

## COURT OF SESSION.

Friday, January 27.

### FIRST DIVISION

(With Lords Kyllachy, Low, and Pearson).

HUNTER BLAIR v. HUNTER BLAIR.

*Entail—Devolution—Provisions to Widow and Younger Children—Aberdeen Act 1824 (5 Geo. IV. c. 87).*

*Held* (fol. the case of *Earl of Kinnoul's Trustees v. Drummond* 7 Macph. 576) that an heir of entail in possession of an estate under an entail which contained a clause of devolution may grant bonds of provision under the Aberdeen Act which shall be valid, although before his death he be obliged to denude in favour of another heir.

*Entail—Provisions to Widow—Deed of Restriction of Security—Amount of Annuity—Aberdeen Act 1824 (5 Geo. IV. c. 87).*

The heir of entail in possession of the estates of D and B bound himself by an antenuptial contract of marriage, in virtue of the powers conferred on him by the Aberdeen Act, to infest his widow in an annuity of £800 out of the said estates on condition that if it exceeded the third part of the free yearly rent of these estates it was to be restricted to the said third part. In security of this annuity the widow was duly infest in the annuity out of the estates of D and B. Thereafter by deed of restriction the widow released and discharged the estate of B from the security of the annuity in which she was infest, and restricted the annuity to the estate of D. She expressly declared, however, that her doing so "shall in no respect injure or affect" the foresaid annuities and the said contract of marriage and instrument of sasine thereon, excepting only in so far as "concerns" the estate of B, but that the annuities "themselves shall remain in as full force and effect as formerly." *Held* that in estimating the amount of the widow's annuity the rentals of both estates must be taken into account, the deed of restriction applying only to the security for and not the amount of the annuity.

Section 1 of the Aberdeen Act 1824 (5 Geo. IV. c. 87) provides that "Whereas" by the Act 10 Geo. III. c. 51, "the proprietors of entailed estates in Scotland were empowered to burden their estates and the subsequent heirs of entail for the improvement of their entailed estates. . . . And whereas sundry entails of lands and estates in Scotland contain no powers in regard to the granting of provisions to the wives or husbands and children of the proprietors thereof, . . . and it has become expedient that the powers of granting such provisions should be conferred or enlarged, as the case may be, . . . it shall and may be lawful to every heir of

entail in possession of an entailed estate under any entail already made or hereafter to be made in that part of Great Britain called Scotland, under the limitations and conditions after mentioned to provide and infest his wife in a liferent provision out of his entailed lands and estate by way of annuity: Provided always that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of the debts and provisions, including the interest of provisions to children hereinafter specified, and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor."

Section 3 enacts that only two liferent provisions are to be subsisting at one time.

By section 4 it is provided that "It shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bonds of provision or obligations binding the succeeding heirs of entail in payment out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estates, of such sum or sums of money bearing interest from the grantor's death as to him or her shall seem fit: Provided always that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates after deducting the public burdens . . . diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession."

It is further provided in this section that with the exception covered by section 5 these provisions shall only apply to children alive at the death of the grantor.

Section 5 enacts that "if any child to whom any such provision as aforesaid may be granted shall marry, and that such provision or any part thereof shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then and in all such cases the provision or any part thereof so settled in consideration of such marriage shall remain and be effectual as if such child had survived the grantor."

Section 6 provides that where provisions to children have been already granted to the extent of three years' free rent, no further provisions to children are to be granted till the former have been diminished.

Section 9 enacts that "After the expiration of one year from the death of the grantor of such provisions to children as aforesaid, it shall and may be lawful for the person or persons having right to the same to

require the heir succeeding to the estate to make payment of the said provisions with the legal interest thereof from the term at which the right of such succeeding heir to the rents of the estate did commence."

The estates of Dunskey, Brownhill, and others, including the *dominium utile* of the lands of Brownhill, in the counties of Wigtown and Ayr, were formerly held under a disposition and deed of entail executed in 1843 by the late Major-General Thomas Hunter Blair of Dunskey in favour of himself and the heirs of his body, whom failing to Sir Edward Hunter Blair, the entailer's brother. The disposition contained the following provision:—"As also with and under this condition, as it is hereby provided, that if any of my said heirs of entail shall at the time of his or her succession to my said lands and estate, or any part thereof, be in possession of the lands and estate of Brownhill, Blairquhan, and others, presently belonging to the said Sir David Hunter Blair, or any part thereof, such heir, unless he or she shall within three months after such succession denude himself or herself of the said estate of Brownhill, Blairquhan, and others, shall be excluded, debarred, and disqualified from succeeding to my lands and estates before disposed, or any part thereof; and in case any of my said heirs who shall have succeeded to and taken possession of my said lands and estates hereby disposed, or any part thereof, shall afterwards succeed to the said lands and estate of Brownhill, Blairquhan, and others, or any part thereof, such heirs shall be excluded and debarred from taking possession of the said lands and estate of Brownhill, Blairquhan, and others, or any part thereof; and in the event of such heir taking possession of the said lands and estate of Brownhill, Blairquhan, and others, or any part thereof, he or she shall forfeit, amit, and lose his or her right to the lands and others hereby disposed, and in either of the events foresaid, of any such heir being in the previous possession without denuding as aforesaid, or taking subsequent possession of the said lands and estate of Brownhill, Blairquhan, and others, or any part thereof, the said lands and others hereby disposed shall fall, accresce, and belong to the next heir of tailzie, who shall be at liberty to take up the succession and establish titles in his or her person, as if the person disqualified or contravening were naturally dead, and that either by service or declarator in manner as hereinafter directed with respect to the other irritancies."

