But I am not satisfied that there is in all cases an inconsistency between the enactment for valuing railways and the exemption which these parties claim under this statute. If, for instance, a railway was made wholly within one parish, not going into any other parish, and wholly upon land acquired from any one person, it would be exempted, and in that case I apprehend that the word "railway" in the one Act would be equivalent with the word "railway" in the other, and that the liability would rest upon the landowner; but in other cases there would be very great difficulty. The question is, whether a rule which is not generally applicable, but only partially applicable, is to be held as overturning the state of law which existed before, or whether it is only to be held as creating a difficulty in the application of it?

But in this particular case it appears to me the railway company who claim an exemption from liability have so mixed up their acquisitions of land which were exempt in their hands with lands which were not exempt—they have so complicated the matter—that it is impossible or unfair to put upon a parochial board the duty of expiscating, as they seem to be endeavouring to do, the particular parcels, which seem to be almost infinite in number, and which are placed in different positions, with reference to the tenure by which they are held. I think, therefore, that they are not in a position in this cause to plead a suspension of the charge. I do not see very well how the matter is to work out in the end. The railway is to be liable to the assessment. Well, is the landowner to be liable as he was before the Act of 1845? Is he to bear a certain proportion of the assessment for land which is not in his possession? Can that legislation have altered a clause which was a clause of total exemption, imposing a burden upon another person, into a clause of relief of some kind? Is the railway company now to have relief against the landowner for something, and if so, for what? I see great difficulty in all that, but in this case I concur in the judgment. I think that, in the state of things into which the railway company have brought the matter, they are not in a position in which they are entitled to the right of exemption. I shall give what aid I can in framing the terms of the findings.

Appeal sustained.

Agents for Appellant—Morton, Whitehead, & Greig, W.S., and Connell & Hope, Westminster.
Agents for Respondents—John Galletly, S.S.C., and William Robertson, Westminster.

Monday, May 9.

HAY NEWTON & OTHERS *v.* HAY NEWTON.

(*Ante*, vol. iv, p. 192.)

Entail—Deathbed—Bond of Annuity—Bond of Provision—Deed of Locality—Faculty—Reduction—Reserved power—Terce. An entail contained the usual fettering clauses, but allowed a deed of locality in lieu of the wife's terce and bonds of provision for children. *Held* (affirming decision of the First Division) that a deed of locality and a bond of provision executed in terms of the entail were reducible as made *ex capite lecti;* that a bond of annuity in favour of the wife was struck at by the clauses of an entail executed subsequent to it in 1861; and that the power in the entail to grant deeds of locality was not a faculty.

These were three appeals from the judgment of the First Division of the Court of Session, arising out of the construction of the entails of the estate of Newton and bonds of provision granted by the late John Stuart Hay Newton of Newton, the father of the respondent and pursuer, who is the heir of entail in possession. The late Mr Stuart Hay Newton died in 1863, and when on his deathbed he executed a deed of locality binding his heirs to infeft his wife Mrs Hay Newton in liferent during all the days of her life in certain locality lands specified in the deed, and a bond of provision in favour of his younger children for £4000. In 1860 he had executed a bond of provision and annuity in favour of his wife for £500 a-year, purporting to do so under the powers of the Aberdeen Act. And in 1861 he had executed a new entail in accordance with the conditions on which the disentail had been consented, which contained the same clauses as to provisions to wives and children, and excluded terce. The respondent, the heir of entail, raised three several actions to reduce these deeds. The first action was to reduce the deed of locality; the second to reduce the deed of provision in favour of his mother under the Aberdeen Act; the third action was to reduce the bond of provision in favour of the two younger children. As to the first action, the original entail of the estate of Newton contained a clause to this effect, "reserving and excepting always furth and from the said clauses irritant full power and liberty to me and the said heirs and members of tailzie above mentioned to grant liferent infeftments to my lady and their ladies and husbands by way of locality, allenarly in lieu of their terce and courtesie, from which they are hereby excluded, not exceeding a third part of said lands, so far as the same is free and unaffected for the time with former liferents and real debts, and after deduction of the annual rents and personal debts that do, or may, affect the same;" and there was a like exception of provisions for the younger children. The pursuer contended that this deed was executed on deathbed, and was invalid.

The widow did not dispute that the deed in question had been executed by the late Mr Newton on deathbed, but she maintained these pleas;—"(1) That the action was excluded by a bond of provision or annuity executed in her favour by the deceased Mr Newton, in terms of the Aberdeen Act in 1860; (2) the bond was binding on the pursuer, and was valid and effectual, so far as regarded the lands therein described; and in so far as the deed of locality now sought to be reduced affected these lands, the pursuer's title to maintain the action was excluded; (3) the deed of locality had been executed in terms of reserved faculties in the deeds of entail, and was therefore effectual; (4) the plea of deathbed was excluded, in respect that the deed sought to be reduced was granted for onerous causes; and *separatim*, the defender was entitled to maintain the deed to the extent of her right of terce in the lands."

