[HEARD February 13th—JUDGMENT August 13th, 1846.]

MISS ANN MC PHERSON, *Appellant.*

MRS. MARIA SOPHIA MC PHERSON, *Respondent.*

Fiar and Liferenter.—Provision to Heirs. &c.—In ascertaining the free rents of lands, in order to fix the amount of a widow's annuity, the fiar of the lands is not entitled to deduct a proportional part, either of the expense of maintaining an embankment against the encroachments of a river, paid by himself and not forming a deduction from the rent payable by the tenant of the lands;—of the expense of repairs upon the parish church;—or of the amount of a factor's fee.

Ibid.—Ibid.—Game.—In ascertaining the amount of a liferentrix's provision out of the rents of lands, credit must be given for the money annually received by the fiar from third parties, for the right of shooting the game upon the lands; and for the rent obtained for the *home*-farm, although "the mansion-house and policies and enclosures thereto belonging," were excepted from the provision.

Ibid.—Ibid.—An annuity given to his widow by an heir of entail, under a power in the entail to provide wives in a liferent infeftment, not exceeding three-fourths of the free rents of the lands, is to be a fixed annuity, calculated according to the amount of the rents in the year in which the heir, granting the annuity, died; not one varying *de anno in annum*, according to the amount of rents actually received.

Ibid.—Tailzie.—Trust.—A widow's annuity given by her contract of marriage in exercise of a power in an entail to provide widows, and in the form of an obligation upon the husband, "and the heirs of entail succeeding to him in the tailzied estate," is payable not only out of the lands actually entailed, but out of personal estate held by the trustees of the entailer's will upon trust to be invested in the purchase of lands to be entailed, and out of lands purchased, but not entailed, in the lifetime of the maker of the provision.

ON the 4th of September, 1789, Mc Pherson executed a bond and disposition of entail of his lands in favour of a series of

heirs, which gave the heirs a power to provide their wives or husbands in the following terms:—" As also, it is hereby pro-" vided and declared, that it shall be lawful to the whole heirs " and members of tailzie foresaid, as they shall come in course " to succeed to the said lands and estate, to grant liferent infeft-" ments, by way of annuity, but not of locality, to the extent " underwritten, to their spouses, in satisfaction to them of all " terces, courtesies, and other legal provisions, from which their " said spouses are altogether hereby debarred and excluded, pay-" able at Whitsunday and Martinmas, by equal portions, to be " uplifted and taken furth of the first and readiest of the rents, " maills, and duties of the foresaid lands and estate, herein-above " resigned, lying and described in manner above mentioned: " But it is hereby likewise provided and declared, that the said " liferent infeftments, by way of annuity, shall not exceeed one-" fourth part of the free yearly rent of the said lands and estate, " as the said free yearly rent shall stand at the time of the death " of that heir of tailzie upon whose death the said annuities " shall respectively become due, after deduction of every public " and private burden affecting the same, of whatever kind or " nature the said burdens may be; so that, in case the spouse " of any heir of tailzie shall come into possession of an annuity " upon the said lands and estate during the existence of a prior " annuity, or annuities upon the same, such spouse shall be " entitled to no more than one-fourth part of the free residue " of the said rents, after deducting therefrom the said prior " annuity or annuities, as well as deducting the annuities to " younger children, hereinafter mentioned, procreated in any " prior marriage, and all other private or public burdens " whatsoever; but providing and declaring, that in case of the " existence of two or more spouses holding annuities, as afore-" said, at the same time, the larger annuity shall, upon the " death of the spouse holding the same, devolve upon the " spouse holding the immediate lesser annuity, if such last-

" mentioned spouse should be existing at the time, in lieu and " place of such lesser annuity, which lesser annuity is to be no " longer payable to the spouse so succeeding to a greater " annuity."

On the 7th June, 1793, Mc Pherson executed a last will and testament which, after referring to the entail of 1789, and giving a variety of legacies, contained the following direction as to his residuary estate :—

" I request and direct the executors of my will hereafter " mentioned, to consolidate into one fund, the whole of my " fortune and moveables, which fund they are to lay out in pur- " chasing lands in Scotland, to be entailed upon the series of " heirs specified in the bond and deed of entail already men- " tioned, according to the strict forms of the law of Scotland."

On the 19th September, 1795, Mc Pherson superseded the entail of 1789, by executing another entail which embraced the lands contained in that deed, and other lands which he had since purchased. This entail contained the following power in regard to providing wives and husbands: " Nor shall the said lands " and estate, or any part thereof, be affectable, or subject to, " any terces or courtesies, or to any annuities or liferent pro- " visions to the wives or husbands of the heirs and substitutes " above written: but with this exception, nevertheless, from " the foresaid limitation, that it shall be lawful to, and in the " power of the said heirs, male or female, of my body, and " whole other heirs of entail before specified, and each of them, to " provide their wives and husbands, and the wives and husbands " of their apparent heirs, an annuity, not exceeding a fourth " part of the free rents of the said estate, after deducting former " liferents, if any be, interest of entailer's debts, feu and teind " duties, cesses, land-taxes, minister's stipend, and any other " burdens that may affect the same, so that subsequent annuities " shall not exceed a fourth part of the surplus rents, but may " increase proportionally, as the former annuities and debts

" shall cease and be paid off; and for which annuities to be " granted in virtue hereof, the heirs of entail succeeding in " virtue hereof, shall, under the declarations after mentioned, be " subject and liable; but declaring always, that the annuities so " to be granted to the wives or husbands of heirs, shall not in " any event be the ground of any adjudication of the said " entailed lands and estate, or any part thereof, or of any dili- " gence that may be the ground of any eviction of the same; " but, that the claim of the said wives or husbands shall " extend no farther than to a personal claim against the heir of " entail in possession for the time; and that an heir of entail " succeeding to the said estate, shall not be liable for the arrears of " any annuities that may be granted to the said wives or husbands " further than to the extent of one year thereof, and that only " after discussing the executors or representatives of the heir " of entail in possession, when the said arrears were incurred: and " declaring that the wives or husbands of such heirs, shall, in no " case, have right to possess the mansion-house of Belleville, or " policy, or inclosures thereto belonging, which shall be always " reserved for the heir of entail for the time." This deed also contained a direction as to payment of the entailer's debts, in these terms: " And in order to render this deed of entail and " settlement more effectual, I hereby bind and oblige me, and " my heirs of law, executors and successors whatsoever, to free " and relieve my entailed lands and estate before specified, " and the heirs named, or to be named, to succeed thereto, " off and from the payment and performance of all debts " and obligements, in which I, for myself, or as representing " any of my predecessors, shall be liable at the time of my death, " and off and from all claims and demands whatsoever, whereby " the said lands and estate, or any part thereof, may be evicted " from my said heirs of entail."

On the same day that he executed this last entail, Mc Pherson executed a trust-disposition, which reciting that he held

an heritable bond over the lands of Blairgowrie for 4,600*l.*; that he had that day executed an entail of his lands, and that he was desirous that the sum in this bond should be invested in the purchase of lands, to be likewise entailed, he conveyed the bond to trustees, with the following direction:—"But in "trust always, and under the provision underwritten: Provid- "ing and declaring, that my said trustees, and their foresaids "shall be bound and obliged, as soon as they shall enter upon "their office of trustees, in virtue hereof, to demand payment "of the foresaid principal sum of 4,600*l.*, contained in the "heritable bond before narrated, and haill interest that may be "due thereon; and upon receipt of the said principal sum "and interest, they shall be bound to employ the same in such "manner as they shall think most proper and expedient for the "purposes of the trust committed to them. And they shall, as "soon as an opportunity of what shall appear to them to be a "proper purchase, or purchases, shall occur, be bound to lay "out the same in the purchase of one or more parcels of ground "lying in the county of Inverness, and as near my said entailed "lands and estate as can be procured. And, so soon as the "whole of the said principal sum, interest thereof, and profits "that may arise therefrom, or from such partial purchases as "they may make, shall be laid out in the purchase of lands, "the said trustees and their foresaids shall be bound and "obliged to execute an entail of the whole lands so purchased by "them, upon the heir of entail who may be in possession of my "said entailed lands and estate, in virtue of the foresaid deed of "entail executed by me upon the heirs thereby substituted to "him, under the conditions, limitations, restrictions, clauses "irritant and resolutive, contained in the said deed of entail, "and precisely in the terms thereof."

The entailer died in February 1796. Some years afterwards, and posterior to the date of the contract of marriage to be afterwards noticed, the trustees executed the trust as to the Blair-

gowrie bond, by calling up the money in the bond, and investing it in the purchase of lands, which they entailed agreeably to the trust.

In the year 1802, the trustees of the entailer's will purchased, with the proceeds of his residuary estate, the lands of Fairburn; and on the 7th of June, 1802, took a conveyance of them to themselves, upon the trusts of the will.

In the same year (1802), James Mc Pherson, the institute in the entails, both of 1789 and 1795, and one of the trustees of the will of the entailer, entered into a marriage with the respondent, and by antenuptial contract, bearing date 9th December, 1802, he granted the respondent the following obligation:—"In contemplation of which marriage, and in considera-
" tion of the sum of money after mentioned, paid by the said
" Miss Maria Sophia Craigie to the said James Mc Pherson,
" and of the assignation and conveyance underwritten, granted
" by her, the said James Mc Pherson binds and obliges himself,
" and his heirs and successors, and also the heirs of tailzie suc-
" ceeding him in the tailzied estate of the said James Mc Pher-
" son, senior, his father, to content and pay the said Miss Maria
" Craigie, yearly, during all the days of her life after his death,
" in case she shall happen to survive him, a free annuity, equal
" to one-fourth part of the free annualrents, issues, and produce
" of the whole tailzied estate of the said James Mc Pherson, as
" after described; as also, to pay her yearly, in the event fore-
" said, an additional free annuity, equal to one-fourth part of the
" free annual profits, rents, interests, and produce of the said
" James Mc Pherson's whole estate and effects still under trust,
" or to which he has succeeded, or may succeed, by and through
" the will of his said father; all as permitted by and in terms
" of the entail executed by the said James Mc Pherson, senior,
" of date 19th September, 1795." In security of the fulfiment of this obligation, he conveyed the entailed lands, so far as authorized by the entail of 1795, and gave the following obligation:—"And farther, the said James Mc Pherson hereby

" assigns, conveys, and makes over to the said Miss Maria " Sophia Craigie, in liferent during her life, in case she shall " happen to survive him, one-fourth part of the free yearly " proceeds, rents, profits, and issues of the said tailzied estate, " with power to her to uplift the said yearly rents, issues, " profits, and proceeds, to the extent aforesaid, or to concur " with the heir of tailzie in possession of said estate in appoint- " ing a factor to levy the rents and issues thereof, and who " shall be bound to account to her for one-fourth part of the " free annual proceeds collected by him, and that half-yearly " and termly, as the said rents and proceeds come into his " hands, and that in payment and satisfaction to her of her said " first-mentioned liferent-annuity, secured upon the said tail- " zied lands and estate: and further, the said James Mc Pher- " son obliges himself, and the heirs of tailzie succeeding him, " and his heirs and successors whomsoever, to secure the said " Miss Maria Sophia Craigie in one-fourth part of the free " yearly rents, interests, and produce of the residue or reversion " of the whole estate of the said James Mc Pherson, his father, " which is not conveyed by the aforesaid entail, but to which " the said James Mc Pherson, now of Belleville, has right by " the will of his said father; and that, in payment and satisfac- " tion to her of the said additional liferent-annuity above men- " tioned: and, accordingly, for her further security, and more " sure payment of said additional annuity, as soon as the said " separate estate of the said James Mc Pherson, coming to " him by his father's will, which is still under trust, or at least " not fully made over to him, shall be vested in land, or other " real securities, he obliges himself and his foresaids, to infeft " and sease his said spouse in liferent therein, to the extent of " one-fourth part of the free annual proceeds of the said whole " separate estate when so vested."

