Upon the whole of the case, it appears to me impossible to doubt that the learned Judges in the Court below were right. The Company were at all times incapable of enforcing any contract, even if this contract had been a valid contract, and useful to them; they had no writing, they had no evidence, they had no muniment of title of any sort; they were wholly remediless against this appellant.

It appears to me that, applying the plain principles of law to the undisputed facts, this appeal must be dismissed, with costs.

Lord Blackburn—My Lords, I am of the same opinion.

I agree with the learned Judges in the Court of Session that this case is an important one, and to my mind it is a very clear one also. Having regard to its importance, I should say more upon it if it were not for the fact that the Judges in the Court of Session have all delivered very able opinions upon it—I refer more especially to the opinion of the Lord President, which I have studied, I may say, because it comes last, and is not long; and having studied it, I might confine myself to saying that I agree with every word as to the law, as to the facts, and as to the conclusions arrived at from the evidence expressed in that short judgment of the Lord President. There I might stop, and so I should if it were not for the fact that Mr Benjamin, in his able argument, being unable to dispute, and knowing that he could not with any chance of success dispute, the law which is laid down in that judgment, endeavoured, if I may say so, to confuse and avoid it. What he endeavoured to say was perhaps the only thing that could be said for his client, but it was a desperate attempt from the beginning, and it totally failed.

[His Lordship then examined the evidence.]

Under those circumstances, is it possible for anybody to think as at matter of fact that this £10,000 was otherwise than by previous agreement given to Mr Henderson for acting as a director of the Company in clinching this bargain? And can anyone doubt that though the bargain was made before he became a director and acquired a fiduciary relation to the Company, it is just the same as if the fiduciary relation had subsisted at the time when he arrangement was made that he should receive the £10,000?

Lord Gordon—My Lords, I consider it unnecessary to make any detailed observations upon this case, which is really clear beyond all doubt. The Court below were unanimous in disposing of the case, and your Lordships have come to the same conclusion. It is undoubted that since the case of *Blaikie Brothers* v. *The Aberdeen Railway Company*, 14 D. 66, H. of Lords 1 Macq. 461, in which your Lordships reversed the judgment of the Court of Session, and in which I happen to have been counsel for the appellant, the principle that a person occupying a fiduciary relation towards a company must not enter into any contract which may involve the interests of the company has been clearly established. I think, after the full statement of the case which has been made by your Lordships, it is quite unnecessary for me further to occupy your Lordships' time.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Counsel for the Appellant—Benjamin, Q.C.—Digby. Agents—Freeman & Bothamley.

Counsel for the Respondents—Horace Davey, Q.C.—Kekewich, Q.C.—Low. Agents—Freshfields & Williams, Solicitors.

COURT OF SESSION.

Friday, December 14.

FIRST DIVISION.

[Lord Adam, Ordinary.

FOGO, PETITIONER.

Entail—Improvements—Entail Amendment Act 1875 (38 *and* 39 *Vict. cap.* 61)—*Charge for Improvements on Mansion-house, by which Free Rental of Estate disproportionately diminished.*

The Court will allow as charges against an entailed estate under the provisions of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), such improvements upon the mansion-house as are likely to secure an increase of rent for it let as a residence and may be classed as "of a substantial nature and beneficial" to the estate, without regard to the fact that by the charges the free agricultural rental suffers corresponding diminution.

This was a petition under the 7th and 8th sections of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), presented by Mrs Jane Mathie Lawrie Fogo, heiress of entail in possession of the entailed estate of Row, and her husband, the Rev. John Lawrie Fogo, for leave to charge the entailed estate with certain sums for improvements on the mansion-house, partly already executed, and partly in course of execution, or only contemplated. The Lord Ordinary remitted to Mr George Dalziel, W.S., as a man of business, and to Mr David Ballingall, as a man of skill, to report on the petition. As regarded the sum for improvements executed prior to this application, the Lord Ordinary granted the desired authority, after deduction of a trifling sum for certain items of improvement which had been altered or removed by subsequent operations.

But the petitioner further asked to be allowed to charge the estate with a sum of upwards of £3000 for contemplated expenditure. The improvements were reported by Mr Ballingall to be of a substantial nature, but excessive when compared with the rental of the estate. And it appeared that the free rental, which, exclusive of the mansion-house, amounted to £670, would be reduced by the proposed charges to £220 per annum. Mr Dalziel, the reporter, suggested that in these circumstances it might be necessary to make some provision for the protection of the younger children of the petitioner, in favour of whom and of her husband the petitioner Mrs Fogo had executed a bond of provision, dated 9th September 1843. That deed provided for payment of an annuity of £225 to her husband during his life in the event of his surviving her, and of £1500 to the younger

children of the marriage. Both these bequests were restrictable in terms of the Aberdeen Act.

