

COURT OF SESSION.

Monday, November 7, 1898.

OUTER HOUSE.

[Lord Pearson.

MURRAY STEWART, PETITIONER.

Entail—Charging Estate with Debt—Bond of Annualrent—Entail Amendment Act 1875 (38 and 39 Vict. c. 61), sec. 8.

Under the provisions of section 8 of the Entail Amendment Act 1875, an heir of entail who has obtained authority to charge the estate is entitled to grant a bond of annualrent at a rate not exceeding £7, 2s. for every £100 of the amount authorised to be charged. Owing to the fall in the rate of interest since 1875 a bond calculated at this maximum rate would now produce a sum greater than the amount authorised.

Held (per Lord Pearson) that in an application for authority to charge, intimation will be made to the next heirs to give them an opportunity of moving that the interlocutor be varied by introducing a more limited maximum rate; that if they appear it is for the petitioner to show why the motion should not be granted, and that if they do not appear the Court will not *ex proprio motu* impose any limit other than that contained in the section.

Observations (per Lord Pearson) on the case of *Cadell, Petitioner*, May 25, 1897, 34 S.L.R. 640.

This was a petition by H. G. Murray Stewart, heir of entail in possession of the estate of Broughton, in the county of Wigton, for authority to charge that estate with a sum of £11,002 expended by him on improvements. Authority was craved to execute either “a bond of annualrent in ordinary form over the said lands of Broughton in respect of or corresponding to the said sum of £11,002, or otherwise to grant a bond and disposition in security for the fourth of the said sum.

The petition was remitted to Mr Montgomerie Bell, W.S., to report on the procedure. The terms of the report lodged by him, so far as material, are fully quoted in the Lord Ordinary’s opinion.

By section 8 of the Entail Amendment (Scotland) Act 1875 it is provided as follows:—“It shall be lawful for an heir of entail in possession of an entailed estate in Scotland holden by virtue of any tailzie dated prior to 1st August 1848 (notwithstanding any provision to the contrary contained in the tailzie) who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate, other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annualrent, binding himself and his heirs of tailzie to make payment of an annual rent for twenty-five years from and after

the date of such authority of the Court,” “such annualrent to be payable by equal moieties half-yearly, and to be at a rate not exceeding £7, 2s. per annum for every hundred pounds so authorised to be borrowed, and so on in proportion for any greater or less sum.”

The Lord Ordinary ordered intimation to be made to the three nearest heirs of the terms of Mr Bell’s report, and no objection having been lodged on their behalf, granted decree in terms of the prayer of the petition.

Opinion.—“In granting the prayer of this petition it is right I should add an explanation of the procedure.

“It is a petition in ordinary form under the Entail Acts 1875 to 1882 to have improvement expenditure charged on an entailed estate in (the alternative modes sanctioned by statute—that is, by bond of annualrent, or (to the extent of three-fourths) by bond and disposition in security.

“The three next heirs are of full age and not subject to legal incapacity. They are resident in England, but are represented by an Edinburgh firm of law-agents of high standing.

“Mr M. Montgomerie Bell, W.S., to whom the petition was remitted in ordinary course, raised three questions in his report.

“The first question related to certain expenditure which was begun but not quite completed when the petition was presented. I have allowed the petitioner to amend his petition so as to include this in terms, and as the reporter, while reducing the sum originally claimed to £10,523, 3s., allows £497, 19s. 10d. additional under this head, amounting together to £11,021, 2s. 10d., I have allowed a charge to the full amount of £11,002, 6s. craved in the petition, this being less than the sum reported as duly expended.

“The second question related to certain items of expenditure which the man of skill had refused, but as to which the solicitors for the three next heirs had stated certain objections. I allowed the parties an opportunity of insisting on these objections, but they have not availed themselves of it.

“The third question touches a matter of considerable importance in entail practice, regarding the alternative of charging the expenditure by way of annual rent. The reporter points out that (as usual) the petitioner has not given any indication as to which alternative he is to adopt, but that if he elects to proceed by bond of annualrent he will be in a position to charge the estate with an annual rent at any rate not exceeding £7, 2s. for every £100 of the sum he is found to have expended on permanent improvements.

“Mr Bell adds—‘The reporter understands that it is not an uncommon practice for heirs of entail in similar circumstances to charge their entailed estates at the maximum rate, and that thereby considerable profits are made by them on such transactions. An instance of this was disclosed in the petition — *Cadell*, May 25, 1897, 34 S.L.R. 640.

