[HEARD 18*th March*.—JUDGMENT 28*th August*.]

HIS GRACE HUGH, DUKE OF NORTHUMBERLAND and others, Trustees for behoof of the Right Honourable James, Lord Glenlyon, deceased, *Appellants*.

SIR J. A. B. M. MC GREGOR, *Curator Bonis* to his Grace John, Duke of Atholl, *Respondent*.

Entail.—Faculty.—A power given by an entail to the heirs to provide their younger children in three years' free rent of the lands is not well executed by a bond for payment to trustees of the amount of the rents, with directions to pay the *interest* only to the children, and to invest the *capital* in the purchase of lands to be entailed upon a series of heirs, including the children and *their* children.

Ibid.—Ibid.—A bond of provision executed under, but not in conformity with, a power in an entail will not be validated by a power given by the bond to the trustees in whose favour it was granted, so to modify the bond as that it should conform to the power.

Ibid.—Ibid.—A power reserved by an entail to the heirs under it cannot be delegated, but must be executed by the heirs themselves.

BY the original entail (1766) of the lands of Tullibardine, part of the possessions of the Dukes of Atholl, power was given to the heirs of entail to make provisions for their widows and younger children by a clause in these terms:—"Excepting and "reserving from the said prohibitive, irritant and resolutive "clauses, full power to the heirs and members of entail above "mentioned, in possession for the time, to grant lifetime infeft-"ments to their wives and husbands, and to the wives and "husbands of their presumptive heirs upon their respective "marriages, the said liferents being always by way of locality "only, and in lieu of their terce and courtesy, from which they "are hereby excluded, and each liferent not exceeding a third

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" part of the said lands and estates, and pertinents thereof " aforesaid, so far as the same are free and unaffected for the " time with former liferents and real debts that may or shall " then affect the same; and also excepting and reserving power " and liberty to the heirs and members of entail above " mentioned in possession for the time, to provide their younger " or other children beside the heir, to three years' free rent of " the said lands and estates, so far as the same are free and " unaffected for the time with any liferents and real debts that " may or shall then affect the same."

On the 18th October, 1824, John, Duke of Atholl executed an entail of his fee-simple lands of Dunkeld, &c., in favour of a series of heirs materially different from that in the Tullibardine entail. In this entail James, Lord Glenlyon, his grace's second son, was the institute, with a substitution, to the heirs male of his body.

On the same day on which he executed this entail, the duke executed a trust bond of provision, which after reciting the entail of 1766 and the power given by it, continued thus:— " And further, considering sundry weighty considerations, it is " my intention to grant to my second son, the Right Honour- " able James, Lord Glenlyon, in the event of my decease, provi- " sions to the full amount of the three years' rents of the " entailed estates contained in the said deeds of entail, and at " present in my possession as aforesaid; and which free rents I " compute to be at present about 8000*l.* sterling per annum, " after deduction of the foresaid locality to the said duchess, " my spouse, and will, I expect, rise to a sum considerably " higher in a few years hence, and which provisions I consider " it most expedient and for the advantage of the said James, " Lord Glenlyon, to make payable to trustees for his behoof as " after mentioned." By this bond the granter bound himself to pay to the appellants, as trustees for the purposes therein mentioned, 24,000*l.*, or such sum more or less as three years'

free rents of the lands might amount to at the period of his death, "which provision is granted by me, and shall be "accepted by the said James, Lord Glenlyon, and his trustees "foresaid, for his behoof, under all the burdens and conditions "and declarations contained in the aforesaid deeds of entail, so "far as the same extend to provisions to younger or other "children besides the heir; declaring and providing always, "that if the provisions hereby granted are or shall be beyond "or contrary to the powers conferred by the said deeds of "entail, the same shall be restricted and modified, so as to be "in strict conformity thereto; and I hereby specially enjoin "the said trustees, and the said James, Lord Glenlyon, to "restrict and modify the same accordingly, so that no contra-"vention may in any case be incurred or inferred in conse-"quence of these presents."

The purposes of the trust were declared in the following terms:—But declaring that these presents are granted to the "said trustees in trust always for the use and behoof of my "said son, James, Lord Glenlyon, and his heirs, in manner "after mentioned, viz., in the *first* place, the said trustees are "hereby empowered to pay over to the said Lord Glenlyon, "during the subsistence of this trust, the annualrent accruing "on the principal sums aforesaid, and that half-yearly or "quarterly, and at such terms as they shall judge most expe-"dient; but expressly declaring that it shall not be in the "power of the said James, Lord Glenlyon, to assign or convey "either the said interest or annual produce of this provision, "or the principal sums themselves hereby provided, and that "the same, or any part thereof, shall not be arrestable or "attachable by any creditor of the said Lord Glenlyon, or "affectable by diligence for his debts or deeds of any kind. "In the *second* place, the said trustees shall invest the said "principal sums hereby provided in the purchase of lands or "other subjects in the county of Perth, and entail the same

