in the word property which he thus used. If a fishcurer at Wick speaks of his property at Wick, he does not mean his money or fish, although technically he is the proprietor of money and fish; but what he means is his houses there. I think that is what is meant by the expression, "I dispone all the property of which I die possessed, and all the goods, gear," and so on. Now, it is impossible, I think, to lay down any other rule with respect to the effect of an enumeration of particulars in limiting the comprehensiveness of the meaning of a preceding general word otherwise than I have attempted to do. It would be in other language, but it is to that effect, that it will or will not limit the meaning according as the enumeration is such and so introduced as to satisfy the Court or not that it was so intended. Here I am satisfied that it was not so intended; and that the word "property" must have all the meaning which would attach to it, if "goods, money," and so on had not followed. Therefore it comes back to the original proposition, that a disposition by a proprietor of all the property of which he may die possessed will comprehend his heritage.

Lord Craighill—I am of the same opinion. The question comes to be one of intention, for if a testator did intend that the word "property" as used by him should carry heritage, there is no doubt that his intention ought to be given effect to, always provided that that intention is clear from the expressions used in the deed intended to regulate his affairs. Now, reading this clause together, it appears to me to be clear that the word "property" must be held to comprehend not merely moveables but also heritage. I further think that the word "dispone" which is used in the beginning of the clause very clearly shows what was the view of the testator himself. Taken altogether the clause must be read as having the effect it would have had supposing he had disponed all his property, and left and allocated his means and effects for the purposes specified in the deed. If that had been the form of the clause I do not think there would have been a stateable case. It further appears to me that if there is any doubt about the matter, the reasonable course to follow is to hold that whatever property may be reasonably held to be comprehended must be covered by the word. Words of enumeration which follow have not the same effect, it appears to me, that they have when you begin by special enumeration, and finish up with a general word. Allowing that words which do follow may have a derogatory effect, still, looking to the deed as a whole, and to the words which have been commented upon in particular, it seems to me that they were not introduced by the testator for the purpose of limiting the word "property" to the moveables which he left.

Lord Rutherfurd Clark concurred.

The Court answered the question of law in the affirmative.

Counsel for First Party—Nevay—M'Lennan. Agent—William Gunn, S.S.C.

Counsel for Second and Third Parties—Lang—Crole. Agents—Duncan Smith & Maclaren, S.S.C.

*Tuesday, June 30.*

## FIRST DIVISION.

[Lord Fraser, Ordinary.

### TEULON *v.* SEATON AND OTHERS.

*Process—Caution—Effect of Failure to Find Caution—Title to Sue.*

A married woman, who was one of the beneficiaries under a trust-deed, raised an action against an intromitter with the trust-funds, and also against the trustees acting under the deed of settlement, seeking to have the intromitter decerned to exhibit a full account of his intromissions with the trust-estate, and to pay to her or to the trustees such sum as should be ascertained to be the balance of his intromissions. The Court, in respect of the pursuer's husband not being a consenter to the action, and that the trustees did not propose to prosecute the claim, *appointed* the pursuer to find caution, and on her failure to do so, *assoilzied* the defenders from the conclusions of the action.

Counsel for Pursuer—Guthrie—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Defender (Seaton)—Graham Murray—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for Defenders (Mrs Seaton's Trustees)—Goudy. Agents—Adam & Sang, S.S.C.

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*Tuesday, June 30.*

## FIRST DIVISION.

[Lord Trayner, Ordinary.

### LORD LOVAT *v.* FRASER AND ANOTHER.

*Entail—Provisions to Wives and Children—Free Rent.*

Terms of a deed of entail which were *held* to imply, in giving a power to provide for younger children in bonds over the estate for a sum equal to three years' "free rent," that the "free rent" should be calculated without any deduction in respect of the provision for the widow secured over the estate under the same deed.

Archibald Thomas Frederick Fraser, Esq., of Abertarff, died on 2d March 1884, and was succeeded by Lord Lovat as his nearest lawful heir of tailzie and provision in the lands of Abertarff and others. The entail under which the lands were held had been executed in 1851 in obedience to judgments of the Court of Session and House of Lords finding that the heir in possession was bound to execute an entail of the lands so as to give effect to a deed of entail in 1808 and a nomination of heirs following upon that deed in 1812.

