[2d *February* 1838.]

Miss Xaveria Glendonwyn and John Napier, Assignee of Mrs. Ismene Glendonwyn or Scott, Appellants.—*Dr. Lushington*—*Sir William Follett.*

Dame Mary Lucy Elizabeth Glendonwyn or Gordon, Spouse of Sir James Gordon, Bart., Respondent.—*Attorney General* (*Campbell*)—*Shee.*

*Discharge.—Husband and wife.—Heritable or moveable.*—A wife conveyed her heritable estate to her husband on condition that he should make payment of all debts due by her, and of all provisions settled or to be settled by her on her children; she granted bonds of provision to her daughters, and one of them after her mother's death, on occasion of her marriage, granted a discharge in her marriage contract, in consideration of a tocher by her father, of all she could claim in right of her father or of her mother in any manner of way, and in full of every claim competent to her of all bairns' part of gear, legitim, portion natural, executry, and every thing else that she could ask and claim by and through the decease of her said father and mother: Held (affirming the judgment of the Court of Session) that the bond of provision was not included in the discharge.

1st Division.
Ld. Fullerton.

William Glendonwyn, of Glendonwyn and Parton, was married to Agnes Gordon, proprietrix of the estate of Crogo, by whom he had three daughters, the

GLENDONWYN v. GORDON.
2d Feb. 1838.

respondent Lady Gordon, the appellant Miss Xaveria Glendonwyn, and Mrs. Ismene M. Glendonwyn or Scott, wife of William Scott, Esq.

Mrs. Glendonwyn on the 29th March 1791 disponed the estate of Crogo to her husband, his heirs and assignees, reserving her own liferent, and "declaring that the said William Glendonwyn and his "foresaids, by his or their acceptance of these presents, shall become liable in payment of all debts "payable by me at the time of my decease, and of the "provisions settled or to be settled by me upon my "children." The obligation to infeft was "subject "to the reservation and declaration above written;" and sasine was taken accordingly. Shortly thereafter, Mrs. Glendonwyn, with consent of her husband, executed a bond of provision in favour of her three daughters, bearing to be "in exercise of the power reserved "to me in a late disposition executed by me of my "estate of Crogo, to and in favour of the said William "Glendonwyn." By the bond she bound herself and her disponees to pay to the respondent, Lady Gordon, the sum of 1,250*l.*, to the appellant, Miss Glendonwyn, 1,500*l.*; and to Mrs. Scott 1,250*l.*, and that "within "twelve months next after the longest liver of us "two, me or my said husband, their father, with a "fifth part of the principal sum of liquidate penalty "in case of failure; together also with the due and "ordinary annual rent of the said principal sum to "each respectively, from and after the time of the "decease of the longest liver of us two, me or my said "husband, to the foresaid time of payment, and yearly, "termly, and proportionally thereafter, until payment."

A power to alter was reserved; and it was declared, that during the life of their parents, the daughters should have no right to assign, and that, in the event of the decease of any of them, the share of the deceased should belong to the survivors. By a codicil, Mrs. Glendonwyn bound herself and her disponees to pay to the respondent the sum of 100*l.* sterling, in addition to the above provision—the payment to be at the same term, and bearing interest in the same way as the first provision of 1,250*l.*

Mrs. Glendonwyn died in the course of the same year (1791).

In 1801 the respondent was married to Sir James Gordon of Letterfourie, Bart., on which occasion a contract of marriage, to which Mr. Glendonwyn was a party, was executed, by which he agreed to pay a tocher of 2,000*l.* to Sir James; and among other clauses there was the following:—" And farther, it is " hereby contracted and agreed upon by both parties, " that the said 2,000*l.* of tocher now paid by the said " William Glendonwyn with his said daughter shall be " in full of all the said Mary Glendonwyn can claim in " right of her said father, or of the deceased Agnes " Gordon her mother, in any manner of way, and in " full of every claim competent to her of all bairns " part of gear, legitim, portion natural, executry, and " every thing else that she could ask or claim by and " through the decease of her said father or mother, " excepting what the said William Glendonwyn may " think fit farther to grant or bestow of his own good " will allenarly."

About the year 1808 the youngest daughter Ismen

GLENDONWYN v. GORDON.