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" according to their nature and quality, upon the said Lord " Glenlyon, and the other heirs of entail named in a deed of " entail of my Dunkeld estates, executed by me of same date " with these presents, and in the same manner, and under the " same provisions and conditions as therein contained, or shall " be hereafter added by me thereto; but if circumstances should " occur to render that measure improper or inexpedient, of " which the said trustees shall be the sole judges, and as I " have the fullest confidence in the said trustees, and view the " present trust as a measure of propriety and benefit to my said " son and his heirs, I hereby give the said trustees the most " full and ample powers to lay out and invest the whole of the " said principal sums hereby provided, in whatever manner " they may judge most prudent and beneficial for behoof of the " said Lord Glenlyon and his heirs, according to circumstances " at the time, and I hereby declare my wish and intention that " the powers of the said trustees in the management of the said " provisions shall be of the most comprehensive nature, and " shall be liberally interpreted." At the date of this bond Lord Glenlyon was in insolvent circumstances, and he continued in that condition until his death.

After the death of the granter of the bond, which took place in 1830, the appellants, the trustees, drew the rents, and paid over the interest of the amount to Lord Glenlyon, who accepted the interest without objection, and in a conveyance of his estate to trustees for his creditors, excepted the bond as if beyond his controul by objection or otherwise. These payments were continued to Lord Glenlyon until his death, which occurred in 1837.

In 1839 the respondent brought an action against the appellants and Lord Glenlyon, the son of the grantee in the bond of provision, concluding for reduction of the bond, upon the ground that it was *ultra vires* of the granter; that it was not a valid exercise of the faculty given by the deed of entail, inas-

much as it was not a provision granted solely in favour of the son, of which he could enforce payment, there being no obligation imposed upon the trustees to pay or account to him, but a provision granted with a mere discretionary power to pay the annualrent to him, if they should think proper, and with a power to entail the principal sum on his heirs-male, and the heirs of entail in the Dunkeld estates, in fee; a provision inconsistent with the authority in the Tullibardine estate to grant provisions to younger children under which the bond professed to be granted.

The only issue taken by the appellants in defence was that the bond was *intra vires* of the duke.

The Lord Ordinary ordered minutes of debate, which were reported by him to the Court. The Court directed the papers to be laid before the consulted Judges for their opinions. The Judges were divided in opinion in regard to the validity of the bond. The majority held, "1st. That the late Duke of Atholl "had only power, under the entail of Tullibardine, to burden the "future heirs of entail with three years' rents of the entailed "estate, according to the free rental thereof at the period of his "death, and that his grace had no right to appoint the capital "of such provision to be raised out of the rents payable to the "present duke on his succession. 2nd. That the bond under "reduction can only be sustained to the effect of entitling the "trustees to claim from the present duke the interest of the "provision authorized to be paid to the late Lord Glenlyon; "but that, *quoad ultra*, no effectual burden was created on the "entailed estate."

The Court, on the 20th May, 1840, pronounced the following interlocutor:—"Having considered the minutes of debate, "opinions of the consulted Judges, and whole cause, they, in "terms of the opinions of the whole Judges, find, that the bond "sought to be reduced is not valid and effectual, except to the "extent of the annual rents provided therein to be paid to the

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" late Lord Glenlyon during his lifetime, in so far as the said " annualrents do not exceed the interests payable on a capital " sum equal to three years' free rents of the entailed estates, " and with this qualification and exception, decern and declare " in terms of the libel."

The appeal was against this interlocutor.

Mr. Turner and *Mr. Anderson* for the Appellants.—The clause in the entail under which the provision was granted, is not to be construed strictly. In all statutory provisions made by heirs of entail under the 5th Geo. IV., cap. 87, which is a statute in derogation of the restraining clauses in entails, the statute is construed strictly, and the provision must be given in the precise mode, and be confined to the extent specified by the statute. But where the provision is made by an heir of entail under a power given by the entail itself, the power is entitled to a liberal construction. The heir of entail is in the eye of law proprietor in fee-simple, except in so far as the entail upon the strictest construction fetters his powers. The presumption is in favour of liberty and against restraint.

The power here takes three years' rents out of the fetters of the entail. To this extent it gives the heirs the full powers which they would have had but for the fetters, and it does not impose any condition upon them as to the manner in which they are to dispose of the rents thus set free.

Although the form of the bond was a trust, and not a direct gift, the substantial benefit was given to Lord Glenlyon; so that even if the power be construed as not giving an absolute power to the heir over the money set free from the entail, but a power limited by its exercise being for the benefit of his children,—that was here observed. The form of a trust was adopted, because of the son's circumstances at the time of the provision, which circumstances continued up to the time of the son's death. But for the interposition of the trust, any

provision given to him would have been carried off by his creditors.

