must be some mistake. I cannot suppose it possible that the landlord means seriously to plead that he is to take to himself the buildings erected or repaired by the tenant's expenditure of this £200, and yet, be under no obligation to repay it, but be released by his own option, and his own act, in availing himself of the opportunity arising on the bankruptcy of the tenant. The landlord was quite entitled to terminate the lease; but he is not, I think, entitled to plead that by doing so he has got quit of his obligation.

But a different question may be raised. It may be said—"True, the obligation subsists, but the time for exacting payment has not arrived, and will not arrive till the natural expiry of the lease."

I am disposed to think that this is a sound view of the terms of the lease, and of the nature of the obligation.

The lease cannot be correctly described as reaching its expiry when, in the option of the landlord, it was prematurely terminated on the bankruptcy of the tenant. The pursuer, Mr Carter, himself speaks of "the unexpired portion of the lease." (Letter of 2d November 1869, p. 24.)

Accordingly, the result—the legal and equitable result—is, in my opinion, that the landlord is now under obligation to pay, and will, at the time when this lease would naturally have expired, viz., at Whitsunday 1880, be bound then to pay this £200, with interest thereon from the date of expenditure till payment at the rate of £1, 10s., per cent. per annum. When this obligation—existing now, but prestable in 1880—is judicially ascertained and declared, it will be available as a fund of credit to the trustee for the creditors of Pendreigh, the tenant; and the adjustment of the matter for present payment by a calculation of discount to the landlord, on the one hand, and interest at £1, 10s., per cent. till 1880, on the other hand, may be safely left to Mr Carter and the agents for the defender.

Lord Kinloch—I am of opinion that the Lord Ordinary has arrived at a wrong conclusion in this case; and that Colonel Dewar, the landlord, is indebted to the pursuer, as representing the tenant, in the sum of £200 concluded for.

I conceive the obligation for this £200 contained in the lease to stand on an entirely different footing from any general obligation for payment of meliorations. The landlord becomes specially bound to pay this sum to the tenant at the expiry of the lease "in respect that the steading of offices situated on the lands hereby let is not in a good state of repair, and the said James Pendreigh binds and obliges himself and his foresaids to expend the sum of £200 sterling in building and repairing the same, according to plans to be approved of by the said James Dewar." The landlord further became bound to pay to the tenant yearly interest on this sum at the rate of £1, 10s. per cent. "from the time when the said sum shall be expended as aforesaid, until payment thereof at the expiry of this lease as aforesaid." The tenant binds himself to keep the steading in good repair, and to deliver it in such repair at the end of the lease.

I consider the advance of this £200 to be in substance just a loan by the tenant to the landlord, repayable at the end of the lease, with interest in the meantime paid to the tenant, the lender. It was in substance the landlord who was to erect the steading, which was to become his when the lease expired. The tenant simply lent the landlord money for this purpose, at an extremely modified rate of interest; and at the end of the lease the loan was to be repaid, and the landlord was to get the steading in good order made over to him.

So viewing this transaction, I think the tenant's right of repayment was not forfeited or affected by his sequestration, and by the landlord taking advantage of an option given him in the lease to terminate the tenancy on that event. That the landlord so chose to terminate the lease cannot, I think, entitle him to shake himself clear of the obligation to pay his debt to the tenant. This is not, I think, one of those prestations on the part of the landlord which are held not demandable unless the tenant fulfil all his obligations down to the natural expiry of the lease. It was a special debt contracted for a special purpose. The counterpart of the loan by the tenant was the erection of a suitable steading, which was to become the landlord's property. This counterpart was fulfilled by the tenant; and on the landlord bringing the lease to a close he obtained the stipulated equivalent in the possession of the renovated steading. I am of opinion that he is bound to pay the debt contracted to the tenant, by which all this was accomplished.

Further, I am of opinion (and on this point I differ from your Lordships), that the landlord was bound to pay this debt so soon as by his own act he brought the lease to a termination, and that he is not entitled to suspend payment till the natural expiry of the lease at the end of nineteen years. With reference to the payment of this debt, I think the expiry of the lease is its termination in any way, and emphatically its termination by the act of the landlord himself. I can see no ground on which the landlord is entitled to have the debt kept up at the reduced interest of 1½ per cent. after the tenant has nothing more to do with the farm. By bringing the lease to a termination, I think the landlord obtained all the equivalent for which he stipulated when coming under this obligation; he got his land into his own hands to let anew as favourably as he could, and he obtained the steading in its renovated condition, with which to furnish an inducement to a new tenant. He thus, I think, obtained the *quid pro quo*, and having got the one, I think he must pay the other. I am of opinion that the defender was bound to pay this debt so soon as he brought the lease to a termination, with interest at 1½ per cent. to that date, and legal interest subsequently till payment. When payment is made all interest will cease.

Agents for Pursuer—Waddell & M'Intosh, W.S.
Agents for Defenders—Macnaughton & Finlay, W.S.

Wednesday, July 19.

SECOND DIVISION.

BARSTOW (PARK'S CURATOR) *v.* BLACK AND OTHERS.

(*Ante*, p. 213, and vol. vii, p. 381).

Heir-at-Law—Heir of Provision—Truster's Debts. Circumstances in which *held* that a testator did not intend to relieve his heir-at-law of debts so as to make them burdens on his heir of provision.

