Friday, May 21.

CALLANDER *v.* CALLANDER.

Entail—Bond of Provision—5 *Geo. IV., c.*87. A deed of entail contained a clause which empowered the heirs in possession to provide younger children's provisions, it being declared that these were to be provided and secured only by way of infeftment and locality, or by assignation to the rents of such part of the lands as the granter of the provision might select. An heir in possession granted a bond of provision, stating it to be done in exercise of the powers conferred on him by the said clause of the deed of entail, which clause he narrated, and binding the succeeding heirs to pay a principal sum, and to infeft trustees in an annualrent furth of the whole lands, and in the lands themselves. *Held* (1) that the bond of provision was reducible, not being granted in the only way permitted by the deed of entail; and (2) that it could not be set up under the Aberdeen Act, the granter having expressly stated it to be granted under the power in the said clause of the deed of entail.

In 1799 Sir John Callander of Westertown executed a deed of entail of the lands of Crichton and Prestonhall and others. The deed of entail contained these provisions:—"As also reserving full power and liberty to the said heirs and substitutes of entail, being in the right and in the possession of the said lands, to provide their children and the children of their eldest sons or daughters, grandsons or grand-daughters, besides and other than the heir succeeding to the said estates, in portions and provisions to the following extent—*videlicet*, in case of one child who does not succeed as aforesaid, to the extent of two years' rent of the said estates at the time of granting the said bond; in case of two children not entitled to succeed to the said estates, to the extent of three years' free rent; and in case of three or more children, to the extent of four years' free rent of my said estates at the period aforesaid, after deduction of all legal and public burdens; and which provisions to the said children shall not bear interest until after the death of the granters, or the father of the child to whom they are granted: All which provisions to whole aforesaid children shall be divided as their respective fathers shall by any deed or writing under his hand nominate and appoint, and failing of any such nomination, equally between and among them, share and share alike: And which whole provisions to the children of the heir in possession, or to the children of his or her eldest son or daughter, grandson or granddaughter, shall be payable successively in the order in which they shall have been granted, and shall be provided and secured only by way of infeftment and locality, or by assignation to the rents, mails, and duties of such parts and portions of the lands and others hereby resigned, as to the granter of the said provisions shall seem meet, not exceeding a fourth part of the yearly rent of the whole lands above resigned, free of all public burdens and deductions whatsoever; and which localities or assignations, if in favour of the children of the heir in possession, shall commence from the term of Whitsunday or Martinmas immediately preceding the death of the granter, and if in favour of the children of the eldest son or grandson as aforesaid, shall commence from the term of Whitsunday or Martinmas next, and immediately preceding the death of their own father; and which localities or assignations respectively shall subsist until the rents so to be assigned and annually applied to the payment of the said provisions and growing interests thereof shall or may have extinguished the same, and no longer, after which the said localities or assignations shall cease and determine, even although, by indulgence or neglect, the said rents shall not have been regularly levied and applied as said is: And declaring that it shall not be lawful for any of the aforesaid heirs of taillie to grant any other kind of security over the said lands and estates for any of the said provisions to children, except in the way of locality or assignation in manner aforesaid; nor shall it be lawful to the said children to use any manner of diligence whatsoever against the said lands and others hereby disponed, or to affect the same in any way, except for levying the rents and duties to be assigned for the payment in manner aforesaid."

In 1841 William Burn Callander, then heir of entail in possession of these lands, executed a bond of provision which ran thus:—"I, William Burn Callander, Esq. of Westertown, considering that I stand vested in the lands and estates of Crichton and Prestonhall, in the county of Edinburgh; Elphinstone, in the county of Haddington; and Westertown, in the county of Stirling; under and by virtue of a deed of entail, made and granted by the deceased Sir John Callander of Westertown, Baronet, my grand-uncle, dated the 29th day of May 1799, and of a deed of rectification thereof, dated the 7th day of March 1806, and both recorded in the Books of Session on the 1st day of May, and in the Register of Entails on the 28th day of November 1812; and that by the said deed of entail there is reserved 'full power and liberty to the heirs and substitutes of entail, being in the right and in the possession of the said lands, to provide their children, and the children of their eldest sons or daughters, grandsons or granddaughters, besides and other than the heir succeeding to the said estates, in portions and provisions, to the following extent, viz.:—In case of one child who does not succeed as aforesaid, to the extent of two years' rent of the said estates at the time of granting the said bond; in case of two children not entitled to succeed to the said estates, to the extent of three years' free rent; and in case of three or more children, to the extent of four years' free rent of the said estates, at the period aforesaid; after deduction of all legal and public burdens.' That the net rental of the said entailed estates of Crichton, Prestonhall, Elphinstone, and Westertown, after deducting all legal and public burdens, amounted, for crop and year 1840, being the last rental at present made up, to £6703, 4s. 5½d. sterling, conform to the rental thereof made up by my factor, an abstract of which is appended hereto, and to other vouchers referred to in said abstract. And now seeing that I am desirous to exercise the powers conferred on me by the above quoted clause of the said deed of entail: Therefore, in virtue of the said power, I hereby bind and oblige the heirs of entail, succeeding to me in the said entailed estates, on the day after my death, in the event of my leaving any child or children, either of my present or of any future marriage, and whether born before or after my death, who may not be entitled to succeed to me in the said entailed estates, to pay to the Right Honourable James Andrew Earl of Dalhousie,

