

difficulty to which he ought not to have been subjected.

LORD CULLEN—I concur. It may be that the Land Court after hearing the motion might have made it a condition of granting a re-hearing that the requisition for a case should be withdrawn, but I am unable to find in the rules any ground for holding that it was incompetent without such withdrawal to entertain the motion.

LORD MACKENZIE was absent.

The Court answered the second question of law in the negative.

Counsel for the Appellant—Macphail, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Respondents—Maitland—Mackintosh. Agents—W. & F. Haldane, W.S.

Thursday, March 11.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

GLASGOW CORPORATION AND ANOTHER v. LORD BLYTHSWOOD AND OTHERS.

Entail—Statute—Construction—Disentailing—Debts Affecting the Fee or Rents of Entailed Estate and Heir in Possession and his Successors—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), secs. 6 and 32—Blythswood Act 1828 (9 Geo. IV, cap. xxiv), sec. 6—Blythswood Act 1844 (7 and 8 Vict. cap. x), sec. 20—Act 1681, c. 11.

Under the Act 1681, c. 11, writs relating to burgage lands required to be registered in the burgh registers, and town clerks were entitled to charge certain fees for the recording. Heirs of entail holding burgage lands under a strict entail granted them out in feu-farm, and the writs relating thereto were registered in the non-burghal registers. Doubts having arisen as to the validity of the feus a private Act was obtained in 1828 authorising the recording of the writs relating to the feus in the non-burghal registers. It contained a clause that the town clerks and their successors in office should be entitled to the fees to which they would have been entitled under the Act of 1681 for the deeds relating to the lands which should have been recorded in the burgh register but which by the private Act were withdrawn from that register. The debtors in that obligation were declared to be the then heir of entail "and the succeeding heirs of entail." In 1844 another private Act was obtained which reserved to the town clerks and their successors in office the right to "demand and exact from the [then heir of entail] and the heirs of entail hereafter to succeed to him under the deed of entail . . . the rates, fees, and emolu-

ments" referred to in the former private Act. In 1887 the heir of entail in possession disentailed the estate. The obligation in favour of the town clerks and their successors was not inserted in the schedule of debts in terms of section 6 of the Rutherford Act and no provision was made to meet it. Thereafter the disentailer re-entailed the estate upon the same succession of heirs as under the former entail with the exception that one brother of the disentailer and his heirs was omitted. The omission accelerated the succession to the estate of another brother of the disentailer and his heirs. That brother while heir in possession refused to pay the fees in question and so did his son who succeeded him. An action was brought by the corporation of the burgh and the town clerk against the executors of the brother who had refused to pay the dues and his son, who was then heir in possession, containing conclusions declaratory of the town clerk's right, and with petitory conclusions. Held that the obligation to pay the dues was a right held by a third party and lawfully affected the heir of entail in possession and his successors, and was therefore in terms of section 32 of the Rutherford Act unaffected by the disentail and was operative against both defenders, as the disentail and the change in the order of the succession effected in the re-entail did not alter the character in which they took the estate, and (2) that the obligation to pay the dues was several, each heir being liable only for the dues accruing during his period of possession.

The Entail Amendment (Scotland) Act 1848 (the Rutherford Act), (11 and 12 Vict. cap. 36), enacts—Section 32—" . . . an instrument of disentail . . . when duly executed and recorded . . . 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 resolute, 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."

The Act 1681, c. 11, enacts—" . . . Therefore His Majesty with consent of his Estates of Parliament *Statuts and Ordains* that in time coming all instruments of *sasine of tenements within burgh royal, or*

liberties, or freedoms thereof holding in burgage, and all reversions, regresses, bands, or writs for making reversions or regresses, assignments thereto, discharges thereof, renunciations of wodsetts, and grants of redemption of the saids tenements within burgh, or the liberties, or freedoms thereof holding burgage, shall be insert in the town clerk's books of the several burghs respective within threescore days after the date of the same, excepting reversions incorporat in the body of the right; and that the town clerk shall keep a several book therefore . . . And it is hereby declared that ther shall be nothing paid to the town clerks for registration of the said sasines, but for any posterior extracts they shall have the half of the rates prescribed by the Act of Parliament for extracts out of the registers of sasines in the particular shires. And for registrating in the towns books of reversions, assignments thereto, or discharge thereof, renunciations and grants of redemption of wodsetts, which were not in use to be registrat before in the towns bookes, that they shall have the half of the rates prescribed by the Act of Parliament for registration and extracting the same as said is."

The Blythswood Act 1828 (9 Geo. IV, cap. xxiv), enacts—Section 3—“ . . . the instruments of seisin or of resignation, and the rights of reversion, redemption, or of servitude, or the conveyances or discharges of servitude, affecting or relating to the lands, [contained in certain deeds, referred to] . . . shall not be void, null, and invalid, or liable to be reduced or set aside as void, null, or invalid, in regard that seisin of the lands, contained in any such deed, disposition, or conveyance aforesaid has not been or may not be given by one of the baillies of the said burgh of Glasgow, or the said instruments of sasine or other writs aforesaid have not been or may not be expedite or passed by the town clerk or clerks or recorded in the books of the said burgh, or in regard that the same have been or may be recorded in the General Register of Seisins kept at Edinburgh, or in the Particular Register of Seisins kept at Glasgow, for the shire of Renfrew and barony of Glasgow, and not in the Register of Seisins kept for the burgh of Glasgow; and all such dispositions, conveyances, feu-charters, contracts, or other original feu rights, precepts of clare constat, charters of confirmation or other charters by progress, instruments of seisin and of resignation, rights of reversion, redemption, or of servitude, or conveyances and discharges thereof, and all instruments of sasine following upon dispositions or other conveyances granted or to be granted as aforesaid, shall, notwithstanding any such ground or allegation as aforesaid, made or to be made against the same, be perfectly good, valid and effectual to all intents and purposes.” Section 5—“ . . . it shall and may be competent and lawful to the said Archibald Campbell [the first Lord Blythswood] and to the other heirs of entail . . . and to any dispee or feuar of any part of the lands . . . and to the heirs and assignees of any such dispee or feuar, and to any person or persons acquir-