Deathbed. Observed, by Lord Benholme, that the intention of a testator may be implied from a deathbed deed which has been reduced *ex capite lecti*.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"*Edinburgh*, 22*d June* 1871.—The Lord Ordinary having heard counsel in relation to the question of liability for the annuities which are provided under the disposition and deed of settlement of the late Mr William Dunn, and by the trust-disposition and settlement of his brother the late Mr Alexander Dunn respectively; and having made avizandum and considered the debate, productions, and whole process, and having regard to the decree of reduction of the said trust-disposition and settlement *ex capite lecti*, at the instance of the curator bonis of William Park, the heir-at-law of Alexander Dunn, by virtue of which decree certain portions of the heritable estate which was conveyed by William Dunn under the terms of his said deed of settlement to the said Alexander Dunn, and also the whole heritable estate which belonged to the said Alexander Dunn in his own right, irrespective of his said brother's deed of settlement, have been found to belong to the said William Park as heir-at-law foresaid; and further, having regard to the terms of the preceding interlocutor of the Court, dated 21st December 1870, whereby the lands and others to which the said William Park has been so found entitled, and the rents and profits thereof, under the burdens mentioned in the previous interlocutor of the Lord Ordinary of 10th November 1870, are ordained to be withdrawn from the condescendence of the fund *in medio* of this process: Finds in point of law (1) that the said annuities, as having *tractus futuri temporis*, are heritable in their nature; (2) that as respects the annuities provided by the said deed of settlement of William Dunn, the conveyance to Alexander Dunn, under the deed of settlement, of the whole heritable and moveable estate which belonged to William Dunn having been burdened with the payment of these annuities, the said Alexander Dunn, by acceptance of said conveyance, became bound to implement the obligation so imposed upon him; (3) that as the burden of the said annuities has not been laid by Alexander Dunn upon any specific portion of his estate, heritable or moveable, the obligation for payment thereof is binding on his heir-at-law, and does not primarily attach to the remaining fund *in medio* in this process, or to any part thereof: Reserves to the pursuers, the trustees of the said Alexander Dunn, or other party interested, right to call upon the said William Park, as heir-at-law foresaid, to make reimbursement or payment of said annuities in so far as not paid by the said Alexander Dunn, and to make due provision for the future payment thereof, in so far as they are still subsisting, and reserves to the said William Park his answer as accords; and (4) with reference to the increase of £100 sterling made by the said Alexander Dunn in his said trust-disposition and settlement to each of the annuities provided to his nieces by his brother's deed of settlement, finds that the provision of said increase was ineffectual as against the said heir-at-law, or the lands and others to which he has been found entitled as aforesaid, and falls primarily upon the heritable estate to be taken by such of the beneficiaries as claim under the trust-disposition and settlement of Alexander Dunn: Appoints the cause to be enrolled, that parties may be heard as to the terms of such decerniture as may be necessary to give effect to the preceding findings: Reserves meanwhile the question of expenses so far as relating to the discussion in connection with the subject-matter of the present interlocutor."

Park's curator reclaimed.

The Solicitor-General (CLARK) and LEE for him.

FRASER, SHAND, LANCASTER, GLOAG, ASHER, MACLEAN, and BALFOUR for respondents.

At advising—

LORD JUSTICE-CLERK—Without resuming the circumstances of the case of the succession of Alexander Dunn, with which your Lordships are familiar, I shall proceed at once to state the opinion that I have formed on the somewhat interesting and important question that was argued to us the other day. That question is, whether the heir-at-law of Alexander Dunn is entitled to claim in this multiplepoinding the amount of an annuity which was left to him in the will of William Dunn, that part of the fund *in medio* on which the claim is made being those subjects that were contained in the destination in William's deed, and which have been found not to fall under the reduction of the deathbed deed, but to be carried by the destination to the heirs of provision. By former judgment we have directed the heritable estate of Alexander Dunn, so far as it fell under the reductive conclusions of the summons, to be withdrawn from the fund *in medio*, and the question which now arises is the claim by the heir-at-law for this annuity on that part of the funds in the multiplepoinding. That is the form in which the question arises, but the real question is whether the heir-at-law is entitled to be relieved by the heirs of provision succeeding under that destination of the annuities which were left in William Dunn's deed. It is objected to the claim of the heir-at-law in this multiplepoinding that the obligation to pay the annuity was a debt due by Alexander Dunn, and being an annuity having a tract of future time, it was a burden on his heritable estate, and that the heir-at-law being the proper debtor in that burden, this debt is extinguished *confusione*. The heir-at-law replies, that although this might be the ordinary result of the legal order of liability of discussion among heirs, this order is excluded in the present case, because Alexander Dunn has indicated his intention that this debt should be borne, not by his heirs of line, but by the heirs of provision succeeding under the destination in the deed of William Dunn. It is a question entirely of intention. It is so put, and must be so put. I am of opinion that in the present case there is no ground whatever for relieving the heir-at-law of the primary obligation for this debt, and that he has no claim against the heir of provision. The general principle of law on which the argument for the heir-at-law was founded may be conceded. When the proprietor of a certain heritable estate executes a special conveyance to a series of heirs, and binds them in the conveyance to make payment of certain debts or provisions, the obligation, although not made real on the lands, may be so expressed as to lay on each heir who succeeds a personal liability to discharge it; and where this appears clearly to have been the intention of the granter, the heir of provision and not the heir-at-law, or the executor of those who succeed to the estate, will be the proper and primary debtors in the obligation. I do not think there can be any question that that, as a general rule, is a competent

