*Friday, July* 10.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## BALFOUR-MELVILLE *v.* DUNCAN.

*Entail—Provisions—Provision to Children—Widow's Annuity—Deductions from Free Rental—Money Borrowed to Pay Children's Provisions.*

When, under powers conferred by the deed of entail, an heir of entail borrows money, and charges the fee of the estate therewith, in order to satisfy younger children's provisions, the bonds granted for this purpose, though debts affecting the entailed estate, are not to be considered as children's provisions in a question as to the application of a clause in the entail whereby it is declared that the amount payable in respect of interest on children's provisions and widows' annuities shall never exceed one-half of the free rental.

*Process—Entail—Annuity to Widow in Excess of Limit—Payments without Objection—Repetition.*

An heir of entail in possession provided an annuity for the widow of the heir-apparent, under powers conferred by the deed of entail whereby the heir was entitled to provide such an annuity to an amount not exceeding one-fifth of the free rental of the estate, subject to the proviso that the amount charged on the estate for widows' annuities and interest on children's provisions should never exceed one-half of the free rental. After the annuity had been paid for more than twenty years without objection, a succeeding heir of entail brought an action against the annuitant for payment of a certain amount which, as he averred, he had overpaid to her in respect of the annuity during the last four years. His averments were directed to show that the annuity ought not to have been paid in full, because the whole charges exceeded one-half of the free rental, but it also appeared, from figures admitted to be correct, that the annuity had in each of the four years in question exceeded one-fifth of the whole free rental. *Held* that (assuming the objection to the annuity on this latter ground to be valid) the remedy of the heir of entail was to present a petition under the Entail Acts for restriction of the annuity, and that as this had not been done it must be assumed, in an action for repetition, that it did not exceed the amount legally chargeable.

*Repetition—Condictio Indebiti—Error or Ignorance—Payments Made under Protest.*

An heir of entail brought an action against the widow of a former heir, concluding for payment of certain overpayments made by him to the defender in respect of an annuity in her favour charged upon the entailed estate. He averred that the annuity exceeded the limits prescribed by the deed of entail, and that he had made payment "under protest and under reservation of his right to claim repayment of the sums overpaid to her." *Held* that, in respect that there was no averment that the alleged overpayments had been made in error or ignorance, the pursuer had not set forth a relevant case of *condictio indebiti*.

By a deed of entail of the estate of Strathkinness, dated in 1805, and recorded in 1822, there was reserved to the heirs of entail who should succeed to and be infeft in the said lands, teinds, and others full power and liberty to grant liferent infeftments out of the said lands, teinds, and others by way of annuity only to the wives of their presumptive or apparent heirs who might happen to be married during their lifetime and possession of the said lands, teinds, and others and which liferents should not exceed one-fifth part of the free yearly rental of the said lands, teinds, and others after deducting feu-duties and all legal public burdens; but subject to the declaration that in case the said annuities thereby allowed and the yearly interest that might be payable on provisions to younger children thereinafter mentioned, should together at one and the same time exceed the half of the yearly rent of the said teinds and others, then and so long as the same might continue to be the case, the said annuities should suffer a reduction as therein mentioned, so that one-half of the free yearly rents of the said lands, teinds, and others should always remain to the heir of entail in possession for the time.

There was also reserved to the heirs of entail power to provide their lawful children (other than the heir succeeding to the said lands, teinds, and others) in such portions and provisions as they should think fit, not exceeding, in case there should be three or more children other than such heir, four years' free rent of the estate, after deducting always feu-duties and other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act of Parliament 10 Geo. III., c. 51 (Montgomery Act).

By bond of corroboration and disposition in security and bond of annuity dated 19th February 1849, John Whyte Melville, then heir of entail in possession of the said estate, bound and obliged himself and the respective heirs of tailzie and provision succeeding to him in the said estate, duly and validly to make payment to the Hon. Charlotte Hanbury or Melville, now Duncan, the wife of George John Whyte Melville, eldest son and heir apparent of the said John Whyte Melville, in case she should survive the said George John Whyte Melville, yearly and each year during all the days of her life after the decease of the said George John Whyte Melville, of a free liferent annuity of £500, restrictable as mentioned in said deed of entail. The said annuity was in terms of

said deed of entail validly charged on said estate.

