Thursday, June 16, 1887.

OUTER HOUSE.

[Lord Trayner, Ordinary.

GRIERSON, PETITIONER.

Entail—Restriction of Widow's Annuity—Aberdeen Act (5 *Geo. IV. cap.* 87), *sec.* 1—*Free Rental.*

In a petition by an heir of entail to restrict the provisions granted by the preceding heir in favour of his widow to a third of the free rental of the estate under sec. 1 of the Aberdeen Act, *held* that the petitioner in estimating the gross rental was not bound to include the rent of the grass park adjoining the mansion-house, although actually let from year to year for grazing; that he was not entitled to deduct from the gross rental the expenses of maintaining the farm buildings; of paying a factor to collect the rents and manage the estate; nor the annual amount of a rent charge, of which the last instalment had been paid off immediately before the preceding heir's death; but that he was entitled to deduct the interest of a bond for improvement expenditure charged upon the estate, although no interest had been demanded or paid thereon during the granter's lifetime.

Sir Alexander Davidson Grierson, Baronet, heir of entail in possession of the entailed lands and estate of Rockhall and others in the county of Dumfries, presented a petition to have the provisions granted under the authority of the Aberdeen Act (5 Geo. IV. cap. 87), sec. 1, by Sir A. W. Grierson of Lag and Rockhall, Bart., the last heir of entail in possession, who died on 27th December 1879, in favour of his widow, restricted in terms of the Act to one-third of the free rental of the estate at the date of the granter's death. The sum provided to his predecessor's widow was £950.

The petitioner averred that the gross rental at his predecessor's death was £3343, 17s. 9d., and that from this there fell to be deducted £1031, 11s., leaving as free rental £2313, 6s. 9d., and as the maximum statutory provision £770, 15s. 7d., to which sum he sought to have the provision restricted.

Lady Grierson, the annuitant, lodged answers to the petition, in which she stated that the gross rental was understated, and that several of the deductions were unwarranted by the statute.

The objections taken to the rental were three in number—(1) The rent of £39 actually received for the grass park adjoining the mansion-house, and let for grazing, had been omitted. (2) The rent of another grass park, amounting to £15, had been omitted, and was not (as contended for by the petitioner) included in the rent of the shootings. (3) The shootings had been undervalued by £50.

The objections taken to the deductions were as follows—(1) General maintenance of farm buildings, £276, 6s. 9d.; (2) expenses of management, factor's charges for collection, &c., £57, 4s.; (3) the last instalment of a drainage rent charge paid off two months before Sir A. W. Grierson's death, £55, 12s. 10d.; (4) interest on £2776, 15s. 5d. charged upon the estate by two improvement bonds, £111, 1s. 3d.

On 20th July 1886 the Lord Ordinary (TRAYNER) remitted to Mr H. B. Dewar, S.S.C., to enquire into the circumstances set forth in the petition, and to report, with power to him to convene parties and call for documents and explanations before answer.