John Burn Murdoch, Esquire of Newck, advocate, my brother; Edward Burn, late of London, merchant, also my brother; and William Bruce, merchant in Leith; and to the survivors or survivor of them who shall accept, the majority accepting and surviving being always a quorum, and with power to assume others when they think right, as trustees for the purposes after mentioned, and to their or his assignees, the several sums of money in the several events after mentioned, viz.:—In the event of my leaving only one child who does not succeed to me in the said entailed estates, the sum of £13,000 sterling, being under two years' free rent of the said estates at this time; in case of two children not entitled to succeed to me in the said estates, the sum of £19,500 sterling, being under three years' free rent of the said estates; and in case of three or more children not entitled to succeed to me in the said estates, the sum of £26,000 sterling, being under four years' free rent of the said estates at this time, after deduction of all legal and public burdens, in terms of the before-quoted clause of the said deed of entail; with a fifth part more, &c. . . . . and for the further security and more sure payment of the foresaid sums, I hereby bind and oblige myself, and the heirs of entail succeeding to me in the said lands and estates, duly and validly to infeft and seise the said Right Honourable James Andrew Earl of Dalhousie, John Burn Murdoch, Edward Burn, and William Bruce, and the survivors or survivor of them who shall accept, or those who shall be assumed, as trustees foresaid, not only in all and whole an annualrent of £1300 sterling, or such other annualrent, less or more, as shall, by law for the time, correspond to the foresaid principal sum of £26,000 sterling, being the largest sum, in any event, provided by this deed, restrictable, as before and after mentioned, to be uplifted and taken, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first uplifting thereof at the first of these terms which shall happen after my death, and so on, to continue yearly and termly thereafter to be uplifted by them, during the not payment of the said principal sums, with a fifth part more of each term's annualrent of liquidate penalty, in case of failure, furth of all and whole (*here follows the description of the lands*), or furth of any part or portion thereof, readiest rents, profits, and duties of the same; declaring, however, that the said annualrent shall be restricted to £975 sterling in the event of my leaving only two children entitled to said provisions, and to £650 sterling, in the event of my leaving only one such child; and declaring also, that in case the provisions hereby granted shall be found to exceed the proportions mentioned in the said deed of entail, and before recited, of the rent or value of the said entailed estates, or to be granted in a form not allowed by the said deed of entail, the provisions hereby granted shall not be deemed to be void and null, but the same shall only be reducible to such extent as they shall be found to exceed the provisions authorised to be granted by the said deed of entail, but no farther, or the form shall be varied in compliance with what shall be held to be the meaning of the said deed of entail; but also in all and whole the said lands, teinds, and others foresaid with the pertinents themselves, and that in real security to the said trustees of the foresaid sum of £26,000 sterling, annualrents thereof, liquidate expenses, and termly failures, in so far as incurred, but restrictable, however, to the sum of £19,500 sterling in the event of my leaving only two children entitled to said provisions; and to the sum of £13,000 sterling in the event of my leaving only one such child."

William Burn Callander died in 1854, leaving four children; the eldest of whom, John Alexander Burn Callander, succeeded to the entailed estates, and died in 1865, being succeeded in the estates by his eldest son, Henry Callander, a pupil. Two of the younger children of William Burn Callander now sued Henry Callander for payment of their provision under the bond of 1841, maintaining these pleas:—"(1) By the said deed of provision the heirs of entail were bound to pay, for behoof of the younger children, a sum amounting to four years' free rents of the entailed estates as at the death of the granter; and the pursuers, as assignees of two-thirds thereof, are entitled to enforce the same against the defender. (2) Or otherwise, the pursuers are, in virtue of the said bond of provision, and disposition and assignation thereof, assigned into two-thirds of one-fourth part of the rents of the entailed estates, until the amount due to them under the said bond is paid; and the pursuers are entitled to decree against the defender in conformity therewith. (3) Or otherwise, the heirs of entail were and are bound to pay to the pursuers an annual sum amounting to two-thirds of £1300, and the pursuers are entitled to recover from the defender the amount of such annual payment for the time for which he has possessed the estates, with interest, and to obtain decree for the future annual payment aye and until the amount due to them under the said bond is paid. (4) Or otherwise, under the said bond and disposition, and assignation thereto, and under and in virtue of the Aberdeen Act, the pursuers are entitled to recover from the defenders two-thirds of three years' free rents, as at the date of the death of the granter of the said bond."

