[13*th April* 1835.]

The Right Honourable Lord MACDONALD, Appellant.
Dr. Lushington — Keay.

The Honourable ARCHIBALD MACDONALD, Respondent.
Lord Advocate (Murray) — Tinney.

Heir and Executor — Relief — Clause. A party possessed of two estates, the one of which he held in fee simple, and the other under an entail, which allowed reasonable provisions for younger children, having bound himself, and his heirs succeeding to these two estates, to pay certain provisions to his younger children; and the first heir who succeeded to these estates having possessed them without paying the provisions, Held (affirming the judgment of the Court of Session) that the second heir succeeding to these estates was liable, without relief against the executors of the first heir.

ALEXANDER the first Lord Macdonald had a daughter, Lady Sinclair, and five sons, viz. Alexander Wentworth, Godfrey, James William, Archibald, and Dudley. His lordship was fee-simple proprietor of the estate of Strath, and he held the estate of Macdonald under a deed of entail, which authorized the heirs in possession "to provide their younger children, besides the heir, "with competent provisions, agreeably to the circum-"stances of the estate."

By a bond of provision, dated 24th September 1794, Alexander Lord Macdonald "bound and obliged him-

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" self, and his heirs succeeding to him in his lands and " estates of Macdonald, Strath, and others, lying in the " islands of North Uist and Skye or otherwise in the " county of Inverness, to content and pay to the respon- " dent, the Honourable Archibald Macdonald, the sum " of 7,500*l.* sterling, and that at the first term of " Whitsunday or Martinmas next and immediately " following the granter's death, with a fifth part more " of penalty in case of failure, and the legal interest of " the said principal sum from the said term of payment, " and thereafter so long as the same should remain " unpaid." This bond of provision sets forth, that the granter, Alexander Lord Macdonald, had, by his contract of marriage, dated 28th March 1768, bound himself, and his heirs, executors, and successors, to make payment to the younger sons and daughters of the marriage, in case of an heir male thereof, of the sum of 5,000*l.*, at the next term of Whitsunday or Martinmas after their attaining to the age of twenty-one years, or after the granter's death, whichever of these events should first happen, with interest thereafter till paid. The bond of provision then sets forth, that in consequence of the rental of the estates of Macdonald and Strath having much increased since the date of the said marriage contract, and being likely still more to increase, his lordship, therefore, over and above the other provisions settled on his younger sons out of his separate estate and effects, by a deed, of the same date with the bond of provision above mentioned, bound and obliged himself, and his heirs succeeding to him in the estates of Macdonald and Strath, to make payment to the pursuer of the sum of 7,500*l.* above mentioned, and to each of his younger sons of the like sum of 7,500*l.*

Alexander Lord Macdonald, the granter of this bond of provision, died on 12th September 1795, and the sum of 7,500*l.*, thereby granted to the late James William Macdonald, became due and payable at Martinmas 1795, and bore interest thereafter till payment.

Upon the death of Alexander Lord Macdonald, he was succeeded in his lands and estates of Macdonald and Strath by his eldest son, Alexander Wentworth the second Lord Macdonald.

The deed referred to in the bond of provision was a general disposition and trust deed, executed by the said Alexander the first Lord Macdonald, of the same date with the bond of provision, by which he appointed the Earl of Buchan and several other friends, and also his eldest and younger sons, as they should attain to majority, to be his trustees; and disponed and conveyed to them all his lands and heritages whatsoever (excepting the family estates of Macdonald and Strath,) and all personal property, debts, and sums of money that should belong to him at his death, and appointed his said trustees to pay certain provisions to Lady Sinclair and her family, and thereafter to divide the remainder of the whole foresaid trust estate and effects equally among his four younger sons.

Alexander first Lord Macdonald held the estate of Strath in fee simple; and though the estate of Macdonald was held under a deed of entail, executed in 1726, this deed had never been registered in the record of entails. This deed of entail, besides authorizing the heir in possession to contract debts to a certain extent, contained also the following declaration and provision:—

" And likewise reserving power and liberty to the said " Alexander Macdonald (the institute) and his heirs

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" above named, to provide their younger children, " besides the heir, with competent provisions, agreeably " to the circumstances of the estate at the time; de- " claring always, that the bonds of provision, so to be " granted by them to their said younger children, shall " be so qualified, that any adjudication to be led or " deduced thereupon shall only subsist as a real secu- " rity for the principal sums, annual rents, and expences " actually disbursed, but that the legal reversions of the " said diligences shall never expire."

The sums contained in the bond of provision above mentioned did not exceed three years rents of the entailed estate of Macdonald at the time they were granted. It appears that the rentals of the estates of Macdonald and Strath, including the kelp for the years 1793, 1794, and 1795, amounted, after deducting all expences, to about 11,670*l.* yearly; of which rental, the unentailed estate of Strath yielded only about 1,000*l.*

Immediately after the death of Alexander the first Lord Macdonald a meeting of his relatives and friends was held in Edinburgh, which was attended by his eldest son Alexander Wentworth, then Lord Macdonald; by the defender Godfrey Macdonald, his second son; by Sir John Sinclair, and by several other of the trustees, all of whom accepted of the trust, and appointed Mr. John Campbell to be their factor, and gave directions for the management of the trust, as appears from the minute-book kept by these trustees. It also appears from the same record, that a memorial and queries had been prepared for the trustees, to obtain the opinion of Mr. Adam Rolland and the Honourable Henry Erskine, advocates, with regard to the effect of the bond of provision as to the entailed estate of Macdonald. The

opinion given by these eminent lawyers was, that it effectually attached this estate, and that it had reference to the reserved powers contained in the deed of entail. They stated, that comparing the clause in the entail with the rental of the estate, the late lord had not exceeded his powers as an heir of entail in making the bond of provision a burden upon the entailed estate. These provisions they held to be effectual against the succeeding heirs of entail; and they stated, "that the "younger sons to whom the 30,000*l.* is provided, have "no occasion for any farther security. The making "the provision being, as we apprehend, in the power "of the late Lord Macdonald as an heir of entail, his "four younger sons, as creditors in these provisions, "would be entitled, if necessary, to attach the entailed "estate for their payment."

