instances of omissions being supplied for the purpose of completing the obvious meaning of a sentence. A very small addition only would be requisite in this case, supposing the word "substitutes" is taken to be synonymous with "heirs." If it is not, nothing would be required to be added to give the sentence an intelligible meaning and a grammatical construction.

I agree with my noble and learned friend on the woolsack that the Lord Ordinary was correct in his opinion, that the alterations were not fatal to the deed, and that the interlocutor of the Court of Session, finding that the irritant clause of the deed of tailzie is vitiated and erased *in essentialibus*, is wrong, and ought to be reversed. I ought to mention, that my noble and learned friend LORD BROUGHAM, at the close of the argument, did not appear to concur in the opinions which have been expressed by my noble and learned friend and myself. I have not had an opportunity of ascertaining what his final opinion is, and therefore am unable to state it.

With respect to the expenses of the reclaiming note, I entirely agree with the view of my noble and learned friend.

Interlocutor of Inner House reversed, and that of Lord Ordinary affirmed.

For Appellant, Holmes, Anton, Turnbull, and Sharkey, Solicitors, Westminster. — *For Respondent*, Deans and Stein, Solicitors, Westminster.

FEBRUARY 15, 1864.

THOMSON PAUL, W.S., *Appellant, v.* MAJOR GENERAL PHILIP ANSTRUTHER, *Respondent.*

Apportionment Act, 4 and 5 Will. IV. c. 23—Heir of Entail—Widow's Jointure—Time of Payment—*A., the widow of a preceding heir of entail, had a jointure secured on the entailed estate, payable in January and July. R., the next heir, also gave a jointure to his widow, payable at Whitsunday and Martinmas after his decease. R. died on 26th February.*

HELD (affirming judgment), 1. *That R.'s representative was not entitled to demand a proportional part from the next heir of the payment made by R. to A. on the January preceding R.'s death.* 2. *That the half year's jointure payable to R.'s widow at Martinmas following R.'s death was a burden on, and liable to be deducted from, the proportion of the rents due to R.'s representative for the period preceding 26th February.*[1]

The late Robert Anstruther, heir of entail of the estate of Caiplie and Thirdpart, in the county of Fife, who died on 26th February 1856, was succeeded in the entailed estate by the defender. In 1844 the life interest of Robert Anstruther in the estate had been sold, in a ranking and sale, to James Stevenson, commission agent in Edinburgh, who thereafter conveyed it to Mr. Thomson Paul, W.S., who again, in 1858, after Mr. Robert Anstruther's death, conveyed to the pursuer all his claims, which remained undischarged out of the rents of the estate.

The rents were, under the leases, postponed; and the rents for crop 1856 (from Martinmas 1855 to Martinmas 1856) were not paid till 1857, when they were drawn by the defender.

This action was raised by the pursuer (the appellant) for payment of that proportion of the crop 1856, which corresponded to the period between Martinmas 1855 and 26th February 1856, when Robert Anstruther died; and to which, under the Apportionment Act, 4 and 5 Will. IV. c. 23, the pursuer was entitled as in right of Robert Anstruther.

Under the settlements of the estate, Sir Alexander Anstruther, the father of Robert Anstruther, who died on 31st July of a year not stated on the record, had provided his widow, Lady Anstruther, with a jointure of £1000 per annum. This annuity had been paid thereafter half yearly in advance, on or about 31st January and 31st July of each year; and on the 2d February 1856, Mr. Paul had paid Lady Anstruther £500 (less income tax) for the half year from 31st January 1856 to 31st July 1856.

The pursuer now insisted, that the defender should pay him the sum of £420 15*s.* 4*d.*, as the proportion of the £500 corresponding to the period from 26th February 1856 to 31st July 1856, during which time the defender had been in possession of the estate, the interest of Mr. Paul in the estate having ceased on the death of Robert Anstruther.

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[1] See previous reports 1 Macph. 14: 35 Sc. Jur. 19. S. C. 2 Macph. H. L. 1: 36 Sc. Jur. 323.

The pursuer made the following averment as to Lady Anstruther's annuity:—"COND. 7. Under the settlements of the said estate executed by Sir Alexander Anstruther, Knight, then proprietor thereof, the said Dame Sarah Anstruther was secured in a jointure or annuity of £1000 sterling, payable half yearly in advance, upon the 31st January and 31st July. By the charter of sale before mentioned, the lands were granted under express burden of this annuity, and it has been invariably paid in advance at Candlemas and Lammas yearly."

