out and be extracted *ad interim;* reserving to both parties respectively, in the event of any material change of circumstances, or of any dispute arising as to the education of the said children, or any of them, or of any different or further regulations becoming necessary, to apply to the Court for such variation on the foresaid sums of aliment, or any of them, or upon the foresaid directions as to the custody or education of the said children respectively, or for such regulations as to access to the said children, or otherwise, as the Court may consider reasonable: Find the pursuer entitled to expenses, and remit to the Auditor to tax the accounts, and to report."

Counsel for Pursuer—Dean of Faculty (Clark), Asher, and Mackintosh. Agents—J. & R. D. Ross, W.S.

Counsel for Defender—Fraser, Scott, and Burnet. Agent—J. Galletly, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MARSHALL *v.* LORD ADVOCATE.

Inventory-Duty—5 and 6 Vict. c. 79, § 23—Marriage-contract Provisions.

In a case where a husband, by antenuptial contract of marriage, after securing a liferent of his estate to his wife, settled on his children "the fee of three-fourth parts of all and sundry lands, &c., which he shall happen to conquest, acquire, or succeed to, during the standing of this present intended marriage"; and providing "that upon the marriage or majority of each of such children one-half of the share of conquest which shall belong to such child in virtue of this provision shall then be payable or prestable to him or her, and shall be enjoyed by him or her unburdened by the said wife's liferent; and for ascertaining the extent of the said conquest it is hereby agreed that the same shall comprehend and extend to the whole estate, heritable and moveable, real and personal, belonging to the said husband at the dissolution of this present intended marriage"—*Held* that this provision to the children was not a debt due by the deceased in terms of the Act 5 and 6 Vict. c. 79, § 23.

This action was raised by the executors of the late Lord Curriehill for recovery of £230, "being the amount of inventory-duty falling to be returned or repaid to the pursuers." The marriage contract of Lord Curriehill and his wife, then Miss Bell, contained *inter alia* the following provision:—"And further, the said John Marshall binds and obliges himself and his foresaids to provide and secure to the said Margaret Tod Bell the liferent, and to the child or children who may be procreated of the present intended marriage the fee, of three-fourth parts of All and sundry lands, heritages, and sums of money, goods, gear, and other estate, heritable and moveable, real and personal, that he shall happen to conquest, acquire, or succeed to during the standing of this present intended marriage; declaring however, that the said Margaret Tod Bell shall be bound and obliged to employ the funds which she shall acquire in virtue of this provision of conquest, after the said John Marshall's death, not only in supporting herself, but also in alimenting and educating the children of this present intended marriage, until the said children shall attain the years of majority or be married; and upon the marriage or majority of each of such children, one-half of the share of conquest which shall belong to such child in virtue of this provision shall then be payable or prestable to him or her, and shall be enjoyed by him or her unburdened by the said Margaret Tod Bell's liferent; and for ascertaining the extent of the said conquest it is hereby agreed that the same shall comprehend and extend to the whole estate, heritable and moveable, real and personal, belonging to the said John Marshall at the dissolution of this present intended marriage, after deduction of the debts due by him, and the sums of £2000 and £2500 contracted to be invested by him in manner before written."

The question arose under this provision whether the three-fourths of the conquest payable to the children was a debt due by the deceased within the meaning of the Act 5 and 6 Vict., cap. 79, sec. 23.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th February* 1874.—The Lord Ordinary in Exchequer Causes having heard counsel for the parties, and considered the argument and proceedings, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, allows an account thereof to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—As the principles upon which the Lord Ordinary has proceeded in this case are the same as those upon which the case of *Moir's Trustees* was recently disposed of by him and the Court (7th January 1874, Scottish Law Reporter, vol. II., p. 157), a very brief explanation will now suffice.

"In that case, as here, the children's provisions, upon which the discussion turned, are to be found in an ante-nuptial contract of marriage. It has been maintained by the pursuers, who are claiming a return of inventory-duty in the present case, just as it was maintained by the pursuers in the case of *Moir's Trustees*, that the amount of these provisions must be held to be of the nature of a debt owing by the late Mr Marshall (Lord Curriehill) to his children, in the sense of the Revenue Statute 5 and 6 Vict., cap. 9, sec. 3, and therefore that no duty is due upon them. But here, as in the case of *Moir's Trustees*, the Lord Ordinary has been unable so to decide. He thinks, on the contrary, that the provisions referred to must be held to have had for their object not the constitution of a debt in the proper and ordinary meaning of that term, but rather the regulation of the children's rights in reference to their father's succession.

"It is quite true that in the present case, differing so far from that of *Moir's Trustees*, the rights secured to the children have relation to the means and estate of their father at the date, not of his death, but of the dissolution of his marriage; but the Lord Ordinary does not think that this is sufficient to require that the two cases should be differently decided, for he thinks it clear that in the present as in the case of *Moir's Trustees*, the amount of the provisions did not fall to be ascertained, and did not become enforcible till the father's death. In short, he thinks that in the one

case as in the other it is merely a protected succession which has been secured to the children.