The respondent accepted the provision given her by this deed in full of terce and *jus relictae*, and in return paid over to her husband 1200*l.*, and assigned to him her whole other real

and personal estate. The respondent was infeft under the precept of sasine contained in this contract upon the 7th January, 1804, and her infeftment was duly recorded.

Of the same date as the contract, (9th December, 1802,) Mc Pherson executed a disposition which recited the execution of the contract of marriage and the obligation in it to pay the respondent an annuity equal to one-fourth of the annual produce of the entailer's own estate stil un der trust, and the purchase of the lands of Fairburn, and continued thus:—"And whereas "said purchase was made for my behoof; but, the executors "under my father's will, not having yet denuded themselves of "the trust, and made over the said trust-effects to me, the titles "to said purchase were taken in their names jointly with me: "and whereas it is proper that the said Miss Maria Sophia "Craigie should be infeft and seised in the said estate, for "security of her liferent right to an annuity equal to one-fourth "part of the rents thereof." On this recital the disposition conveyed the lands of Fairburn in implement of the obligation in the contract of marriage, and assigned to the respondent one fourth of the rents of the lands under reservation of a right to sell the lands, and a corresponding obligation to pay her one-fourth of the interest of the price or of the rents of the lands in which the price might be reinvested.

In the year 1803, James Mc Pherson, the respondent's husband, brought an action of declarator and adjudication, in which he obtained a decree in December of that year, finding that the entail of 1789 was revoked by the entail of 1795; that the fetters in the entail of 1789 were to be held as not referred to in the will of 1793, but were void and null; that the order in the will to entail the lands to be purchased did not apply to the fetters, or the series of heirs in the entail of 1795: "but that, according "to the true and legal construction of the said latter will and "testament of the 7th June, 1793, when considered with due "reference to the whole other settlements made and executed "by the said deceased James Mc Pherson, and with the whole

" other circumstances of the case, the lands and estate of Fair-
" burn already purchased by the said executors with a part of
" the English executry funds of the said testator, and all other
" lands and heritages to be purchased by them with the balance
" of the said English executry funds in their hands, and with
" the capitals appropriated by the said executors for answering
" annuities as they fall, must be settled and entailed upon" a series of heirs, " being that part of the series of heirs contained
" in the bond and disposition of tailzie of 1789, alluded to in
" the said latter will and testament, 7th June, 1793, remaining
" in force and unrevoked: and that the said lands and others
" already purchased, or to be purchased, must be so settled and
" entailed without prohibitory, irritant, and resolutive clauses,
" or other fetters or limitations whatsoever," and ordaining a conveyance to be executed accordingly. Under this decree, James Mc Pherson established in himself a fee-simple title to the lands of Fairburn.

The executors under the will of the entailer, used inhibition against James Mc Pherson, and brought an action for reducing the decree which has just been mentioned, and in July, 1825, obtained decree of reduction containing a declaration " that the said James Mc Pherson, as the surviving dis-
" ponee infeft in the lands of Fairburn, under the disposition
" thereof from Alexander Mackenzie, of Fairburn, granted to
" him, along with Sir John Mc Pherson and John Mackenzie,
" both now deceased, is not debarred from selling the same, for
" the *bonâ fide* purposes of the trust referred to in the said dis-
" position: but, that he is bound to execute a tailzie, either of
" the said lands, free of all incumbrances, or of other lands to
" be purchased with the price thereof, in favour of the series of
" heirs specified in the tailzie 1789, and under the ordinary
" fetters contained in strict entails, restraining from altering the
" order of succession, contracting debt, or alienating the lands,
" all as authorized by the Act of Parliament 1685: approved,

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" and hereby approve, of the foresaid draft of clauses prohi-
" bitory, irritant, and resolutive, prepared for the consideration
" of the Court by Mr. Alexander Monypenny, in terms of the
" former deliverance; and decerned, and hereby decern, accord-
" ingly: and further, in respect the said James Mc Pherson
" has found caution, as aforesaid, to execute such tailzie, in the
" terms so adjusted, either of the said lands of Fairburn, free
" of all incumbrances, or of other lands to be purchased as
" aforesaid; and also, in the event of his selling the said lands
" of Fairburn, to consign the price thereof, under deduction of
" necessary charges, in the bank of Scotland, or royal bank of
" Scotland, or bank of the British Linen Company, to remain
" so consigned until it shall be invested in a purchase of other
" lands, in such manner that the same may, at the sight of the
" Court, be duly entailed, in terms of the decree of the Court;
" recalled, and hereby recal, the inhibition complained of:
" ordained, and hereby ordain it to be marked on the margin
" of the record of inhibitions, that the same is recalled by
" authority of the Court; and decerned, and hereby decern."

All the trustees of the entailer's will died, with the exception of James Mc Pherson, who was thus the surviving disponee in the conveyance of the lands of Fairburn to the trustees of the will. James Mc Pherson died in April 1833, without having performed all the trusts of the will, leaving the lands of Fairburn vested in himself as surviving trustee, without having either sold them or executed an entail of them in terms of the interlocutor of July 1825.

Upon the death of James Mc Pherson, the appellant succeeded to him, as heiress under the entail and under the will. She made up her titles under the entail, and also took possession of the lands of Fairburn, and with the view of establishing her title to these lands and to the other estates derived under the will, she brought an action of declarator and adjudication against the parties interested. In this action she

obtained a decree on the 12th of November, 1834, which declared "that the said trust, created by the said latter will and "testament before narrated, notwithstanding the death of the "said trustees, subsists effectually for the benefit of the pursuer, "and those who have the substantial and radical interest therein, "and that the pursuer is entitled to have the said trust, and "means and property belonging to the same, transferred to her "and the other heirs of tailzie called to succeed to her by the "foresaid bond or deed of tailzie of 1789, in their order succes-"sively, for fulfilment of the purposes of the said trust, in so "far as they are not yet fulfilled, and for behoof of the various "parties interested therein, according to their respective rights "and interests; and that the pursuer, and the said heirs of "tailzie in their order successively, are entitled to proceed "to the execution and fulfilment of the trust, for behoof of "themselves and those who have the substantial and radical "interest therein, either primary or reversionary; and declared, "and hereby declare, that the pursuer, and the other heirs of "tailzie in their order successively, have the full right and title "to the said lands of Fairburn and others, in the same manner "as it stood in the persons of the said deceased trustees, and of "the said deceased James Mc Pherson, last of Belleville, as the "last survivor of the said trustees; but in trust always, and "subject to the various conditions and provisions, and for "fulfilment to the various parties interested therein, according "to their respective rights and interests, of the purposes of the "said trust;" and adjudged the lands of Fairburn to belong to the appellant, and the series of heirs called by the entail of 1789; "but in trust always, and subject to the various con-"ditions and provisions, and for fulfilment to the various parties "interested therein, according to their respective rights and "interests, of the purposes of the said trust; and subject to "all the claims, rights, and interests of the said Mrs. Maria "Sophia Craigie (the respondent), in so far as these shall be

" found legally to affect the said estate, all objections of every " kind, and the answers thereto, being reserved entire to both " parties." This decree repeated the finding in the decree of July 1825, in regard to the right to sell Fairburn for the purposes of the trust, and the obligation to reinvest the balance of the price in the purchase of lands to be entailed.

The appellant expede a crown charter of adjudication upon this decree, on which she was infeft in April 1836.

During the dependence of the action at the instance of the appellant, which has been mentioned, the respondent brought an action against the appellant, setting forth the provision made for her in her contract of marriage with James Mc Pherson, and concluding to have the appellant decerned to pay her an annuity equal to one-fourth of the free rents of Belleville, (the entailed lands,) after deduction of any former liferents, and all public and parochial burdens; the annuity to commence at Whitsunday 1833—the first term after her husband's death—and to be under deduction of monies already received; and likewise to pay her an annuity equal to one-fourth of the rents and profits of the lands of Fairburn, and of the other trust-property, as these rents and profits stood at the time of the death of her husband, after deduction of the debts for which the trust-estate was liable, and public and private burdens; the annuity to commence from the first term after the death of her husband.

The appellant, after assuming possession upon the death of James Mc Pherson, had let the *home* farm, which, in the questions that arose in the action that has been last-mentioned, she maintained came within the exception in the entail 1795, of " the " mansion-house and policies or inclosures thereto belonging;" and she also let from year to year the shooting of game upon the lands, at an average rent for the five years preceding 1833, of 180*l.* And in the management of the estate she was, according to her statement, at a yearly expense of from 80*l.* to 100*l.* in maintaining an embankment to restrain the over-flowing of

the river Spey, which but for that would create great damage to the lands.

In defence to the action of the respondent the appellant pleaded:—

I. That the claim of the respondent was to be dealt with as one merely personal against the appellant, her infeftment being in contravention of the entail, and otherwise bad.

II. That the respondent had no right to anything beyond a fourth part of the free rent of the lands of Belleville, entailed by the deed of 1795, as the same was actually realised from time to time; and that in estimating this fourth, the mansion-house and policy of Belleville, and inclosures thereto belonging, including the *home* farm were to be excluded.

III. That the respondent was not entitled to any part of the rent of the lands purchased with the proceeds of the Blairgowrie bond, as they were not included under the entail of 1795, the respondent's contract of marriage, or her summons.

IV. That the respondent was not entitled to any part of the rent of the lands of Fairburn, as they were never vested in James Mc Pherson, otherwise than as trustee of the entailer's will; were now vested in the appellant as such trustee; and never were comprehended under the entail of 1795.