The estate of Brownhill mentioned in the above provisions was merely the superiority of the lands, the *dominium utile* being included in the entail of Dunskey and others. The estate of Blairquhan contained a corresponding clause of devolution in case the succession to Dunskey should open to the same heir. Sir Edward Hunter Blair succeeded in September 1849, on the death of General Thomas Hunter Blair, to the entailed estates of Dunskey and others, and made up titles thereto. In June 1850 he married, and by an antenuptial contract

of marriage dated 3rd June he made provision under the Aberdeen Act for his widow and for the children of the marriage who should not succeed to the entailed estates. By the contract of marriage Sir Edward Hunter Blair bound himself and his heirs of entail "duly and validly to infeft and seise the said Elizabeth Wauchope, his promised spouse, in case she shall survive him, in all and whole a free liferent annuity of £600 sterling." The annuity was to be increased in a certain event which afterwards happened by an additional annuity of £200 to £800. The annuities were payable out of the said entailed estates of Dunskey and others, and were declared to be "provided and accepted under all the conditions, restrictions, and limitations whatever contained in" the Aberdeen Act, and especially under the condition that if the annuities should exceed "one-third of the free yearly rent or value of the said lands and estate, as the same shall be ascertained in manner pointed out by the said statute," they should be restricted to the third part thereof as ascertained in manner foresaid. The provisions in favour of children were for one child the amount of one year's free rent, for two the amount of two years' free rent, and for three or more of three years' free rent. In security of the annuities Lady Hunter Blair was duly infeft in the said annuities to be uplifted and taken furth of the lands of Dunskey and others in terms of the contract of marriage conform to instrument of sasine in her favour recorded on 6th June 1850. On the death of Sir Edward's father in December 1857 the succession to the estate of Blairquhan opened to him, and he elected to take it up, and executed a deed of denuding and disposition of the estate of Dunskey and others in favour of his eldest son and the heirs of his body. In 1858 Lady Hunter Blair granted a deed of restriction whereby she released and discharged the lands of Brownhill from the security of the annuities in which she was infeft, but it was declared and provided that her doing so should in no way injure or affect these annuities, "excepting only in so far as concerns the foresaid lands and others hereinbefore expressly declared to be redeemed and disburdened thereof, but that the said annuities and the said contract of marriage and sasine thereon themselves shall remain in as full force and effect as formerly, as affecting the remaining lands and others therein contained not hereby disburdened thereof."

The Rev. David Hunter Blair, who succeeded to the estates of Dunskey and others in consequence of the denuding in his favour by his father, presented a petition to the Court in 1876 for authority to disentail the estates. He was unaware of the existence of the deed granted by Lady Hunter Blair, which was accordingly not brought to the notice of the Court. As a condition of obtaining the disentail he was ordained to "give security over the entailed estates of Dunskey, Brownhill, and others for the provisions granted by Sir Edward Hunter Blair in

favour of his wife and his younger children," and the necessary bond of annuity and disposition in security in favour of the marriage-contract trustees for that purpose was executed and recorded. His right to challenge the validity of the provisions was expressly reserved. The existence of the deed of restriction having come to the knowledge of Sir David Hunter Blair in 1888 he raised an action of reduction of the bond and disposition in security in so far as affecting the lands of Brownhill. The Lord Ordinary found that the security given over the lands of Dunskey, Brownhill, and others "will be full and sufficient, although the lands of Brownhill are released and discharged from the said security," and ordained the defenders to deliver to the pursuer a deed discharging the lands of Brownhill from the security created by the bond of annuity and disposition in security. A deed of restriction was executed restricting the security accordingly, but it was declared that it was not to affect the amount of the annuity payable to Lady Hunter Blair, or her right to have the rental of the lands disburdened taken into computation in connection therewith. There was also a provision to the effect that Sir David Hunter Blair's right to challenge the provisions was reserved entire.

Sir Edward Hunter Blair died on 7th October 1896, survived by his widow and more than three children. A special case was presented to the Court by (1) The Rev. Sir David Hunter Blair, (2) Lady Hunter Blair, (3) Lady Hunter Blair's marriage-contract trustees, (4) the children of Sir Edward and Lady Hunter Blair other than the first party, and the trustees of certain of them who were married, and (5) the trustees acting under the trust-disposition of Sir Edward Hunter Blair.

The following were the contentions of the parties as set forth in the case:—"The first party maintains—(1) that in consequence of the succession of Sir Edward Hunter Blair to the said estates of Blairquhan and others, and the necessary denuding by him of the said estates of Dunskey and others, the said provisions granted by the said Sir Edward Hunter Blair in favour of the second and third parties are ineffectual against him and the said estates of Dunskey and others; (2) that if the said provisions are effectual, the rental of the said estates of Dunskey and others, excluding Brownhill, as at 1858, the year of the denuding, is to be taken for the purpose of ascertaining the amount of the annuity; (3) that the said provision to younger children is in any event restrictable to three years' free rent of the said estates of Dunskey and others, calculated as at 1858, the year of the denuding. The second party maintains—(1) that the provision in her favour is valid and effectual; (2) that the amount of her annuity is not affected by the deed of restriction granted by her in 1858; and (3) that the rental of 1896, the year of Sir Edward Hunter Blair's death, or alternatively of 1876, the year of the disentail, must be taken for the purpose of

ascertaining whether it is restrictable. The third and fourth parties maintain (1) that the provision by the said Sir Edward Hunter Blair in favour of his younger children is valid and effectual; and (2) that the said bond for £20,000 is restrictable to three years' free rent of the said estates of Dunskey and others, calculated as at 1896, the year of Sir Edward Hunter Blair's death, or alternatively as at 1876, the year of the disentail. The fifth parties adopt the contentions of the second, third, and fourth parties."

The questions submitted to the judgment of the Court were—“(1) Is the annuity granted by the said Sir Edward Hunter Blair to the second party by said antenuptial contract of marriage, and secured by the said instrument of sasine and the said bond of annuity and disposition in security, effectual to the second party as against the first party and the said estates of Dunskey and others? (2) In the event of the preceding question being answered in the affirmative—(a) In ascertaining the amount to which said annuity may be restrictable, is the rental of 1858, the year of denuding, or that of 1876, the year of disentail, or of 1896, the year of Sir Edward Hunter Blair's death, to be taken? (b) Does the rental of Brownhill, if necessary, fall to be taken into account in fixing the amount of said annuity? (3) Are the provisions granted by the said Sir Edward Hunter Blair to his younger children by the said contract of marriage, and secured by the said bond and disposition of security, effectual to the said younger children or their representatives as against the first party and the said estates of Dunskey and others? (4) If the preceding question is answered in the affirmative, is the said bond for £20,000 restrictable to, and the amount of said provision to be held to be three years' free rent, calculated as at 1858, or as at 1876, or as at 1896? (5) If questions Nos. 1 and 3 are answered in the affirmative, is the first party entitled to be relieved of the said annuity and provisions out of the general estate of the said Sir Edward Hunter Blair?”