At the next meeting of the trustees, at which the late Alexander Wentworth Lord Macdonald was present, the memorial and queries, with the opinion of the learned counsel above mentioned, were laid before the meeting; and the minutes bear, "that the 30,000*l.* "provided to the younger children is clearly a burden "upon Lord Macdonald's estate."

In a state of the trust affairs laid before that meeting the 30,000*l.* contained in the bond of provision is put down as "a sum left by his Lordship's settlements as a "burden upon the estate."

Several years afterwards Alexander Wentworth Lord Macdonald having an intention to borrow some money upon his unentailed estates, while he admitted that the bond of provision formed a burden upon the entailed estate, was desirous to be informed whether this burden

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could be made to attach exclusively to the entailed estate, or whether it affected proportionally the unentailed lands of Strath? With the view of ascertaining precisely how the law stood as to this point, and also as to some other matters connected with this bond of provision, a full statement was laid before the late Mr. Solicitor General Blair (afterwards Lord President), and the opinion of this eminent lawyer was requested, as to how far and in what proportions the bond of provision above mentioned would be understood to affect the entailed and unentailed estates, and this query in particular was put to the learned counsel:—

"In case the above 30,000*l.* shall be considered "as applicable proportionally to the whole of his "lordship's estate, what method would be best to "fix this, so as to render the security for the 30,000*l.* "in the first place, and then of the posterior creditors, "indisputable?"

The opinion of Mr. Blair upon this case was very clear and explicit. He says, "I am of opinion that "the bond of provision which his lordship granted in "favour of his younger children in September 1794, "ought to be held and presumed an exercise of the "power, which he had by the entail, of burdening the "estate of Macdonald, in so far as that power shall be "held in fair construction to extend; and that this "was the intention of Lord Macdonald seems also to "be clear." He adds, that though there may be some difficulty in fixing the precise amount of the sum which might be made a burden on the entailed estate, he thinks that the amount of three years rents might be taken as a reasonable test for determining the extent of the burden

which the heir of entail was entitled to impose upon the entailed estate. He gives it as his opinion, that the amount, so far as it might be held a reasonable exercise of the power conferred on the heir, "must be a burden "on the entailed estate, and the succeeding heirs of "entail, without relief from Lord Macdonald's other "representatives, or from his unentailed estate." He then says, "How far the estate of Strath, therefore, can "be considered at present as a fund of credit, must "depend in the first place upon the question of law, as to "any part of the sum provided being ultimately charged "upon the entailed estate, upon which I have already "given my opinion, and it is a point upon which I am "very clear; and 2dly, upon the exact proportion of "the total sum provided, which is to be held a burden "upon the entailed estate."

In consequence of the opinions now referred to, all the parties concerned relied that the younger sons were sufficiently secured upon the entailed estate for the payment of the bond of provision in question; and in particular the late Lord confided therein, that he required to give no further security upon the said estates to them. Every arrangement which took place, and the conduct of all the brothers to the late Lord's death, proceeded upon this view of the matter; and it appeared to be perfectly understood by all parties concerned as fixed and settled that the bond of provision was equally effectual in creating an obligation against the heirs of entail, and the heirs succeeding to Strath, as if the provisions therein contained had been created real burdens on these estates by infeftment or adjudication.

Upon the 27th of August 1803 the respondent Mr. Archibald Macdonald, in fulfilment of certain mar-

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riage articles entered into between him and his wife, assigned and conveyed his claim under the foresaid bond of provision in favour of Sir John Sinclair, and other trustees, for the purposes specified in the deed of conveyance and assignment.

On the 19th day of June 1809 the late Alexander Wentworth Lord Macdonald advanced to the pursuer 2,000*l.* sterling, and on the 23d May 1810 the farther sum of 2,500*l.*, leaving the principal sum of 3,000*l.* still due to the pursuer under the said bond of provision. This sum, with the interest since Whitsunday 1824, remains due to the pursuer; and the question at issue is, whether the present Lord Macdonald, who it is admitted has succeeded to the estates of Macdonald and Strath, is not liable to pay this balance. The respondent, Mr. Archibald Macdonald, is the third son of the late Alexander the first Lord Macdonald.

On the revised cases for the parties being lodged the Lord Ordinary pronounced the following interlocutor:—

"19th January 1832.—The Lord Ordinary, having con-
"sidered the cases for the parties, finds, that in the
"year 1794 Alexander Lord Macdonald executed a
"trust deed, conveying the whole of his heritable estates,
"with the exception of the estates of Macdonald and
"Strath, and the whole of his moveable property, to
"certain trustees, for the behoof of his younger chil-
"dren: Finds, that at the same time, Alexander Lord
"Macdonald executed a bond of provision for the sum
"of 30,000*l.*, by which, 'over and above the other pro-
"'visions settled upon his younger sons out of his sepa-
"'rate estate and effects, he bound and obliged himself
"'and the heirs succeeding to him in his lands and
"'estate of Macdonald and Strath and others lying in