The powers reserved to the institute and heirs of entail by the said disposition and deed of entail and settlement of 15th August 1808, and by the said disposition and deed of entail of 8th February 1851, were identical. In the latter

deed these reserved powers were thus expressed, viz.—"Excepting and reserving always full power and liberty to me, the said Archibald Thomas Frederick Fraser, and the heirs-male of my body, and to the said Thomas Alexander Fraser, now Lord Lovat, the nearest heir-male of the said deceased Alexander Fraser of Strichen, and to each of the heirs succeeding to the lands and estates before disponed, notwithstanding the premises, to provide and secure our lawful wives and husbands, and also the wives and husbands of the apparent or presumptive heir for the time, in liferent annuities during their lives in lieu of terce and courtesy, furth of the lands and estates hereby disponed, not exceeding one-third of the free rent, after discounting former liferents, interest of debts, if any be, with the annuities and other sums remaining due and affecting the said estates, and of any provisions granted by former heirs to children, so that after liferents shall not exceed a third of the free rents at the time when such liferents shall take place, but may increase as the former liferents and debts or burdens are paid off or extinguished; Provided always, that no part of the estates hereby settled shall be given off in liferent by way of locality to any of the said wives or husbands, but they shall not only be infeft in yearly annuities upliftable furth of the lands and estates hereby disponed, or part thereof: And excepting and reserving also full power and liberty to me, the said Archibald Thomas Frederick Fraser, and the heirs-male of my body, and to the said Thomas Alexander Fraser, now Lord Lovat, the nearest heir-male of the said deceased Alexander Fraser of Strichen, and to each heir who shall succeed to the said lands and estates, and who shall be infeft and in the fee and possession thereof for the time, to grant bonds of provision to our child or children respectively who do not succeed to the said tailzied lands and estates, and to the younger child or children of our oldest sons, to the extent of three years' free rent of the estates hereby disponed as aforesaid, which sum of provision is to be divided among, and to be payable to the children, in the case of more than one, in such portions and at such times as the father shall think fit to direct, only the provisions shall not bear interest till after the death of the granters; and in case all or any of the said younger children shall die under age and unmarried, and without having uplifted the said provisions, then the provisions of the children in such circumstances shall not go to their executors or nearest of kin, but shall become extinct, and shall accresce to the heir possessing the said estates for the time: And providing always, as it is hereby expressly provided and declared, that it shall not be in the power of any heir in possession to burden the said estates with new provisions to children till the first provisions contracted by the preceding members of entail for their children are paid and extinguished—at least such heirs shall only be entitled to contract new provisions to the extent of what remains unexhausted of the three years free rent, allowed as a fund for providing younger children by this tailzie, so as that the said estates may never at any one time be affected beyond the said sum, and none of the children, whether of one or more heirs, to have more in any event than the provisions hereinbefore allowed of three years' free rent."

Mrs Fraser wife of Archibald Thomas Frederick Fraser, was secured in a liferent annuity, not exceeding one-third of the free rent of the entailed lands, by various deeds, the first being a post-nuptial contract of marriage, providing her an annuity of £300, on which she was infeft in the year 1822; this annuity was increased to £550 by subsequent deeds, under the proviso that the annuity should be increased or diminished so as to be in conformity with the powers reserved to her husband by the deed of entail.

Miss Fraser, his daughter, was also secured by certain bonds of provision in provisions varying in amount, the highest sum mentioned in the bonds of provision in her favour being £6000, qualified by a similar proviso.

Lord Lovat, as heir of entail in possession, presented a petition for restriction of the provisions to the widow and child, and for warrant to charge the entailed estate with these provisions.

It was stated in the petition that the highest amount of annuity and provisions which Mr Fraser was entitled to grant in favour of his widow and daughter, under the said deed of entail, was as follows:—

| | |
|---|---|
| Widow's annuity, amounting to one-third of free rent, . . | £527 9 4 |
| Daughter's provision, three years' free rent, . . . . | 3164 16 0 |

These calculations were based on the assumption that the free rental of the estate amounted to £1582, 8s., and that in fixing the amount of the child's provision the widow's annuity, amounting to £527, 9s. 4d., was to be deducted from that rental before computing Miss Fraser's provision.