The case was argued before the First Division, and the Court on 2nd December appointed all the questions except 2 (b) and 5 to be reargued before them and Lords Kyllachy, Low, and Pearson.

Argued for the first party—The provisions of the Aberdeen Act were subject to an implied condition that the granter died in possession of the entailed estate. The statute had not provided for a case where for any reason the heir in possession had parted with the estate before his death, and such a one having lost his right to it was outwith the statute and the powers conferred by it. It was true that this view was negated by the case of *Earl of Kinnoul's Trustees v. Drummond*, February 26, 1869, 7 Macph. 576, but the decision in that case was not warranted by the terms of the statute and should be reconsidered. With regard to the provisions of the statute, too much weight should not be attached to the "expediency" clause of the

preamble, for it was not the intention of the Legislature to confer a wide power quite irrespective of circumstances. Here the circumstances were that the heir in possession of one estate had elected to take possession of another more valuable one, out of which he might make ample provision for his wife and family, so no injustice would be done by upholding the first party's contentions. On a fair reading of the first section "such heir" must refer to the general description of the class of persons empowered to grant provisions—in other words, it was equivalent to "the granter," and as the burdens to be taken into account were those diminishing the rental of the granter at his death, it followed that he must be in possession at his death if the clause was to have any application. The provisions might be good enough when granted, but if the granter did not die in possession they must fall to the ground. The other sections of the statute bore out this contention. Thus section 3 was inconsistent with any other, for if the denuder chose to take up a more valuable estate, and the provisions imposed by him on the original estate were left standing, the inequitable result might follow that the new heir in possession would be cut out altogether from making any provisions, since only two liferents could subsist at one time. The same argument applied to the restrictions in section 6 as to the provisions in favour of children. Again, in section 4 by the words "as aforesaid," reference was made back to section 1, and to the condition that the granter must die in possession of the estate. By section 9 interest must be paid from the date when the right of the person paying such interest commenced. That showed this date must be synchronous with the death of the granter, but according to the contention of the second party interest would run from the date of devolution, though no right to the provision evolved at that time. With regard to the other modes by which an heir of entail in possession might part with his right to an estate, viz., irritancy, propulsion to his eldest son, and compulsory sale, the provisions would be equally defeated by any of these processes. In the case of the last, a compulsory sale must naturally be preferable to a voluntary annuity. The granter was not given any power by the Act to override the claims of his creditors. But the same answer would apply to all these cases, viz., that the statute did not contemplate them, but applied only to cases where granter died in possession. The effect of the deed of restriction granted by the second party in 1858 had been to release Brownhill from the burden, and the second party was no longer infeft in it. The marriage contract must be read along with this deed of restriction. Accordingly, taking the two deeds together, it followed that the rental of Brownhill did not fall to be taken into account in fixing the amount of the second party's annuity.

Argued for second party—It was admit-

ted that the provisions were good when granted, and accordingly the only question was whether they flew off when devolution took place. The question had been expressly decided in *Earl of Kinnoul's Trustees v. Drummond*, and the decision there was justified by the terms of the Act. When the Act stated that certain provisions might be made, it placed the heir of entail in possession *quoad* this in the position of a fee-simple proprietor, with certain limitations. There was and could be nothing in the bond granted by such an heir to show that the provisions were contingent on his dying in possession, and accordingly it was antecedently improbable that it could be intended by the statute that they should fly off if there was devolution. There was nothing said in it to that effect, and the first party's contention rested solely on a doubtful grammatical construction of the word "such" in the first section. The difficulty suggested by him arose in a part of that clause dealing with the measure of the bond. The word "such" was really only equivalent to "the," for before it was necessary to begin to measure the right, the man granting it was dead, and it would be absurd to make "such" refer to him. "The granter" is expressly contrasted with the person described as "such," who must be the successor affected by the burden of the provisions. The following sections were in no way inconsistent with this view. Thus section 5 assumed that there was a fund of credit to be dealt with in a marriage-contract, and not a word was said of its flying off in the event of devolution. Again, the provisions in sections 3 and 6 inflicted no hardship on the heir taking by devolution, for he must take the estate with all its burdens, and the effect of the devolution was to give it to him sooner than he would naturally have had it. The difficulty of section 9 was only an apparent one. That clause was not intended to define the extent of the provision to younger children which had been already done by the fourth, but merely to regulate procedure in the normal case. In the ordinary case the granter would be in possession at his death, and so it was natural to provide that interest should only begin to run from that date when the claim would arise. It was true there was no provision specially made for the case of devolution, but that could not make any difference in the right. The analogous cases of irritancy, propulsion, and compulsory sale, proved the falsity of the first party's contention. The logical outcome of his argument was that provisions by an heir in possession would be defeated by any of these events, and it was clear that the statute did not contemplate that the rights created by it would be defeated in all these cases, which would be a most inequitable result.—*Morton v. Eglington*, July 8, 1847, 6 Bell's App. 136; *Earl of Cassilis v. Hamilton*, 1745, 1 Pat. App. 381; *Callendar and Lothian v. Willyson*, 1725, M. 15,554; Sandford on Entails, p. 433. (2) The effect of the deed of restriction was in no way to diminish the amount of the second party's annuity, but merely to

diminish the security which she held for it, which was an entirely different thing.

At advising—

LORD KINNEAR—The first question we have to consider is whether the annuity which Sir Edward Hunter Blair provided by his marriage-contract to his widow, and the provisions which he granted to his younger children, are effective against his eldest son Sir David and the estate of Dunskey, notwithstanding that in consequence of a clause of devolution in the entail Sir Edward had denuded of the lands and disposed them to his son and the other heirs of entail in 1857, nearly forty years before his death.