2d Feb. 1838.

intermarried with William Scott, Esq. Mr. Scott purchased from Mr. Glendonwyn the estate of Crogo for 12,000*l.*, and in the year 1809 he also bought from him the estate of Parton for 60,500*l.* Mr. Glendonwyn died in the course of the same year.

Some time thereafter Mr. Scott became insolvent, and was unable to pay the price of the lands which he had purchased. A process of ranking and sale of his estates was thereupon raised at the instance of his creditors; and, under the authority of the Court of Session, the estate of Parton was sold for a sum which did not amount to the price and arrears of interest due thereon.

Miss Glendonwyn put in a claim to be ranked on the price of the estate for the provisions due to her under her mother's bond of provision; and for which she was accordingly ranked and received payment of the money. Mrs. Scott, with consent of her husband, assigned her provision in trust to the late Mr. David Ramsay, W.S., who in that character lodged a claim, which was opposed by the common agent, on the ground that the bond being merely a personal bond, fell under the jus mariti of Mr. Scott, and was compensated by the large balance of the price which was due by Mr. Scott. Mr. Ramsay contended, on the other hand, that the bond was heritable, and therefore did not fall under the jus mariti; and the Court having sustained this plea[1], Mr. Ramsay received payment of the principal sum and interest.

In the meantime no claim was made on behalf of Lady Gordon for her provision, it having been supposed

---

[1] 23d June 1825, 4 S. & D., p. 108, (new ed. p. 110.)

that it was embraced in the discharge contained in the marriage contract. But in 1832 she lodged a claim for the amount, to which objections were stated, both by the common agent, and by Miss Glendonwyn and Mr. Napier the assignee of Mrs. Scott, both these ladies being creditors for the respective shares of the residue of the price. The main objections were that the claim was discharged; that if not discharged, the provision fell under the jus mariti of Sir James, and that he being indebted, by certain bills, to the late Mr. Glendonwyn, his executors were entitled to set off the amount of the provision, and at all events the interest, against these bills. The Lord Ordinary, on the 5th Feb. 1835, pronounced this interlocutor:—
" The Lord Ordinary having heard the counsel for
" the parties on the objections to the claim for Lady
" Gordon, finds her Ladyship entitled to be ranked in
" her own right to the principal sum contained in her
" mother's bond of provision, and to the interest thereon
" in right of her husband Sir James Gordon, and ranks
" and prefers her accordingly, and decerns; but finds
" that the ranking, in so far as regards the interest, is
" subject to any claim of compensation founded on the
" bills referred to in the objections, at the instance of
" the executors of the late William Glendonwyn against
" the said Sir James Gordon, in so far as they can instruct
" the same; quoad ultra repels the said objections."

The appellants presented a reclaiming note against this interlocutor, but the Court on 9th June 1835 adhered.[1]

---

[1] 13 S., D., B., & M. p. 883, (new ed.)

GLENDONWYN v. GORDON.

2d Feb. 1838.

They then entered their appeal.

*Appellants.*—According to the sound construction of the discharge in the marriage contract, all claim which the respondent had, in virtue of the bond of provision, whether as against her mother, or her father, was fully discharged.

The discharge consists of three distinct substantive parts. The 2,000*l.* which Mr. Glendonwyn gave as the consideration for it, is declared, 1st, to be in full of all that the respondent could claim in right of her father or her mother, in any manner of way; 2dly, to be in full of every claim competent to her, of all bairns part of gear, legitim, portion natural, and executry: and 3dly, of every thing else that she could ask or claim by and through the decease of her father or mother, except what Mr. Glendonwyn might think fit farther to grant or bestow of his own free will.

It seems to be a singularly strict and limited construction, to hold that this discharge does not reach the bond of provision in question. That bond is a claim against her father, payable within twelve months after the death of the longest liver of her mother and father; and which sum became exigible twelve months after his death, he being the longest liver. It is clearly a sum or debt which the respondent can claim, in right of "the said deceased Agnes Gordon her mother," in some manner of way. Unless the bond was to be specifically mentioned, hardly any words can be imagined which would more distinctly comprehend it,—and it cannot be contended, that the special mention of

it was necessary to its effectual discharge. But it is said, that as the clause relates specifically to "bairns "part of gear, legitim, portion natural, and executry," it cannot be extended to any claims other than those of the nature of legitim or of succession; and that as the bond is not only a debt, but is one of an heritable nature, the discharge cannot be construed so as to comprehend it; and this is based on the rule, that where a party gives a specification of particulars, preceded or followed by general words, the general words are not meant to extend to things of a different kind,— that the enumeration points out the kind of things contemplated,—and that had others of a different nature been thought of, they would have been mentioned. This, no doubt, is the general rule, but that rule is founded on the implied intention of the parties; and therefore it ought not to be applied where, from the structure of the clause, it is evident that the general words were not meant to be restrained by the particular specification.