V. That the annuity of the respondent was subject to the following deductions:

1st. Of the interest of one-fourth of a debt for improvements upon the entailed lands, made by her husband, and constituted a debt against the heirs of entail under the 10 George III.

2nd. Of one-fourth part of the annual expenditure in maintaining the embankment of the river Spey.

3rd. One-fourth of the expense of repairing the parish church, and repairing and upholding the buildings, farm-offices, and fences upon the lands.

4th. One-fourth of a factor's salary and the necessary expenses of management.

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

VI. That in computing the respondent's annuity, the following items should not be taken into account:

1st. Unrecovered arrears of rent.

2nd. The rent of the *home* farm, as being included within the exception of the mansion-house policy and inclosures.

3rd. The money received annually for the right of shooting, as not being of the nature of rent and being variable in its amount from year to year.

The Lord Ordinary, (*Moncrieff*,) reported the cause to the Court upon cases for the parties, but added to his interlocutor the following note:

" After much consideration of this cause, which appears to " be of great importance to the parties, and involves matters of " law of considerable moment, in so far as a very special case " can do so, the Lord Ordinary has come to the opinion, that " it is, in the circumstances, his duty to report it without pro- " nouncing a judgment. His reason for doing so will be seen " in the reference necessarily made to a former judgment of the " Court. But, having given much study and thought to the " case in the important points, and having been thereby brought " to an opinion on those points, however difficult he may have " thought them, he feels it to be his duty to explain his views " of the case fully, and to give the party interested, whatever " benefit she may derive from that opinion.

" There is much able reasoning in these revised cases; but, " in both of them, some which is not satisfactory to the Lord " Ordinary's mind. When the defender maintains that nothing " but an infeftment in an heritable estate could vest the powers " of providing the annuity here claimed, and tries to illustrate " the proposition by common rules applicable to land estates " descending by succession on ancient titles, she evidently " throws aside the fundamental fact, that there is no ancient " title and that all depends on the will of one man, the imme- " diate author of the granter of the onerous settlement in ques- " tion. All the deeds executed by that gentleman, the prede-

" cessor of the pursuer's husband, must be considered together,
" and as making one settlement, in so far as they were subsisting
" at his death; and the question is, what is the true and legal
" import of them all, in regard to the matter here in discussion?
" There is no technicality in it; the deeds being all the deeds
" of one man, who was completely *rei suæ arbiter*.

" The defender says, towards the end of her paper, that this
" is not a question of *intention* but of *power*. It is a question
" both of *power* and *intention* on the deeds of the pursuer's
" husband; but as to the deeds of James Mc Pherson, the
" *entailer*, all the questions of *power* in relation to his heirs
" depend absolutely on the *intention*, as it may be found in all
" the deeds which he executed, when duly considered together.
" And more particularly, it can admit of no question, that, with
" reference to the *personal estate* left by him, the rights, inte-
" rests, or powers, of his heir affecting it, must depend entirely
" on the will and intention expressed, or necessarily involved
" in *all* the deeds which he left in operation, and not merely
" on the single expressions of a particular deed. The Court
" is bound to look anxiously for the whole will of the testator.

" On the other hand, when the pursuer assumes, that, be-
" cause there was an ultimate end in view, all the natural con-
" sequences of it must take immediate legal effect, the process
" of reasoning is too rapid, and the conclusion unwarranted.

" The fact which gives rise to the present cause is, that, in
" the year 1802, the late James Mc Pherson entered into an
" onerous contract of marriage with the pursuer, by which a
" provision in certain terms was settled on her. As to the
" meaning of that settlement in regard to the estate and funds
" over which it should extend, it seems to the Lord Ordinary
" to be impossible to make a serious question. Quite clearly,
" it was *intended*, and in words made to cover, not only all the
" entailed estate of Belleville, as it stood at the date of the
" contract, but also all the estate then standing in trust-funds;
" but expected to be converted into entailed estate. The terms

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" of the deed are so explicit as to admit of no doubt or ambi-
" guity. They are direct as to the estate of Belleville, and
" separately direct and explicit as to the trust-funds. No man
" can doubt, that if Mr. Mc Pherson believed this to be within
" his *power*, it was fair and right, whatever may be the effect of
" it; and, considering the nature of the settlement of old James
" Mc Pherson, and the many years which elapsed after his
" death, before the pursuer's claim for her annuity emerged,
" there is little reason to doubt, that the pursuer and her
" friends, at the time of her marriage, were very reasonably
" entitled to believe that all the covenants of the contract
" would long before that time be secured of full implement,
" according to their plain meaning. The Lord Ordinary thinks
" it quite unnecessary to go into any discussion on the import
" of the marriage-contract in *this* point, conceiving it to admit
" of no reasonable controversy. But it is most important that
" the present question is based on the fact that such a marriage
" contract was *bonâ fide* concluded, and took effect in the
" marriage of the parties.

" The question, therefore, is, whether the pursuer's husband
" had *power* to engage for what he promised and bound himself
" to, or how far his honourable intentions towards the lady with
" whom he contracted, are defeated by the form or meaning of
" the deeds on which his rights and powers depended. She
" is certainly entitled to fair and full implement, in so far as
" her husband had, by any just and reasonable construction of
" the settlements of his predecessors, power to contract with
" effect in terms of her marriage-contract.

" I. There can be no doubt that the pursuer has a good
" right to an annuity equal to one-fourth of the free rents and
" profits of the estate of Belleville proper, and all the lands
" comprehended in the entail 1795. This seems to be ad-
" mitted. The mode of estimating it is a different question.
" But Mr. James Mc Pherson clearly had power to bestow such
" a right, and he has done so in very express terms. It is to

" be made effectual in terms of the entail, by a claim against the " heir of entail in possession for the time.

" II. The Lord Ordinary is next of opinion, that the pur- " suer has right to an annuity equal to a fourth part of the rents " and profits of the lands, which were purchased by means of " the money recovered under the Blairgowrie bond of 4,600*l.*, " with the interest and accumulations upon it. He cannot " think this at all doubtful. That bond was specially con- " veyed by the trust-deed of the 19th September, 1795, " executed on the *same day* with the *second entail* of the " estate of Belleville, to which it expressly refers, as containing " the destinations, conditions, limitations, &c. &c.; 'and other " 'clauses and conditions therein expressed;' and the trust- " deed bears, that it was the testator's wish and intention, that " the money in the bond should 'be laid out in purchasing " 'lands, &c., to be entailed upon the same series of heirs, *and* " '*under the same provisions, limitations, and clauses contained* " '*in the said deed of entail.*' On this narrative, the bond and " all the sums contained in it, and interest thereof, and the right " of annualrent held heritably under it, were conveyed to the " trustees, with power to uplift the same, and to hold all till " they should vest it in lands, and make an entail thereof in the " manner directed; with an obligation on them, as soon as a " proper opportunity should occur, to lay out the whole princi- " pal and interest and accumulated profits in the purchase of " lands, and then to execute an entail thereof 'upon the heir " 'of entail who may be in possession of my said entailed lands " 'and estate *in virtue of the foresaid deed of entail* executed by " 'me upon the heirs thereby substituted to him, under the " 'conditions, limitations, restrictions, clauses irritant and reso- " 'lutive contained in the said deed of entail, *and precisely in the* " '*terms thereof.*'

" There can be no doubt concerning the meaning and effect " of this settlement; and as any entail to be executed under it " must necessarily have contained all the limitations in the

" entail 1795 referred to, and among them the exclusion of the " right of terce, so it must also have contained a clause, in the " very words of that entail, empowering the heir in possession " to provide his wife in an annuity equal to one-fourth of the " free rents and profits of the lands so to be acquired and " entailed.

" If the property so put in trust had stood in that trust, " without an investment having been effected, or an entail " executed, till the death of the pursuer's husband, though " there might have been room for argument as to the operation " of the provision in the marriage-contract as affecting it; and " though, in consequence of a certain judgment of the Court in " 1816, concerning the intermediate accruing interests of the " bond, there might have been a necessary *suspension* of the " beneficial interest in it, till lands were entailed, the Lord " Ordinary would have had great difficulty in holding, that " there was not, according to the true meaning of the whole " settlement, such a right vested in James Mc Pherson, as " might enable him to provide to his wife the proportional " annuity intended by the entailer, to take effect as soon as the " possible application of it should emerge by the due execution " of the trust. But it seems to him to be unnecessary *here* to " consider any such question, the actual state of the case remov- " ing in his mind all doubt. For, long before the death of " James Mc Pherson, the pursuer's husband, the debt was " realized, lands were purchased, and, though the deed is not in " process, it is admitted that an entail was executed, which, " the Lord Ordinary presumes, was in the precise terms of the " entail 1795, on which James Mc Pherson *stood infeft* and in " possession at the time of his death. As he, therefore, as the " first heir of entail, did become vested in these lands, with all " the powers given or reserved by the entail, the Lord Ordi- " nary is of opinion, that it is of no consequence as to the effi- " cacy of the settlement by marriage-contract in favour of his

" wife, to take effect at his death, whether that settlement was " executed before or after he was so invested. He apprehends " that Mr. Mc Pherson was entitled and empowered to bind " himself onerously to provide, and in anticipation of the due " execution of the trust, directly to provide, to his wife, an " annuity equal to one-fourth ' of the free annual profits, *rents*, " ' interests, and *produce* of the said James Mc Pherson's *whole* " ' *estate* or effects still under trust, or to which he has suc- " ' ceeded, *or may succeed*, by and through the will of his said " ' father, all as permitted by, and in terms of, the entail 1795;' " and whatever questions may arise on this settlement with " regard to the personal property put separately under trust, " the Lord Ordinary can see no reasonable ground for doubting " that it is an effectual exercise of the power expressed in the " entail of these lands, (in conformity to that in the entail 1795,) " to which Mr. Mc Pherson actually *did succeed*, and which " became *part of his estate*, held by valid infeftment before his " death. Perhaps it may not be simply on the maxim *jus* " *superveniens auctori accrescit successori*, that this result is to " be obtained; though the defender seems to misapprehend the " particular application of that rule. The *pursuer* is the *suc-* " *cessor* here; and the title infeftment, which came into her " author's person, accresces, if that be necessary, to *her title* by " the *onerous contract* in her favour. But the Lord Ordinary " thinks, that the point here rests on a broader and clearer " principle. The trust was expressly constituted for James " Mc Pherson, as the first heir of entail; and, as it was quite " explicit as to the entail referred to, and the title to be given, " as soon as lands should be acquired, he was entitled to " act on the faith of such a title being vested in him when the " trust should be fully executed, and to contract and provide " accordingly, in the exercise of the power which any entail *to* " *be* made *must* confer on him; and he having done so, and subse- " quently become vested in the lands in question, it is the same

" case as if he had then made the same settlement with express " reference to the particular lands. It is a much clearer case in " this point than that of Houston *v.* Stewart Nicholson, January " 28, 1756; for there the money appointed to be laid out on " land to be entailed, *had not been laid out* in the *lifetime* of the " granter of the provision; and the Lord Ordinary cannot think " that, *in this question*, it can possibly make any difference that " the bond was here vested in trust for the heir's behoof.

