It is said that notour bankruptcy is not a matter of fact but of law, and that therefore it is not a matter for the trustee to deal with. Now I don't think so. Notour Bankruptcy is a matter of fact, and a matter of fact with which the trustee is very well fitted to deal. But if it had been a matter of law, could the trustee not have dealt with it? I think he could. It is no reason to exclude the trustee that there are points of law involved, for as is shown, by the fact that when a trustee admits claims, he deals both with fact and law. But I don't think that this matter of notour bankruptcy is a matter of law at all, but purely of fact. And matter of fact, the notour bankruptcy in this case occurred on the 3d December.

I therefore concur with the majority of your Lordships, that we should affirm the interlocutor appealed against.

Counsel for Appellant :— Solicitor-General (Clark) and Harper. Agent — R. P. Stevenson S.S.C.

Counsel for Respondent—Watson and Strachan. Agent—J. Mack, S.S.C.

Saturday, December 7.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

DUNBAR *v.* DUNBAR.

Entail—Provisions to Children—Statute 5 Geo. IV. c. 87 (Aberdeen Act).

Held that the interest upon provisions granted to children by previous heirs, under the 4th section of the Aberdeen Act, forms a deduction in estimating the free annual rental under that section where provisions have been granted by subsequent heirs.

This was a reclaiming note against the Lord Ordinary's interlocutor. An action of count, reckoning, and payment was raised by Mrs Dunbar, as guardian, and her three daughters, against Robert Lennox Nugent Dunbar of Machermore, Kirkcudbrightshire, a minor, and the tutors appointed by his father. The estate of Machermore was entailed, in terms of a disposition and deed of tailzie registered July 22, 1762. By bond of provision, dated 27th February 1843, and recorded in the Books of Council and Session 11th May 1846, the late Robert Nugent Dunbar, the elder, grandfather of the defender, then of Machermore, bound and obliged himself, and the heirs succeeding to him in the lands and estate of Machermore, and *subsidiariæ* his heirs and successors whomsoever, to pay to his younger children Antoinetta Nugent Dunbar, William Nugent Dunbar, Catherine Nugent Dunbar, and Arthur Nugent Dunbar, the principal sum of £2500 sterling, equally amongst them, and that at and against the first term of Whitsunday or Martinmas that should happen one year after his death, with penalty and interest as therein mentioned. This provision was made under the 5 Geo. IV. c. 87. Robert Nugent Dunbar, the elder, died March 20, 1846, and was succeeded by the now also deceased Robert Nugent Dunbar, the younger, the father of the defender Robert Lennox Nugent Dunbar, now of Machermore. He was survived by his four younger children. Robert Nugent Dunbar, the younger, granted on 11th May 1847 a disposition in security over Machermore to his brothers and sisters, for the sum of £2283, 12s., being the three years' free rents, to which under the statute the provision was restricted. Of this sum £1141, 16s., or one-half, was paid off in 1863, leaving the remaining half, being the shares of the two sisters, still as a debt over the estate.

Robert Nugent Dunbar was married to Mrs Annette Ellen Atcheson or Nugent Dunbar on 9th July 1856. Four children, the issue of the marriage, now survive. A prenuptial contract of marriage was entered into between the parties, by which Robert Nugent Dunbar bound and obliged himself, and the whole heirs of entail succeeding to him in the entailed estate of Machermore, and *subsidiariæ* his heirs, executors, and successors whomsoever, to make payment of the following provisions to the child or children of his said marriage who should be alive at his death, and should not succeed to the said entailed lands and estate—viz., If one such child, a sum equal to one year's free rent or value of the said entailed lands and estate of Machermore and others, as the same should be at the date of the death of the said Robert Nugent Dunbar; if two such children, the sum of £1000 sterling between them; "and if three or more such children, a sum among them equal to two years' rent or value of the said entailed lands and estate of Machermore and others, and as the same shall be at the death of the said Robert Nugent Dunbar." It was also specially provided that the provisions in favour of the younger children should bear interest from the day of the death of their father, and be payable one year thereafter. Robert Nugent Dunbar, the younger, died on 25th July 1866, and the security over the entailed estate created by the disposition in security executed by him for behoof of his sisters, was thereby extinguished. Antoinetta and Catherine Nugent Dunbar are taking the necessary proceedings, under the Aberdeen Act, to recover payment of their provisions. The only question as to which the parties were not agreed in this case was—Whether in ascertaining the sum to which the pursuers are entitled, not only the £1141, 16s., being the amount remaining undischarged of a provision made by the grandfather of the defender, a former proprietor of the estate, for his children, must be deducted from the three years' free rental of the estate, but also, as contended for by the defender, whether the interest of that sum should not be deducted in estimating the free annual rental? The statute enacts by section 1—"That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made in that part of Great Britain called Scotland, under the limitations and conditions after-mentioned, to provide and infeft his wife in a liferent provision out of his entailed lands and estates, by way of annuity," the said annuity not to exceed "one-third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children, hereinafter specified, and the yearly amount of other burdens, of what nature soever, affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail

in possession, all as the same may happen to be at the death of the granter." And further, by section 4—"That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid, to grant bond of provision or obligations, binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the granter's death, as to him or her shall seem fit, provided always that the amount of such provision shall in no case exceed" the proportions therein mentioned "of the free yearly rent or free yearly value of the whole of said entailed lands and estates, after deducting the public burdens, liferent provisions, including those to wives or husbands, authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens, of what nature soever, affecting or burthening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof, as aforesaid, to the heir of entail in possession."

