which I have read, and which would make the finding run thus: "Find, that in the present case the charterers, having stipulated, that they should be entitled to insure freight at the owner's expense to an amount corresponding to the amount of their advances, must be held to have made such insurance a part of their security, and, not having effected any such insurance, must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment." I would submit to your Lordships, that these words should be adopted, and that the interlocutor should be varied in the manner which has been explained.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend with regard to the short ground upon which he has rested his decision in this case. By the contract between the parties the insurance upon the advances was to be effected by the charterer. There was no obligation upon him to insure, except in the sense of its being for his own protection that he should be insured, but as he chose not to insure he took the risk upon himself, and therefore he must bear the loss.

LORD COLONSAY.—My Lords, I concur in the result which has been arrived at, and I think the grounds which have been stated are quite sufficient for the determining of this case.

LORD CAIRNS.—My Lords, I also concur,

Interlocutor of the 2d December 1871 *varied, and, subject thereto, affirmed, together with the interlocutor of the* 31*st January* 1872*; and appeal dismissed with costs; cause remitted.*

Appellants' Agents, W. Mason, S.S.C.; Hillyer, Fenwick, and Stibbard, Fenchurch Street, London. — *Respondents' Agents*, W. Archibald, S.S.C.; Simson, Wakeford, and Simson, Westminster.

MAY 19, 1873.

JAMES MACKINTOSH, Esq., *Appellant*, *v.* MISS EMILY MARIA MACKINTOSH and Others, *Respondents*.

Entail—Heir—Burden—Marriage Contract—Annuity—Relief—*M. in* 1857 *made a deed of entail, and bound himself and his heirs and executors to free and relieve his lands (the entailed estate) of all his debts and obligations. In* 1867 *he executed an antenuptial contract of marriage, providing annuities to his third wife, and in security bound himself to infeft her in the entailed estate, which was done, and the deed reserved an option to him and his heirs to get rid of the burden by purchasing like annuities from an insurance office. M. having died:*

HELD (reversing judgment), *That the heir of entail was entitled to be relieved of the annuities, these being debts and obligations within the meaning of the clause.*[1]

This was an appeal from a judgment of the First Division on a Special Case. The late James Mackintosh of Lamancha executed in 1857 a deed of entail of the estate of Lamancha, binding himself and his heirs, etc. "to free and relieve my lands before disponed of all my debts and obligations." By his last disposition and settlement dated 1857 he confirmed this deed. In 1867 he married a third wife, and settled upon her two annuities, in security of which he bound himself and his heirs to infeft her in the estate of Lamancha, but reserved an option to purchase from an insurance office like annuities, in which case the widow was to give a discharge. James Mackintosh died in 1869, and the First Division held, that the heir of entail was not entitled to be relieved of these annuities. The heir then appealed.

The *Lord Advocate*, and *Asher*, for the appellant.—The judgment was wrong. It is not denied, that the appellant must take the estate, subject to such burdens as existed at the testator's death. But here there was an express clause, that the entailed estate was to be relieved of all debts and obligations, and which must have included future debts.

The annuities were both debts and obligations, and therefore must be paid by the general estate, so as to relieve the heir. The provision as to buying like annuities from an insurance office must have been for the benefit of the trustees, as parties entitled to the general estate, for the interest of the heir of entail would be not to pay off such annuities.

The *Dean of Faculty*, and *Pearson*, Q.C., for the respondents.—The Court below was right. It is well settled, that if debts are imposed on a particular estate, then they are the proper debts of the heir succeeding to that estate—Ersk. iii. 8, 52; 1 Bell's Lect. 237; *Robertson* v. *Robertson*,

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[1] See previous reports 8 Macph. 628: 41 Sc. Jur. 344. S. C. L. R. 2 Sc. Ap. 310: 11 Macph. H. L. 28: 45 Sc. Jur. 180.

