Friday, June 29.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

ROBERTSON OR ROSS *v.* RAMSAY AND WALKER'S TRUSTEES.

Agent and Client—Account.

L. advanced a sum of £2000 to R., in consideration of which R. granted his personal bond for £10,000, payable in event of his succeeding in a claim which he was then making to certain landed estates. R. also gave L. an *ex facie* absolute disposition of the estates, L. granting a back-letter acknowledging that the disposition was granted, *inter alia*, in security of the bond. *Held* that the fee of the agent for preparing the bond fell to be regulated by the consideration, viz., £2000, in respect of which it was granted.

In February 1876 the pursuer Andrew Ross Robertson or Andrew Robertson Ross, along with his aunt Mrs Jane Robertson or Macpherson, entered into a transaction with Mr Henry Leck, accountant, Glasgow, whereby the latter advanced to the former the sum of £2000. Mr Robertson Ross and his aunt were at that time claimants to the estate of Shandwick, as nearest heirs-portioners of the last heir in possession of that estate, and the money advanced to them was for the purpose of enabling them to prosecute their claim. The consideration given by them to Mr Leck was a personal bond for the sum of £10,000, which was thus expressed—"We, . . . In consideration of the sum of two thousand pounds sterling paid to us by Henry Leck, accountant in Glasgow, do hereby bind and oblige ourselves, jointly and severally, and our several and respective heirs, executors, and successors, without the necessity of discussing them in their order, to make payment to the said Henry Leck, and his heirs and executors or assignees, of the sum of ten thousand pounds sterling, and that so soon as and at the date that we or either of us shall succeed to the said estate of Shandwick, in the county of Ross, with a fifth part more of the foresaid principal sum of liquidate penalty in case of failure, and the interest of said principal sum of ten thousand pounds sterling at the rate of five pounds per centum per annum from the date of said succession until paid." They further granted an *ex facie* absolute disposition of one-half *pro indiviso* of the estates of Shandwick; and Mr Leck, on his part, gave them a back-letter acknowledging that the disposition was granted, *inter alia*, in security for the bond of £10,000.

Messrs Walker & Ramsay, writers, Glasgow, acted as agents for both parties in carrying out the transaction. Their account for law charges against the pursuer in this matter amounted to £100, 14s. 6d., but they accepted £90 from him as full payment, £10, 14s. 6d. being deducted as discount. The account was not taxed or examined in any way. The charge for the preparation of the bond above-mentioned was made on an *ad valorem* scale, and amounted to £73, 10s.

The pursuer alleged that there had been an overcharge for the preparation of the bond, and that according to the table of fees applicable to and binding on Edinburgh and Glasgow agents the charge ought to have been £3, 3s., calculated in accordance with the table, upon the consideration of £2000 given for the bond. He sued for repetition of the balance between £90 and the sum he admitted he was liable to pay.

The defenders, William Ramsay and the trustees of Matthew Walker, the only other partner along with William Ramsay of the firm of Walker & Ramsay, averred—"(Cond. 2) By the existing table of fees there is no *ad valorem* fee allowed to the agent who prepares a personal bond unless security is given. In the present case a disposition of half the estate of Shandwick was given in security of the personal bond. The two deeds were part of the same transaction. . . . The agents in the transaction might, instead of charging as they have done, have charged regulation fees for the bond, and *ad valorem* fees for the disposition; but the result would not have been more favourable for the pursuer. In the most favourable case for the pursuer the *ad valorem* fee would have been on a sum of £10,000, which was the sum repayable to Mr Leck."

The Lord Ordinary remitted to the Auditor of the Court of Session to audit the defenders' account. The Auditor having reported that the fees of the agents should be regulated by the consideration in respect of which the bond was granted, the Lord Ordinary gave decree against the defenders, and added the following note:—

"*Note.*— . . . The principle on which the account was framed was to charge the expense of the transaction against the pursuer and Mrs Macpherson as if they were the borrowers of £10,000, according to the rule that a borrower pays the expense of the loan.

"The Lord Ordinary remitted the account to Mr Baxter, the Auditor of the Court, for his report, and he has reported that the fees of the agents should be regulated by the consideration in respect of which the bond was granted. The Lord Ordinary agrees with him. The transaction in truth was not a loan, but a purchase; and in the case of a purchase the *ad valorem* fee is charged on the price.

"The defenders urged that as the transaction was settled between them and the pursuer the latter is not entitled to re-open it. The Lord Ordinary cannot adopt that view. The defenders had a duty to discharge to the pursuer in seeing that the account was charged according to the proper principle. They have, in the opinion of the Lord Ordinary, made a gross overcharge, and it would be very inequitable to allow them to retain the benefit of it. The Lord Ordinary desires it to be understood that he has no doubt that the defenders believed that they were entitled to make the charge; but they cannot, it is thought, profit by their own mistake."

The defenders reclaimed.