The defender pleaded, *inter alia*—"(2) The alleged bond of provision is invalid and ineffectual in so far as regards the said defender and the entailed estates, in respect that it is *ultra vires* of the granter thereof as heir of entail in possession of said estates under the deed of entail in virtue of which the alleged bond bears to be granted, and the defender should be assoilzied accordingly. (3) The said alleged bond cannot be sustained as a bond granted under and in virtue of the Act 5 George IV., cap. 87, in respect that it was not granted under and in virtue of the powers of that statute, and is so expressed as to exclude the view that it was granted under and in virtue of these powers, and the defenders should therefore be assoilzied from the last alternative conclusion of the action."

The Lord Ordinary (ORMIDALE) pronounced this interlocutor:—"Finds that, under the deed of entail in question, power is reserved to the heirs and substitutes of entail, being in the right and possession of the entailed lands or estates, to provide their children, other than the heir succeeding to said estates, in portions or provisions, to the extent, in case of one such child, of two years' free rent; in case of two such children, of three years' free rent; and in case of three or more such children, of four years' free rent; and that by said deed of entail it is declared that said provisions should be provided and secured only by way of infeftment and locality, or by assignation to the rents, maills, and duties of such parts and portions

of the entailed lands as to the granter of said provision should seem meet, not exceeding a fourth part of the yearly rent of the whole entailed lands, free of all public burdens and deductions whatsoever, said provisions to be made payable and to subsist as mentioned in the deed of entail: Finds that, by the bond of provision libelled on, the deceased William Burn Callander, as heir of entail in possession for the time of the entailed estates in question, on the narrative, and in virtue of the powers conferred on him by the said deed of entail, made provisions in favour of his three younger children, not succeeding to the entailed estates, to the effect of entitling the pursuers, as two of said three younger children, to two third parts of four years' free rents of the entailed estates, payment thereof to be secured by way of infeftment for an annualrent as therein mentioned, and subject to the declaration, that in case the provisions thereby granted should be found to exceed the proportions mentioned in the deed of entail, they should not be deemed to be void and null, but that the same should only be reducible to such extent as they should be found to exceed the provisions authorised to be granted by the said deed of entail, but no farther, or that the same should be varied in compliance with what should be held to be the meaning of the deed of entail: Finds also, that by said bond of provision the said deceased William Burn Callander assigned to his trustees therein named not only the rights, titles, and securities of the entailed estates, but also as much of the rents thereof as would pay the provisions thereby constituted in favour of his younger children: Finds that, by the disposition and assignation libelled on, executed in favour of the pursuers by Mr Hugh Bruce, as the surviving trustee acting under said bond of provision, they are now directly in right of the provisions constituted in their favour as aforesaid: Finds that, by judgment of this Court, dated in December 1863, pronounced in an action of reduction of said bond of provision, at the instance of the eldest son and heir (succeeding to the entailed estates in question) of the said deceased William Burn Callander, against his trustees, appointed by and acting under said bond, it was held that the bond was a valid and operative instrument, notwithstanding an alleged defect in its testing clause: Therefore, in these circumstances, repels the defenders' first two pleas in law, and appoints the case to be enrolled, in order to be farther proceeded with.