ing right to the lands . . . to record all instruments of seisin, or any other writs necessary to complete his, her, or their title . . . in the General Register of Sasines kept at Edinburgh or in the Particular Register of Sasines kept at Glasgow for the shire of Renfrew and barony of Glasgow; any law or practise to the contrary thereof in any way notwithstanding.” Section 6—“ And whereas the provisions hereinbefore enacted relative to the recording of instruments of sasine and other writs in the General Register of Sasines kept at Edinburgh, or in the Particular Register of Sasines kept at Glasgow for the shire of Renfrew and barony of Glasgow, instead of the Register of Sasines for the burgh of Glasgow, and for securing the legal validity of such instruments and other writs, will affect the exclusive right claimed by the town clerks of Glasgow in virtue of an Act of the Scottish Parliament passed in the first parliament of His Majesty King James the Sixth, intituled Anent giving of Sasines within Burgh, and in virtue of another Act of the Scottish Parliament passed in the third parliament of His Majesty King Charles the Second, intituled Act concerning the Registration of Sasines and Reversions of Tenements within Burgh, to pass, expedite and record instruments of sasine, and other writs mentioned in the said recited Acts in respect of all the lands and tenements hereinbefore described as lying within the territory of the burgh of Glasgow, and to demand and exact certain fees and emoluments payable according to the existing table of rates upon the passing, expediting, and recording of such instruments of sasine and other writs in virtue of the said Acts and of immemorial usage under the same: And whereas it is just and expedient that such fees and emoluments as are legally exigible in respect of the said land should be preserved and continue to be paid to the said town clerks after the passing of this Act notwithstanding the operation thereof, or of this said recited Act passed in the thirty-second year of the reign of His late Majesty King George the Third, be it therefore enacted that the said town clerks and their successors in office shall from and after the passing of this Act have right to demand and exact from the said Archibald Campbell and the succeeding heirs of entail mentioned in the said deed of entail the same rates of fees and emoluments to which they may have been hitherto entitled, or may in future be entitled, in virtue of the said Acts of the Scottish Parliament, according to the law and practice of Scotland, but which may in future be withdrawn from them in consequence of the said sasines and other writs being authorised by the terms of this Act to be passed, expedite, and recorded by any notary-public or person other than the said town clerks; anything herein contained, or in the said recited Act passed in the thirty-second year of the reign of His late Majesty King George the Third, to the contrary notwithstanding.”

The Blythswood Act 1844 (7 and 8 Vict. cap. x) enacts—Section 20—“ . . . [After making provisions for continuation of

feuing provides] reserving to the town clerks of Glasgow and their successors in office the right to demand and exact from the said Archibald Campbell now of Blythwood, and the heirs of entail hereafter to succeed him under the deed of entail hereinbefore directed to be executed, the rates, fees, and emoluments mentioned in the said Act [of 1828.]” Section 21—“ . . . That it shall and may be lawful for the said Archibald Campbell, and failing him the heir of entail for the time entitled to the possession of the lands and heritages . . . and to the tutors, curators, or other legal guardians of such heir . . . to contract with the said town clerks or their successors in office for a renunciation by them of their right to demand and exact from the said Archibald Campbell and the heirs of entail aforesaid the fees and emoluments in the Act. . . [of 1828] and hereby reserved to them, and that in consideration of such a definite sum of money as may be agreed upon to be accepted of by the said town clerks in the place and stead of the said fees and emoluments, and which sum of money the said trustees are hereby authorized and directed to pay out of the price or prices of any lands that may be sold, under authority of this Act, upon receiving from the said town clerks, or other parties legally entitled to grant the same, a proper and valid discharge and renunciation, which the said clerks shall be and are hereby empowered to grant and execute, in favour of the said Archibald Campbell and the heirs of entail aforesaid of the said right to demand and exact the said fees and emoluments in all time thereafter.”

The Corporation of the City of Glasgow and Sir John Lindsay, Town Clerk of the City and Royal Burgh of Glasgow, for any interest he might have, *pursuers*, brought an action against (1) the Right Honourable Archibald Douglas Campbell, the present and fourth Lord Blythwood, and (2) Lord Blythwood and others, as trustees and executors of the third Lord Blythwood, father of the fourth Lord Blythwood, *defenders*, concluding as follows:—“It ought and should be found and declared that the pursuers are, or the pursuer the said Sir John Lindsay is, entitled to charge and collect from the defenders, and the defenders are bound to pay to the pursuers or to the pursuer Sir John Lindsay as town clerk aforesaid, for the purposes of ‘the Town Clerk’s Fee Fund,’ in terms of the Glasgow Corporation and Police Act 1895, and in particular section 17, sub-section 5, of Part iii thereof, the rates, fees, and emoluments exigible by the Town Clerk of the City and Royal Burgh of Glasgow according to the table of rates fixed by Act of Sederunt dated 4th July 1882, in respect of writs or writings other than sasines which were in use to be recorded in the Register of Sasines of the Burgh of Glasgow in virtue of an Act of the Scottish Parliament passed in the first Parliament of His Majesty King James VI, intitled ‘Anent giving of Sasines within Burgh’ (1567, cap. 27), and in virtue of another Act of the Scottish Parliament passed in the third Parliament of His

