COURT OF SESSION.

Tuesday, July 19, 1887.
Friday, July 20, 1888.

SECOND DIVISION.

SPECIAL CASE—PATERSON AND OTHERS.

Entail—Aberdeen Act, sec. 4—*Bond of Provision—Entailed Estate—Money Invested for Purchase of Land to be Entailed.*

The heir of entail in possession of an entailed estate obtained the authority of the Court, with the consent of the next heirs, to uplift and acquire in fee-simple certain sums of money which had been deposited in bank for the purpose of purchasing lands to be added to the entailed estate. The consents of the next heirs were given upon the conditions specified in an agreement by which the heir of entail in possession became bound to invest these sums and hold them for the purchase of lands to be entailed upon the series of heirs called to succeed to the entailed estate. The deed contained a declaration that the heir of entail in possession "shall have the same powers in regard to them that he would have had if they had been invested in the purchase of lands and entailed in terms of the entail statutes according to the present law, or any future Act that may be passed affecting entails." The sums were uplifted and invested in debenture stock of a railway company. The heir of entail thereafter executed a bond of provision in terms of the Aberdeen Act in favour of his younger children.

Held that the railway stock was dealt with in the trust-deed as part of the entailed estate, and was to be included in calculating the amount due to the children under the bond of provision.

Entail—Church Patronage (Scotland) Act, 1874 (37 *and* 38 *Vict. cap.* 82), *sec.* 4—*Compensation for Abolition of Patronage—Nature of Payment.*

Held that the sum of money payable as compensation in respect of the abolition of patronage under the Church Patronage (Scotland) Act, 1874, to the heir of entail in possession of an entailed estate, does not form part of the entailed estate so as to create a *jus crediti* in the substitute heirs, but is to be regarded as a personal payment to the heir, the unpaid instalments of which pass at his death to his executors.

Entail—Aberdeen Act, sec. 4—*Bond of Provision—Apportionment of Amount.*

The 4th section of the Aberdeen Act provides in regard to bonds of provision granted by heirs of entail in favour of younger children, "that the amount of such provision shall in no case exceed the proportions following of the free yearly rent or free yearly value of the whole of the said entailed lands and estates . . . that is to say, for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole."

The heir of entail in possession of an entailed estate executed a bond of provision in terms of the 4th section of the Aberdeen Act, by which, on the narrative that he was desirous of granting a suitable provision to his second son W, and that he had made what he considered suitable provision otherwise for his younger sons C and H, and also for his two daughters, he bound and obliged himself, and the heirs of entail succeeding to the entailed estate, to pay to his son W, £10,000, being the estimated amount of three years' rents, but in the event of its being found to be in excess of his powers to provide the whole to him, then to pay to and among W, C, and H the sum of £10,000 in the proportions following, viz., to W, £9000, to C, £600, and to H, £400; or otherwise, and in the event of its being found to be in excess of his powers either to provide the whole to W or to apportion it in manner before mentioned among his three sons, then to pay the sum of £10,000 among all his sons and daughters equally, provided that the sum payable should be restrictable if it should exceed three years' free rents.

In a question between W and the other other younger children, it was *held* by a majority of the whole Court (the Lord President, the Lord Justice-Clerk, Lords Mure, Shand, Adam, Rutherfurd Clark, Kinnear, and M'Laren), that the true meaning of the 4th section of the Aberdeen Act is that an heir of entail in possession may make provision for his younger children to an amount not exceeding three years' rent, if he have three such children or more, and that if he does not exceed that amount he may divide it amongst them or give the whole of it to one, as he thinks fit, the excluded children having in the latter case no title to complain and the succeeding heir no interest to object, so long as the provision does not exceed the statutory amount, and that therefore the provision of the whole £10,000 to W was valid.

Opinions per Lords Young and Lee, who gave effect to the last alternative in the bond, that the true construction of the statute is that the provision for one child shall not under any circumstances exceed one year's free rent, and that if the heir in possession in his discretion divides the provision among three children, the division must be subject to this.

Opinions per Lords Trayner and Fraser, who gave effect to the second alternative in the bond, that the provision for one child shall not, according to the true construction of the statute, exceed one year's free rent, but that the bond in question, as regards the second alternative, was in conformity with the statute, as being a bond in favour of three younger children, the amount of which did not exceed the statutory limit of three years' rent.

By his settlement dated 22nd July 1829 Mr Paterson, attorney-at-law, of Kingston, in the Island of Jamaica, directed his trustees James Dunlop, Esq. of Annanhill, and others, to realise part of his estate there, and invest the proceeds

in the purchase of lands in Scotland to be settled by deed of entail on the series of heirs therein specified. The trustees purchased the estate of Montgomerie in Ayrshire, and executed a deed of entail settling the succession in accordance with Mr Paterson's directions on William Paterson and the heirs male of his body. After the purchase of this estate there remained of the deceased Mr Paterson's Jamaica estate, which was directed by the settlement to be laid out in purchasing lands to be settled on the series of heirs called to the succession of the Montgomerie estate, a sum of £1080 deposited by his trustees in the Royal Bank of Scotland in Glasgow. A further sum of £3722, 5s. 6d. was paid by the Glasgow and South-Western Railway Company for ground taken from, and damage occasioned to, the entailed estate of Montgomerie by the formation of the railway from Mauchline to Ayr, and deposited in the said bank on 3rd March 1871. A further sum of £3026, being one-half of the free residue of the estate in the hands of his trustees, was set apart in terms of the will to be laid out in purchasing lands to be settled upon the series of heirs entitled to succeed to the Montgomerie estate, and deposited in the same bank in Ayr to the credit of Paterson's trustees for the Montgomerie estate, on 11th July 1877.

In June 1872 William Paterson, as heir of entail in possession of the estate of Montgomerie, having obtained the necessary consents of his three eldest sons, Robert Paterson Paterson, William Alexander Orr Paterson, and Charles Orr Paterson, presented a petition to the Court for authority to uplift and acquire in fee-simple the two sums of £1080 and £3722, 5s. 6d. The conditions for obtaining the consents were set forth in a deed of agreement with them dated in August 1872, by which he bound himself, on receiving payment of these sums, to deposit the same in name of himself and his sons and Neil Colquhoun Campbell, advocate, Sheriff of Ayrshire, as trustees in trust, "to purchase good railway debentures or debenture stock, or preference stock, or to lend on heritable security the whole or any part of the above sums, and hold the same until a favourable opportunity presents itself for purchasing land, and thereafter to execute an entail of the lands to be purchased therewith in favour of the heir of entail in possession of the estate of Montgomerie and the other heirs in succession, all in terms of the entail of the estate of Montgomerie; . . . declaring, however, that the trustees shall be entitled, if they think proper, to apply the said sums, or any portion thereof, in payment *pro tanto* of children's provisions charged upon the rents or fee of the estate of Montgomerie. Until the said sums shall be applied in the purchase of land to be entailed or in payment of children's provisions, the interest or dividends accruing thereon to be paid by the trustees to the heir in possession of the estate of Montgomerie; and declaring that the heir of entail in possession of the estate of Montgomerie shall have the same powers in regard to the above-mentioned sums that he would have had if they had been invested in the purchase of lands and entailed in terms of the Montgomerie entail according to the present law, or any future Act that may be passed affecting entails." He obtained decree in this petition in 1872. In 1878 he obtained decree in another similar petition to uplift and acquire in fee-simple the third sum of £3026 The conditions of obtaining the consents of his three sons were embodied in an agreement dated in March 1878, in which as before he bound himself to deposit the money in bank or invest it to be held for the purchase of lands to be added to the Montgomerie estate and to be entailed in terms of the Montgomerie entail. These three sums were accordingly uplifted and invested in name of William Paterson and others, as trustees under the said deeds of agreement, as follows:—(1) £4800 four per cent. funded debt of the Glasgow and South-Western Railway Company; (2) £2930 of the same stock.