The intention of the parties is to be gathered from the terms and structure of the whole clause, each part of which is individualized, both by the form of the clause, and the particular mode of expression, so that each ought to be taken per se, instead of the one being interpreted by the other.

The respondent, it is provided, shall receive the 2,000*l.* paid to her in full of all she can claim "in right "of her father, or of the deceased Agnes Gordon her "mother, in any manner of way, and in full of every "claim competent to her of all bairns part of gear," &c. These two portions of the clause are quite dis-

GLENDONWYN v. GORDON.
2d Feb. 1838.

tinct, and the frame of the clause marks, that instead of the latter being introduced with an intention to limit the first, it was introduced in order to add to it,—to contain a special provision of its own, but to leave the former its full effect, the same as if it had stood alone. Then there is added to the enumerating part of the clause, the farther declaration, that the 2,000*l.* is accepted also in full of "every thing else that she (the "respondent) could ask or claim, by or through the "decease of her said father or mother," excepting what the former might choose to bestow upon her of his own free grace. It is not disputed, that if the bond be merely a personal debt, these words are sufficiently broad to comprehend it; but it is said to be an heritable debt, and therefore to be a claim of a different kind from those mentioned in the preceding part of the clause.

It is true that the Court below, adopting the argument of the respondent, held the debt to be heritable, and that the claims specially mentioned in the discharge clause of the contract of marriage, being all of a moveable nature, the other parts of the clause, however comprehensively expressed, could not be extended to include an heritable debt.

The Court appears to have been misled as to the nature of the claim, by the case of Ramsay, and by not attending sufficiently to the terms of the power under which Mr. Glendonwyn executed the bonds of provision.

The case of Ramsay originated in a claim made in the ranking by the assignee of Mrs. Scott; and the plea of the common agent was, that being a moveable

bond it fell under Mr. Scott's jus mariti; that it therefore belonged to Mr. Scott, and that he being debtor to Mr. Glendonwyn in the price for which he Mr. Scott had purchased the estate of Parton, the amount must be set off against the debt due by him. But the answer was, that whatever might be the general nature of the bond, it was heritable, as in a question between husband and wife,—that it therefore did not fall under the jus mariti of the husband; that he was not creditor in it, and that Mrs. Scott having nothing to do with the debt due by Mr. Scott to Mr. Glendonwyn, she could not be affected by any plea bottomed on that ground, and as little could her assignee. Accordingly, the Court decided that the bond was heritable as between Mr. and Mrs. Scott. But, granting the decision to be right, it affords no ground for treating the bond to the respondent as heritable in the present question, which is one between the creditor and debtor, as to whether it was discharged or not. As between these parties, the bond is indisputably moveable; and it ought to have been taken as possessing that character, in resolving the question, whether it was comprehended by a discharge granted by the creditor, and taken by the debtor.

Another circumstance which apparently weighed with the Court, in inducing them to hold the bond as not discharged, was the terms of the power under which it was executed. It seemed to be assumed, that that power gave the bond an heritable character. But this is a mistake:—Mrs. Glendonwyn disponed her estate of Crogo to her husband, under this provision, that, by acceptance thereof, "he shall become liable in payment

GLENDONWYN v. GORDON.

2d Feb. 1838.

"of all debts payable by me at the time of my de-"cease, and of the provisions settled or to be settled "by me upon my children;" and it was in exercise of this reserved right, that she executed the bonds in favour of her daughters. But the provisions were not made real burdens on the estate, or rather the estate was not conveyed under the real burden of such provisions as she might grant. On the contrary, not only is the amount to which they might extend not declared in the disposition, which, of itself, would have been fatal to their being real burdens, but, by the conception of the clause, the payment of them is made merely a personal obligation against Mr. Glendonwyn, and not a debt burdening the lands themselves.

