Under this question is raised the inquiry, what shall be the deductions to be made in ascertaining the free rent of the estate, three times the amount of which is to measure the liability under the bond. The deductions prescribed by the entail are "public burdens, liferents, and interest of debts which may affect the said lands and estates."

(1) The public burdens to be deducted admit of scarcely any controversy, now that it has been explained that the "assessment for protecting the river in close time" was imposed by a public statute. Feu duties, though usually deducted in consequence of special enumeration, cannot be called public burdens. No more can "abatements allowed to tenants from rental."

(2) Under the head of liferents comes the annuity of £2000 payable to the widow of Francis Lord Gray, beneath a bond of annuity, with warrant of infeftment, dated 13th December 1832. Though the first payment of this annuity seems not to have been due till the first term after the granter's death, I consider the liferent to have been a burden on the lands at the date of his death, and therefore to be estimated in the deductions. But the interest of the two bonds of provision, of £5000 each, in favour of Mrs Ainslie herself, and going to make up the very amount for which her provision is to stand, are clearly not to be deducted; and this deduction was not pressed.

(3) Lastly is to be considered the interest of an alleged improvement debt incurred by Francis Lord Gray under the Montgomery Act, and alleged to amount to £26,950, 0s. 1d., being part of a sum of £35,000 charged on the lands under an Act of Parliament obtained after the death of Francis Lord Gray, by his son and successor, John Lord Gray. The question raised is, whether, at the death of Francis Lord Gray, which is the point of time to be regarded, there lay against the estate the interest of a debt affecting the lands, in respect of this improvement expenditure?

I am of opinion that this question must be answered in the negative. The provisions of the Montgomery Act do not in any correct sense create a debt affecting the lands. The lands are expressly protected against all adjudications for repayment of the money expended. The whole result of the expenditure, if made in terms of the statute, is to constitute the person expending it a creditor of the succeeding heirs for three-fourths of the amount, each heir being no further liable than to the extent of one-third of the clear rents during his life. The executors or assignees of the proprietor making the expenditure are authorized to pursue the next succeeding heir for the amount due, or such part as falls on him, within a year after the death of the expending proprietor; and if they fail to do so, they are declared, to the extent to which they ought to have made recovery, to have forfeited their claim against the subsequent heirs. There is no provision for interest being recovered on the debt except in so far as it may become due by any individual heir in respect of delay in the payment of what falls on him. It is thus not due by the estate, but due by any individual heir for his own default. I cannot therefore consider that at the death of Francis Lord Gray there subsisted any "interest of a debt affecting the lands and estates" in respect of this improvement expenditure; and I think no deduction can be made from the rents on this account in estimating the amount of provision due to Mrs Ainslie.

4. The fourth question asks whether, in the event of the present Baroness Gray being liable in interest on these bonds, she has relief against the executrix of her predecessor, Madelina Lady Gray, for the two years of the latter's possession of the estate. It was conceded, as I understood, that she was so entitled; and so no discussion on this point took place before us.

In these circumstances, the first and second questions are to be answered in the affirmative, except that under the first question only £4500 are to be sustained as due. The third question is to be answered in the affirmative so far as the liability is concerned, except that the interest is to be sustained as due only from 31st January 1867. The deductions are to be authorized as before stated. The fourth question is to be answered in the affirmative.

SHAND asked for expenses.

WATSON maintained no expenses should be granted, as Mrs Ainslie had asked £20,000 more than the Court had given her, and this was the larger half of the money at stake.

The Court gave no expenses, the Lord President observing that the mode of deciding questions of expenses in special cases is not the same as in ordinary cases; the test is not to be the measure of exact pecuniary success.

Agents for Baroness Gray—Hope & Mackay, W.S.

Agents for Mrs Ainslie and Others—Dundas & Wilson, C.S.

Thursday, July 14.

EISTENS *v.* NORTH BRITISH RAILWAY.