On 4th February 1884 Mr William Paterson executed a bond of provision, as heir of entail infeft and in possession of the lands and estate of Montgomerie, in terms of the 4th section of the Statute 5 Geo. IV. cap. 87, on the narrative that he was desirous of granting a suitable provision to his second son William Alexander Orr Paterson not succeeding to the said entailed estate, and that he had made what he considered suitable provision otherwise for his younger sons Charles Orr Paterson and Henry Edmund Paterson, and also for his two daughters Mrs Ann Paterson or Sadlier and Mrs Mary Paterson or Campbell, by which he bound and obliged himself and the heirs of entail succeeding to the foresaid estate of Montgomerie, in the following terms, viz., "to content and pay to my said son, William Alexander Orr Paterson the sum of £10,000 sterling, payable one year after my death, with a fifth part more of penalty in case of failure, and the interest of the said sum at the rate of four per centum from the first term of Whitsunday or Martinmas after my death to the foresaid term of payment, and thereafter during the not-payment thereof: But in the event of its being found to be in excess of my powers, to provide the whole of said sum to my said son William Alexander Orr Paterson (but only in that event), I bind and oblige myself, and the heir of entail succeeding to the foresaid estate of Montgomerie, to content and pay to and among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson, the said sum of £10,000 sterling, payable one year after my death, with a fifth part more of penalty in case of failure, and the interest of the said sum at the rate of four per centum from the first term of Whitsunday or Martinmas after my death to the foresaid term of payment, and thereafter during the not-payment thereof, and that in the proportion following, *videlicet*— to my son William Alexander Orr Paterson the sum of £9000 sterling, to my son Charles Orr Paterson the sum of £600 sterling, and to my son Henry Edmund Paterson the sum of £400 sterling. Or otherwise, and in the event of its being found to be in excess of my powers either to provide the whole of said sum to my son William Alexander Orr Paterson, or to apportion it among my said three sons in manner before mentioned (but in that event only), then to content and pay the said sum of £10,000 sterling among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson, and Mrs Ann Paterson or Sadlier and Mrs Mary Paterson or Campbell, in equal proportions, payable also at the term and with the interest and penalty before provided: Providing also that if the sum above settled on

my said son William Alexander Orr Paterson, or alternatively in either of the events above mentioned, on my said three sons, or on my said three sons and two daughters, shall be found to exceed three years' free rent or value of said entailed estate, as the amount of the said free rents and values shall be ascertained in the manner pointed out by the said statute, then the said sum or sums, as the case may be, shall be and are hereby proportionally restricted so as to be consistent with the powers conferred by said statute." As narrated in the said bond of provision, the granter had during his lifetime, and also by his trust-settlement, made provision for his two younger sons and his two daughters exceeding the proportions of the entail provision which would have fallen to them had it been equally divided.

Mr William Paterson died on 20th October 1885, and was succeeded by his eldest son Robert Paterson Paterson, who made up his title by decree of special service as heir of tailzie and provision to his father, duly recorded. After finding security to the satisfaction of the Court for the provisions contained in his father's bond of provision he obtained authority to record a deed of disentail of the lands and estate of Montgomerie. He thereafter re-entailed them by disposition and deed of entail in favour of himself and the heirs male of his body and the other heirs therein mentioned.

In the circumstances above mentioned a question arose as to the amount of the younger children's provisions provided by the bond of provision, and as to whom they were payable.

At the date of Mr William Paterson's death—20th October 1885—the rental of the estate of Montgomerie was . . .	£3276	14	10
And the public burdens and others which fell to be deducted in estimating the free rental . .	435	10	1
Leaving a free rental of . .	£2841	4	9
Three years of which was . .	£8523	14	3
The yearly interest on the said two sums of £4800 and £2930 amounted to £309, 4s.			
Three years of which was . .	927	12	0
Total, .	£9451	6	3

This special case was presented for the opinion of the Court, to which Robert Paterson Paterson of Montgomerie was the party of the first part; Robert Paterson Paterson, William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson, the trustees of the deceased William Paterson, were parties of the second part; William Alexander Orr Paterson was the party of the third part; Charles Orr Paterson and Henry Edmund Paterson were the parties of the fourth part; and Mrs Sadlier and Mrs Campbell, daughters of the deceased Mr William Paterson, were the parties of the fifth part.

With reference to the amount of the said provisions, the first party maintained that the amount of the younger children's provisions was limited to three years' rents of the entailed lands and estate of Montgomerie; that even if the late Mr Paterson had the power to leave his younger children three years' interest of the said two sums of £4800 and £2930, he had not exercised that power, and that therefore the sum due under the said bond of provision was £8523, 14s. 3d. only. On the other hand, the parties of the third and fourth parts maintained that the provision of £10,000 was only to be restricted in case it should exceed the amount within the power of the heir of entail in possession of the estate of Montgomerie to provide, and that therefore the sum due under the said bond of provision was £9451, 6s. 3d.

With reference to the question as to whom the said provisions were payable, the party of the third part maintained that it was within the power of the said William Paterson, as heir of entail, either to apportion the provision or to settle it on him alone; and that in any view the provisions otherwise made by the granter in favour of his other children must be held to be *surrogata* for their proportions of the said provision, and that he was entitled to obtain payment accordingly of the whole sum. On the other hand, the parties of the fourth and fifth parts maintained that the said sum of £10,000 should be paid to and among the said William Alexander Orr Paterson, Charles Orr Paterson, Henry Edmund Paterson, Mrs Ann Paterson or Sadlier, and Mrs Mary Paterson or Campbell equally. Or alternatively, the parties of the fourth part maintained that the said sum should be paid to and among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson, in the following proportions, viz., to William Alexander Orr Paterson the sum of £9000, to Charles Orr Paterson the sum of £600, and to Henry Edmund Paterson the sum of £400, as provided by the said bond of provision, subject to proportionate reduction according as the ascertained amount of the free rental might be under £10,000.

The deed of entail of the estate of Montgomerie, under which the first party succeeded, contained, *inter alia*, the patronage of the parish church of Tarbolton. By the 4th section of the Church Patronage (Scotland) Act, 1874, it is enacted that "in all cases in which the patronage of a parish is held either solely or jointly by a private patron or any guardian or trustee on his behalf, it shall be lawful for him or for such guardian or trustee at any time within six months after the passing of the Act to present a petition to the sheriff of the county," praying him to determine the compensation to be paid to such patron in respect of the operation of the Act, "but it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title or under a deed of entail, or other limited title, to present such petition; and if no such petition shall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be competent in any manner of way." Within the period prescribed the deceased Mr William Paterson had presented a petition to the Sheriff of Ayrshire, and obtained a decree finding that he was entitled to the sum of £383, 14s. 5d. as compensation under the Act, and payable by four yearly instalments on the occurrence of a vacancy in the said parish. A

vacancy occurred in 1884. The deceased Mr William Paterson got payment of the first instalment, and the parties of the second part of the second instalment. A question arose between the first and second parties as to who was entitled to the price of said patronage.

The first party maintained that the price fell to be dealt with as a *surrogatum* for part of the entailed estate, and that his father's executors were bound to disburse the instalments paid to him and them that they might be dealt with as part of the entailed estate, and that they had no claim to the remainder. The parties of the second part maintained that on the occurrence of the vacancy Mr Paterson, the petitioner, was entitled to payment of the compensation, and that they, as his executors, were entitled to the instalments still remaining unpaid.

The questions for the Court were—"(1) Does the interest of the foresaid sums of £4800 and £2930 four per cent. funded debt of the Glasgow and South-Western Railway Company fall to be included in calculating the amount due under the bond of provision executed by the late William Paterson of Montgomerie? (2) Who is the party entitled to the sum due under the said bond of provision—(*a*) The said third party to the whole amount; (*b*) the said third party and his brothers Charles Orr Paterson and Henry Edmund Paterson, in the proportion stated; or (*c*) the whole younger children equally? (3) Who is entitled to the several instalments of the patronage compensation money?"

On the first question the following arguments were submitted:—For the heir of entail—In his bond of provision Mr Paterson had invoked the powers of the Aberdeen Act alone in settling the provisions to be made to his younger children. That Act, to which he had elected to restrict himself, and to which he must be held, applied to nothing but entailed lands proper. It did not apply to the two sums which had been invested in trust "for the purchase of land to be entailed, or in payment of children's provisions." If Mr Paterson had meant to include these sums in the bond of provision, he should have invoked the trust-deed which had reference to them—*Callander* v. *Callander*, May 21, 1869, 7 Macph. 777; *Dickson, et al.* v. *Dickson*, June 13, 1854, 1 Macq. 729, *per* Lord Brougham, 732; *Macpherson* v. *Macpherson*, May 24, 1839, 1 D. 794. It was of no consequence what powers were contained in the trust-deed, because Mr Paterson had failed to invoke them in his bond of provision. Thus, even if he had had the power to leave his younger children three years' interest of the two sums, he had not validly exercised it. There was no evidence of intention to do so otherwise.

The younger children replied—Mr Paterson was anxious to give as much as he could to his children, and must be held to have known that the rental of the lands was not sufficient to satisfy the provisions on which he had fixed, there being a shortcoming in any view. With the interest of the sums in the trust-deed he considered that this shortcoming would be made up. Desirous, then, of making it up he referred to the trust-deed, and found that it gave him all the powers he would have had if the subjects had been land and not money On a sound construction of the words "entailed estate," as used in the statute, they included the two sums in question. In the cases of *Dickson* and *Callander* it was only decided that where the plain provisions of the deed were inconsistent with the statute the Court could not give effect to the statutory powers. But the Court laid down that where it was plainly the intention of the testator to exercise these powers, he need not allude to the deed at all. It was certainly Mr Paterson's intention to include the interest on these sums.

