animadverted strongly on the delay which had taken place in the Inferior Court, the proof having been adjourned day after day for a period of three months, as if the case had been one of intricacy and importance.

Agent for Advocator - D. Forsyth, S.S.C.

Agents for Respondent—Morton, Whitehead, & Greig, W.S.

Wednesday, July 10.

MACKAY *v.* EWING AND OTHERS.

Trust—Failure of Trustees—Judicial Factor—Annuity—Discretion to Increase—Petition—Competency. A person by his trust-deed provided an annuity to his daughter of £50, which the trustees if they thought right were empowered to increase. The trustees declined to accept, and the daughter served to her father, and took possession of the estate. A judicial factor was afterwards appointed. Held that a petition by the daughter for increase of her annuity was incompetently brought, the proper course being to apply to the factor, who might, if he thought fit, apply to the Court for special powers to that effect. Question, whether the factor or the Court, on an application from the factor, could exercise the discretion reposed by the truster in his trustees.

This case came before the Court on a petition at the instance of Mrs Mackay, wife of Captain Mackay, and daughter of the late John Russell, Esq., of Balmaad, praying the Court to award her an annuity out of the trust-funds, and to authorise the judicial factor on the estate to pay it to her. Mr Russell died in 1819, leaving considerable property, both heritable and moveable, and also a trust-disposition and settlement appointing trustees to carry out the purposes of the trust. The truster, among other provisions, appointed his trustees to pay his daughter a free yearly annuity of £50 during her life, "or until she comes eventually to have possession of the trust-funds in virtue of the succeeding clause of the deed;" with power to his trustees, "if his funds would admit, and if they should think she has occasion for it, eventually to make some addition to said annuity, according as their own good judgment and discretion should suggest," The trustees declined to accept, and the petitioner served to her father, and entered into possession both of the heritable and moveable estate. She appointed her husband factor, and she remained in possession until 1840, when a judicial factor was appointed on the estate. Since that date four judicial factors have been appointed by the Court, and the estate is now under the management of Mr John Allan, solicitor, Banff. Answers were put in by Mrs Ewing, the petitioner's daughter, the leading beneficiary under the trust, who opposed the petition, on the ground that the petitioner and her husband were due large sums to the estate, on account of their intromissions, during the nineteen years of their management, and by the judicial factor, who, without opposing the petition, stated certain considerations that were proper for the Court to hold in view in disposing of it. The leading one of these was, that the petitioner had never accounted to him for her intromissions.

Last year, the Lord Ordinary (MURE) appointed the factor to pay the petitioner an annuity of £50, and this judgment was acquiesced in by Mrs Ewing. The petitioner afterwards moved for an increase to her annuity, which was again opposed by Mrs Ewing, on the same grounds as before. The Lord Ordinary, proceeding on a calculation as to what might be the probable results of an accounting between the factor and the petitioner for a period of her intromissions with the trust-funds, increased the annuity by £100, and appointed the factor to pay her a yearly annuity of £150. Against this interlocutor Mrs Ewing reclaimed; and maintained, in addition to the reason relied upon in the Outer-House, that the petitioner was indebted in large sums to the estate; that it was beyond the jurisdiction of the Court to grant the prayer of the petition, because it was incompetent either for the factor, or for the Court on an application from the factor, to exercise the discretionary power conferred by the truster on his trustees to raise the petitioner's annuity above £50, if they thought proper. The Court felt this to be a question of considerable difficulty and delicacy, but were saved consideration of it by holding that the prayer of the petition was altogether incompetent either as a step in the factory or as a separate proceeding. The proper course for the petitioner to have followed was to apply to the factor, who would consider the case, and who might apply to the Court for special powers to increase the annuity if he thought proper. If the factor refused the application, and declined to ask powers from the Court, the petitioner might then perhaps directly apply to the Court, but her course, in the first place, was to apply to the factor. The interlocutor of the Lord Ordinary awarding the additional sum of £100 was accordingly recalled. As to the sum of £50 which the Lord Ordinary had ordained the factor to pay under the petition which was now found to be incompetent, the Court did not think it necessary to interfere, as that sum was provided as an annuity to the petitioner by the trust-deed; and Lord Curriehill expressed a hope that no difficulty would be made by the factor as to the payment of that sum.

