and so cover not only legal claims but also claims arising under the marriage-contract.

Further, this is a settlement by the testator of his whole estate, and it is very unlikely that he would wish to allow old claims under a marriage-contract that had never been operative to interfere with the provisions of his general settlement.

LORD KINNEAR concurred.

The Court answered the question of law in the negative.

Counsel for the First Parties—Kemp—A. M. Mackay. Agents—Waugh & M'Lachlan, W.S.

Counsel for the Second Party—Constable—W. Mitchell. Agent—James F. Mackay, W.S.

Tuesday, February 28.

OUTER HOUSE.

[Bill Chamber.

CRAWFORD LESLIE, PETITIONER.

Entail—Disentail Proceedings—Provisions to Younger Children — Free Rental — Anterior Provision by Heir-Apparent to be Deducted in Computing Subsequent Provisions to Children by Heir in Possession—Aberdeen Act 1824 (5 *Geo. IV, c.* 87), *sec.* 4—*Entail Amendment Act* 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 6.

In 1878 the heir-apparent of an entailed estate, with consent of the heiress in possession, granted a bond of annuity and provision in favour of his wife and younger children, and died in 1898.

In 1885 the said heiress in possession granted a bond of provision in favour of her younger children, and died in 1904.

In a petition by the heir of entail in possession for authority to record an instrument of disentail, *held* that, in computing the free rental available to satisfy the provision granted in 1885, the provisions granted in 1878 viz., (1) the annuity to the widow, (2) interest on the provision to children, fell to be deducted in virtue of the terms of the Aberdeen Act 1824 (5 Geo. IV, c. 87), sec. 4, and the Entail Amendment Act 1868 (31 and 32 Vict. c. 84), sec. 6.

A petition was presented to the Court by Reginald William Henry Crawford Leslie, heir of entail in possession of the entailed lands of Badenscoth and others, in the county of Aberdeen, for authority to record an instrument of disentail.

A remit was made to Francis J. Dewar, W.S., to report upon the facts and procedure. He reported, *inter alia*, that in 1878 Lieutenant-Colonel Crawford, heir-apparent of his mother Mrs Isabella Crawford Leslie, then heiress of entail in possession of the estate now sought to be disentailed, granted with her consent, under the powers of the Aberdeen Act and of sec. 6 of the Entail Amendment Act 1868, a bond of annuity and provision in favour of his wife and younger children. The amount of the annuity payable to his wife after his death was to be £200 during the life of Mrs Crawford Leslie, and £500 thereafter, and the amount of the provision to younger children was £4000, payable a year after his death. The said Lieutenant-Colonel Crawford died on 5th December 1898 survived by a widow and six children. Mrs Crawford Leslie, his mother, having obtained the authority of the Court, in February 1899, charged the entailed estates with a bond and disposition in security in favour of her son's younger children for £4000 in implement of her son's said provision in their behalf. On 8th March 1899 the widow completed her title to her annuity by infeftment. The statutory affidavit necessary to obtaining the leave of the Court to charge the estate with the £4000 provision to younger children had disclosed the existence of a then unsecured provision for £9500 granted under the powers of the Aberdeen Act 1824 (5 Geo. IV, cap. 87), sec. 4, by Mrs Crawford Leslie in 1885 in favour of her younger children Mrs Margaret E. Gordon and Mrs Isabella Gordon, contingently payable on their survivance, and revocable at her option. Mrs Crawford Leslie died on 25th April 1904 and was succeeded in the entailed estates by the petitioner, and survived by her two daughters, who were thus now creditors in the £9500 provision as far as it did not exceed two years' free rental of the estates as at the death of their mother. The two years' free rental of the estates amounted to £7087, 2s. 11d. In these circumstances the question arose whether the petitioner in computing the free rental was entitled to deduct the sum of the heir-apparent's provisions previously made, viz., two years' annuity to the widow at £500, and two years' interest on children's provision (£4000) at 3 per cent.—in all £1240.

The Aberdeen Act 1824 (5 Geo. IV, c. 87), sec 4, *inter alia*, after conferring power upon heirs in possession of entailed estates to grant bonds of provision to children provided that the amount of such provision should in no case exceed certain proportions of the free yearly rents or free yearly value of the whole said entailed lands and estates "after deducting the public burdens, liferent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever affecting or burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession."