To meet the defence founded on the bond of annuity of 1860, the pursuer brought an action of reduction of that bond, principally on the ground that it was struck at by the prohibitions of the existing deed of entail. He contended that the bond was not delivered till within six days of the granter's death and while he was on his deathbed, and that the bond was revoked by a deed of entail

executed by the granter in 1861, which conveyed the estate to the pursuer free from any such burden; and moreover, under the Rutherfurd Act the power to grant such bonds was taken away from heirs possessing under deeds of entail executed subject to the latter Act. On the other hand, the widow contended that the pursuer was barred from maintaining his action by having approbated and taken advantage of the deeds of entail executed by his father; and further, that the bond being delivered at or about its date was now valid. In the third action, for setting aside the bond of provision in favour of the younger children, the pursuer contended that, as it was made on deathbed, he was entitled to have it reduced; while the defenders contended that the bond could not be set aside by the heir who had approbated the deed of entail giving such powers; and moreover, that the bond was exercised by virtue of a faculty, and therefore was not affected by the law of deathbed. The Lord Ordinary, and afterwards the First Division, decided in favour of the pursuer in all the three actions, holding that the deed of locality was reducible under the law of deathbed, because the heir of entail executed it *qua* owner of the estate; and that the bond of provision in favour of the wife was evacuated by the execution of the entail of 1861; and lastly, that the provision to younger children was also reducible by the respondent for a similar reason to that which affected the deed of locality. The two separate classes of defenders appealed against the decisions, and the appeals were argued in March last, when judgment was reserved.

SIR ROUNDELL PALMER, Q.C., and ANDERSON, Q.C., for them.

LORD-ADVOCATE and DEAN-OF-FACULTY in answer.

At advising—

LORD CHANCELLOR—My Lords, in this case there are several appeals, arising in three different actions, the subject matter of the several appeals being this—Mr Hay Newton, deceased, was an heir of entail of an entail which had been substituted under the Rutherfurd Act for a certain other tailzie which had existed since the year 1724, by which the lands in question in entail came to Mr Hay Newton. Mr Hay Newton, before the Rutherfurd Act, and whilst he was heir under the old deed, the bond of tailzie of 1724, executed a bond of provision in favour of the appellant, his wife, who has since married again; and by that bond of provision he secured to her an annuity of a certain amount, which bond of provision he could competently execute by virtue of the provisions of the Aberdeen Act—it was a provision to take effect after his decease. The bond which he so executed remained in his custody until very shortly before his decease, to the time indeed when another instrument was executed, upon which also a question arises in the present case. The instrument having been thus executed under the Aberdeen Act, he proceeded subsequently under the Rutherfurd Act to make a new arrangement, if I may so term it, of the tailzie, with the concurrence of those who, under the Rutherfurd Act, are directed to concur, namely, the other succeeding heirs of tailzie; and by the new entail there was reserved a power, and by locality, and by that alone, of making provision for the widow to a certain extent; and there was also reserved a power of making provision for the children of the marriage.

This being so, he executed an instrument which is confessedly an instrument on deathbed, by which he made provision by way of locality for his widow. And he executed also a certain instrument of provision for the children. As regards the provision made for the children, a single question arises upon it, which is, whether or not the instrument which he executed is to be exempted from the operation of the law of deathbed in consequence of its being executed by virtue of a faculty and not by virtue of the interest of Mr Hay Newton in the estate? The question as regards his widow goes further than that, because, as regards the widow, the question is raised (as by the children) of its being a deed of locality exempted from the law of deathbed in consequence of its being executed by way of faculty, not by way of interest in the estate. And further than that, she says that the Act was not to the prejudice of the heir; and she relies upon two grounds, namely, first, that the deed of locality being a substitute for the bond of provision, was founded upon onerous conditions and considerations. And further, she says that she is entitled to the right of terce in certain lands, part of the lands in question, which again would have the effect of giving a validity to the deathbed provision, which otherwise confessedly it could not have. I say confessedly, subject of course to the previous question, whether or not he executed it by virtue of the faculty.

This being so, the decisions of the Court in Scotland have been adverse to Mrs Hay Newton, and they have been adverse also to the children. They have been adverse to the children upon the one single point which I have referred to; but they have been adverse to Mrs Hay Newton on all the points she raised in the discussion. The question now before your Lordships is, Whether or not that decision of the Lord Ordinary and the subsequent decision of the Court of Session, should or should not stand?

Now, under the original tailzie of 1724, I believe there has been no dispute or question before us as to the validity of the bond of provision *per se* under the Aberdeen Act, supposing that instrument to be a still existing instrument,—supposing it to have been delivered originally, and having been delivered, to have remained uncancelled and unaffected by anything that subsequently took place. There is a question no doubt as to whether or not the instrument were ever duly delivered, inasmuch as it is said that after its execution, when it was duly attested, it remained in the custody of Mr Hay Newton, and was never in a literal sense handed over to the widow. But shortly before his death, after the execution of the deathbed provision, he sent the bond by his agent Mr Dalgleish to Mrs Newton; or rather Mr Dalgleish himself subsequently sent the bond to her, with a letter in these terms—"As I understand that Mr Newton wishes that you should see the former bond of provision and annuity in your favour, which is now superseded by the deed of locality which I sent you to-day, the form of providing for the annuity has been altered, in consequence of the new deed of entail having been granted subsequent to the Rutherfurd Act having been passed, which provides that the Aberdeen Act shall be inapplicable to such deeds of entail," and he sends the bond accordingly. It is only in that mode that the bond was ever handed over to Mrs Newton. Now, as regards the question of delivery, it has not appeared to me very material whether it is considered that the deed was delivered or not, if it was revoked. Being an

instrument to take effect after death, by the law of Scotland the instrument was revocable, and the question is, Whether or not in effect the testator had revoked the instrument? I consider it right to deal with this bond in the first instance, as it is the first instrument in point of date upon which any question arises, and the mode in which it has to be dealt with has, of course, some effect upon the consideration of the subsequent instrument of locality.