Counsel for the Petitioner—Mr Inglis. Agents—H. & A. Inglis, W.S.

Counsel for Mrs Ewing—Mr Shand and Mr Thomson. Agent—A. Morison, S.S.C.

Counsel for the Judicial Factor—Mr W. A. Brown. Agent—J. C. Baxter, S.S.C.

Wednesday, July 10.

MACALISTER, PETITIONER.

Entail—Improvement—Expenditure—10 *Geo. III.*, *c.* 51—9 *&* 10 *Vict.*, *c.* 101—11 *&* 12 *Vict.*, *c.* 36. Held that money borrowed by an heir of entail, and expended and charged on the estate under the Drainage Act 1846 (9 & 10 Vict. c. 101), cannot be constituted a burden on the estate, under the 16th sect. of the Entail Amendment Act.

This was a petition under the Entail Amendment Act (11 and 12 Vict., cap. 36) for leave to constitute and charge certain improvements executed by the petitioner on the entailed estate of Glenbar. By the 16th section of the Act it is provided—"That where an heir of entail in possession of any entailed estate, holden by virtue of any tailzie dated prior to the 1st day of August 1848, shall, whether prior or subsequent to the passing of this

Act, have executed improvements on such estate of the nature of the improvements contemplated by the said last recited Act (the Montgomery Act, 10 Geo. III., cap. 51), but shall not have obtained decree therefor in terms of the said Act, by reason of the provisions thereof not having been adopted, or not having been duly complied with, it shall be lawful for such heir to apply by summary petition to the Court in manner hereinafter provided, setting forth such improvements and the amount of money, not exceeding the amount authorised by the said Act, expended thereon, and praying the Court for authority to grant bond of annualrent," &c.

A part of the improvements was executed with money borrowed under the Drainage Act of 1846 (9 and 10 Vict. cap. 101) by which the Treasury is authorised to make advances to proprietors on the security of the land, re-payable in twenty-two years by instalments of £6, 10s. per cent. per annum. Section 38 of that Act provides that heirs of entail, "as between such person and the persons in remainder or reversion," shall be bound to pay the half-yearly payments of the rent-charge.

The petitioner has paid the rent-charge for about sixteen years, and latterly offered to redeem the remainder in the manner provided by the Drainage Act.

Mr Webster, to whom the Lord Ordinary remitted to report on the improvements, disallowed those executed under the Drainage Act. The petitioner objected to Mr Webster's report. A curator *ad litem* was appointed, and argued in support of the report; and the Lord Ordinary repelled the objection of the petitioner. On a reclaiming note, the First Division ordered written argument to be laid before the whole Court.

The consulted judges, with the exception of Lord Barcaple, were for adhering to the Lord Ordinary's interlocutor.

Lords Cowan and Neaves returned this opinion:—"We are of opinion that the interlocutor of the Lord Ordinary on the point in question should be adhered to.

"The petitioner seeks to charge the entailed estate of Glenbar with a bond of annuity, or other bond, to an amount corresponding to the statutory proportions of certain sums said to have been expended by him in improvements of the nature contemplated by the Act 10 Geo. III., c. 51, the Montgomery Act. The point in dispute relates to the competency of making such a charge in consideration of expenditure for operations made in the first instance under the Drainage Acts, 9 and 10 Vict., c. 101, and others.

"The money so obtained for drainage was converted, in terms of the Drainage Acts, into a half-yearly rent-charge, at the rate of £6, 10s. per cent., payable for twenty-two years. The petitioner has paid this rent-charge for about sixteen years, and he has latterly offered or declared his readiness, which he had not done before the Lord Ordinary, to redeem the remaining payments in the manner allowed by the Acts. On that footing he now seeks to have the expenditure so made treated as if it had been made originally under the Act 10 Geo. III., and to have it created a burden on the estate, in terms of the Entail Amendment Act, section 16.

"It appears to us that the expenditure thus made under the Drainage Acts, and charged on the estate in terms of those Acts, cannot now be dealt with as an improvement debt with which the estate or the heirs of entail are to be burdened under the Entail Amendment Act, as if executed under the Montgomery Act.

"By the 16th section of the Entail Amendment Act it is enacted that where an heir of entail shall 'have executed improvements' contemplated by the Montgomery Act, 'but shall not have obtained decree therefor in terms of the said Act, by reason of the provisions thereof not having been adopted, or not having been duly complied with, it shall be lawful for such heir to apply' as the petitioner has here done.