Robert Anstruther also provided his widow in a jointure out of the lands. Her first half year's annuity was paid by the defender at Whitsunday 1856. The terms of the obligation in the bond of provision were:—"Therefore I hereby bind and oblige me, my heirs, executors, and successors whatsoever, to content, pay, and deliver to the said Mrs. Louisa Elphinstone or Anstruther, my wife, a free annuity of £700 sterling yearly during all the days of her life after my decease in case she shall survive me, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after my decease."

The Court of Session decided in the terms stated in the reasons of appeal.

The pursuer appealed—(1) against the interlocutor of the Lord Ordinary of 3d February 1860, except as regarded the first five findings thereof, and excepting in so far as it found the appellant entitled under the first conclusion of the summons to payment of the sum of £437 7*s.* 11*d.*, with legal interest from the term of Whitsunday 1857. (2) Against the interlocutor of the Second Division, dated 14th November 1862, in so far as it adhered to the Lord Ordinary's interlocutor, except as regarded the first five findings thereof, and in so far as it found, that the sum due by the respondent to the appellant as at Whitsunday 1857, amounted to only £575 2*s.* 4*d.*, and in so far as it disallowed the claims and pleas of the appellant as set forth in Mr. Smith's report, and in so far as it did not find the appellant entitled to expenses.

The questions thus involved in the appeal were—(1) Whether the respondent was entitled to deduct from the proportion of the rent current at the time of Robert Anstruther's death, to which the appellant had right, any portion of the jointure settled by Robert Anstruther on his widow? The Court below had found, that the respondent was so entitled. 2. Whether the appellant was entitled to payment from the respondent of the proportion of the half year's jointure to Lady Anstruther, paid by the appellant on 31st January 1856, corresponding to the period between 26th February 1856, when Robert Anstruther died, and 31st July 1856, when the next half year's annuity became payable? The Court below found, that the appellant was not so entitled. 3. Whether the appellant ought not to have been found entitled to expenses? The Court found neither party entitled.

The appellant submitted, in his *printed case*, that the interlocutors, in so far as appealed against, should be reversed for the following reasons:—1. Because the jointure of the widow of an heir of entail is a burden upon the heirs of entail succeeding to the estate, and no proportion of Mrs. Robert Anstruther's jointure was payable by the appellant, as in right of Robert Anstruther, her husband, by whom the jointure was provided. 2. Because so much of the half year's jointure or annuity, advanced by the appellant to Lady Anstruther on 31st January 1856, as corresponded with the period from 26th February 1856 to 31st July 1856, was a proper burden on the respondent as heir in possession of the estates, and in receipt of the rents during that period, and the respondent was liable to relieve the appellant of the said jointure to that extent. 3. Because it was irregular and incompetent for the Court, in the state of the record, to sustain the respondent's claim for a proportion of Mrs. Anstruther's jointure of £425, and to repel the claim of the appellant for a proportion of the jointure of £1000 of Lady Anstruther. 4. Because in any event the Court ought to have found the appellant entitled to the expenses of the action.

The respondent in his *printed case* supported the interlocutors of the Court below, for the following reasons:—1. The half year's annuity paid to Lady Anstruther by the appellant was a burden on the right he acquired to the estate of Caiple and Thirdpart; in paying the same he paid only what was legally due by himself as the proper debtor therein, and he is not entitled to repetition from the respondent of any part of the sum so paid. 2. The annuity to Mrs. Robert Anstruther is a burden and charge on the rents of the estate, and the respondent, in accounting to the appellant for his share of the rents for the year from Martinmas 1855 to Martinmas 1856, is entitled to deduct the proportion effeiring thereto of the annuity paid by him to Mrs. Anstruther for that year.

Rolt Q.C., and *Anderson* Q.C., for the appellant.—1. As to the proportion of Mrs. Robert Anstruther's jointure, between 11th November 1855 and 26th February 1826. The burden imposed under Lord Aberdeen's Act is a burden thereon primarily upon the heirs of entail coming after the granter. The annuity does not begin to run during the lifetime of the granter, but is only payable at the first term after his death. It cannot be payable as for a period during coverture. Therefore it was wrong to deduct this proportion of such jointure between 11th November 1855 and 26th February 1856 out of the proportion of rents payable at Whitsunday 1856 to Robert Anstruther's representatives. The rents which fell due at Whitsunday 1856 were due for the previous half year, whereas the jointure then due was prospective, viz. due in respect of the half year succeeding. Consequently it was erroneous to deduct the apportioned jointure