Now, with regard to this instrument, it not only was kept by Mr Hay Newton in his own possession, and was never parted with until it was handed over by Mr Dalgleish in the mode I have just described, with a letter saying that it had been superseded, but the conduct of Mr Newton has been considered by the learned Judges in Scotland, and I think justly so considered, to have operated distinctly as a revocation (it being within his power to revoke it) of this bond of provision. Because what took place was this,—In order to avail yourself of the Rutherfurd Act it is necessary to specify all the obligations which exist upon the estate at the time that the operation is performed of re-settling, and re-arranging the tailzie in compliance with the Rutherfurd Act. It is incumbent upon the party so making the re-settlement to specify all the instruments which affect it, in order that he may preserve those instruments with the consent and approbation of those whose concurrence is necessary to enable him to make the re-settlement. Of course the circumstance of what charges were or were not affecting the property would be an item of importance requiring consideration on the part of all those who are asked to acquiesce in the re-arrangement. Accordingly, a statement was made by him on oath, which seems to have been required in consequence of there being some infants concerned in the consent given to the arrangement, and the intervention of the Court being necessary in that respect. He made an affidavit, in which he distinctly stated that there was no bond of provision, and that there were no instruments whatsoever affecting the estate other than some which he there referred to, but distinctly omitting the mention of any instrument of this description. That declaration was made by him distinctly, advisedly, and solemnly, and it is wholly inconsistent with any intent on his part that this instrument should remain as one having any effect.

In this view I concur entirely with the judgment which has been pronounced in the Court below by Lord Curriehill, which was the unanimous decision, I believe, of all the Judges. In that decision he makes these observations:—"That provision would have been effectual in virtue of the provisions in the Aberdeen Act if the granter had continued to hold the estate exclusively on the title upon which it was possessed by him at the date of that bond, and if, moreover, he had never revoked or innovated that provision. But that bond contained merely a *mortis causa* provision, which the granter could render ineffectual at any time, by destroying it, by revoking it, or by otherwise indicating his intention that it should be inoperative. And in my opinion he did do so, by granting the deed of 17th July 1861, and by the proceedings under which he obtained authority to grant it. Although the restrictions which were imposed upon the owner's right by the original entails of 1724 and 1842 were continued by the deed of 1861, and some other restrictions were added, yet it was expressly declared by that deed that the granter himself, and his heirs of tailzie, should thenceforth enjoy, bruick and possess the said lands, barony, and others, by virtue of this present tailzie and infeftments, rights and conveyances to follow hereupon, and by no other right or title whatsomever." He refers also to an affidavit which had been made, and he says, that the affidavit "is dated the 4th of June 1863, and it sets forth that Mr Newton appeared, and being solemnly sworn and interrogated, deponed, *inter alia*, there are no provisions to husbands, widows or children affecting, or that may be made to affect, the fee of the said entailed lands or others, and the heirs of entail."

It appears to me, therefore, that in that state of circumstances, Mr Hay Newton having the power of declaring the bond to be at an end, and having made that solemn declaration that no such bond existed, must be taken to have exercised that power of control which he had over the instrument, and in that respect to have destroyed the instrument he had so executed. No doubt, at the time he did so, he was contemplating the executing of a deed of locality. It is an unfortunate circumstance, as regards the lady, that that deed was not executed until it was too late, but he probably contemplated, by executing that deed of locality, to make the same provisions which he had made by the bond. And he therefore probably thought himself justified in revoking the former instrument; and he thought himself justified in saying solemnly upon oath that he had handed over the estate free from any instrument or provision whatsoever, reserving to himself, as he did, the right of making the provision he desired for his widow by a deed of locality, such as he afterwards attempted to execute.

Then that being so as regards the bond of provision, the first question that arises as regards the children and the widow is,—as to the deed of locality providing for the widow, and the deed making provision for the children,—whether they can be maintained although executed on deathbed, on the ground that they were executed by virtue of a power reserved to Mr Newton under the entail, and not by virtue of an authority which he himself held and possessed as the owner of the estate in tail.

Now, the learned Judges have pronounced their opinion in the Court below, which seems founded on accurate reasoning, although that reasoning may be somewhat refined, as it always is in all these questions of feudal-holding. The reasoning proceeds upon grounds analogous to those upon which the English courts have acted, at times with great refinement also, namely, the distinction between power and property. The question is simply this—A deed of tailzie being executed, and fetters being created and imposed upon all those who come under the entail by virtue of the provision of tailzie, with reference to dealing with and alienating the estate—looking to the instrument to see in what respects the power, which as fiars they would otherwise have had over the property, is thereby fettered and restricted—you find that they are fettered and restricted in regard to a variety of charges and burdens, which it is impossible for them, in consequence of the restrictions created in the deed, to give. That being so, certain descriptions of burden—amongst others, this right of burdening the estate on behalf of the widow and children—is reserved; in other words, it is not fettered. The fiar has all the rights incident to