Title to Sue—Reparation—Contract. Collaterals have no title to sue for reparation for the death of a brother.

Per Lord President—Such reparation is only granted where the relationship was near, and a mutual obligation of support existed between the claimant and the deceased.

It is the contract of carriage that makes a railway company liable for the death of a passenger whilst its train is on another company's line.

The pursuers are the two sisters of the deceased Mr Eisten, who was killed in the collision at Thirsk Junction in May 1869. The accident occurred on the North-Eastern line; but the defenders admitted that they would be responsible in damages if the pursuers could show that they had a title to ask for them. Mr Eisten was at his death about forty years of age, and was the only surviving brother of the pursuers. Their father and mother were dead; and as their father, at his death six years ago, had left no means, the pursuers would have been destitute but for their brother's support. He was the principal bill-clerk of the City of Glasgow Bank at Glasgow, and in receipt of a salary of £215, with a prospect of increase. He left about £185, from which his funeral and outstanding debts fell to be deducted. The pursuers said they had been led to believe they would receive reparation from one or other of the railway companies, but they had received nothing. They had lived with their brother, and as they had now no means of subsistence, they claimed damages to the extent of £2000, as reparation for his loss, and *solatium* for their feelings. The Lord Ordinary (ORMIDALE) dismissed the action, in respect

the pursuers had no title to sue. He held that the case of *Greenhorn* v. *Millers* in 1855 settled conclusively that the pursuers had no title to sue on the ground that they had suffered in their feelings; and that they had no right otherwise to reparation, as neither could a creditor or annuitant of the deceased insist on reparation; nor, if the deceased had merely been injured, and raised an action for compensation, but died before it was concluded, could his executor or representatives have continued the action.

The pursuers reclaimed.

SHAND and MONCREIFF for them.

SOLICITOR-GENERAL and M'LAREN in answer.

At advising—

LORD PRESIDENT observed that this was not an action of assythment, for no crime had been committed by the defenders, nor was there delict on their part on account of which damages could be claimed. The fault was that of a servant of the North-Eastern Railway Company; and the defenders came to be responsible because of the contract between the deceased and the North British Railway Company that they were to carry him safely to the end of his journey, and in order to do so they had to convey him over the line of the North-Eastern Railway Company. The action, therefore, lay upon the contract; and the action was just the *actio injuriarum* of the civil law. If Mr Eisten had survived the accident he could have claimed damages for bodily injury. But as he had not survived the accident the question was whether any one could now make this claim? Hitherto our law had only allowed the claim to be made by one who was the husband or wife, or an ascendant or descendant of the deceased; and in these cases reparation was allowed though the party claiming could not qualify pecuniary loss. The grounds on which such a claim was allowed were the nearness of relationship, and the mutual obligation of support in case of necessity between the claimant and the deceased. It was for the combination of these reasons that an action for reparation could be brought. In the case of collateral relationship there was no example in our law of an action being sustained on the one ground or on the other. In the case of *Greenhorn*, it was decisively settled that *solatium* could not be allowed to collateral relations of the deceased for the mental distress his death had caused. But if a claim for *solatium* could not be sustained, still less could one for pecuniary loss. It could not rest on the mere fact of the parties' affection for one another and their residence together; and it was settled law that in the case of collaterals there was no obligation for mutual support. His Lordship therefore thought, if the judges who decided the case of *Greenhorn* had also had to consider the question of damages for pecuniary loss, they would have held there was even less reason for affirming it than that for granting *solatium* for injured feelings. If people were to be liable in a further degree than they were at present, it was difficult to see where the practice was to stop. At present there was a clear line of distinction; but if those who were related in blood, and suffered pecuniarily and mentally, were to be held entitled to reparation, no one could see where the line was to be drawn. The affection between friends was often of the most tender description; and frequently there was affection of the strongest character between those who were related only by affinity. There was also often an artificial relationship, coupled with affection of an intense kind, and where the element of pecuniary injury was also present. Such was the case of a bastard child and its putative father, or a person and his adopted child. And in this last case the strength of the affection was generally the ground of the adoption. If the Court were to go the length asked in the present action, it could scarcely stop where between the claimant and the deceased there had subsisted a close affection, and where the death had caused mental distress and pecuniary loss to the claimant. At present, within the line where the law allowed a person to sue for reparation, it presumed the loss of the deceased was an injury to the claimant's affection, and would not allow it to be shown, and between the deceased and the claimant there was the mutual obligation of support. His Lordship, therefore, thought that the title of the claimants to sue must be negatived.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH—I think it clear that the present is not a case of assythment. For the action is not laid on crime, which is essential to support a claim of assythment. It may be doubtful whether such a claim can ever be prosecuted against a Company, which cannot as such commit a crime. But at any rate the action is not laid on crime. It is a civil action of reparation, and nothing else.