mode of charging successive heirs succeeding to a special subject in a burden, which otherwise, and but for the expression of such intention, would have been chargeable upon another class of heirs. In the case of an entailed destination under which the successive heirs incur no passive title of their predecessors, but under which each heir may keep up a burden against their successors although it is not made a charge on the entailed estate, such intention is more easily presumed. An instance of this, which well illustrates the principle, will be found in the case of *Keith* v. *Kerr*, in Cochrane's Succession, which was referred to in the debate. In that case a provision which was imposed upon the heirs succeeding to an entailed estate was found in the first place not to be a burden on the estate, or an entailer's debt, so as to open the estate to the diligence of creditors; and, on the other hand, it was found to form a valid personal obligation against each heir who succeeded to the estate. This was carried further in the case of *Macdonald*, in which a personal obligation of this nature was laid upon the heirs succeeding to two estates, one entailed, and the other held in fee-simple, and it was there found, after the second heir succeeded and died intestate, that he must be held to have intended his executors to be relieved of the burden by the heir of provision, the debt remaining personal, although charged upon the heirs succeeding in the two estates, and that not only as regarded the heir succeeding in the entailed estate, but also in regard to the fee-simple estate. That judgment was not unanimous, as Lord Glenlee dissented from it; and were the question to arise again solely upon a simple destination or a fee-simple estate, I do not know that it could be held as absolutely settled. But we may assume in this argument that it is sufficient authority for the general doctrine for which the heir-at-law contends. But it may be assumed that no such liberation of the heir-at-law, or the heir who would in the ordinary operation of law be liable for the debt, can be operated under this principle, excepting by a clear intention expressed or implied to burden a class of heirs who would otherwise be entitled to relief, and to liberate a class of heirs who would otherwise have been liable in relief. An intention to burden an heir of provision in a question with the creditor in the obligation is of no moment, for no question of relief can arise unless the heir claiming it is liable to the creditor. Neither is it of any moment in the present question of intention that the heir of provision is liable to relieve the executor in respect of the heritable character of the debt, for there is no question here with the executor, but with the heir. What must be shown by the heir-at-law is an intention to lay the primary obligation on the heir of provision, and to take it off the shoulders of the heir of line; in short, to invert and alter the customary rule and order of discussion among the heirs. Now, that being the problem which the heir-at-law is to solve, I must own that I have no difficulty whatever in arriving at the conclusion which I have already expressed. I can find no indication of any such intention in this case in any aspect of it. The argument, which was very ingenious and forcible, was of this kind: it was said that William Dunn had charged these annuities upon his real estate, because they were heritable debts and affected the heritage. Then it was said, if Alexander Dunn had died intestate, this destination, remaining unaltered, would necessarily have left the burden upon the heritage on which it was imposed, and Alexander Dunn had no power on deathbed to alter the destination to the effect of increasing the burden upon the heir-at-law. I think the whole of that argument in all its parts is fallacious. In the first place, I think it proceeds upon an entire misconception of what William Dunn's deed in reality did. It was not, as in the cases of *Macdonald* or of *Keith* v. *Kerr*, a special conveyance subject to a special obligation on the succeeding heirs, but it was a conveyance of the *universitas* of the granter's estate, heritable and moveable, to a single disponee, with a substitution annexed under an obligation to discharge the whole of the granter's debts, provisions, and legacies, heritable and moveable. There is no special conveyance subject to a special burden under that deed. It is a catholic conveyance of the whole estate, heritable and moveable, with and under the burdens and conditions which are there expressed; and there can be no question that in the event of Alexander Dunn not taking the heritable subjects they would go under the destination with and under the burdens of all those debts, legacies, and annuities. That is the nature of the deed. But it contains no invertion of the ordinary rule or order of discussion among the heirs who might take, for that is left to be regulated by the ordinary operation of law. The debts and legacies were made a burden on the *universitas* of the estate as much as the annuities were. It is true that the moveable estate would, had the succession been divided, have been liable to the debts and legacies in the first instance; but if the personal estate had proved insufficient to discharge them, the settlement made them a burden on any heir who took up any part of the heritable estate. Neither is it at all clear, if such a question had arisen under William Dunn's succession, that the residuary disponee taking the residue of the heritage, if there were any not specially disposed of, would not have been liable to liquidate this heritable debt, viz., the annuities, before the special disponees were discussed. But Alexander Dunn succeeded under this conveyance of William Dunn's estate to the *universitas* of the estate, and the *universitas* of his debts and obligations. He became at once debtor personally in all these provisions. The annuities became at once primary charges against the whole of his heritable estate, and on those who might succeed to it, just as the debts and legacies became primary charges on those succeeding to his personal estate, however derived, although these had been charged on the *universitas* of William's estate, both moveable and heritable. The liability of Alexander's heirs and executors ceased to depend on the terms of William's settlement, and became altogether merged and absorbed in their representation of Alexander himself, who was the debtor in all these obligations to the full extent of his whole estate. He had full power to deal with the subjects under William's destination, and he did deal with them, for with regard to Boquhanran and Kilbowie, he evacuated the destination, and the heir-at-law included them in his reduction. That, supposing there were more foundation for the argument of the heir-at-law, would have introduced a great perplexity and complication into the result, because there is no ground for holding that the whole of these annuities would be chargeable upon that portion of the estate falling under the des-