The argument to the contrary is that under the Aberdeen Act the heir of entail must at the time of his death be in possession of the rental to be charged for payment of such provisions. The argument is based upon various provisions of the statute, but chiefly on the last clause of the first section, which authorises the granting of annuities to widows. This power is given to "every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made" in Scotland, but under the proviso that such annuity shall not exceed one-third part of the free yearly rent of the estate after deducting public burdens, liferent provisions, interest of debts, and the yearly amount of other burdens affecting the estate and "diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the granter."

It is plain enough that this proviso is not intended, or at all events that it does not purport, to define the persons who are empowered to grant annuities, but to determine the measure and extent of the obligation which may be imposed on succeeding heirs. But it is said that according to the grammatical construction of the clause, the words "such heir" in the last part of it which I have just quoted must mean the particular heir who grants the provision, and therefore that since the burdens to be taken into account are those which diminish the rent to the granter as they may be at his death, the power is confined to those heirs only who may be in possession of the estate and drawing the rents up to the date of their death. Even as a question of grammatical construction, I do not think this is the correct reading of the clause. The words "such heir" must in my opinion be referred to the previous definition of the class of persons empowered, to wit, "every heir of entail in possession of an entailed estate," and so on, which, so far as I see, is the only possible antecedent. This is in accordance with the proper signification of the word "such," which is usually employed for the purpose of indicating generally and indefinitely persons or classes of persons who have been already defined, and it is in accordance also with the conception of the whole clause which induced the draftsman to specify "the granter" in terms when it became necessary to refer to

a particular provision for the purpose of fixing the year in which the rent and deductions from rent were to be taken into account. In this view the clause means that every heir of entail may provide his wife in a liferent provision by way of annuity, and that in each case the amount is to be fixed with reference to the rent, subject to the proper deductions, of the year when the granter dies, or, in other words, of the first year in which the widow's right emerges. But if there were any doubt as to the correct syntax, I do not think it a sound method of construing the statute to rest so much weight, as the argument we are considering requires, upon grammatical niceties. If we consider the substance of the enactment, and the general relations of the empowering and subsidiary clauses, I think we shall find that the meaning does not depend entirely upon the exact signification of a connecting particle. In the first place, the empowering words are the widest and most comprehensive that could be used—"Every heir of entail in possession" is to have the right. Now, there is nothing in the legal position of an heir in possession under an entail with a shifting clause which should serve to qualify in his case the general powers conferred upon every heir of entail. It is settled law that until the shifting clause comes into operation and compels him to denude, he has exactly the same right in the entailed estate as if he were subject to no such contingency. In other words, he is full fiar with all the rights and powers of a proprietor in fee-simple except in so far as he is restricted by the fetters of the entail. His title is defeasible upon his succession to another estate, but until that event happens—and it may never happen—he is entitled to the same rights and privileges which any other heir of entail would have under the cardinal fetters. Now, it is one of these rights that he may grant Aberdeen Act provisions, because the fetters have been so far relaxed as to allow such provisions to be granted without a contravention of the prohibition against burdening the estate with debt, and I do not think it is maintained that if he exercises that right there is anything in the Act to affect the validity of his bonds, provided only that the shifting condition does not come into operation in his lifetime so that the granter dies in possession of the estate. But then it follows that Sir Edward Hunter Blair's provisions for his wife and younger children were perfectly good and valid at the time they were granted—and indeed that was conceded by Mr Johnston in argument. His case was, not that it was beyond Sir Edward's power to grant the provisions as heir in possession of Dunskey for the time being, but that although originally valid they became inoperative by reason of his subsequent succession to Blairquhan. That means that the powers conferred by the first and fourth sections of the Aberdeen Act are not confined to heirs in possession under entails which contain no clauses of devolution or obliga-

tions to denude, but at the same time it is said that if an entail contains such clauses, the heir in possession, although the same powers are conferred upon him as on other heirs, and in the same terms, can only exercise them subject to the condition that if the clause of devolution comes into operation the provisions are to become void. He may infeft his wife in an annuity, and may grant bonds to his children in the ordinary terms, but in his case these obligations are subject to a resolute condition by which they are invalidated in a certain event. This, if so it be, is an implied condition, because it is not expressed in the deeds which he is empowered to grant, and just as little is it expressed in the statute. Now, whatever be the grammatical construction of the proviso in the first section, I cannot see that it affords any sufficient ground for importing by implication a resolute condition into obligations of the most onerous kind which *ex hypothesi* purport to be absolute. I think it very material to consider on the one hand the legal character and purpose of the obligations authorised by the statute, and on the other hand the scope and reach of the argument for invalidating those now in question, and the variety of cases which it will cover, if it is well grounded. In the first place, the provisions need not be, and in the great majority of cases will not be gratuitous, for we know in practice that they are most frequently made by antenuptial contract of marriage. Then when the husband, by antenuptial contract or otherwise, undertakes to provide his wife in a life annuity, he is to secure it by immediate infeftment; and it is altogether inconsistent with the notion of a security by infeftment on a grant expressed in absolute terms that it should be invalidated on the occurrence of a contingency which is not expressed in the grant itself. From the moment the grant is recorded, the wife is entitled to deal with it as an absolute right conditioned only upon her survivance of her husband, and third persons transacting with her are authorised by the statute to rely upon her infeftment. The children's provisions are not secured in the same way, and they are, in general, conditional upon the child surviving the father. But there is a power in the fifth section of the statute to settle any such provision with the consent of the granter, in consideration of the marriage of the child to whom it may be granted; and in that case, if the child so marrying dies before the granter, the provision so settled shall remain and be effectual in the same way as if he had survived. In this case also, therefore, the provision may operate, although it need not necessarily operate, so as to create an immediate vested interest in the grantee, which may be made the subject of an onerous contract. Now, it must be observed that the argument for contingently invalidating rights of this kind which are assumed to be perfectly good when they are granted, and to be expressed in absolute terms, if they are granted by an heir holding under a