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" ' the Islands of North Uist and Skye,' to pay the said " sum in equal proportions to his younger sons, God- " frey, Archibald, James, and Dudley Stuart Erskine " Macdonald: Finds, that the Honourable James Mac- " donald, in addition to his share of 7,500*l.*, acquired " right to the sum of 3,252*l.* 10*s.* 4*d.* of the share be- " longing to his brother Godfrey now Lord Mac- " donald: Finds, that Alexander Lord Macdonald was " succeeded in the estates of Macdonald and Strath by " Alexander Wentworth, the late Lord, who died in " 1824, and was succeeded in the said estates by the " present defender: Finds, that no part of the said " sums of 7,500*l.* and 3,252*l.* 10*s.* 4*d.*, amounting to " 10,752*l.* 10*s.* 4*d.*, was paid by Alexander Wentworth " the late Lord Macdonald, and that the present action " is brought by the pursuers, being three of the execu- " tors of the Honourable James Macdonald, who died " in 1814, for their shares of the said sum: Finds, that " the present pursuers are also the whole executors of " the late Alexander Wentworth Lord Macdonald, and " have in the present action been met by the defence, " that the debt in question, being one for which the late " Lord Alexander Wentworth was personally liable, is " a debt properly affecting his executry, and of which " the defender is entitled to total relief from the pur- " suers, his executors: Finds, that by the bond libelled, " creating the obligation, that obligation was expressly " imposed on the granter and the heirs succeeding him " in the estates of Macdonald and Strath: Finds, in " respect of the special terms of the bond, that the " obligation to pay, though personal, devolved succes- " sively on the heirs possessing those estates, and that " therefore the debt, in so far as unpaid by the late

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" Lord Macdonald, was not one of which the defender,
" the heir now in possession of these estates, is entitled
" to demand relief from the executry of his predecessor:
" Therefore, repels the defences, and decerns in terms
" of the conclusions of the libel in regard to the prin-
" cipal sum, and also in regard to the interest from the
" 19th of June 1824, the period of the late Lord's
" death; but in regard to the interest falling due during
" the possession of the estates by the late Lord Mac-
" donald, sustains the defences and assoilzies the de-
" fenders: Finds no expences, due and decerns.

(Signed) " JOHN FULLERTON."

To this interlocutor his lordship added the following note:—

" Note.—The defender does not deny his liability for
" the debt; but pleads that he is entitled to be relieved
" from the executry of the late Lord Alexander Went-
" worth. In the ordinary case this would require to be
" made good in an action of relief against the execu-
" tors; but as here the pursuers, claiming equal shares
" in the sum pursued for, happen to be also the whole
" executors interested in the intestate succession of the
" late Lord Alexander Wentworth, the question of relief
" admits of being discussed in the form of a defence.
" The question thus raised is attended with considerable
" difficulty. There seems no reason to doubt that when
" a granter of a bond of provision binds his heirs gene-
" rally, the obligation on the first heir forms truly a
" personal obligation to all intents and purposes, which
" will, in the event of payment not being made during
" his lifetime, devolve on his executors without relief
" from his heir. But the peculiarity of this case is

" that the bond creating the obligation imposes it " specially on the heirs succeeding in the estates of " Macdonald and Strath; and again, the estates of Mac- " donald forming by far the most valuable of the two, " (in the proportion, according to the pursuers, of more " than eleven to one,) was held by the granter under a " strict entail, containing a power to grant provisions to " younger children, while it is not denied by the de- " fender that the bond of provision in question was " within that power. Indeed, it is expressly admitted " in the defender's case that he is bound, not only as " the heir in Strath, but as the heir in Macdonald. " With regard then to the estate of Macdonald, or " rather such parts of the bond of provision as might be " ascertained to form a burden on the heir in that en- " tailed estate, this seems the ordinary case of a debt " effectually created against the heirs of an entailed " estate; a debt as to which, though remaining personal, " the heir in possession so far from being bound without " relief (so as to transmit the obligation against his " general representatives,) is held entitled, even in the " case of payment, to take assignations enabling his " general representatives to obtain relief against the " succeeding heirs of entail. As to the estate of Mac- " donald, then, it seems to follow from the known rule " applicable to entailed estates, that by the bond in ques- " tion the granter intended to create, and did effectu- " ally create, a burden transmissible against the heirs " successively taking the estate, without relief from the " executry of their respective predecessors. In regard " to the estate of Strath, which is unentailed, there is " more difficulty. The question, how far the heirs of an " unentailed estate may be successively bound in an

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" obligation merely personal, without relief, except from " their successors, is one which must be of rare occur- " rence, as in such a case the unfettered nature of the " right affords the heir in possession the means of re- " lieving himself. But still the Lord Ordinary perceives " no incompetency or inherent incongruity in constitut- " ing a debt in such a way as to impose the obligation of " debit, though personal, on a certain series of heirs, any " more than in destining a personal right of credit to such " series of heirs, of which last the competency cannot be " doubted. The question, then, is one purely of inten- " tion; and considering the terms and whole tenor of " the bond of provision, and its effect according to the " ordinary rule, in regard to the entailed estate of Mac- " donald, the Lord Ordinary thinks, that it does contain " a sufficient expression of intention, even as to both " estates, that the obligation, so long as unperformed " should devolve successively on the heirs taking those " estates; and that, in absence of any deed of the late " Lord Alexander Wentworth altering that arrange- " ment, it must be held, in a question inter hæredes, like " the present, to have been his intention that the debt " should be paid by the heirs of the estates, the debtors " appointed by the bond, without relief from his own " executry. Upon these grounds, supported by the " analogy drawn from the unquestioned practice in the " case of entailed estates, the Lord Ordinary has re- " pelled the defence in so far as it is pleaded against the " claim for the principal and for the interest accruing " since the present Lord became liable by succeeding to " the estates. He cannot, however, extend the principle " beyond what is warranted by that analogy. He has " therefore considered the interest accruing during the

" possession of the estates by the late Lord Alexander " Wentworth as properly a debt due by him in his in- " dividual character, to which the defender's claim of " relief against the executry is applicable; and, as it is " not denied by the pursuers that the executry of the late " Lord is sufficient for that purpose, he has sustained the " defence in regard to that interest."