On the second question the arguments submitted appear *infra*. The clauses of the Aberdeen Act bearing on it were as follows—"4. And be it further enacted, that it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bonds of provision or obligations, binding the succeeding heirs of entail in payment out of the rents or proceeds of the same to the lawful child or lawful children of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the granter's death, as to him or her shall seem fit: Provided always, that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates after deducting the public burdens, life-rent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever, affecting or burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or clear yearly value thereof as aforesaid to the heir of entail in possession—that is to say, for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole: Provided always, that such provision shall, except in the case of the settlement thereof by a marriage-contract, as hereinafter mentioned, be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir." "5. Provided always, and be it further enacted, that if any child to whom any such provision as aforesaid may be granted shall marry, that such provision or any part thereof shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then, and in all such cases, the provision, or any part thereof so settled in consideration of such marriage, shall remain and be effectual as if such child had survived the grantor."

On the third question—For the first party—The compensation awarded under the Church Patronage Act was just a windfall which he was entitled to get as a *surrogatum* for part of the entailed estate.

For the second parties—The Act gave the patron an option, whether he was an heir of entail or

not, to claim or give up the compensation. Its whole language showed that it regarded the whole matter as a personal one, and not connected with the entailed estate. There was no provision for depositing and investing the money. On the occurrence, then, of the vacancy in 1884 the late Mr Paterson was entitled to the compensation, and his executors were entitled to the instalments still remaining unpaid.

At advising on July 19, 1887—

LORD JUSTICE-CLERK—This case has given us a good deal of anxiety with regard to one of the questions put to us—that, namely, which involves a consideration of the 4th clause of the Aberdeen Act. We have thought it advisable to have the opinion of the whole Court, looking to the important nature of that question. We therefore now appoint minutes of debate to be prepared and laid before the whole Court.

With regard to the first and third questions, however, we are prepared to give judgment.

The first relates to the interest of certain sums of £4800 and £2930 funded debt of the Glasgow and South-Western Railway Company. The question with regard to these two sums is, whether they fall to be taken into calculation in estimating the amount due under the bond of provision executed by the late William Paterson as heir of entail in possession of the estate of Montgomerie under the Aberdeen Act? I am of opinion that these sums, which were sums directed to be entailed, and which have been invested for the purpose of purchasing land to be added to the entailed estate, are truly in this question under the Aberdeen Act. By the trust-deed it is declared that the heir of entail "shall have the same powers in regard to the above-mentioned sums that he would have had if they had been invested in the purchase of lands, and entailed in terms of the Montgomerie entail, according to the present law, or any future Act that may be passed affecting entails." It seems clear therefore that it was in view to treat these sums as part of the entailed estate. The proceedings in regard to the matter are narrated in the special case, and I do not need to enter into them in detail, but it is quite clear what the conception was upon which the investments were made. The provision seems to me to be perfectly clear—that until the sum is invested in the purchase of land the heir of entail in possession of Montgomerie shall have the same control over the sums, and the interest upon the sums, as he would have had in lands subject to the entail. It is said that Mr Paterson, who executed the bond under the Aberdeen Act, did not intend—or at all events has not duly carried out his intention—to charge these invested funds as part of the estate of Montgomerie. I am of opinion that it was totally unnecessary that he should do so, because they are part of the estate of Montgomerie, inasmuch as they fall under the same destination as the entailed lands, and the same provisions in regard to fetters affect them as affected the entailed lands. They can, in short, only be considered in the same way as the estate of Montgomerie would have been before this addition—for it truly was an addition—was made to it.

That is the general view I take of the investments. It is consistent with practice and with principle. There are provisions in the Entail Acts—in the Rutherfurd Act and the subsequent Acts—in regard to money destined to be entailed. We know what these provisions are, and I think that no other result than what I have indicated would be consistent with the principles upon which such investments have hitherto been dealt with.

The third question is one of considerable interest—"Who is entitled to the several instalments of patronage compensation money?" I have formed a clear opinion upon this question, and that opinion is, that the instalments of the price of the patronage of Tarbolton, in respect of which certain payments of compensation had become due under the Patronage Act, do not form part of the entailed estate, and that there was no obligation on the heir of entail to invest the money or purchase with it land to be entailed, and that the subsequent heirs of entail had no interest whatever in these payments. I gather that not only from the nature of the fund itself and the source of it, but I gather it from the words also of the Church Patronage Act of 1874. It is enacted there that "in all cases in which the patronage of a parish is held either solely or jointly by a private patron, or guardian or trustee on his behalf, it shall be lawful for him, within six months after the passing of this Act, to present a petition to the sheriff of the county, praying him to determine the amount of compensation;" and then it says that "it shall not be incumbent on any such patron, or upon any guardian or trustee for such patron, whether the patronage is held upon a fee-simple title, or under a deed of entail, or other limited title, to present such petition; and if no such petition shall be presented within the said period, it shall be held and taken that the claim for such compensation has been renounced, and no claim therefor shall afterwards be made in any manner of way." I think it is impossible to contend that the Act creates any *jus crediti* whatever in the substitute heirs under the destination. The heir in possession could at his pleasure renounce the claim for compensation altogether, and the mere omission to present a petition within six months is equivalent to that. Mr Paterson was the patron, and he was entitled to decline to receive compensation both for himself and all that were to succeed to him.

That, generally, is the view that I take upon his matter. It is a kind of *residuum* this compensation for the abolition of patronage. It does not come in place of any part of the entailed estate, but is to be regarded as a payment made to the party entitled to the next presentation by way of *succedaneum* personally. I think it goes to the executors. Although the instalments are postponed I do not think that makes any difference on the right of the heir in possession at the passing of the Act. I think the instalments vested in him at that date, and that consequently his executors are entitled to the subsequent instalments.

LORD YOUNG concurred.

LORD CRAIGHILL—I think the first question ought to be answered in the affirmative. I have felt no difficulty in coming to this conclusion. By the trust-deed, a portion of which is quoted in the special case, it is declared that the heir

of entail in possession of the estate of Montgomerie "shall have the same powers in regard to the above-mentioned sums that he would have had if they had been invested in the purchase of lands, and entailed in terms of the Montgomerie entail according to the present law, or any future Act that may be passed affecting entails." The effect of this declaration was, as I think, to bring the money in question as much within the powers conferred by the Aberdeen Act as if the lands for the acquisition of which it was held had been actually acquired and had been in the possession of the heir of entail. The power to be exercised is not a power conferred by the trust-deed, for, according to my reading, all that is thereby done is to assimilate the interest of the money to the rent of the land intended to be bought. The power to be exercised, and which was exercised, was that conferred by the Aberdeen Act.

With regard to the third question, the executors of the last heir of entail, who was the party by whom the petition was presented to the Sheriff asking that the value of the patronage of Tarbolton should be fixed under the Church of Scotland Patronage Act, 1874, are the parties who in my opinion are entitled to the unpaid instalments of the patronage compensation money which was fixed by the Sheriff under the powers conferred by the said statute. They are the persons who are now in his right. The right of patronage was extinguished by the passing of the Act, and no longer formed a portion of the entailed estate. There is nothing therefore to which the present heir of entail as such may lay claim, because his rights are limited to property which is within the entail. More than that, the claim of the succeeding heir of entail is discountenanced by this consideration, that were he to get the money he would not get it as part of the entailed estate, but could spend it as his own. Whoever shall succeed in this petition will get what is absolutely his own, and this is a plea which can hardly be urged by an heir of entail, and suggests that those entitled to the compensation money, so far as unpaid, are the heirs *in mobilibus* of the last heir in possession.

The parties of the second part, as their father's executors, are therefore entitled in my opinion to the unpaid instalments of the price of the patronage of Tarbolton.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Answer in the affirmative the first of the said questions, and the third to the effect that the parties of the second part are entitled to the several instalments of the fund of the right of patronage of the parish of Tarbolton: Find, declare, and decern accordingly; and in respect of the importance of the second question, appoint the parties to prepare minutes of debate, to be interchanged, revised, and lodged, and boxed by the first sederunt day in October next to the Judges of the whole Court."