complete ownership of the estate, except so far as they are fettered and restricted. Whatever you do not find fettered and restricted is a part of the original right which, not being fettered or restricted, may be exercised. And accordingly, if you say (and our law allowed such a provision), I hand over this estate to such a person, with full and ample authority to do such and such acts, but with complete restriction and obligation on the other hand against the doing of other acts, all that you leave him the power to execute is that part of the ownership which you have not restricted, and is not a part of any new estate, or interest, or power or authority which you can create, or added as a new power or authority to the interest with which you invest him. For instance, if you give him an estate for life, and you give him besides the power of burdening the inheritance with charges for his wife and children, you have then created a life interest, and you have superadded to the life interest a power; but if you give him the entire interest, as is done in this instrument of tailzie, restricted only in certain particulars, then in every particular in which you have not restricted it the entire interest remains. My Lords, it appears to me to be perfectly plain, following as an inevitable logical consequence, that this gentleman, in whatever capacity you look upon him, is not taking a power superadded to any limited interest which exists, but is taking a large and disposing interest over the whole property, limited only in certain respects, and in every other respect, where not so limited, existing as the full power and authority which every landowner has the right to exercise.

Now in that state of things the heir has a right to complain of what has been here done. The heir cannot complain of any exercise of a faculty which has been granted to another person in addition to another lesser state which has been granted to him, because he is not the heir of the person who is executing the instrument, he is the heir of the person who created the life interest, but he is not the heir of the person who has the life interest to which the power has been superadded. But here Mr Hay Newton, exercising that authority which remained in him unfettered and unrestricted, has effected a disposal of the estate by an instrument executed on deathbed, which was to the prejudice of him who would succeed him as fiar under the same tailzie under which his ancestor held. In this state of circumstances, this gentleman, the heir of tailzie, who was the successful party in the Court below, had a right, as it seems to me, to quarrel with and to reduce the instrument which was executed by Mr Hay Newton upon his deathbed against the instrument of the person claiming under him as heir.

The case of *Pringle* v. *Pringle*, which has been referred to in the argument, is a very clear case; and there is only one case, that of *Forbes* v. *Forbes*, which for a moment created any doubt or difficulty in my mind on this point—the case referred to by Lord Curriehill; and to those who are better acquainted with the whole system of the administration of Scotch law than I profess to be, it will probably present itself in so clear an aspect as not to require any further notice. That case was simply this—a Mr Forbes executed an instrument upon his marriage by which he gave a liferent interest to himself and his wife, and he then reserved such an amount of interest to himself as, according to the whole purport and the effect of the deed (the subquent limitation being to the heir of the marriage), would have undoubtedly left Mr Forbes able to execute any instrument whatsoever, which, as regards third persons, would pass the estate, but he had also in that instrument covenanted that he would not execute any instrument whatever which would bind or affect the estate as against the heir; and as between himself and the heir, he was bound by that engagment. Your Lordships will find the case of *Forbes* v. *Forbes* at page 20 of the respondent's case. It is said "Lord Forbes, the father, entered into an antenuptial contract of marriage with his wife, Dorothea Dale, by which he bound and obliged himself to infeft and seize him and the said Dorothea Dale, and the longest liver of them, in liferent, for her liferent use allenarly, and the heirs male to be procreated betwixt them in fee. Farther, by this contract Lord Forbes put himself and his heirs under a limitation not to alter the order of succession, nor even to contract debt or prejudice of the heir of marriage. A reserved power is made in favour of Lord Forbes, any time in his lifetime *et etiam in articulo mortis* to make such provision for his said younger child or children as he may think fit, not exceeding £3,000. In case Lord Forbes should die without making such provision, it was declared lawful for Lady Forbes to exercise the power. Lord Forbes, nine days before his death, and when on deathbed, executed three bonds of provision in favour of his three daughters. The heir-at-law resisted payment of these bonds on the head of deathbed, and the Court of Session sustained his defence. The House of Lords reversed this judgment, and declared that the bond of provision in question having been granted in execution of a faculty reserved in the contract of marriage, the exception of deathbed did not lie either against the principal sum of £2,000, or the annual rents and interests thereof." And then it is said—"This case of *Forbes* is referred to by Erskine as supporting the doctrine that an heir who accepts a disposition qualified by a reserved faculty cannot challenge on the head of deathbed a deed executed in virtue of the faculty." But, as is justly said in the respondent's case, the argument for the younger children was that it was "an onerous stipulation and an obligation undertaken on his part for a most valuable consideration—the marriage portion advanced by Lady Forbes' father." And having made this provision by which he so bound himself as between himself and the heir, the heir having homologated the instrument, and taken the benefit of it, because by means of that instrument the fiar was prevented from burdening the estate as between himself and the heir, and if he had alienated the estate by the power which he possessed as regarded third persons of doing, he still could have been sued by the heir in respect of the value of the property; the heir having taken this advantage was not to be permitted to assert that a right which had been reserved by the very instrument conferring his right upon the heir should not be exercised in the manner in which the fiar had proposed to exercise it. I apprehend that was the true answer to that case; and that there cannot be any doubt that in this particular case the provision made by Mr Hay Newton has been made out of the full and complete ownership, which, as it appears, he possessed, and has not been made by virtue of any faculty, and is therefore to the prejudice of the heir. And being to the prejudice of the heir, it must fail to prevail, either as regards

the provision for the children or the provision for the widow.