(Signed) " J. F."

The above interlocutor having been brought by a reclaiming note under the review of the Second Division of the Court, their lordships, by a majority, adhered to that judgment, and, of this date, pronounced the following interlocutor:—

" Edinburgh, 29th May 1832.—The Lords, having " considered this reclaiming note, with the other pro- " ceedings, and heard counsel, adhere to the interlocu- " tor of the Lord Ordinary, and refuse the desire of " this note."

The following are the opinions delivered by the judges of the Second Division on which the above interlocutor is founded:—

Lord Cringletie.—" I think the interlocutor of the " Lord Ordinary is right. The provision was laid by " the first Lord Macdonald on the heirs succeeding " to him in his lands and estates of Macdonald and " Strath; and it appears to me, from the deed which " he afterwards executed, conveying his whole estate, " personal and moveable, to trustees for the purposes " therein stated, that it never could have been in his " contemplation that any of the heirs should be bound " to pay the provision, except the heirs succeeding to " the estates of Macdonald and Strath. This I conceive

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" to be perfectly clear as the intention of the granter of " that bond. The Dean of Faculty says that the ques- " tion is not as to what was the intention of the maker " of the bond, but that this being a personal bond, which " the second Lord Macdonald ought to have paid, the " question is, whether, he having died intestate, the " burden is not to fall on his executors? I think, that " if it was the intention of the first Lord Macdonald to " lay the burden on the heirs of Macdonald and Strath, " that just goes to answer that very question. If it be " once ascertained that the burden is laid on the heirs " of Macdonald and Strath exclusively, then I appre- " hend that it so remains so long as it is unpaid. The " Lord Ordinary has remarked in his note, that ' there " ' seems no reason to doubt, that when a granter of a " ' bond of provision binds his heirs generally, the " ' obligation on the first heir forms truly a personal " ' obligation to all intents and purposes, which will, in " ' the event of payment not being made during his life- " ' time, devolve on his executors without relief from his " ' heir.' Most unquestionably without relief. Put the " case, that the second Lord Macdonald had not lived " a fortnight after succeeding to the property, and had " left a great personal succession, would there have been " a particle of justice in saying, that an heir of his " having succeeded to the estates, his executors should " notwithstanding be liable to pay this debt in the bond " of provision? I cannot conceive that such an argu- " ment could be raised with any justice at all, or with " even the appearance of justice. The obligation remains " upon that in the original bond, and just where it was, " upon those succeeding to the estates. It was an " obligation against the first heir, and against all the

" heirs, and either of them could have kept it up as a " debt against the estates of Macdonald and Strath, if " they had paid it. It would just have remained as it " had stood before, a debt upon the estate, for which " the estates were liable."

Lord Glenlee.—" As to the executors of the first " Lord Macdonald, there can be no possible doubt that " there can be no claim against them in consequence of " the declaration in the bond; but not in respect of the " terms of the bond, binding himself and the heirs in " Macdonald and Strath to pay, but from the reference " it makes to the other deed he granted at the same time.

" If the question was of such a nature as admitted of " my thinking of the matter at all, I think that what he " would have said would have been different from what it " is alleged he said.

" There is nothing in the deed which seems to me to " imply that the heirs succeeding in the estates should " not only be liable as heirs, but also that they should " be liable without relief against the executors of the " preceding heirs. I think that there can be no doubt " that the second Lord Macdonald was the proper " debtor in this bond, so long as he lived, and that the " creditors under it might have attached his moveable " funds of every kind, wherever they were to be found, " for payment. But when he died, did this right to " attach his moveable funds expire at once with himself? " I take it that the truster might have made a provision " to the daughter of the eldest son, who had predeceased " him. Suppose the granter had conceived this provi- " sion in favour of a daughter of his eldest son, pre- " deceasing him, this daughter would have thus been " the creditor of her uncle, a second son succeeding to

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" the estates and excluding her; would she not have " had him, and his whole estate, real and personal, " bound by this provision?—and could she lose this " recourse upon his estate by his death?—and could it " be said to her, you are not entitled to confirm as " executor-creditor to him after his death, so as to attach " his moveable funds, although during his life you could " do so? If he had been alive you might have taken " them, and during his life you ought to have secured " yourself, or obtained payment out of any funds he " had. Would this power have been lost at once " by his death? And can it be said you cannot confirm " as executor-creditor to him, because it was the inten- " tion of the granter of the bond that it should be paid " by the heir, and not from the moveable funds? I " have no idea of that at all.

" As the case has happened, some of the parties here " are both creditors under the provision and executors. " I think it will not do to say that their being executors " eo ipso subjects them to the claim; but I think that, " so far as there is an excrescence of moveable funds " over and above paying the debts of the second Lord " Macdonald, they are liable pro tanto to the relief of " this claim. I have no idea that because they were " creditors of the second Lord Macdonald, and were " also his executors, this claim thereby became extinct. " That is absurd: they were just as much creditors as " executors. By our old law an executor, who was " also a creditor, had a preference, and was entitled to " pay himself out of the executry. That has been " altered, no doubt; but the executor still remains a " creditor. It follows from this, as matter of necessity, " that unless there is an excrescence to which these

" people have succeeded, over and above the debts due " by the second Lord Macdonald, there is no claim of " relief against the executors.

" I think the claim of relief must be limited to the " excrescence of the whole moveable funds left by Went- " worth Lord Macdonald, over and above his debts; " but I think to that extent the claim good.

" I see that the Lord Ordinary has thought, that if " the whole estates had been unentailed, the question " would have been very doubtful; and he founds very " much on the analogy drawn from questions applicable " to debts upon entailed properties. Now, I do not see " the inference, that because the first Lord Macdonald " declared that himself and his heirs succeeding to him " in these estates should be burdened with the provision, " that all claim against his funds, so soon as he died, did " necessarily disappear, and that his executors were not " liable.