Answers were lodged for the widow and daughter. Objections were taken to the accuracy of the rental; it is unnecessary to state these. Miss Fraser objected to the widow's annuity being deducted from the free rental in fixing her provision.

The Lord Ordinary (Trayner) on 23d May pronounced this interlocutor:—"Finds that in estimating the amount of the provision in favour of the respondent Miss Catherine Fraser, with which the said Archibald Thomas Frederick Fraser, her father, was entitled to charge the said estate, the amount of the annuity provided to the said Mrs Janetta Fraser Macpherson or Fraser is not to be deducted or taken into account: *Quoad ultra* appoints the cause to be put to the roll for further procedure: Grants leave to reclaim.

"*Opinion.*—Lord Lovat, the heir of entail in possession of the entailed estate of Abertarff, makes the present application to the Court for the purpose, *inter alia*, of getting the provisions made in favour of the respondents, the widow and daughter respectively of the preceding heir of entail, and which now burden the estate, restricted, on the ground that these provisions are in excess of the amount which the last heir could competently make, having regard to the terms of the deed of entail and the amount of the free rent of the estate.

"The clauses in the deed of entail which authorise the heir in possession to burden the lands with provisions in favour of his wife and children who did not succeed to the estate, are given at length in the petition, and need not be re-

peated, but they amount to this, that the provision in favour of a wife shall not exceed 'one-third of the free rent, after discounting former liferents, interest of debts, if any be, with the annuities and other sums remaining due and affecting the said estates, and of any provisions granted by former heirs to children, so that after liferents shall not exceed a third of the free rents at the time when such liferents shall take place;' while as regards children not entitled to succeed, the provision authorised is to be 'to the extent of three years' free rent of the estates hereby disponed as aforesaid.'

"With regard to the amount of the provision to which the widow is entitled, no very serious question is raised. The amount of her provision depends upon the amount of the free rent, and that cannot be determined at present, as some of the deductions claimed by Lord Lovat depend upon facts which are at present in dispute, and may require investigation.

"The important question argued before me, and on which I was asked to give judgment, is, whether, in estimating the provision to the daughter, the amount of the widow's annuity should or should not be deducted in ascertaining the free rent? The petitioner maintains that it should be so deducted, on the ground that it was a debt or sum 'due and affecting the estates' at the time that the provision in favour of the daughter became payable, and that therefore it falls within the category of the deductions directed to be made by the deed of entail in ascertaining the free rent. In support of this contention the petitioner points out that the widow was infeft in her provision prior to the death of her husband—that her provision was thus made a real burden on the estate—and refers to the case of *M'Donald* v. *Lockhart*, 14 S. 785. Further, he maintains that whereas in the case of the widow's provisions the words 'free rent' are in a measure defined in the deed of entail as meaning actual rent, less certain deductions, or kinds of deductions specified, no such definition or limitation of 'free rent' occurs in the clause authorising the provision in favour of the children, and thence he deduces that in the latter case the words 'free rent' are to be read literally, as meaning the rent receivable after deduction has been made of all burdens or provisions whatsoever affecting the estate or its rents. On the other hand, the respondents contend that the clause relative to widow's provisions only authorises such deductions from the actual rent as arise from the obligations of the entailer, or burdens imposed by him on the estate by the deed of entail, or provisions made for widows or children by some former heir; all burdens, in short, directly affecting the rents of the estate at the time the provision in favour of his wife or widow was made by the heir in possession. The respondents also contend that the 'free rent' referred to in the clause authorising the children's provisions must be read as meaning the same thing as 'free rent' in the case of the widow's provisions—(1) because the same words occurring in the same deed should bear the same interpretation where the context does not render some other interpretation necessary; and (2) because the words in the clause relative to the children ('to the extent of three years' free rent of the estate hereby disponed as aforesaid') import into this clause the definition or limitation of 'free rent,' which appears in the clause preceding. In other words, the respondents' contention is, that the meaning, intention, and fair construction of the clause relative to children is obtained by a slight transposition of the words, which should run thus: 'three years' free rent, as aforesaid, of the estates hereby disponed.'