shifting clause, cannot be confined to that particular case, and still less to the case of an heir who has survived the devolution of the estate he has burdened for a considerable number of years. It rests upon nothing but the supposed necessity for the heir being still in possession at the date of his death. And therefore it is applicable to every heir in possession of an entailed estate who grants Aberdeen Act provisions, and the argument must be that in every such case it is an implied condition of the bond that it is to be of no effect if the granter should cease to be in possession of the estate before his death. But that is a contingency which may happen in a variety of ways although there be no clause of devolution in the entail. The heir in possession may propel the succession to his heir-apparent. He may commit an irritancy, and at the date of the statute we are construing he might have possessed under an imperfect entail, which although effectual to a certain extent, and falling within the scope of the Aberdeen Act, might nevertheless allow of his getting rid of the estate by reason of a flaw in some one of the fettering clauses while the others were valid and effectual. The argument is, that in any of these cases—and others might be figured—the heir who has granted bonds in absolute terms and under obligation by contract to do so, may nevertheless defeat them at will by ceasing to retain possession of the estate. The case of a propulsion of the estate is a striking example, because it must be held, if the argument is sound, that an heir of entail who has come under the most onerous obligations by marriage-contract may defeat the rights he has professed to grant by propelling the succession to his eldest son—that is, to the very heir whose estate he had undertaken to charge for the benefit of his widow and younger children. It is no answer that this would be a fraudulent attempt to defeat his own obligations, because the hypothesis is that it is a condition of the obligation imported by implication from the terms of the Act, that he may defeat it in this way if he pleases. It is contrary to all probability that Parliament should authorise the creation of rights so anomalous—rights which are to all appearance absolute and indefeasible, and which for that reason are to be the subjects of onerous contracts, and are nevertheless defeasible at the will of the person who has granted them. But this is the logical result of the argument which was presented to us, and I think it is an argument to which the counsel who used it was driven. For unless they could maintain, which I agree would be hopeless, that there is so complete an exclusion of heirs holding under shifting clauses from the benefit of the Act, that even although the shifting clause never takes effect and they die in possession of the entailed estate, their bonds of provision are void, it follows that in all cases the provisions granted by such heirs are valid when they are granted, and can only be invalidated, if at all, by the subsequent occurrence of the contingency

which is supposed to defeat them. If there be any ambiguity in the statute it ought to be construed in such a way as is consistent with the legal character of the rights it creates, and not so as to be destructive of these rights in an indefinite variety of cases. But I confess I think the sounder view is that there is no ambiguity, that the power is given to every heir of entail in possession, and that the provision that the measure of the widow's annuity is to be fixed by the rent at the granter's death has no necessary reference to his possession up to that time, but is sufficiently explained by observing that that is the year when the annuity begins to accrue.

I do not think the argument derives any additional force from the fourth section, which deals with provisions to younger children. These are also to be measured by reference to the rent under deduction of the annual burdens. But the terms in which this is expressed seem to me to confirm the view I have taken of the first section, and they are certainly in no way inconsistent with it. The bonds authorised are to bind succeeding heirs of entail in payment of sums bearing interest from the granter's death, provided that the amount shall not exceed certain specified proportions of the yearly rent or yearly value after deducting the burdens "diminishing the yearly rent or yearly value thereof as aforesaid to the heir of entail in possession." This seems to me to mean the heir in possession when the provision comes into operation. It can indeed mean no other heir, because the rent to be taken into account cannot be that actually enjoyed by the granter. It is the rent to be charged, and that is to be ascertained as at the granter's death. For although this is not expressed in terms, as in the case of the widow's annuity, it is perfectly well settled that in fixing the amount of children's provisions also it is the rent of the year in which the granter died that is the rule, and not that of the year in which the bond bears date.

Two other sections of the Act were founded upon to show that in such a case as this the provisions are invalidated, the sixth and the ninth. The sixth is that when provisions have been already granted to the extent of three years' free rent, no further provisions are to be granted till the former are diminished. It is said that this would defeat the intention of the Act if the provisions granted by an heir who had denuded remain effectual, because that might deprive a succeeding heir of the power to grant such provisions at all. I cannot see the force of this argument. The power to provide for wives and children is given to every heir, and it was, therefore necessary to provide against the whole rent of the estate being carried away from the heir in possession by this enactment that, when the power has been fully exercised by several heirs in succession, those who come after them shall lay no further burden on the estate until that already imposed is diminished. I do not see how the intention of the Act can be said to be defeated by a

condition expressed in the Act itself. Nor does it seem to me that the particular operation of the condition in the case in question has any real bearing upon the argument. It may be that in consequence of an heir in possession having been required to give up the estate in his lifetime there may be a greater number of successions within a given period than might otherwise have happened, and therefore that the last succeeding heir came to an estate more deeply burdened with such provisions than it would otherwise have been. But if that be so, all that can be said is that the Legislature has not thought it necessary to make a specific provision for that contingency, and that is no sufficient reason for refusing effect to the plain words of the empowering clause.

The argument on the ninth clause was perhaps more plausible, but to my mind it has no greater validity. It provides that persons in right of provisions to children may after the expiration of one year from the death of the granter require the heir succeeding to the estate to "make payment with interest from the date at which the right of such succeeding heir to the rents of the estate did commence," and it is argued that this shows that the death of the granter must necessarily be synchronous with the succession of the heir who is required to pay, because otherwise the heir might be compelled to pay interest for many years during which his creditor had no right to the provision. It appears to me, on the contrary, that it is just because these two events may not be synchronous that this provision in the ninth clause was required for the protection of succeeding heirs. The ninth clause is not intended to define the right extent of the provision of the younger children; that had been already done by the fourth. The fourth clause provides that bonds of provision or obligations may be granted for sums "bearing interest from the granter's death," and it is quite clear that the ninth does not enlarge the claim for interest by carrying it back to any earlier period. But then it provides machinery for enforcing payment against the heir succeeding to the estate, and as that is not to be done until after the expiration of a year from the date of the granter's death, it was reasonable and necessary to provide for the possible case of several successions happening during that time, and to protect the heir against whom proceedings are taken, and who may not have succeeded to the granter directly, but to his immediate successors and after an interval, from liability to pay interest before his right to the rents had begun. The two clauses are quite harmonious. The child has right to interest from the date of the granter's death, but if the heir whom he requires to pay did not succeed until after an interval, he cannot be called upon to pay interest for the period prior to the date of his succession. There is no specific provision for the case of the succession occurring many years before the granter's death in consequence of a devolution. But that can make no difference in

the right. The child's claim for interest must still run from the granter's death, and from no earlier period, and I do not see that there should be any greater difficulty in working out the right than there is in the ordinary case.