The substance of Mr. Dewar's report was as follows:—"I. *Gross rental*—(1) That the grass park adjoining the mansion-house had since 1873 been temporarily fenced and let from year to year for grazing to the tenant of Boghead farm at a rent of £39; that it lay in front of and upon two sides of the mansion-house, and was traversed by the carriage drive, and shaded with trees; that it was 10 acres in extent, and of much the same nature as the usual park or lawn in front of a gentleman's country seat, and that he was of opinion that the case of *Leith* v. *Leith*, June 10, 1862, 24 D. 1059, relied on by the petitioner, did not apply, as it dealt with 'policies', and that the £39 should be added to the gross rental. (2) That the shootings were not let at the date of the late Baronet's death, and therefore this grass park was not included in them; that it was entered in the valuation roll of that year (1879) at £15, and that in his opinion this sum should also be added to the gross rental. (3) That when the house, unfurnished, and shootings were let five years prior to the late Baronet's death the rent was £183, that £83 might fairly be taken as the rent of the house; and that £100 or £50 more than the amount stated by the petitioner might be taken as the fair value of the shootings, especially as that was the sum reached by allowing 1s. an acre for 2000 acres—the extent of these shootings—which the reporter was informed was a fair valuation. II. *Deductions from the gross rental*—(1) That in his opinion, looking to the provisions of the Aberdeen Act, sec. 1, and to the cases of *Cochrane* v. *Cochrane*, November 25, 1846, 9 D. 173, and *Dunbar* v. *Dunbar*, December 7, 1872, 11 Macph. 200, the petitioner was not entitled to deduct the expenses of general maintenance. (2) That the same opinion applied to the sum of £57, 4s. deducted for factor's charges for collecting rents and management (cases already cited, and *Macpherson* v. *Macpherson*, May 24, 1839, 1 D. 794). (3) That a sum of £55, 12s. 10d. was included in the deductions under the name of drainage interest or rent charge, which, in his opinion, looking to the history of this charge, should not have been deducted. In questions under the Aberdeen Act the whole annual rent charge instalment—both capital and interest included in the instalment—fell to be deducted in estimating the free rental—*Lord Saltoun, Petitioner*, January 18, 1887, 24 S.L.R. 352. But this sum, paid 10th October 1879—two months before Sir A. W. Grierson's death—was the final instalment of capital and interest due under an advance of £856 made in the year 1857, and by its payment the rent charge was extinguished, so that at Sir A. W. Grierson's death no debt whatever existed in respect of this drainage loan. The petitioner relied upon the fact that this instalment was paid during the currency of the year of the death, and upon the case of *Christie* v. *Christie*, December 10, 1878, 6 R. 301. In the reporter's opinion that case

was not in point. The words of the Aberdeen Act, sec. 1, were 'at the death of the granter.' (4) That in 1873 the late proprietor charged the fee and rents of the then entailed estate with a sum of £2776, 15s. 5d. of improvement expenditure under the authority of the Court, by granting two bonds and dispositions in security in the usual form for £2176, 15s. 5d. and £600 respectively in favour of certain parties. The bonds bore on the face of them that the moneys were advanced to the granter Sir Alexander by these parties, but in point of fact that was not so. No money passed to Sir Alexander in respect of these bonds. They were, however, duly recorded in the Register of Sasines in 1873, but they were in reality, whatever they were in point of form —or perhaps in point of law—gratuitous *mortis causa* gifts by Sir Alexander, and he by arrangement with the creditors did not pay, and was not to be bound to pay, any interest on the loans during his life. In the reporter's opinion, as the existence of these bonds did not diminish the clear yearly rent to the late Sir Alexander Grierson, the interest upon them, amounting to £111, 1s. 3d., should not be allowed as a deduction in estimating the free rental upon which the jointure fell to be calculated—Aberdeen Act, sec. 1, and *Lord Saltoun, supra cit.*"

The Lord Ordinary (Trayner) on 16th June 1887 pronounced this interlocutor:—"Finds that the provision or annuity provided by the deceased Sir Alexander William Grierson to the respondent his widow was in excess of the provision or annuity he was entitled to provide to her under the Statute 5 Geo. IV. cap. 87, and that the same falls to be restricted: Finds that the said annuity or provision ought to be restricted to the sum of £922, 3s. 6d. sterling per annum, and restricts the same accordingly: Finds that in so far as the bond of annuity mentioned in the petition exceeds the said sum of £922, 3s. 6d. the same is null and void, and of no force or effect as affecting the petitioner and the heirs succeeding to the entailed estate on which said annuity is burdened: Finds the petitioner liable in two-thirds of the reporter's fee, and the respondent liable in one-third thereof: *Quoad ultra* finds no expenses due and decerns.

"*Opinion.*—The late Sir Alexander William Grierson, heir of entail in possession of the lands of Rockhall, by bond of annuity dated 8th May 1849, provided his widow an annuity of £950 under the authority of the Aberdeen Act. Sir Alexander died on 27th December 1879, and was succeeded in the entailed estates by the petitioner. The present petition is presented for the purpose of having the said annuity restricted to the amount of one-third of the free yearly rent of the entailed estate, which, the petitioner avers, the said annuity considerably exceeds. I remitted to Mr Dewar to enquire into the facts set forth in the petition, and his report is now before me, and I have heard parties thereon.