In another view, a gift to A and his children is not the less a provision for A, that his children are introduced; it is still for his benefit. It is, in fact, an absolute gift to him. The restrictions upon the provision were for the benefit of Lord Glenlyon himself, if the state of his circumstances be taken into account,—and they cannot be excluded.

[*Lord Chancellor* (*Lyndhurst*).—That argument may go the length, that giving the smallest portion to children and the remainder to grandchildren will be within the power.]

If his lordship, instead of being insolvent, had been imbecile, a form of execution, which should have guarded him from the effects of his condition, would surely have been a good execution of the power; and why not one which protected him, or rather the provision, from the effects of his insolvency? Unless the trust be a good mode of effecting the provision, there was no way in which the duke could have exercised the power for his son's benefit, that would have saved the provision from going to the son's creditors.

The provision was in substance a gift to Lord Glenlyon in liferent, and his children in fee; but power was vested in the trustees to have changed this, had his lordship's circumstances altered, and even to have paid over the money to him, without investment at all. The fullest discretion was given to the trustees, in this as in every respect. Even, however, viewing the provision as a gift to him in liferent, and his children in fee, it would still be within the power; for a power to provide *children* will include *grandchildren*. *Smollett*, in note to *Wemyss* v. *Traill*, 23 Nov. 1810.

Although the trustees were directed to invest the money in the purchase of lands to be entailed on the same series of heirs as in the entail of the Dunkeld estates, yet that direction is immediately qualified by a discretion given to the trustees, if

the measure of entailing should be improper or inexpedient, to invest the money in whatever manner they might judge most prudent and beneficial, "for behoof of the said Lord Glenlyon "and his heirs." So that the son and his heirs, not the heirs of entail, are the parties whose interests the trustees are to consider.

Moreover, in case the bond should not be within the power in the entail, the trustees are specially authorized, and indeed enjoined, so to modify the provision as to make it conform to the power; so that the bond may be good so far, though void as to the direction to entail, if that direction was in truth *ultra vires*.

But further, Lord Glenlyon, the party interested, homologated the bond, by accepting the provision given by it. If he, the party interested, did so, it is *jus tertii* of the respondent to object to its validity.

The Lord Advocate and *Mr. Kelly* for the Respondent.—The provision which the entail authorized was a money provision for the benefit of Lord Glenlyon personally, as a younger child. The provision, however, was so framed as to be neither a money provision, nor given to him directly, which alone the power authorized. It is to be vested in trustees, and all that these trustees are authorized to give him personally, is the interest of the sum provided; and even as to that, they are merely *empowered* to pay him over the interest,—they are not directed to do it. So that Lord Glenlyon, instead of having the capital, had only the interest; and that not absolutely, but dependent on the will of the trustees. He had not even a liferent in the sum provided.

The propriety or expediency of interposing the trust in the way in which it was done, however reasonable, or dictated by the circumstances, will not answer the objection to its legality.

But even admitting that the circumstances of Lord Glen-

lyon rendered some precaution for protection of the provision necessary, the full benefit of it might still have been secured to him, either by the purchase of an annuity, or by partial payments declared to be alimentary. It was not necessary for his protection, that the money should be invested in the purchase of lands, and still less that these lands should be entailed, and that not upon the heirs in the entail, under which the provision was made, but upon the heirs in an entirely different entail, and of a different series.

No doubt the trustees are authorized, if the measure of entailing should be deemed improper or inexpedient, to adopt another investment; but of the necessity for this, the entire judgment is placed in them,—that is, they are not to modify the granter's own words so as to make the effect of the bond consistent with his intentions, but so as to make it consistent with the legal effect of the entail, of which they are constituted judges.

Elsewhere power is given to the trustees, in case the provision should be contrary to the entail, "to restrict and modify," —not to modify only. These words, taken in connexion with what precede, have reference not to the mode or form of the provision, but its amount, as being within or exceeding that allowed by the entail. Accordingly, there follows an injunction, not upon the trustees only, but also upon Lord Glenlyon, to make the modification and restriction.

However this may be, a power to be exercised by one person cannot be delegated to another. It was not competent, therefore, for the duke to devolve upon the trustees the discretion of fixing how far the provision was within the power given—the impropriety or expediency of the investment—or the extent of the provision. If the money were once paid over to the trustees, what control can the heir have over them, that they will exercise the discretion given them, as to the mode of investment, so as to make it within the terms of the entail, and that

they will not adhere to the trusts of the bond as expressed in it, by giving the benefit of the provision to the heirs under the Dunkeld entail?