" We have nothing before us as to the deed of entail, " except one very short quotation; and there is no doubt " in my mind, that that quotation gives no power to the " heirs to burden the estate with debts. All it does say " is, that the institute and other heirs should be entitled " to grant reasonable annuities to younger children; " but it confers no powers, as many entails do, to make " these a burden upon the estate at all. The only effect " is, that the irritant and resolutive clauses do not strike " against the heir. No doubt, such a provision is a good " debt against every person who succeeds to the estate. " It stands as an entailer's debt, which, in common par- " lance, is said to affect the estate; but every body knows, " that although the entailer's debt, in this sense, affects " the estate, yet, like every other debt, it is due by the

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" heir, and by every body who represents that heir. All " the entail authorizes is simply to contract the debt; " and I hold it to be contrary to the entail to say that " it is confined to the estate, and that therefore the " heirs, and the heirs only, who succeed under the en- " tail, shall be liable for payment of the provisions with- " out relief.

" I think this case is to be judged of just like a per- " sonal debt, for which all the heirs are liable, but which " does not exclude the right of the creditor to go against " the funds of any heir who is really subject for that " debt. The diligence can only be valid to the effect of " securing the money, and not to that of carrying off " the estate."

Lord Meadowbank.—" I concur with Lord Cringletie " in the conclusion to which he has come. But at the " same time, I apprehend that it is not the intention of " the first Lord Macdonald which must regulate the " question. I may state my opinion in one sentence. " It appears to me that this estate was primarily liable, " and if the estate was not relieved of the debt it " appears to me that it was the intention of the last " Lord Macdonald to leave it as a debt, for which the " heir, and not his executors, was liable."

Lord Justice Clerk.—" Upon reading these papers, I " have formed an opinion in favour of the interlocutor " of the Lord Ordinary, and very much on the same " grounds as stated by his lordship. I cannot permit " my opinion to go on the grounds stated by Lord " Meadowbank as to the intention of the late Lord " Macdonald. We must look to the purpose for which " the bond was granted, with reference to the marriage " contract. After having made a deed, conveying the

" whole of his funds out and out—every farthing, in " short, of which he was possessed—he executed a bond " of provision, which proceeds on the narrative that in " consequence of the great increase of the rental of " Macdonald and Strath since the date of the marriage " contract, and that it was likely to increase still more, " he therefore, for love and favour which he had for his " children, declared he was to make this additional pro- " vision in their favour, over and above the other pro- " visions by the bond, by which he laid an obligation on " the heir succeeding to him in the estates of Mac- " donald and Strath. I have no doubt whatever, that " it was the intention to make the heirs, and heirs alone, " liable. The estate of Macdonald is an entailed estate, " and there is, I apprehend, no doubt that that would " be a good, valid, and effectual burden over that estate. " There is no doubt the specialty here, that the estate " of Strath is not entailed; but the bond nevertheless " declares, that it is the heirs succeeding to both estates " of Macdonald and Strath that shall be liable for the " provision there made. When I see this man giving " over every thing he had in the world to trustees, for " the purpose of making these provisions, I conceive it " to be a clear declaration of that person, that the pro- " vision shall form a burden upon both estates, although " the one was entailed and the other not. Then the " first Lord Macdonald is succeeded by the second Lord " Macdonald, and no doubt this person was, in terminis " of the bond, bound to pay the provision. His rents " might have been attached, his funds might have been " seized, and the unentailed estate might have been " brought to the hammer, and sold off. I have no doubt " of that at all. As to the entailed estate, it might have

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" been made effectual against it too;—all that certainly " might have been done, though it was not. The second " Lord Macdonald lives for sometime, and dies, leaving " the provision unpaid; and then the question comes to " be, whether the present Lord is answerable for this " debt, he being in possession of both estates of Mac- " donald and Strath? As to this being merely an en- " tailer's debt, and not a real burden, and one which " can only be made effectual in the usual way, I am " satisfied of that; but here, when there is a manifest " declaration of purpose and intention, I think the " authorities quoted in these papers are sufficient to " show that it must be given effect to. I can conceive " difficulties to arise, if Lord Macdonald had said, I " will not take Strath; but he does not say that; no such " thing. He takes that estate; and I hold that there " are authorities to shew clearly, that where the will " and purpose are expressed, that will and that purpose " must be given effect to. Therefore I am of opinion, " that we are bound to make the provisions be paid out " of the fund which was expressly destined for that " very purpose by the will and declaration of the " granter; and I think that the second Lord Macdonald " did nothing to alter that liability, and did nothing to " affect that will."

The Court adhered.

Against these interlocutors an appeal was presented, and the original appellant, Godfrey Bosville Lord Macdonald, having died in the month of October 1832, and having been succeeded by his son Godfrey William Wentworth now Lord Macdonald, the present appeal was ordered to be revived upon his petition.

Appellant.—The question in this case relates exclusively to the succession of the last Lord Macdonald, as no claim could lie against the executors of the first Lord Macdonald, and is one of Scotch law and of principle. The debt due by the late Lord Macdonald having been merely a personal obligation, and not having been made a real burden upon the estates, must be borne by the executor, and not by the heir in a question of relief between those two parties. It is not pretended that the debt was heritable, or secured on the estates; indeed, it is expressly found by the Lord Ordinary, and distinctly admitted in his note, that the debt was personal; and of this none of the judges appear to have entertained any doubt. That being the case, has the late Lord Macdonald done any thing whatever to exclude the established right of relief which his heir, by the law of Scotland, has from the executors of any personal debt which the heir may be called upon to pay? On this question the case depends. The rule of law is expressly stated by Mr. Erskine in these terms:—"The law itself "has divided succession into two branches, the heritable "and the moveable, and as each of these ought to bear "the burdens which naturally attend it, the heir is the "proper debtor in heritable debts, because he succeeds "to all the subjects upon which these debts are secured, "and the executor is primarily liable in the moveable "debts, because he is considered as heir in the moveable "estate." The late Lord Macdonald was debtor to the respondents, his younger brothers and sisters,—debtor in an obligation which was personal. Now, knowing that, and knowing that if he makes no settlement they will succeed to his executry, he thinks it best to leave it to them, just because he is largely their debtor. A