"The gross rental of the estate taken as at the death of Sir Alexander the petitioner sets forth in the amended state (which differs very slightly from the statement in the petition) as £3343, 17s. 9d., from which he claims deduction of £1031, 11s. in order to reach the sum of the free rental. The free rental is thus, according to the petitioner's view, £2312, 6s. 9d., one-third of which is £770, 15s. 7d. The respondent (the widow of Sir Alexander), on the other hand, maintains that the rental is greater, and the permissible deductions less in amount than stated by the petitioner, and that her annuity is not subject to any restriction.

"The points of difference between the parties are all brought out in Mr Dewar's report, but some of these are not now insisted in.

"I shall notice the points on which the parties are still at variance in the order in which they are mentioned in the report:—I. *The total rental of the estate.*—(*a*) The respondent maintains that the gross rental of the estate should be increased by the sum of £39 per annum, which is called the rental of a 'grass park leased to the tenant of Boghead.' From the description of this grass park by the reporter, it appears to be the park or lawn in which the mansion-house is situated, it lies in front and on two sides of the house, is traversed by the carriage drive or approach to the house, is shaded with trees, is 10 acres in extent, 'and is of much the same nature as the usual park or lawn in front of a gentleman's country seat.' This is therefore a part of the estate which the heir in possession is not entitled to lease any more than he can the mansion-house (Rosebery Act, sec, 1) for any period beyond his own life. It was settled in the case of *Leith*, 24 D. 1059, that in estimating the free yearly value of an entailed estate for the purpose of fixing a provision under the Aberdeen Act, the value of the mansion-house, gardens, and policies (or, as put in the opinions of Lords Mackenzie and Kinloch, 'the mansion-house with its appurtenances as such') is not to be taken into account. I think this decision covers the present question. The words 'gardens and policies' when attached to "mansion-house" apply to the whole pleasure grounds attached to the dwelling (including the lawn or park) which would naturally be occupied by the proprietor if he resided there, or would as naturally go to the tenant if the mansion-house happened to be let. If an heir of entail chooses to let his garden and keep his mansion-house, the rent of the garden is not included in the gross rental of the estate. I see no reason for drawing any distinction in this respect between the park, gardens, or mansion-house. I think the same rule applies to them all. I do not think that the decision in *Leith's* case as regards the mansion-house, &c., proceeded on the ground that by letting them, 'the heir did not reap a profit.' On the contrary, the heir by letting his mansion-house and grounds may reap a considerable pecuniary advantage; and in many cases the reaping of that advantage is the sole reason why the house and grounds are let. The rent of the mansion-house, &c., if let, or its value if unlet, does not enter into the general rental of the estate in any case. No inquiry is made whether the heir has let (if he has let) the mansion-house and grounds at a profit, for that is a matter with which no one has any concern but the heir himself. I rather take the reason upon which the mansion-house, &c., either let or unlet, are excluded from the yearly value or rental of the estate to be this—that the mansion-house and grounds being intended for the use and enjoyment of the heir in possession, he is to be entitled (and not the estate) to any benefit derived from the temporary surrender of such use and enjoyment.

I am therefore of opinion that the rent of the lawn or park (£39) does not fall to be added to the gross rental. (*b*) A sum of £15 is sought to be added to the gross rental for a grazing park. I think this addition should be made for the reasons assigned by the reporter. The petitioner alleges that this rent is included in the shooting rent, and it was suggested that on this matter of fact a proof might be allowed. I think proof would be thrown away (as well as expense) on so trifling a matter. But indeed, as the reporter has dealt with the matter, no proof is necessary, for the rent of this park is certainly not included in the shooting rent as fixed by the reporter. (*c*) I think, for the reasons assigned in the report, that the shooting rent should be increased £50 as suggested.