The contentions of the parties in their minutes of debate were as follow:—

1. For the third party—On a sound construction of the Aberdeen Act Mr Paterson was entitled to settle the provision on one or more of his children as he thought fit. The object of the Act was to empower an heir in possession of an entailed estate to provide a fund out of that estate for his child or children not succeeding to the estate, and in a question with the next heir of entail the measure of his power was the number of the younger children he might have up to three. The power was an absolute one, and entirely in his discretion or option. There was no obligation to exercise it in any particular mode, in favour of any particular child, or to any particular extent, or even to exercise it at all. There was no *jus crediti* conferred on the children, nor any *jus quæsitum* in anyone to compel the heir of entail to exercise the power. The extent to which he could burden the estate was increased according to the number of his family up to three, but it was not and could not be disputed that although he might have three or more children he need only exercise the power to the extent of providing for one or two. The children omitted had no right to interfere. The argument on the other side really amounted to this, not that the children omitted had any right to challenge the provision in favour of one child, but that, were there no alternative here, the next heir of entail would be entitled to object. But the next heir of entail could only object that either the provision exceeded the permitted sum or that it was in favour of persons not falling under the description of children. The power was given without regard to the father's ability or inability to provide otherwise for his youngest children. It was given in respect that such a power should belong to the fiar of an entailed estate in all cases. There were no reasons of public policy or expediency for limiting a father's discretion in apportioning the provision among his children—for restraining him from what it was admitted he had actually done here, making advances to some of his children during his lifetime, and further provision for them in his settlement, and settling the entail provision on another child, or as in the *Airlie* case, 14 D. 1063—where the granter was in possession of several entailed estates—making provision for separate children out of separate estates. The Legislature had given the heir in possession absolute power to exclude all his children from the benefit of the provision. Absolute discretion to give or withhold must surely be held to include discretion to give to one or more. The father had the best knowledge of the requirements of his children. But further, this was the fair construction and true meaning of the language of the statute. The whole contention on behalf of the parties of the fourth and fifth part rested on the use of the preposition "for," which they construed as meaning "to" or "in favour of." Quite as true a meaning of the word "for," as given in the dictionary, was "because of," "by reason of," or "in proportion to," and that was the actual meaning of the word here. The power was in fact absolute, and the *proviso* specifying the extent to which the estate might be burdened was only intended in a question with the next heir to limit the extent of the burden proportionally, up to a certain point, to the number of younger children the heir in possession might have.

But assuming that the language of the Act could be strained to bear the construction contended for by the other parties, and that "to justify a provi-

sion of three years' rents three children at least must be benefited," that was done by the second alternative in the present bond, which provided to William £9000, to Charles £600, and to Henry Edmund £400. It was admitted that if the amount was not to be equally divided that apportionment was not an unfair exercise of the power. The exercise of the power to apportion had been all along matter of ordinary and unquestioned practice—1 Jur. Styles (Heritable Rights), p. 190—and the power had been assumed to exist in a series of cases. In *Grierson*, December 12, 1843, 6 D. 213, a bond was sustained in which the heir was taken bound, as stated in the opinion of the Lord Justice-Clerk, "directly to pay to the particular younger children named, being only some, in respect, as he states, others were adequately provided for." Even had the power conferred by the Aberdeen Act been of such a nature that the right to the provision was vested in the children, subject to the father's power of apportionment, so "that some one or more of the objects of the power cannot be excluded by the donor of the power from a share," the Apportionment Act (37 and 38 Vict. cap. 37) would have applied. This Act, which provided for the validity of an apportionment, notwithstanding that one or more of the objects was left out, extended to Scotland—*Mackie's Trustees*, 12 R. 1230. But the question was no longer matter for argument, in respect the power of an heir of entail in possession to provide three years' rents to one or more of his children, provided he had three or more children, had been determined by decision, and had been frequently recognised and assumed as law by the Court—*Antrobus* v. *Innes*, November 25, 1830, 9 S. 70, and 3 Deas & Anderson, 286; *vide* also Sandford's Treatise on Entails, 1842, p. 303; *Breadalbane's Trustees* v. *Marquis of Breadalbane*, May 26, 1840, 2 D. 904, *vide* opinions of Lord President, Lord Moncreiff, and Lord Murray, p. 917, and Lord Fullerton, p. 938. In *Viscountess of Strathallan* v. *Duke of Northumberland*, May 20, 1840, 2 D. 840, the judgment of the Court was an express finding that the heir of entail had power to provide the whole three years' rents to one younger child. This judgment was affirmed by the House of Lords on August 28, 1846, 5 Bell's App. 396. In *Grierson*, 6 D. 203, *vide* Lord Justice-Clerk (Hope), pp. 213 and 214, Lord Medwyn, p. 216, and Lord Moncreiff, p. 219, such a bond was held to be strictly in terms of the Aberdeen Act—*Campbell* v. *Campbell*, December 13, 1860, 23 D. 163, *per* Lord Ardmillan and the Lord President. These cases recognised the right of the heir of entail to settle the provision on one or more of his surviving children, and there was no indication throughout the reported cases of any contrary opinion. The third party was therefore entitled to the whole sum provided to him by his father.

2. For the fourth and fifth parties—It was the interest of Henry and Charles to contend for the principle of equal division; their claim for £600 and £400 respectively was only alternative, and would only be pleaded in the event of the claim for equal division being rejected. The solution of the question must be sought in the words of the statute, for there was no decision of the Court upon the point, although there were *obiter dicta* of various eminent Judges. The words of the fourth section of the statute seemed clearly to enact that the amount of the provision for one child should in no case exceed one year's free rent. The provision to William did exceed one year's free rent, and was therefore beyond the amount authorised by the statute. But it was said on the other side that "for" was to be read as if it had been "in the case of," and that where there were three younger children the father might burden the heir of entail with a provision equal to three years' rents, although two of the three children were none the better for his liberality. It might be quite true that the children had no *jus crediti* against their father in the provision. The question, however, would have been the same if this provision to William had stood alone. Could the father have so burdened the heir of entail? It so happened that the heir here, in view of the alternative provisions, had no interest to discuss the question; but if the determination of this case was to be authoritative, the possible effect in other cases on the heir of sanctioning such a provision could not be overlooked. To say, as the third party said, that in the general case the heir had no right and no interest to object or to inquire into the allotment, was to beg the question, for the whole contention of the fourth and fifth parties was that if the father had made no alternative provisions the heir could have cut William down to a provision of one year's free rent. If William's contention were to be affirmed the Court would pronounce a judgment which must rule a case where the heir and a younger child, who had been given the whole of the younger children's provisions, were the sole parties. If, then, the question was considered in this light the position seemed to be this—The statute was passed with the view of enabling a father to encroach on the estate of the heir for the benefit of the younger branches of the family, and any pretended exercise of its powers, except for their direct and personal benefit would not receive effect—*Breadalbane's Trustees* v. *Marquis of Breadalbane*, May 26, 1840, 2 D. 904. The extent of the encroachment was regulated by the number of those to be provided for, a line being drawn at the third child, to prevent an unreasonable encroachment on the rights of the heir. But if the children for whose benefit alone the power was given did not receive the benefit of its exercise, that exercise would not be within the statute at all. Was the second son to have a larger provision at the expense of the heir because he happened to have several younger brothers and sisters? Such a result did not seem to be intended by the statute, and certainly did not supply the remedy which it was intended to supply. The clause of the statute had been frequently subjected to interpretation, and the leading canon had always been that the benefit of the younger children themselves must be directly provided for. It was not the case that the question had been settled in favour of the contention of the third party. It had not, and any *dicta* on the subject were merely *obiter*—*vide Viscountess Strathallan* v. *Duke of Northumberland*, May 20, 1840, 2 D. 840, *per* Lord Meadowbank, p. 854, and *per* Lord Lyndhurst, August 28, 1846, 5 Bell's App. p. 407. The question in dispute there was whether a provision of a liferent to the children, with directions to invest the fee and entail it on a series of heirs, was a provision which fell within the powers of the granter.

The Court, too, were construing, not the Aberdeen Act, but the provisions and powers of a deed of entail. In *Antrobus and Others* v. *Innes* it was not disputed that the opinion of the Lord Ordinary (Newton) did support the view of the statute contended for by the third party, but the interlocutor did not determine the question, and though the First Division adhered to it, it was plain, from the short opinions of Lord Gillies and Lord Balgray, that their Lordships did not regard the interlocutor as determining the extent of the liability. That point they looked upon as reserved. Lord Newton's reasoning moreover, it was submitted, was not conclusive. It was not disputed that the father might, if he chose, give nothing to any of his younger children, but, on the other hand, he could not exercise his power of burdening the heir except for the object—the whole object of the statute—of making provision for the younger children. In so far as he omitted to provide for any one of them, to that extent he lost the power of burdening the heir, a power given him on condition only that he should provide for his younger children, and liable to be extended or diminished exactly as he had more or fewer to provide for. It was conceded that the father might under the statute elect to benefit one only; he could not be forced by any of the others to admit them to a provision, but if he made this election, the statute, as had already been contended, limited him correspondingly in the amount of the provision. The presumption was that he would not omit any of his children unless he or she was otherwise provided for. If that was the case, it was not just to burden the heir of entail with their maintenance, but the necessity of their brother or sister—the *ratio* on which the statute proceeded—was not increased because they were thus otherwise provided for. The case of *Campbell* v. *Campbell* did not touch the point, for there, as was pointed out by Lord Deas, the amount of the provision had previously been ascertained and charged on the estates under the authority of the Court, and could therefore no longer be open to dispute. In *Grierson*, 6 D. 203, the point was not raised. The remarks of the Judges had no reference to any question of distribution among the children.