" III. The question whether the rents and profits of the " lands of Fairburn purchased and held by the executors of the " will of Mr. Mc Pherson, the elder, and generally, whether " the personal funds and estate carried by that will, and the " subsequent testament regarding the personal effects in Scot- " land, are effectually made subject to the provisions in the " marriage-contract, is, in the Lord Ordinary's opinion, a ques- " tion of very great difficulty; and he must confess, that in the " course of his study of it, his impressions have occasionally " varied. There is a specialty in relation to the funds, which " stood, at the commencement of this process, invested in the " lands of Fairburn, to which it is necessary to pay particular " attention. But the general question, as to the whole personal " estate, is greatly involved with the principles which must " regulate that point.

" The disposal of this personal property rests, in the first " instance, on the will dated June 7th, 1793. That deed " narrates and refers to the *entail* of the Scotch estates, *which* " *the entailer had executed in One thousand seven hundred and* " *eighty-nine;* and it professes to dispose of his whole other " property. The material clause, after the special legacies, is " in these words:—He requests his executors 'to consolidate " 'into one fund the whole of my fortune and moveables, *which* " '*fund they are to lay out in purchasing lands in Scotland, to* " '*be entailed upon the series of heirs specified in the bond and* " '*deed of entail already mentioned*, according to the strict

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" ' forms of the law of Scotland.' The executors, at an early " period, purchased the lands of Fairburn; and Mr. James " Mc Pherson, the first heir, having been advised, as it should " seem, that though the destination to *him* was clear, there was " such imperfection in the appointment concerning the strict " entail to be executed, in consequence of that entail, 1789, " having been superseded by the entail 1795, as to entitle him " to disregard it, took measures for making up a title in his " own person by adjudication, and by certain proceedings " obtained a decree of this Court in absence, and completed a " title by infeftment in fee-simple. An action of reduction and " declarator was subsequently brought by two of the executors. " In that process the late Lord Meadowbank found, that the " entail to be executed must be in favour of the heirs called by " the entail 1795, and that it must be an entail containing " simply the ordinary fetters of an entail against altering the " succession, contracting debt or alienating, as authorized by " the ' Act 1685,' but finds no sufficient warrant for them to " ' adopt all the various powers and conditions contained in the " ' deed of tailzie, 1795;' and he reduced the decree, and the " titles made up by James Mc Pherson. The Court recalled " that interlocutor, and decerned in the rescissory conclusions " of the reduction; but found that James Mc Pherson, as the " surviving disponee, *was not debarred from selling the lands* " for the purposes of the trust, but that he was bound to " execute an entail of them free of all incumbrances, or of other " lands to be purchased with the price, in favour of the heirs of " the entail 1789, under the ordinary fetters of a strict entail " against altering, contracting debt, or alienating; and they " subsequently approved of a draft of such clauses, framed in " the general terms referred to.

" That judgment may perhaps be *res judicata* among the " heirs of entail, though no entail was executed, and though in " a question with the pursuer, the effect of it is to be con-

" sidered. If it were not for the terms of it, the Lord Ordinary " must confess, that he should have doubted the *competency* of " the executors *to purchase lands, and hold them in their own* " *persons, without executing an entail,* and afterwards to sell " them, so as to keep up the trust indefinitely; and he parti- " cularly doubts how far the Court, if *the rights and interests of* " *the present pursuer* had then been put in their view, would " have held that the lands of Fairburn, then held to stand in " the executors ready to be entailed, if, when they were so " entailed, her right by the marriage-contract would have been " legally secured over them, could be sold by the executors, *to* " *the effect of destroying any right in her.* But, as the Court " did determine that there was power to sell them, the legality " of a sale may not be questionable, and the question remain- " ing must be whether the pursuer's rights were thereby effec- " tually impaired.

" It seems to be assumed by the defender, that, when Lord " Meadowbank expressly, but the Court *by implication only,* " found that there was no warrant for inserting in the entail all " the particular clauses of the entail 1795 or 1789, it must be " inferred, that the meaning and effect of this was, to exclude " the *power* of the heir *to make a provision for his wife,* as " reserved by both those entails. The Lord Ordinary has great " doubt, whether it was in the contemplation of the Court, that " their findings should have any such effect. The meaning " appears to him to have been, that there was no warrant to " make the entail *stricter* than the ordinary clauses would " render it, and that the various *more astringent* clauses in the " entail 1789, should not be adopted. But, as to the power of " the heir to provide for his wife, he doubts much, whether it " was at all in their contemplation *to decide anything concern-* " *ing it.* The pursuer was *no party* to the proceedings, and her " rights were never considered.

" This is a matter which may affect all the personal estate,

" and it is important. But one thing the Lord Ordinary holds " to be clear matter of law, viz., that an entail in the terms con- " templated by the Court, *would not have excluded the terce.* " He sees that there is some discussion about this in the " papers; but he holds it to be a clear and settled point. If, " therefore, an entail of the lands of Fairburn had been exe- " cuted in those terms, and Mr. Mc Pherson had been infeft on " it, it is plain, that the pursuer must *either* have received " implement of the *mitigated* provision in her contract, one- " *fourth* of the free rents, according to the evident intention of " the maker of all the deeds, or otherwise her *terce* would not " have been barred, and she would have been entitled to a life- " rent of one-*third* of the lands by locality. How far she can " be placed in a *worse* condition by the trustees not executing " the entail, though Mr. Mc Pherson survived the decree many " years, requires serious consideration.

" But now, it is to be observed, that there is nothing in the " clause of the will 1793 to warrant the trustees to accumulate, " in their own hands, the interest of the personal estate when " realized. And accordingly, the Lord Ordinary understands " that the deed has all along been so construed; that the late " Mr. Mc Pherson received all the rents of Fairburn from the " date of the purchase till *his own death;* that after his death " the whole rents were uplifted *by the defender;* that, since the " lands were sold, a fourth part of the price has been consigned " in the British Linen Company, to await the issue of the " present question, and *that the remainder of the interest has* " *been uplifted by the defender as the heir of entail.*

" The case, therefore, is, that during Mr. Mc Pherson's life, " there was an *existing heritable estate purchased with the exe-* " *cutry funds* of the whole annualrents and profits of which he " was in the actual possession and enjoyment till the day of his " death; and that, since his death, the defender has been in " the possession and enjoyment of the rents of *that estate,* as

Mc Pherson *v.* Mc Pherson.—13th August, 1846.

" heir of entail; and since the lands were sold, *pendenti pro-*
" *cessu*, of the interest of the price, subject only to what is
" reserved to meet the claim of the pursuer. It is very clear to
" the Lord Ordinary, that, *so far as Mr. Mc Pherson had the*
" *power*, one-fourth of the rents of Fairburn, and of the interest
" of the price, as the *surrogatum* for the estate, as well as of the
" interest of any personal funds in the hands of the executors,
" *were provided* to the pursuer by her marriage-contract. The
" question, therefore, is, whether, according to a right construc-
" tion of the testator's deeds, James Mc Pherson had power to
" make that provision.

" The Lord Ordinary is sensible that there is great diffi-
" culty in this point. He does not think the pursuer's argu-
" ment well founded, which is derived from her husband's
" infeftment on the fee-simple title, not singly, because that
" title stands reduced, but specially in respect that it *had no*
" *existence at the date of the marriage-contract;* and, therefore,
" whether it was absolutely null or not, in a question with third
" parties, who might have contracted while it stood unreduced,
" the pursuer, not having contracted on the faith of it, cannot
" have any benefit by a title, which was reduced, and ceased to
" exist, before her husband's death. He sees also, that there
" is, of course, no room for a claim of terce literally, as there
" *might* have been, *if an entail of Fairburn had been executed*, in
" the terms of the interlocutor of the Court, and if Mr. Mc
" Pherson had been infeft in such an entail. And, from the
" peculiar nature of the judgment, and the indefinite terms of
" the will, there is great difficulty in finding satisfactory legal
" data for doing that which is truly the justice of the case, viz.,
" putting the pursuer in the same position, *as if the lands had*
" *actually been entailed*, with a power of making provision for
" wives, such as the testator contemplated in both the entails
" which he himself executed.

" Nevertheless, the Lord Ordinary cannot think the difficulty

" insuperable. The funds were left for the sole purpose of being " laid out on lands to be entailed. The Lord Ordinary has " already indicated a doubt, how far the executors had power " to *purchase lands* for any *other* purpose. At any rate, lands " were purchased, which *might* have been entailed, and Mr. Mc " Pherson had the enjoyment of them during his whole life. " The Court found that the entail to be executed must be to " the heirs of the entail 1789, thereby clearly recognising that " deed as a part of the will of the testator. They found, indeed, " that there was no warrant for requiring the entail to contain " all the clauses, either of that entail, or of the entail 1795; " and the Lord Ordinary sees the difficulty which this raises in " the way of the pursuer's claim. It is what influences him in " reporting the cause without a judgment. But, as it is impos- " sible to determine anything regarding the marriage-contract, " on the supposition that the testator, in so settling his personal " estate, could intend, that by the entail to be executed, or " under the virtual trust to be kept up until it should be exe- " cuted, the heir in actual possession of the rents or proceeds, " should have *no power* of providing his wife in a liferent right, " affecting *either*, it appears to him that, if there be law for " extending, on equitable principles, the power for this purpose " given by a testator in entails *executed by himself* to *other funds* " plainly intended to be given as adjuncts, and in subserviency " to such entails, the equity of the present case is, that the " onerous provision here made should be sustained to the " limited extent of the fourth part of the free produce of the " executry-fund, till an entail shall be made, and of the rents of " any lands which may be hereafter entailed.

" The decision in the case of Houston *v.* Stewart Nicholson, " January 28, 1756, does afford a principle for such a construc- " tion. For in that case, the *only power* was given in the " entail of the *lands actually entailed*; and by the *words* it was " expressly *limited* to a liferent 'out of the *foresaid estate*.'