tination which had not been evacuated. We need not, however, go into that. It is only an illustration of how completely Alexander Dunn was the master of the whole of this estate, and indeed the debtor in the whole of those obligations. I am therefore very clearly of opinion that if Alexander Dunn had died intestate there could have been no ground for holding that he intended these annuities to be primarily paid by his heir of provision. I see nothing which points at any such conclusion. On the contrary, they never were primarily laid on these heirs in any question with other heirs in heritage, and at Alexander's death they were simply heritable debts due by him falling to be discharged in the first instance by his heir-at-law out of his general heritable estate, although the heirs of provision taking the special subjects will be liable to this and to all the other debts which he owed. But their liability would arise simply from the passive titles, and according to the legal order of discussion. In this view I think that the argument fails entirely in its foundation. But, secondly, Alexander Dunn did not die intestate. He left a settlement by which, in any question with the heir-at-law, it is now fixed that he validly conveyed the property in question to special disponees. It is of no moment in this argument that the heirs of provision have to a certain extent set aside Alexander's deed as regards these subjects. That is a matter which can neither enlarge nor diminish the rights of the heir-at-law. The deed as it stands operated a conveyance which has been found to be effectual of those subjects to the heirs of provision under Alexander's deed subject to certain alterations, and in this question with the heir-at-law that is a good conveyance, and his title to reduce it has been repelled. The question is, whether Alexander intended that this conveyance should be primarily burdened with the charge of these annuities to the relief of the heir, whoever he might be, succeeding to his other heritable estate? Now, although the deed as a conveyance of Alexander's other heritable estate has been reduced, it still remains and is in force as far as it conveys those subjects, and for all purposes necessary to construe and interpret the conveyance. There cannot be the slightest doubt that if the question be, as it is here, in what terms Alexander conveyed these special subjects to his special disponee? you must read, and you are entitled to read, the deed from beginning to end in order to ascertain that; and it is of no use for the heir-at-law to say—I have reduced that settlement—because in so far as it is not reduced it stands. Now, when it is so read it appears clearly that Alexander's intention was not that these heirs should be specially burdened with this special debt, but exactly the reverse. He meant that this debt, and all other debts, should be themselves charges on the *universitas* of his estate, and his deed starts with charging his trustees to discharge them out of the *universitas* of his estate, and he did not intend that these special subjects should be liable to any special burden. The heir-at-law undoubtedly maintained that Alexander could not remove the burden already laid on the heirs succeeding to the destination to his prejudice, but that plea, if it were maintained —and I do not say whether it were well-founded or not—comes too late in the present discussion; for it is now *res judicata* in this case that the heir-at-law had no right to reduce the conveyance to the heirs of provision, and they have been assoilzied from the reduction. And, accordingly, if that conveyance was a conveyance which did not render the heirs of provision liable in this special burden, it is too late for the heir-at-law to say that the effect of it is to diminish the rights which he had prior to the deathbed deed. And, therefore, on the whole matter, if it only rested upon the effect of the deathbed, I think the heir-at-law has failed in showing the intention on which alone he can relieve himself of his ordinary legal liability, and that although he takes up this heritage *ab intestato*, he takes it with his ordinary burdens, and one of these is to discharge the debts chargeable against the heritage of the ancestor from he takes. On the whole matter I think the Lord Ordinary's interlocutor should be adhered to.

Lord Cowan—For the disposal of this reclaiming note the parties are at one in holding that the general question to be decided is whether, having regard to the deeds of settlement referred to in the interlocutor, the annuities—given by the deed of William Dunn, and referred to in the trust-deed of Alexander—are burdens upon Alexander's heir-at-law, or upon the heirs of provision taking the special heritable subjects specifically destined to them, whether under William's deed or Alexander's? I am of opinion that the Lord Ordinary, in recognising the liability of Alexander's heir-at-law to pay those annuities as in a question with the heirs of provision, has arrived at a right conclusion.

The legal rules which regulate questions of relief *inter hæredes*, as regards the debts and obligations of the ancestor, do not admit of doubt. Personal debts and obligations are a burden on the executor, and heritable debts are a burden on the heir. And in any question of relief among heirs, it is the heir of line who is primarily liable, and who must relieve the heirs of provision, or of tailzie, of liability for the ancestor's debts. This is the rule; but the ancestor may burden particular heirs, or special heritable estates destined to special heirs; and effect will be given to such intention whenever explicitly declared, or to such direct imposition of debt or obligation on special heirs or heritage, to the relief of the heirs of line. The question is, whether this relief is provided for or exists in this case.

The whole estates, heritable and moveable, which belonged to William Dunn were conveyed by his deed to his brother Alexander under the burden, *inter alia*, of his debts and of the annuities in question. The whole succession conferred on Alexander was thus burdened; and by his acceptance of the deed he became personally bound to discharge and provide for the debts and annuities, payment of which, in truth, was attached as a condition to the succession. No specific portion of the estate was charged with the burden either of the debts or the annuities; although, had any question arisen as between parties respectively entitled to the heritable estate and to the moveable funds, the annuities, being payable for a tract of future time, would have been a burden on the parties taking the heritable estate, while the moveable succession must have borne the burden of the personal debts. In this case no such question could arise. Alexander having survived his brother, and taken the whole succession, became bound to discharge, on the same footing as if they were his own personal obligations, both debts and annuities.