from the apportioned rent due to Robert Anstruther. The effect is to make the granter of a jointure pay a portion of such jointure. 2. As to the portion of Lady Anstruther's jointure between 26th February 1856 and 31st July 1856. The payment of this jointure on 31st January was a prospective payment, in respect of the period between 31st January and 31st July. Therefore, the portion between 26th February and 31st July was a proper burden on the respondent, the heir in possession. Instead of so holding, the Court below has held the whole payment made on 31st January as a proper debt of Robert Anstruther, the heir then in possession. The reason why the heir in possession pays a jointure is not because he is personally liable, but because the jointure is a *debitum fundi*, and he pays it merely as representing the land—Ersk. ii. 9, 43; Stair, iv. 35, 24. It follows, that if the jointure of Lady Anstruther was a *debitum fundi*, each term's payment of the jointure was payable out of the rents of the same term. The rule is made simply by treating the land as the debtor. As the jointure is due in respect of the term next following, it follows, that the rents of that term only must bear the burden—Erskine, ii. 9, 67. 3. It was inconsistent in the Court below to make the appellant bear the proportion of Mrs. Anstruther's jointure between 11th November and 26th February 1856, and also to bear the whole payment of Lady Anstruther's jointure between 26th February and 31st July 1856. At first the respondent in his answers judicially admitted the point as to Lady Anstruther's jointure, yet in his revised answers he changed that ground of defence. To introduce a new ground of defence in this way without an addition regularly made to the defences was contrary to the Judicature Act 6 Geo. IV. c. 120, § 10. 4. Notwithstanding the two points decided in the Court below against the appellant, he substantially succeeded; and as the action was rendered necessary by the respondent's default, and his claim as to one of the points was irregularly raised, the appellant ought to have had his costs of the action.

The *Attorney General* (Palmer), and *Mure*, for the respondent, were not called upon.

LORD CHANCELLOR WESTBURY.—My Lords, this is an appeal presented from the decision of the Court of Session; but I think it is presented under circumstances which do not leave much room for doubt as to the propriety of that decision.

It is necessary to recollect, that the points which have been submitted to you relate wholly and entirely to questions arising on a jointure to which Lady Anstruther was entitled upon a particular estate; and also to a jointure to which another lady, the widow of the last proprietor, is also entitled upon that estate.

Mr. Robert Anstruther, the late proprietor, was fiar in possession of the estate in question. All his interest, by virtue of a judicial sale, became vested in the appellant. Mr. Robert Anstruther's estate was subject, in the first place, to a jointure of £1000 a year, charged on the estate under the terms of an antecedent settlement in favour of Lady Anstruther, who was the widow of Sir Alexander, the proprietor who preceded Mr. Robert Anstruther. Mr. Robert Anstruther being thus seised of the estate, took advantage of the provisions of the Act of Geo. IV., commonly called Lord Aberdeen's Act, and granted a jointure to his wife, Mary Anstruther, of £700 a year, charged upon the same estate, and upon the rents and profits thereof. The jointure rentcharge that was payable to Lady Anstruther was payable on the 31st January and the 31st July; the jointure rentcharge that was payable to Mary Anstruther was payable at Martinmas and at Whitsuntide.

Now, the two questions which have been argued before your Lordships arise thus:—The present appellant, Mr. Paul, as assignee of the estate of Mr. Robert Anstruther, paid over a half year's jointure to Lady Anstruther on the 31st January. Mr. Robert Anstruther died on the 26th of February following. Payment was made on the 31st of January 1856. The fiar, whose estate Mr. Paul, the present appellant, held, died on the 26th February 1856. By the law of Scotland these jointure rentcharges, being alimentary provisions, are always payable, not, strictly speaking, in advance, but they are payable from the day on which they take effect. The appellant contends, that, inasmuch as the £500 paid to Lady Anstruther on the 31st January was paid in respect of the half year to be computed from the 31st January to the 31st July 1856, he made a payment in advance, and that he therefore exonerated the estate of the succeeding proprietor in respect of so much of the payment as is properly to be attributed to the period of time between the 26th February and the 31st July 1856, and he seeks, as it were, to be put upon the estate as a species of creditor or encumbrancer in respect of so much of the payment as, according to his contention, would belong to the period which I have mentioned, namely, the time between the 26th February and the 31st July.

I think you must all be of opinion, that there is no ground whatever for that contention. The payment that was made to Lady Anstruther on the 31st January was a payment of a demand then legally due. It was a payment which the proprietor of the estate was at that time bound to make, and there is no ground whatever for holding, that the representative of the proprietor is entitled to claim from the estate any portion of the charge affecting that estate, which charge, having become payable during the continuance of his ownership, has been paid by him in discharge of the legal liability. Upon that part of the case, therefore, I think your Lordships will not hesitate to affirm what has been done by the Court below.