Then it is said that the bond of provision existing made some difference with regard to the provision for the widow by the deed of locality. I think that has been sufficiently disposed of when the bond itself has been destroyed. Therefore I need not pursue the case as regards the bond. Holding the bond to have been revocable and revoked, of course it could have no influence as supporting the deed of locality.

But then a question has arisen which required a little more looking into—namely, with regard to the lady's right of terce. I think that with regard to all the lands, excepting two small properties called Long Newton and Kidlaw, the whole property was held upon instruments which fully, and completely, and directly, and by terms of the instrument, excluded the lady from terce. With reference, however, to those particular lands, they are in a somewhat peculiar position—namely this,—There was a moment, undoubtedly, in which they existed in the husband, Mr Hay Newton, unentailed. And it is upon that instant of time that the lady places her hand, and says,—Then and there my right of terce arose, and nothing could subsequently be done to affect that right of terce. But one is obliged to look at the circumstances to see in what manner this property was for a short portion of time in the possession of the husband. Now it was in this way,—All that was intended to be done was this—a disentailing took place with reference to these lands in question, accompanied by an express obligation on the part of Mr Hay Newton that the property should be re-entailed.

That obligation is expressed in a letter which is to be found in page 18 of the appellant's case, where we find that Mr John Stuart Newton "presented an application to the Court of Session for disentail of the said part of the pasture lands of Kidlaw and Longnewton, mentioned in the preceding article. Mr James Webster, S.S.C., was appointed tutor *ad litem* in that application on behalf of Francis John Stuart Hay, the second son of the petitioner, being the second consenting heir" (he was then an infant). "The disentail was carried through after the petitioner had granted Mr Webster a letter in the terms following:—*Edinburgh*, 19 *Athole Crescent*, *5th June* 1863. —To James Webster, Esq.. S.S.C. Sir,—With reference to the petition presented by me to the Court of Session on 13th March last, for approval of the instrument of disentail of those parts of the pasture lands of Kidlaw and Longnewton therein specified, and for authority to uplift the balance in the hands of the trustees, under the Newton Estate Act, 4 and 5 Vict., c. 33, also therein specified, I hereby undertake that the whole of the lands above referred to, with the exception of as much thereof as will be equal in value to £1000, being the balance of the provisions made by the late William Waring Hay Newton, Esquire of Newton, my father, conform to bond of provision executed by him on 19th November 1810, codicil thereto dated 1st August 1820, both registered" in certain ways, "shall immediately after the instrument of disentail is approved of by the Court, and recorded in the register of tailzies, be re-entailed by me on the same series of heirs which are contained in the deed of entail of the lands and barony of Newton, under the exceptions therein mentioned, which was executed by me on the 17th, and is recorded in the register of tailzies on the 30th day of July 1861."

And accordingly we find, turning again to page 29 of the respondent's case, that this instrument of disentail took effect, and then the re-entail took effect. And then what is called the narrative of the deed of entail of the 2d October 1863 is as follows:—"And whereas I am desirous and it is proper, with reference to the understanding upon which the procedure for disentailing the foresaid lands and others was carried through, to execute the disposition and deed of entail," and so on, which he proceeds to do. In other words, he was under a distinct obligation which he was competent to enter into at the time of the disentailing taking effect, to take that land with an undertaking on his part to re-settle it. Accordingly he does by an instrument, duly registered, re-settle it. I apprehend that in that interval of time it cannot be said that during the time that the land was in his hands, burdened with this undertaking and responsibility, which he could be compelled to carry into effect, and afterwards did carry into effect by an instrument executed, the land so situated became liable to the widow's terce.

That being so, the grounds alleged for supporting the deed of locality appear to me to fail, and the consequence is that the appeal must necessarily be dismissed. I do not know what your Lordships will think as to costs. I will leave it to your Lordships to say whether, considering the circumstances of the case, this case falls within the description of family suits, with respect to which we are willing in certain cases to regard the parties as being desirous of obtaining the directions of the Court. Otherwise the strict rule would apply with respect to costs.

Lord Chelmsford—My Lords, at the close of the opening argument on behalf of the appellants the learned counsel for the respondent were informed that your Lordships were of opinion that the deed of locality of the 31st October 1863 was not protected from reduction *ex capite lecti* on the ground of its being granted in the exercise of a faculty, but that, having been executed by the granter in virtue of rights and powers which he possessed as owner of the estate, it was challengeable by the heir.

It was contended for the appellants that the case of *Forbes* v. *Forbes* was a direct authority in favour of their argument that the grant of the deed of locality was made in the exercise of a faculty; and their counsel complained that Lord Curriehill, in his judgment upon this point, took no notice of that case. But the Lord Ordinary, with whom Lord Curriehill agreed, did advert to *Forbes* v. *Forbes*, and distinguished it from the present case. The ground of distinction which he drew was, that in *Forbes'* case the heir had homologated the deed, and as Erskine says in § 38 and § 98, referring to *Forbes* case in support of the doctrine, "When one in *liege poustie* makes over his estate to his heir with a reserved faculty to revoke or burden it at any time of his life, and afterwards exercises the faculty on deathbed, if the heir has done any act importing an acceptance of the deed in which the faculty was reserved he cannot challenge the exercise of it upon deathbed, for his acceptance of the disposition, with its reservations and conditions, makes him a disponee, and disponees have not the privilege of heirs, and of course have no right to bring reductions *ex capite lecti*."