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donation to them, at the expence of the heir in the heritable property, is surely not to be presumed. Debitor non presumitur donare. They were not nearer to him in blood, or more connected by affection. The case is not that of a father leaving a large landed estate to his eldest son, and providing for his younger children. The last Lord had no such motives to influence him. If he had intended really to make a donation of his executry, over and above the provisions due by himself under his father's settlement, which he had not paid, the presumption is, that he would have made a deed to that effect; that he would not have died intestate, but that he would have said, like his father, "I think you ought to have my whole executry, be- "sides claiming from our brother, who succeeds to me "in my estates, the provisions in your favour executed "by our father." Certainly, if Lord Macdonald had ever formed such a notion in his mind, the reasonable presumption is, that he would have executed a deed to that effect. But, besides the utter improbability of such being his intention, the natural explanation of his conduct, (if conjectures as to his intention can be safely hazarded at all) is, that seeing these provisions still remained due by him, amounting to a very considerable sum, he allowed the respondents to take his executry on that very account, that he might thereby pay off that debt, and giving them at the same time the benefit of any surplus which there might be.

That such was a very probable view to pass through his mind, and that there is not one single scrap of evidence militating against such an inference, cannot be disputed. Thus, for aught that appears, the Court may in fact have deviated from the ordinary and esta-

blished principles of law, by conjectures as to the views of the late Lord Macdonald, which may have been exactly the opposite of those which did pass through his mind.

Upon analyzing the opinions of the judges it will be seen that there is not one single ground upon which this personal debt is thrown upon the heir, without the established relief against the executor, which does not depend upon conjectural views of the intention of a party who died intestate without any sort of evidence of his own intentions.

In cases of intestate succession, there can logically and upon sound principle be no room for speculation as to a party's intention. The law enables every man to regulate his own succession, and establishes certain rules and certain principles in case a party dies without expressing and giving effect to his own will. Now, that being the case, the law holds that there is no intention of the deceased, who has died intestate, to guide or influence the succession to his property, and on that ground his succession falls under general principles. There can be no such thing as a special case of intention in a case of intestate succession; such an idea seems a contradiction in terms. If the party wished any special rule to be adopted as to the succession of his affairs, it was his business, and within his power, to have expressed such an intention. Nay, the law holds that if he had entertained any such special intention he would have expressed it; and upon the assumption, therefore, that the deceased had no special intentions whatever, the law proceeds to distribute his affairs, and to regulate his succession upon rules and principles which have no sort of reference to his views or wishes; besides any attempt

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to decide questions occurring in intestate succession, by speculations as to the deceased's views and wishes, is to be deprecated.[1]

Respondents.—From the whole tenor of the bond of provision by the first Lord Macdonald, and the trust deed executed by him of the same date, 24th September 1794, and bearing reference to each other, it appears that the granter not only declared his intention, but expressed this in the most clear and explicit terms that could have been made use of, to make the provision of 30,000*l.* in favour of his four younger sons a burden upon the family estates of Macdonald and Strath.

In the personal bond of provision, the words of the granter are, "I do therefore hereby, with and under "the provisions and conditions after specified, and over "and above the other provisions settled upon my "younger sons, out of my separate estate and effects, "by a deed of this date, bind and oblige myself, and "my heirs succeeding to me in my lands and estate of "Macdonald, Strath, and others," &c. to content and pay 7,500*l.* sterling, to each of his four younger sons, and that at the first term of Whitsunday or Martinmas next and immediately following his death, with a fifth part of penalty and interest. This was the usual and appropriate style of a personal bond of provision, and was agreeably to the reservation in the entail. The term of payment came to be Martinmas 1795, and as

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[1] Erskine, B. 3. T. 9. Sec. 48; Sandford on Heritable Succession, vol. ii. p. 49; Russel v. Russel, 23 Jan. 1745 (5211); Denham v. Denham, 8 March 1765 (5244); Mullo v. Mullos, 20 Dec. 1758 (5228); Campbell v. Campbells, 14 Jan. 1747 (5213); Sandford on Heritable Succession, vol. ii. p. 241; Russel v. Dall, Sandford on Heritable Succession, vol. ii. p. 244; Duric, 7 March 1629; Falconer, (Dict. 12, 487.)

the principal sums bore interest from that time, they then became vested interests in the four younger sons, and at their disposal, although all of them were then in minority. So in case of the death of any one or more of them intestate, after the term of payment, their provisions would have fallen by law to their surviving brothers and sisters, as their nearest in kin. But to prevent this legal consequence, the bond of provision contained the following declaration:—"That in the "event of the decease of any of my said sons as said is, "before marriage or majority, the provision hereby "made in his or their favour, shall accresce and belong "to Alexander Wentworth Macdonald, my eldest son "or other heir succeeding to me in my lands and estate "of Macdonald;" which declaration confirms the intention of the granter to have been, that as the heirs in the family estates were to be liable for the provisions to the younger sons, on attaining to majority or marriage, so these heirs were to be relieved or reimbursed of that provision in case of the failure of any of the sons before either of these events: and again, the bond of provision "revokes all former provisions made by me "in favour of my younger children out of my said "estates of Macdonald and Strath," but without prejudice to the other provisions settled upon them, out of my separate estate and effects, by a deed of this date. These expressions explicitly declare the provisions to have been made payable out of the estates of Macdonald and Strath.