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84), sec. 6, after enabling heirs-apparent of entailed estates to grant with consent of the heir in possession such provisions in like manner and in similar conditions as were competent to heirs in possession under the powers of the Aberdeen Act 1824, *inter alia*, enacts that "such

provisions to be granted by such heir-apparent shall not interfere with or affect any provisions which have been granted by the heir in possession of such estate, and shall be postponed to the provisions granted by such heir in possession."

LORD DUNDAS — The petitioner asks authority to record an instrument of disentail of certain lands in Aberdeenshire. No answers were lodged by the three next heirs of entail, who were duly cited. An affidavit and relative schedule of debts, &c., is produced, setting forth that there are no entailer's debts or other debts, and no provisions to husbands, wives, or children affecting or that may be made to affect the fee of the entailed estates that are not secured by having been placed upon the record, other than those therein specified, which include, *inter alia*, "a provision for the sum of £9500 granted by the petitioner's immediate predecessor in the entailed estates, the late Mrs Isabella Crawford Leslie, by bond dated 2nd March 1885, in favour of her two younger children Mrs Margaret Elizabeth Gordon and Mrs Isabella Gordon." A question has arisen as to the extent to which this provision is to be secured, or payment of it to be made, as a condition of the petitioner obtaining authority to record his instrument of disentail. The ladies who are creditors in the bond have appeared by counsel and craved to be sisted as parties to the proceedings.

The material facts are these — In 1878 Lieut.-Colonel Crawford, then heir-apparent to the entailed estates, with the consent of his mother Mrs Crawford Leslie, who was then heiress of entail in possession, granted a bond of annuity and provision in favour of his wife and younger children, under the powers of the Aberdeen Act and of section 6 of the Entail Act 1868, the amount of the annuity being £500, and that of the children's provisions £4000, payable one year after his death. In 1885 the said Mrs Crawford Leslie granted an Aberdeen Act bond of provision, revocable in her option, being the bond mentioned in the schedule above referred to for £9500, payable one year after her death to her said younger children Mrs Margaret Elizabeth Gordon and Mrs Isabella Gordon. Lieut-Colonel Crawford died on 5th December 1898, survived by his wife and by certain younger children. In February 1899 his mother, who also survived him, applied to the Court for authority under the Aberdeen Act and the Entail Act 1868, section 6, to charge upon the entailed estate her son's said provision of £4000, and this was done by way of a bond and disposition in security for that amount in favour of the younger children. The widow of Lieut.-Colonel Crawford also completed title to her annuity by infeftment. For the reasons explained in Mr Dewar's report, no account was taken in these proceedings of the bond for £9500 of which mention has been made. Mrs Crawford Leslie, the granter of it, died in April 1904, survived by her grandson the petitioner, who succeeded to the entailed estates, and by her two daughters already named. These ladies desire that the proper amount of their provisions under their mother's bond be secured or paid to them before the disentail is carried through by their nephew. The reporter explains that two years' free rental of the estates as at Mrs Crawford Leslie's death would amount to £7087, 2s. 11d.

In these circumstances the question has been raised and argued, whether or not the petitioner is entitled in ascertaining the amount of his sisters' provisions, to deduct (*a*) the annuity of £500 to Lieut.-Colonel Crawford's widow, and (*b*) interest on his children's provisions of £4000. If the petitioner's contention is correct a sum of £1240 or thereby would fall to be deducted, as explained by the reporter, leaving the amount of the provisions of the petitioner's aunts at £5847, 2s. 11d. or thereby.

The question is I believe a new one, and is not without difficulty. If regard were to be had to the terms of the Aberdeen Act only, the deduction would appear to be a good one, the sums involved being clearly burdens affecting the entailed estate as at the date of the death of the granter Mrs Crawford Leslie, within the meaning of that statute. But one must consider also the language of section 6 of the Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84), which confers power upon an heir apparent to an entailed estate to grant provisions to his wife and children, with the consent of the heir in possession, to the same extent as an heir in possession may do under the Aberdeen Act. A proviso follows, the full intention and effect of which I have found it difficult to appreciate. It is provided, however, *inter alia*, that "such provisions to be granted by such heir-apparent shall not interfere with or affect any provisions which have been granted by the heir in possession of such estate, and shall be postponed to the provisions granted by such heir in possession." . . . Now it seems to me that the question under consideration may be capable of solution if due regard be had to the words "which have been granted" above quoted. These words must refer to some particular *punctum temporis*. I think that in their grammatical sense, and according to the ordinary use of language, they must be held to refer to the point of time at which the heir-apparent, with consent of the heir in possession, grants his bond of provision. He can grant no bond without such consent. If that be the true sense of the phrase, then in 1878, when Lieut.-Colonel Crawford with his mother's consent granted his bond, there were no provisions which "had been granted" by the heir in possession which could be interfered with, and the result would be that the deduction now claimed by the petitioner is a good one. Another point of time to which the words "have been granted" might be held to refer is the date at which the provisions made by the heir-apparent become payable, viz., in this case a year after the death of Lieut.-Colonel Crawford. I do not think that this reading of the words is so natural or proper a one as that above indicated. But the result in the present case would in my opinion be the same; because I do not think

