 a-year during all the years of his life. I think the petitioner, as a condition of the disentail, must make provision for the discharge of the obligation to this extent. I shall accordingly grant the prayer of the petition for disentail of the entailed lands on the petitioner finding security for the due and regular payment to the respondents of said annual sum during all the years of his life. On his death, when the succession opens to a new series of heirs, the obligation in favour of the respondents will come to an end. The following additional authorities were cited by the petitioner:—*Stirling Dunlop*, 15 D. 456; *Howden*, 12 Sh. 734; *Duke of Richmond*, 16 Sh. 172; *Schank*, 22 R. 845; *Bruce*, 1 R. 740. By the respondents—*Irving*, 9 Macph. 539; *Earl of Caithness*, 1912 S.C. 79.

"I understood that it was conceded by the petitioner that my judgment on the foregoing point would apply to the two other annuities referred to in the petition."

The respondents reclaimed, and argued—Before the petition could be granted due provision must be made for entailer's debts or other debts affecting, or that might be made to affect, the fee of the entailed estate or the heirs of entail—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), secs. 6 and 32. The case of *Dalgleish* v. *Rudd*, December 1, 1897, 25 R. 225, 35 S.L.R. 144, was distinguishable, for in that case the event in which the burden was to be imposed never occurred. If this had been a simple destination the burden would have been effective, for a gratuitous donee was bound to accept the gift subject to the conditions imposed upon it by the granter—*Earl of Caithness* v. *Sinclair*, 1912 S.C. 79, *per* Lord Kinnear at p. 85, 49 S.L.R. 29; *Irving* v. *Irving*, February 22, 1871, 9 Macph. 539, 8 S.L.R. 368. *A fortiori*, therefore, where the destination was protected by the fetters of an entail.

Argued for petitioner—The burden was a mere condition of the entail, and implied the existence of the entail. It therefore fell with the entail—*Dalgleish* (*cit.*), at pp. 235 and 237. The words "other debts" in section 6 of the Rutherfurd Act (*cit.*) meant debts *ejusdem generis* with entailer's debts, and section 32 was merely executorial of section 6. This could not be said to be an entailer's debt, as it did not become exigible until after the entailer's death. Neither had it been made a real burden on the lands. As to the meaning of entailer's debts, reference was made to *Howden* v. *Porterfield*, June 17, 1834, 12 S. 734; *Duchess Dowager of Richmond* v. *Duke of Richmond*, December 2, 1837, 16 S. 172; *Crawfurd, Petitioner*, March 2, 1853, 15 D. 456; *Carrick Buchanan, Petitioner*, December 2, 1854, *vide* Duncan's Entail Procedure, p. 231. In the event of the estate descending to heirs whomsoever, they would not be bound to pay the annuity, and the disentail was equivalent to a failure of heirs-substitute.

LORD PRESIDENT—Mr Inglis has said very well all that is to be said on the part of the petitioner in this case, but I have no doubt whatever that the first finding of the Lord Ordinary's interlocutor cannot stand.

This deed of entail, which when these proceedings come to an end will have vanished, contains a clause to the effect that "the said whole heirs of entail, after the death of the entailer and his spouse, shall in all time coming thereafter make payment to the session of the United Presbyterian Congregation at Kirkwall of the sum of £200 annually, and that in equal portions, half-yearly, at the terms of Whitsunday and Martinmas."

Now, standing the entail, there can be no doubt whatever that each heir of entail in succession in possession of that entailed estate would be bound to pay the £200 to the Kirk-Session of the United Presbyterian Congregation of Kirkwall, and if he failed to make payment, the kirk-session would be entitled to proceed against the estate for the purpose of making good the annual payment of £200. Well, the petitioner desires to get rid of the entail altogether, and he is entitled to do so—but only on condition, as I read section 6 of the Act of 1848, that the Court, before they proceed with the disentail proceedings, shall see that all such debts as are referred to in section 6 are provided for. The Court is to order such provision as may appear just to be made for all debts affecting, or that may be made to affect, the fee of the estate or the heirs of entail. Now

if this is—as I clearly think it is—one of the debts which affects the heirs of entail of this estate so long as the entail is extant, just provision must be made for it. The effect of the deed of disentail, when it is executed and the entailed estate is freed from the fetters, is not to destroy such a claim as this, for section 32 quite clearly and distinctly provides that the effect of the disentail is to leave intact such burdens, charges, and encumbrances, rights and interests, and that they are to remain just as valid and operative in all respects as if the deed of disentail had never been executed.