The Lord Ordinary found that the principal itself being once deducted, there was no room for allowing a deduction in respect of interest, which must be held to have been disposed of as an accessory along with the principal itself.

For the defenders and reclaimers it was argued that the whole question here was, whether the interest of provisions refers to provisions under section 4 of the Aberdeen Act? That £45, 13s. 5d. was the interest of a debt, and as such falls under the statutory deductions. In some cases such deductions may even reach such a point as to leave no free rental for the younger children's provisions.

Authorities—Duff, p. 79; *Cochrane*, 9 D. 173; *Lockhart*, 15 D. 914; *Lockhart*, 14 S. 785; *Bonar*, June 6, 1868, 6 Macph. 410.

For the pursuers it was argued that either the interest or the capital might form a deduction, not both. This is not a debt which burdens the lands themselves. Section 4 provides that the rents are the source from which such provisions are payable. This is not a provision diminishing the yearly value of the estate, but one to be paid in a slump sum. The limit of such power of burdening is three full years' free rental, but in estimating this it matters not who are the creditors for whom deductions fall to be made. Where there are two families of provision-holders in place of one, the unpaid provisions of the elder family become themselves a deduction from the three years' free rental, and consequently the interest on them is not at all in that position, as it is the sum paid annually by the heir of entail to be relieved from the payment of the capital.

Authorities—*Brodie*, 6 Macph. 92; *M'Donald*, Dec. 15, 1835, 14 S. 150.

At advising—

Lord Justice-Clerk—The case, on the point which has been argued to us, has been very meagerly stated on the record, but there is no dispute about the facts on which it depends. The controversy relates to the amount of a bond of provision granted by the last heir of entail under the Aberdeen Act, and depends on the question whether in estimating the three years' free rent, in terms of the 4th section of the Aberdeen Act, the interest of provisions granted under that section of the statute by a prior heir, not yet extinguished, are to be deducted? There is no other question.

The Lord Ordinary has found that such interest is not to be deducted, but on a review of the authorities, and on the words of the statute, I am unable to come to that conclusion. It seems to me opposed to the words of the Act and (if the words of the Act were doubtful) to the whole current of authority and practice.

The rule or canon for ascertaining the capital sum to which the statutory powers, by whomsoever exercised, can apply, is contained in the 4th section of the Aberdeen Act, and in that section only. The question how much of that capital sum is open or available for provisions to the heir in possession for the time, is fixed by the 6th section, and the mode of recovery, the rights of the heir who is the debtor in the provision, and the remedies open to the creditors, are regulated by subsequent clauses. But none of the other clauses in the statute deal with or affect the rule under which the free rent of the estate is to be ascertained. They only concern the principal or capital sum, which consists, in whole or in part, of three times one year's rent, the amount of which can only be arrived at by applying the rules laid down in the 4th section.

Does the word provisions include provisions granted under this clause? This is an important question if there be real doubt about it. There must at this moment be many rights burdening entailed estates, the amount and effect of which must have been regulated by the construction of the Act, whatever that may be, and the rights under them may come to be limited or enlarged according to the construction we may adopt.

On the words of the 4th section, there can be no doubt that the expression is sufficient to include, and *prima facie* does include, provisions under this clause. It is true that there are no explanatory words to this effect adjected to this clause, as there is in the 1st section, in providing for the mode of ascertaining the free rent for the widow's annuity, nor such as occur in the preceding line of this very clause. But this raises no inference sufficient to limit this general expression, and the matter is put beyond all doubt by the test which is afforded by the next limb of the sentence—"other burdens," &c. The only question remaining is—Whether this provision does or does not burden the estate or the rents?

It does not burden the estate, but it certainly does burden the rents and proceeds of the estate. The 8th section of the statute makes this certain, for it provides that while the provisions granted by the Act shall not affect the fee, they shall affect the rents. The 9th section is also material. It provides that after a year has elapsed from the death of the granter, the creditor in the bond may call up the amount, and the heir on payment may take an assignation and keep up the debt. It also provides that the creditors may use all diligence against the rents, but may not adjudge the estate. The 10th section gives the heir a privilege, by which, on assigning one-third of the rents, he frees himself from diligence during his life, although, of course, the unpaid balance will remain on his death. Finally, under the 12th section it is provided that in no case can the heir in possession be deprived of more than one-third of the free rent of the estate, and he is authorised to apply to the

Court to restrict the burden accordingly. Under these provisions of the statute there cannot, I think, be any doubt that these bonds affect the rents, and therefore that the interest of them must be deducted in estimating the amount of the year's rent three times, which is the limit of the burden. And such I believe to have been the uniform understanding of the profession. I gather this from our Institutional writers. Mr Duff, in his work on Entails, says that the interest of provisions to wives and children must be deducted. Mr Bell, in his Lectures, states it still more clearly. He says that the free rent is to be ascertained in the same way as that directed in the first clause as regards the widow's annuity. Now, it is matter of express decision in the case of *Boyd*, 13 D. 1302, that the interest on provisions granted under the 4th section must be deducted in ascertaining the free rent, in order to fix the amount of the widow's annuity. Mr Ross also so states the law.