Majesty King Charles II, intitled Act ‘Concerning Registration of Sasines and Reversions of Tenements within Burgh’ (1681, cap. 11) upon the passing, expediting, and recording of such writs or writings in virtue of said Acts, and of immemorial usage under the same in accordance with the law and practice of Scotland, but which writs or writings were withdrawn from being recorded in the said Register of Sasines for the Burgh of Glasgow by virtue of the Act 9 Geo. IV, cap. xxiv, intitled ‘An Act to amend an Act of the Thirty-second year of the reign of His late Majesty for vesting those parts of the lands and estate of Blythwood and others which lie in the county of Lanark in trustees for the purpose of selling or feuing the same and for other purposes therein mentioned,’ passed on 19th June 1828, in so far as such writs or writings related to the lands specified in the said last-mentioned Act, and in particular it ought and should be found and declared that the pursuers are, or the pursuer the said Sir John Lindsay is, entitled to charge and collect from the second-named defenders in respect of writs or writings withdrawn as aforesaid and relating to said lands and for the purposes aforesaid, the rates, fees, and emoluments specified and contained in an account commencing 30th September 1916 and ending 30th September 1917, amounting said rates, fees, and emoluments to the sum of £63, 4s. 1d. sterling, all as detailed in said account to be produced at the calling hereof, with interest at the rate of 5 per centum per annum from the date of citation hereto until payment: And whether it be so found and declared or not the second-named defenders ought and should be decreed and ordained by decree aforesaid to make payment to the pursuers, or to the pursuer the said Sir John Lindsay, for the purposes of the said ‘the Town Clerk’s Fee Fund’ the sum of £63, 4s. 1d. sterling with interest as aforesaid.”

The *account* referred to in the summons was:—“16 October 1916.—1. Bond for £150 by Alexander Taylor’s trustees to Andrew Taylor over (1) 352½ square yards and (2) 365½ square yards on the east south-east side of Abercorn Street, parts of Blythwood in territory of royalty. 18 October 1916.—2. Memorandum between trustees for Royal Hospital for Sick Children and John Morrison’s trustees constituting additional ground annual of 14/2d. over 363 square yards forming 147 Gardner Street in territory of royalty. 18 October 1916.—3. Notarial instrument, John Morrison’s trustees in 363 square yards forming with another plot 967 square yards bounded on the west by Rosehall Street, now called St George’s Road, in territory of royalty. 24 October 1916.—4. Disposition by Richard Chisholm to Elizabeth H. Waters of three contiguous steadings, viz., (1) 237½ square yards, (2) 236½ square yards, both bounded on the north-east by Garscube Road, and (3) 235½ square yards bounded on the north-east partly by said road; parts of 1 rood 33⅓ falls, part of Blythwood in territory of royalty. 11 November 1916.—10. Assignment by J. B. Morrison’s executors and others to Mar-

garet Birkmyre or Inglis of £700, part of bond for £2100 over 590 square yards No. 2 on plan, on the south by west side of Grove Street. 2 December 1916.—18. Discharge by Charles Turner of £20, part of ground annual of £40 over 524½ square yards, No. 3 on plan, on the north north-west side of Clarendon Street in royalty. 26 December 1916.—20. Agreement between Charles Turner and others modifying provisions in a contract of ground annual (£40) over 677½ square yards No. 35 Clarendon Street, and bounded on the south-west by south by Granville Street. 13 February 1917.—25. Assignment and discharge by trustees of Margaret M. Hamilton or Fulton and others of part of bond for £1100 over 785 square yards bounded on the south-east by south by Rosehall Street or St George's Road, being part of 5968½ square yards, which area is to extent of 5844½ square yards, part of 1 acre, 13 falls, and comprehends 124½ square yards in territory of royalty. 14 February 1917.—26. Extract, decree of special service James C. Gilfillan as heir of William Gilfillan in, *inter alia*, 1682 square yards bounded on the east by Kelvin Street in royalty or territory of the burgh. 30th April 1917.—30. Notice by the Corporation of the City of Glasgow by virtue of a decree against Archibald M'Kechnie as to real burden for £109, 17s. 10d. over 810½ square yards bounded on the west south-west partly by Braco Street and on the north north-west partly by St George's Road in regality of Glasgow.

37 Deeds @ £1 8 1 = £51 19 1d.
 15 „ (Memoranda) @ 0 15 0 = 11 5 0

£63 4 1d.

“*Note.*—With the view of saving trouble to the Town Clerk in making up, and to Lord Blythswood's agents in checking previous accounts, it has been the practice to make the estimated average rate the uniform charge for each writ. The foregoing charges are made on that basis, but the whole account is subject to adjustment in any form that may be finally arranged.”

The pursuers *pleaded*—“1. The pursuers being entitled, in terms of the statutes condescended upon, and immemorial usage, and in accordance with the law and practice of Scotland, to charge and collect from the defenders the rates, fees, and emoluments specified, and the defenders disputing this right, the pursuers are entitled to decree of declarator as concluded for. 2. The sum sued for being due and resting-owing by the second-named defenders to the pursuers, or one or other of them, for the purposes condescended upon, decree should be granted therefor in favour of the pursuers or one or other of them as concluded for.”

The defenders *pleaded*—“1. No title to sue. 2. The action is incompetent, and ought to be dismissed. 3. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 4. The defenders should be assoltized, in respect—(1) that the Blythswood Estate Acts of 1828 and 1844 have ceased to have any force or effect; (2) that any obligations contained therein for payment of recording fees to the town clerks of Glasgow were binding only on the

heirs succeeding under the entail then existing and not on the defenders. 5. In respect the first-named defender does not represent either of the old entailers, and holds the Blythswood estates solely under the entail of 1887, he should be assoltized. 6. In any event—(1) any conclusion as regards the defender first called should be limited to lands dealt with by the Statute of Geo. IV, cap. 24, so long as said defender is infett in said lands; (2) the general declarator should be dismissed as regards the defenders second called.”

On 11th March 1919 the Lord Ordinary (HUNTER) repelled the 1st, 2nd, 4th, and 5th pleas for the defenders and continued the cause, and granted leave to reclaim.