The second portion of the case presented to your Lordships depends entirely upon the construction of the Apportionment Act. You must remember, and I think it is necessary that we should all remember, the state of the law prior to the introduction of that Statute. Previously to the introduction of that Statute, the beneficial ownership of an antecedent proprietor ceased altogether upon his death; and, therefore, if he died but one day before the half yearly or yearly rents became due, his estate would lose the whole proportion of rents, that would become due during the period of time that elapsed prior to his decease, between the last day of payment and his decease. To remedy that evil and inconvenience, the Apportionment Act was introduced. That has been held to apply to Scotch tenants in tail. And, therefore, there is given to the representative of the last proprietor so much only as the Statute confers upon him of the beneficial interest of his successor by virtue of the clear words of the enactment. And the question is, what that proportion is.

Now the second section is expressed at very great length; but reading it concisely, and omitting words of mere enlarged description, your Lordships I think will find, that it simply amounts to this,—that with respect to all rents reserved or rentcharges granted after the passing of this Act, by any person having a limited interest or a determinable interest, upon the determination of that interest the executors, administrators, or assigns of the person whose interest is determined shall be entitled to a proportionate part of such rents or rentcharges—all just allowances and deductions in respect of charges on such rents being first made.

Now it would operate in this manner: Suppose A to be a proprietor whose interest has determined, and B to be his successor, and suppose the estate is subject to annuities and mortgages, and that, pending the current half year or year, as it may be (I speak of the half year or year current at the time of the decease of the antecedent proprietor)—suppose that, pending the currency of that time, his successor in the estate paid an annuity, or the interest of mortgages, at the times when they legally became due, such successor is by the Act entitled to deduct out of the rents, the proportionate part of which he is to pay, the amount of all legal charges and deductions which have been paid by him. That is nothing more than what one might reasonably expect to be the rule of law. The antecedent proprietor of the estate is entitled to claim from the successor a proportionate part of the enjoyment of the estate; but he must take a proportionate part only of such enjoyment, as the successor himself would be entitled to by virtue of the settled ownership of the estate, at the time when the interest of the antecedent proprietor ceased, and his successor came to enjoy it.

Now, if that be so, the question we have next to ask is, Was Mary Anstruther's jointure a charge upon the estate, and upon the rents and profits thereof? Of that there can be no possibility of doubt. It is by virtue of the Statute expressly made a charge on the estate, and on the rent and profits thereof. Then the next point of inquiry is, Did that charge accrue and become due before the day of the payment of the rents, to the proportionate part of which the appellant seeks to be entitled? It appears, that the rentcharge—that is, the jointure—became due upon the very day on which the rents became due. And the Court of Session has held, and I think very properly held, that that charge, becoming due *simul et semel* with the rents, was a charge which the respondent was entitled to deduct, having actually paid it out of the rents which on the same day he received. The result, therefore, of this examination of the subject is, that there would be no title in the present appellant to be repaid any portion of the half year's jointure, which he paid on the 31st January, and that there would be a right on the part of the respondent to claim, that the half year's jointure, that he paid to Mary Anstruther at Whitsuntide, should be deducted out of the rents which he received at the same time. But then the appellant raises this point: he contends, that it was not competent by the rules of pleading in Scotland, as settled by the Judicature Act of that country, for the respondent to have introduced upon the record a title to those allowances which I have just been endeavouring to explain. And the matter appears to stand thus, though from some neglect or want of accuracy in the printing, it was at first somewhat difficult to understand the matter. It appears originally, that in his answer to the condescendence of the present appellant, the present respondent put in a distinct admission, that he did not deny the present appellant's title to claim a proportion of the jointure rentcharge which he paid upon the 31st January. That was the state in which the pleadings stood upon the revised condescendence. But it subsequently appears, that application was made to the Lord Ordinary for leave to alter the record in that respect. And leave was given accordingly, by an interlocutor of the Lord Ordinary which was made on the 4th March 1859, and the revised condescendence was then readjusted, and instead of the answer to the 8th article containing the admission which I have stated, the present respondent was permitted to put in a very different answer to that article, which article was also, by virtue of the same liberty, altered by the appellant, and the admission which the revised condescendence and answer contained was altered into a denial of the liability by virtue of that leave given to readjust the record. Now both parties have taken advantage of that liberty. The appellant has taken advantage of it to alter the terms of the 8th article of his condescendence. He has also taken advantage of it to alter the terms of his 7th plea in law. He has also taken advantage of it to alter the terms of