The claim, therefore, not being heritable, but being moveable, was discharged by the marriage contract; and it was so, even upon the assumption that the specification in the second part of the clause were to be held as confining or limiting the general words of the clause to debts or claims ejusdem generis.

The discharge was granted of all that the respondent could claim in right of her father or mother, in any manner of way, and of every thing she could ask or claim by or through their decease, and of all bairns' part of gear or legitim and executry.

If the discharge had mentioned only executry, or only bairns' part of gear or legitim, it might have been contended that the general words could not be extended to claims of debt; but where the discharge is of all claim competent to the respondent as in right of her mother, against her father, in any manner of way, and of every thing else she could ask or claim

by or through the decease of her father or mother, it is extravagant to maintain that this does not comprehend a bond of the nature of that in question.

Besides, the rule of law is, that debitor non presumitur donare[1]; and therefore the legal presumption is, that the 2,000*l.* was paid by Mr. Glendonwyn in extinction of the 1,350*l.* due by him under the bond; and it cannot reasonably be supposed that he intended to give the respondent 2,000*l.*, and at the same time remain indebted to her in 1,350*l.* This presumption is fortified by the conduct of the respondent, which shows that she understood that the bond was discharged; for although the legal proceedings were instituted in 1817, she made no claim in respect of it till 1832.

*Respondent.*—The clause in the marriage contract discharges merely the respondent's interest as a lawful child in the succession of her father and mother. The contract stipulates, that in respect of a tocher of 2,000*l.* then paid, the respondent was to have no claim, 1st, as an heir in mobilibus of her mother, to call the father to account for his wife's share of the goods in communion;) nor, 2dly, as an heir in mobilibus of her father, (her interest in his "executry" being discharged;) nor, 3dly, to that share of her father's moveables, which he could not have disappointed by any testamentary deed. This third legal right is anxiously discharged under the words by which it is usually described, "bairns" part "of gear, legitim, portion

[1] Borthwick against Livingston, March 1684; Stenhouse against Young, 15th June 1737.

GLENDONWYN v. GORDON. 2d Feb. 1838.

"natural." All these the respondent might have lawfully claimed on the decease of her father (who died intestate), had they not been discharged by her marriage contract.

But the marriage contract discharges nothing else than the respondent's rights to the moveable estate of her parents. It does not cut off or discharge the respondent's rights as one of the heirs at law of her father in his heritable or land estate, nor does it discharge any ordinary debt due to her by him. It does not discharge his liability to account as a trustee for any sum intrusted to him and his heirs on behalf of the respondent, at whatever date the sum may have been declared payable.

A land estate, Crogo, was conveyed to Mr. Glendonwyn, and accepted by him under the condition that he should become debtor to the respondent for the sum of 1,350*l.*, payable at the death of the longest liver of him and his wife. The obligation which he undertook was onerous; and, by the decease of his wife, became irrevocable. In the marriage contract not one word is said which implies that it was in the view of the parties to discharge the debt on Crogo, due to the respondent; if such intention had existed, it was too important not to have been specially mentioned, and the intended husband of the respondent ought to have been told that the amount of the sum paid to him nominally as a tocher with his bride by her father was a delusion, inasmuch as, to the extent of 1,350*l.*, the father was merely paying an onerous debt, instead of acting with liberality towards his daughter.

The whole terms of the clause demonstrate that the

discharge bore reference to the ordinary rights and claims competent to the respondent, and to every lawful daughter, in relation to the ordinary course of legal succession, and not to any special provision or jus crediti absolutely secured in her behalf. The terms of the clause are applicable to the ordinary rules of the law of succession, and to nothing else, and in no other light could the respondent's intended husband or his legal advisers understand the clause. By the law of Scotland, general terms of discharge subjoined to an enumeration of special claims are not held applicable to rights or claims of a different description.[1]

In the present case not only are the rights specially enumerated in the marriage contract (being rights of succession) of a different kind from the onerous debt, of which payment is now demanded from the heirs portioners of Mr. Glendonwyn; but, by inserting special clauses in the disposition of the estate of Crogo, care was taken to render the provisions in favour of the disponer's daughters heritable burdens on the lands; whereas the rights of succession to moveables which are specified in the marriage contract are necessarily personal. In the procuratory of resignation and precept of sasine, special reference is made to the burden or debt in question; and, accordingly, in the case of Ramsay, it was held that the bond granted to the respondent's sister must be dealt with as an heritable debt. But whether it be so considered, it is clear that the bond constitutes a debt, and as such it

[1] Erskine, b. iii. tit. 4. sec. 9.