Opinion (from which the *facts* of the case appear)—“In this action the pursuers are the City of Glasgow and the Town Clerk of that city, and the defenders are (*first*) the present Lord Blythswood and (*second*) the testamentary trustees of the late Lord Blythswood. The first conclusion of the action is that the pursuers are entitled to charge and collect from the defenders, and the defenders are bound to pay to the pursuers, the rates, fees, and emoluments exigible by the Town Clerk of the city and royal burgh of Glasgow, according to the table of rates fixed by Act of Sederunt dated 4th July 1882, in respect of writs or writings other than sasines which were in use to be recorded in the Register of Sasines of the burgh of Glasgow, in virtue of the Scots Acts passed in 1567 and 1681, upon the passing, expeding, and recording of such writs or writings in virtue of said Acts, and of immemorial usage under the same in accordance with the law and practice of Scotland, but which writs or writings were withdrawn from being recorded in the said Register of Sasines for the burgh of Glasgow, by virtue of an Act passed in 1828, in so far as such writs or writings related to the lands specified in the said last-mentioned Act. There is a special conclusion that the pursuers are entitled to charge and collect from the second-named defenders the rates, fees, and emoluments contained in an account commencing 30th September 1916 and ending 30th September 1917. The summons concludes with a petitory conclusion against these defenders for payment of the account.

“By the Act 1617, cap. 16, provision was made for the establishment of public registers in which instruments of sasine and other writs relating to lands held in counties might be registered. This Act, however, did not apply to lands held within the area of royal burghs.

“The Act 1567, cap. 27, provided that no sasines of lands or tenements within a burgh should be given except by one of the bailies and the town clerk. A Burgh Register of Sasines was established by the Act 1681, cap. 11, which provided—[*His Lordship quoted the Act*].

“Prior to 1828 a considerable portion of the lands held by the authors of the defenders, and now forming part of the estate of Blythswood, was situated within the original territory of the burgh of Glasgow. This land was all held by burgage tenure.

It could not be sub-feued, and all the writs relating thereto could be competently recorded only in the Register of Sasines for the burgh kept by the town clerks thereof. Notwithstanding this it appears that the law agent of Mr Archibald Campbell, the heir of entail in possession of said lands, in 1828 and for some time previously had encroached upon the exclusive rights of the town clerks, inasmuch as sasines in certain properties within the burgh had been passed and expedite by other notaries, and such sasines and other writs relating to properties there had been recorded in the registers applicable to feudal properties. The pursuers explain that at that time, when the feuing of burgage lands was not allowed, it was of great advantage to a landowner who desired to lay out part of his estate in building lots to be entitled to do so by subinfeudation, and this course had been adopted by Mr Campbell's law agent in disposing of parts of the burgage lands, apparently through inadvertence.

"In 1828 an Act of Parliament was passed to vest those parts of the estate of Blythswood which lie in the county of Lanark in trustees for the purpose of selling and feuing the same and for other purposes. From the preamble of this Act it appears that one of the objects of the Act was to remove doubts as to the register within which instrument of sasines and other rights or deeds requiring registration, following upon the conveyances of the lands to be executed by the trustees in favour of purchasers or feuars, or in favour of Mr Archibald Campbell and the other heirs of entail, or to be granted by the feuars, should be recorded. The Magistrates and Town Council of Glasgow had threatened opposition to the passing of the bill, but their opposition was withdrawn on an arrangement being come to whereby the interests of the community and the rights of the town clerks in future were protected by certain clauses. Section 5 of the Act provides that all instruments of sasines, etc., relating to the lands may be recorded in the General Register or the Particular Register for the shire of Renfrew and barony of Glasgow. Section 6, on the narrative that the provision in section 5 would affect the exclusive right claimed by the town clerks of Glasgow under the Acts of 1567, c. 27, and 1681, c. 11, to pass, expedite, and record instruments of sasine and other writs mentioned in the said Acts in respect of lands within the burgh, and to demand certain fees and emoluments payable according to an existing table of fees, and that it was just that these fees and emoluments should be preserved and continue to be paid to the town clerks, provided that, notwithstanding the Act of 1828, the town clerks should have right to demand and exact from the said Archibald Campbell and the succeeding heirs of entail enumerated in the deed of entail of 1739 the same fees and emoluments to which they may have been hitherto entitled or may in future be entitled in virtue of the said Acts of the Scottish Parliament according to the law and practice of Scotland, but which may in future be withdrawn from them in consequence of the said

sasines and other writs being authorised by the terms of this Act to be passed, expedite, and recorded by any notary-public or person other than the said town clerks.

"On 10th September 1828 the Magistrates and Council of Glasgow granted a charter of resignation and novodamus in favour of Mr Archibald Campbell, heir of tailzie, and to the other heirs of entail entitled to succeed, of the lands in burgh, except certain portions which had been conveyed to purchasers and others, the subjects to be held feu of the Magistrates and Council and for services of the burgh used and wont, in terms of the Act of 1828.

"According to the averments of the pursuers the successive heirs of entail in possession of the Blythswood estate from 1828 till 1872 regularly paid to the town clerks for the time being the fees payable for sasines and writs withdrawn from the burgh register under the Act of 1828. It may be noted that in 1860 the Titles to Land (Scotland) Act 1860 (23 and 24 Vict. c. 143), by section 21 withdrew from town clerks appointed subsequent to 8th March 1860 the exclusive right or privilege of preparing or expediting any writ applicable to land, and gave them no right to compensation in respect of the withdrawal of the right. But dues in respect of recording writs in burgh registers continued to be exigible, and it is with these alone that the present action is concerned.

"In 1872, by a Glasgow Municipal Act, the fees and emoluments pertaining to the office of town clerk were to be charged and collected by the town clerk and paid over to the treasurer of the fee fund, out of which the salaries of the town clerks and others are payable. Another Act passed in 1895 made similar provisions.

"The pursuers further allege that between 1872 and 1916 the successive heirs of entail in possession of the Blythswood estate continued to pay to the town clerks for the time being the sum charged against them as recording dues of deeds withdrawn from the Burgh Register and recorded in the General Register of Sasines in Edinburgh, as authorised by the Act of 1828.

"On 30th September 1916 Major-General Barrington Campbell succeeded to the Blythswood estate as third Lord Blythswood. He refused to pay the recording dues which, according to the pursuers, became due after the date of his succession to the estates. His trustees are the defenders called in the second place. He died on 12th March 1918 and was succeeded by his son the defender called in the first place.