his 8th plea in law; and he has founded a legal argument in his own favour upon the fact of the altered answer to the 8th article in the condescendence introduced by the present respondent into the readjusted record. Our experience has taught us not to be surprised at what one finds in these pleadings; but if it were not for that experience, one would be surprised, that this point should be attempted to be raised, having regard to the fact, that both parties have equally availed themselves of this leave to readjust the record; and having regard above all to the fact, that, from that interlocutor giving leave so to readjust the record, the present appellant has not attempted to appeal; and having regard also to the fact, that there is not the smallest trace, that the present appellant ever raised this point or took the objection in the Court below. The Lord Ordinary directed the respondent to pay to the appellant the costs, which were modified to the sum of four guineas, in respect of the liberty so given, and yet, in the face of these circumstances, the appellant attempts to found one part of his complaint upon the circumstance of this alteration having been made in the record. I think you will agree with me, that is a most unfounded part of the appeal.

The result, therefore, is, that although upon the grounds which I have endeavoured to explain, the technical point to which I have referred is a little involved by reason of the language of the Act of Parliament, I think your Lordships will not hesitate to concur in the decision of the Court below, and to come to the conclusion, that the interlocutor appealed from ought to be affirmed, and that this appeal ought to be dismissed with costs.

LORD CRANWORTH.—My Lords, with regard to what my noble and learned friend has called the technical point, I think it is very important to observe, that, though certainly in a sense technical, if your Lordships could have listened to the argument which has been offered on the part of the appellant, it would indeed have had the effect of putting the proceedings upon these appeals into a very loose and dangerous condition; because if there be one principle connected with the Scotch appeals more sacred than another, I think it is, that all that this House has the power of looking at is the record which comes up of the interlocutors which are complained of. Now it is not pretended, that there was in the Court below any complaint of what has been done in the readjustment of the record. Perhaps if there had been, there might have been good ground to have objected in some form, in the Court of Session. And then under the provisions of the Judicature Act as to not letting the parties alter these pleadings, if the Court of Session had not listened to that objection, there might have been good ground for an appeal to this House. At present there is no such appeal. Therefore we can only look at the record as it has come up to this House, under which record the question is confined to the claim as to these two annuities. Now, with regard to the first, Lady Anstruther's annuity, the whole argument is founded upon a fallacy. It is spoken of as something payable by anticipation or in advance. That is very true. In one sense it is payable in advance, that is, the law or the contract of the parties having contemplated, that it would be necessary for the widow to have money in order to maintain herself, makes the money payable at the beginning of the period instead of at the end; it is then payable —it is then a charge upon the estate. But you would no more say, that it is a payment in advance, than you would say, that a conveyance of an estate on the 1st January is chargeable with a payment to be made on the 1st May. It is to all intents and purposes an annuity then payable. With regard to the other point in the case, I confess, that in the course of the argument I have had considerably more doubt—that is, as to the construction of the Apportionment Act. But it must be borne in mind here, first, that the claim of the executors or assignee of a deceased tenant for life is under the Apportionment Act. In any such claim he is not claiming anything that by common law is his right, but he is merely claiming the benefit of the boon which that Act of Parliament gives to him. And that Act of Parliament gives to him only an apportioned share of the rents, subject to all the deductions and charges and all just allowances.

Now here the dates are material to be attended to. This jointure was made a charge by Mr. Robert Anstruther in the year 1834. And the first question would be, supposing there had been no bankruptcy and no assignment, and Mr. Robert Anstruther being dead, this claim had been set up by his executors, would it not have been a just charge upon the rents, as against his executors, as being a charge which he himself had made and promised long before the claim of his executors had arisen, because that could only arise at the death? Just so in respect of the claim of the assignee. Long before any such claim existed on the part of Mr. Paul or the gentleman whom he represents, which only originated I think in the proceedings in the year 1838, and by the assignment in 1844, this had become a charge upon the rents, which accrued after his death.

I concur, therefore, with my noble and learned friend upon both points. I think, that the Court of Session were quite right, and that consequently this appeal ought to be dismissed.

LORD CHELMSFORD.—I agree in the opinion of my two noble and learned friends.

Interlocutors affirmed with costs.

Appellant's Agents, Hope and Mackay, W.S.; Grahames and Wardlaw, Westminster.—*Respondent's Agents*, W. Sime; Maitland and Graham, Westminster.