What thus seems to have been the practice is so far borne out by decision that I have not found that it ever was questioned judicially. It was argued to us that the word "provision" did not even include provisions granted under the power of the entail. But Lord Curriehill's opinion in the case of *Lockhart*, 15 D. is conclusive on this point, and he lays down the contrary as the undoubted construction of the statute. On the question whether provisions under the 4th section do or do not affect the rents, I think the case of *Cochrane*, 9 D. 127, sets that matter at rest. That case related to a provision which burdened neither the estate nor the rents, but had been found in the House of Lords to be a personal burden on the successive heirs of entail. The question which arose in this case was, whether the interest of this provision ought to be deducted in fixing the amount of free rent under a bond granted in virtue of the 4th section of the Aberdeen Act? It was found that it should not, because, unlike provisions under the Aberdeen Act, it was purely a personal debt, and did not affect the rents, and that the debt could not be kept up against the rents by the heir on payment, as can be done under the Aberdeen Act. The opinions of Lord Justice-Clerk Hope, Lord Moncreiff, and Lord Cockburn, clearly establish that a provision under the Aberdeen Act does affect the rents, not merely because it is a personal debt of the heir of entail, but because *vi statuti* it is a burden on the rents, into whose hands soever they may come, and therefore can be kept up against the succeeding heirs.

The Lord Ordinary seems to have thought that the provisions of the 6th section might lead to an opposite conclusion, and that somehow the result of deducting the interest in question would give rise to a double deduction of it. I think this is a mistake. The 6th section does not relate to the mode of ascertaining the free rent. It has no connection with that subject. It relates exclusively to the capital sum after it has been ascertained under the 4th section, and only applies in the special case of the bond of provision, along with sums already laid upon the estate under the 4th section of the Act exceeding that sum. It provides that no greater burden than the three years' free rent shall burden the rents or the heir in possession, and that therefore the last bond must be limited to the sum which will complete that amount, until part of the prior burden is paid off or extinguished. It has no other object or effect. It never comes into operation at all unless the margin has been exceeded, and, when it has, it only postpones the excess as a charge on the rents, until they are relieved of the prior and existing burden. In cases in which it applies it cannot receive effect until the capital sum of free rent has been previously ascertained.

LORDS COWAN and BENHOLME concurred.

LORD NEAVES—I differ. I think the true interpretation of clauses 4 and 6 of the Aberdeen Act is this, that the first heir may burden up to the extent of three years' free rental, and the succeeding heirs may keep that burden up to the amount of three years' rental so far as there remains free any portion thereof, the outstanding provision having been previously deducted. Suppose an estate having £1000 of free rental; £3000 would be the limit of burdens by the first heir: if £1000 of this have been paid off, *that* will be the limit of the next heir's burdening power. There is no new calculation required, and every succeeding heir can supplement a partial exercise of his powers by a former heir. The words of the 4th section are not nearly so explicit as those of the first, where children's provisions are expressly included. Section 4 gives us no explanation as to what these provisions are. I think these deductions must be made at starting, after which section 6 regulates, and it appears to me that any provisions not filled up by one heir may be supplemented (to the full extent unfilled up) by the next. There is nothing in the 4th clause to supersede the regulations in the 6th, and it appears absurd to say that while one heir of entail may burden to the full extent, say of £1000, the whole burden could only be £900 if there were two series of heirs.

The following interlocutor was pronounced:—

"Recall the said interlocutor in so far as it finds that, in estimating the free annual rental, the sum of £45, 13s. 6d., being a year's interest on that sum of £1141, 16s., which is the balance of the prior bond affecting the entailed estate, should not be deducted from the free entail: Find that the said sum must be deducted: Find that the pursuers are entitled to decree in this process for the sum of £1668, 8s. 2d.: Find the pursuers liable in expenses since the date of closing the record; and remit to the Auditor to tax the same, and to report: *Quoad ultra* continue the case."

Counsel for Pursuers—Solicitor-General (Clark) Q.C. and Sheriff Chrichton. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Defenders—Marshall and Blair. Agents—Hunter, Blair, & Cowan, W.S.

Thursday December 5th.

SECOND DIVISION.

(Before seven Judges.)

SPECIAL CASE—LADY MASSY AND OTHERS

Succession—Fee and Liferent—Trust—Power of disposal.

A testatrix directed her trustees "to make payment, at the first term of Whitsunday or Martinmas after my death," of certain legacies