James Heriot Balfour Melville succeeded his father James Balfour Melville as heir of entail in possession of Strathkinness in 1898. At that date there were the following burdens affecting the fee of the estate:—(1) The annuity of £500 above mentioned in favour of Mrs Duncan. (2) Bonds and dispositions in security amounting to £13,104, 9s. 3d. These bonds represented sums borrowed by John Mackintosh Balfour Melville, a former heir of entail, from the Scottish Union and National Insurance Company, and others, for the purpose of making provisions for younger children granted by a former heir of entail. (3) A bond of provision for £8635, 5s. 8d., representing the provision (as restricted by the Court) made for his younger children by the said James Balfour Melville.

James Heriot Balfour Melville continued to pay the annuity of £500 to Mrs Duncan until 1901, when the estate of Strathkinness was disentailed and sold, under an arrangement by which the said annuity became payable by the purchaser.

In the present action, which was directed against Mrs Duncan and her present husband Leslie Fraser Duncan, Mr J. H. Balfour Melville concluded for payment of £750. He averred that in each of the years 1898, 1899, 1900, and 1901, during which he had paid Mrs Duncan's annuity, the said annuity, together with the interest on the children's provisions, had exceeded one-half of the free yearly rental of the estate by not less than £218, 12s. 8d., the sum thus overpaid amounting to more than the sum sued for. He also averred that he had paid the said annuity "under protest and under reservation of his right to claim repayment of the sums overpaid to her."

The amount of the free rental (as to which the parties were substantially agreed) was, in each of the years in question, £2108, 16s. 5d., one-half whereof is £1054, 8s. 2d. The annual interest on the bonds granted by John Mackintosh Balfour Melville was £427, 12s. 10d., and the interest on the bond of provision granted by James Balfour Melville was £345, 8s., amounting in all to £773, 0s. 10d.

The defender pleaded, *inter alia*—"(3) The pursuer's statements are irrelevant. (5) On a sound construction of the deeds mentioned, the female defender was entitled to the payment of the sums of which repayment is now sought. (6) *Esto* that the said payments were erroneous, the pursuer is not entitled to recovery in respect (1st) they were made in error of law, or otherwise in full knowledge that they were not due; (2nd) they were not made by the pursuer, but by the mortgagees in possession of his estate, against whom alone he can claim in respect thereof."

On 5th January 1903 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor by which he found that the pursuer's averments were irrelevant, and assoilzied the defender from the conclusions of the action.

*Opinion.*—"This is an action of *condictio indebiti*, in which the pursuer seeks to recover the sum of £750, as having been overpaid by him to the defender in the years 1898, 1899, 1900, and 1901. The pursuer was heir of entail in possession of the estate of Strathkinness during these years. He succeeded on 14th May 1898, and the estate was disentailed by interlocutor pronounced by Lord Pearson on 20th July 1901. The defender was the widow of the heir apparent of a former heir of entail in possession, and is in right of a bond of annuity granted by her father-in-law and charged upon the estate for £500, subject, as the bond bears, to the restriction in the deed of entail under the power on which the annuity was granted. The pursuer alleges that he paid this annuity in full during the four years specified, whereas, in respect of the restriction in the deed of entail, a less amount was really due. The deed of entail provides, so far as it bears on the case, that an heir of entail may grant a liferent infeftment to his wife or her husband out of the entailed lands by way of annuity in place of terce and courtesy from which the wife or husband is thereby excluded, which liferent 'shall not exceed one-fifth of the free yearly rental after deducting feu-duty and all legal public burdens.' In a subsequent part of the clause there is this declaration, on which the case chiefly depends—'Declaring always, that in case the said annuities hereby allowed, and the legal interest that may be payable on provisions to younger children hereinafter mentioned, shall together at one and the same time exceed the half of the free yearly rental of the said lands, then, and so long as the same might continue to be the case, each of the three higher annuities shall suffer a reduction proportioned to their several amounts so as that one-half of the free yearly rental of the said lands shall always remain to the heir of entail in possession for the time.' In this case there is only one annuity to be considered. The provision in this clause as applicable to this case seems very clear. If the interest payable on the provisions to younger children plus the annuity of £500 do not exceed the one-half of the yearly rent, then the £500 shall be payable in full. But if the interest on the provisions plus the annuity exceed one-half of the yearly rental, then there shall be such abatement of the amount as shall leave one-half of the free yearly rental in the hands of the heir in possession. If parties are agreed about the yearly rent, then the defender's right must depend upon the amount of the interest on the children's provisions. So that the sole question is what is the amount of the children's provisions. As no reference was made in argument to the Aberdeen Act I presume both parties are satisfied that it does not apply. With regard to the children's provisions, the deed of entail confers upon the heirs of entail power to provide for their younger children 'in such portions and provisions as they shall think fit, not exceeding four years' free rent of the same after deducting feu-duties and all other legal and annual burdens.' But it is declared 'that when the said power shall

have been exercised by any of the said heirs of entail in favour of the said children it shall not be in the power of any of the succeeding heirs of entail to give provisions on the said lands . . . until such time as the prior provisions granted by former heirs be paid and purged in whole or in part.' I did not understand it to be argued that this provision has become inapplicable.