This question being removed, those which remain for determination are—1st, whether the deed of locality is protected from reduction on the ground that the bond of provision in favour of the appellant Mrs Ferguson furnished an onerous consideration for it? 2d, supposing the deed of locality not to be saved from reduction on this or any other ground, whether upon the reduction of the deed of locality the bond of provision revived?

There is another totally distinct question from these as to the right of the appellant to terce upon certain lands of Kidlaw and Longnewton, which, during an interval between their being disentailed by her former husband, and afterwards re-entailed, belonged to him as owner.

None of the questions remaining for decision apply to the appeal from the interlocutor as to the bond of provision in favour of younger children, which is simply reducible *ex capite lecti*.

Upon the question of the bond of provision in favour of Mrs Ferguson furnishing an onerous consideration for the deed of locality, this of course could only be if the bond was in existence unrevoked at the time of making the deed.

The Lord Ordinary held that the bond of provision conferred a right so different in kind and in extent from that which the appellant would take under the deed of locality that it could not exclude the action for reduction of that deed. By the bond of provision the widow had a liferent over the whole of the lands; by a deed of locality she has a local interest in certain specified lands which are to yield her a rent equal to one-third of the rent of the whole lands. The heir might prefer to have the liferent extending over the whole of his lands instead of the widow having a portion of the lands themselves, and therefore he would have a right to have the locality deed reduced. But having elected to reduce the deed, the question, whether the bond of provision revives, depends upon whether it was revocable, and if so, whether it was revoked before the making of the locality deed?

The bond of provision was made on the 13th December 1860, under the Aberdeen Act, 5 Geo. IV., cap. 87, which empowers an heir of entail in possession of entailed estates to infeft and provide his wife in a liferent provision out of his entailed lands and estates by way of annuity, not exceeding one-third part of such lands and estates. The bond was never delivered, but remained in the possession of Mr Hay Newton's agent, Mr Dalgleish, until the 2d November 1863, seventeen days before Mr Hay Newton's death, when it was sent to the appellant, then Mrs Hay Newton, with the following letter from Mr Dalgleish:—"As I understand that Mr Newton wishes that you should see the former bond of provision and annuity in your favour, which is now superseded by the deed of locality which I sent you to-day, the form of providing for the annuity has been altered in consequence of the new deed of entail having been granted subsequent to the Rutherfurd Act having been passed, which provides that the Aberdeen Act shall be inapplicable to such deeds of entail."

I do not think, in order to give validity to the bond of provision, that it was necessary it should have been delivered. If nothing had been done to revoke it, and it had been found at the time of Mr Hay Newton's death in his possession or power, it would have been good and available even without the clause dispensing with its delivery. But it was in Mr Hay Newton's power to cancel or revoke the bond, and it appears to me that he revoked it before or at the time of the new entail which was made under the Rutherfurd Act, 11 and 12 Vict., cap. 33.

Part of the machinery of an entail under this Act is that the heir of entail applying to the Court of Session to disentail the estate must make an affidavit setting forth, *inter alia*, "that there are no provisions to husbands, widows or children affecting or that may be made to affect the fee of the entailed estate, or the heirs of entail, or if there are such provisions setting forth the particulars, and the Court is empowered to order such provision as may appear just to be made for such provision; and any person who shall wilfully make such affidavit falsely shall be deemed to be guilty of perjury."

Mr Hay Newton made an affidavit on the 7th June 1861, in terms of the Act, that there was no provision to widows affecting the entailed lands. It is impossible that he could have forgotten the bond of provision in favour of his wife made only six months before; and we cannot attribute to *him* that he swore what he knew to be untrue. He must, therefore, have considered that the bond was revocable at his pleasure; and he must have determined to revoke it before making the new entail.

Some stress was laid in the course of the argument upon Mr Dalgleish's letter, in which he writes—"The bond of provision is now superseded by the deed of locality," as if there had been no previous revocation of the bond.

Taking the whole of this letter together, its meaning appears to be, that as the form of annuity previously granted could not be applied to entails under the Rutherfurd Act, therefore the bond of locality had been substituted for the bond of provision. If the bond of provision had not been revoked, there would have been no occasion for the deed of locality, as the entail under the Rutherfurd Act would not have interfered with the provisions previously made for the appellant, the Court being empowered under the Act to provide for any provisions to husbands, widows, or children affecting the entailed estates or the heirs of entail. The making of the deed of locality is, to my mind, a strong proof that there was no existing provision in favour of the appellant. The bond of provision, therefore, having been revoked, it could not furnish any consideration to uphold the deed of locality, and save it from reduction. The remaining question is with respect to the appellant's right to terce on the portions of the lands of Kidlaw and Longnewton which were disentailed on the 10th September 1863, and re-entailed on the 2d October following. The lands were disentailed with the consent of the respondent and the two next heirs, under a conditional agreement that such of them as should not be required to be sold should be re-entailed, subject to the conditions and provisions of the entail of 1724, by which terce is excluded. During the interval of 22 days between the disentailing and re-entailing these lands they were held by Mr Hay Newton in fee, but they were held under a transaction with the then next heirs of entail that they should be re-entailed. It appears to me that they were never held by Mr Hay Newton as unfettered fee-simple lands, but that he was a mere conduit pipe through which they passed subject to the obligation of re-entailing them. In the deed of entail authorised by the Court it is expressly said that the entail is made "with reference to the understanding upon which the procedure for disentailing the lands was carried through."