"Before such an application can be ascertained it is necessary, of course, that the heir applying shall, in terms of the Act, have 'executed the improvements.' This, we conceive, means that he shall have done so at his own expense, or from his own resources. He must be in the position described by the Montgomery Act, of an heir that 'lays out money upon improvements.' It is immaterial, no doubt, from what source he gets the money, if it is his own. He may pay it out of his pocket, or may borrow it on his own credit or security, or on that of his life-interest in the entailed estate. But the position of an heir availing himself of the Drainage Acts is entirely different. The object of these Acts is to 'facilitate works of drainage, by advances of public money *on the security of the lands to be improved*.' Accordingly, by the 34th section, the land is to be charged, in payment of the advance, with the rent-charge, payable for twenty-two years; and every heir of entail is by the 38th section taken bound to pay the rent-charge half-yearly during the continuance of his life-interest. Hence the heir raises the money, not by his own credit or means, but on the credit and security of the whole heirs of entail, and of the entailed estate itself, with its rents and profits, though not to the effect of attaching the fee.

"Now if the question be asked, whether an heir so proceeding 'has executed improvements' of the nature contemplated by the Montgomery Act, in in terms of the 16th section of the Entail Amendment Act, and so as to have the benefit now sought by the petitioner, that inquiry suggests this other question, whether an heir so proceeding can obtain the benefit of the Mongomery Act, or of section 16 of the Entail Amendment Act, immediately upon the drainage operations being executed, and at the same time at which he is binding the estate for the rent-charge imposed by the Drainage Acts. The improvements, if properly executed, are executed at once. The money, if expended by the heir, is expended at once. If the making of the improvements and expenditure of the money is all that is necessary, and the mode of obtaining the money is immaterial; and, in particular, if the arrangement with the Drainage Commissioners is virtually the same as any other mode of borrowing the money by the heir;—then he stands from the first in the position of being able both to bind the estate for the drainage rent-charge, and to burden it or the heirs with the bond of annualrent allowed by the Entail Amendment Act as for general improvements. In the view supposed there is no incompatibility between the two things any more than if he were *simul et semel* to borrow money on his life-interest, and to lay it out so as to be charged under the Montgomery Act. If it is not competent for him to do the two things referred to *simul et semel*, it must be because an heir executing drainage operations, or getting them executed, under the Drainage Acts, is not executing or laying out money in improvements, as contemplated under the Mont-

gomery Act or Entail Amendment Act. But if an heir in that position is not held at the outset to come under these last-mentioned Acts, the running out of the drainage rent-charge or the ultimate redemption of it does not seem to alter his position. If the two things are originally incompatible, the heir must be put to his election, and the choice of the one seems a renunciation of the other.

"It seems to be the true rule in such matters, that where a burden laid on the entailed estates is borne by the proper debtor in it, according to the natural and appointed mode of satisfying it, it is thereby for every extinguished, and cannot be further kept up. Here, however, it is proposed that after the true debtor had made these annual payments, as he was bound to do *inter hæredes*, he should be allowed to rear them up *ex post facto* as a fresh burden upon the subsequent heirs.

"Besides these general objections in principle, some other considerations here seem to weigh against the petitioner.

"An heir who proceeds under the Drainage Acts, not only in the first instance burdens the estate, and pledges the credit of the succeeding heirs, but by the continuance of the rent-charge for a number of years exposes them to the risk of having to bear the greater part of that burden. In the early part of its currency the death of the original heir, after a payment of only one or two instalments, would leave the great bulk of the debt still to run, and to be paid by his successors. After the heirs have borne and have so far escaped from that risk, the question is, whether they ought, in the latter period of its currency, to be subjected in a new liability for three-fourths of the original expenditure, to reimburse the first heir to that extent. It seems the fair import of the Drainage Acts, that while all the heirs are taken bound to the Government, there is a statutory compact among them that every heir shall in his turn bear the half-yearly payments that 'become payable during the continuance of his interest;' and it seems a violation of that compact if after the first heir has, by living long, defrayed the burden thus imposed upon him, he should to any extent shift it again from his own shoulders to those of the subsequent heirs.