"*Note.*—It was explained, on the part of the defenders, that their first plea in law was stated, not in the expectation that the Lord Ordinary could sustain it in the face of the judgment of the Court referred to in the above interlocutor, and reported in 2 Macph., p. 291, but merely to keep the question open, in the event of their appealing that judgment to the House of Lords. In regard to the defenders' second plea, which has now also been repelled, it has to be observed that the summons in this case contains four alternative conclusions, the three first being founded on the powers of the deed of entail, and the last on the Aberdeen Act. But the argument hitherto addressed to the Lord Ordinary had reference not so much to the particular conclusion of the action under which the pursuers are ultimately to ask decree, as to the question whether they are entitled to any decree at all; it being contended, on the part of the defenders, that the pursuers were not entitled to decree to any extent or effect, for the reason (as stated in the defenders' second plea in law), that the bond of provision on which they have libelled is invalid and ineffectual, in respect that it is *ultra vires* of the granter thereof, as heir of entail in possession of the estate in question, under the deed of entail in virtue of which the bond bears to be executed, and consequently that the pursuers are not entitled to have any decree pronounced in their favour in the present action, laid as it is on the said bond of provision. It was urged by the defenders, in support of this contention, that the bond of provision could not be sustained as being granted in virtue of the Aberdeen Act, as it expressly bore to be granted in virtue of the powers of the deed of entail alone. In answer to this, the pursuers cited and relied on the case of *Macdonald Lockhart*, as decided in this Court (15th July 1853, 15 D. 914); but the authority of that case, so far as it can be held to bear on the present point, appears to the Lord Ordinary to be very much shaken by the remarks of the Lord Chancellor (Cranworth) and Lord Brougham in the subsequent case of *Dickson* v. *Dickson*, in June 1854, 1 Macq. p. 729. The Lord Ordinary, therefore, would not, as now advised, be disposed to pronounce decree in terms of the fourth or last conclusion of the summons, founded as it is on the Aberdeen Act. Neither would the Lord Ordinary be disposed at present to give decree in terms of the first conclusion of the summons, as it does not appear to him that the deed of entail imposes an obligation and liability for the provisions in question on the heirs of entail. It does, however, appear to the Lord Ordinary that the deed of entail affords sufficient warrant for decree being pronounced under one or other of the second and third conclusions of the summons, and therefore he has repelled the defenders' second as well as their first plea in law. The only objection suggested to this view on the part of the defenders, as the Lord Ordinary understood their argument, was, that while the deed of entail only authorised an infeftment and locality, or an assignation to rents, to the extent of a certain specific portion of the entailed estates, sufficient to satisfy the provisions in favour of younger children, the bond libelled on is not so limited, but embraces the whole of the entailed estates. The Lord Ordinary cannot think that this is a good objection, as, in his opinion, it is quite competent to have the provisions restricted, if necessary, in the range of their operation as well as their amount, so as to obviate any such objection as that referred to. Whether any restriction is necessary, either as regards the operation of the pursuer's provisions or as to their amount, is a matter on which parties are still to be heard. The Lord Ordinary, however, was led to understand that if it were once definitely settled that the defenders' second plea in law is untenable, and that the bond of provision founded on by the pursuers is valid under the entail, all other subordinate questions would probably be adjusted without farther litigation."

The pursuers reclaimed.

GORDON, Q.C., MILLAR, Q.C., and J. MARSHALL, for reclaimer.

CLARK and H. SMITH for respondent.

At advising—

LORD PRESIDENT—This is a case of very great importance to the parties. It involves a large sum of money, and it must be attended apparently with a good deal of hardship in whatever way it is decided. The younger children of the late Mr

Callander, who are pursuers of the action, have apparently no other provision but that which they seek here to establish; and, on the other hand, the heir of entail in possession we have reason to know otherwise is not in a condition to sustain any very heavy burden. But we must dispose of the case on purely legal considerations, without regard to the pecuniary interests of the parties.

The late Mr William Burn Callander, the granter of this bond, proposed in it to exercise the powers conferred on him by this deed of entail under which he holds the estate, and the first question for consideration is, whether he has validly exercised that power, or whether, as the Lord Ordinary puts it, he has exercised that power in such a way that the provision which he has made may in some way or other be given effect to consistently with that power. The second question is, whether the bond may not be held good under the Aberdeen Act?

First, as to the leading question. The deed is a very peculiar one, and is in some respects different from any deed I remember to have seen; but I do not think there is any great difficulty in understanding what the maker of the entail intended should be done in the exercise of that power, or, indeed, in ascertaining the way, and the only way, in which he prescribed to the heir of entails that they should make their provisions. He says, in the first place, that he reserves power to the heirs of entail to provide liferent jointures in favour of their wives and husbands, and in favour of the wives and husbands of their eldest sons, and so on. This is not the part we are immediately concerned with, but it must be kept in view as a part of that reserved power of making provisions with which we have actually to deal. Now, in the case of the wife and the husband, it must be kept in view that the entailer restricts the heirs of entail, not only in the amount of the provisions, but also in the way in which they are to be made. The provision is not to exceed £1000, and is to be made only by way of infeftment, and in a yearly annuity out of the lands, such liferent annually not exceeding £1000, or one-sixth of the free yearly rent. It is to be of fixed amount, not located on any part of the lands, but payable generally out of the entire estate. The power of making provision to younger children stands in such respects in contrast to that. The entailer reserves power to the "heirs and substitutes of entail, being in the right and in the possession of the said lands, to provide their children and the children of their eldest sons or daughters, grandsons or granddaughters, besides and other than the heir succeeding to the said estates, in portions and provisions to the following extent—*videlicet*. . . . . And which whole provisions to the children of the heir in possession, or to the children of his or her eldest son or daughter, grandson or granddaughter, shall be payable successively in the order in which they shall have been granted, and shall be provided and secured only by way of infeftment and locality, or by assignation to the rents, maills, and duties of such parts and portions of the lands and others hereby resigned, as to the granter of the said provisions shall seem meet, not exceeding a fourth part of the yearly rent of the whole lands above resigned, free of all public burdens and deductions whatsoever." Stopping here in the meantime, two observations occur which are confirmed by subsequent parts of the deed. The first is, that there is here no obligation imposed on succeeding heirs of entail to pay the provisions; and the second is that the only way in which they are to be provided and secured is by way of infeftment and locality, or by way of assignation to the rents. Now, I don't know if it is possible, taking these words as they stand, to put any other legitimate construction on them but one. The law is familiar with provisions by way of locality. It is not so familiar with provisions by way of assignation to the rents of a fixed portion of the estate. That is very parallel, and perhaps only a less formal way of constituting a right like that of locality. Now, a locality has a different effect from a provision of annuity out of the entire estate, or out of the rents of the entire estate, for, in the first, the provision being localised on a portion of the estate, the party in right of it takes his risk of that portion maintaining its value during the time the provision lasts, and the heir to the rest of the estate takes the risk of his portion. But there is an advantage to the heir in possession, for if the provisions were secured over the entire estate, they would be preferable over the whole. There is thus a material difference between these provisions, and the maker of this entail has emphatically said that these bonds of provision shall be provided and secured only in this particular way by locality or by assignation to the rents of a certain definite part of the estate.