In my opinion, therefore, the interlocutors appealed from must be affirmed; and I am afraid that there is nothing in the case requiring an exception to be made to the general rule with respect to the costs of the appeal.

LORD WESTBURY—My Lords, I have very few observations to add. I regret very much that this appeal has been presented, because the whole case was to my mind disposed of in a most satisfactory manner by the comprehensive judgment of Lord Curriehill.

The principal argument of the appellant is founded entirely upon a misconception of the word "faculty," and of the rule of law which says that a deed granted in exercise of a faculty shall not be reducible *ex capite lecti*. The word "faculty" in the enunciation of that rule means a power of disposition held by one man over the estate of another. In that case the deed is not reducible, and for this reason, that the power of reduction is limited in the Scotch law to the heir of the granter of the instrument but when the heir of the granter is in no respect prejudiced or damnified by the instrument, there is no such power of reduction. Now, the heir of the donee of a pure faculty, that is, of a power of one man to dispose of or charge the estate of another, cannot be damnified by the exercise of that power. Therefore the law has left that case of exemption to the ordinary rule of deathbed.

Now here the appellant calls this a power or faculty to grant a deed of locality. It is neither a faculty nor a power. The deed of locality, if validly granted, is granted by the right of ownership. It emanates from the fee-simple of the party and not from any express power or faculty to charge the estate belonging to another person. It is happily expressed by the Lord Ordinary that what is called power to grant deeds of locality is nothing more than a relaxation of the fetters, or rather a declaration that the fetters shall not apply to that case which leaves the gentleman who is called the donee of the power absolute fiar unfettered, so that he in respect of the ownership has that right which an absolute fiar has, namely, to grant deeds of locality.

This has been made so clear in other decisions that I regret very much there should have been such misapprehension as to lead to this expensive appeal.

But then it is said by the appellant—nay, but the heir-at-law has accepted the estate under the deed, reserving what he still calls a power. The heir-at-law accepted the estate on the terms of the entail, which were these—that the fiar, the maker of the entail, or the tenant in tail, might grant deeds of locality, but then he must grant them in conformity with the rule of law, and therefore he must grant them subject to reduction *ex capite lecti*. That is nothing more than a mode of putting the same argument again upon the ground of "faculty."

But then the appellant complains that no attention was paid to his argument in the Court below, which he repeats here in page 59 of his case in these words:—"The appellants have contended that even in the case of one who is substantially fiar and owner of the estate such reserved powers may be validly exercised on deathbed in a question with any one who is claiming and taking benefit under the deed which contains the power." The answer to that argument is just what has been already stated; The deed contains no power; and if you call this a condition of ownership, it is a condition that must be complied with in conformity with the rule of law, and the rule of law renders subject to reduction any deed—even if executed for the purpose of performing that function *ex capite lecti*. There is no exception, unless you can make out that it is a faculty granted to one man to charge the estate of another. That is not the law of the present appellant.

Then the appellants contended that the cases of *Forbes* v. *Forbes* and *Pringle* v. *Pringle* were in their favour. I will say a word upon those cases, because they have been much misapprehended. The case of *Forbes* v. *Forbes* was a case of antenuptial marriage-contract, which, being for valuable consideration, bound the heir. The heir tried to avoid it by going back to the earlier title and getting investiture under the earlier title. But the House of Lords held that the marriage-contract bound the estate and bound the heir, and that the faculty to grant bonds of provision was a faculty given to a liferenter who had nothing more than a liferent, and therefore the bond, if executed upon a power exercised by him taking effect on his deathbed, would be a power over the inheritance which was limited to another person. It was a pure faculty; and on that ground the House of Lords, setting up the contract as against the heir, set up also the faculty, and held that it was not reducible as being *ex capite lecti*.

The case of *Pringle* v. *Pringle* was not a case of a contract for valuable consideration, but it was a case of homologation. It was a case which depended upon contract, but not a contract for valuable consideration; but the House of Lords held that it was a contract which the heir had assented to, had homologated and confirmed, and therefore that he could not avoid it by resorting to an investiture on an earlier title. And on the ground of heirs' homologation and confirmation they set up the contract, and arrived at the same conclusion which had been previously arrived at in the case of *Forbes* v. *Forbes*. Neither of these cases therefore is applicable to this case unless you can displace the observation made by the Lord Ordinary and by Lord Curriehill, which is perfectly correct, that this, which is here called a "faculty," is no faculty at all—that it is nothing more than a reservation of the ordinary *jus disponendi* which is incidental to ownership, and which, if granted, is granted in respect of ownership, not in respect of a favour.

But it is said that here the widow is excluded from terce, and that if excluded from terce she gives up the terce as a consideration for the deed of locality. My Lords, that proceeds upon a misapprehension of the whole case, because the widow's exclusion from terce is absolute and unconditional. It is not made to depend on her getting another provision; but whether what is called the power, the right to grant a deed of locality, was exercised or not, or whether a bond of provision was given or not, the widow would be equally excluded from terce.