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" All the argument, therefore, which is rested on similar words " in the present case is answered, in point of principle, by the " equitable construction which was there applied. For though " the annuities which were conveyed were given for the purpose " of being laid out in the purchase of lands to be annexed to " the entailed estate under the conditions of the entail, *no lands* " *had been purchased, or in fact so annexed;* and nevertheless " the Court found, that a provision of a *third* part of the pro- " duce of those annuities made by the heir in possession in her " marriage-contract, was effectual. There are differences be- " tween that case and the present, chiefly arising from the diffi- " culty created as to the *measure* of the power by the judgment " of the Court in the former cause. But the question is, whe- " ther there is any difference in the *principle* of the thing. If " there is not, *some* equitable measure must be found. In some " respects, especially as to *Fairburn* and its price, the equity is " stronger in the present case that it was in the case of Houston. " But, in general, the Lord Ordinary is of opinion, that Mr. " Mc Pherson was fully warranted to make the settlement on " the pursuer which he did make in regard to this fund, and " that it ought to receive effect upon the presumed will of the " testator, by reference to this deed of entail.

" There are other examples in which provisions granted by " an heir of entail have been sustained, although it was after- " wards found, that he was not *in titulo* to make them. See " February 11, 1829, Kennedy *v.* Kennedy. That was on the " Act 1695, as to apparent heirs, and may not be exactly " applicable to the present question. It only shows that an " actual and valid infeftment in the person of the heir is not " always necessary to the effectual exercise of such a power.

" On the whole, the Lord Ordinary is strongly inclined to " think, that the pursuer's claim to one-fourth of the free rents " of Fairburn, while these lands were held by the executors " after her husband's death; to one-fourth of the free interest

" of the price since obtained; and to one-fourth of the free " rents of any lands which may be hereafter purchased and " entailed, ought to be sustained. And he farther thinks that " the same rule ought to be applied to any other personal funds " in the hands of the executors.

" IV. The second general question in this case, which relates " to the rule by which the *amount* or *extent* of the pursuer's " annuity, whether it shall hold to be well provided, is to be " determined, is also attended with difficulty. But the Lord " Ordinary will express the view which he has of the different " points, very shortly.

" (1.) He is of opinion, that as to the estate of Belleville, " and the lands purchased with the proceeds of the Blairgowrie " bond, her right is to have a fixed annuity, equal to one-fourth " of the free rents of those lands, as they stood at the death of " James Mc Pherson, the heir. If this depended on the entail " of 1789, there could be no doubt of it. But the Lord Ordinary " conceives, that, in right construction, the clause of the entail " 1795 has precisely the same effect. The clause in the first " deed, apparently drawn in London, is more anxiously ex- " pressed in the particular points. But, though the *style* of the " second, prepared in Scotland by an eminent man of business, " is somewhat different, and, in the last part of it, seems to " have been intended to simplify and render more consonant to " the true intention what was perplexed and irrational in the " former, it is in the main point not materially different in its " substance. The power is, to provide their wives, &c., 'in an " 'annuity not exceeding the *fourth* part of the *free rents of the* " '*said estate*, after deducting former liferents,' &c. If this " clause stood simply on these words, the Lord Ordinary con- " ceives, that it would be construed to refer to the free rents, as " they might stand *at the death* of the *granter* of the provision. " For, *for where there is no locality* permitted, it could never be " presumed that the entailer meant to create so harassing a

Mc Pherson *v.* Mc Pherson.—13th August, 1846.

" species of right as that the annuitant, on the one hand, or the " heir succeeding on the other, should be entitled *in every year* " to require a strict accounting of all the rents or *produce* of the " land, before the anuuity could be paid. It would be a hard " state of things on both sides, but especially on her's, whose " *aliment* depended on it. But the clauses which follow really " seem to make it clear that this *could* not be the intention.— " 'So that subsequent annuities shall not *exceed* a fourth part " 'of the *surplus rents*, but *may increase* proportionally, as the " '*former annuities* and *debts* shall cease to be paid off.' *In-* " *crease* from *what?* Clearly not above the *free* rents in *every* " *year*. That would have no meaning, because the increase " would follow of course on the ceasing of the burdens, from " the very nature of the right. It *could* only mean an *increase* " above the *surplus rents*, as these might stand when the " annuity came into operation, that is, at *the testator's death.* " That being taken as the measure of surplus rents, which " the annuity *should not exceed* in the first instance, an *increase* " is allowed to take place when *former annuities* and other " similar debts should fall in or be paid up. In this view the " clause is clear and intelligible; but in any other it is diffi- " cult to see what purpose it could have been intended to " answer.

" The defender comments at great length on certain clauses " of the marriage-contract, as implying, on the part of James " Mc Pherson, an intention to provide the annuity on a different " principle,—and it is really not improbable, that he or the " maker of the deed had some such idea. But the material " part of the deed is perfectly clear and simple. He binds him- " self and the heirs of entail 'to content and pay the said Miss " 'Maria Sophia Craigie yearly during all the days of her life " 'after his death, in case she shall happen to survive him, *a* " '*free annuity equal to one-fourth part of the free annual rents,* " '*issues, and produce of the whole tailzied estate* of the said

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" 'James Mc Pherson, as after described.' Whatever, there-
" fore, may be the effect of the subsequent clauses, and whe-
" ther they may be consistent with the power given or not, the
" pursuer cannot lose her right thus bestowed in precise con-
" sistency with the terms of the entail. The clause which
" follows relates to the produce of the *personal estate* which
" was necessarily in a different situation, and in so far as some
" of the clauses might be directed to vest a real right in the
" lands, or to entitle the annuitant to uplift the rents, name a
" factor, &c., with reference to the entailed estate, such clauses
" ought to be construed as merely intended for the pursuer's
" *security*, and ought not to affect the validity or effect of the
" right itself, according to its terms, and the nature of the
" power given by the entail.

" The Lord Ordinary will only further observe, that, when
" the defender speaks of it being a very easy matter to settle
" a claim for an annuity on her principle, the proposition is far
" from obvious. Not to speak of rents allowed to fall in arrear,
" the only *compulsitor* being in the heir's hands, what is to be
" made of a yearly accounting for the *produce* of all the land,
" which the heir may choose to take in her own hands? As it
" is, there is a question about a home farm. But what if the
" heir should let the whole, or a great part of the estate, fall out
" of lease, and keep it in her own hands,—a thing not at all
" uncommon, both in the Highlands and other parts of Scot-
" land? It would be a very distressing position to put the
" widow in, that she could get no payment of her annuity, not
" only till the heir chose to realize its produce, and fix its value,
" but till a comparative accounting should take place upon all
" the *expenditure* and *profit* in *every* year. The Lord Ordinary
" cannot presume, that this was the meaning of the entailer,
" and neither does he think that it is the fair import of the
" marriage-settlement.

"(2.) The clause of the marriage-contract relative to the

" other funds is differently expressed. It necessarily was so; " because the produce of that fund could not be determined by " the date of Mr. Mc Pherson's death. It might vary from " time to time before lands were purchased and entailed, and it " would necessarily be changed when a purchase and entail were " effected. In this part of the case, therefore, the Lord Ordi- " nary will simply state, that if the Court should find that the " pursuer's claim is well founded generally to a fourth part of " the free produce of these funds, his opinion is, that the right " must be measured by the interest or produce coming into the " hands of the trustees in each year from the death of James " Mc Pherson, until the capital should be laid out as directed " and an entail executed; and that then the annuity must be " fixed by the free rent of the lands when they come into the " possession of the heir of entail. Though there is a difference " in this result from that in the other case, it is only a difference " *necessarily* arising out of the nature of the whole settlements " of the entailer, and he does not think it at all legally incon- " sistent.

" V. Various questions are discussed as to the deductions to " be made before determining what is the *free* rental. In this " part of the case, a good deal depends upon the rule to be " adopted as to the nature of the annuity. The defender " assumes her own construction. The Lord Ordinary will, " therefore, say little on these points.

" (1.) The defender claims a deduction for *improvements*. " This must be out of the case, if the annuity shall be fixed at " the death. But the statement of the claim shows how much " the pursuer's annuity would be made to depend on the arbi- " trary discretion of the defender, and what a perplexing account- " ing it would involve, if the defender's construction were " adopted.

" (2.) A deduction is claimed for the expense of keeping up " an *embankment* against the river Spey. The Lord Ordinary

" will not say that this may not require consideration on any " construction. But, at present, he does not see clearly why " such a deduction should be admitted, any more than on " account of keeping up farm-steadings, fences, &c. The " defender says, that if the land were let to a tenant, taking " him bound to keep up the embankment, the pursuer would " bear her share of this in the diminished rent. That may be " true; but the answer seems to be, that the proprietor will act " for her own interest in that matter, having a right to three- " fourths of the free-rent, and that, if she takes the burden on " herself, it is her own act, and she cannot throw any part of it " on the annuitant. Yet the point may be doubtful.

" (3.) The defender claims deduction on account of the repairs " of the *church*. This supposes that there is to be no fixed " annuity. But, taking it otherwise, the case of *Anstruther*, " May 14, 1823, seems to be against the defender, that being " the case of a liferent by *locality*.

" (4.) The defender claims abatement for *unrecovered arrears* " This brings out the effect of the defender's construction. The " pursuer is to suffer abatement in every *year*, having no power " to recover the rents, or to control the management; and it is " to be observed, that even the power given to her contingently " to appoint a factor could not be exercised till she could show " that the heir had *refused* to pay rents *actually recovered*.

" V. The defender claims deduction for a salary for a " factor generally; and in support of this she says that she is " seeking no advantage, but only that the estate *should be* " *treated as if it were placed under sequestration* for the behoof " of all parties. The Lord Ordinary can never think that it " was the intention of the entailer that the estate should be so " treated. And, in general, he sees no ground for this claim " on any construction.

" VI. A question is raised as to the mansion house and " policy. The Lord Ordinary does not understand the pursuer

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" to make any claim to the mansion-house, or to the policy or " pleasure-ground properly understood. In so far as she does " so, he is clearly of opinion, that the claim is unfounded, and " that they cannot be taken into account at all, at least if the " annuity is to be fixed, and, he rather thinks, even on the " other construction. But the pursuer says there is a home " farm which may be of considerable extent; and the Lord " Ordinary does not see any good ground for excluding either " a home farm *producing agricultural crops*, or land *let in grass*, " or *pasture* for the *sale* of cattle.

" VII. A serious question arises with regard to extensive " grounds let on account of the *game*. There may seem to be " difficulty in this from the newness of the practice. But at " present the Lord Ordinary is not satisfied with the defender's " argument for excluding it. The ground *is let for a rent*. As " it is so, it is no good argument to say that the proprietor " *may not let it*, but leave it to go to waste unproductive. The " practice of letting such ground, and the profitable returns " obtained for it, have altered the nature of such property. " The pursuer has a right to one-fourth of *the rent* of *all* the " land which can be *profitably let*; and if the proprietor keeps " it to herself, that should not alter the pursuer's right. If the " defender's construction is to be taken, and if *every year's* rent " is to be taken separately, it will not be easy to hold that the " *actual rent of the land part of the estate*, perhaps amounting " to hundreds of pounds, is to contribute no benefit to the " pursuer. But, even if the estimate is to be made at once, for " a fixed annuity, it does not appear that such land can be " justly excluded from the reckoning. There may indeed be " difficulty as to the mode of making the estimate in that case, " as in all cases of rent, which is precarious from the nature of " the subject.