"I have found the question thus raised to be attended with difficulty, but I have come to be of opinion that the respondents' contention is sound, and ought to be sustained. It appears to me that in estimating the free rent for the purpose of fixing the widow's provisions, the only deductions permissible are deductions on account of existing burdens imposed by the entailer or a former heir. Some of the deductions are specified in terms to be of that character. While the deductions more generally expressed as 'interest of debts, if any be, with the annuities and other sums remaining due and affecting the said estates,' in my opinion undoubtedly refer to the debts of the entailer, and the annuities and payments which were made burdens on the entailed estate by the deed of entail, in so far as they remained undischarged, I adopt the views of the respondent as to the meaning of 'free rent' in the clause affecting children, and therefore hold that the provision made for the wife, not being a prior burden in the sense of the deed of entail, was not to be regarded as a deduction from the free rent in estimating the amount of the children's provision.

"The case of *M'Donald* v. *Lockhart*, relied on by the petitioner, seems to me clearly distinguishable from the present case. In that case the children's provisions were to consist of three years' rents, so far as the 'estate was free and unaffected at the time with liferents.' The wife was infeft in a liferent provision during her husband's life, and therefore the estate was affected with her liferent 'at the time,' *i.e.*, the date of her husband's death. Accordingly, the widow's liferent was deducted from the rent before estimating the children's provisions. Each case of this kind depends so much on the expression of the clause authorising the provisions to be made, that exact precedent can scarcely be found; but the difference between the clause in *M'Donald'* case and the Abertarff Entail (as I interpret it) is quite obvious. It may also be noticed that the decision in *M'Donald's* case was in conformity with the views of a majority of the Court only, and against the views of two very distinguished Judges.

"So again in the case of *Gray*, 8 Macph. 990, the widow's provision was deducted from the rent before estimating the children's provisions, the direction there being that the children were to get two or three years' rent, 'after deduction of all public burdens, liferents, and interest of debts which may affect the said lands.' That clause was much more comprehensive as to deductions than the clause in the present case.

"The case of *Douglas*, 15th May 1822, 1 Sh. 382, cited by the respondents, appears to me more like the present case than either of the other cases above referred to, and in it the deduction of the widow's provision was not allowed." . . . .

The petitioner reclaimed, and argued—Taking the expression "free rent" by itself, would there

be deduction of the widow's annuity? Popularly speaking there would not, for free rent implies deduction of public and parochial burdens only. But the popular sense was not the sense in which the expression should be taken here. The proper interpretation was that attached to it in the Aberdeen Act, 5 Geo. IV. c. 87, secs. 1 and 4. Proper deductions were heritable bonds and infeftments in favour of former widows, and the burden in favour of the new widow—in short, all the burdens affecting the estate at the death of the granter. The fact that the widow was infeft before the granter's death was in this view important.—Sandford on Entails, p. 381; Duff, pp. 79, 80; *M'Donald* v. *Lockhart*, Dec. 19, 1835, 14 S. 785; 8 Scot. Jur. 110. In the case of *Douglas* (May 15, 1882, 1 S. 382), relied on by the Lord Ordinary, there was a very distinct specification of the burdens as "former" liferent or real debts. The general principle was illustrated by the case of *Maitland* (Dec. 22, 1849, 12 D. 416), where in a case in which the husband of an heiress of entail was entitled to the liferent of the estate on his survivance, it was held that a bond for children could receive no effect, there being no free rent at the death of the granter. The case of *Baroness Gray* (July 14, 1870, 8 Macph. 990, 42 Scot. Jur. 600) was also directly in point. Now, it was said for the respondents that, admitting the argument for the petitioner so far, it was met by the fact that there was a reference to the definition of "free rent" as given in the clause referring to widows' provisions. The proper reading, however, was not "free rent as aforesaid," but "disponed as aforesaid." But in any case the definition was not applied to children's provisions, nor was it necessary to apply it, for there was this difference between the children's and the widow's provisions, that the latter existed at the date of the heir's death, the latter not till six months after it.