The trust deed of the same date proves the same intention. It conveys to the trustees all lands and heritages, "other than the estates of Macdonald and "Strath;" and it declares that the provisions to the

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younger sons under that trust deed, "are over and "above certain provisions settled upon them out of my "separate estates of Macdonald and Strath:" and the trust deed declares, that in case any of them should die without issue, their shares of the trust funds shall accresce to the whole surviving children. This shows the marked distinction drawn betwixt these general trust funds and the provisions payable out of the estates of Macdonald and Strath, which in the like event were to revert to the heir in possession of these estates.

The late Alexander Wentworth Lord Macdonald was not the proper or primary debtor, in regard to the balance due under the bond of provision in question. The heirs who have succeeded to the estates of Macdonald and Strath, and who for the time have enjoyed these estates, are the proper and primary debtors, by whom the balance due to the respondents under this bond of provision must be paid.

The late Alexander Wentworth Lord Macdonald was not the personal debtor for the sums payable by the bond of provision; it was not a debt contracted by himself, and for which his representatives could alone be made liable. On the contrary, he was responsible for the payment of this debt, merely as one of the heirs who succeeded to the estates of Macdonald and Strath. The debt in question was created a burden upon the heirs succeeding to these estates; and it will be observed the obligation was not upon the first heir alone, but upon all the heirs who might succeed to these lands. It forms a burden upon, and, strictly speaking, is inseparable from the right of succession, and is thus to every practical effect, in so far as heirs are concerned, a real burden upon the property.

Where a proprietor, by his settlement, expressly appoints certain sums of money to be paid by the heirs succeeding to him in particular estates, he charges those estates with the payment of the money, as clearly, nay much more unequivocally than if he had made the sums of money real feudal burdens upon the estate in the most technical form, and at the same time had obliged his heirs and executors personally to pay the debts. The rule, in all cases, for determining by whom such debts are primarily to be paid, is the will of the testator, express or implied. When a person says that such a sum is to be paid by his heirs succeeding to such an estate, how can it be doubted that such heirs are the primary debtors against whom a claim for payment will lie?

That this is the doctrine of the law of Scotland might be established by reference to many authorities. Thus Lord Stair says, "Heirs are not convenable at "the creditor's option, as in the case of heirs and exe- "cutors; but they have the benefit of an order of dis- "cussing. Thus, first, debts, and obligements relating "to any particular lands or rights, and no other, do in "the first place affect the heirs who may succeed in "these lands or rights, before the heir-general. So an "obligement obliging the defunct's heirs of line or "tailzie, so soon as they should come to his estate, was "found to affect the heir of tailzie who came to that "estate, without discussing the heir of line; Hope (de "hæredibus), Lyon contra Scott. So an obligement "obliging a debtor, and his heirs male succeeding in "such an estate (which was provided to heirs male), "and all other heirs and successors, was found to burden "the heirs male before the heir of line or executors;

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" July 22, 1662, Anderson contra Wauchop. So like-
" wise an obligement to infeft a party in an annual rent
" out of lands designed, was found to affect the heirs of
" provision of these lands, without discussing the heir of
" line; Edmonstone contra Edmonstone. This was
" also the opinion of the Lords, though there was no
" decision in it; 19th February 1611, Blair contra
" Fairly: and in these cases the heir of tailzie or pro-
" vision will have no relief against the heir of line, or
" other nearer heirs of blood, who otherwise, and also
" executors, must be discussed before heirs of provision
" or tailzie."

And again, Lord Stair says, " There is likewise a
" petitory action founded upon the mutual obligations
" of heirs and executors for relief of the moveable debts
" whereby the heir is distressed, and of the heritable
" debts whereby the executor is distressed; for creditors
" have action against either or both of them, for any
" debt of the defunct. But creditors have not the same
" access against heirs of line, male, tailzie, and provi-
" sion, there being an order of discussion among them,
" that the posterior heir cannot be distressed till the
" heirs prior in order be discussed, unless the defunct
" have burdened one special heir only."

To the same purpose Mr. Erskine says, " Though
" proper heirs are all at last liable universally for the
" debts of their ancestor, yet they must be sued in a
" certain order. Some heirs are liable in the first place,
" and others not till those who are primarily liable have
" been discussed. Thus in the case of obligations rela-
" tive to a particular subject, the heir who succeeds in
" that subject may be sued without discussing any other
" heir; for whoever succeeds in a right must be the

" proper debtor, in any burden chargeable upon that " right. Thus also in debts which the debtor's heir " male is burdened with the creditors may sue such heir " without taking notice of the heir at law; nay, he can- " not insist against the heir at law till the special heir " be first discussed; 18th February 1663, Blair v. An- " derson."

Mr. Erskine lays it down as a clear proposition, that " the conveyance of a debt affecting an entailed estate; " in favour of the heir of entail and his heirs what- " soever, does not import a perpetual extinction of the " debt. The debt is indeed dormant during the life " of the disponee; but if the heir at law and the heir " of entail happen, at any time after, to be different " persons, the ground of the extinction, or rather of " the suspension, ceaseth, and consequently the debt " will revive in the person of the heir at law against " the heir of entail; for it is considered as a separate " estate, in the absolute power of the heir who pur- " chased it, and affectable by his creditors. Nay, though " the deed assigning the debt to the heir of entail should " also contain a discharge of it in his favour as having " made the payment, the discharge hath not the effect " of extinguishing it confusione, seeing that part of the " deed which assigns it is a sufficient indication that it " should still continue to subsist in his person."