As such the action is not derivative or founded on any right possessed by the deceased, and transmitted to the pursuers. It is a proper personal action pursued by them in their own alleged right. They sue for damages as directly due to them in consequence of the loss of their brother, from his being killed on the railway represented by the defenders.

That such an action is competent by our law, though not recognised by some other systems of jurisprudence, is undoubted. But the privilege has been hitherto confined to relatives in the nearest degree—to husband and wife, to parent and child; perhaps generally to ascendants and descendants. Admittedly it is not extended to all relatives; and a limit must be fixed somewhere. I am of opinion that, both by principle and practice, the line must be held drawn so as to exclude collaterals, such as brother and sister. One reason for this may justly be stated to be that collaterals are not liable to a legal claim for support: and the loss of one of these is not therefore a patrimonial loss, in the sense of anything being lost to which a legal right was held. Another reason may lie in a due discrimination between the feelings possessed in the different cases. I think it is a wise arrangement of the law which confines the right to the nearest relatives, of the injury to whom there can be no doubt; and does not take cognisance of the very varying state of things which may exist in the circle beyond.

Whilst thus considering the present claim to be excluded in legal principle, I am further of opinion that its exclusion directly follows from the decision in the case of *Greenhorns* v. *Millers*. It is true that in that case nothing was in controversy but a *solatium* to wounded feelings; and that the Court did not decide any more than the point actually before them. But in sound legal inference I consider the exclusion of a legal claim for *solatium* to infer the exclusion of a claim for all other reparation. The principle of liability is the same in both cases; there are only involved two different

items of damage. Of the two the claim for *solatium* is perhaps the more clear and strong. At any rate, if the one of these claims be admissible, I think the other must be so equally. If the one is rejected, the other must be so also. The foundation of the claim is relationship; and the relationship which admits the one must equally admit the other. If the limit is passed in the one case, it is as much passed in the other. The decision in the case of *Greenhorns* fixed that brothers and sisters had no legal title to sue for reparation of the loss of a brother, so far as concerned *solatium* to feelings. I think it follows that the present pursuers have no legal title to sue for the damages now claimed by them, which, though different in kind, I consider to stand in point of law in no different position from the other.

I am, on these grounds, of opinion that the Lord Ordinary's judgment should be adhered to.

Agent for Pursuers—M. Macgregor, S.S.C.

Agents for Defenders—Dalmahoy & Cowan, W.S.

Thursday, July 14.

SECOND DIVISION.

GRIERSON *v.* KERR.

Landlord and Tenant—Lease—Farm Mismanagement —Deterioration. Circumstances in which *held*, in accordance with a report from a man of skill to that effect, that allegations of mismanagement made by a landlord against his tenant were ill founded.