I agree that a point may be made on the ninth section of the Act, and perhaps in some other of its provisions also, that the case of devolution is not contemplated by the draftsman. There is no specific reference to anything of that kind throughout the statute, and the case specially contemplated is no doubt the normal case of a succession opening to the heir of the granter of provisions in consequence of his death. But that is an observation which does not go far. The scope of the Act must be determined by the true construction of the empowering words which enable "every heir of entail in possession" to grant provisions, and it appears to me of little consequence that the subsequent clauses for working out rights in detail may contain no specific reference to the particular case in hand, provided it falls within the true meaning of these words.

I have expressed this opinion without reference to the case of *Lord Kinnoul's Trustees v. Drummond*, because we have been asked to reconsider that case and to find that it was wrongly decided. I should come to that conclusion with reluctance, because it has stood without challenge for thirty years, and we cannot tell how many family settlements may have been made in reliance on its authority. But after full consideration of the argument I see no reason for questioning the soundness of the decision, and I think we ought to follow it. For these reasons I think we should answer the first and third questions in the affirmative, and, as I understand, we do not consider the others at present because the learned Judges who have given us their assistance have not heard a full argument upon them.

LORD M'LAREN—I think the argument on the construction of the first section of the Aberdeen Act admits of being put in a very simple way. I think the section in question would have been perfectly clear and unambiguous if the maker of the statute had not for greater clearness, as he supposed, introduced the parenthetical words "diminishing the interest of such heir of entail in possession." Now, the question is whether "such heir in possession" means the maker of the deed of provision, or his successors in the estate in their order. In the first alternative it would not apply to an entail containing a clause of devolution. But when it is considered that the words I refer to, "diminishing the interest of such heir in possession," are words descriptive of burdens and interest of debt, both of which are to be deducted from the widow's annuity, I think it is perfectly impossible to give these words the construction contended for by the first party. How can burdens, the deduction of which is only to come into effect after the death of the maker of the

deed, diminish his interest? The words have no sense or meaning to my mind when used in that connection, but they are perfectly sensible when it is understood that they have reference to the diminution of the interest of his successors, by whom the annuity is to be paid. That view to my mind suffices for the disposal of the argument upon the first section, and I think without it the other observations that were made in support of the first party's case would not have sufficient weight by themselves. I would only add this, that it must have been perfectly known to the learned lawyers who took part in the preparation of the Aberdeen Act that there were many entails that contained clauses of devolution, and that there were other modes in which the interest of the heir in possession might cease prior to his death. If it had been intended to exclude such entails from the operation of the Aberdeen Act, or to qualify the Aberdeen Act so that its clauses should not apply to an heir of entail who had devolved or propelled the estate, I should have expected to find proper limiting words in the Act of Parliament. If it was intended that the Act should be thus limited in its application, it was not necessary to specify the different ways in which the right of the heir in possession might cease. The necessary and sufficient limitation would be, "every heir of entail who shall die possessed of the entailed estate." I find no warrant for introducing such a limitation by construction into the Aberdeen Act.

LORD PEARSON—The provisions here in question are contained in the antenuptial marriage-contract of Mr Edward Hunter Blair (afterwards Sir Edward), who was at the date of the contract in 1850 heir of entail in possession of the entailed estate of Dunskey. The provisions are granted as under the powers conferred by the Aberdeen Act on an heir of entail in possession to make provision out of the entailed estate and the rents thereof in favour of his wife and children, it being declared by the contract that they are granted under all the conditions, restrictions, and limitations contained in that Act. Lady Hunter Blair, who is the second party to the case, was duly infeft in her annuity by instrument of sasine recorded on 6th June 1850.

The entail of Dunskey contained a clause of devolution in ordinary terms applicable to the event of the heir in possession succeeding to the estate of Blairquhan, of which Sir Edward's father was then heir of entail in possession. The entail of Blairquhan contained a corresponding clause of devolution in case the succession to Dunskey should open to the same heir. The effect of the two clauses was that the two estates could not be held together, and that on the occurrence of the event the heir must choose between them.

The event occurred on the death of Sir Edward's father on 27th December 1857, whereby the succession to Blairquhan opened to Sir Edward Hunter Blair. He elected to take Blairquhan, and executed a deed of



denuding and disposition of the estate of Dunskey in favour of the first party, his eldest son, and the remaining heirs of entail.

The first party has since disentailed the estate of Dunskey, granting bonds in security of Sir Edward's marriage-contract provisions, but his right to challenge the validity of the provisions was reserved entire.

Sir Robert Hunter Blair died on 7th October 1896, survived by his widow and more than three children, and the first party now challenges the validity of the provisions as affecting Dunskey.

The argument before us disclosed that the question thus raised has mainly to do with the construction and scope of the Aberdeen Act. It was raised and decided in the case of *Lord Kinnoull's Trustees*, 7 Macph. 576, and we are now asked to review that decision as having been pronounced on an inaccurate view of the provisions of the statute. Stated in terms of this case the question is, whether provisions granted as under that Act are effectual where the entail contains a clause of devolution which has taken effect during the lifetime of the granter of the provisions. But the argument of the first party against the validity of the provisions raises this larger question, whether such provisions are effectual in any case except where the granter of the provisions remains heir of entail in possession at the date of his death. I except, of course, the case of disentail, which is authorised only upon a security being given for implementation of onerous provisions. The argument of the first party involves this proposition, that the provisions are defeasible even by the voluntary act of the granter if he thereby ceases to be heir of entail in possession; as, for example, by his propelling the estate.