The second Lord Macdonald, upon succeeding to the lands of Macdonald and Strath, became clearly liable to this burden. So far as the late Lord Macdonald left any part of this burden undischarged, he must be held to have indicated his intention that the future heirs succeeding to the estates of Macdonald and Strath should continue burdened, as he himself was, in terms of the

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bond of provision. If the first Lord Macdonald had executed a deed of entail of his lands of Strath, or a new deed of entail of the barony of Macdonald, and had therein expressly bound his heirs of entail to pay the sums in question, surely there can be no doubt that these sums, so far as undischarged at the death of the first heir, would have been a burden upon the present Lord Macdonald and all the succeeding heirs of entail: and it makes no difference whether the burden was created by a deed of entail or by any other deed, provided the proprietor of the lands and the granter of the deed has indicated his intention of making a certain class of heirs primarily liable for the debt or obligation in question.

This is the rule by which all questions of this kind must be determined. A personal obligation is, no doubt, primâ facie binding upon executors, and is payable out of the personal estate. But the granter of the deed may, if he pleases, declare and appoint that this personal obligation shall affect his heirs male or his heirs of line, or his heirs succeeding to him in particular estates; and his declared will, in regard to this matter, will ascertain which class of his heirs or representatives shall be primarily liable for the fulfilment of this obligation. The will or presumed will of the proprietor is the rule by which all questions of relief between heirs and executors must be ultimately determined. The rule of giving effect in questions of relief to the presumed or express will of the deceased proprietor has been long recognised in England; and there are many cases in which it has been ruled in the Courts of that country that the personal estate may be exempted from liability for personal debts, without any express words, provided there be

"plain intention," and "necessary implication," or "declaration plain," sufficient to convince the judge that such was the meaning of the testator. In the late case of Bootle v. Blundell [1], the Lord Chancellor has entered fully into the discussion of this doctrine. In all such cases, the principle, both in this country and in England, is, that the primary fund, or what is presumed to be so, must exonerate the auxiliary. In general, such questions must be determined upon presumptions as to the intention of the granter of the deed. In the present case all doubt as to this matter is removed, the granter having expressly declared that the debts in question should affect his heirs succeeding to him in particular estates. That this is a personal obligation can be of no importance in a question inter hæredes, because in such questions the point is not what is the nature of the debt abstractly considered, whether heritable or moveable, but upon whom has it been thrown, in the first instance, by the testator or granter of the deed? Who, in short, are the primary debtors under the deed?

It can never for a moment be doubted that a direct action lies at the instance of the younger children of the first Lord Macdonald against the present Lord Macdonald, as the heir succeeding to the estates of Macdonald and Strath, for the payment of the sums due upon the bond of provision. This was no proper or personal debt of the late Lord Macdonald. It was due by him merely as one of the heirs succeeding to these estates; but, as already mentioned, he was entitled to keep it up against the future heirs, by paying it upon assignation. He has done the same thing by allowing

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[1] 10 Ves. 494.

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the debt to remain a burden upon the heir succeeding to the estates, of which burden no discharge has ever been granted, and thus leaving the obligation as it stood at the death of the first Lord Macdonald. The question now at issue is purely a question of relief. The point is, whether the present Lord Macdonald, as succeeding to the lands of Macdonald and Strath, being indubitably and primarily liable for the balance due upon the bond of provision, be entitled to claim relief from the separate funds and estate of the last Lord Macdonald? How such a claim of relief can be made by the heir who is by the deed itself declared to be primarily liable, it is not easy to understand.

It has been said, indeed, that the first Lord Macdonald bound himself, and his heirs succeeding to the estates of Macdonald and Strath, to pay the sums in question; and it has been suggested, that the present Lord Macdonald is not one of the heirs of the first Lord Macdonald, but only an heir succeeding to the second Lord Macdonald. It need scarcely be observed, that this is a mere play upon words; and that, in legal phraseology, the present Lord is the heir of the first Lord Macdonald, in the estates of Macdonald and Strath, as much as the second Lord. But suppose it were correct that the present Lord Macdonald were to be held merely the heir of the late Lord in the estates of Macdonald and Strath, how would this vary the question at issue? The last Lord was liable for the sums in question, not as personal debts contracted by himself, but solely as burdens consequent upon his taking up the succession to the estates of Macdonald and Strath. His right to these estates, there can be no question, was burdened with the payment of the bond of provision;

and if the present Lord shall take up these estates as heir of the last Lord, upon what principle can he claim them free of the burden under which they were held, and under which they have been transmitted by the late Lord ?[1]

LORD BROUGHAM :— My Lords, This case relates to the execution of certain bonds, and their operation, whether on the real or personal estate. The noble and learned Lord who heard the argument in its commencement, but who was prevented by the pressure of business from hearing it throughout, entertained with myself some doubts upon the grounds of the decision in the Court below; but on a further consideration of the case those doubts have been entirely removed, and I am clear that the decision of the Court below ought to be affirmed. I think, on consideration, that it is reconcileable with the authorities; at all events, I am quite certain, that, on the principles of the law as it now exists in Scotland, the decision is well founded. I would therefore move your Lordships that the interlocutors be affirmed.

The House of Lords accordingly ordered and adjudged, "That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed."

MACDOUGALL and BAINBRIDGE — SPOTTISWOODE and ROBERTSON,—Solicitors.

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[1] 3 Stair, 5, 17; 3 Ersk. 4, 52. and 4, 27; Blair v. Anderson, 18 Feb. 1663 (3,571); Kerr v. Turnbull, 15 Feb. 1758 (15,551); Gordon v. Sutherland, 29 Jan. 1731 (11,534); Temple v. Gairns, 22 Feb. 1706 (15,355); Crawford v. Hotchkis, 11 March 1809 (Fac. Coll. xv. 258, No. 88.); Rose v. Rose, 2 April 1787 (Fac. Coll. ix. App. 17.); Bootle v. Blundell, 19 Ves. 494; Gordon v. Maitland, 1 Dec. 1757 (10,050).