EARL OF MAR, Appellant. — *Solicitor General (Cockburn)— Roberston.* No. 45.

LADY F. J. ERSKINE and others, Respondents.—*Lord Advocate (Jeffrey)—Mr. John Campbell.*

Entail—Provisions to Children.—Circumstances in which, (affirming the judgment of the Court of Session) provisions to younger children granted under an entail giving power to the heirs of tailzie "to provide their "younger children to reasonable provisions," were sustained.

Sept. 28, 1831.

1ST DIVISION. Ld. Moncrieff.

THE entail of the estate and earldom of Mar contains the following clause: "And also excepting and reserving full power "and liberty to the said Thomas Lord Erskine and the other "heirs of tailzie to provide their younger children to reasonable "provisions; declaring always, that any bonds of provision to be "granted by the said Thomas Lord Erskine and the other "heirs of tailzie above mentioned shall be so qualified as that "any apprising or adjudication, or any other legal diligence to "be led and adduced therefrom, shall only subsist for a real "security for the principal sums, annual rents and expenses, "but that the legal reversion of said diligences shall never "expire." In May 1816 John Francis Earl of Mar, then the heir in possession, executed, in virtue of this power, three bonds of provision in favour of his six younger children for 15,000*l.* sterling of capital sums, and with 700*l.* of annuities. John Francis died in August 1825, and was succeeded in the entailed estate by his eldest son John Thomas Earl of Mar, against whom the younger children of John Francis brought actions of constitution on their bonds of provision and annuity. John Thomas died in 1828 before decree, and was succeeded in the entailed estate by John Francis Miller Earl of Mar, against whom the present actions were transferred and decrees recovered in July 1829. Some time before his death Earl John Thomas executed two bonds in favour of Ladies F. J. Erskine and J. J. Erskine, his two daughters, the first for 10,000*l.* in corroboration of an obligation in his marriage contract, and the second for a provision of 20,000*l.* on the narrative of his powers under the entail, and of any other power which might be competent to him.

Sept. 28, 1831.

under the statute 5 Geo. 4, c. 87, declaring that any sums to be received by them under his contract of marriage or the former bond should be imputed in part payment of the new bond, and the provisions were declared to be restrictable if they exceeded what was lawfully competent to the granter under the most liberal exercise of his powers to burden.

When the present earl succeeded to the estates these provisions to Earl John Francis's daughters, with arrears of interest, amounted to 24,000*l.* At the death of Earl John Thomas the gross rental of the estates was about 8,700*l.*; but the parties were at issue whether the amount of the free rental was 6,181*l.* or 6,846*l.* after deducting public burdens, the annuities, interests of the whole provisions and of the arrears for which decree had been recovered against the present earl. In these circumstances the earl raised an action of reduction of the two bonds granted by Earl John Thomas on the grounds that they were not reasonable because the estate was already burdened with provisions granted by Earl John Francis to the extent of 25,000*l.*; and the free rental was so much reduced, that there were no means of paying those granted by Earl John Thomas, except by depriving him (the present Earl) for a term of years of any beneficial interest in the estate.

In defence it was maintained, that the bonds of provision in question were expressly sanctioned by the entail; that they were not affected by the Act 5 Geo. 4, c. 87; and that, in any view, they must be supported to the extent of two years free rental. The Lord Ordinary reported the cause on cases to the Court, adding the subjoined note.* The Court (3d December 1830) † assoilzied the defenders.

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† 9 Shaw and Dunlop, p. 126.

* "Note.—It appears to the Lord Ordinary that this case depends, in the first "instance, on a question of law, which, though of an arbitrary nature, is not properly "a question of discretion; and eventually, in case the first point should be deter-"mined in favour of the pursuer, on a question of discretion, which must be decided "by the Court. He is of opinion that in considering the question whether the bonds "of provision are at all liable to reduction, it is the entail alone which must regulate, "and that the act of parliament 5th Geo. IV. c. 87. ought to have no influence on "any part of the argument; for though that act is referred to, as well as the entail, "in the latest of the two bonds, evidently for the general purpose of taking the "chance of any advantage it might possibly afford, yet as the act in the 12th section "reserves, in the most unqualified terms, all powers already granted by any existing

Sept. 28, 1831.

The Earl of Mar appealed.

Appellant.—1. In determining upon the validity of the bonds of provisions in question, it was essentially necessary that the

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" entail, and as it is clear in point of fact that the defenders in this case do not and " cannot maintain any enlargement of the power by the statute, the Lord Ordinary " thinks that their case must be judged of, on the power reserved by the entail, in " the same manner as if it had arisen before the act of the 5th Geo. IV. was passed. " The just construction and application of the clause in the entail cannot be affected " by a statute which expressly reserves the full force of it, and which was intended " for cases where either no power, or a less power than that given, was reserved by " the entail.

" The entail gives power to the heirs of tailzie ' to provide their younger children " to reasonable provisions.' In this case the last Earl of Mar has exercised the " power in all due form, and he was the only person whose act or consent was " required, either for making the provisions at all, or for fixing the amount of them " in the first instance. The question is, whether his deed is liable to reduction, on " the ground that the provisions expressed in it are not reasonable. This is evidently " not a simple question of discretion, nor at all the same question which would arise, " as in the case of Rothes, if some express condition in the entail had been omitted, " or unduly observed, and the Court were called upon, by its own powers of equity, " to supply the defect, by supporting the deed to the extent of what they might think " reasonable provisions. In the case of Rothes the Court, after much discussion, " found that a consent required by the entail had not been duly obtained, and they " then sustained the deed to the extent of provisions modified by themselves. But it " is thought that if it had been found that the consent had been duly obtained, the " Court would probably not have interfered with the deed actually done, though the " provisions exceeded what they afterwards, in the exercise of mere discretion, fixed " upon as suitable according to the rental at the death of the granter. Although, " therefore, there is no doubt that, in the present case, the terms of the entail imply " that if the provisions granted are unreasonable, this is a relevant ground of reduc- " tion to some extent; yet, before the Court can be called upon to exercise the dis- " cretionary power of determining what would be reasonable, it must be made out " clearly by the pursuer that there is such a palpable excess as to render it the duty " of the Court to set aside the legal act of the party to whom the discretionary power " was in the first instance committed. But it is possible to determine that a given " sum is excessive, without previously fixing an absolute measure of what would be " reasonable, or not excessive.