This deed of William Dunn, however, contains what has been found, by judgments of this Court and of the House of Lords, provisional substitutions relative to specific heritable subjects, conveyed by his settlement to his brother Alexander under the universal conveyance in his favour. And as the terms of the deed by which these substitutions were created have been founded upon by Alexander's heir-at-law as equivalent to a specific declaration that the burden of the annuities should attach to the heirs' substitute upon their succession—it is proper to examine the terms of William's deed in this respect, so as to ascertain with precision what his intention was as to these annuities.

Clear it is that no special burden is imposed upon the lands, to the succession of which the substitute heirs were called. Payment of them was expressly imposed upon Alexander as a condition of his taking the whole succession, heritable and moveable; and the inquiry resolves into this, whether that part of the deed relative to the special heritable subjects was intended to impose the burden of these annuities upon the substitute heirs as a personal obligation attaching to them as they should succeed. Although such personal obligation has not been created a real burden on the lands, it is quite competent for the heir-at-law to show that by clearly expressed declaration it was so attached to the destination that no heir-substitute could take the special subjects without subjecting himself to liability. The cases of *Lord Macdonald* and of *Cochrane* were decided upon that footing—the intention being clearly indicated that the heirs of provision, and not the heirs of line, were the parties on whom the burden of payment was laid. Such intention, however, must be clearly set forth. The burden of the ancestor's debts, when heritable, primarily attaches to the heir of line; and a specific declaration that the heir of provision is to be bound must be found in the deed of settlement—either in express words, or by necessary implication—ere this primary liability on the part of the heir-at-law can be held discharged, and his right to be relieved of such debts recognised. The deed of William, however, contains no such declaration. Had Alexander predeceased without heirs of his body, and the succession to William's estates, heritable and moveable, opened to the parties to whom the specific heritable subjects are conveyed, and also the whole residue of the estate, heritable and moveable, these parties could have taken the succession only subject to the same burdens and conditions as those imposed on Alexander, his heirs and successors. The clause in that event would have been treated as a conditional institution. But Alexander having survived and taken the succession, heritable and moveable, became personally liable for the whole burdens and provisions in question, *eo ipso* and as a condition of his acceptance of the general conveyance in his favour. Supposing Alexander to survive him, and take under the deed, and vest himself with the estate, whether partially or wholly, there is no indication of an intention on William's part that his brother was to be relieved of the obligations attached to his succession, or that, upon his death intestate, the heirs of provision were to relieve his (Alexander's) heir-at-law and general estate of obligations for which he was primarily bound to provide. As in a question between the two sets of heirs it cannot be predicated to have been William's intention that the heirs taking the specific subjects were to relieve Alexander and his general estate.

On the opening of the succession by William's death Alexander completed his title to the whole moveable estate by confirmation as executor-nominate. And as regards the heritable estate, he vested in himself by completed titles large and valuable portions of it, and these, upon the supposition of his dying intestate, would have fallen along with his own heritable estate to his heir-at-law, to the detriment of the succession of the heirs-substitute in William's deed to those of the special heritable subjects which had not been so dealt with by Alexander. And yet the contention of the heir-at law is that the annuities in question are burdens by special declaration upon those heirs of provision to his relief. I cannot so read William's deed. I cannot hold it to contain that specific declaration of intention which was necessary, in the event of Alexander's dying intestate, to relieve his heir-at-law from payment of these annuities.

The trust-deed and settlement executed by Alexander, by which he attempted to convey at once his own heritable estate, as well as that which had belonged to his brother William, and also his whole moveable estate to trustees for the purposes therein specified, was executed on deathbed. It was consequently reducible, and has been reduced in so far as prejudicial to their respective interests, both by his heir-at-law and by certain of the heirs of provision—Mr Dunn Pattison in particular—claiming under the substitutional provision in William's deed of settlement. I do not think it in the least doubtful that the heir-at-law is entitled to take Alexander's heritage on the same footing as if Alexander had died intestate. Had Alexander's deed gratuitously imposed burdens upon his own heritage, to the relief of the heirs of provision, which, but for the deathbed deed, the heir would have taken free, the decree of reduction must have the effect of entitling him to claim the heritage as if no disposition of it had been attempted by Alexander. There is not, however, any such effect operated by Alexander's deed. In the view which I take of the relative position of the parties, and which I have endeavoured to explain, Alexander's general estate was primarily liable for William's debts and annuities; and consequently, his heir-at-law was bound to bear without relief from the heirs of provision those burdens.

This view appears to me conclusive of the present argument in all its branches. As regards those of the heirs substitute who have repudiated Alexander's deed, they can be subject to no personal obligation not imposed upon them specially by the deed of William. And as regards the heirs of provision who do not repudiate Alexander's deed, but are willing to let it stand so far as their interests are concerned—I do not think that the heir-at-law can found upon it to the effect of being benefited by any declaration of intention to impose the burden of the annuities on the heirs of provision in the special subjects, supposing the deed to have so declared. But I can find no such intention indicated. There is no clause or provision to that specific effect; and any implication of intention as to this matter, to be drawn from the provisions of the deed, rather tends to the opposite conclusion. All that Alexander has done, as regards these annuities, is to declare that the whole estates, heritable and moveable, given to the trustees shall be liable for their payment, as well as for his whole debts and obliga-

tions. That is the primary purpose of the trust; and, in the second place, he confirms the conveyances and destinations contained in his brother's deed to the heirs of provision, with certain exceptions and declarations—*i.e.* he leaves undisturbed the substitutional rights created by William's deed. There is in all this anything but a declaration of intention to subject his heir-at-law to burdens for which his heritage was not liable had he died intestate. It assumes no doubt that the testator and his general estate was primarily liable for these burdens; but in this I cannot hold that he was at all mistaken. It is not from the force of any declaration contained in this trust-deed that the heir-at-law must provide for these annuities without relief from the heirs of provision. It is because of such being his legal position, supposing no trust-deed to have been executed by Alexander.