GLENDONWYN v. GORDON.

2d Feb. 1838.

cannot be comprehended within the terms of the discharge.[1]

LORD CHANCELLOR.—My Lords, in the cause which was heard at your Lordships bar yesterday the question was, whether a release or discharge contained in a marriage settlement of the respondent had discharged a claim to the sum of 1,350*l.*, to which she was entitled under a bond executed by her mother, and by a contract between the father and mother made payable by the father?

My Lords, it appears at the time the marriage settlement was executed, which was supposed to contain the discharge of this claim, the daughter was entitled to this bond. She was also entitled to a proportionate share of the property of the mother in the hands of the father, and in the event of the father dying leaving property applicable to this purpose, she would be entitled to a share of the father's estate.

It appears that upon the marriage of that daughter a settlement was made containing the clause upon which the question arises. The bond itself was executed by the mother, and contains this provision, that the 1,250*l.* (the 100*l.* being added by a subsequent instrument) should be "in full satisfaction" to the daughters "of all bairns part of gear, portion natural, "executry, or any other thing which any of them can "claim through their mother." These words are not

1 A good deal of discussion of a special nature arose as to the right of the appellants to a diligence to recover correspondence to prove the meaning of the clause; but this was precluded by a final interlocutor, and is otherwise unnecessary to be reported.

unimportant when I come to consider part of the terms upon which the contest has arisen at the bar. The marriage contract also provided that the provision then made should be a discharge as affected the husband's estate, and a discharge (which raises the question as to this claim) against the father's estate, and it appears to me that the terms used in both these parts of the deed are not unimportant to be attended to.

Now, my Lords, with regard to the husband's estate there is this clause:—" And which provisions before " written, conceived in favour of the said Mary Glen- " donwyn, she hereby, with consent of her said father, " accepts of in full satisfaction of all terce of lands, " half or third of moveables, and every other claim or " provision whatever which she could by law ask or " demand by and through the decease of the said " James Gordon in case she shall survive him, and in " full of all that her heirs and executors or nearest of " kin could ask or claim on any account whatever by " and through her decease in case she shall predecease " her said husband." Then comes the provision out of which the question arises:—" and which provisions be- " fore written, conceived in favour of younger children " or daughters of this marriage, are and shall be in full " satisfaction to them of all bairns part of gear, legitim, " portion natural, executry, and every thing else that " they could ask or claim by or through the decease of " the said James Gordon, excepting what he might " think proper to bestow of his own good will."

Then come the words upon which the question arises:—" and further it is hereby contracted and agreed " upon by both parties, that the said sum of 2,000*l.* of

Glendonwyn v. Gordon.
2d Feb. 1838.

" tocher now paid by the said William Glendonwyn " with his said daughter shall be in full of all the said " Mary Glendonwyn can claim in right of her said " father or of the deceased Agnes Gordon her mother, " in any manner of way, and in full of every claim com- " petent to her of all bairns part of gear, legitim, " portion natural, executry, and every thing else that " she can ask or claim by and through the decease of " her said father or mother, excepting what the said " William Glendonwyn may think proper to grant or " bestow of his own good will."

Now, my Lords, it was contended that the latter words in that sentence and the words in the early part of that sentence both have the same meaning.

My Lords, I have referred to the provisions of the bond itself affecting the mother's estate, and to the provisions in the marriage settlement affecting the intended husband's estate, and compared them with those which are introduced affecting the father's estate; and your Lordships will find the same expressions are used in all those provisions. Now it is quite clear that in the other provisions those general words by which they might claim "by or through the decease" were not intended to apply to any thing except what the parties might become entitled to by succession according to the laws of Scotland. It is clear, therefore, that these words applied only to right or claim which would devolve upon the respondent upon or in consequence of the death of the father and mother. These parties therefore described legitim as a claim "by " or through the decease" of the parent, which is not very correct, inasmuch as the death of the

parent does not create the right, but only brings it into action.