For these reasons, the provision to William was beyond the granter's power. The provision, further, must be equally divided among all the children. If the division was to be equal—and that was the result of the statute—it was the granter's will that all five children were to have an equal share. The granter was not bound, it was true, as a condition of exercising his full powers, to give anything to the daughters at all, for he was entitled to burden the heir with provisions to the extent of three years' rents if these were to be distributed among three children. But he had declared that he would only confine his bounty to his three sons if he had power to give them unequal provisions. This, it was contended on the first alternative, was beyond his powers, and therefore the daughters must be admitted to a share. But it was contended alternatively that if the amount was not to be equally divided, the father, who took leave under the statute to make provision of an amount equal to three years' rent, must divide that among three children at least in such a fashion that none of them should have an illusory share. It was not maintained, if this was to be the rule of division, that the apportionment of £9000 to William, £600 to Charles, and £400 to Henry, was an unfair exercise of the power. The Act 37 and 38 Vict. cap. 37, cited by the other party, applied exclusively to powers conferred by "deeds, wills, and other instruments," and not to a statutory power, particularly if that power was conferred for the very purpose of favouring all the objects of it.

The following were the opinions of the consulted Judges:—

Lord President, and Lords Mure, Shand, Adam, and Kinnear—We are of opinion that the third party is entitled to the entire sum contained in the bond of provision, assuming that sum to be not more than three years' rent.

The object of the fourth section of the Aberdeen Act is to relax the fetters of entail for the purpose of enabling the heir in possession to provide for his younger children; and to the extent to which the fetters are so relaxed the proprietor of an entailed estate is placed in the same position as if he were unlimited owner. He must exercise his powers in conformity with the conditions of the statute, because, except in so far as the statute relieves him, he is restricted by the fetters of the entail. But in construing these conditions it is material to observe that the power is given to him alone, and that no corresponding right is given to anyone else. He is at liberty to exercise the power or not as he pleases, and to any extent he pleases, provided only that the provision he makes for a younger child shall not exceed in amount the proportion of the free rents authorised by the statute. So far we do not understand that there is any controversy between the parties. The only question is, whether in case he has more than one child to provide for he is restricted by the statute in settling and disposing of a provision, the total amount of which does not exceed the sum with which he is entitled to burden succeeding heirs. We are of opinion that he is not so restricted.

The question depends upon the construction of the *proviso* for limiting the amount of the provision; and we think the object and effect of that *proviso* is to determine the proportion which the total amount of the provision must bear to the rental of the estate, and that it has no other effect. We are far from thinking that the question is free from difficulty, or that the words of the *proviso*, if taken alone, will bear no other construction. But they must be read in connection with the enabling part of the enactment which they are intended to qualify, and when so read the reasonable construction appears to us to be as we have stated. The statute empowers the heir to make provision for his younger children, subject to this condition that "such provision shall in no case exceed" certain amounts; and then it proceeds to specify the maximum amount which may be given in each of three several cases—for one child the provision shall not exceed a sum equal to one year's rent; for two children, two years' rent; and for three or more children, three years' rent. We cannot think that the words "for one child" mean "for any one child," whatever be the number of children for whom the heir makes provision. If this had been the intention it must have been so expressed. But

this part of the clause is intended to refer to the case of there being one child only for whom provision has to be made; and accordingly, when the statute goes on to provide for the case of three or more children, it does not contemplate a separate provision for each, the amount of which is to be measured by anything that has gone before, but a total provision for all, the amount of which is not to exceed three years' rent. The statute, in our judgment, merely fixes the measure of the right given to the heir to bind the succeeding heirs in the several cases mentioned. If the heir makes provision for three children, or for four, there is nothing in the statute to require that each of the four shall have no more than a fourth part, or each of the three no more than a third part of three years' rent. The words of the *proviso* are satisfied if the total amount of the provision in either case does not exceed three years' rent. And there is certainly nothing in the purpose or reason of the enactment to import a restriction which is not expressed in terms. It was indispensable, from the nature of the enactment, that the total amount of the burden to be imposed on succeeding heirs should be fixed, and it is very intelligible that it should be fixed with reference to the number of children to be provided for. But it is not to be assumed, in the absence of an express enactment for that purpose, that the legislature intended to go further, and to regulate the distribution to any effect, or to deprive the father of a discretion which he alone would have the means for exercising with advantage to his family. And therefore if he should think fit to give one-half of the whole provision to one child among four, and to divide the remaining half among the other three, the statute gives no right to anyone to take objection to that arrangement. The succeeding heir is not prejudiced, because no greater burden has been laid on him than his predecessor had right to impose, and the younger children are not prejudiced, because they have no right to anything except what their father thinks fit to give them.

But if the heir in possession may give to one child, out of three or more, more than one-third of the total provision, we think it follows, by parity of reasoning, that he may give him the whole amount to the exclusion of the others. The excluded children have no title to complain, and the succeeding heir has no more interest in this case than in the former, for the provision, however it may be distributed, does not exceed the statutory amount. It is said that in this case the words of the statute are violated, because a provision from which one child alone takes any direct benefit is not a provision for three or more. But the objection appears to us to rest upon too narrow a construction. If the words were taken alone, a provision "for three children" might very well mean a provision to or in favour of three, and no fewer. But the preposition "for" has a variety of meanings, and the precise force which it ought to receive in the particular case must depend upon the context. Now the statute, as has been seen, does not contemplate the children directly as the subjects of any right which it creates. It empowers the father to make a provision for them, varying in amount according to their number, and it is in a clause for determining the total amount which may be given in each of three different cases that the words in question occur. In this connection the word "for" may fairly be construed as meaning "in respect of," or "in the case of," referring merely to the fact of there being one, two, or more younger children to be provided for, but without implying that each, if there be more than one, is to take a direct and separate interest under the provision.

A different construction would, in our judgment, tend to defeat the purpose of the statute. It is a beneficial provision in favour of heirs of entail. But there may be many cases—and the present case is an example—in which the heir would be prevented from making the best use, or even a just and reasonable use, of his power under the statute if he were precluded from taking into consideration in exercising the power the whole means at his disposal for providing for his younger children, and the different claims or necessities of each. He may think it fitting to give the whole or the greater portion of the statutory provision to one child, either because the others have been already provided for, or for other reasons of which he alone can judge, and we think it would be contrary to the policy of the statute that he should be precluded from giving due effect to the considerations which ought to influence a father in the disposal of his means, by any fixed and rigid rule as to the apportionment of the sum with which he is entitled to charge the succeeding heirs of entail.

The true meaning of the enactment therefore appears to us to be that the heir in possession may make provision for his younger children to an amount not exceeding three years' rent, if he have three such children or more to provide for, and that if he does not exceed that amount, he may divide it among them, or give the whole to one, as he thinks fit. And we think this construction is supported by authority of weight. It is true that the question has not been directly decided. But the current of judicial opinion, at all events since the case of *Antrobus*, is all in this direction. The opinion of Lord Newton in that case may not be technically binding, but it is of high authority, and we believe it to have been generally accepted as a sound exposition of the statute. The point is assumed as clear by the Lord President and Lord Moncreiff in the *Breadalbane* case, and we are satisfied that the practice has been in accordance with their opinion. This is a most valuable aid in the interpretation of a statute, and if the question were otherwise more doubtful than we believe it to be, we should hesitate to disturb a construction which has been accepted by the profession, and acted on for so long a period.

Lord Lee—As the granter of the bond in question held his estate under the fetters of a strict entail, complete in all the fettering clauses, and containing no reservation of any power to grant provisions to younger children, I think that the question is whether the statute 5 Geo. IV. cap. 87, authorised him to grant a bond in favour of one of his younger children (there being three or more), binding the succeeding heirs to the extent of three years' free rent, or to any extent exceeding one year's free rent.

It has been suggested that the effect of the statute is very much the same as the effect of a

reserved power in the deed of entail, "to provide younger children to three years' free rent" (such as existed in the case of *Viscountess Strathallan*, 2 D. 840, affd. 5 Bell's App. 396), and that therefore, in virtue of the statutory powers, the heir in possession, having three or more younger children, is just in the position of an unlimited proprietor of the estate to the extent of three years' free rent.

If this were a sound view it would, I think, lead irresistibly to the conclusion that the bond here in question is valid in favour of William Paterson to the full extent of three years' free rent.

But my opinion is that the case of a bond granted under the statute alone (the fetters of the entail being complete and perfect) is altogether different.

The statute is so expressed as to keep up the fetters of the entail, excepting in so far as relaxed to the effect of exercising the powers thereby conferred, and these powers are granted "under certain regulations and conditions" which are specified. The powers only enable the heir in possession to bind the succeeding heirs.

In the case therefore of a bond granted under the statute, I think that it cannot be said that it is the granter's infeftment as proprietor of the lands that makes it effectual. It is the power granted by the statute, and in my opinion its validity and effect must depend upon the question whether it has been executed in terms of the statutory powers. I think that this was settled in *Lady Elizabeth Pringle's* case (*Breadalbane Trustees*, 2 D. 904, and the Judges in the case of *Grierson* v. *Grierson*, 6 D. 203, so regarded it. The Lord Justice-Clerk there stated, in distinguishing the two cases, "the bond granted must be in terms of the statute, and the power must be exercised in the form and mode pointed out by the statute. I think that the *Breadalbane* case has fixed that principle of construction."