"The defenders have stated a number of preliminary pleas to the validity of the action. Their first plea is that the pursuers have no title to sue, and their second plea is that the action is incompetent. Upon these pleas I heard no argument and I accordingly repel them. The fourth and fifth pleas raise the question whether any liability attaches to the third Lord Blythswood or the present peer, as they hold the Blythswood estates solely under an entail of 1887, which does not impose upon the heirs thereunder any direct liability to pay the dues

exigible by the Town Clerk of Glasgow under the Act of 1828. This plea appears to me to raise a question of difficulty. Its consideration necessitates an examination of the position of the heirs of entail under the 1887 deed.

"In 1844 an Act (7 and 8 Vict. c. x) was passed to enable Archibald Campbell, Esq., of Blythswood, the heir in possession of the estate, to make a new entail of the lands and estates of Blythswood, lying in the county of Lanark, and sell or grant feus of certain parts thereof, and for other purposes.

"By the 20th section of this Act it is provided that the town clerks of Glasgow and their successors in office 'are to have right to demand from the said Archibald Campbell, now of Blythswood, and the heirs of entail hereafter to succeed to him under the deed of entail hereinbefore directed to be executed, the rates, fees, and emoluments mentioned in the Act of 1828.' Section 21 enacts that the rights of the town clerks may be purchased by the said Archibald Campbell, or by the heir of entail for the time entitled to the possession of the lands directed to be entailed.

"In 1887 Sir A. Campbell of Blythswood, Baronet, the son of the Archibald Campbell mentioned in the Act of 1844, disentailed the estate under the powers conferred by the Entail Acts, and thereafter entailed the estate on himself and the heirs mentioned in the disposition and deed of entail of 1887. This deed has not been lodged in process, but I understand that the heirs called to the succession are the same as under the earlier deeds of entail, with the exception that one of the entailor's brothers and his heirs were cut out of the succession. The first-named defender and his father were in the line of succession of the earlier entails, but their right of succession would have been postponed to the brother of Sir Archibald Campbell and the heirs of his body who were excluded by the 1887 entail. That brother is I understand dead, but he was survived by a son who is still in life.

"Sir Archibald Campbell, who afterwards became the first Lord Blythswood, died in 1908. He was succeeded by his brother the Reverend Sholto Douglas Campbell, who died in 1916. As already mentioned General Barrington Campbell, another brother, succeeded as third Lord Blythswood.

"According to the contention of the defenders whatever obligations, provisions, and restrictions were incumbent on the actual holders of the estates under the Acts of 1828 and 1844, or the earlier deeds of entail, were all swept away and extinguished when the late Sir Archibald Campbell disentailed and became fee-simple proprietor.

"The pursuers were not parties to the entail of 1887, and Sir Archibald never purchased the rights of the town clerks, as he might have done in terms of section 21 of the 1844 Act. If the rights of the town clerks of Glasgow depended upon an obligation undertaken by an heir of entail in possession, the defenders, as not representing the original obligant, would not be bound. But the first Lord Blythswood, the entailor under the deed of 1887, before

granting a re-entail, was under obligation not to defeat the rights of the town clerks to the fees to which they were entitled under the Act of 1828. The third Lord Blythswood and the present holder of the title take the estates affected by this obligation. In *Gillespie v. Riddell*, 1908 S.C. 628, 45 S.L.R. 514, Lord Kinneir at p. 640 of S.C., in the course of his opinion refers to the distinction between obligations created by an entailor and those created by an heir of entail. Dealing with the position of an heir of entail in possession his Lordship says—'There could be no question that as a gratuitous taker he was liable for the entailor's debts and obligations.'

"The defenders, as I understand their position, maintain that although liability might ultimately be made to attach to them they cannot be sued in the first instance. If this plea were sustained the present action might have to be dismissed, and the pursuers might be forced to bring an action against the representatives of the first Lord Blythswood. In certain cases a plea of this sort would fall to be sustained. I do not, however, think that it must necessarily be successful. It is within the right of anyone to select which of his heirs should be liable for a particular debt. The facts and circumstances connected with an obligation may amount to an implied selection or may dispense with the necessity thereof. Although the Acts of 1828 and 1844 do not make the obligation to pay the fees of the town clerks of Glasgow real so as to affect the title of a singular successor, I think the intention is to impose the obligation upon a gratuitous taker of the estate who is in fact in possession, although, as the Acts were passed in view of particular entails, only the heirs thereunder are referred to. At all events I think it may be assumed, in the absence of any indication of contrary intention—and none is averred—that the intention of the first Lord Blythswood was that the heirs of entail succeeding under the entail created by him in 1887 should meet the obligation imposed upon him and the heirs succeeding under the earlier entails. I shall therefore repel the fourth and fifth pleas-in-law for the defenders.

"The defenders also presented an argument to me that the pursuers' right to fees for recording deeds was strictly limited to the deeds enumerated in the Act of 1681, and that as none of the deeds mentioned in the list of deeds in the account sued for fell under this enumeration the action ought to be dismissed. I am inclined to think that the defenders' construction of the terms of the Act of 1828 are too narrow. At the same time I think it may be well that before disposing even of the declaratory conclusions of the summons I should know something of the nature and history of the deeds referred to in the account, and be put in possession of what was and has been the practice of paying recording fees in respect of such deeds. The pursuers, perhaps not unnaturally, have relied largely upon the fact that the defenders' predecessors have paid the dues claimed without challenge.

I propose, therefore, to allow them an opportunity of giving more detailed information on the points I have indicated. In the result I quite see that a difficult and expensive inquiry may be necessary. It would be desirable, therefore, that the purely preliminary pleas of the defenders should first be authoritatively disposed of. I shall pronounce an interlocutor repelling the first and second, fourth, and fifth pleas of the defenders, and *quoad ultra* continue the cause, and grant leave to reclaim."

