

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

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

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

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

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

In the present case, the prominent fact is, that the provision made is not in itself a provision

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

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

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

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

Friday, May 21.

M'BRIDE v. WILLIAMS AND DALZIEL.

(Ante p. 273.)

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

In this case the verdict obtained by the pursuer in the first trial having been set aside as contrary to evidence, a second trial took place before the Lord President and a special jury. A verdict was returned for the defenders. Each party now moved for the expenses of the first trial.

RETTIE for defenders.

THOMS for pursuer.

Miller's Trustee v. Shield, 1 Macph. 380, was cited.

At advising—

LORD PRESIDENT—This is a question of some difficulty, but the case is a very special one. I think the general rule is quite correctly laid down in *Miller's Trustee v. Shield*, that where there have been two trials, and the party who ultimately prevails failed to succeed in the first, he will not be held entitled to the expenses of that trial in which he has lost. But circumstances may occur to overrule that general principle, and I think that here there are circumstances which are entitled to very great weight. Until our judgment on the bill of exceptions in this case, it had never been authoritatively decided that malice might competently be proved, though not put in issue, and therefore the defenders were to a certain extent excusable in believing that they were not called on at the first trial to meet a proof of malice. Although there was a general allegation of malice on record, that allegation was perfectly general, amounting to nothing more than the use of the word malice. But farther, the nature of the evidence led for the purpose of establishing malice was such that it could not have been anticipated to turn out in evidence to be substantially incorrect in point of fact. I don't say more than that on this point. But the action involved a most serious imputation on the character and conduct of the defenders. When they were successful in getting the verdict of the first jury set aside, and at the second successfully met the case of malice, and so not only escaped from the consequences of the verdict of damages, but vindicated their own character against the serious imputation cast on it by the pursuer, I think they are in a very exceptional position, and have a very strong claim on our indulgent consideration. I am therefore disposed to think they should have the expenses of the first as well as of the second trial.

The other judges concurred.

Agents for the Pursuer—Lindsay & Paterson, W.S.

Saturday, May 22.

SECOND DIVISION.

M'TURK v. M'TURK AND OTHERS.

Entail—Prohibition—Irritant and Resolutive Clauses—Act 1685, c. 22—11 and 12 Vict., c. 36.

Terms of a deed which held not to fence the prohibition against sales, alienations, and altering the order of succession by sufficient irritant clauses, and entail accordingly held invalid.

This was an action of declarator brought by James Robert M'Turk, or M'Turk Gibson, Esq., against the next heirs of tailzie, to have it declared that the deed of entail under which he holds the lands of Glencrook, in the parish of Glencairn, Dumfriesshire, is not a valid deed of entail. By section 43 of the Entail Amendment Act, it is enacted that where a deed of tailzie is defective in

any one of the prohibitions against alienation and contraction of debt and alteration of the order of succession, it shall be held invalid and ineffectual as regards all the prohibitions, and the estate shall be subject to the deeds and debts of the heir in possession. The disposition and deed of tailzie in question was executed in May 1808, and recorded in the Register of Tailzies in January 1810, and in the books of Council and Session in June 1838. In the entail there was a prohibition against altering the order of succession, and against sales and alienations, and the contraction of debts and of deeds, "whereby the said lands and estate may be burdened or evicted." The irritancy was in the following terms:—"All such deeds to be granted, or debts to be contracted, in so far as the same may affect the said lands and estate, shall be void and null, and the said lands and estate shall be noways affected or burdened therewith, or subjected to, or be liable to be adjudged, or anyways evicted, either in whole or in part, for or by the debts and deeds, legal or voluntary, contracted or granted by any of the said heirs." At the end of the resolutive clause there were the following words, which it was contended by the defenders supplied any defects in the irritant clause—"And upon every such contravention it is hereby expressly provided and declared, not only that the said lands and estate shall not be burdened with the debts and deeds of the heirs of tailzie as before provided, but also that all acts and deeds contrary to the foregoing conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force or effect against the other heirs of tailzie succeeding to the said lands and estate, and that neither the said heirs nor the said estate shall be anyways burdened therewith." The Lord Ordinary (ORMIDALE) held the entail did not contain the irritant clauses necessary for fencing the prohibitions against sales, alienations, and alterations of the order of succession.

The following is the interlocutor of the Lord Ordinary:—"Edinburgh, 23d December 1868.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Finds that, in respect the deed of entail in question in this case is defective in its irritant clauses, it is not valid and effectual in terms of the statutes libelled on: Therefore repels the defences, and finds, declares, and decerns in terms of the conclusions of the summons; but finds no expenses due.

"*Note.*—The entail in question is peculiar in its structure, and in many respects not very clearly or distinctly expressed. The question is, whether it can be held to contain all the necessary prohibitive, irritant, and resolutive clauses? The Lord Ordinary is of opinion that it does not contain the irritant clauses necessary for fencing the prohibitions against sales, alienations, and alterations of the order of succession.

"Under the *second* head of what are called in the deed its 'provisions, limitations, and restrictions,' there is a prohibition against altering the order of succession; and under the *third* head there is not only a prohibition against sales and alienations, and the contraction of debts, and of 'deeds whereby the said lands and estate may be burdened or evicted;' but also an irritancy in these terms:—"Declaring hereby that all such *deeds* to be granted, or debts to be contracted, in so far as the same may affect the said lands and estate, shall be void and null, and the said lands and estate shall be noways affected or burdened therewith, or sub-