M. Competition, Ap. No. 2. The rule applies equally as between the heir and general disponees —*Campbell* v. *Campbell*, Hume, 180; *Campbell* v. *Campbell*, 8 S. 713; *Carrick's Trustees* v. *Moore*, 2 D. 1068; *Douglas* v. *Douglas*, 6 Macph. 233. There is nothing in the combined deeds to alter this general rule. The clause in the deed of entail is merely one of style, and it has never been applied to an annuity to the entailer's widow; nor indeed was such a debt then existent. The clause in the last will to pay debts never includes heritable debts, which these annuities were—Ersk. iii. 9, 48; *Douglas* v. *Douglas*, 6 Macph. 223. As to the option to purchase annuities, this option is expressly given to the entailer and the heirs of entail alone. Besides, even if it was for the benefit of the widow's executors, still it was an option and not compulsory. There is nothing to shew, that the testator did not mean these annuities to remain burdens on the entailed estate.

Cur. adv. vult.

LORD COLONSAY.—My Lords, this is an appeal from a part of a judgment of the First Division of the Court of Session pronounced on a special case stated by the parties. Two questions were submitted to the Court for decision. The first is that to which the present appeal relates. The Court of Session found that the heir of entail was not entitled to the relief he asked.

That judgment was rested mainly on two grounds—1st, That by the law of Scotland, as a rule, a liferent annuity, or a debt secured on heritable estate, is to be borne by the heir succeeding to the heritage in the case of intestate succession, and that the same rule holds in the case of testate succession, unless a contrary intention is made to appear. 2d, That the clause in the entail on which the heir founds cannot in the circumstances be understood as applying to the particular annuities in question. The first of these propositions is admitted, but the appellant contends that a contrary intention is made to appear. The second proposition is disputed.

The late James Mackintosh of Lamancha left three deeds, which are referred to in the special case, viz. 1st, deed of entail of the estate of Lamancha dated in 1857; 2d, last will and settlement dated in 1865; 3d, contract of marriage with his third wife, dated in 1867.

The first of these deeds contains the clause, on which the heir of entail mainly founds, and which is thus expressed: "I oblige myself, my heirs, executors, and representatives whatsoever, to free and relieve my lands before disponed of all my debts and obligations." The second of the said deeds conveyed his whole estates, heritable and moveable, other than the estate of Lamancha, to certain trustees, and directed them to pay "the whole debts which may be due by me at the period of my death," and also to pay certain legacies and bequests, and to divide the residue into six shares, to be distributed in certain proportions among his four children, all of whom were by his first wife. It also contained a clause revoking "all wills and settlements executed by me at any time heretofore, excepting a disposition and deed of entail of my lands and estate of Lamancha, which shall stand, and subsist in full force and effect."

The third of the said deeds made certain provisions in favour of his third wife, including the two annuities of £150 and £70, now in question, and for "her further security and more sure payment" of the said annuities he bound and obliged himself to infeft her in the estate of Lamancha. This deed also contains the following clause, on which the heir of entail founds—"But declaring that it shall be in the option and power of the said James Mackintosh and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said Mary Ann Burn by purchasing at his and their own expense from any respectable insurance company to be selected and approved of by her, an annuity payable to the said Mary Ann Burn in the terms before provided, equal in amount to the said annuity of £150 and yearly sum of £70 hereinbefore provided to her, and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects and others before mentioned and described of the said provisions secured over them as aforesaid."

In January 1867 Mrs. Mackintosh was infeft in the estate of Lamancha on the contract of marriage. In February 1869 Mr. Mackintosh died without having exercised the said option.

It appears from the Special Case, that the rental of the entailed estate was about £700 per annum, and that the public, parochial, and other burdens payable by the proprietor amounted to about £100 per annum. It also appears, that the general trust estate comprehended a house in Charlotte Square, Edinburgh, heritable and personal estate in Calcutta of considerable amount, and personal estate in Britain, exceeding £27,000, and that the two sixths of his estate falling to the share of each of his daughters will be more than £10,000 and less than £20,000.

The heir of entail now claims to be relieved of the annuities by the general trust estate. I am of opinion that he is entitled to be so relieved.