On the part of the appellant it was contended that the first and last part of the release meant the same thing; if so, as the latter is clearly confined to such claim as legitim, executry, &c., the meaning of the words first used must be equally so confined. It is true that the first words constitute a distinct sentence of themselves, and that if they mean only such claim as legitim and executry they are inoperative, and that there is needless repetition. But the appellant, by contending that the first and last words are operative to the same purpose, that is, that they both apply to the bond debt, admits that the sentence is twice repeated, and that one of the sets of words is inoperative.

It is true that the words "in right of the father or "mother" do not very correctly apply to the claim of legitim or executry, but perhaps they do not less accurately describe those claims than the words "by or "through the decease" of the parents, by which words the parties have themselves described those claims; and as applicable to the claim against the father's estate to which the child was entitled as a child of the mother, the expression is not perhaps incorrectly used. The child was entitled to a share of the mother's estate in the hands of the father; to that amount the child claimed against the father as a child of the mother, and in that sense, in right of the mother at least, those words are much more applicable to such a claim than to the claim under the mother's bond. In that claim the child was the obligee, the mother the obligor, and

Glendonwyn v. Gordon.

2d Feb. 1838.

the father, having taken upon himself the duty of paying the bond, was in the character of a debtor only. In what sense can the claim of the obligee be said to be in right of the obligor or of the debtor liable to pay the bond? It was said that the mother reserved to herself the right of giving a portion to her daughter, and that by the bond she transferred that right to her daughter, but it is clear that such right of the mother was exercised and exhausted by her giving the bond, and that in lieu of her right so exercised a debt arose due to the daughter. That which the daughter obtained cannot be identified with the right which the mother reserved, and it was well observed, that as the father and mother are included in the same sentence, the same meaning must be applied to a claim in right of each. But in what possible sense can this be said to be a claim in right of the father who is connected with it only in the liability to pay?

Many authorities in the law of Scotland were referred to for the purpose of proving that general words were to be construed by reference to the subject matter particularly described, and were not to extend to other matters not ejusdem generis, which is a rule founded upon common sense and the ordinary usages of mankind. If the parties had not such foreign matter in contemplation, the heating it, as included in the general expression used, would be contrary to their intentions; and if they had it in contemplation, it cannot be supposed that they would have omitted to specify it: at all events, the general words must be such as in their natural and ordinary meaning to embrace the matter in question.

The appellant must assume, that not only the father, but the daughter and her intended husband, had this bond in contemplation when they executed this settlement, and that the first words in the discharge were introduced expressly to include it. This appears to me to be a very incredible supposition. It is obvious that if the father intended to protect himself against the bond, and did not intend to effect the object by fraud, he would have referred to it in terms. The claim under the bond is of a totally different nature from any of those specified, and the general words appear to me to be totally inapplicable to such a claim. I do not overlook the observation which was made at the bar as to the claim against the father's estate, with respect to what he owed to the child as legitim, which, to a certain extent, may be considered in the character of a debt.

I am therefore of opinion, that the judgment of the Court of Session is correct, and that the interlocutor complained of ought to be affirmed.

Being of this opinion upon the terms of the settlement, it is not necessary to decide whether the bond is to be considered as an heritable bond: and considering that this is a claim of a creditor against the property of the debtor, and that there was no difference of opinion amongst the judges below, I think that the appeal ought to be dismissed with costs.

LORD BROUGHAM.—My Lords, I entirely agree in the opinion to which my noble and learned friend has arrived in this case, to which I paid as much attention as I could yesterday, though I was prevented by an

GLENDONWYN v. GORDON.

2d Feb. 1838.

engagement elsewhere from hearing the argument on the part of the respondent. But my opinion having been against the appellant upon his own showing, I did not think it so necessary to attend to that argument. I have carefully considered the case, and I have found nothing to shake the opinion which I formed upon reading the words in question.