"This seems all the more inequitable, and the more at variance with the meaning of the statutes, when it is considered that the drainage-advances are only made when it is estimated that the operations will effect an improvement in the annual value of the land exceeding the amount of the rent-charge. The heir obtaining the advance in this manner by way of rent-charge truly expends nothing; and probably in many, if not in most cases, the tenant in occupation bears the whole burden from year to year. To allow the heir in such circumstances to run up a new debt in his own favour against the succeeding heirs seems out of the question, and would be giving to him, not reimbursement, but profit on the transaction, at the expense of his successors."

Lord Barcaple, who differed, gave this opinion:—"I am clearly of opinion that so long as any part of the rent-charges in respect of drainage-advances from Government shall remain a burden on the estate, the petitioner is not entitled, under the Entail Amendment Act, to grant either a bond of annual-rent or a bond and disposition in security over the estate in respect of any portion of the expenditure on such drainage. That would be to impose a double burden upon the estate and future heirs of entail contrary to the manifest intention of the Entail Amendment Act.

"It is an entirely different question, Whether, if the rent-charge be brought to an end, and the lands entirely disburdened, during the life of the heir of entail who executed the drainage, either by his having paid it during the whole term of its endurance, or by his having redeemed it, the fact of its having been once constituted excludes him from exercising the powers conferred by the Entail Amendment Act?

"In the present case a portion of the rent-charges is still a subsisting burden on the estate; and no proposal to redeem it is made in the petition, and none appears to have been made when the case was before the reporter and the Lord Ordinary. In these circumstances I think that the Lord Ordinary rightly held that the petitioner was debarred from exercising the powers of the Entail Amendment Act. But in the Inner-House, and in the printed papers now before the consulted judges, the petitioner has proposed to redeem that portion of the drainage-charge which still subsists. The petition is, in general terms, merely setting forth the expenditure on improvements, and making no reference to the rent-charges, the existence of which has been very properly brought forward by the reporter as an objection to the application being granted. If the objection will be obviated in point of principle by the remaining terms being redeemed, I do not think it incompetent, or contrary to practice, for the Court to allow that to be done now before disposing of the petition.

"I am of opinion that when a rent-charge for drainage-advances has been brought to an end, either by payment or redemption, in the life of the heir who made the improvement, the fact of it having been once constituted does not debar him from exercising the powers conferred by the Entailed Amendment Act. It does not appear to me to be of any importance that the discharged burden was constituted, and could only be constituted, under an Act of Parliament. The two Acts—the Drainage Act and the Entail Amendment Act—make no reference to one another. The objection to the petitioner's application, as matters now stand, seems to me to be, that by granting it a double burden would be imposed on the future heirs of entail. That objection would be precisely the same whether the rent-charge were imposed under powers created by a public statute or in any other conceivable way.

"It is of no consequence where or how the heir making the improvements obtains the money with which he does so. All that is necessary under the Entail Amendment Act to entitle him to exercise the powers conferred by that statute is that, whether with money of his own, or obtained on loan or otherwise from any other party, he has executed improvements of the nature there defined. It appears to me that the only ground on which it has been necessary or proper in the present case to inquire into the mode in which the money was obtained is, that it created a subsisting burden against the future heirs of entail. If no such burden had subsisted when the petition was presented, I do not think that the inquiry would have been relevant at all.

"It is not sought by this application to create any burden on the estate in respect of payments made by the petitioner to the Government, either in liquidation of the rent-charge or for its redemption. No such payments could possibly constitute

a claim to exercise the powers of the Entail Amendment Act, which only authorises the estate to be burdened in respect of expenditure on improvements. Neither is it proposed, under the present procedure, in any way to combine the two statutes —the Drainage Act and the Entail Amendment Act, or to convert the burden constituted under the one Act into the different burden authorised by the other. The question is simply whether, by full payment or redemption of the rent-charge, it is not taken entirely out of the way as if it had never existed? Undoubtedly that is the practical effect, as regards freeing the estate and future heirs from all burden under it; and there is therefore no ground in equity, or with reference to the fair interests of the future heirs, for reverting to its former existence, as constituting an impediment to the exercise of the powers of the Entail Amendment Act. Nor do I think there is in that statute any provision, express or implied, making the powers under it inapplicable in such a case. The 38th section of the Drainage Act is referred to in the argument as bearing upon this matter. But it only regulates the incidence of the burden on successive heirs during the subsistence of the rent-charge; and I do not think it throws any light upon the present question, which proceeds on the assumption that the rent-charge has been brought to an end by the heir who made the improvements.