" VIII. Finally, there is a question as to the time, when " the *first term's* payment shall become due. If the entail

" 1789 were to regulate this, there could be no doubt about it; " and though the entailed estate depends on the deed 1795, " that, in the Lord Ordinary's view, ought to be construed as " having the same effect. But the defender says that the pur- " suer is only entitled to her annuity *how* and *when* the defender " *recovers* the rents. This may be a necessary consequence of " her construction; but the Lord Ordinary cannot enter into " it. One thing he should think clear, that, if the pursuer " were not entitled to a payment of her annuity within some " short period after her husband's death, she must be entitled " to some reasonable *aliment* until it did become payable."

Before any judgment had been given in the case, the lands of Fairburn were sold by the appellant, and 5000*l.*, one-fourth of the price, was consigned in a bank, to abide the result of the respondent's claim.

On the 24th of May, 1839, the Court pronounced the following interlocutor:—" Find the defender liable to the " pursuer in a free liferent annuity, equal to one-fourth part " of the free rents, issues, and produce of the entailed estate of " Belleville, comprehending the lands entailed by the late " James Mc Pherson, senior, of Belleville, and also the lands " of Strone, and others, acquired and entailed under, and in " virtue of, a deed of trust, executed on the 19th day of Sep- " tember, 1795, by the said James Mc Pherson, in favour of " John Mackenzie, esquire, of the Inner Temple, London, " counsellor-at-law; William Duncan, esquire, of Philpot " Lane, in the city of London, merchant; and James Gibson, " Writer to the Signet: Find that the said annuity must be " estimated according to the amount of the rents of the said " lands, as the same stood at the death of the late James Mc " Pherson, second of Belleville, the husband of the pursuer, " and must be equal to, but not exceed a fourth part of the " free rents of the said estate, as they then stood, after deduct- " ing former liferents, if any, interest of entailer's debts, feu

" and teind duties, cesses, land taxes, minister's stipend, and " any other burden affecting the same; but to increase pro- " portionally as former annuities and debts affecting said " estate, shall cease and be paid off: Find the defender liable " to the pursuer in an additional liferent annuity, equal to one- " fourth part of the free annual rents, profits, interest, and " produce of the whole free trust funds and property or exe- " cutry, after deduction of debts of James Mc Pherson, senior, " the first of Belleville, including the estate of Fairburn, until " the same was sold by the defender, and the price thereof " after the same was sold, as the said annualrents, profits, " interest, and produce, accrued, or may yet accrue, from the " date of the death of the said James Mc Pherson, the second " of Belleville, until the said trust funds or executry shall be " invested in conformity with the provisions of the deeds " relative thereto, and thereafter, as the rents of the lands " which may be purchased with the said price, and other exe- " cutry or trust funds, and entailed in terms of said deeds, " may stand at the time when they come into the possession " of the heir of entail: Find the said annuities were and are " payable half yearly, at two terms in the year, Whitsunday " and Martinmas, by equal portions, beginning the first half " year's payment at the term of Whitsunday, 1833, being the " first term of Whitsunday or Martinmas after the death of " the said James Mc Pherson, for the half year immediately " preceding, and thereafter, at the terms of Whitsunday and " Martinmas, in equal portions, during the lifetime of the " pursuer, with the legal interest thereof from the time the " same respectively fell or may fall due, and till paid, such " annuities and interest thereof being payable by the defender " to the pursuer, from the said term of Whitsunday, 1833, " only during the defender's lifetime, and that under deduc- " tion of any sum or sums of money she can instruct already " to have paid to account thereof." But reserving all questions

" in regard to the rate of interest arising out of the consigna-
" tion in bank of part of the price of Fairburn: Find, that
" in estimating the amount of the year's rent as at the death
" of the late James Mc Pherson, the pursuer's husband,
" according to which the said annuity falls to be fixed, no rent
" or value must be computed for the mansion-house, or for
" the policy or pleasure-ground thereto attached, but that the
" policy cannot be held to include any farm carried on by the
" proprietor for profit, whether the same was arable or pas-
" ture: Find, that in estimating the amount of said annuity
" and additional annuity, regard must be had and computation
" made of rents actually received for the game and fishings on
" the said lands: Find, that in ascertaining the amount of the
" said annuity and additional annuity, deduction must be made
" from the rents of the entailed estate, of the interest payable
" on so much of the alleged improvement debt as may be
" found in the proceedings now in dependence, to have been
" validly imposed a burden on the said lands or heirs of entail
" succeeding thereto, in terms of the Act 10 Geo. III., cap. 51.
" But, find, that in estimating the said annuity and additional
" annuity, no deduction falls to be made on account of the
" expense of constructing and repairing embankments against
" the river Spey, or on account of the repairs, annual or occa-
" sional, of the parish-church, or on account of any salary or
" allowance to a factor or collector of rents."

A discussion then took place in regard to the amount of rent for the right of shooting game, which should be taken into account in fixing the respondent's annuity; and on the 15th February, 1843, the Court pronounced the following interlocutor:—" Find, that, in estimating the rents, issues, and produce
" of the lands mentioned in the interlocutor of the Court, of
" date May 24, 1839, in order to fix the one-fourth, under the
" deductions stated in said interlocutor, as the liferent annuity
" payable to the pursuer, the amount of the sum to be taken

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

" as the rent of the game on the said estate is to be of rent " received prior to the death of James Mc Pherson; and is, " by the consent of the pursuer, to be the average of the rents " received for the game during the year in which the said " James Mc Pherson died, and the five preceding years."

Subsequently an interlocutor was pronounced, carrying out the findings in the two interlocutors which have been quoted.

The appeal was taken against these different interlocutors.

Mr. Stuart and *Mr. Anderson* for the Appellant.

I. It is not disputed that the respondent has a legal provision out of those lands which have been actually entailed by the entailer himself. The extent of that provision is another question. But the respondent has no such provision out of that part of the entailer's estate which was not so entailed, and is not even yet entailed; even assuming that her husband would have had power to grant her provision, if the entail had been executed in his lifetime. The obligation given by the contract of marriage is upon the heirs and successors of the husband, and " also the " heirs of tailzie succeeding him in the tailzied estate" of his father, to pay her an annuity. The appellant is neither heir nor successor of the husband, neither is she his heir of entail in regard to lands purchased with the residuary estate of the entailer upon trust to be entailed no doubt, but which never have been entailed, and which, at his death, were vested in the husband, solely in his character of surviving trustee. Still less is she his heir of entail in regard to that part of the residuary estate which retained its original pecuniary and personal nature. In regard to both of these parts of the estate, the husband never attained the character of heir of entail, so as to entitle him to grant any obligation in that character, which could bind those who should attain it after his death. He had a *jus crediti* against the executors of the entailer, but he had not in his person the rights of a *proprietor*, any more than if he had been

a purchaser having a right to adjudge in implement of the contract of sale.

A power to create a burden upon lands cannot be created by any one not infeft in them. It may be very true, that the respondent's husband in his lifetime would have been entitled to the income arising from the whole estáte, whether invested in land or not, and whether that land were entailed or not, upon the authority of *Stair 2 Wil. & Sh.* 414. Or that, if he had been infeft as heir of entail, he might have given a provision not only to his own wife, but to the wife of his apparent heir, which is all that was decided in *Houston* v. *Nicholson, Mor.* 2338. But neither of these cases are of any authority to show that a party uninfeft having a life interest in trust estate, is entitled to create a charge upon the estate to subsist after his death.

[*Lord Cottenham.*—Neither of these cases is of any authority unless you fail in establishing that the lands were not subject to the power. In the view *Lord Moncrieff* took of the power, they have application.]

II. But even if the entail had been executed in the husband's lifetime, it would not have authorized the provision given by the contract of marriage. The direction in the will was to invest the estate in the purchase of lands to be entailed on the same series of heirs as that contained in the deed of 1789, but not by a deed in the same terms or containing the same powers. On the contrary, the decree of the Court definitively fixed, that according to the true construction of the will, the entail to be executed, was an ordinary one, with the fetters prescribed by the Act 1685. This would not embrace a power to provide widows; so that even if the husband had at any time possessed a character which would have entitled him to impose an obligation upon the heirs of entail, he could not have imposed the obligation of this provision upon them, as the entail, if it had been executed, would not have given him power to grant it.

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

[*Lord Cottenham.*—Was the respondent a party to the action in which that decree was made?—If not it cannot bind her.]

She was not, but her husband was, who claimed the power to insert the jointure in the contract of marriage.

[*Lord Cottenham.*—At the time of that suit, the wife had an interest in it, because her contract of marriage expressly gave her a jointure over Fairburn. If, therefore, the husband had the power to make the jointure, he was bound to execute it.]

There was no onerosity as against the testator, and those succeeding to him, which could entitle the respondent to this provision, or upon which to found an equity in her favour. Her rights, therefore, must depend upon the strict construction of the power and the deed executing it. All that the will prescribes is, that the property covered by it is "to be entailed "upon the series of heirs specified in the bond and deed of "tailzie already mentioned," *i. e.* the deed of 1789. Although the entail is to be upon the same series of heirs, it does not follow that it is to be with the same powers to jointure. An entail with the usual fetters would amply satisfy the injunction of the will.

Even if this were not so, the provision cannot affect any estate but that which is embraced by the entail 1795. The obligation in the contract is to give the respondent an annuity, "as permitted by the entail of 1795." Construing this strictly, it can only affect the lands covered by the entail of 1795; but the property which had not been invested at the date of that deed, was not subject to its fetters, nor to the powers given by it; that property was to be entailed under the direction of the will by an ordinary entail, without mention of powers to jointure. The effect of the entail of 1795 might very well be to supersede and revoke the entail of 1789, in regard to the lands embraced by it, but it could not have any effect in regard to the property not expressly embraced by it, so as to

bring that property within its operation. Notwithstanding the deed of 1795, this property continued subject to the directions in the will, which, as already observed, were that it should be invested in lands to be entailed upon the same series of heirs as in the entail of 1789, but without any mention of what powers were to be enjoyed by the heirs. If this be so, then, as the entail of 1795 does not embrace that part of the estate which was not then invested in land, and out of which Fairburn was subsequently purchased, the respondent's husband had no power to grant her a provision out of these lands; and the contract did not, in fact, give such a provision, for it is in terms limited to a provision "permitted by and in terms of the entail dated "19th September, 1795."