It is not (as I understand) maintained that the existence of a clause of devolution in the entail puts the heir who is in possession outside the Aberdeen Act from the first, so that he cannot grant provisions which shall be effectual even in the event of the estate not devolving during his life. The contention is that the provisions are from the first subject to an implied condition that they will fall if the devolution takes effect during the granter's lifetime; and this even in a case where, as here, the devolution does not operate *ipso jure* on the occurrence of the event, but is the result of a real choice or election on the part of the heir of entail, and is therefore his voluntary act.

The terms of the statute undoubtedly lend some colour to the argument that it does not apply where the granter of the provisions has from any cause ceased to be in possession of the estate before his death. The explanation I take to be, that the statute contemplates the usual and normal case of the granter remaining in possession, and uses language which is appropriate to that, and which does not well fit exceptional cases. But it does not follow either that such cases are outside the statute, or that the provisions being within it at the

outset are affected by an implied resolute condition that they shall fall if the precise event does not happen to which the language of the statute points. That depends on a comparison of the words conferring the power to grant provisions with the clauses which seem to limit it to certain cases.

Now, the empowering words are perfectly general, and apply to all heirs of entail in possession. There is nothing in them to suggest any restriction on the power (beyond the restrictions expressly imposed), nor to suggest the idea that the provisions are to be defeasible in certain events. Indeed, the contrary is pretty strongly suggested as to the wife's provision by the fact that the statute authorises her immediate infestment, and as to the children's provision, by its being expressly treated in sec. 5 as an available fund to be settled in consideration of the child's marriage, and as not defeasible in such case even if the child should predecease his father the granter.

The chief difficulty is caused by the expression "such heir of entail in possession," occurring towards the end of section 1, in the clause prescribing the mode of calculating the widow's annuity, and therein in the clause prescribing the deductions to be made from gross rental. The deductions are to be such as diminish the clear yearly rent or value of the estate "to such heir of entail in possession." The antecedent of these words is the general expression occurring at the beginning of the section, descriptive of the class of persons who are empowered to grant provisions, and the suggestion is that it is the granter's rental which is conceived as being diminished by the burdens and deductions, and therefore that the clause has no application except where the granter remains in possession until his death. But in the first place, the clause proceeds with the words "all as the same may happen to be at the death of the granter," which suggests that the granter is a different person from the heir in possession whose rents are diminished. And this seems to be demonstrated by the consideration that one of the deductions allowed from the rental is the interest of provisions to children, which interest is (as provided by sec. 4) to run from the granter's death. I conclude, therefore, that if the word "such" refers to the granter of the provision (which is at least doubtful), it is an inaccuracy, and that the expression truly refers to the succeeding heir or heirs, in whose hands the rental is really diminished by the provisions, and who in consideration of that fact is allowed to state the net rental in calculating the annuity.

As to the puzzle (for it is little more) raised on sec. 6, I content myself with referring to what has already been said by Lord Kinnear on that head.

Then it is said that while the children's provisions, authorised by sec. 4, are to bear interest from the granter's death, the creditor in those provisions is authorised by sec. 9 to require the heir succeeding to

the estate to pay the provisions, with interest "from the term at which the right of such succeeding heir to the rents of the estate did commence." This shows, it is said, that the statute contemplates the date of the granter's death and the date from which the succeeding heir enjoys the rents as being the same date; and that it cannot apply to a case like the present, where the next heir's right to the rents commenced nearly forty years before the death of the granter. But even in the normal case, the two dates do not necessarily coincide; for the provision to children is not exigible until fifteen months after the granter's death; and if during that period the next heir who succeeded to the estate should also die, his successor is protected by this section from being liable in interest on the provision for the period before his right to the rents began. Moreover, the difficulty suggested on the facts of the present case is not a real one. Section 4, which is the clause authorising the bond of provision, defines the provision as to interest by the words "bearing interest from the granter's death;" and it would be impossible for anyone holding an obligation in those terms to plead the 9th section, which merely regulates procedure, in aid of a larger claim. I think that in effect section 9 must be read as subordinate to section 4, and as meaning that the heir who is called upon to satisfy the provision is to bear the interest from a period not earlier than the date of his succession.

On the whole matter, I am satisfied that the decision in the case of *Lord Kinnoull's Trustees* was well founded in law, and ought to be followed.

On the other question which was argued, I see no reason to doubt that the year whose rental is to be taken in calculating the provisions is, in this, as in the ordinary case, the year of the granter's death.

LORD ADAM—All the questions have been answered with the exception of one, viz. 2 (b). That question arises in this way. Sir David Hunter Blair being then heir of entail in possession of the lands of Dunskey and others, by antenuptial contract of marriage with Lady Hunter Blair dated 3rd June 1850, in virtue of the powers conferred on him by the Act 5 Geo. IV. c. 87, bound and obliged himself and the heirs succeeding to him in the said entailed lands to infest and seize her in an annuity of £600, and in an additional contingent annuity of £200, out of the said entailed lands of Dunskey and others, but under the condition that if the annuities should exceed one third part of the free yearly rent or value of the said lands as ascertained in the manner pointed out by the statute, the annuities should be restricted to the one third part of the free yearly rent or value of the lands so ascertained.

In security of these annuities Lady Hunter Blair was duly infest in the said lands, conform to instrument of sasine recorded on 6th June 1850.

It appears that the lands of Dunskey and others, in which Lady Hunter Blair was

infest in security of her annuities, included the lands of Brownhill, and of course had any question then arisen as to the amount of the annuities to which she was entitled, the yearly rent or value of these lands would have been taken *in computo* in fixing the amount.

By deed of restriction, dated 6th and recorded 13th July 1858, Lady Hunter Blair released and discharged the lands of Brownhill from the securities of the annuities in which she was infest as aforesaid, but it was thereby declared that her doing so should in no way injure or affect the foresaid annuities, excepting only in so far as concerns the foresaid lands of Brownhill declared to be redeemed and disburdened thereof, but that the said annuities and contract of marriage and sasine thereon should remain in as full force and effect as formerly as affecting the remaining lands and others.