“‘The reporter does not wish to suggest

that the petitioner has any intention to create a real charge on the said entailed lands and estate in respect of the improvement expenditure at a higher rate than that which is necessary to produce payment to him of the actual sum to be allowed in respect thereof. But in view of the practice to which the reporter has referred, and in the interests of the next heirs of entail, he ventures to suggest that it may be made part of the duty of the reporter to whom the adjustment and revisal of the bond or bonds of annualrent may be remitted, to see that the annualrent charge stipulated for therein does not exceed the amount which, according to the rates charged for the time in similar transactions by first class insurance offices in Scotland (which take up the greater part of such securities) would be required to secure repayment to the petitioner of the amount authorised to be charged under the petition.'

"It will be observed that this suggestion of the reporter, which seems to me altogether reasonable, is made 'in the interests of the next heirs of entail.' It raises no question of competency. Had it done so, I should have decided the question or reported the case to the Inner House, whether the next heirs appeared to defend their interests or not. But the question raised is one merely as to the amount with which the estate should be charged not being beyond the maximum allowed by the statute. I therefore appointed special intimation of Mr Bell's report to be made to the three next heirs or their known agents in order that they might appear for their interest if so advised. As they have not appeared I take it that they do not object to the maximum charge.

"I am not, however, to be held as deciding that the petitioner, in an application to charge improvement expenditure, is entitled, as a matter of course, to obtain authority for a bond of annualrent at the rate of £7, 2s. per cent. That is the rate required to provide repayment of the capital in twenty-five years on a 5 per cent. basis. But if the lender is willing to improve his money at a less rate than 5 per cent., he will be willing to accept a bond of annualrent at a less rate than £7, 2s.; or conversely, if he is to get a bond calculated at £7, 2s. per cent., he will give a correspondingly larger sum for it.

"Accordingly, if the petitioner is armed with authority to charge the estate with an annual rent calculated at the statutory maximum rate, he will be able to go into the market with his bond, and thus put into his pocket, at the cost of the estate, a substantially larger sum than the amount he is found to have expended on improvements.

"That is what happened in the case of *Cadell*, referred to by the reporter. But I desire to point out that that was not a decision on the question. What happened was this. The petition was in ordinary form, save that it made no mention of the alternative of granting a bond and disposition in security. Answers were lodged for the two next heirs objecting to certain

items of expenditure as being a business venture subject to depreciation—it was a brickwork)—and asking for a special inquiry. The usual remit resulted in a report which satisfied the respondents on that head, and the man of business (Mr Rankine Simson, W.S.) reported that authority might be granted in the usual terms. Thereupon the parties came to an agreement, whereby on the petitioner restricting his claim as to the brickwork, and renouncing his statutory right to substitute a bond and disposition in security for a bond of annualrent, the respondents (including the *curator ad litem* to the third heir) assented to authority to charge being granted in terms of Mr Rankine Simson's report. This agreement was embodied in three minutes which were lodged in process. This resulted in an interlocutor granting warrant to the petitioner to execute a bond of annualrent over the estate in ordinary form, such annualrent not exceeding the sum of £7, 2s. per cent. of the sum to be charged. Having thus obtained authority, the petitioner granted a bond of annualrent in favour of an insurance company at the rate of £7, 2s. per cent. on £3000, which he desired to charge, and for this bond he received from the Insurance Company £3436, 5s. 9d. This came out in a subsequent and final report by Mr Rankine Simson, and it was then, and not till then, that the question was raised. After careful consideration (for the pecuniary result was startling) I formed the opinion that the question was raised at too late a stage, the bond of annualrent of which I was then asked to approve being within the authority which I had previously granted in terms assented to by the three next heirs.

"The question therefore remains quite open. Moreover, it is not, so far as I know, concluded by practice. I found on inquiry that the case of *Cadell* was certainly not the first case in which a petitioner had obtained more for his bond than the amount of his improvement expenditure. And in the present case it was argued for the petitioner that the case of *Leith*, 1888 (15 R. 944), was an authority in favour of his view. That case itself does not seem to me to decide any such question; and the remarks of Lord Adam (p. 950) which were founded on seem to apply to the later stage which was reached in the case of *Cadell*, and not to affect Mr Montgomerie Bell's present suggestion that the Court should interfere at an earlier stage.

"On the other hand, I have had occasion to know that within the last few years there had been instances of such annualrents being granted by heirs of entail at £6, 4s., £6, 10s. 8d., and £6, 14s. 1d. per cent. in place of £7, 2s. And only last week, in the case [of *W. E. M'Adam* (Nov. 5, 1898), the reporter, Mr J. P. Wright, W.S., reported in favour of a rate of £6, 0s. 9d. per cent., being on the basis of 3½ per cent per annum on the authorised charge, and this was acquiesced in by the petitioner.