My Lords, I have here again to express my regret, in which I have no doubt those noble Lords who have attended to those cases will concur, that we have no note of what passed in the Court below; we are left wholly in the dark, not only as to the rationes decidendi, if any were assigned,—(and permit me to observe in passing, that it is less likely that reason will be given for judgments in the Court below if it is well known that no transcript of these reasons ever reached your Lordships, when cases come by appeal. It is obvious that the old practice, the sounder, the more wholesome, and the more convenient practice, of furnishing the Court of appeal with notes of what passed on advising the cause below, that is, deciding the cause below, had a tendency to call the attention of the learned judges to the grounds, and to induce them to state the grounds upon which they gave their judgment when the case came before them;)—my Lords, we not only have no account of the reasons given, and upon which the judgment under appeal was rested, but it so happens, in this case more than even in the last, that we do not know what the question was that came before the Court for its decision. No person can here tell whether the question was either argued at the bar or disposed of by the bench upon the words

of the settlement in the two clauses, the first and the third clause, of the settlement, the passage of the settlement now in question, or upon the other wholly different question, Was or was not the bond heritable not heritable to the defect of the devolution of the succession, but heritable to the effect of its nature in law, and its incidents upon the funds of the obligor of the settlement? If it was heritable cadit questio. My Lords, I must say, that if I were called upon to give an opinion upon it,—though I quite agree with my noble and learned friend that it is unnecessary at present to decide that,—but if I were called upon as at present advised to say whether the nature of this settlement was such that it was a charge upon the land, (I do not mean to say as to devolution,) but whether it was a charge upon the land in respect of its being heritable or no, I am disposed to agree with the Court below, which upon this very bond, or at least a bond conceived in terms of this bond, gave a decision that it was heritable. I mean heritable suâ naturâ; because it is quite immaterial to the question whether as to the devolution of the succession it was so or not; but whether suâ naturâ the bond was an inheritable instrument. Now we do not know whether that was or not the only point raised before the Court, and the only matter disposed of by the Court.

Again, it has been said by the Attorney General, in that part of his argument to your Lordships which I heard, that the real question before the Court was, shall or not diligence go against the party,—the process to compel the production of the instrument, in the nature of a subpœna duces tecum? I must say that we

GLENDONWYN v. GORDON. 2d Feb. 1838.

sit here in a foreign country, as it were in regard to law,—to decide questions upon a law not familiar to the judges who are called upon to dispose of those questions. We are called upon often to lay down a law which shall regulate the decisions of a Court sitting in the other country; which shall regulate the conveyancing and the practice of conveyancers in that country, and shall dispose of the most important rights of the subjects there. We are called upon under those circumstances, and labouring under all those disadvantages, and without the aid which we have in cases arising in this country, in which we are to dispose of questions arising under our own law, namely, the copia prætorii which the attendance of the judges always gives to your Lordships when you call for it. When without that aid, or any thing like that assistance, we are called upon to dispose of such questions, labouring under such great difficulties, it surely is not too much to ask that those necessary difficulties should not be needlessly increased, by keeping us in the dark as to what took place in the Court below,—not only the grounds of the Court's decision, but the very questions raised by the parties before the Court, to be by the Court disposed of. I do hope, therefore, that this second occasion will be one of the last upon which we shall have to complain of it, though undoubtedly during the next five or six cases before your Lordships it may not be very easy to supply the defect of which we now so justly complain.

Now, having said so much upon this case, I have to add, that I entirely take the same view as my noble and learned friend does of the question for your

Lordships decision. In the first place, I think that I should have had no great doubt upon it, if the first of the three limbs of the passage in the settlement stood alone, because what question would then arise? It would raise this question: can the obligee, the party entitled beneficially under the bond of reversion, be said to claim in right either of the father or of the mother, the mother being the obligor in the bond, and the father being the party taking upon himself the burden as obligor in that bond by a kind of transfer from the principal and original obligor? To that question I should have little hesitation in giving a negative answer if it stood alone; but it does not, and the reason why I say I should have little hesitation in giving a negative answer is, that I cannot comprehend how, either in strictness of technical language or in common parlance, a party can be said to claim in right of the obligor of an instrument when that party's claim is wholly constituted by the obligation contracted in that instrument. Suppose I am obligee in a bond granted by A., do I claim in right of A.? No; I claim against it. A claiming in right of A. assumes that I claim by privity with A., that I claim under A. But I claim adversely to A.; I am the obligee, the creditor; A. is the obligor, the debtor. With no accuracy—in no intelligible sense can it be said that the party so claiming quasi creditor is claiming in right of his debtor.

Then it may be said, and at first I was inclined to listen to that contention, that A. having transferred, that is to say, the wife having transferred, so that the husband became the obligor by the transfer, then the obligee, the party under the bond of provision, may be said to claim in right of the original obligor. But still

GLENDONWYN v. GORDON.