It was ingeniously argued by the pursuer's counsel that the words "shall be provided and secured only by way of infeftment and locality or by assignation," &c., might only be intended to mean that this is the form of security that is limited, and that the provision stands independently; that the security may be bad so far as the estate is concerned, and yet be good against the heir of entail. I am sorry that I cannot give effect to that contention, for there is no other way in this deed for making provisions but what is contained in these clauses, and it must be observed that the words are "*provided and secured.*" But this is still clearer from the rest of the clause, which runs thus:—"And which localities or assignations respectively shall subsist until the rents so to be assigned and annually applied to the payment of the said provisions and growing interests thereof shall or may have extinguished the same, and no longer, after which the said localities or assignations shall cease and determine, even although, by indulgence or neglect, the said rents shall not have been regularly levied and applied as said is." Now, there is a very important protection to the heir in possession, and it would be impossible to give effect to that consistently with the contentions of the pursuers; for, if they are right, they have an obligation from the heir for payment of a capital sum: "Declaring that it shall not be lawful for any of the aforesaid heirs of taillie to grant any other kind of security over the said lands and estates for any of the said provisions to children, except in the way of locality or assignation in manner aforesaid; nor shall it be lawful to the said children to use any manner of diligence whatsoever against the said lands and others hereby disponed, or to affect the same in any way, except for levying the rent and duties to be assigned for the payment in manner aforesaid," showing that this form, and this only, can be permitted in making provisions. It does not appear to be necessary to read any more clauses of the deed. I think we have seen very clearly from what has been read that the relaxations of the fetters of the entail, so as to enable the heirs to make provision for their

widows and younger children, are so expressed as to be of a very strict kind, and that the purpose of the entailer, which I think is well carried into effect, is to declare that no provision shall be made under the powers of this deed except in the particular manner he has himself prescribed.