Argued for the respondents—There was no need to go beyond the terms of the deed of entail to determine the meaning of "free rent." Now, the reference imported by the words "as aforesaid" was plainly applicable to "free rent." The words "hereby disponed" were used nearly a hundred times in the deed, but the words "as aforesaid" were nowhere else coupled with them. Again, if reference was made to the cases, *Douglas* (May 15, 1882, 1 S. 382) was a direct authority, and had not been displaced by *M'Donald's* case (Dec. 19, 1835, 4 S. 785). In the latter the Court was dealing with liferents burdening the estate at the time the succession opened. In the case, too, of *Baroness Gray* (July 14, 1870, 8 Macph. 990, 42 Scot. Jur. 600) the burdens were all "that may affect" the estate—a much wider expression. Again, the argument on the opposite side would demand that the children's provisions should be deducted in estimating what was available for the widow, but that was not claimed by the petitioner, and could not be maintained either on authority or on the terms of the deed.

At advising—

Lord President—The last heir of entail in possession of the entailed estate was Archibald Thomas Frederick Fraser, who died on 2d March 1884, leaving a widow and one daughter. He had made provision for his widow and that daughter under the powers conferred upon him by the deed of entail. The object of the present application is to restrict the provisions so made, and to obtain warrant to charge them on the entailed estates, the petition being presented at the instance of the present heir of entail in possession, Lord Lovat.

The only part of the deed of entail to which it is necessary to pay particular attention is the clause which gives the power to make provisions, of which the last heir availed himself. We have nothing to do here with any statutory provisions. The deed of entail was made in 1851 in conformity with the directions of this Court and the House of Lords. A disposition and deed of entail and settlement of the lands had been executed in 1808, and in 1812 a disposition and nomination of heirs, both executed by the Honourable Archibald Fraser. On his death a litigation took place as to whether the heir who succeeded was bound to hold the estate under entail, the upshot of that litigation being that the deed of entail now under consideration was executed in 1851, with the object of giving effect to the deeds of 1808 and 1812 taken together. We must therefore read the deed as if it had been executed as far back as 1808. The power is thus expressed; it is a power to the granter and heirs succeeding him in the estates, "notwithstanding the premises, to provide and secure our lawful wives and husbands, and also the wives and husbands of the apparent or presumptive heir for the time, in liferent annuities during their lives in lieu of terce and courtesy, furth of the lands and estates hereby disponed, not exceeding one-third of the free rent." Now, that is the power in so far as regards the power to provide for the wife, and it is important to notice the precise terms in which the "free rents" of the estate are described or defined, because there is, in the view I take of the case, a reference back to this definition or description, when we come to the clause dealing with the power of making provisions for children. Now, the terms used are "one-third of the free rent after discounting former liferents, interest of debts, if any be." Then follow these words—"with the annuities and other sums remaining due and affecting the said estates;" these words refer specifically to certain annuities provided in the deed of entail itself. Then we find these words — "and of any provisions granted by former heirs to children, so that after liferents shall not exceed a third of the free rents at the time when such liferents shall take place, but may increase as the former liferents and debts or burdens are paid off or extinguished." That must plainly be supplemented by the words "interest of provisions." The maker of the deed thought it unnecessary to repeat the word "interest," as he had used it already in connection with debts, but it is quite manifest that that is the meaning. Now, when we come to the definition or description of "free rents" as regards the provisions of children, we find it thus expressed — "The amount is to the extent of three years' free rent of the estates hereby disponed as aforesaid."

There has been a contention as to the meaning of the words "as aforesaid," the respondent maintaining that you are to go back to the description or definition in the former part of the clause to ascertain how the "free rent" is to be

estimated, and what are to be the deductions from it. The other party says the words "as aforesaid" refer merely to the "lands hereby disponed." The one party says it is to be a provision of a third of the free rent which is to be ascertained as aforesaid; the other says it is to be a provision out of the rents of the lands disponed as aforesaid. I am very clear that the former is the proper reading of these words.