"I propose therefore in each case to allow the next heirs an opportunity of modifying the usual terms of the interlocutor giving

authority to borrow by qualifying it in some such way as Mr Montgomerie Bell suggests, and it will be for the petitioner to show cause why this should not be done. I think it may be a question of circumstances. Certainly no hard-and-fast rule can be laid down as to the rate on which the bond should be calculated. It will depend, moreover, less on the character and value of the estate, the amount of prior burdens affecting it, and the amount of the loan required. But it is a question for the next heirs, and if after due intimation they do not appear to oppose, I see no reason why the Court should interpose any difficulty."

Counsel for the Petitioner—Blackburn.
Agents—Russell & Dunlop, W.S.

Tuesday, November 8.

OUTER HOUSE.

[Lord Kincairney.

STEWART v. STEWART'S TRUSTEE.

Succession—Fee and Liferent—Payment of Annuity out of Capital.

It is a general rule that an annuity provided by trust-disposition falls to be made up out of capital if the income of the estate be insufficient to meet it. Terms of settlement held (by Lord Kincairney) not to indicate an intention that the payment should be limited to income so as to elide the general rule.

Succession—Fee and Liferent—Double Liferent on Same Estate—Right of Liferenter to Enforce Realisation.

A party whose only estate at his death consisted in the residuary interest in a trust fund on which an annuity absorbing the whole annual income had been charged in favour of his wife during her life, had provided, by marriage-contract, a liferent of his whole estate as at his death to his wife. Held that she was entitled to have the residuary interest realised, and to have a liferent of the income from the sum thereby obtained.

This was an action at the instance of Mrs S. Dalrymple Hay or Stewart, widow of the deceased James Stewart, against Leveson Douglas Stewart and others, trustees under the antenuptial marriage-contract between herself and her late husband, and also against the said L. D. Stewart as sole surviving trustee under the will of John Stewart, her husband's brother.

By the said marriage-contract Mrs Stewart was provided with a liferent of all the estate, heritable and moveable, which should belong to her husband at his death. In point of fact at his death in 1895 he possessed no property except a residuary interest in the property of his brother John Stewart, which was burdened with an annuity of £250 in favour of the present pursuer.

John Stewart by his last will and testament directed his trustees, *inter alia*, to

receive the "rents, issues, and annual produce" of his estate, and to pay thereout a certain sum for keeping up a policy of assurance, and subject thereto, to pay to his brother James during his life the annual sum of £250, and thereafter to apply the said sum to the maintenance and benefit of his wife. Subject to this annuity he bequeathed his whole estates to his brother James Stewart.

The income of the estate thus left by John Stewart proved to be insufficient to pay the annuity of £250 provided by him to the present pursuer, and she accordingly raised this action of declarator against the trustee under his will and against the trustees under her own marriage-contract.

The conclusions of the action so far as material to the present report were as follows:—"In the first place it ought and should be declared that under the said last will and testament of the said deceased John Stewart the pursuer is entitled to receive as from and after 19th December 1895, being the date of the death of her said husband James Stewart, out of the trust-estate of the said deceased John Stewart, an annuity of £250 during her life, or until she shall marry again, and that during the said period she is entitled to receive in each year full payment of the said sum of £250 from the said trust-estate, whether the income thereof in each year or in any particular year amounts to that sum and is sufficient to meet the said annuity or not; and that the defender the said L. D. Stewart, as sole surviving trustee acting under the said last will and testament, and his successors in office, are bound to make payment to her accordingly of the said sum annually out of the funds of the said trust-estate, whether income or capital. In the fourth place it ought and should be found and declared that in virtue of the obligation contained in the said contract of marriage between the said James Stewart and the pursuer the pursuer is entitled to receive the free annual income of the residue of the estate of the said James Stewart, and that in order to the providing and securing of the same the pursuer is entitled to have the interest of the estate of the said James Stewart in the estate of the said John Stewart (which interest is of a reversionary character) realised, and that it is the duty of the defender the said L. D. Stewart, as trustee acting under the said disposition and settlement of the said James Stewart, and as his executor, to realise the said reversionary interest accordingly, and to pay to the pursuer such sum as she may in the course of the process to follow hereon be found entitled to receive as a *surrogatum* for the income of the said reversionary interest between 19th December 1895 and the date when the price of the said reversionary interest shall be receivable, and to hold the balance that may result as a part of the estate of the said James Stewart, and to account to the pursuer for the income that may be derived therefrom."

The pursuer pleaded, *inter alia*—" (2) The income of John Stewart's trust-estate being insufficient to provide the pursuer with the