It is maintained by Sir David Hunter Blair that the result of the deed of restriction executed by Lady Hunter Blair is, that the rental of Brownhill must be excluded in ascertaining the amount of the annuity to which she may be ultimately found entitled. I do not think so.

The provision settled on Lady Hunter Blair, and the security for that provision, are quite distinct things.

So far as I see, an heir of entail in possession might under the statute competently bind and oblige himself and the heirs succeeding to him in the entailed estate in payment of an annuity to the full amount permitted by the Act without securing it by infestment at all, or he might grant security for the annuity over a part only of the estate. I see no incompetency accordingly in Lady Hunter Blair doing as she has in express terms done by the deed of restriction, reserving her right to her annuity entire while discharging a part of the estates of the security which she held over them for it. I think the amount of the provision to which she may ultimately come to be entitled is no way affected thereby.

What subsequently took place with reference to this deed of restriction in no way alters the case.

It appears that Sir David Hunter Blair when he disentailed the estates in 1876 was unaware of this deed of restriction, and its existence was not brought under the notice of the Court. As a condition accordingly of obtaining the disentail he was ordained to give security over the entailed estates, including Brownhill, for the provision in favour of Lady Hunter Blair, and the necessary bond of annuity and bond and disposition in security in favour of the marriage-contract trustees for that purpose were afterwards executed and recorded.

Subsequently, however, on becoming aware of the deed of restriction, Sir David Hunter Blair raised a reduction of the bond and disposition in security in so far as it affected the lands of Brownhill.

In this action the Lord Ordinary ordained the marriage-contract trustees to deliver

to Sir David Hunter Blair a deed discharging the lands of Brownhill from the security created by the bond and disposition in security and restricting the security to that extent. A deed of restriction was thereafter executed by them restraining the security accordingly, but it was thereby declared that the same should not in any way affect the amount to which Lady Hunter Blair might be entitled under the said bond, nor should affect or prejudice her right to have the rental of the lands disburdened taken into computation in connection therewith. On the other hand, Sir David Hunter Blair's right to challenge the provision was reserved entire.

It appears to me that the rights of parties are the same now as they were when the deed of restriction was originally granted, and accordingly that the question should be answered in the affirmative.

On the questions submitted to the seven Judges, the LORD PRESIDENT, LORD ADAM, LORD KYLLACHY, and LORD LOW concurred in the opinions delivered by Lord Kinnear, Lord M'Laren, and Lord Pearson. On the remaining question, 2 (b), the LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred in the opinion of Lord Adam.

The Court pronounced the following interlocutor:—

“In conformity with the opinion of the whole seven Judges, Answer the first question in the affirmative: And in answer to the second question subsection (a), Find and declare that in ascertaining the amount to which the annuity granted to the second party may be restrictable, the rental of 1896, the year of the death of Sir Edward Hunter Blair, is to be taken, but reserving all questions as to the amount of the rental, and the deductions to be made therefrom: Answer the second question, subsection (b), in the affirmative: Answer the third question in the affirmative: And in answer to the fourth question, Find and declare that the bond and disposition in security for £20,000 is restrictable to, and that the amount of said provision is, three years' free rent calculated on the said rental of 1896, but reserving all questions as to the amount of the rental and the deductions to be made therefrom: And find that the first party does not insist in his contention with respect to the fifth question; and decern: Find the second, third, fourth and fifth parties entitled to their expenses as against the first party, and remit,” &c.

Counsel for First Party—H. Johnston, Q.C.—W. Campbell, Q.C.—A. O. M. Mackenzie. Agents—E. A. & F. Hunter & Co., W.S.

Counsel for Second, Third, and Fourth Parties—Balfour, Q.C.—Rankine, Q.C.—Pitman. Agents—Cooper & Brodie, W.S.

Counsel for Fifth Parties—Rankine, Q.C.—Craigie. Agents—Cooper & Brodie, W.S.

Friday, January 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HAMILTON v. LOCHRANE.

*Proof—Proof prout de jure—Cost of Work Done in Reliance on Verbal Agreement to Purchase Heritage—Recompense.*

By memorandum of agreement between A, a builder, and B, A agreed to build a villa which B was to have the option of purchasing up to a certain date. B having ultimately refused to exercise this option, A sued her for the cost of certain alterations and additions made upon the villa while it was being erected, as he alleged, at her request, and in consequence of a verbal intimation by her to him that she had decided to exercise her option, and also of an undertaking to pay the expense occasioned by the alterations and additions. A averred that the alterations and additions cost him not less than £150, and did not add to the selling value of the house. B admitted that certain alterations had been made upon the house in consequence of objections stated by her. *Held* that although A would not have been entitled to a proof except by writ if he had claimed damages as for breach of contract, he was entitled to a proof *prout de jure* in support of his claim for reimbursement.

*Opinion* reserved by Lord Moncreiff as to whether such proof would be competent in a case where the defender did not admit that alterations had been made in consequence of his objections.

*Sale—Sale of Heritage—Proof—Breach of Contract—Damages.*

Where A had contracted with B to erect a villa which B was to have the option of purchasing up to a certain time—*opinions* that if A, alleging exercise of the option by B, claimed either implement of the contract or damages for the breach of it, he could not prove that B had exercised the option otherwise than by B's own writ or oath.

This was an action brought in the Sheriff Court at Glasgow by George Hamilton, builder, Dumbreck, against Mrs Maria Agnes Murphy or Lochrane, widow, residing at 10 Parkview Gardens, Crosshill.

Originally the pursuer sought decree for the sum of £400 as damages for breach of a contract concluded, as he alleged, between him and the defender for the sale of a villa erected by him, but his claim was ultimately limited to the sum of £150, being the amount expended by him upon the villa in question, as he alleged, in reliance upon the representations and undertakings of the defender, and without any resulting benefit to himself.

By memorandum of agreement entered into between the pursuer of the first part and the defender of the second part, dated 26th and 27th July 1897, the pursuer under-