The question, then, we have to consider is, whether the bond is made in conformity with the rules prescribed by the entail? The first clause of the bond, after recital of the powers, is expressed thus:—"Therefore, in virtue of the said power, I hereby bind and oblige the heirs of entail succeeding to me in the said entailed estates, on the day after my death, in the event of my leaving any child or children, either of my present or of any future marriage, and whether born before or after my death, who may not be entitled to succeed to me in the said entailed estates, to pay to trustees named the several sums of money in the several events after mentioned, viz.," &c. The first question is, was Mr Callander entitled to impose such an obligation on the succeeding heirs? I cannot find any authority for that in the deed. I can find no authority for imposing on the heirs of entail a personal obligation to pay a capital sum, and that, and that only, is what is done here. The only other thing he does is to create a real security for the fulfilment of that obligation, and that I think is the whole of this deed. The deed proceeds thus:—"And for the further security and more sure payment of the foresaid sums, I hereby bind and oblige myself, and the heirs of entail succeeding to me in the said lands and estates, duly and validly to infeft and seise the said parties, as trustees foresaid, not only in all and whole an annualrent of £1300 sterling, or such other annualrent, less or more, as shall, by law for the time, correspond to the foresaid principal sum of £26,000 sterling, being the largest sum, in any event, provided by this deed, restrictable as before and after mentioned, to be uplifted and taken at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first uplifting thereof at the first of these terms which shall happen after my death, and so on, to continue yearly and termly thereafter, to be uplifted by them during the not payment of the said principal sums, with a fifth part more of each term's annualrent of liquidate penalty in case of failure, furth of All and Whole (*here follows the description of the lands*), or furth of any part or portion thereof, readiest rents, profits, and duties of the same; declaring, however, that the said annualrent shall be restricted to £975 sterling in the event of my leaving only two children entitled to said provisions, and to £650 sterling in the event of my leaving only one such child; and declaring also that, in case the provisions hereby granted shall be found to exceed the proportions mentioned in the said deed of entail and before recited, of the rent or value of the said entailed estates, or to be granted in a form not allowed by the said deed of entail, the provisions hereby granted shall not be deemed to be void and null, but the same shall only be reducible to such extent as they shall be found to exceed the provisions authorised to be granted by the said deed of entail, but no farther, or the form shall be varied in compliance with what shall be held to be the meaning of the said deed of entail; but also in all and whole the said lands, teinds, and others foresaid, with the pertinents themselves, and that in real security to the said trustees of the foresaid sum of £26,000 sterling, annualrents thereof, liquidate expenses, and termly failures, in so far as incurred, but restrictable, however, to the sum of £19,500 sterling in the event of my leaving only two children entitled to said provisions; and to the sum of £13,000 sterling in the event of my leaving only one such child" Then come the proper feudal clauses and the ordinary clauses of assignation to writs and rents, with a precept of sasine and power of redemption. Now, it appears to me that this is just a formal bond by which he binds the heirs in a sum of money, and clothes it with a real security in the form of infeftment in an annualrent and in the lands themselves. It appears to me that that is as unlike the provision contemplated by the entailer as could have been devised, and is the reverse of what the entailer intended. He did not mean to make the heir personally liable for a sum of money, nor that there should be any security over the whole estate, or any security in this form, for he has told us that he will allow no form but that of locality proper, or assignation to the rents of a definite portion of the estate, to be fixed by the granters of the bonds themselves.

But it is said that the granter of this bond has appealed to the Court to set right any error he may have committed in following out the will of the entailer, because we have the power to vary the form in compliance with what shall be held to be in accordance with the deed of entail, and power to restrict the annuity. I should not be disposed to shrink from doing anything competent in the way of restricting a bond of provision so as to make it valid; and, so far as restriction is concerned, I don't think there would be any difficulty. Even if the security granted by the granter of the bond of provision were too extensive as regards the powers of the deed of entail, that might perhaps be restricted. But the excess of power here is more radical and irremediable; for the deed of entail demands that the granter of the bond shall set apart that portion of the estate which is to be subject to the bond of provision, and that he has failed to do. He has failed to do the only thing he had power to do, and the question is, can the Court do it for him? Can the Court substitute for this deed a deed which shall be within the powers of the entail? And can they, in making that deed, exercise the discretionary power given to the granters of bonds of provision of selecting the portion of the estate on which the liability shall rest? I think that is beyond the powers of this Court, and beyond anything that was contemplated. And therefore I must differ from the Lord Ordinary, and must hold that it is impossible to set up this deed as a due exercise of the powers contained in the deed of entail. In point of fact, I think the Lord Ordinary has hardly looked the difficulty in the face. He appears to think that in some way or other something may be worked out from some of the conclusions of the summons to make this bond effectual. I should like to see it worked out. I think if the Lord Ordinary had tried to work it out he would have found these difficulties I have mentioned, and others arising from the conclusions themselves. It is obvious to me that, even if we had power to reform this deed, it could not be done in the way contemplated by the second and third conclusions of the summons, which are as inconsistent with the deed of entail as is the bond itself.

But another question is raised by the fourth conclusion, whether this bond may not be sustained