If the appellant be right in this, his argument will apply *a fortiori* to that part of the estate covered by the will, which has never yet been invested in land.

III. The effect of the interlocutor is to give the respondent a fixed annual sum equal to one-fourth of the free rents, as at the date of her husband's death, but there is no authority for this; the annuity is to vary, *de anno in annum*, according to the amount of rent actually levied from the occupiers. The power in the entail is to grant an annuity not exceeding a fourth-part of the free rents. There is nothing in the terms used to show that the annuity is to be fixed according to the free rents in any given year; and the provision given by the husband, in execution of the power, is an annuity "equal to one-fourth part," not of the rents merely, but "of the annual rents," that is, of the rents as annually paid. This construction, in regard to the lands entailed, is confirmed by the terms of the provision in regard to that part of the estate which had not been invested in entailed lands. The produce of this part of the estate must necessarily have varied from time to time, according to the variation of its investment; it was impossible, therefore, for the provision out of it to be fixed in amount. Further, the lands are conveyed

in security of the annuity, and power is given "to uplift the rents " to the extent aforesaid." Not only so, but power is given to the widow to concur with the heir in possession, in appointing a factor to levy rents, who should be bound to account to her for one-fourth "of the free annual proceeds collected by him, " and that half-yearly and termly as the said rents and proceeds " come into his hands, in payment and satisfaction" of the annuity. If the annuity was to be a fixed sum, how could a fluctuating payment be a satisfaction of it. The fourth of the money actually received might fall greatly short of the fixed sum. This construction of what the husband actually did, is assisted, moreover, by the terms of the deeds giving him power to do it. The entail of 1789 is express in fixing that the time at which the fourth of the rents is to be calculated, is to be the death of the heir giving the annuity, showing that the maker of the entail had the subject in view, and knew how to express himself upon it; but the deed of 1795 drops this, and leaves the calculation to be an annual one, and so James Mc Pherson read and exercised the power.

IV. In computing the respondent's annuity a proportion of the expense annually incurred in maintaining the embankment of the river Spey should be deducted. In truth the rent paid for that part of the estate is not strictly a return for the produce of the land, but for the money thus expended by the landlord, and without which expenditure the tenant would be driven to make it himself. The expense, ranging from 80*l.* to 120*l.*, per annum, is not an expense of management, it is indispensable for the actual preservation of the *corpus* of the land; without it, the river, one very rapid and stormy in its current, would break in and lay everything waste. The appellant might in his management let these lands with an obligation on the tenant to maintain the embankment, receiving in return a deduction from the rent otherwise payable. If so, the free rent could only be taken after allowing for this deduction, and it can-

not make any difference on the rights of the present parties that the landlord has himself undertaken the expense. The power in the entail specifies "any other burden" affecting the lands. The expense of keeping up the lands themselves is surely a burden affecting them, if without it they would go to waste and destruction.

V. The respondent cannot be entitled to have the money paid for the right to shoot game included in the account of the free rent. It is not rent in any sense of the term—it is a sum paid in gross for the temporary exercise of a personal franchise. Whatever could be ascertained to be a fair occupation-rent may be the subject of the annuity; but how could an occupation-rent be fixed in the present instance? by what standard could the value of this franchise be measured? If a proprietor retains lands in his possession, the worth of them to him may be ascertained in that way as easily as if he had let them to others. But if a proprietor does not choose either to grant the right of shooting to others, or to exercise it himself, or if the proprietor be like the appellant, a female, who does not choose to have the privacy of her estate encroached upon by communicating this franchise to others, of what value is the right to him or her, or of what value can it be said that it ought to be?

The Lord Advocate and *Mr. Bethel* for the Respondent.

I. Whatever defect in the title of James Mc Pherson to grant the respondent the provision in her contract of marriage, there might be at the date of that deed, was remedied by what occurred subsequently. With regard to the proceeds of the Blairgowrie bond, that was not only invested in land, but the land was entailed according to the directions of the will, in his lifetime, and he was infeft under the entail. From that time he was unquestionably *in titulo* to grant the provision, and the title he had thus acquired accresced to the respondent upon the maxim *jus superveniens successori accrescit*. The same maxim

will likewise apply so as to make the provision effectual in regard to the lands of Fairburn. It is very true that these lands had not like the others been purchased at the date of the contract, and that they have never been entailed; but from the time they were purchased and vested in the trustees by infeftment, James Mc Pherson, as having the beneficial interest in the trust held the lands as proprietor through the infeftment of the trustees, with all the rights to which a proprietor is entitled, and thereby acquired a full title to grant the respondent's provision, which title, as in the other case, accresced to the respondent so as to validate the previously-created provision.

But, in truth, there was no necessity for any infeftment in James Mc Pherson, in order to validate the provision, or that any investment in lands at all should have been made. If the estate had all continued personal, he would still have been entitled to grant the provision on the authority of Houston *v.* Nicolson, *Mor.* 2338, where the right to grant a provision out of the profits of money directed to be invested in the purchase of lands to be entailed was expressly sustained, upon the principle that there being no doubt of the intention, the case was to be viewed as if the intention had been carried into execution. Moreover, in the present instance, the provision to widows does not require to be made a real charge upon lands or to affect them in any way; it is expressly limited by the power to a personal obligation upon the heirs.

II. Assuming the provision to have been granted in a form that would make it binding, there can be little question of the power of the granter. The fair and reasonable construction of the will is, that the testator intended the entail thereby directed to be made, to be similar in its terms to the one he had himself made, which expressly gave power to grant this provision. It can hardly be supposed, in the absence of any express terms requiring that effect, that he would desire that his estates should be held by the same heirs upon two different entails containing

different powers. When the entail of 1795 revoked by necessary implication the entail of 1789, it substituted itself for the deed of 1789 in the direction of the will to invest the estate in the purchase of lands to be entailed.

But, on the other hand, if the will did not authorize the provision, it would still be sustainable on another ground. The respondent's right to terce was no way excluded; nor was it dependant upon her husband's infeftment, Bartlett, 21st February, 1811, *F. C.* Her husband was, therefore, entitled to grant her a reasonable provision, so long as it did not exceed the terce, Cant *v.* Borthwick, *Mor.* 15554; Rose *v.* Fraser, *Mor. voce Terce App. I.* The radical right was in the husband, and that was sufficient to support the provision. Houston *v.* Nicolson goes to this, that, although land was not purchased, there was power to grant a provision out of the money directed to be entailed. In that case, the provision was sustained because of the intention, although the form prescribed by the power was a *locality*, a form applicable to lands and not to money.

But, still further, the annuity would be good under the 5 Geo. IV. cap. 87, which had passed in the lifetime of the respondent's husband. The contract of marriage, though executed prior to the Act, did not take effect until after it. It was a plain expression of intention to grant the provision; and the statute does not make it necessary that deeds granting provision should recite or refer to it.

III. It is impossible to read the contract of marriage without seeing, that the intention of James Mc Pherson was to execute the power given him by the entail in the terms and to the extent to which it was given. According to the interpretation which has been put upon powers similarly expressed, the extent of the provision is to be measured by the amount of the rents, as at the death of the heir granting the provision, Mackgill, *Mor.* 15451; Glencairn *v.* Graham, *Mor.* Heir Appar. App. I; Douglas, 15 May, 1822, *F. C.*; Rothes, 7 *Sh.* 339. Mc Donald

v. Lockhart, 14 *Sh.* 785. That is the general rule of construction, unless there is something in the terms of the provision expressly to the contrary, which there is not in the present case; and unless such were the rule, it would be difficult to extricate the rights of parties, for the heir in possession has, necessarily, the control over the lands, and may so manage them as greatly to impair the provision, without the possibility of the annuitant interfering, or he may disappoint the regularity of payment if there were to be a half-yearly enquiry as to its amount.

But the terms of the provision would justify the construction the respondent contends for. If a fourth of the rents as they were actually realized had been intended, there would not have been any occasion for the use of the word "*annuity;*" but the provision is of an "annuity equal to one-fourth," which must mean something different from the actual fourth itself.

IV. The deductions to which the annuity is to be subject in calculating the free rents are specified in the entail, with a conclusion of any "other burden," that is, any other burden of a nature similar to those enumerated; but the expense of the embankment is neither specified, nor is it a burden, and still less a burden similar to those specified. It is not a charge upon the rent in any way whatever, but an expense disbursed by the proprietor out of his own pocket, and very much resembling those permanent repairs which in no view could be a charge upon the annuity.

V. The entail allows a certain proportion of the revenue derived from the lands to be settled by the heirs upon their widows. An annual revenue has for many years been derived from the sale of the right to shoot game. So long as game was not allowed by law to be sold, the privilege was not one of any ascertainable value; it was strictly a personal franchise communicable by the proprietor to others, but not for any consideration of pecuniary value. But so soon as the sale of game was permitted the matter was changed. The franchise then

became a source of revenue, and its value is as capable of being ascertained as any other source of revenue, such, for instance, as the right of salmon fishing; and the Court below so decided in Sinclair *v.* Duffus, 5 *D. B. & M.* 174, where it was held that, in computing the amount of a provision by an heir of entail, money given for the right of shooting was to be taken into account.

LORD BROUGHAM.—My Lords, this case arose upon the claim of a widow under a settlement of a person very well known in Scotland, Mr. Mc Pherson, of Belleville, in Invernesshire. The claim of the widow is, under that settlement, to a sum not exceeding one-fourth of the net clear rent—a free annuity, equal to one-fourth part of the clear annual rents, issues, and produce of the whole tailzied estate, after deducting minister's stipends, and other burthens of a similar kind, which are enumerated in the clause.

My Lords, the two questions which principally detained your lordships from giving judgment when this case was heard, and which appear to require, perhaps, further consideration, were these:—First, whether the expenses of keeping the estate clear and defended, and free from the waters of the adjoining river, and which expenses were said to be of such constant occurrence, that they might almost be reckoned an annual outgoing in the management of the estate; whether those expenses should be deducted for the purpose of ascertaining what the clear rent was, to one-fourth part of which the widow was entitled. The next question was, whether an account should be taken of the game, there being a large extent of territory let, and which was let, manifestly, for no other purpose than for shooting and sporting thereupon.

To both of those questions I shall shortly now advert, stating, that I have come to the conclusion at which Lord Moncrieff arrived, he having, at different times, no doubt felt

some difficulty in the case, and having expressed on the face of his very learned and elaborate note a degree of caution in coming to that conclusion, which, so far from weakening my confidence—and I apprehend I may say the same for your lordships—so far from weakening your confidence in the result at which he arrived, rather tends to give me greater trust in that most learned, able and diligent Judge's opinion upon this case.