The annuities, indeed, have been increased to the extent of £100 each by Alexander's trust-deed; and the heir-at-law's rights might be thereby prejudiced; but the Lord Ordinary by his interlocutor has specially found that he is entitled to be relieved from the burden of these additional annuities.

Lord Benholme—This is certainly a case which involves very important questions of law; but after the clear exposition that your Lordship has given of most of those, it is not my intention to trouble you with many observations. I shall confine what I have to say rather to some views which I believe peculiar to myself, though tending in the same direction as those upon which your Lordship have relied. In the first place, the question here is a question as to the succession of Alexander Dunn, and not a question as to the succession of William Dunn. That must be clearly borne in mind. The intention of William may be referred to as affecting the succession of Alexander by modifying Alexander's intentions; but the question is with reference to the succession of Alexander. Nor can it be doubted that in regard to Alexander's succession the ordinary rule of relief between several classes of heirs is to be followed, unless there be some disturbance of that ordinary rule. The heirs of provision of Alexander are to be relieved by the heirs of line, unless Alexander has otherwise arranged. What we are in quest of is the intention of Alexander. It has been argued that this intention of Alexander is in a great measure to be ascertained by looking to the intention of William; and William's intention in regard to Alexander's succession—not in regard to his own—has been dealt with very much by reference to the case of *Macdonald*. If that case of *Macdonald* were on all fours with the present, the argument might prevail; but there are many circumstances of distinction which I think deprive it of all weight as a precedent in the present case. It is indeed a very difficult thing to see how one proprietor could attempt to influence the succession of his successor. The first Lord Macdonald laid the burden of certain debts on his heirs in the lands of Macdonald and Strath; and the argument was successful that it was Lord Macdonald's intention, not only that his own heirs in these estates should be liable for the debts, but also that his heirs' heirs should be liable for the debts; and I rather think with your Lordship that the circumstance that an entailed estate, viz., that of Macdonald, was one of the properties that were burdened, or supposed to be burdened, with this debt, was a circumstance which determined the decision of the Court in that case. Had the estates been unentailed, I doubt whether such a decision would ever have been pronounced. No doubt Lord Fullarton suggests that it might be just as competent to entail a burden as a benefit; but that would be very up-hill work I think, and one can hardly imagine how it can be done, except by imposing a real burden upon the estate. Lord Glenlee went against that decision; and I think it extremely doubtful whether, as a general rule, it would be held at present that, where a party burdens his heirs in a certain estate, that is a burden which is to affect not only his own heirs in that estate, but his heirs' heirs in that estate. But however that may be, it is very clear that William Dunn and his succession cannot at all be likened to that of Alexander's estate. William did not impose this burden upon any particular set of heirs. The circumstance that would decide the liability would be the heritable nature of the debt. But that quality, as bearing a tract of future time, whilst it unquestionably decides the question as between heir and executor, has in law no effect in regard to the liabilities of different classes of heirs. It would impose the burden in the first place upon the heir-at-law; and it never could be said that the heritable quality of these annuities, whilst they subjected heirs, had any peculiar stringency against heirs of provision, rather than against heirs of line. It appears to me that this goes very far to relieve the question of Alexander's succession; because if one cannot suppose that William had any such intention of affecting his brother's succession, then what is there in regard to Alexander's conduct that can induce us to suppose that he intended to invert the ordinary rule of his own succession. Had he died intestate, I humbly think that the ordinary rules of succession would have applied, and that his heirs of line would have been liable to relieve his heirs of provision of these annuities. But Alexander did not die intestate, for he altered the destination of a portion of William's succession; and my opinion is to some extent influenced by the deathbed deed. I am quite free to admit that a deathbed deed can never affect the heir-at-law by anything that it proposes to do; but where the question is a matter of fact as to the intention of Alexander in regard to his succession, can you say that his deathbed deed is of no consequence? The Solicitor-General argued with great ability and great plausibility that this deathbed deed could have nothing to do with this question, and that the heir-at-law cannot be influenced or affected in any way by it. But suppose the question is to ascertain, not what Alexander did, but what was his intention, I have great hesitation in saying that the deathbed deed may not ascertain the intention. In the ordinary case of deathbed deeds set aside by the heir-at-law, he sometimes forfeits some interest which he otherwise would have taken, just because he has frustrated the deathbed deed. On what footing is that? Does not a deathbed deed ascertain the intention of the testator? and is it not the frustration of that intention so ascertained by the deathbed deed that imposes the forfeiture? Now observe the application of that here. Alexander's deathbed deed conveyed his own heritage as well as the succession from William, and vested it, or attempted to vest it, in trustees, merging the whole as a fund for the payment of debts, and payment, among other debts, of these annuities; the heir-at-law has