It does not appear to me that the two clauses to which I have referred—section 6 and section 32—are open to two meanings. I have no doubt that this is one of the debts referred to in section 6 and one of the debts referred to in section 32, and that the Lord Ordinary has plainly gone directly against the statute. The provision he thinks ought to be made, and which he would make, is to pay £200 a-year to the respondents during all the years of the life of the petitioner. That is exactly what the Entail Act says is not to be done. What is to be done is to make the burden as effective and fully operative as if the deed of entail remained in full force.

I am therefore for recalling the first finding in the Lord Ordinary's interlocutor and substituting for that finding a finding to the effect that the annual sum of £200 directed to be paid to the Kirk-Session of the United Presbyterian Congregation of Kirkwall falls to be secured in terms of section 6 of the Entail Amendment Act of 1848, and for remitting to the Lord Ordinary to see that it is so secured.

LORD MACKENZIE—I am of the same opinion, and I think that to take any other view would be going directly contrary to section 6 and to section 32 of the Rutherfurd Act.

LORD SKERRINGTON—As matters stand at present, the respondents' claim is secured by the fetters of the entail. By the recording of the instrument of disentail the respondents' security would be prejudiced, and they would require to resort to diligence against the estate. Now the Rutherfurd Act, by its 6th section, foresaw such a state of matters, and it conferred a further right upon the creditor to intervene and to object to the disentail being given effect to until security had been given for his just rights and interests, whatever these might be. In the present case I do not think there is any doubt as to the nature of the interest which ought to be secured.

Accordingly I agree with your Lordships.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Alter the said interlocutor by deleting from the first finding therein the portion thereof commencing with the words 'but that only' to the end thereof: With this alteration, adhere to the said interlocutor, and remit to the Lord Ordinary to proceed as accords."

Counsel for Petitioner—Murray, K.C.—J. A. Inglis. Agents—J. C. & A. Steuart, W.S.

Counsel for Respondents — Macmillan, K.C.—Dunbar. Agents—Robson & M'Lean, W.S.

Friday, June 19.

SECOND DIVISION.

[Sheriff Court at Stranraer.

BARBOUR *v.* M'DOUALL.

Lease — Outgoing — Compensation — Drainage Improvements — Custom of Estate — Notice of Intention to Execute Improvements—Agreement to Dispense with Notice — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 3 (1) *and* (4).

In a claim at the instance of outgoing tenants at the termination of a lease for compensation for drainage improvements the arbiter found that the improvements had been executed by the claimants with tiles supplied by the landlord in accordance with the "custom on the estate," and that no additional rent or interest had been charged against the claimants in respect of such drainage. The tenants having claimed compensation for the improvements under section 3 of the Agricultural Holdings (Scotland) Act 1908, and averred an agreement to dispense with written notice of intention to execute the improvements, *held* that in respect that the actings of the parties were covered by the custom of the estate a written notice of intention to execute the improvements in terms of the statute was necessary to certiorate the landlord that the tenants intended to claim under the statute, and that no agreement to dispense with such a notice could in the circumstances be inferred.

Lease — Outgoing — Compensation — Unreasonable Disturbance—Reasonable Opportunity of Valuing Stock — Expense Directly Due to Quitting Holding—Forced Sale — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 10.

The Agricultural Holdings (Scotland) Act 1908, sec. 10, enacts—"*Compensation for Unreasonable Disturbance.*—Where (*a*) the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit, . . . the tenant upon quitting the holding shall . . . be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods: . . . Provided that no compensation under this section shall be payable (*a*) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such