Mr Dalziel also remarked in his report—"It is submitted for your Lordship's consideration whether an expenditure on the mansion-house of an entailed estate, the effect of which is to reduce the income from the remainder of the estate to such an extent as to be totally inadequate to enable the heir of entail personally to occupy the mansion-house, can be treated as being 'beneficial to the estate' in the meaning of the Act."

The next heir of entail, Mr David Fogo Lawrie Fogo, concurred in the application. Mr Bruce Johnston, W.S., who had been nominated factor *ad litem* to the two others of the three next heirs of entail, who were children of Mr D. F. L. Fogo, stated in a minute—"The result of these inquiries has been to satisfy the curator *ad litem* that the property has all along had a mansion-house of some sort, and that the house now existing, as improved and enlarged, is not out of keeping with the nature and extent of the property. He is also satisfied that an increased rent, corresponding to the amount proposed to be charged in respect of additions to the mansion-house and offices, may reasonably be expected, and has indeed been obtained, on a five years' lease. At the same time, it appears to the curator that the free rental obtained from the estate otherwise would by itself be inadequate to enable an heir of entail to reside on the property. Whether the expenditure on the mansion-house is properly chargeable on the entailed estate in the view of its being beneficial only in the sense of the house being let to a third party, is a question which the curator *ad litem* desires to leave in the hands of the Lord Ordinary; but, on the assumption that, in the circumstances stated, the expenditure proposed to be allowed by Mr Ballingall's report can be competently charged, the curator does not oppose the prayer of the petition being granted." It was stated that the petitioner's younger children consented to the authority being granted. The question therefore came to be, whether the prospect of an increased rent for the mansion-house as a residence was sufficient to bring these improvements under the category of being "beneficial to the estate?"

The Lord Ordinary (ADAM) thereupon pronounced an interlocutor in which, *inter alia*, he allowed the proposed expenditure for contemplated improvements to the extent of £1500, and authorised the petitioner to charge the entailed estate, other than the mansion-house, with a bond of annual-rent accordingly.

The petitioner having obtained leave, reclaimed.

At advising—

LORD SHAND—The interlocutor which this reclaiming note submits to the review of your Lordships deals with two classes of improvements. The first was executed prior to the date of this application. These improvements the Lord Ordinary has sustained as a good charge against the entailed estate, and no objection is taken. The improvements of the second class are those which the petitioners were in course of executing, or had yet to execute, and they ask the Court, taking advantage of the recent Entail Amendment Act (38 and 39 Vict. cap. 61), to give them authority to charge the estate with the money that is to be borrowed to meet the cost of these improvements, which are of a substantial nature, and consist mainly in alterations and additions to the mansion-house. The amount sought to be charged is £3908, 1s. 5d., and upon consideration Mr Ballingall, to whom the Lord Ordinary remitted, has disallowed a sum of £808, 10s. 11d. That has been acquiesced in by the petitioners. There remains a balance of £3099, 10s. 6d.; of this the Lord Ordinary has allowed only about one-half to be charged upon the estate. The petitioner has submitted that the whole amount should be allowed.

Now, it does not appear from the Lord Ordinary's judgment on what precise ground his Lordship has disallowed half of this sum, but it was stated to us that his view was that the extent of improvements on the mansion-house was so much in excess of the agricultural value of the estate that they could not be represented as being beneficial to it. The full agricultural rent, as appears from Mr Dalziel's report, exclusive of the mansion-house, is about £670. That is the free rental, and it will be reduced, as he reports, by the charges to be imposed on the estate, if the Court should grant authority as is craved in this petition, to a sum of £220 or thereby. It appears that the estate will be immensely improved as a place of residence by the proposed expenditure, and I see that Mr Johnston, who acted as tutor *ad litem* for two of the heirs of entail, who are in pupillarity, states very properly that he is "satisfied that an increased rent, corresponding to the amount proposed to be charged in respect of additions to the mansion-house and offices, may reasonably be expected, and has indeed been obtained on a five years' lease." That statement I accept as showing that the property will by these proposed improvements be greatly enhanced in value as a place to reside on, although the effect will be to reduce the agricultural rental.

The question then is—Are these improvements to be allowed to this full extent, or only to the extent of one-half? I propose to your Lordships to allow the full amount to be charged. In the case of *Mosman*, January 25, 1867, 5 Macph. 303, it was decided that in dealing with improvements of the class authorised by the Act 11 and 12 Vict. cap. 36, there is no limitation of the cost to two or three years' rental. What the Court has to look to is whether the improvements are truly beneficial to the estate or not? So here there is no limitation imposed by the Statute of 1875 of any number of years' rental as the extent to which improvements are to be authorised. The question is therefore, to adopt the words of the statute—Whether the contemplated improvements are "of a substantial nature, and beneficial to the estate?" It cannot be doubted that they are of a most substantial nature, and further, they come within the description of what is beneficial to the estate, for they will give a correspondingly increased value to the estate. Therefore I am of opinion that they are within the meaning of the statute beneficial to the estate.