"No reference is made on record or was made in argument to the restriction of the annuity to one-fifth of the free rent.

"The case was debated in the procedure roll. The fact which the pursuer has to establish is that under the clauses of the deed of entail there was not each year £500 available for the defender's liferent. The defender has stated various pleas in bar of the action; but the first question is whether the pursuer has relevantly averred that the payments made by him were over-payments.

"After consideration I have come to be of opinion that there is no relevant averment of fact which warrants that conclusion. My judgment proceeds on the opinion that the question depends on the clause of the entail to which I have referred at length, and on no other clause, and is this, whether there is a relevant averment that the provisions to children, plus the annuity, exceed one-half of the free rental.

"The pursuer's averments come to this, that the free rental is to be taken as £2108, 16s. 5d., and that the half of the rental to which the heir is entitled is £1054, 8s. 2d., and my judgment proceeds on the assumption that £1054, 8s. 2d. is half the rental. I assume that, because I understand that to be the pursuer's case. That is the minimum amount to which, as he contends, the pursuer is entitled. The interest on children's provisions is stated in two sums, £427, 12s. 10d. and £345, 8s., amounting to £773, 0s. 10d. The latter sum (£345, 8s.) I understand to be the interest on the amount of the provisions created by the pursuer's father for his younger children as ascertained by a judgment of the Lord Ordinary (Lord Pearson), which has not been questioned, and no question has been raised about it. Admittedly, it must be taken into account in ascertaining whether the annuity and the interest of the provisions exceed the half of the yearly rent, stated by the pursuer himself to amount to £1054, 8s. 2d. Now, obviously and admittedly these two sums do not do so. They amount only to £845, 8s. But on the other hand, if the other sum £427, 12s. 10d. is to be taken into account, then the total, £1273, 0s. 10d., exceeds the half of the free rental (as stated by the pursuer) by £218, 12s. 8d. Clearly, therefore, if my view of the deed of entail be correct, the question as it has been pleaded must depend on whether the £427, 12s. 10d. consists of children's provisions or does not.

"This is not the way in which the pursuer puts his case, but I think it in accordance with the provision of the entail.

"The question whether this sum of £427, 12s. 10d. is to be considered as children's provisions or as debt is a question of law, not of fact. As to the matter of fact the parties seem agreed. The sum consisted of sums borrowed on the security of the estate for the purpose of paying provisions for the children of a prior entailer. There is no need of proof on that point. Is this amount or the interest on it to be considered as children's provisions? I think this question should be answered in the negative. The co-existence of two sets of children's provisions seems prohibited by the clause in the entail last referred to, except in the case of partial payments of prior provisions with which the deed deals expressly but which do not bear on this case. In a petition by the present pursuer, presented, *inter alia*, for the ascertainment of the amount of children's provisions which it was in the power of the pursuer's father to grant, it was decided by Lord Pearson that this sum ought not to be deducted in ascertaining the amount of rental for the calculation of children's provisions. His judgment was affirmed in the Inner House, and I do not clearly see that that could have been the judgment had the sum been regarded as children's provision. A very similar question was decided in *Brodie* v. *Brodie*, December 6, 1867, 6 Macph. 92. The judgment was to the effect that the amount of such burdens became debts on the estate and ceased to be children's provisions. The defender's counsel put forward, and I think rightly, this judgment as a conclusive authority in his favour.

"The pursuer asked a judgment on the documents, and failing that, for a proof; but if his averments are irrelevant there is of course no room for a proof, and indeed the parties are so little at variance as to the facts that any slight difference might probably be arranged without a proof. But my judgment assumes all the facts to be as the pursuer has stated them, except so far as they involve mere questions of figures."

The pursuer reclaimed, and argued—(1) The whole bonds affecting the estate were in substance children's provisions, and therefore the whole interest on them ought to be deducted. The case of *Brodie* v. *Brodie and Others*, December 6, 1867, 6 Macph. 92, on which the defender relied, was a case relating to provisions under the Aberdeen Act, not, as here, to powers granted by the entailer himself. The Lord President there proceeded on the policy of the Entail Amendment Acts—a consideration which was inapplicable to the present case. (2) The annuity should also be restricted, in respect that it exceeded the amount allowed by the entail, *i.e.*, one-fifth of the free rental. If so, the pursuer was entitled to repetition.