The clause in the entail was certainly intended to impose an obligation somewhere to free and relieve the estate of Lamancha of all Mr. Mackintosh's debts and obligations, and I have no doubt that it was meant to extend to future debts and obligations. The words are quite general; and the Judges in the Court below appear not to have attached importance to the circumstance,

that the obligation in question was contracted at a date subsequent to the entail. Indeed it does not appear, and is not alleged, that at the date of the entail there existed any debt or obligation, and if there was none, the clause must have been intended to apply to future debts and obligations. The purpose of it appears to have been, that the estate of Lamancha should be launched under the entail free from debt; and the conception of the clause appears to have been, not with the view of effect being given to the ordinary rule of law as between heir and executor, but with the view of making a special arrangement because of the entail. The ordinary rule of law as between heir and executor in regard to the incidence of debts is founded on the presumption, that the heritage is capable of bearing all the burdens incident to it. The heir who succeeds to it, if he is not fettered, can deal with it as he pleases, and turn it to the best account for his own relief. But if he is only to be put into possession under the fetters of an entail, his condition will be materially different; and if the entailer intends that the estate he is entailing should be started free from debt, it is quite reasonable that he should make provision for doing so out of his other means, and the more so if his other means are ample, as in this case they are said to have been.

The obligation to free and relieve Lamancha was imposed by the entailer on himself, his heirs, executors, and representatives whatsoever. That appears to have been with him a primary or leading object. If he had himself redeemed the obligation, he must have done so out of his general estate, and which would have been to that extent diminished. Not having done so, on what part of his estate did he intend that the obligation to relieve should devolve? It could not be on the estate of Lamancha, because that was the estate to be relieved. His only other estate was the general estate; therefore, if the relief was to be given by him or by his estate, it was to be given out of his general estate.

It appears to me, that this view is supported by the terms of the trust settlement. It is true that in the general case a direction to trustees in a *mortis causâ* trust deed to pay the debts of the deceased does not of itself imply any deviation from the general rule of law as to the incidence of heritable and moveable debts. But an expressed intention to start an incipient entail, or to add other lands to an existing entail, introduces another element, and gives rise to other considerations leading to the inference, that the testator intended the lands so dealt with to be cleared of debt, even if there was no express declaration to that effect, as the continued existence of debt on these lands might result in defeating the object of the entail.

Here there is the declaration, or rather obligation, of the testator himself in the deed of entail which he referred to in the trust deed as forming part of his settlement, and he directs his trustees to pay all his debts, to record the entail, and to put the heir in possession of Lamancha under and in virtue of the deed of entail.

Taking these two deeds together, I do not doubt that Mr. Mackintosh's intention was, that the estate of Lamancha should be freed and relieved out of his general estate, unless there are special grounds for holding, that the particular annuities in question are not within the range of the debts and obligations to which the clause in the entail has reference.

Up to the time when the trust settlement was executed there did not, so far as we see, exist any debt, that would have affected Lamancha according to the ordinary rule of law as between heir and executor. But then came the marriage contract by which a security over Lamancha was given to the lady for the annuities in question, and by the same deed Mr. Mackintosh reserved to himself, his heirs, executors, and successors, the option and power to purchase for the lady from any respectable Insurance Company to be approved of by her an annuity equal to those in question, and she bound herself thereupon to discharge the security over Lamancha, and disburden that estate thereof.

Upon this deed several observations have been made. First, it has been observed, that the burden it imposed was subsequent to the date of the entail. I have already shewn that this circumstance is immaterial, and may be dismissed. Secondly, an observation to which some importance appears to have been attached in the Court below was, that as Mr. Mackintosh was wealthy, and could have provided for his widow otherwise, it is difficult to understand why he should have imposed the burden on the entailed estate, if he intended it to be borne by his general estate. I am not much moved by that observation. It may be, that Mr. Mackintosh could have provided for his widow by placing funds in the hands of trustees for that purpose, or by coming under obligation to do so, or to provide her with a jointure; but we do not know how his funds were employed at that time. He may not have been disposed to disturb his investments, or to lock up funds in the hands of trustees. The lady or her advisers may have preferred immediate substantial security over Lamancha to an obligation *de futuro*, to be implemented out of floating capital.