The defenders reclaimed, and argued—The declaratory conclusions were incompetent. They did not distinguish and specify the writs for which the different defenders were liable. The first-named defender was liable as heir of entail, and the second as executors for an account incurred by their author, but the summons did not distinguish those grounds of liability. The liability of the different defenders was not defined, nor was the list of deeds properly linked up with the conclusions. Under the declarator each heir would be found liable for all the dues incurred before, during, and after his period of possession, and likewise the town clerk was suing for the dues accruing before, during, and after his tenure of office. The liability of each heir should have been limited to the dues accruing during his period of possession, and he was only liable so far as *lucratus* by the succession. Admittedly the dues of passing, recording, and expediting could not be recovered, but only those of recording, if any. The proper form of action should have been by a town clerk for the dues accruing during the period or periods of possession of an heir or heirs contemporaneous with the town clerk's tenure of office. Certain of the deeds in question had never been recordable under the older Acts and practice; they were the novel creations of modern statutes. The concession of the pursuers that they would accept a decree in narrower terms was an admission that the declaratory conclusions were faulty. The pursuers' averments were irrelevant. The town clerks' rights to fees under the Acts 1567, cap. 27, and 1681, cap. 13, were safeguarded in the Blythswood Acts 1828 (9 Geo. IV, cap. xxiv), section 6, and 1844 (7 and 8 Vict. cap. x), section 20. Those fees were payable in respect of deeds which under the old Acts should have been recorded in the burgh register, but which had been registered in the non-burghal registers. The Town Clerk's right to charge was confined to the deeds mentioned in the old Acts. No such deeds were now in use, and consequently there could be no dues accruing for recording them and the town clerk suffered no loss. In the general law the right to charge fees for the older writs was abolished as the old writs were abolished. The then existing town clerk alone received compensation, *e.g.*, Heritable Securities Act 1845 (8 and 9 Vict. cap. 31), section 10. The pursuers had alternatively failed to specify that the new writs were the modern equivalents of the older writs. If that was to be their case they should have stated what the nature of the older deeds was, and traced their history to show that the modern deeds

were their equivalents. Some of the deeds had no prior equivalent, *e.g.*, those relating to the extinction of casualties. Further, the action assumed that the whole of the heirs of entail were jointly and severally liable. Such liability was not to be inferred, and there were no averments to instruct it. The statutes in question negatived such a liability, and implied that each town clerk could charge for the dues accruing during his tenure of office. The reasonable construction was that the counter-obligant, the heir of entail, was liable only for the dues accruing during his period of possession. The present conclusions did not admit of decree appropriate to such a liability. In any event the pursuers' rights terminated with the disentail. Admittedly the obligation was not real and did not run with the lands. The Blythswood Acts laid it upon the heirs of entail. After the disentail there were no heirs of entail in the sense of those Acts. There were heirs under a new entail, but the re-entail was a mere accident. The disentailer might have sold the lands or bequeathed them away. If so, upon the pursuers' argument the obligation would have been upon those who but for the disentail would have taken the lands, but who might have no connection with them. The parties to the Blythswood Acts could not have had disentail in contemplation, for disentail was not competent till 1848, but even in 1844 entails might come to an end, and the Acts had not provided for that contingency. The obligation had come to an end because those who had the qualifications of debtors in it had also come to an end, Section 6 of the Rutherford Act 1848 (11 and 12 Vict. cap. 36) contemplated a case where the amount of the debt could be stated. That was impossible here, or at least was only possible as between each town clerk and each heir of entail. Section 32 only applied to the heir of entail and his successors. His successors were the successors under the entail. That Act provided no absolute security, for even apart from it entails might come to an end, so that circumstances might defeat its provisions. In the *Earl of Eglinton v. Glasgow and South-Western Railway Company*, 1885, 12 R. 643, 22 S.L.R. 409, the obligations were mutual, and were intended to run with the lands. In *Dalglish v. Rudd*, 1897, 25 R. 225, 35 S.L.R. 144, and in *Baikie v. Kirkwall Educational Trust*, 1914 S.C. 860, 51 S.L.R. 77, the obligations were intrinsic of the entail. Here they were extrinsic of the entail.

Argued for the pursuers—The declarator sought was competent. It fairly raised the question for decision, because the pursuers maintained that there was an obligation to pay the fees for every writ relating to the lands in question which since the Act of 1828 had gone into the non-burghal registers, but which apart from that Act should have gone into the burghal register. The whole liability therefore fell as a single obligation upon each heir's shoulders. The practical question was, however, whether the present town clerk could recover the fees under the Blythswood Acts from the present defenders, and if the declarator was considered

too wide it covered the question, and it was competent for the Court to grant decree in narrower terms, so as to declare that each heir was liable only for the writs falling in during his period of possession. The Blythswood Act of 1828 was passed to settle doubts as to the validity of the Blythswood entail, and also to validate the feuing of the lands which were held in burgage. Those feus were incompetent. The burgh could, but an individual holder of burgage land could not, grant it in feu-farm—Bell's Lectures (3rd ed.), pp. 793 and 794. The result of feuing that burgage land was that the writs connected therewith were recorded in the non-burghal registers, and as a result the Town Clerk lost the fees for recording. The Act of 1828 had inserted in it the obligation here in question in order to obviate opposition and to compensate the Town Clerk. The Act of 1828, as it validated the entail, really placed the obligation in the position of being intrinsic of the entail. The Act of 1844, though it was in slightly different terms, was clearly meant to perpetuate the obligation in the Act of 1828. The obligation imposed in those Acts was quite unaffected by the fetters of the entail. It was imposed by Act of Parliament, and it affected for all time the then proprietor and his successors. There was no hint of any limitation to a particular period, and the obligation created, though it might not be exigible till deeds passed, was perpetual, and affected the heir of entail at the time and his successors. The obligation was not a debt contracted voluntarily by an heir, which could never affect the fee of the estate. Here if there was failure to pay the respondents could have sued the heir in possession and done diligence against the lands and the rents. There was no authority dealing with a statutory obligation, but an obligation granted by an heir in virtue of a reserved power could be made, both for principal and interest, to affect the fee—*Howden v. Porterfield*, 1834, 12 S. 734, per Lord Mackenzie at p. 738; *Duchess-Dowager of Richmond v. Duke of Richmond's Trustees*, 1837, 16 S. 172, per Lord President Hope at p. 173. If so, then both section 6 and section 32 of the Rutherford Act applied, for the obligation could be made to affect the fee of the estate, and further, was expressly laid upon the heirs of entail. *Baikie's case*, (cit.) per Lord President Strathelyde at p. 864, and the *Eglinton case* (cit.) were exactly in point. The obligation not having been stated in the schedule to the disentail petition and not having been provided for, the disentail was quite ineffectual to discharge the obligation. The result was that the disentailer still remained liable in perpetuity, and gratuitous takers from him of the lands continued liable also in so far as they benefited. The Act of 1844, section 21, recognised that the obligation affected the lands, for the redemption money to buy off the Town Clerk's rights was to be paid out of the price of land sold. The action was relevant, and no question arose as to whether the writs referred to in the list were the modern equivalent of the older deeds, for the Blythswood Acts were to provide compensation for the loss of the dues of recording the writs current at their