" This is necessarily an arbitrary question. To resolve it, all circumstances must " be considered,—the rental, the existing burdens, the condition of the heir, and the " condition of the daughters of such a family. The pursuer rests his argument very " much on the rules of the act 5th Geo. 4, as affording a guide in this matter. The " Lord Ordinary humbly thinks that those rules ought to have no influence on the " question. If they were admitted, the consequence would be, that the defenders " would receive no provisions at all, because the provisions made by the former Earl " are not paid off, and they amount to, or rather exceed considerably, the whole " amount permitted by the statute; and the Lord Ordinary cannot think that when

Sept. 28, 1831, Court should decide, in terminis, how far the provisions are effectual under the statute in virtue of which, as well as the powers reserved by the entail, they expressly purport to have

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" the Court sustained those provisions, amounting to 25,200*l.* as made under this " entail, it could be the meaning that the Earl then in possession, having two daugh- " ters grown to women's estate, should, in the event which happened of his dying " before it was possible to pay off these previous provisions, have no power to provide " a shilling to these daughters. The pursuer does not maintain this; and it would " be the more difficult to maintain it, because, to the extent of 10,000*l.* the bond " executed by the Earl after his succession was in implement of an onerous obligation " long before undertaken by marriage contract.

" The question then is, whether the provision of 10,000*l.* to each of the daughters " is, on general principles, so plainly unreasonable, that it must be set aside as not " warranted by the entail? The gross rental of the estate is agreed upon at 8,742*l.*, " subject to some questions by which it may be increased or diminished to the extent " of a few hundred pounds. After all deductions, including annuities, taken simply " at their yearly amount, and the interest of former provisions, but without deducting " the expense of management, the rental is 6,683*l.*, which will be increased to the " extent of about 194*l.* if it should be found that the annuities ought to be valued. " If the provisions of the defenders be sustained, there will be an additional burden " thrown on the pursuer to the extent of the interest of 20,000*l.* annually, and his " free rental will then amount to about 5,600*l.*, subject to increase or diminution, " according as the points referred to in the notes to the rental may be judged of. " But there was also an arrear of 1,400*l.* of interest and annuities due at the death of " the last Earl.

" The heir in possession is not subject to a personal obligation for payment of the " principal of the provisions. But it is strongly urged by him that adjudications may " be led, whereby he might be deprived of possession of the estate for a length of time; " to which it is answered, that as the bonds of provision afford complete securities, he " could easily raise the money on assignations of the bonds.

" In this state of the case, the Lord Ordinary thinks that the question is attended " with difficulty. On the one hand, the burden is heavy upon the heir, arising from " two sets of provisions coming into operation at one time; and his condition as Earl " of Mar must be considered. But, on the other, it would be unjust that the de- " fenders should be left without proper provisions; and their condition as the daugh- " ters of the Earl of Mar must also be taken into consideration. The interest of the " provisions, as they stand, taken at four per cent., will only yield an income of 400*l.* " to each, and they were both unmarried at their father's death. The question is, " whether such provisions are, in the circumstances of the case, so plainly excessive " and unreasonable as to call for reduction. The Lord Ordinary has only further to " observe, that when the Court, in the simple exercise of equitable discretion, in the " case of Rothes, sustained the bonds to the extent of a provision of 6,000*l.* to the " daughter, (though she had succeeded to a separate sum of 3,000*l.*,) and an annuity " of 800*l.* to the widow, the heir, who was also an Earl, was left in a much worse " condition, even making allowance for his minority, than the pursuer in the present " case would be, if the provisions should stand; and if they shall be reduced to any " considerable extent, one of the defenders, who is still unmarried, would not possess " the means of living with any decent respectability in her proper rank and condition."

Sept. 28, 1813.

been granted. 2. The terms of the entail of Mar necessarily imply, that if the provisions granted to younger children are unreasonable, it shall be competent for the Court to give relief to the heir in possession. 3. The clause of the entail of Mar, empowering the successive heirs of entail to make provisions in favour of their younger children, implies, that no particular heir of the series shall be entitled to burden the estate to an extent, as has been done by the late earl, which renders it practically impossible for any succeeding heir to avail himself of that privilege in favour of his own family.

Lord Chancellor.—My Lords, in this case there is no occasion to hear the counsel for the respondents. I move your Lordships that the interlocutor be affirmed, with 200*l.* costs. It is really burning day-light to be arguing such questions in your Lordships house. I do trust that learned counsel will exercise a little discretion in signing appeals to this house. The point has been very ingeniously put by the learned counsel who has been heard at your Lordships bar, but there really is nothing at all in the case.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—Lady Lamington, 14th Feb. 1682 (M. 8,240); Lady Preston, 13th July 1677 (M. 8243); Belchier, 30th June 1779 (M. 15,683); 5 Geo. 4. c. 87.

Respondents' Authorities.—Rothes, 29th Jan. 1829) (S & D. 7.

MUNDELL—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.