"In the view which I take of the case, it is necessary for the petitioner to satisfy the Court as to the improvements and the expenditure upon them, that no portion of the rent-charge remains a burden on the estate. Upon his doing so I am of opinion that he will be entitled to the authority for which he applies."

At advising—

The LORD PRESIDENT, LORDS DEAS and ARDMILLAN, concurred with the Lord Ordinary and the majority of the consulted judges.

LORD CURRIEHILL concurred with Lord Barcaple.

Agent for Petitioner—G. Cotton, S.S.C.

Agent for Curator *ad litem*—James Finlay, S.S.C.

Thursday, July 11.

MERCER *v.* ESK VALLEY RAILWAY CO. AND OTHERS.

Interdict — Private Road — Property — Sub-Lease. Circumstances in which the Court granted interim interdict against a railway company constructing railway works on ground belonging to the complainer, and using, for access to their works, a road passing through his grounds, the railway company founding on, as their title, a sub-lease from the tenant of the complainer's lands.

Mr Mercer, proprietor of the lands of Kevock Mill, Lasswade, presented a petition against the Esk Valley Railway Company, the North British Railway Company, and the Shotts Iron Company, asking to have them interdicted from proceeding further with the construction of a railway siding, loading bank, access, and other works, at a point of the complainer's lands at Kevock Mill, and from passing along or using in any way that part of the private road leading from the Lasswade public road to Kevock Mill, which passes through the complainer's lands.

The Esk Valley Railway Company was incorporated in 1863, and obtained power for making a line of railway from near Eskbank to a point near Springfield paper works, passing through the complainer's lands. The complainer alleged that the line, as constructed by the Esk Valley Railway Company, was not on the line sanctioned by their act of incorporation, nor within the limits of deviation allowed by the railway acts and the act of incorporation, nor on a line agreed to by the complainer, in certain agreements which he set forth, but on ground belonging to the complainer, to which the railway company has no title whatever. He complained, farther, that the levels, gradients, and curves of the line, as constructed, were disconform to the said act and agreements, and that the railway company had wrongfully failed to implement the obligations undertaken by them in the said agreements, in consideration of which the complainer had consented to the deviation from the Parliamentary plan. In 1867 the Esk Valley Railway Company had leased their line to the North British Railway Company. Recently they had commenced to construct a siding, loading-bank, and access to loading-bank, at a point on the line as at present constructed through the complainer's lands, and had intimated to the complainer their intention to use these works, when completed, as well as the road leading from the Lasswade public road, through the complainer's property, to Kevock Mill, for the purpose of conveying ironstone from the mineral field leased by the Shotts Iron Company from Sir George Clerk, to the line of railway. The road which the respondents so proposed to use was, the complainer alleged, a private road, forming part of his property.

The defenders relied chiefly upon a sub-lease from the tenant of Kevock Mill of the ground for the siding, and contended that, as his sub-tenants, they were entitled to the use of the road in question, to which he had right, for the purpose of access to the ground so sub-let.

The Lord Ordinary (MURE) granted interim interdict, holding it to be clear from the admissions on record, that a part of the ground on which the access to the loading-bank in question had been formed was beyond the ground which the company were to take for the purposes of their Act, and that the complainer was entitled to interdict, unless it could be shown that the tenant of Kevock Mill had power to sub-let the ground for the purposes to which it was proposed to apply it, and to give them and the other respondents right to use the road to Kevock Mill as an access to the loading-bank. His Lordship was inclined to hold that the tenant had no such power, and that the complainer was entitled to interim interdict during the trial of the question of right.

The Railway Companies reclaimed.

DEAN OF FACULTY MONCRIEFF and J. M'LAREN for them.

A. R. CLARK and SHAND for complainer.

The Court adhered.

LORD PRESIDENT—Interim interdict is always a matter of delicacy and importance. I have no doubt in this case that the Lord Ordinary was quite right. There were two matters involved in the present application—(1) the use of a bit of ground coloured dark brown on the plan, and (2) the use of the road leading from the public road to Kevock Mill. As to the first, it is conceded that the Railway Company have not obtained any title from the proprietor. As to the other ground taken for their railway,