Then comes the remaining fallacy, which is, that the deed of locality was given in place of the bond of provision. The answer unfortunately (and I regret there should be such an answer) is, that the bond of provision, which was dated in the year 1860, was superseded or evacuated, in effect revoked and recalled, by the operation of the deed of entail of 1861. And the deed of locality was

not attempted to be made until the year 1863. What, therefore, is attempted to be set up as the consideration for the deed of locality, or as something on which the widow may fall back if deprived of the deed of locality, turns out to have been evacuated entirely on different grounds, and therefore cannot be prayed in aid of the inefficient and ineffectual deed of locality.

Now these things are so well explained in the very excellent judgment given by Lord Curriehill, that I should have thought that judgment would have been satisfactory to every Scotch lawyer. I regret this appeal—and I am sorry that this is a case of a widow, but I am glad to say a widow by no means destitute of a living. On the contrary, I believe she is well provided for. And as to costs, we must abide by the ordinary rule. The appeal must be dismissed, and dismissed with costs.

LORD COLONSAY.—My Lords, I have really nothing to add to the observations which have just been made by my noble and learned friend. I think the flaw in the whole case of the appellant is assuming this to be a faculty, which it is not.

Interlocutors affirmed, and appeals dismissed, with costs.

Agents for Appellants—Hunter, Blair & Cowan, W.S., and Loch & Maclaurin, Westminster.
Agents for Respondent—James Dalgleish, W.S., and William Robertson, Westminster.

SPRING CIRCUIT.

AYR.

Tuesday, April 5.

H. M. ADVOCATE *v.* M'CONNELL.

(Before Lords Justice-Clerk and Cowan.)

Indictment—Theft. A prisoner, charged under an indictment which libelled "theft," without any specification of the nature of the act, was proved to have feloniously appropriated four sheep which had been handed over to him by mistake, along with a number of others which he had been ordered to drive to his master's farm. *Opinion* of Lord Cowan, that the libel had sufficiently set forth the case proved by the evidence.

John M'Connell was charged with the crime of sheep-stealing under the following indictment, viz.:—"That albeit, by the laws of this and of every other well-governed realm, theft, particularly sheep-stealing, is a crime of an heinous nature, and severely punishable: Yet true it is and of verity, that you the said John M'Connell are guilty of the said crime, actor, or art and part: in so far as, on the 11th day of November 1869, or on one or other of the days of that month, or of October immediately preceding, from or near a field called or known by the name of 'Barlaugh Park,' forming part of the farm of Drumore, in the parish of Kirkmichael, and county of Ayr, then and now or lately occupied by Patrick Wyllie, farmer, then and now or lately residing at Drumore aforesaid, or from some other part or parts of said farm, or from some part of the farm of Barlaugh, in the parish of Maybole, and county aforesaid, to the prosecutor unknown, or at or near to the village of Dailly, in the parish of Dailly, and county aforesaid, you the said John M'Connell did, wickedly and feloniously, steal and theftuously away take four or thereby sheep, the property or in the lawful possession of the said Patrick Wyllie."

Evidence was led by the Crown to the following effect. M'Connel, who was a cattle-drover, was employed by his master to go to the farm of Barlaugh and drive from it 117 sheep, the property of his master, and which had been grazing there. He arrived at Barlaugh; and the sheep having been counted, were delivered over to him. The accused did not count the sheep at the time they were handed over to him; and it did not appear from the evidence at what time he discovered that instead of 117 sheep he had received 121. It was proved, however, that he had delivered to his master only 117 sheep, and that he had appropriated the other four to himself, and sold them.

At the conclusion of the evidence,

BUNTINE moved, on the authority of the case of *H.M. Adv.* v. *Douglas*, H. C., Jan. 23, 1865, 37 Jur. 354, that the case should be withdrawn from the Jury, on the ground that the prosecutor had not proved the species of crime which he had charged in the indictment. The prosecutor had libelled "theft" simply, while he had attempted to prove the prisoner guilty of a very peculiar kind of theft, viz., the felonious appropriation of strayed sheep, or the felonious appropriation of sheep which had been intrusted to him for a specific purpose, either by mistake or design. If the prosecutor had intended to prove that species of theft, it was his duty to have made more specific allegations in the indictment.

LORD COWAN thought that the case should go to the Jury.

LANCASTER, A.-D., argued that the crime proved against the prisoner was theft, not breach of trust, and claimed a verdict of guilty.

BUNTINE repeated his former arguments, and urged that the case of *Douglas* was a conclusive authority in his favour. In that case the prisoner was charged simply with theft of sheep, as in this case. The evidence showed that the prisoner had feloniously appropriated strayed sheep, and the Lord Justice-Clerk there remarked, that when that particular and peculiar kind of theft was intended to be charged the panel was entitled to have "the facts constituting it fully set forth" in the libel. Whatever the crime proved here was, it was not the simple kind of theft, viz., the feloniously taking the property of another out of his possession.

LORD COWAN, in his charge to the Jury, said—That, in his opinion, the case of *Douglas* was not analogous to the present case. Here by a mistake the prisoner had been given the custody of certain sheep, and he had feloniously appropriated them; and that by doing so he committed theft, and theft was properly libelled in the indictment.

The Jury found the prisoner guilty.

Agent for Defender—James Robertson, Girvan.