2d Feb. 1838.

I think that would be inaccurate; not perhaps so inaccurate as the other, but still it would be very inaccurate, and not either a technical or a sensible construction in common parlance; because, suppose I have an obligation constituted in my favour by A., and claiming against A. adversely as the creditor, and B. the debtor, A. by some other transaction transfers to B., and B. comes in the shoes of A., the obligor and my debtor, it is clear that I do not claim in the right of B., the transferee or assignee of the obligation which A. had contracted with me. But do I any more claim in right of A., the original obligor, my original debtor, the assignor of the obligation to B.? Assuredly not; A. was my original debtor, I do not claim in right of him; B., as my debtor by assignment, I do not claim in right of him; but I claim against B. because B. has placed himself by the contract in the shoes of A. I therefore hold that it is inaccurate to say, either in regard to the original obligation contracted to me or the transfer of that obligation by assignment, that I claim in right either of the assignor of the obligation, that is to say, the person who has transferred to another, or the person to whom that obligation has been transferred.

With respect to the second part of the sentence, the specification part of the clause, it is quite clear; though there is, no doubt, a repetition three times over of legitim by a tautology not unusual in all conveyances in all countries. The legitim is described as legitim —bairns part of gear, which is the usual Scotch-law mode of describing it, and the executory, that is to say, the personalty, which falls under the distribution after the decease, is also specified; it is quite clear that those words do not aid the argument of the appellant or

impeach the judgment of the Court below; but they do more, they aid the argument of the respondent, and tend to set up and confirm the judgment of the Court; because it is an undeniable principle in all construction that where there is an elaborate specification, and particularly an anxious specification, as the Scotch lawyers call it, that then you are to take the construction of generality by the particularity, and limit it accordingly, so as to make it apply to things ejusdem generis. That applies to where there is a doubt; here I do not think there is a doubt, even if there had been no specification.

So far upon the second branch of the disputed clause. The only other remark that arises is, that nothing can be drawn from it in favour of the appellant's argument, but that whatever inference is to arise from it is in favour of the respondents. Then we come, in the last place, to what appears to me, if there had been any doubt upon the preceding part, to leave none whatever, because it says, any thing she can ask or claim "by or "through the decease" of the parent. Can anybody doubt that that which a party claims "by or through "the decease" can in no sense whatever be said to be a description of what he claims, without the least regard to by or through the decease of anybody, except that it marks the term of payment or of performance, namely, the obligation and the right constituted by the bond of provision? It is quite clear that it cannot; I agree that it is inaccurate in any sense to say that any claim even not under the bond of provision,—even of legitim, can arise by or through the decease, because it arises by or through the relation of parent and child. It becomes what the Scotch lawyers call after the civil

GLENDONWYN
v.
GORDON.

2d Feb. 1838.

law, executable, and payable at the decease. Instead therefore of saying " by or through the decease," the accurate expression would have been " upon or after " the decease;" but it is more incorrect to say that the obligation under the bond of provision arises " by or " through the decease" of the parent when it arises by or through the bond, than it is to say that the right of legitim arises by or through the decease. Neither of them is an accurate expression, but I think the former is more inaccurate, and a wider departure from technical language than the latter.

My Lords, I stated that I thought if the first part claiming " in right of" had stood alone, without either the specification in the second or the words " by or " through the decease" in the last, there would have been no doubt. I am clearly of opinion that the latter part removes all doubt, and therefore that the judgment of the Court below, proceeding upon that view as I take for granted it did, if that point were ever raised, is right. I am told it was not, and if so it is still more hard upon us to have that point raised here for the first time which was not raised in the Court below. But whether it was so or not, under the circumstances of this case, and with the unanimous decision in the Court below, —with respect to which there was so little doubt raised in my mind that I was not, for my own part, for hearing the respondent,—the case being so clear, and the further consideration of it not having tended in the slightest degree to cloud it with any kind of obscurity, or to raise any hesitation in our minds, I think, with my noble and learned friend that this appeal ought to be dismissed with costs.

Glendonwyn v. Gordon. — 2d Feb. 1838.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal; the amount thereof to be certified by the clerk assistant.

Archibald Grahame—George Webster, Solicitors.