reduced the deathbed deed in so far as regards the effect of it in carrying off Alexander's own estate; but when the question is what was Alexander's intention as to his own succession in regard to this matter as to the preference between his heir-at-law and his heir of provision, has that deathbed deed no effect in ascertaining his intention? Was it not clearly his intention that there should be no preference in favour of the heir-at-law? He conveys his own estate with the intention that it, as well as William's succession, should all be employed in the discharge of these debts. Now, I am humbly of opinion that that is a very important matter. I quite agree that the heir-at-law cannot be prejudiced by anything that is done by a deathbed deed. But to tell me that he cannot suffer any prejudice by anything that is ascertained as the intention of the testator, is just to say that in all those cases where the heir-at-law forfeits something, that forfeiture is inflicted upon him contrary to law, because the deathbed deed ought not to speak at all as to the intention of the testator, or ascertain it. It is the deathbed deed that does in every such case ascertain the intention of the testator. In these circumstances, the intention of Alexander in regard to his succession is ascertained by the deathbed deed. It is ascertained that it was his intention, though that intention has been defeated, to give this estate as a fund for the payment of these debts.

Lord Neaves—I concur in thinking that the interlocutor which is here brought under review ought to be adhered to; and I shall shortly state the grounds on which I think so. They very nearly coincide with what Lord Cowan has said. William's deed may have had several effects, but it had certainly this effect as a very plain one, viz., that from the terms in which it was framed, conveying all his succession to Alexander under the burden of debts, legacies, and annuities, that conveyance to Alexander was coupled with a personal condition, and Alexander, by the fact of surviving and accepting William's conveyance, became personally debtor to the creditors of William, —of the legatees and the annuitants; and upon his succession and acceptance and death, a passive title passed to every one of his heirs and representatives to fulfil the obligation so undertaken. That was one effect of the conveyance of William Dunn. It may have been another effect to be determined according to its terms and the *res gestæ*. I confess I am not prepared at present, nor do I say that I give any opinion prospectively to the effect that the doctrine laid down in the case of *Macdonald* is not well founded. I think effect was given to that doctrine, that it is competent for the first originator of an entailed succession (by which I mean not only a strict entail, but any entail that contains a special substitution), not only to settle that certain subjects shall go in a certain line, but also to declare that a certain obligation shall accompany these subjects in that line. I think that is established in that case. It was established in another case, viz., *Cochrane* v. *Kerr*. But it was established as a competent mode of proceeding in the case of *Macdonald*. No doubt it is always a question whether that is intended; and in the case of *Macdonald* the intention was perhaps more easily inferred from one of the estates being entailed, and from the probability that he meant to deal with the other estate, which was not entailed, in the same way. But it would not have been a logical ground for saying, that if only competent in regard to an entailed estate, it was also competent in regard to an unentailed estate. It showed it was competent in either, but that it was more probable when there was an entail, and less probable where there was no entail. I can quite understand an arrangement of this kind as a very reasonable thing; a man has lands in one or two parishes—he entails one part of his lands upon a certain series of heirs, not by a strict entail, but by a destination, and another part of his lands in another parish upon another special heir. I can quite understand, and it has been done, that burdens have been attached to these lands, intended to accompany the possession of them as long as they were transmitted in that line of succession. We had a case not long ago where for centuries the payment of a precentor was held to be a burden upon an estate, and had been paid as a burden by the successive heirs, who without any break of the original succession had succeeded. I do not think it incompetent that a proprietor should indicate an intention of that kind so as to attach to the succession of the subject so long as that provision continues. No doubt it requires, as was also held in the case of *Macdonald*, that each successive heir of provision shall leave that matter undisturbed, though he is the absolute *dominus* of the estate. And the first question arising here is, did he attach a special liability to a special succession? and second, did he adopt that arrangement? These seem to me to be the two questions we have to decide, assuming the general power. Now, in the first place, I do not think William Dunn did attach the special obligation to a special successor. He left the *universitas* of his estate to his brother, and he made this a burden or condition, not only upon particular lands, but upon his whole subjects, whatever he might die possessed of, and not only upon his heritage, but upon his moveables. No doubt the effect of that would have been to make it come out of the heritable estate if that had been the only fund, not in consequence of his imposing it as a burden, but in consequence of the heritable nature of the subjects. I think, therefore, this was not an intended constitution of an entailed obligation, or of an obligation that was to follow that succession necessarily, but it was just a general bequest of all and sundry his effects, and a general obligation to the person who should be the recipient of that, to pay these debts. The next point is whether Alexander did anything to indicate his adoption of that arrangement, supposing it had existed. Alexander dealt with the succession by converting the title into a different title, and I see no reason to presume any such intention on his part. Therefore I think the two things fail which are essential to this case, viz., the intention of William to specialise this burden in connection with special estate, and next, the acquiescence or concurrence and continued adherence to that opinion by Alexander, who was the *dominus* of the estate, and whose succession we are now distributing. If an action were brought by any annuitant or legatee of William Dunn, he must constitute his claim against whoever he says is the heir and representative of Alexander, the first debtor in the obligation. He must therefore be sued upon a passive title as representing his ancestor. It is quite well known that successions change in their character; in one heir lands may be conquest, which in the next generation are heritage. But I see no ground for thinking, either in William's o