The distinction between powers reserved in the entail and powers conferred by statute upon heirs in possession holding under the fetters of a strict entail, was dwelt upon by Lord Fullerton in the case of *Viscountess Strathallan*, 2 D. 840. His opinion contains the following passage at p. 864—"For in this one most important particular, the present case differs from that arising under the settlements executed by Lord Breadalbane. The entail there was complete, and did completely exclude provisions such as that which was granted. The power sought to be exercised was one conferred by special statute, dispensing to a certain extent with the fetters. It was there powerfully argued that unless the provision was clearly and strictly within the line to which the statute extended the power it could not be sustained. Here the question arises under a power granted by the entail itself, and a power granted under the express forms of an exception and reservation from the prohibitive and resolutive clauses." Lord Medwyn (at p. 849) draws the distinction not less pointedly. It thus appears that even the Judges in the minority in *Lord Breadalbane's* case recognised the difference of the question under the statute.

While therefore the heir in possession may quite truly be said to be free, excepting in so far as he is fettered, I think it not less clearly settled, by the decision in *Lady Elizabeth Pringle's* case, that if the fetters of the entail be complete, he cannot exercise the statutory power of burdening succeeding heirs with provisions otherwise than subject to the "regulations and conditions" of the statute.

This being so, the question is whether the bond in question is in accordance with these regulations and conditions, and if so, to what extent?

My opinion is that the statute empowers the heir of entail in possession to grant a bond of provision in favour of one only of several younger children, if he sees fit to do so; but in that case I think that he is subject to the statutory condition that "for one child" the amount of such provision shall not exceed one year's free rent. If he shall desire to grant a bond of provision in favour of three or more younger children, he is empowered to do so, but still subject to the condition that "in no case" shall the amount of such provision exceed for one child one year's free rent.

If it had been intended to enable the heir in possession to accumulate the whole provisions authorised to be charged against succeeding heirs upon one of several younger children, I think that the statute would have been differently expressed. It would have been very simple to express it in like manner to the clause in the Strathord entail. The fact that it was not so expressed, and that the declared object of the statute is to confer or enlarge, "under certain regulations and conditions," the powers of granting provisions, appears to me to indicate that the proportion to be observed in limiting the amount was intended to be dependent on the number of children to be provided out of the rents of that estate, and not upon the number of children existing. I find nothing in the statute to support the view that the heir was empowered to exercise in favour of one child the whole power conferred upon him for three or more children. My view of the statute is, that it only authorises the succeeding heirs to be burdened with provisions out of the rents of that estate, according to the number of children for whom such provisions shall be granted; and that a provision for one child exceeding one year's free rent is not authorised.

It is suggested that the heir in possession may have other estates, entailed or unentailed, out of which he has provided or may provide for the other children. In that case I think that he should have no difficulty in exercising the power conferred by the statute in conformity to its conditions.

But if it be consistent with a sound construction of the statute that the heir in possession may grant the whole amount of three years' free rent out of one estate to one of his younger children, I think that he must have power to do this in favour of the same child in the case of each of his entailed estates (however numerous), and in each case to leave his other younger children unprovided. It seems impossible to regard the fact that he may make, or may have made, provision otherwise for his other younger children as affecting the question whether the bond is valid under the statute to any extent beyond one year's free rent for one child.

If the legislature had intended that the whole amount of three years' rent might be accumu-

lated upon one of several younger children, and that nobody should have any title to object so long as that amount was not exceeded, I cannot understand why one younger child should not have been allowed in all cases (whether there be one or many younger children) the full amount of three years' free rent. Why should the heir in possession be authorised to provide one of several younger children with three years' free rent (leaving the others possibly unprovided), and be unauthorised to provide him to the same extent where there are no others to be provided? I think that the provision of the statute "that the amount of such provision shall in no case exceed the proportions following" must receive effect, and that the succeeding heir has an unquestionable right to insist upon it.

My opinion, on the whole, is that the bond in question is not valid in favour of William A. Orr Paterson, excepting to the extent of one year's free rent, and that the whole amount of three years' free rent (assuming the sums of £600 and £400 with one year's free rent to be less than three years' free rent) can only be made good under the bond against the succeeding heir by adopting the alternative of dividing it in equal proportions among the whole younger children.

I have only to add, with reference to Lord Newton's opinion in the case of *Antrobus*, that the opinions delivered in the Inner House seem to me to indicate that the judgment of the Court did not imply any adoption of that part of the Lord Ordinary's opinion which is now founded on, and that I respectfully dissent from it as not consistent with a sound view of the statute.

Lord Fraser concurred in the opinion of Lord Trayner.

Lord M'Laren—I was at first disposed to favour the view represented by the second alternative, but after reading the opinion signed by the Lord President and other Judges I have come to concur in the results at which they have arrived, and in the main in their reasoning.

To a complete expression of my view it is only necessary that I should add a few sentences.

The statute empowers the heir to create a fund of provision, to be ascertained by reference to rental; and the amount of the provision "for three or more children" is to be a sum not exceeding "three years' free rent or value *in the whole*." The words "in the whole" imply that provisions of unequal amounts may be granted to the children who are creditors in the bond, provided their aggregate value does not exceed the ascertained sum based on three years' rent or value.

Now, in general, when a father or person *in loco parentis* was empowered to apportion a fund amongst a family, our law (before it was altered by statute) would not permit him to apportion a vanishing share to any member of the family. This no doubt would be the logical limit of an unqualified power of apportionment, but the legal limit was that a substantial share must be given to each child.

This limitation of the power, however, presupposes that there is a right on the part of each child to receive a share of the fund, and had the language of the Aberdeen Act been consistent with the view that every one of the younger children is to have a right of participation in the fund, then I should have held that the father could not appoint unsubstantial shares to certain of the children, or give the whole to one child. But the statute is complied with in form and substance by a bond in favour of three children out of a family of six, and as no one child has an antecedent right to say that he or she must be one of the three children in whose favour the bond is to be granted, I infer that no child has a title or interest to complain that vanishing shares are given to any of the objects of the power, or, which is the same thing, that the entire fund is given to one.

Lord Trayner—The bond of provision in question is one granted by an heir of entail in possession in favour of his younger children, in virtue of the powers conferred on heirs of entail by the Aberdeen Act. By it the granter binds and obliges himself and the heirs of entail succeeding him (1) to pay to William, his second son, the sum of £10,000; or in the event of its being found that to provide the whole of said sum to his said son was in excess of his powers, then (2) to pay the said sum to his sons William, Charles, and Henry in the proportions following, viz., to William £9000, to Charles £600, and to Henry £400; and in the event of that also being found to be in excess of his powers (3) to pay the said sum of £10,000 among his whole younger children (five in number) in equal proportions. The £10,000 thus provided was regarded by the granter as the amount of three years' free rent of the entailed estate, and it is provided that in the event of its being ascertained that said sum exceeded three years' free rent, then "the said sum or sums, as the case may be, shall be and are hereby proportionally restricted so as to be consistent with the powers conferred by said statute." The question now is, Who is entitled to the provision thus made? Is William entitled to the whole £10,000; or is it divisible in the proportions foresaid between William, Charles, and Henry; or is it divisible among the whole of the younger children in equal shares?

The solution of the question now to be determined depends largely on the construction to be given to the fourth section of the Aberdeen Act, quoted in the bond of provision. It provides that an heir of entail in possession shall be entitled to grant bonds of provision or obligations binding the succeeding heirs of entail to make payment to the younger children of the granter of the bond "of such sum or sums of money, bearing interest from the granter's death as to him or her shall seem fit: Provided always that *the amount of such provision* shall in no case exceed the proportions following; . . . that is to say, for one child one year's free rent or value, for two children two years' free rent or value, and for three or more children three years' free rent or value in the whole." It does not occur to me that the terms of this clause are ambiguous or its meaning doubtful. If a provision is made for one younger child, that provision shall not exceed one year's free rent; if for three or more children, it shall not exceed three years' rent. The number of younger children which the heir granting the provision may have existing at the date of the bond, or at any other time, does not appear to me to enter into the

question. That matter is not taken into account in the statute. The only fact (so far as the number of the younger children is concerned) which requires to be or can be considered is, the number of children in whose favour the provision is made. The heir in possession is at liberty to make provision for his younger children out of the rents of the entailed estate or not as he pleases. But if he does make such provision it shall not exceed the proportions specified. If therefore, having a dozen children, he makes provision merely for one of them, he cannot make that provision in excess of one year's rent; if for three or more of them, three years' rents. Whether therefore a bond of provision granted under this statutory authority is valid and effectual or is not so, will depend upon the number of children provided for and the amount of the provision made. Children existing, but not provided for, are not taken (as I have said) into account by the statute.