If the bond has not been executed according to the form and extent allowed by the entail, it does not constitute a charge upon the lands, and the heir in possession is entitled to be relieved from it. And with regard to homologation by Lord Glenlyon, he was, by his position, incapable of it. The duke had power, but was not under any obligation, to make the provision for him. Had Lord Glenlyon been disposed, therefore, there was no right in him by which he could have challenged the provision. If he could not in any view quarrel it, he was incapable of homologating it.

LORD LYNDHURST.—My Lords, in this case the successive heirs of entail had a power reserved to them of providing for their younger children, to a limited extent, out of the entailed estate. The only provision made by the bond in question for Lord Glenlyon, a younger child of the Duke of Atholl, the then heir of entail, consisted of the annualrent of the sum secured upon the estate by that instrument. He took no interest in the principal sum, and had no power whatever over it. He was not even allowed to charge or anticipate the income. This was the whole amount of his interest. The grant so far was within the power, and to this extent the bond of provision was, I consider, undoubtedly valid, for I cannot acquiesce in the objection, which was rather hinted at than urged, viz., that the bond which secured this income was not given to Lord Glenlyon directly, but was executed to trustees for his benefit. But the trustees after, in the *first* place, paying the annualrent to Lord Glenlyon, are directed, in the *second* place, to invest the principal in land, and to entail the same upon Lord Glenlyon and the other heirs of entail named in the entail of the Dunkeld estates.

Now the power given was to charge the estate with a sum of money, in order to provide for younger children. It would not, I conceive, be a valid execution of such a power to do this, for the purpose of applying the money in the purchase of land to be entailed upon a particular series of heirs, which, though including children, extended also to other and more remote relations. The provision was to be for the benefit, that is, the exclusive benefit, of the younger children. And, indeed, upon this point, although differing from the majority of his brethren in the general conclusion, one of the learned Judges in the Court of Session, (Lord Medwyn,) observes that he had no doubt that the Duke of Atholl did what he had no legal title to do, when he authorized his trustees to invest this provision in land, and entail it on a series of heirs; because this was not within the terms of the permissive clause.

But then there is a power given to the trustees to modify any of the provisions of the bond. This is relied upon by the appellants. It is to this effect, viz., that "if the provisions hereby "granted are or shall be contrary to the powers conferred by "the said deed of entail, the same shall be restricted and modified so as to be in strict conformity thereto, and the trustees "and Lord Glenlyon are enjoined to restrict and modify the "same accordingly." Under this clause it is supposed that the trustees could apply the sum secured by the bond as they might think proper, for the benefit of Lord Glenlyon's children. But the power reserved by the deed of entail was to be exercised by the heir of entail for the time being. It was in its nature discretionary to be exercised in favour of younger children, as he might think fit; and I concur, therefore, in opinion with those among the learned Judges who consider that the power could not be delegated or transferred. A power which is to be exercised in favour of others according to the discretion of the person in whom it is vested, cannot, by the law of this part of the island, be delegated or transferred.

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The decisions upon this subject are collected in Sir Edward Sugden's valuable *Treatise on Powers*. After referring to them, he observes that this is a settled point: v. ii. p. 214, 7th edit. The principle is of universal application; and no decision or dictum to the contrary has been referred to from the law of Scotland.

It is said that a permissive clause of this kind in a deed of entail is to be construed liberally; that the subject over which the power is to be exercised may be considered as taken out of the entail, and may therefore be disposed of according to the will of the heir of entail. But admitting that the clause is to receive a liberal interpretation, still the charge can only be made for purposes which, upon a fair interpretation, come within the power. Here the power was to provide for younger children. The heir of entail might have executed that power in favour of those children, distributing the money among them in any proportions he might have thought proper. He gave the interest of the fund, and that only, to Lord Glenlyon. The principal was left to be applied by the trustees in the purchase of land, and in settling it in a manner not within the power, or, if that could not properly be done, in the exercise of a discretion which the law will not sanction.

I may further observe, that the authority thus attempted to be given to the trustees never was exercised nor any step taken for that purpose, during Lord Glenlyon's lifetime, or, indeed, at any subsequent period. It cannot now be exercised as a provision for him; nor can it, I conceive, be apportioned among the children by the trustees, as the Duke of Atholl could not confer such an authority upon them.

With respect to the reliance placed upon the acquiescence of Lord Glenlyon, the answer given by two of the learned Judges of the Court of Session is, I think, conclusive. He had no authority to do otherwise: he had no right whatever to object, and his acquiescence is therefore wholly immaterial.

I submit, therefore, to your lordships, that the judgment of the Court below ought to be affirmed.

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LORD CAMPBELL.—My Lords, I take entirely the same view of the case as my noble and learned friend who has preceded me. He has stated the subject in such a lucid and satisfactory manner that it seems to me quite unnecessary to offer a single observation upon the point.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House; and that the said interlocutor, therein complained of, be, and the same is hereby affirmed. And it is further ordered, That the appellants 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 cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.