"Neither does the Lord Ordinary think that the circumstance that the children's provisions in the present case extend only to a portion of the father's succession, in place of the whole of it as in the case of *Moir's Trustees*, can make the decision in the latter inapplicable as a precedent in point, for he cannot see how that circumstance can alter the principle of decision, however much it may affect the amount of the interests involved.

"The Lord Ordinary has only further to remark, that the special provision of £2500 in the marriage contract in the present case, about which there has been no dispute, and the manner in which it is constituted, serve very well to illustrate the difference between provisions constituted in the case of *Hagart* (Court of Session, 9 Macph. 358; and House of Lords, 10 Macph. 62), so as to be of the nature of debts, and therefore not liable to inventory duty, and provisions such as these here in question, which, being differently constituted, are not of the nature of debts, but of regulated succession, and are therefore liable to inventory-duty."

The pursuers reclaimed.

At advising—

LORD PRESIDENT—In this case the question is, whether the provisions paid in terms of the marriage-contract to the children of the late Lord Curriehill were "debts due and owing by the deceased, and payable by law out of his or her personal or moveable estate," within the meaning of the 23d section of the statute 5 and 6 Vict. c. 79.

The cases which have occurred on the construction of this clause of the statute are somewhat instructive, and there are two of them of recent occurrence in this Court that have been referred to by the Lord Ordinary, both of which I think stand upon very clear grounds of judgment. In the case of *Hagart*, the earlier of the two cases, the provision which had been paid by the executors out of the personal estate of the deceased was a sum of money representing the capital that was required to secure an annuity of £800. It was therefore a sum which, according to the provision of the marriage-contract in virtue of which it was paid, was quite ascertainable; and it was plain enough therefore that, the father being under an obligation to pay that sum of money, it was a debt due from him and payable out of his personal estate within the very words as well as the meaning of this section of the statute. In the other case of *Moir*, the provision payable to the children of the marriage under the marriage-contract was the father's entire estate, and it was impossible to say that that was a debt payable out of his personal or moveable estate. The thing was nonsense upon the face of it. And there could be just as little doubt that it was not within the meaning of the statute. But the present case differs from both of these, and stands mid-way between the two; for while this is not a payment of an ascertained sum of money which the father became bound by his marriage-contract to pay, neither is it, on the other hand, the entire residuary estate of the father after paying his debts and any other provisions that may be secured by the marriage-contract. The obligation of Mr Marshall in his marriage-contract is to provide and secure to the said Margaret Tod Bell, his spouse, in liferent, and to the child or children who may be procreated of the intended marriage in fee, three-fourth parts of all and sundry lands, heritages, and sums of money, goods, gear, and other estate, heritable and moveable, real and personal, that he shall happen to conquest, acquire, or succeed to during the standing of this present intended marriage. The obligation, therefore be it observed, is not to pay, but to provide and secure; and that which is to be provided and secured is a certain proportion, viz., three-fourth parts of what in somewhat loose language may be called the conquest of the marriage; because, even in that passage which I have read from the marriage-contract, the description is not confined to conquest in the proper sense of the term, for it comprehends not only what he has conquest by his own industry during the subsistence of the marriage, but also what he may succeed to during the marriage. And it is made clear in an after part of this portion of the marriage-contract that the words are intended to be used in a more comprehensive sense than that, because it is declared that the same shall comprehend and extend to the whole estate, heritable and moveable, real and personal, belonging to the said John Marshall at the dissolution of this present intended marriage, after deduction of the debts due by him," and two sums of money specially secured by the marriage contract. So that the estate which is here dealt with as the entire estate of Mr Marshall at the dissolution of the marriage comprehends not only what he may conquest or succeed to during the marriage, but also all that belonged to him at the time that the marriage was dissolved. In short, if the dissolution of the marriage was occasioned by the predecease of the husband, then this estate so described would be his entire estate,—everything that he was possessed of; in the event of the husband surviving, then this estate, so described, would certainly not comprehend anything that he might acquire, or save, or succeed to after the dissolution of the marriage, and between that event and his own death, but it would comprehend everything else that belonged to him. The event which actually occurred was that the husband survived the wife for some two years; and accordingly, in practical effect the estate belonging to him at the dissolution of the marriage, and which is dealt with by this clause of the marriage contract, is substantially the entire estate. Now, what is provided here to the children is the fee of three-fourth parts of that estate. That is to say, in effect it is the fee of three-fourth parts of all that Mr Marshall shall leave at the time of his death, excepting only what he may have acquired in any way between the dissolution of the marriage and his death. It appears to me that that is not such an obligation as occurred in the case of *Hagart*, nor is it an obligation in any proper sense of the term to pay a sum of money, nor is it a debt which is payable by law out of his personal or moveable estate; but it is a share or proportion of his estate, both heritable and moveable. The distinction there, I think, in point of law, is very clear; and therefore upon that ground I am of opinion that the handing over,—the transferring or conveying of this portion of Mr Marshall's estate by his executor to his children in fulfilment of this provision of the marriage contract, is not the payment of a debt within the meaning of the 23d section of the Act. It was indeed contended, or at least suggested, that one clause of this marriage contract which I have not yet read would have en-