This being my view of the statute, it follows in my opinion that the first branch of the threefold provision in question cannot be given effect to. It is a provision expressly in favour of one child (William) for a sum exceeding one year's rent; it is in fact a provision for one child to the extent of three years' rent, and is therefore not authorised by the statute.

It is maintained on behalf of William that there is authority for holding that this provision in his favour is valid, and reference is made to the opinion of Lord Newton in *Antrobus* v. *Innes*, November 25, 1830, 9 S. 70, and the opinion of the Lord President (Hope), Lords Moncreiff, and Murray in *Breadalbane*, May 26, 1840, 2 D. 917. The opinion of Lord Newton (given in a note to a judgment which was brought under review) undoubtedly favours the contention in support of which it is cited. But it has to be observed, in the first place, that the case in which that opinion was delivered was decided upon grounds that rendered it unnecessary to put any construction on the Aberdeen Act; and in the second place, that the other Judges, when the opinion in question was brought under their notice, expressly refused to take it into consideration, as being unnecessary to the decision of the question before them (3 Deas & Anderson, 286). Lord Newton's opinion therefore stands in the position of being *obiter*, and not confirmed, but practically put aside by the Judges who were reviewing his interlocutor. The opinion by the Lord President and others in the *Breadalbane* case was also *obiter;* the question now raised—for the first time directly raised—was not argued before them. They were dealing with a totally different issue. These opinions therefore, although the opinions of eminent Judges, cannot be accepted as authority in the decision of a question which was not before them, or argued, or considered.

The *Glenlyon* case, 2 D. 840, is referred to also as an authority "finding that the heir of entail had power to provide the whole three years' rents to one younger child." No doubt that was the result of the judgment, but the circumstances of that case make the judgment of no authority in the present. That case did not depend upon the Aberdeen Act at all. It was a case where, by the terms of the deed of entail, the heir in possession was authorised "to provide younger or other children besides the heir to three years' free rent," &c. Under that power, and not by virtue of the statute, the heir in possession provided the whole three years' rents to one younger child, and the provision was held good, because the power given under the entail was held practically to exempt the three years' rents from the fetters of the entail, and to leave the heir in possession the power of dealing with them as if he had been proprietor in fee-simple. How little that case bears as authority upon the present may be gathered from the following passage in the opinion of Lord Meadowbank—"In conclusion, I beg leave to observe that it does not appear to me that much light can be thrown upon this case by a reference to that of the *Trustees of the Marquis of Breadalbane and Lady E. Pringle*, the one arising under a clause in a deed of entail, and the other under the provisions of an Act of Parliament, to each of which respectively very different rules of construction are to be applied. In the case of construing powers conferred by a tailzie, the principle unquestionably is to give that interpretation which is most calculated for leaving the heir in possession free and unfettered, while the powers conferred by statute cannot be extended beyond what the terms employed plainly and distinctly import, and are subjected to a more strict and rigid construction."

I am of opinion that there is no authority for holding that under any reasonable construction of the Aberdeen Act a bond of provision solely in favour of one child can exceed the amount of one year's free rent. If there was any authority to that effect it would appear to me to be in direct conflict with the higher authority of the Act itself.

The second branch of the provision in question stands in a different position. It is a provision in favour of three children of the granter, although that provision is distributed in unequal shares. This inequality in the distribution of the provision is made the ground of objection to it. It is said on behalf of the whole younger children (except William) that "if the granter is to exercise his full power under the statute he must give to each of the younger children an equal share of the provision." The answer to that objection seems to me to be that the statute imposes no such obligation on the granter of the provision: it makes no reference whatever to the distribution or division of the provision which it authorises to be made. It does not require the heir in possession to make any provision for younger children; it confers on the younger children no right to demand any provision; it confers on them no right which would entitle them to question the legality or the propriety of any such provision, no matter in what terms it is conceived. The succeeding heir has a right to challenge the provision if made otherwise than as according to statute, but in my opinion no one except the succeeding heir can make such challenge, and he only on the ground I have stated. The succeeding heir in the present case takes no objection to the validity of this branch of the provision, and rightly so in my opinion. Being a provision in favour of three younger children to the extent of three years' rents (for I assume meantime that the £10,000 does not exceed the sum of three years' rents), he has no interest to object. Even if any objection were offered to this branch of the provision on the ground of unequal distribution, by children having an interest

and title to object, in my opinion the objection should be repelled. (1) If the heir in possession has made a provision authorised by the statute it is not to be subjected to any limitation which the statute does not impose. The statute imposes no restriction or limitation on the heir making the provision beyond this, that it shall for a certain number of children not exceed a certain sum. How that sum is to be divided the statute does not say. It must therefore be left to the heir making the provision to say how it is to be divided. Nobody else can do so; the succeeding heir cannot do so, nor can the younger children, whether partly benefited by or entirely excluded from the provision. (2) When the provision has been made, the amount of that provision is practically set free from the entail restrictions, and may be dealt with by the heir making the provision as a fund of which he is proprietor in fee-simple, and he may dispose of it as he pleases, provided he benefits none but younger children, that being a limitation imposed upon his power by the statute. "The effect of the statute in this particular is to place the entailed proprietor in regard to provisions in terms of the statute exactly on the same footing as if to that extent the rents of the entailed estate formed part of his unlimited property"—*per* Lord Fullerton in the *Breadalbane* case. (3) The same doctrine is recognised in the cases of *Grierson*, 6 D. 203, and *Campbell*, 23 D. 159.

It has been suggested that the second branch of the provision in question is not one provision for three children, but constitutes in fact three bonds—one in favour of William, one for Charles, and one for Henry—and that the provision for William is not in conformity with the statute, in respect it exceeds one year's rent. I am not able to adopt this view. I take the bond in question to be what it professes to be, and what I think it truly is, namely, one bond of provision in favour of three younger children, the amount in which is not disconform to the statute, in respect that for the three children the provision made does not exceed the statutory limit of three years' rent. That one child may take more than another under that bond does not in my opinion make the bond disconform to the statute, which does not provide that in no case shall one child get more than one year's rent. It provides that the rents of the entailed estate shall not be burdened beyond a certain amount as a provision for a certain number of children, but nowhere provides what each or any child's share shall be. If the bond is otherwise conform to statute the resulting interests under that bond will not make it disconform. This, again, is an objection which no one interested in the provision has any title or interest to maintain. The succeeding heir cannot object, for the rents of the estate have not been burdened beyond what the statute allows—three years' rents for three children. And accordingly the heir now in possession is not maintaining this objection. Nor can the younger children (Charles and Henry) object on this ground, for they had no right to any provision whatever, and therefore they cannot object that the provision actually made for them is not as large as it might have been had their father been disposed to make it larger.

On the whole matter I am of opinion that the parties entitled to the sum due under the bond of provision in question are William, Charles, and Henry Paterson, in the proportions of £9000 to William, £600 to Charles, and £400 to Henry. If it be ascertained that the sum of £10,000 exceeds the amount of three years' free rent the sums payable to William, Charles, and Henry respectively will suffer proportionate abatement.

At advising on July 20, 1888—

Lord Justice-Clerk—I concur in the opinions of the Lord President and the other Judges who agree with him.

Lord Young—I am not able to concur in that opinion. It ends with a sentence which struck me a good deal—that "if the question were otherwise more doubtful than we believe it to be, we should hesitate to disturb a construction which has been accepted by the profession, and acted on for so long a period." I am not at all aware that the construction which these learned Judges put upon the statute has been "accepted by the profession and acted on for so long a period." I know of no evidence of that at all. The present case seems to afford some evidence to the contrary. For, in the first place, this deed, prepared I do not know by whom, but I assume by experienced conveyancers, presents three alternatives, the maker of the deed, with the advice of his agent who prepared it, being doubtful as to the construction of the statute. He presents the alternatives in the order in which he prefers them, but there is no indication there that there is a construction which has been accepted by the profession and acted on for a long period. After providing three years' rent to one son, he goes on—"But in the event of its being found to be in excess of my powers to do that," then he does something else. And then again, "or otherwise, and in the event of its being found to be in excess of my powers either to provide the whole of the said sum," and so on, then he does something else. There is no indication there of a construction which has been accepted by the profession and acted on for a long period. Then, if I look to the judicial opinions here, I find five of the learned Judges, and your Lordship now concurring with them will make six, who say that any one of these alternatives is as good as another. That is the opinion of six of the learned Judges. Two of the learned Judges—Lord Fraser, and Lord Trayner—are of an opinion contrary to that of the six learned Judges whom I have first referred to, that the construction of the statute upon which the first alternative proceeds is quite erroneous and untenable—that is to say, they think the construction to be quite erroneous and untenable which has been accepted by the profession and acted on for so long a period. Then another learned Judge—Lord Lee, with whom I happen to agree—thinks the construction on which the first alternative proceeds is inadmissible, and that the only alternative proceeding on an admissible construction of the statute is the last.