This was an appeal against a judgment pronounced by the Sheriff of Dumfriesshire on a petition of interdict at the instance of Sir Alexander William Grierson of Rockhall, against John Kerr, tenant of the farm of Bluntfield and Hazleshaw, belonging to the petitioner under a lease for 19 years, and which expires in 1873. The petition sets forth that soon after the respondent's entry to said farm the petitioner put the houses and fences into a tenantable state of repair, and expended considerable sums in feuing and drainage. It alleged that the respondent had mismanaged the cultivation of the farm, failed to uphold the houses, to protect the fences, and to uproot the whins; and that he had burned the heather to the injury of the game. By these alleged acts it was said that the farm had been greatly deteriorated. The following is the prayer of the petition:—"May it therefore please your Lordship to appoint a copy of this petition, and of the deliverance to follow hereon, to be intimated to the respondent in common form, and in the meantime to interdict the respondent and all others in his name from further, at his own hand, burning any part of the remaining heather on the said high lands on the said farm of Bluntfield and Hazleshaw, and, on again advising, to declare the interdict permanent; and further, to remit to a qualified person, or qualified persons, to visit and inspect the said farm and the farm buildings and fences thereon, and to report as to the respondent's alleged mismanagement of the said farm, and as to the state of the buildings and fences thereon, and as to the consequent damage to the petitioner arising therefrom, and from the reckless burning of the heather, and also as to what is necessary and proper still to be done in fulfilment of the stipulations in the said memorandum of agreement; and to ordain the respondent forthwith to execute all operations that may be deemed to be necessary and proper to be done in the premises; and in the event of the respondent failing to reside on the said farm during the remaining period of his lease, and to execute the operations foresaid, and manage the same properly, to appoint a qualified person to reside thereon and manage the said farm at the respondent's risk and expense during that period; and to give such further directions or orders, or to do otherwise in the premises as to your Lordship shall seem proper; and further, to find the respondent liable in the damage caused to the petitioner by the respondent's said mismanagement and reckless conduct, and decern therefor, and to find the respondent liable in expenses."

The respondent, in his defence, denied the statements contained in the petition. Thereafter a remit was made to Mr Jardine, Government Inspector of Drainage, to inspect the farm, and report as to the alleged mismanagement. Mr Jardine, *inter alia*, reported that he considered the respondent had generally managed the farm in accordance with the memorandum of agreement, but suggested that he should clear the farm of whins during the remaining three years of the lease, and not burn any more heather. The Sheriff-Substitute (HOPE) gave effect to Mr Jardine's report, and, of consent, granted interdict against burning more heather on said farm, and *quoad ultra* sustained the defences, and found the petitioner liable in modified expenses.

The following is the note added to the Sheriff-Substitute's judgment:—

"*Note.*—The first point to be decided is the effect to be given to the report by Mr Jardine. From the authorities he has seen, the Sheriff-Substitute thinks that it is binding on the parties so far as it disposes of the points remitted. The petitioner, who applied for it, maintains that it is not; but it is difficult to see how he could be held as not consenting to the remit, seeing that he not only prayed for it in the petition, but made a motion to the same effect. The fact that the report is not to his mind will not annul his judicial consent. The respondent has consented also, although the procurator who was acting for him temporarily when the motion was made did not feel justified in consenting at that time. The latest writer on Sheriff-court practice says—'The proper evidence of the consent of parties is a minute. There appears, however, no absolute necessity for that, provided the consent be otherwise apparent.' —(Wilson, p. 177). It may be assumed that the respondent's procurator, who consented to or acquiesced in the remit when he heard of it, would have done the same if he had been present when the motion was made.

"In these circumstances, the report would seem to be binding. The Act of 1853 is very explicit: —'It shall be competent to the Sheriff to remit to persons of skill, or other persons, to report on any matter of fact, and where such remit shall be made of consent of both parties, the Sheriff shall hold the report to be final and conclusive with respect to the matter of such remit.'—(§ 10). The only points which the report has enabled the Sheriff-Substitute to decide are the question of the heather burning (as to which it is not necessary to say anything, as the respondent has consented to the interdict being made perpetual), and that of the state of a certain field. It is plain that if the respondent is not using the farm as an arable one he is bound to lay it all down in grass.