Argued for the defender—(1) On the main question the case of *Brodie* was conclusive as to what provisions should be deducted. The question was the same whether the provisions were granted under powers conferred by the Aberdeen Act or under powers conferred by the deed of entail. (2) The provision that the widow's annuity should not exceed one-fifth of the rental referred to

the rental at the date of granting it. Even if it could be held to be regulated by the present rental, this was not a process in which the pursuer could recover any sums so paid in excess. (3) This was not a proper case of *condictio indebiti* — to let in that principle the person who made the payments must have made them in ignorance of his rights. Here the pursuer averred that he knew his rights.

At advising—

LORD KINNEAR—I think the Lord Ordinary's judgment is right, and that we ought to adhere to it. Apart from the special grounds on which his Lordship proceeds, I think the averments irrelevant, because I cannot find in the case as stated any legal basis to support the conclusions of the summons. To say that the pursuer paid an amount in full for certain specified years, whereas he might have made deductions from each year's payment, which he did not in fact make, is by no means enough to found a *condictio indebiti*. To recover overpayments under such an action it is necessary that the pursuer should show that they were made in error or ignorance, and in such circumstances as will entitle him to be relieved against his own mistake. But if all that he can allege is that he paid a debt in full, when he might have insisted, if he had thought fit, upon making a certain deduction, and if it appears on his own showing that he did so in full knowledge of his legal rights, and of the facts bearing upon his liability, I see no ground in law on which he should be entitled to recover. The pursuer says nothing as to the reasons which induced him to pay more than he alleges that he was bound to pay, and in the absence of all information on that head it is impossible for the Court to affirm that he paid on grounds and under circumstances which entitle him to repetition.

But I agree with the Lord Ordinary on the special ground on which he rests his judgment. In his Lordship's view the question on which the case depends is whether a certain sum of £427, 12s. 10d. is to be taken into account in ascertaining the amount of the rental for the purpose of satisfying a condition of the entail, that in case the annuities to widows and the interest on provisions to younger children, taken together, should exceed the half of the yearly rent, the annuities should suffer a reduction, so that one-half of the free yearly rents should always remain to the heir in possession for the time. The sum in question is interest accruing under certain bonds and dispositions affecting the fee of the estate for money borrowed in order to satisfy provisions for younger children, and I agree with the Lord Ordinary that the case of *Brodie* v. *Brodie*, 6 Macph. 92, is a conclusive authority for holding that although such bonds may be perfectly good debts, they are not children's provisions in the sense of the deed of entail, because the children's provisions have been satisfied and extinguished, and the debts with which the estate is now charged are due to outside creditors. I think this decision directly in point.

Another ground of deduction was urged in this Court which does not appear to have been maintained before the Lord Ordinary, viz., that £500 a-year exceeds one-fifth of the free rental, which under the deed of entail is the utmost amount allowed for an annuity to a widow. But this is an objection to which, in my opinion, no effect can be given in an action for repetition. The annuity of £500 was admittedly validly charged upon the estate, and it has been paid year by year, and apparently without objection, since the death of the defender's husband in 1878. If the sum charged upon the estate exceeded the sum allowed by the deed of entail, the pursuer's remedy was to take proceedings by petition under the Entail Acts for restricting the amount. But as the annuity has not been restricted by the proper procedure it must be assumed that the unrestricted sum which is actually charged on the estate does not exceed the amount legally chargeable.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Guy—Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents — Younger — Wallace. Agents — Duncan Smith & Maclaren, S.S.C.

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*Thursday, November* 26.

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.

## THOMSON *v.* WILLIAM BAIRD & COMPANY, LIMITED.

*Reparation — Master and Servant — Employers Liability Act* 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 7—*Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37)—*Notice —Claim under Workmen's Compensation Act not Notice under Employers Liability Act.*

*Held* that a letter by the agents of an injured workman to the employers making a claim on the workman's behalf under the Workmen's Compensation Act, and containing no reference to the Employers Liability Act, was not a notice under the Employers Liability Act.

*Reparation—Negligence—Master and Servant — Liability at Common Law — Dangerous System.*

One of a squad of workmen engaged in repairing a private railway belonging to and adjoining the works of his employers, a limited company of ironmasters, was injured by waggons coming round a curve on the line. In an action of damages at common law by the injured workman, he averred that the accident was caused by the