The expression "free rent," if it were not defined, might give rise to very great difficulties of interpretation. On the one hand, one could not be sure that he did not mean the free rent after providing for public and parochial burdens. That is the ordinary meaning of the expression. But again it would be very difficult to suppose that the entailer used the words in a sense which would allow the whole rents of the estate to be covered by provisions to widows and children so as to leave nothing at all for the heir in possession. Therefore, I say, one looks for some definition of what it is the entailer means, and when that expression occurs, as it does in the clause regulating children's provisions, one searches the deed for a description by the entailer of the terms he has used.

But I am further of opinion that the words "as aforesaid" must be applied to the definition of the term "free rent," and not to the words "hereby disponed." Indeed, the latter application is something very like nonsense. These words as applicable to the estate are out of place and have no meaning, and although the words "estate hereby disponed" are very favourite words in this deed, and occur over and over again, the words "as aforesaid" are nowhere else coupled with them.

I am therefore very clearly of opinion that these are words of reference which carry you back to the terms of the definition or description which the entailer has given of "free rent." Now, when you do go back it is very clear that the widow's provision is not to be reckoned, for it is expressly provided that the deductions or discount is to be a deduction or discount exclusively of former liferents, a term which cannot by any possibility apply to the provision for the widow of the person making the provision. That is perhaps sufficient, but there is another provision tending to the same conclusion. There is a clause which forbids the heir in possession "to burden the said estates with new provisions to children till the first provisions contracted by the preceding members of entail for their children are paid and extinguished, at least such heirs shall only be entitled to contract new provisions to the extent of what remains unexhausted of the three years' free rent, allowed as a fund for providing younger children by this tailzie, so as that the said estates may never at any one time be affected beyond the said sum, and none of the children, whether of one or more heirs, to have more in any event than the provisions hereinbefore allowed of three years' free rent." Now, if it had been intended that the widow's annuity should be deducted from the free rents from which the children's provisions are given, one would have expected that there would have been an allowance, or power to increase the provisions to children on the expiration of any rights which limited the amount of free rent available for them, and therefore—on the contention of the petitioner—on the expiration of a widow's annuity. But there is no provision of the kind.

Then, again, there is a provision for the increase of the widow's liferent, as the provisions for former widows' liferents fall out, but none for increasing this liferent as any provision which may have been made for the children comes to an end. And so in the case of children, where they, by reason of subsisting provisions to former children, cannot get the full fund available for children, it is provided that on the dropping of any such provision they may, but there is nothing said about their rights being augmented as provisions for widows fall out. The two funds are quite distinct.

And as I come clearly to the result that the provisions to children are not to be limited by the amount required for the widow's liferent, I need only add this, that I think it is unnecessary to refer to any prior authorities. The decision of this case depends entirely on the construction of the clauses of this entail, and I think it is very plain upon it.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court adhered.

Counsel for Petitioner—C. K. Mackenzie. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents—Strachan. Agent—Æneas Macbean, W.S.

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*Tuesday, June 9.*

## OUTER HOUSE.

[Lord M'Laren.

### MALOY *v.* MACADAM.

(Sequel to case reported *ante*, p. 243, Dec. 19, 1884, and 12 R. 431.)

*Reparation—Seduction*—Mora—*Condonation of Injury.*

In an action of damages for seduction, brought after the death of the alleged seducer, it appeared that after the first intercourse with the deceased the pursuer had cohabited with him for many years, during which time she was ostensibly in the position of a servant. *Held* that the action was barred by delay, and by the remaining in the service.

In this action of declarator of marriage and legitimacy, and alternatively of damages for seduction of the pursuer Elizabeth Maloy by the deceased Andrew Macadam, the Court, as previously reported, adhered to the interlocutor of the Lord Ordinary by which his Lordship assoilzied the defenders from the conclusions for declarator of marriage and legitimacy.

The process was then remitted to the Lord Ordinary to proceed. Elizabeth Maloy maintained before the Lord Ordinary that she was entitled on the facts established by the proof already led to damages for seduction.

After hearing counsel the Lord Ordinary