At advising—

LORD PRESIDENT—It is not now said that the pursuer in this action is too late in bringing his claim.

In order to determine whether there is an overcharge or not, it is necessary to examine the nature of the transaction which the defenders

were employed to carry through. A Mr Leck advanced to the pursuer the sum of £2000, and in return he obtained a personal bond for the sum of £10,000, and an heritable security consisting of an absolute disposition and back-letter of one-half *pro indiviso* of the estate of Shandwick. Mr Robertson Ross and his aunt Mrs Macpherson were claimants to the estate of Shandwick as the nearest heirs-portioners of the last heir in possession of that estate, and it was in expectation of their succeeding to it that this money was advanced. What Mr Leck got in return was the chance of obtaining a sum five times as large as what he gave, in the event of the success of the claim. There is no need to advert to the terms of the heritable security.

The account before us is charged on the principle that the matter to be dealt with was a personal bond with an heritable security for £10,000, and if that be the right view of it, an *ad valorem* fee, which is the charge made, is the proper one. The Lord Ordinary made a remit to the Auditor of Court, and has now adopted the view reported to him, that the transaction was not one of loan, but of purchase, and that Mr Leck bought from the pursuer and his aunt a chance of obtaining £10,000 for a present payment of £2000. I confess I do not care much what the nature of the transaction is. It must be either a loan or a sale, if it is a legitimate transaction at all. I may say it appears to me to look very like a bet, and perhaps that is another aspect of it. I am very clearly of opinion, with the Lord Ordinary, that according to the rule in the table of fees now in use the consideration is the proper sum upon which to charge the *valorem* fee.

It was very ingeniously argued that the responsibility of the agents was not limited to £2000, but that it might amount to £10,000. There would be a great deal of force in that contention if the holder of the bond were secured with what would at some future date for certain be worth £10,000. But here the chance was all the lender got, and although the agent's liability might be for £10,000 in the event of their being guilty of *crassa negligentia*, yet in another view it might be *nil*. I therefore see no reason to doubt that the conclusion to which the Auditor and the Lord Ordinary have come is quite right.

Lord Deas, Lord Mure, and Lord Shand concurred; and the Lord President added that he did not intend to express an opinion upon the amount of the agents' responsibility in the matter.

The Court adhered.

Counsel for Pursuer—Nevay — J. A. Reid. Agent—A. Nivison, S.S.

Counsel for Defenders — Asher—M'Kechnie. Agents—Ronald & Ritchie, S.S.C.

Friday, June 29.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MACKENZIE *v.* MACKENZIE'S TRUSTEES.

Succession—Direction to Trustees to accumulate Residue for the Purchase of Lands to be entailed—Right to Accumulations so arising—Where struck at by Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).

A testator by trust-deed conveyed to trustees his whole means and estate other than certain lands of which he was heir of entail in possession, and directed that the residue should be laid out in the purchase of land to be entailed as therein directed. The purchases were to be made from time to time, as was judged most eligible, and the other purposes of the trust were not to postpone the fulfilment of this. The rents of lands so purchased were to go to the heir of entail in possession of the existing entailed estate, and, in the event of no purchase being made, three-fourths of the profits of the accumulated fund were to be paid to that heir, "the surplus interest being applied to increase the amount of disposable funds." *Held* (1) that this last direction, viz., to accumulate one-fourth of the profits with capital, was, after the lapse of twenty-one years from the testator's death, "null and void," under the Thellusson Act (39 and 40 Geo. III. cap. 98); and (2) (*revg.* Lord Rutherfurd Clark, Ordinary — *diss.* Lord Deas) that they fell to be paid to the person "who would have been entitled thereto if such accumulation had not been directed," viz., to the heir of entail, and not to the testator's next-of-kin, as intestate succession.

The late Colin Mackenzie, Esq. of Newhall, by his trust-disposition and deed of settlement, dated 1st August 1838, and registered in the Books of Council and Session 14th October 1842, on the narrative of his having of the same date executed a deed of entail of the lands of Drumcudden, Easter St Martins, and others, in favour of his nephew, the pursuer, and the heirs-male of his body, whom failing the other heirs of tailzie therein mentioned, and that it was his desire and intention that the said entailed estates should not only be freed of all debts and burdens, but that the same should be increased by new purchases from his free means and estate, after the several other purposes therein mentioned should be fulfilled, gave, granted, and disponed to certain trustees his whole means and estate, heritable and moveable (excepting the lands and heritages mentioned in the said deed of entail). After providing for the payment of the testator's debts and funeral charges, legacies, and annuities, the truster directed his trustees, in the ninth purpose of the trust, "to lay out and invest the whole free proceeds of my trust-estate, with the interest which may accrue thereon (subject to the explanations underwritten), in the purchase of lands and estates as near to the foresaid lands of Easter St Martins and Drumcudden as they can conveniently be had, and shall afterwards settle