Thirdly, it was contended, and that appears to have been the main ground of judgment in the Court below, that the annuities secured over Lamancha are not a debt, or at least are not a debt in the sense of the clause in the entail; that they are not a capital sum due, which might be at once paid off, but are a continuous security over the rents for the termly annuities as they fall due, and similar to the right which the present or future heirs of entail would have, to make

provisions for their widows under the Aberdeen Act, or under the powers given by the entail, which are similar to those of the Aberdeen Act. I am not satisfied with that view. The clause of relief in the entail applies to "all my debts and obligations." I am of opinion, that these annuities constitute a debt in the ordinary sense of the word. They are a debt, in which the widow is the creditor, and the representatives of Mr. Mackintosh are the debtors, and for payment of which the estate of Lamancha may be attached, unless the relief sought be given. But whatever ingenious criticism may be made on the word "debts," it is impossible to escape the generality of the word "obligations." Neither can the obligation be assimilated to a provision under the Aberdeen Act. It does not profess to be anything of the kind. It has none of the requisite conditions or limitations as to the amount or liability or mode of recovery. The only similarity is, that it is a provision for a widow. Nor does the circumstance, that it is an obligation for an annuity, and not for a capital sum, appear to me to raise any practical difficulty. The clause in the marriage contract provides for and sufficiently meets any difficulty of that kind that might have been raised. It reserves the power to relieve the lands, and prescribes the mode. The only question is as to the evidence of the obligation, and I would here again observe, that at the very moment of imposing the burden on Lamancha, Mr. Mackintosh had in contemplation the removal of it by himself or his representatives, and must have intended the relief to come, not out of Lamancha, but out of his own other means, that is to say, out of the general estate. The respondents say, that they cannot purchase an annuity, as no direct power to do so is conferred on them by the trust deed. But if I am right in holding, that the clause of relief in the entail was intended to attach to the general estate, it follows, that the power reserved in the marriage contract may be exercised by the respondents, as the trustees of that estate. They also say, that they have no interest in purchasing an annuity, which would be an expensive proceeding. The same observation would apply to the appellant. But if the obligation to relieve Lamancha has devolved on the general estate, the respondents must give the relief in the mode provided, unless they can find a less expensive and equally effectual mode of doing so.

For these reasons, I am of opinion that the interlocutor of the Court of Session of date 2d March 1870, in so far as appealed from, should be reversed, and that judgment should be pronounced in terms of the third of the alternative forms set forth in the Joint Case, in so far as regards the subject matter of this appeal. If your Lordships concur in the view that I have expressed, it may be a question whether there ought not to be a remit to the Court, because a decernitor may be required, upon which proceedings may be taken. Perhaps the parties will consider that.

LORD CHELMSFORD.—My Lords, I agree in the motion that has been made.

Lord Advocate (for the appellant).—I think it is quite proper that there should be a remit.

LORD COLONSAY.—Then the judgment will be in the terms I have stated. There will be a remit to the Court to do whatever is necessary.

Lord Advocate.—I presume your Lordships have intentionally abstained from saying anything about costs?

LORD COLONSAY.—Yes.

Interlocutor of 2d March 1870, *in so far as appealed from, reversed; and judgment pronounced in terms of the third of the alternative forms set forth in the Joint Cases, in so far as regards the subject matter of the appeal: Cause remitted.*

Appellant's Agents, T. and R. B. Ranken, W.S.; Tatham and Proctor, London; *Respondents' Agents*, Alex. Howe, W.S.; Loch and Maclaurin, Westminster.

MAY 19, 1873.

WILLIAM D. R. SCOTT GLENDONWYN, *Appellant, v.* SIR ROBERT GLENDONWYN GORDON, Bart., *Respondent.*

Entail—Fetters—Institute—General Disposition—Special Destination—Extrinsic evidence to explain Will—*X. was institute under a deed of entail of the lands of C., but the fetters did not bind her. She was also owner in fee of an estate of P. In her general settlement she conveyed all her estate, heritable and moveable, and particularly the estate of P., to G., but nothing specially was mentioned as to the lands of C.*

HELD (affirming judgment), *That it was competent to shew by the actings of X. in reference to the estate of C., that she believed she was prevented from disposing of that estate, or at all*