titled the children in a certain event to payment of a portion of this provision during the lifetime of their father; and if that had been so the case would have stood in a very different position from what it does. The provision which is so founded on is this, "declaring that the said Margaret Tod Bell shall be bound and obliged to employ the funds which she shall acquire in virtue of this provision of the conquest after the said John Marshall's death, not only in supporting herself, but also in alimenting and educating the children of the present intended marriage, until the said children shall attain the years of majority or be married. It is quite plain that all that contemplates only the event of the wife surviving the husband. But then follow these words, "And upon the marriage or majority of each of such children, one-half of the share of conquest which shall belong to such child in virtue of this provision shall then be payable or prestable to him or her, and shall be enjoyed by him or her unburdened by the said Margaret Tod Bell's liferent. Now, it is contended that this provision applied not merely to the case of the widow surviving the husband and enjoying a liferent, but also to the case of the widow predeceasing the husband, and that whenever the children attained majority or marriage they were entitled to demand from their father payment of one-half of the provision secured to them by this contract. But it is too clear almost to admit of argument that this provision is intended only to apply to the case of the survivance of the widow, because it is a provision that they shall have that portion of their shares of the conquest paid over to them unburdened by the case of the widow's liferent—words which apply only to the widow surviving and enjoying the liferent. That specialty, therefore, I think is entirely out of the case and on the general ground which I have already noticed I am quite satisfied that the Lord Ordinary's interlocutor is well founded.

Lord Deas—I am of the same opinion, and I have nothing to add. On the whole, I come to the conclusion that this was a provision and not a debt.

Lord Ardmillan—I am of the same opinion. I think this case was very correctly described by your Lordship as lying somewhere between the case of *Hagart* and the case of *Moir*, but upon all the authorities the result is that this is a provision by way of succession, and not a proper debt. There is no direct obligation to pay. The obligation is to provide and secure, and it is to my mind pretty plain that the maker of the deed had the distinction in view, because in dealing with the liferent of the wife he introduces an obligation to content and pay, and follows that with an obligation to provide security for that which he had engaged to content and pay. In the case of these provisions, the primary obligation is to provide and secure. There is no obligation in words to content and pay.

Lord Jerviswoode—I think this was a very proper case to bring before the Court for judgment, but now that it is here I take the same view as your Lordship.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Marshall's executors against Lord Ormidale's interlocutor of 24th February 1874, Adhere to the interlocutor, and refuse the reclaiming note: Find the defender entitled to additional expenses, and remit to the Auditor to tax the account of said expenses and report."

Counsel for Pursuer — Watson and Pearson. Agents—Gibson & Strathearn, W.S.

Counsel for Defender—Dean of Faculty (Clark), and Rutherford. Agent—Angus Fletcher, Solicitor of Inland Revenue.

Friday, March 20.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

M'DONALD *v.* M'DONALDS.

Entail—Resolutive Clause.

Terms of the resolutive clause in a deed of entail *held* sufficient for the validity of the deed.

This was an action of declarator raised by Colonel Alastair M'Iain M'Donald of Dalchosnie, against John Alan M'Donald, his brother, and Misses Elizabeth Moore Menzies, Adriana and Jemima M'Donald, his sisters, as being the whole heirs of entail at present in existence called to the succession of the estates of Dalchosnie, Loch Garry, and Kinloch-Rannoch, under a deed of entail made by the late General Sir John M'Donald, K.C.B., and registered on 18th November 1837. The summons concluded for declarator that this deed of entail is not a valid and effectual tailzie in terms of the Act of the Parliament of Scotland, passed in the year 1685, chap. 22, entituled "Act concerning Tailzies," and that the foresaid lands and estates of Dalchosnie, Loch Garry, and Kinloch-Rannoch, as particularly described in the said deed of entail, belong to the pursuer in fee-simple, and free from the whole conditions, and prohibitory, irritant, and resolutive clauses contained in the said deed of entail.

Sir John M'Donald was the father of the pursuer, and proprietor of the estates above mentioned; he died on the 24th June 1866, and was survived by his wife, who died on 7th November 1872. Sir John's brothers, who were called as substitutes in the entail, died before him without issue, and the whole of his surviving children were defenders in this action, as being the whole heirs presently in existence after the pursuer.

The deed of entail contained certain conditions which the pursuer and the other heirs of entail were directed to obey, including a direction to use the surname and armorial bearings of M'Donald, to possess the lands only under the deed of entail, and to purge and redeem adjudications and other legal diligence against the lands. These conditions were followed by prohibitory clauses, containing sundry restrictions and limitations; *inter alia*, that the wives and husbands of the heirs of entail should be excluded from all right of terce or courtesy in the entailed lands, and that it should not be in the power of the pursuer or any of the other heirs of entail to alter the order of succession thereby established, or to sell or alienate the lands therein contained, or to burden them with debt, or to do any act or grant any deed, directly or in-