that it could be held that in 1899 Mrs Crawford Leslie had in any true sense "granted" provisions to her younger children. Her deed of 1885 was, as already explained, of a testamentary character, and also defeasible in the event of the children's predecease. The argument against the deduction in question being allowed seems to necessitate a reading of the proviso by which the words "which have been granted" are deprived of all meaning, unless indeed they must be taken as equivalent to "which shall be granted"—neither of which contentions appears to me to be tenable. Upon the question under discussion I am therefore in favour of the petitioner, and against the younger children.

The deductions claimed by the petitioner in computing the free rental were allowed.

Counsel for the Petitioner—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Friday, March 17.

OUTER HOUSE.

[Lord Ardwall.

NEWLANDS *v.* GILLANDERS.

Expenses — Process — Fees to Counsel — Agent's Account of Expenses—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 22 *and* 23—*A.S., February* 6*th*, 1806.

An action for the sum contained in a law-agent's business account was undefended, and decree in absence was pronounced. The account along with the account of expenses in obtaining the decree in absence was, in terms of the Act of Sederunt, 6th February 1806, remitted to the Auditor to tax and report. *Held* that counsel was entitled to receive a fee for moving the approval of the report, and the agent to charge for instructing counsel to that effect and attending the motion.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 22, enacts that "Where a defender shall not enter appearance on or before the second day after the summons has been called in Court, the cause may immediately be enrolled in the Lord Ordinary's motion roll as an undefended cause for decree in absence"; and section 23 enacts "when any cause is enrolled as an undefended cause before the Lord Ordinary, the Lord Ordinary shall without any attendance of counsel or agent grant decree in absence in common form in terms of the conclusions of the summons, or subject to such restrictions as may be set forth in a minute written on the summons by the agent for the pursuer."

It is enacted by the Act of Sederunt, 6th February 1806, in regard to actions by law agents for payment of a business account, "The Lord Ordinary before whom the process may come shall remit the account to the Auditor of Court, and no decree shall be pronounced, either in absence or after having heard parties, without a report having been made by the Auditor."

Andrew Newlands, S.S.C., in Edinburgh, brought an action against Dr Ian L. G. Gillanders and Euphemia S. Barclay or Gillanders, his wife, residing at Wynberg, South Africa, but formerly of London, to recover payment of a business account due him by them. The action was undefended, and decree in absence was pronounced. On the pursuer's motion the account sued for was remitted to the Auditor to tax, along with the account of expenses of obtaining decree in absence. In this latter account there were charged a fee to counsel for moving the Court to approve of the Auditor's report, and also a fee of 6s. 8d. to the agent for instructing counsel and attending the motion. The former fee the Auditor disallowed; the latter fee he reduced to 5s.

The pursuer lodged a note of objections to the Auditor's report, and argued—The present case was governed by that of *Hunters* v. *Alexander*, May 20, 1882, 19 S.L.R. 619. He also cited Begg on Law-Agents, p. 170; Smith on Expenses, p. 301; Coldstream's Procedure, p. 35.

LORD ARDWALL sustained the note of objections for the pursuer to the Auditor's report.

Counsel for the Pursuer—Cullen. Agent—Andrew Newlands, S.S.C.

Friday, June 2.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HETHERINGTON *v.* GALT.

Property—Feu-Charter—Boundary—Error in Measurements in Titles—Effect of Words "or thereby"—Adjustment of Boundary by Agreement between Proprietors—Boundary Adjusted and Followed by Possession Binding on Singular Successors.

A portion of ground supposed to be rectangular and measuring, according to a plan annexed to the charter, 200 feet at front and back, was in 1883 feued out in two rectangular and contiguous plots. The feu-charter set forth the area of each plot and the boundary lines and their measurements. The measurement of the one plot at front and back bore to be 120 feet "or thereby"; the measurement of the other plot at front and back bore to be 80 feet "or thereby." When the respective proprietors proceeded to mark