Alexander's deed, that he had any other intention than that these annuities and legacies should be paid to the annuitants and legatees, but that it should be specially confined to the moveables. I see no intention of that, and still less do I see any intention on Alexander's part to keep up that special arrangement, and exempt his heir-at-law from the usual liability that attaches to him as such, viz., a general liability for this kind of obligation, which *ex sua natura* are heritable, and fall upon the heirs in the very character of heir-at-law, which he has been so anxious to assert and so successful in asserting in this case. He has asserted his rights as an heir-at-law, and in so doing he has also clearly established his liability. I make these remarks as to the grounds on which I proceed, not wishing to throw any doubt, so far as I am concerned, on the case of *Macdonald*. Nor do I mean to give any opinion upon the views stated by Lord Benholme, which are very subtle and very important. It is always a consideration to sportsmen, and I believe also to lawyers, that some game should be preserved undestroyed for future occasions, and the question there involved certainly will receive every attention when the time for deciding it arrives; but I am not prepared to say that the case of approbate and reprobate is to be determined, looking to the intention of the testator on his deathbed. There you punish the party for frustrating it, but you cannot enforce it; here you seek to enforce the thing by giving specific effect to it. That I have very great doubts about, but I do not wish to anticipate the question. I only say that it is not part of the ground on which I go. I think it involves a great deal of nicety what a testator can do on deathbed in the way of indirectly affecting his heir-at-law. He cannot directly do anything, and I do not know whether declaring his intention would receive effect on deathbed. If a man does not show that he intends a thing till he is on deathbed, the law may refuse to give effect to his intention as much as to his positive deed. But there may be indirect things that he can do, and in particular there may be things that he can do in restoring the heir-at-law and the natural liabilities that attach to him. I do not think that essential to the present case, and I do not commit myself upon it.

Agents for Reclaimer—Murray, Beith & Murray, W.S.

Agents for Respondents—J. & R. D. Ross, W.S.; W. Ellis, W.S.; Melville & Lindsay, W.S.; Maconochie & Hare, W.S.; James Webster, S.S.C.; Graham & Johnston, W.S.

COURT OF JUSTICIARY.

Wednesday, July 19.

CLARKSON *v.* MUIR.

(Before Lord Justice-Clerk, Lord Cowan, and Lord Neaves.)

Suspension—Summary Procedure Act 1864—*Sentence—Vitiation.* The penalty in a sentence under the above Act was originally written out as "two pounds, ten shillings," the word "three" was superinduced over the word "two," —conviction *quashed*, on the ground that this was a vitiation *in essentialibus*, which could not be corrected by parole proof that the alteration was made before the sentence was signed or read over to the accused.

Jurisdiction—Circuit Court—Public Houses Act 1862, sec. 33. The High Court have power to quash a sentence which is vitiated *in essentialibus*, although the prosecution was instituted under an Act which directed appeals to be made to the Circuit Court.

This was a suspension by Andrew Clarkson, public-house keeper, Lanark, against the Procurator-Fiscal of the Burgh Court of Lanark. The complainer was charged under the Summary Procedure Act 1864, at the instance of the respondent, with a contravention of the Public-Houses Amendment Act 1862 before the Burgh Court. After evidence had been led, sentence was pronounced whereby they convicted the complainer of the offence charged, and "adjudge him to forfeit and pay the sum of three pounds, ten shillings of modified penalty," and a sum of expenses, and in default of payment within fourteen days, adjudged him to be imprisoned for twenty-one days. The conviction was objected to on various grounds; but the only one which was considered by the Court was that the sentence was vitiated *in essentialibus*, the word "three" being written over the word "two." The complainer alleged that the sentence had originally been written out with the word "two" pounds, and had been changed at a time and by a person unknown to him into "three" pounds.

GUTHRIE SMITH and M'KECHNIE argued that the sentence was vitiated *in essentialibus*.

The Solicitor-General (CLARK) and M'LEAN argued that, under the Public-Houses Act, sec. 33, the Circuit Court was the proper Court, if any, to have recourse to. They offered to prove that the sentence was altered before it was signed or read over to the accused. At all events, the word "three" must be read *pro non scripto*. The conviction would then still remain good as to the 10s. and the other parts of the sentence. The three pounds was not necessary for the validity of the sentence. The appellant could not come to the High Court merely to complain that the magistrates had imposed too small a penalty upon him.

LORD JUSTICE-CLERK—The last objection is fatal to the sentence. On the face of it, the Court adjudges the accused to forfeit and pay the sum of three pounds, ten shillings of modified penalty. But the word "three" is superinduced on something else. This is necessarily fatal to a criminal sentence on which imprisonment may follow. It will not do to hold the word *pro non scripto*. The sentence is a warrant for something, but it is uncertain for what. We must have jurisdiction to correct an error of this kind.

There could have been no difficulty in correcting an error in the sentence after it is written out. The clerk might easily have drawn his pen through the word which was wrong, and put the proper word on the margin, and then have got it properly authenticated.

LORD COWAN—I concur in thinking that this is a serious vitiation. It will not do to say that the word is to be read *pro non scripto*, and that the clerk in giving out a warrant for imprisonment would be bound to omit the vitiated word; for the sentence itself would be a warrant of imprisonment. A jailor would not be justified in liberating the accused on payment of 10s. I concur with your Lordship that there is no excuse for the clerk