"II. *Deductions from rental.*—(*a*) I agree with the reporter that the following deductions from the rental cannot be allowed, viz.—£276, 6s. 9d. for general maintenance, &c., and £55, 12s. 10d. in respect of an annual rent charge which was actually paid off before Sir Alexander died. (*b*) With regard to the deduction of £111, 1s. 3d., being the annual interest on an improvement debt, I take a different view from that expressed in the report. Looking to the real nature of the transaction (as admitted), rather than to the form in which this debt was burdened on the estate, I am of opinion that this interest falls within the class of deductions directed to be made by the Aberdeen Act, sec. 1. There can be no doubt that it is the 'yearly interest of debt' affecting the estate; the only difficulty arises from the question whether in the circumstances it was a yearly interest 'diminishing the clear yearly rent or value thereof to such heir of entail in possession.'—that is, the heir in possession who makes the provision. It is clear enough that in one view the interest in question did not diminish the income of Sir Alexander, for he did not pay it, but that does not in my opinion really affect the question. Suppose that Sir Alexander had taken the bonds for the improvement debt to himself and his heirs and executors, and had, as heir of entail, paid to himself as creditor the interest, in that case his income would have been the same, but the interest would have gone so far to diminish the rent or yearly value of the estate to him as heir of entail. The same result would have followed if the improvement debt had been vested in somebody else than Sir Alexander, but who for any reason did not choose to exact payment of the yearly interest, Sir Alexander's income would not have suffered, but the yearly rent or value of the estate was nevertheless affected. Again, if a creditor had adjudged the life interest of Sir Alexander, the adjudication would only have carried the rents under deduction of the interest on the improvement debt, which shows that the interest diminished the yearly value of the estate to the heir of entail. It is probably not correct to introduce the element of Sir Alexander's income into this question at all. The question is whether the rent or yearly value of the estate was diminished to the heir in possession. I think it was; the burden of a debt bearing interest which may be legally exacted must necessarily do so, and it was merely the accident of Sir Alexander being the creditor himself which prevented his being out of pocket the amount of the interest, and the yearly rent of the estate being to that extent diminished.

"The result of the opinion I have expressed is this:—

Gross rental admitted by Petitioner . . .		£3343	17 9
Add—Rent of grass park	£15		
Additional for shootings . . .	50		
		65	0 0
Gross Rental,		£3408	17 9
Deduct—Total deductions claimed by Petitioner . . .	£1031 11 0		
Of which disallowed—			
1. Instalment of annual rent charge. .	£55 12 10		
2. Cost of maintenance, &c.	276 6 9		
3. Expense of management	57 4 0		
	389 3 7		
Total of deduction allowed		642	7 5
Free yearly rental		2766	10 4
		£922	3 5½

One third of which is—say £922, 3s., 6d., to which the annuity of £950 will fall to be restricted."

Counsel for the Petitioner—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—R. Johnstone. Agents—J. C. & A. Steuart, W.S.

Tuesday, March 20, 1888.

OUTER HOUSE.

[Lord Fraser, Ordinary.

DUNCAN'S TRUSTEE *v.* M'CRACKEN.

Succession-duty—16 *and* 17 *Vict. c.* 51, *sec.* 2—*Foreign Domicile*—*Testament creating a British Trust.*

Although moveable property in Scotland belonging to a person domiciled abroad will not on his death be liable to legacy duty or succession-duty, yet if the deceased has directed part of his estate to be invested in this country in trust for a person in liferent and for another in fee, the fund so settled, as a fund to be administered according to the law of Scotland exclusively, will be subject to succession-duty when the fiar's right to possession emerges on the death of the liferenter.

Miss Margaret Helen Duncan, a native of Scotland, went to reside in Paris in 1847, and remained there till her death in September 1869.

By her will, which was executed on 30th November 1864, she disposed of the residue of her estate as follows—"I give and bequeath the annual revenue of all I possess . . . to my brother-in-law Mr John Hume of Forthill Cottage, Broughty Ferry, for all his life, after his death the same to go to Mrs Elizabeth Cairncross, wife of John William M'Cracken, notary-public, No. 233 York Street, Belfast, Ireland, for her life, when the residue of all I possess shall become the property of Georgina M'Cracken, third daughter of the said John William M'Cracken, subject to the following conditions, viz., that the capital shall be placed in such a way that she can neither lend it nor spend it, but may, if she please, buy an annuity with it."