date and also the writs later introduced. That necessarily followed from the fact that those Acts withdrew from the burgh registers all deeds relating to those lands. The modern writs but for those Acts would have been recorded in the burgh registers. It could be shown by statutes, text books, and practice that the deeds in the list would all naturally have been recorded in the burgh register. The defenders were approbating and reprobating. They accepted the entail, but would not accept the obligation attached to it. The disentail was similar to a propulsion of the fee. A propulsion of the fee would not defeat such an obligation as the present—*Gillespie v. Riddell*, 1908 S.C. 628, per Lord Kinross, 45 S.L.R. 511, and *Brander, Petitioner*, 1902, 9 S.L.T. 380. There was no relevant defence to the action, and the pursuers were entitled to decree.

At advising—

LORD PRESIDENT—The main topic discussed at the debate before us was the question of the defenders' liability under the 6th section of the Blythswood Act of 1828. Here I agree with the conclusion reached by the Lord Ordinary, in whose opinion will be found a full and accurate account of the circumstances which have given rise to the controversy. I am not, however, prepared to follow the reasoning of the Lord Ordinary. In my opinion the decision of the question rests on the application to the case of section 32 of the Rutherford Act, which does not appear to have been brought under the Lord Ordinary's notice. Why this was so I cannot understand, for it is plainly conclusive on this part of the case. The obligation of the defenders to pay the fees in question to the town clerks of Glasgow is founded on the 6th section of the Blythswood Act of 1828 by which it is enacted, "That the said town clerks and their successors in office shall, from and after the passing of this Act, have right to demand and exact from the said Archibald Campbell and the succeeding heirs of entail mentioned in the said deed of entail the same rates of fees and emoluments to which they may have been hitherto entitled, or may in future be entitled, in virtue of the said Acts of the Scottish Parliament, according to the law and practice of Scotland, but which may in future be withdrawn from them in consequence of the said sasines and other writs being authorised by the terms of this Act to be passed, expedited, and recorded by any notary-public or person other than the said town clerks."

This obligation was by the 20th section of the Blythswood Act of 1844 continued in the following terms—"and also reserving to the town clerks of Glasgow, and their successors in office, the right to demand and exact from the said Archibald Campbell now of Blythswood, and the heirs of entail hereafter to succeed to him under the deed of entail hereinbefore directed to be executed, the rates, fees, and emoluments mentioned in the said second recited Act." The defenders say that "In 1887 Sir Archibald Campbell, baronet, of Blythswood, who was then heir of entail in possession of the

said estates under the old entail, disentailed the estate under the powers conferred by the Entail Acts. He thereafter entailed the estate on himself and the heirs mentioned in the said Disposition and Deed of Entail of 1887." The result was, say the defenders, that—"Neither the first-named defender nor his father ever held the estates under or subject to any of the provisions of the various Blythswood Acts quoted, or under or by virtue of any of the deeds of entail there mentioned. Whatever obligations, provisions, and restrictions were incumbent on the actual holders of the estates under these Acts or deeds of entail were all swept away and extinguished *de facto et vi statuti* in 1887, when the late Sir Archibald Campbell disentailed and became fee-simple proprietor." Now the disentail had no such effect, for by section 32 of the Rutherford Act it is expressly provided that "the 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 or 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."

Now the right conferred on the town clerks of Glasgow under section 6 of the Blythswood Act of 1828 and reserved by the Blythswood Act of 1844 was undoubtedly a right held by third parties and lawfully affecting the heirs of entail in possession and their successors under the deed of entail existing at the date of the disentail. That right was therefore not defeated or affected injuriously, but remained valid and operative just as if no disentail had been executed. An excellent illustration of the scope and effect of this section of the Rutherford Act is to be found in the case of *Baikie v. Kirkwall Educational Trust*, 1914 S.C. 860, 51 S.L.R. 717. It was scarcely disputed that this was an authority directly in point. From the date of the disentail till September 1916, the view that the disentail had not affected the obligation in question was acted upon by the successive heirs of entail in possession of the Blythswood estates. That view was manifestly correct.

The second question to which our attention was directed, was the just construction of the section in the Blythswood Acts of 1828 and 1844 on which the pursuers' claim rests. I do not think their meaning is doubtful; and it was only faintly maintained that there was any room for controversy. It plainly appears that each successive heir of entail is liable to pay the fees which become due and payable during the period of his possession of the estates. He is liable for nothing more. And if this be so, then confessedly the pursuers are not

entitled to have decree in terms of the first declaratory conclusion of the summons. For it seeks to affirm a joint and several liability on the part of the defenders for payment of the fees for an indefinite period of time. We were invited by the pursuers' counsel to limit and modify the scope of that declaratory conclusion as we thought fit. I am not disposed to do so. Under the remaining conclusions of the summons the pursuers may obtain all that, in my judgment, they are entitled to have in the present action.