A question, not unattended with difficulty, might have arisen from the circumstance that the lady now in possession of the estate granted at her marriage a bond of provision for the younger children of the marriage. It was for

£1500, but restrictable in terms of the Aberdeen Act. Of course, if the free agricultural rental is now to be reduced to £220, that has a material effect on these provisions, and a question might have arisen whether this charge could have been effected in the face of this bond? But this lady is, in the first place, in her 71st year, and we have, besides, the consent of all parties interested in this bond of provision. The petitioner's eldest son has also by a formal minute stated that he desires that the application should be granted; all the members of the family, in short, concur in the application, and accordingly I propose that your Lordships should grant authority as craved.

LORD DEAS, LORD MURE, and the LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the petitioners on the reclaiming note for them against Lord Adam's interlocutor of 6th November 1877, Recal the interlocutor in so far as it finds that it would not be beneficial to the estate that it should be charged with any greater expenditure in respect of improvements on the mansion-house, &c., than £1500: Find that the petitioners ought to be allowed to charge the estate on this account with the full amount of £3090 of improvement expenditure: Remit to the Lord Ordinary to modify and alter his interlocutor so as to give effect to this finding, with power to his Lordship to dispose of the expenses incurred in the Inner House."

Counsel for Petitioners—Rutherfurd. Agents—Frasers, Stodart, & Mackenzie, W.S.

Friday, December 14.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MACKENZIE *v.* CATTON'S TRUSTEES AND ANOTHER.

Husband and Wife—Marriage-Contract—Entail—16 *and* 17 *Vict. cap.* 94, *sec.* 24—*Reduction of an Excambion on the ground of Fraud by a Succeeding Heir of Entail.*

An heir of entail in possession of an entailed estate obtained in 1865 a decree of the Court under the Acts 6 and 7 Will. IV. cap. 42, 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, authorising an excambion of certain parts of the entailed lands for certain other lands belonging to him in fee-simple. Having executed a contract of excambion in pursuance of that decree, he, some years afterwards, conveyed the lands so excambed to the trustees under a marriage-contract entered into between his daughter and her husband, for behoof of her and him in liferent and the children of the marriage in fee. In a reduction of the decree, brought eight years afterwards by a succeeding heir of entail against the marriage-contract trustees and the only child of the marriage, on the ground of irregularity in the proceedings, and of fraud on the part of the original petitioner for the excambion—*held* that the proceedings were, under the 24th section of the 16 and 17 Vict. cap. 94, final, the marriage-contract trustees and the child being "third parties acting *bona fide* on the faith" of the decree.

Husband and Wife—Fraud—Marriage-Contract—Liability of Singular Successors under a Marriage-Contract for the Fraud of their Author.

Held that the right of marriage-contract trustees and the heir of the marriage taking benefit by such a transaction as that narrated above is not liable to reduction by reason of the fraud of the party who conveyed to them in the marriage-contract.

Observed (*per* Lord Shand) that "it is quite settled that a marriage-contract is an onerous transaction, as much as a purchase or a loan would be."

Counsel for Pursuer (Reclaimer)—Balfour—Moncreiff. Agent—A. P. Purves, W.S.

Counsel for Defenders (Respondents)—Rhind—Hunter. Agent—Robert Menzies, S.S.C.

Saturday, December 15.

SECOND DIVISION.

[Sheriff of Renfrewshire.

PAUL SWORD & COMPANY *v.* HOWITT.

Ship—Charter-Party—Bill of Lading—Master's Gratuity—Liability of Assignee of Bill of Lading to Pay Gratuity.

The master of a ship sued the assignees of certain bills of lading for payment of a gratuity which it was stipulated should be paid "on right and good delivery of the cargo." This stipulation was in all the bills of lading but one, and the charter-party also contained it. The bill of lading which did not contain it stated that the freight was to be paid as per charter-party. The defence was that there was no right and good delivery of the cargo, it having been received in a damaged state; and further, that the stipulation to be binding must be contained in the bill of lading. *Held* that the defences must be repelled, in respect (1) that the terms of the charter-party, including the stipulation for gratuity, must be read into the bill of lading; and (2) that it was not averred that the damage was due to the fault of the master; and that in these circumstances the gratuity was as much due by the assignees as payment of freight.

By a charter-party, dated 11th May 1874, between the pursuer, who was master of the ship "Kishon," and Fraser, Eaton, & Co., merchants at Sourabaya, it was agreed that a cargo of sugar should be shipped on board the pursuer's ship at various ports in Java to go to the United Kingdom. The terms of the charter-party, *inter alia*, were—"And deliver the same on being paid freight at the rate of £3, 12s. 6d. . . . per ton of 20 cwt. nett weight delivered, and 1s., say one shilling,