as being justified by the provisions of the Aberdeen Act: whether the heir is not here dealing with his estate in virtue of that relaxation of the fetters of the entail which is given him by the Aberdeen Act? Now, to enable an heir to burden his estate in the way provided by the Act, it is not necessary that he should recite the powers of the Act, or even that he should specially refer to them, if without doing so he proceeds to do something that can be justified by the Act. In short, the Aberdeen Act is incorporated into every entail. But then, while that is so—and one might go the length of saying that the bond of provision might be sustained if consistent with the provisions of the Act, although the granter did not know he had the powers under the Act—the question remains, whether that will avail the pursuers for setting up this bond? For I must say, that if a party in possession of an entailed estate knows that he has power to make provision under the deed of entail itself, and also that he has power to do so under the Aberdeen Act, and distinctly expresses his intention to make them under the deed and not under the Act, I apprehend the Court cannot give effect to the bonds so granted as being bonds under the Act, for that would be against the plain intention of the granter of the bonds. If the granter says, "I will not make a provision under the Act, but I will make one under the deed," the Court cannot turn that into a bond under the Act. And even though that is not formally expressed, if it clearly appears by implication that that was the purpose of the granter, I fear the result must be the same. Now it must be observed that Mr Callander in this bond expressly sets out the power he is going to exercise. He says, "Considering . . . that by the said deed of entail there is reserved full power and liberty to the heirs and substitutes of entail, being in the right and possession of the said lands, to provide their children," &c., "and now seeing that I am desirous to exercise the powers conferred on me by the above quoted clause of the said deed of entail, therefore, in virtue of the said power," &c. There is no appearance there of any intention to go beyond the power of the deed, but a very express declaration that his purpose is to exercise that power and no other. It might be said, suppose that after all that he does go on and make a provision not in terms of the deed of entail, but in terms of the Act, is that not to be given effect to? It is not necessary to answer that question, for that is not done either here, for the provision has just as little resemblance to the provision contemplated by the Act as that contemplated by the deed of entail. We cannot even suppose that he was under any misconception as to whether he had power or not under the Aberdeen Act to make provisions, for he says he has exercised the powers of that Act, and therefore they were in his mind at the time of this provision, for he declares that they are to be postponed, and be posterior to an annuity of £2300 settled by him on his wife under the powers of 5 Geo. IV., c. 87. Having thus the two sets of powers before his mind, he says, "the power I mean to exercise is that which I have set out at the commencement of this bond." I am sorry to say, therefore, that on this point too I cannot resist the plea of the defender, and I must hold that this is a bad bond in every way, and incapable of being supported either by the powers under the deed of entail or by the powers under the Aberdeen Act.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the bond sued on is inoperative to any legal effect. I regret this conclusion, but it appears to me inevitable.

The bond bears to be granted under a specified deed of entail, and under a special clause in that entail. The clause is quoted in the bond, which then narrates that the granter is "desirous to exercise the powers conferred by the above quoted clause of the said deed of entail."

I consider it to be an undoubted general principle in entail law that the powers conferred by the entail, as exceptions from the fetters thereby imposed, must be exercised in terms of the entail; otherwise, that any deed bearing to exercise the powers is void, and falls under the prohibitions of the entail.

The bond of provision in the present case appears to me, very clearly, not granted in terms of the powers in the entail. The entail gives power to provide younger children with a sum, where there are three or more, not exceeding four years' free rent of the estate, as at the date of granting the bond. But it is declared, in the most express terms, that the sum "shall be provided and secured only by way of infeftment and locality, or by assignation to the rents, maills, and duties of such parts and portions of the lands as to the granter of the provisions shall seem meet, nor exceeding a fourth part of the yearly rent of the whole lands." And again, "which localities or assignations respectively shall subsist until the rents so to be assigned and annually applied to the payment of the said provisions and growing interests thereof shall or may have extinguished the same, and no longer; after which the said localities or assignations shall cease and determine, even although, by indulgence or neglect, the said rents shall not have been regularly levied and applied." And it is declared that "it shall not be lawful for any of the aforesaid heirs of taillie to grant any other kind of security over the said lands and estates for any of the said provisions to children, except in the way of locality or assignation in manner aforesaid." The mode of making the provision is thus declared to be exclusively the assignment of the rents of specific portions of the estate, which shall be applied in payment of the sum, and shall be credited in extinction of it, even though not regularly levied and applied. This is a very explicit provision, in the exact following out of which the heirs of entail, who would have free possession of the remainder of the estate, are materially interested.

In place of so proceeding, Mr Burn Callander, by the bond now in question, laid the whole sum of the provision as one indiscriminate debt on the heirs of entail, declaring the whole amount to be payable on the day after his death. For the capital sum, so made a debt on the heirs of entail, he granted an heritable bond over the whole entailed estate, making the debt exigible out of all or any part of the estate, and assigning the whole rents for its extinction, so as to enable the creditor, immediately on his death, to levy the whole in satisfaction of the debt. This is manifestly a deed of a wholly different description from that authorised by the entail—so radically and fundamentally different, that no mere proceeding of restriction can convert the one into the other. I am of opinion that it is therefore invalid.

It is said that by confining the deed, in its practical operation, to the clause of assignation of the rents, and by the Court limiting the assigna-

tion to specific farms on the estate, the deed may be restricted to that allowed by the entail. I cannot give effect to this argument. The assignment of the rents contained in the bond is neither really nor ostensibly an assignment such as the entail contemplates. It is not an assignment of specific farms, merely comprehending more than was enough. It is the common clause in a bond and disposition in security, assigning the whole rents for immediate payment of the whole debt. What the entail contemplated was the choice by the granter of the bond of specific farms, the rents of which, estimated as at the time of granting the bond, were gradually to pay off the debt, with a certain risk run by the children of the payments being diminished or postponed. I can find no authority for holding that the Court either may or can perform this operation for the granter of the bond, which would be simply equivalent to their making for him, after his death, the optional and discretionary deed which he alone was competent to make.