The relevancy of the averments in support of the petitory conclusion of the summons was attacked by the defenders, and it was not disputed by the pursuers that these averments were lacking in specification and required serious amendment. The Lord Ordinary seems to have taken the same view; but I think the best course will be to send the case back to the Lord Ordinary for inquiry on the lines he indicates in his opinion, after the pursuers have made their averments more detailed and specific than they are as they now stand. I propose that we pronounce an interlocutor in the following terms—"... *v. infra* ..."

LORD MACKENZIE—[*Read by Lord Sker-rington*].—The 32nd section of the Rutherford Act and the decision in *Baikie v. Kirkwall Educational Trust* (1914 S.C. 860, 51 S.L.R. 717) appear to me conclusive on the question whether the obligation subsists notwithstanding the disentail. The statutes of 1828 and 1844 constituted rights held by third parties which lawfully affected the heir in possession of the estate and his successors. Section 32 says that these "shall remain at least as valid and operative in all respects as if no such instrument of disentail had been executed or recorded." The case of the *Earl of Eglinton v. The Glasgow and South-Western Railway Company* (1885, 12 R. 643, 22 S.L.R. 409) shows that the right does not require to be a real right. The question is what is the scope and present effect of the right in the hands of the pursuers. In my opinion the fair construction of the obligation is that each heir is liable for the period of his own possession of the estate and no further. The fact that the original tailzied destination was modified when the new deed of entail was executed in 1887 did not alter the character under which each successive heir possessed. Each heir took under a destination which made him answer the description of those persons liable under the Acts of 1828 and 1844. The omission of one of the heirs in the original destination does not make any difference.

The first general conclusion for declarator ought not in my opinion to be granted. It apparently proceeds upon the theory that each heir is liable *in solidum* not only for his own period of possession, but for his predecessor's and also for his successor's. This view will be negatived by the findings your Lordships propose, in which I concur. The second part of the declarator is covered by the proposed findings. The question of the amount, if any, for which liability

attaches may be tried under the petitory conclusion.

LORD CULLEN—The liability which the pursuers seek here to enforce did not have its origin in the deed of entail of the lands or in any act of the entailer, but was created by the Statute of 1828, which imposed it on the heir of entail then in possession and on the heirs of entail succeeding after him. It was a peculiar obligation. It was of indefinite duration, and liability for payment under it was a thing not to occur once for all but to recur from time to time. The creditor in it was to change from time to time, each town clerk having while in office a title to enforce it not derived from his predecessor but derived independently from the statute. There are no words in the statute expressly so binding the debtor heirs of entail as to make each of them liable *in solidum* or expressly binding them *pro rata*. The obligation is thus open to construction. Having in view its characteristics as above mentioned, I am of opinion, on a fair construction of it, that it was intended to impose liability on each of the debtor heirs of entail only for such fees as might become due during the period of his possession of the lands. It is noticeable that the reservation of the right of the town clerks contained in section 20 of the Act of 1844 applies only to the liability of the then existing heir of entail in possession and his successors, and says nothing about liability of the bygone heir of entail in possession in 1828, who had died in the interval.

The next question raised relates to the effect of the disentail of 1885 and the new entail of 1887. It was hardly disputed that under section 6 of the Rutherford Act and section 15 of the Entail Amendment Act of 1875 the obligation in question was one which should have entered the schedule of debts and incumbrances, and been provided for in the disentail proceedings. Unfortunately this course was not followed. In these circumstances the pursuers appeal to section 32 of the Rutherford Act. The saving clause contained in it is in very broad terms. Difficult questions regarding its application may be figured as arising from transactions following on the recording of the instrument of disentail according to their nature. The species of transaction which took place here was that the heir who disentailed in 1885 gratuitously re-entailed the lands in 1887 on the same series of heirs as were called under the old entail, with the omission of a particular *stirps*. The substantial effect of the disentail and new entail was thus to alter the order of succession to the extent of this omission. The defender first here convened and the author of the defenders second convened were both called to the succession by the destination in the old entail. It is true that they succeeded to the lands in a different order and under a different deed. The question is how the above-mentioned provision of section 32 should be applied in the circumstances. I think it should be applied to the effect of carrying on the

obligation in question against the heirs succeeding under the entail of 1887, including the first defender and the author of the other defenders. No considerations of equity oppose this result. The only alternative suggested by the pursuers is to treat the statutory obligation in question as now wiped out. But that would be simply to deny all force and effect to the provision of section 32, under circumstances where there is no real difficulty in applying it so that the parties interested in the obligation will stand in the same position in which they stood before in all material respects, and where no other interests are involved. The case of *Baikie*, 1914 S.C. 860, 51 S.L.R. 717, appears to me to be an authority in point.

As regards the questions relating to the writs included in the pursuers' account, the Lord Ordinary has not dealt with these but has expressly left them over in the meantime, and I agree with your Lordships in thinking that the case should be remitted so that he may dispose of them.

I accordingly concur in the judgment which your Lordships propose.

The LORD PRESIDENT intimated that LORD ORMDALE concurred.

LORD MACKENZIE was absent at advising.

LORD SKERRINGTON, who had not heard the case, delivered no opinion.

The Court pronounced this interlocutor—

“Find (1) that notwithstanding the disentail of the Blythswood estates in 1887 the right conferred by the Blythswood Act of 1828 (continued by the Blythswood Act of 1844) on the town clerks of Glasgow and their successors in office to exact payment of certain fees from the successive heirs of entail in possession of the Blythswood estates is still valid and operative; (2) that each successive heir of entail in possession of the said estates is bound to pay only the fees, if any, which become due and payable during the period of his possession: Therefore dismiss the first declaratory conclusion of the summons: *Quoad ultra* remit to the Lord Ordinary to dispose of the remaining conclusions of the summons.”

Counsel for the Pursuers (Respondents)—Lord Advocate (Clyde, K.C.)—Christie, K.C.—D. P. Fleming. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Reclaimers)—Chree, K.C.—Brown, K.C.—Dallas. Agents—Strathern & Blair, W.S.