He says, that he considers that this outgoing is not to be deducted from the clear rent. The argument for deducting it is this: that, suppose a lease had been granted, what they call there a tack had been granted to a tacksman, and the tenant had taken upon himself the expenses of those embankments, necessary for the preservation of the land, that would *pro tanto* have diminished the rental. The argument is put thus: suppose the expenses were 80*l.* a-year for the embankment, and the gross rent would be 280*l.* if the landlord paid for the embankment; and suppose, that by the terms of the lease the tenant was to pay for the embankment, he would deduct the 80*l.*, and the whole clear rent would only be 200*l.*, instead of 280*l.* Then, contends the appellant, the owner of the estate, "I have no right to reckon the whole 280*l.*, but only the 200*l.*" That is, neither more nor less than deducting the expense of the embankment.

Now Lord Moncrieff's answer to that appears to me perfectly conclusive. He says it may be so, if that was a bargain—it may be so, if that was the lease. But, in the first place, this is assuming that the embankment is a yearly expense, like one of the ordinary expenses to which the owner of an estate is liable in the manurance of his property. But, *non constat*, that it is a yearly expense. I look upon the expense of an embankment to be very much the reverse of an annual expense. I know a little of embankments myself, and I am perfectly aware that they are never regarded as an annual expense of the

estate—we look upon it very differently—we look upon it as an improvement of the corpus of the estate. Frequently an embankment is made, by means of which a neighbouring proprietor, a conterminous owner, is very apt to throw the whole of the water upon his adversary—an attempt which was made by those whom I succeeded in my property in the neighbourhood of Mr. Attorney-General Wallace. But the Attorney-General defended himself by a similar embankment; and so the two proprietors played with embankments upon each side of a very rapid mountain stream, till at last, as might be very easily seen, Mr. Attorney-General prevailed. And, therefore, there was not a monument erected on the shore to celebrate his victory, but there was a great hole which had been made by this very successful embanking against us, the opposite proprietor; and its goes to this day by the name of "Lawyer "Wallace's Hole;" establishing his triumph in the matter, as conclusively as it would have been, very certainly, in matter of law. That is a very constant course, and very often one party succeeds, and not only throws off the water and defends himself against the encroachment, but obtains a very considerable accession of land either from the sea, (which is the most common case,) or from the river, or from the lake.

Now what is the consequence? Is that to be deducted as a yearly expense and outgoing in the management of the property? No such thing. It is a positive improvement of a permanent nature, the benefit of which goes to the fiar; and, therefore, the burden of it ought to fall upon the fiar who enjoys the benefit. It is true that the widow will get a benefit in the proportion of one-fourth part, but she is not to pay for that embankment merely because the owner chooses to embank, and by so embanking greatly increases the value of the *corpus* of the estate.

I take, therefore, a most manifest distinction, founded on the whole view which I have taken of such a case, between

mere ordinary outgoing on the property and the expense of an embankment, which was the expense chiefly contemplated by these proceedings.

But, then, says my Lord Moncrieff, admitting it to be an annual outgoing, admitting that they are right in saying that, if there had been a lease, and it had been a term of the lease that the lessee should pay the expense of the embankment, then the landlord would receive, therefore, so much less rent; in that case, past all doubt, the fourth part of the widow would suffer a deduction—because she is only to get a fourth part of the clear rent; and she could not come into Court and complain that 80*l.* had been allowed to the tenant, because the settlement which gives this right to the widow, assumes that the management of the estate is to be in the fiar; and if he is to retain the management of the estate, as is most justly and accurately observed by Lord Moncrieff, he is to manage it for his own benefit. Miss Mc Pherson, the present fiar, is left to manage it in the way she thinks best for her own benefit. The widow is liable to suffer if she mismanages it. She has no power to interfere. She cannot come into Court to stay her from proceeding in a way which is injurious to the widow's rights. She cannot come into Court to call upon the Court to stimulate the fiar to get more out of the land than she gets. She cannot call upon the fiar by any process of law, or in any way whatever to alter the management of the estate. So far she suffers from the management of the fiar, if it turns out to be injudicious. But precisely in the same way if the fiar chooses, as Lord Moncrieff justly observes, not to make that kind of bargain with the tenant, but herself to pay the expenses, the benefit of that, if it is to be called a benefit, accrues to the widow, just as the detriment would accrue to the widow, in the contrary case which I have supposed.

I am, therefore, of opinion with his lordship upon that ground, that this expense of the embankment—and there are

one or two others of a similar kind, factor's fees and other items—must not be deducted. It would really be too absurd to say that the salary of the steward, that is, the factor, was to be deducted before the sum was ascertained, out of which a sum not exceeding one-fourth was to go to the widow. That is still clearer even than the case of the embankment. It tends to show that every annual expense, merely because it is such, must not be taken to go to diminish the annuity.

The next point, my Lords, is with respect to the game. It no doubt was very ably and strenuously argued as a matter that ought not to be included for the benefit of the widow, that a certain tract of country was only let for the purpose of keeping so much grouse as a matter of pleasure; and that the fiar need not have let it, but might have kept it in her own hands. My Lord Moncrieff's answer to the case of the tacksman just applies to that, namely, if she had done that—if she had not let the game. If the game had been unlet, I am not called upon to say what my opinion would have been, as to whether the widow would have had a right to say, I am not to be a loser, because Miss Mc Pherson chooses to shoot instead of letting the game. I am not called upon in supporting the judgment below, and in arguing in favour of my opinion for affirming that judgment, to say what would have been the case, if the game had not been let. Because I apprehend that is not one of the matters here in dispute; but I have a very clear opinion, (though I am not called upon to give judgment upon that ground,) that the widow would be entitled even in that case. All the cases that have been decided would go to that extent.

There is the case of Sinclair *v.* Duffus, which really appears to me to take away all controversy upon this, and which appears to me to have received the consideration of all the Judges, and the consulted Judges also. The consulted Judges gave their opinion, and the Court there held, I think

unanimously—with the exception of Lord Fullarton, who dissented from the rest of his learned brethren—that, in ascertaining the amount of provision that may be granted by an heir of entail in possession, the annual value of the game, let or unlet, is to be taken into computation.

My Lords, upon these grounds, therefore, I have no hesitation in recommending to your lordships that the judgment of the Court below be affirmed.

Lord Chancellor.—My Lords, I quite concur in what my noble and learned friend has stated as the principle of this case. It appears to me also to be equally clear that the right of this widow to an annuity applies to all the estates which are matters in contest. With regard to the Belleville estate, there can be no doubt. With regard to the two other estates, the one which was purchased for the 4,600*l.* under the Blairgowrie bond, and the other which was purchased out of the residue of the testator's estate all that we have to look to is to see whether the party who executed the marriage-settlement had or had not the power so to charge those several properties. He gives her a charge of "a free annuity equal to one-fourth part of the free "annual rents, issues, and produce of the whole tailzied estate "of the said James Mc Pherson, as after (therein) described. "As also to pay her yearly, in the event foresaid, an additional "free annuity, equal to one-fourth part of the free annual profits, "rents, interest, and produce of the said James Mc Pherson's "whole estate and effects still under trust," (there is no doubt as to what that refers to,) "or to which he has succeeded or may "succeed by and through the will of his said father," that applies to the residue of the personal estate. He, therefore, by the terms of this marriage-settlement has contracted that she shall have one-fourth part of the annual profits of all those several descriptions of property.

Then having so bound himself, the only question is, had he

or had he not power so to bind the property to which he refers? As to the original property of James Mc Pherson there can be no doubt; and there can be no doubt as to the residue of the property which was directed to be laid out in land and to be entailed. If that had taken place, then under the provisions of the statute he had power to make a charge for his widow to the extent of one-fourth part of the income of that property. And whether the money was actually invested, or remained in trust to be invested, I apprehend it is quite impossible that the widow, the party to this marriage-settlement, could suffer from the omission or neglect of this party in carrying into effect the trusts of the will.

I apprehend, therefore, my Lords, that the title of the widow is clearly made out to a fourth part of the income arising from this property. I am also of opinion that the measure of that right is that which has been laid down by the learned Judges in the Court below.

LORD CAMPBELL.—My Lords, the only point upon which I deem it necessary to add a single word to what has been urged by my noble and learned friends who have preceded me, is with respect to the game. Now this I know is a very important question in Scotland, and is a question of growing importance, because the English are so found of grouse-shooting in Scotland, that a considerable part of the Highlands of Scotland are devoted to the pleasure of the English on the 12th of August.

The earliest inhabitants of the Highland hills I fancy were the red deer; then came the black cattle; and sheep afterwards were found to be more profitable. But now the most profitable purpose to which the Highland hills can be converted, is the rearing of grouse, and the sheep are in many instances laid aside because they interfere with the eggs of the grouse in the spring; and instead of sheep, the whole territory is devoted to grouse rearing.

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

Now a very important question arises,—extremely important for widows in Scotland,—whether, if they are entitled to a certain proportion of the free annual rents of a Highland estate, the sums received by way of rent for the shooting shall be included or excluded. If they were excluded, in many instances the widow would be left entirely destitute; but I can see no reason in the world why, if the produce of the ground is devoted to the feeding of grouse, the profit thence arising should not be considered the annual rent of the land, just as much as if the produce of the ground is devoted to the feeding of four-legged animals, deer, cattle, or sheep. It is a rent received substantially for the use and occupation of the land.

There are some subtleties arising from the right of shooting being considered a franchise; but when we construe a settlement of this sort, whereby a certain proportion of the annual rent is given as a provision for the widow, we must suppose that the author of the settlement is a man of sense, reason, and understanding, and that he looks to the manner in which the land is occupied and to the source from which the profits are to arise. I am clearly of opinion, therefore, upon principle, that the rent received from the right of shooting upon these moors is to be considered as part of the annual rent of the land. And I am very glad to think that we have not only principle and good sense to proceed upon, but the decided case of Sinclair *v.* Duffus, to which my noble and learned friend who first addressed your lordships, has alluded.

I concur entirely, therefore, with the great majority of the learned Judges below and with my two noble and learned friends who have preceded me, that the rent from the shooting should be included, and that the widow is entitled to one-fourth of that as much as she is entitled to the portion of the rents arising from the rest of the estate.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House, and that the said interlocutors

Mc PHERSON *v.* Mc PHERSON.—13th August, 1846.

therein complained of be, and the same are, hereby affirmed, and that the said cause be remitted back to the Court of Session in Scotland, to do further therein as shall be just, consistently with this judgment. And it is further ordered, That the appellant do pay, or cause to be paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the said Court of Session, or the Lord Ordinary officiating on the Bills during the vacation, is hereby empowered to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. and T. W. WEBSTER—RICHARDSON and CONNELL, Agents.