It follows, *a fortiori*, that the Court can give no effect to the clause which declares generally and unqualifiedly that, if the provision be not granted in a right form, "the form shall be varied in compliance with what shall be held to be the meaning of the deed of entail." This is equivalent to declaring that if the Court find the deed bad, they shall themselves make a new and right one; for this seems the only way in which the remedy suggested could be made effectual. The functions and competency of the Court do not extend to this.

The only other question which has been raised before us is, Whether, if the provision is not well made in terms of the entail, it can be sustained as a provision under the Aberdeen Act, to the extent of three years' rent of the estate? I am of opinion that it cannot be so sustained.

I think it fairly follows from the authorities, that if a provision is truly made under the Aberdeen Act, it will not vitiate the provision that it does not proceed on an express recital of that Act, as the ground and warrant of what is done. The provision, if *de facto* a provision under the Aberdeen Act, will, I think, remain effectual, notwithstanding the omission to recite, or, it may be, a mis-recital of the authority by which it is sustained.

It does not, however, follow that where there is not a mere omission to recite the Act, but a declaration, or what is equivalent to a declaration, that the provision is *not* made under that Act, but under a different authority, the Aberdeen Act can in that case be brought in aid of the provision. I think there is authority to the contrary in the case of *Dickson*, referred to by the Lord Ordinary. And in principle I think that in such a case all resort to the Aberdeen Act is excluded. The utmost effect of the Aberdeen Act is simply to insert in the entail a power to make certain provisions. It is optional to the heir of entail to exercise the power or not. If he does not exercise the power, and expressly declares that he does not do so, the deed which he actually executes may be in itself valid or not; but its validity cannot be supported on the ground of a power which the granter, *totidem verbis*, disclaims exercising. The Court cannot declare a power exercised which the granter of the deed declares he did not exercise, nor ever intended exercising.

In the present case, the prominent fact is, that the provision made is not in itself a provision under the Aberdeen Act; because it is a provision of four years' rent of the entailed estate, where the Aberdeen Act only allows of three. Nor is this a mere error in amount, the provision being all the while intended to be under the Aberdeen Act. For the bond explicitly sets forth that the provision is granted under the entail and not otherwise. In the passage already referred to, the granter expressly declares that he is "desirous to exercise the powers conferred by the above quoted clause of the said deed of entail." It is easy to see why this should have been so; it was simply because the power under the entail was larger than that afforded by the statute. It may not be absolutely clear that the Aberdeen Act is applicable to a case in which the entail allows provisions of larger amount than those which the statute authorises; and where, therefore, it may be said that the interposition of the statute is not required. And I doubt in this view whether it can be rightly said that the Aberdeen Act is by implication inserted in every deed of entail. But, assuming that, even in the case of larger provisions in the entail, the Aberdeen Act may be brought into operation, with the view of obtaining its collateral benefits, the result in the present case is, that the heir of entail possessed two separate powers, of either of which he might discretionarily avail himself. He avails himself of one, and naturally of the larger power, namely, that given by the entail, and therein, by a direct implication, declares that he does not exercise, nor intend to exercise, the power of the Aberdeen Act. In order to convert the provision into one made under the statute, it would be necessary for the Court first to hold that the provision was made under the powers of the Aberdeen Act, contrary to the truth and to the granter's own statement; and then to make the provision square with that of the statute, by reducing the four years' rent to three, and making it otherwise conformable to the statutory enactments. I think the Court cannot do this. It would again be, in another form, simply to make for the granter a deed which he did not make for himself.

I am of opinion that the defenders are entitled to *absolvitor* from the whole conclusions of the action.

Agents for Pursuers—Hagart & Burn Murdoch, W.S.

Agents for Defenders—Macrae & Flett, W.S.

Friday, May 21.

M'BRIDE *v.* WILLIAMS AND DALZIEL.

(*Ante* p. 273.)

Expenses—New Trial. A verdict obtained by a pursuer in an action of damages for slander was set aside as contrary to evidence. In a second trial, the verdict was for the defender. *Held* that, in the circumstances, the defender was entitled to the expenses of the first, as well as of the second trial, the first having been lost by him, not through fault on his own part in the conduct of his case, but owing to the production by the pursuer of evidence of malice, which evidence turned out in the end to be incorrect, and it not being authoritatively settled at the time when the first trial took place that such evidence could competently be led when there was no issue of malice.