Well, there is a charming variety of opinion here as to the construction of the statute, on the bench as well as in the profession, as shown by the deed before us; and I must therefore think that the construction is a fair question to be put to the Court and determined deliberately, not

as disturbing what has been universally accepted to be the true construction, but as deciding now for the first time—for so far as anybody knows, it never was decided before—what is the true construction of the statute. And as I have said, at the stage which the case has now reached, and when I am delivering my opinion, there is a most charming variety of opinion upon the question.

I think with Lord Lee that the construction upon which the first and also the second alternative proceeds is quite inadmissible.

The first alternative is a provision proceeding upon the narrative that if it be within his (the testator's) power to give the whole amount of three years' rents to one son, then he will do so and so. He only means to provide for him—to make a provision in his favour—stating the quite satisfactory reason that his other younger children are otherwise quite satisfactorily provided for. Therefore he has no intention of providing for them. Then he binds himself and the heirs succeeding as follows—"Or otherwise, and in the event of its being found to be in excess of my powers either to provide the whole of said sum to my son William Alexander Orr Paterson, or to apportion it among my said three sons in manner before mentioned (but in that event only), then to content and pay the said sum of £10,000 sterling among the said William Alexander Orr Paterson, Charles Orr Paterson, and Henry Edmund Paterson," and so on. If that is a provision for three or more of the children it is intelligible; if it is a provision for only one child, which I think it clearly is, it is certainly bad; and the opinion that it is good proceeds upon the view that it is a provision not for one child but for three. Now, I cannot take that view of it, but that is the opinion which, according to the opinion of the five learned Judges, with which your Lordship concurs, and therefore according to the opinion of six, is the opinion which must prevail. But for the variety of opinion upon it the language of the statute I should have thought too clear to admit of any doubt, that the provision for one child shall not exceed one year's free rent or value of the estate. That language is, "provided always, that the amount of such provision shall in no case exceed the proportions following—that is to say, for one child one year's free rent or value." And if this is a provision for one child, which I have said I think it is, then if the amount of the provision exceeds one year's free rent or value—being up to three years' free rent or value—it is in my opinion bad.

But it is said, and I confess it is the only argument in favour of the view I am opposing that I have seen, that the heir of entail does not object, and that the younger children have no interest to object, and that therefore it must be good. Now it is quite certain that the heir of entail does not object, and it is quite certain that he has no interest to, because under this deed the heir of entail will have to pay £10,000, for one or other of the three alternatives must prevail, and each of them imposes an obligation on him to pay £10,000, and as I have said one of these must prevail. Therefore it is that I say he is in no way interested.

But is there no interest? Have the younger children no interest? It is said they have no interest. Why? Because there is no obligation on the parent to provide for any of them. I quite admit that. And if there had been no alternative in their favour they would have had no interest, and they would not have been listened to for a moment. If an heir of entail in possession grants a bond of provision in favour of one younger child for three years' free rent, or for four years', or for ten years', and the heir of entail is willing to pay it, the other younger children have no manner of title to object. They are not called in at all. It is for the heir of entail to object if he thinks fit. If he chooses to pay the money to a man who has no title to demand it, that is no affair of the other younger children, in whose favour the father is under no obligation.

But to go into that is to lose sight of the deed that is before us. The maker of the deed says—If that is not according to the true meaning of the entail, then I dispose of the fund otherwise. I give it to the other younger children in that event. I am to refer to the other provisions bye-and-bye. That gives them an interest which otherwise they would not have had. But in the same way, suppose the heir of entail in possession has power to make provision in favour of his widow. It happens to be in her case by way of liferent or annuity—annuity not exceeding a third of the free rental of the estate. Suppose the heir had a widow, and before his death he reasons thus—"It is all one to the heir of entail whether he pays the three years' free rent to my widow, or to one of my younger children whom I choose to nominate if I can under the Act of Parliament. My widow will be well provided for. She is another man's widow too, and she will have when I die £10,000 a-year. There is no occasion to provide for her, but I am empowered by the statute to provide for her, and instead of giving it to her who don't need it, I will give it to my son, or one of my daughters." Well, if he did that, and the heir of entail chose to pay it, as he might, out of regard to his father, or from any other motive, the widow would have no right to object at all, because he was under no obligation to make provision for her—none at all. But if he had made it as here—"If by the statute I am empowered to give this provision which the statute enables me to give to the widow, if I am empowered to give that to my son or daughter, I will do it. But if that is not within my power under the statute, then I desire that my widow shall have it"—would she not have had a right then? Must we not have sustained her claim? And that upon the footing that there was no authority in the statute to give it to the son or daughter, and therefore the first provision must fail, but that there was authority to give it to the widow, and therefore the second must have effect. All this reasoning, upon which the opinions which I am now expressing my grounds for differing from proceed, would be equally good in that case. It is all one to the heir whether he gives the annuity to the widow or to a son or daughter. It is of the same amount, and if he do not object, then the widow cannot object, because there is no right in her to demand the provision. But in the case I have put, in which the heir says—"If I can by the statute give the widow's provision to a son or daughter, I do it; but if I cannot, I give it to the widow"—I should be obliged to sustain the widow's claim.

These are the grounds on which I reject, and I must say without any doubts or misgivings in my own mind, the construction of this statute on which this first provision proceeds. It is somewhat remarkable, it appears to me, that Lord Trayner, who concurs in that, thinks that the same result practically may be attained by giving one child a provision, not of full three years' rents, but by giving small provisions to the others. I have a strong opinion against that. I think the provision is absolute. The provision for one child shall not exceed one year's free rent, and you cannot make it exceed one year's free rent by the palpable device of making it two years' and three-quarters, or two years' and nine-tenths, and dividing the fraction of the third year amongst the other younger children. That is the merest pretence, and is, I think, a violation of the Act of Parliament. I think that the provision of the statute is, that one child is only to have one year's free rent, whatever the number of the children may be. You may give them, if they are up to the number of three or more, three years' free rent, but upon the condition that no one child shall have more than one.

And what is the good sense of the thing upon another consideration? Let me take the second alternative provision here, or let me take the first again for the purpose of illustration. According to the opinion which is to prevail here—that must govern the judgment—the eldest son is to have £10,000. If his two younger brethren had died, he could only have got a third of that. That is absolutely certain. Now, taking it as a matter of sense, what is the sense of a construction of the statute which makes the provision depend upon the death or the survivance of children who take nothing. A man has three children. He gives £10,000, which is assumed to be three years' free rent, to one of them, and not a shilling to the other two, and that upon a statement that they do not require any provision. If these two, who require nothing and take nothing, survive the testator the one child shall have £10,000. If they do not, although nothing is given to them and nothing taken by them, that £10,000 provision is reduced to a third of it. Now, I must say my mind rebels against that as a reasonable construction of the Act of Parliament. A man has three daughters. One of them is unprovided for. The other two are married. They are duchesses. He gives three years' free rent to the child who is unprovided for. She will take that if the duchesses survive their father, but if they die, although they take nothing from him or from the entailed estate at all, then her provision is cut down to a third. In the same way with three sons. Two of them are millionaires. They have gone into the world and made their fortunes, and the father is a poor man compared to them. If they survive they take nothing, and the third unprovided for son would have three years' rent, if they do not survive, but die leaving their millions behind them, his provision would be cut down to a third of the three years' rent. Now, I avoid all that by simply construing the language of the statute according to the plain import of the words—the provision for one child shall not exceed one year's free rent. No matter how many children there are, the provision for no one shall exceed under any circumstances a year's rent. If you have more children, up to three, you may divide three years' free rent amongst them as you please, subject only to this, that no one of them shall have more than one. That is a very plain and simple and to my mind sensible construction. The other I cannot assent to. My opinion here therefore accords with that of Lord Lee. I think the last alternative is the only alternative which proceeds upon a right construction of the statute, or, in other words, is according to the heir of entail's powers, and therefore must necessarily prevail in favour of the younger children—not that they had any right to demand the provision, but because there is here a provision made in their favour which they are entitled to insist in, if it is the only alternative under which the maker of the deed was entitled to act.

Lord Rutherfurd Clark—I agree with the opinion of the Lord President and of the other Judges who concur with him.

Lord Craighill was absent.

The Court pronounced the following interlocutor:—

> "Having resumed consideration of the special case, with the opinions of the consulted Judges, in conformity with the opinions of the Judges of the whole Court, Answer the second question to the effect that the third party is entitled to the sum due under the bond of provision: Find and declare accordingly: Find the parties of the fourth and fifth part entitled to expenses out of the sum payable under the said bond of the expenses incurred by them since the 2nd day of July 1887," &c.

Counsel for the Third Party—Comrie Thomson—Jameson. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for the Fourth and Fifth Parties—Gloag——Gillespie. Agents—J. & A. Forman & Thomson, W.S.

END OF VOLUME XXV.