a stream passing through his land as beneficial and also as little hurtful as possible to his own property; and if he sends down all the water which he gets in as pure a condition as he got it to the lower heritor the latter has nothing to complain of. On the ground pleaded by the defender in his 5th plea I think he is entitled to be assoilzied.

Lord Craighill—I concur, and have very little to add. I grant that as far as drainage operations are concerned a lower heritor is not entitled to complain of what the upper heritor does, but I am not prepared to say that if the course of a burn is for any reason changed, and if injury is thereby done to the lower heritor, there will not be a good claim for damages against what may in some views be a wrong. It does not follow from the general rule that an upper heritor may do anything he pleases irrespective of the interest of a lower. If substantial damage is done, I should be disposed to give a measure of redress such as is given by the Sheriff, but looking at the circumstances I am driven to conclude that the operations done here were such as the defender might reasonably carry through. The silence of the pursuer in reference to the damage for so long a time satisfies me that he would have been more wise if he had never made any complaint, and that now that he has made one that we cannot sustain it.

The Lords sustained the appeal, reversed the judgment, and assoilzied the defender from the conclusions of the summons.

Counsel for Appellant — Macdonald, Q.C. — Jameson. Agents—Thomson, Dickson & Shaw, W.S.

Counsel for Respondent—Keir. Agent—David Milne, S.S.C.

Tuesday, June 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DUKE OF ROXBURGHE, PETITIONER.

Entail—Provisions to Younger Children—5 Geo. IV. cap. 87 (Aberdeen Act), sec. 4—How to Calculate "Three Years' Free Rent."

An entailed proprietor by his marriage-contract bound himself to make provisions in favour of his younger children, in terms of the Aberdeen Act, to the amount of three years' free rent of his entailed estates, if there should be three or more younger children. There were four children of the marriage, and in the marriage-contracts of the three younger children their father, being a party to the contracts, bound himself to pay certain sums to their marriage-contract trustees, and thereafter granted bonds for these sums in terms of the statute. Subsequently, with consent of the three next heirs, he disentailed his estates and re-entailed them, along with certain other lands, declaring the provisions undertaken by him in his marriage-contract to be real burdens upon the estate so entailed. *Held* that in estimating the amount of the free rental in order to determine the whole amount due to his younger children on his death, the rental of the lands originally entailed must be taken, and not the rental of the lands included in the second deed of entail.

By antenuptial contract of marriage entered into between the late Duke of Roxburghe and Miss Susanna Stephania Dalbiac, afterwards Duchess of Roxburghe, dated the 2d, 14th, 19th, and 26th days of December 1836, and recorded in the Books of Council and Session on the 4th day of July 1874, the said Duke, with consent of his curators, in contemplation of his marriage, and in exercise of the powers vested in him by the Act 5 Geo. IV. c. 87 (the Aberdeen Act), section 4, as heir of entail then in possession of the entailed lands and estates of Roxburghe and others, known as the Roxburghe estates, thereby bound and obliged himself, and the whole heirs of entail and provision succeeding to him in the said entailed lands and estates, to make payment out of the rents or proceeds thereof of the provisions following: — To the child or children to be procreated of the said marriage who should be alive at his death, and should not succeed to the said entailed lands and estates, and to the representatives or assignees of those children who should predecease him, claiming in virtue of special settlement by marriage-contract, viz., to one such child one year's free rent or value of the whole of the said entailed lands and estates; to two children two years' free rent or value of the said whole lands and estates; and to three or more children, three years' free rent or value of the foresaid whole lands and estates, as the amount of the said free rent or value should be ascertained at the date of his death, the said provisions to bear interest from and after his death, and to be payable one year after that event. It was thereby declared that these provisions were granted by the said Duke under all the conditions and subject to all the restrictions and limitations whatsoever contained in the said statute; and further, "that the said provisions shall be divisible among the said children if more than one, and the representatives or assignees of those who shall predecease claiming as aforesaid, in such proportions as the said noble Duke shall appoint by a writing under his hands at any time of his life," and failing such appointment, the same were to be divided among such children equally, all as more particularly set forth in said contract of marriage, an extract of which is herewith produced and referred to.

By a contract of marriage, dated the 5th day of August 1857, entered into between James Grant Suttie, afterwards Sir James Grant Suttie of Prestongrange and Balgone, Bart., now deceased, and the Right Honourable Lady Susan Harriet Innes Ker, now Grant Suttie, elder daughter of the said late Duke of Roxburghe, to which the said late Duke was a party, he thereby bound and obliged himself to provide, content, and pay to the trustees therein named, and to the survivors and survivor of them, and to such other person or persons as might be assumed in manner therein mentioned, the sum of £25,000

in name of tocher with the said Lady Susan Harriet Grant Suttie. The said sum of £25,000 so settled was a share or proportion belonging to the said Lady Susan Harriet Grant Suttie of the foresaid provisions of three years' free rents of the said entailed lands and estates in favour of the said late Duke of Roxburghe's younger children.

By a contract of marriage, dated the 27th day of October, and registered in the Books of Council and Session on the 20th day of November, both in the year 1862, entered into between George Russell, of Whitehall Place, in the city of Westminster, Esq., and the Right Honourable Lady Charlotte Isabella Innes Ker, afterwards Russell, younger daughter of the said late Duke of Roxburghe, to which the said late Duke was a party, he bound and obliged himself, and his heirs, executors, successors, and representatives whomsoever, and likewise the heirs of entail succeeding to him in the said entailed lands and estates, to make a similar provision of £25,000.

By a contract of marriage, dated the 12th and 13th days of January, and registered in the Books of Council and Session the 31st day of March, all in the year 1866, entered into between the said Honourable Charles John Innes Ker, commonly called Lord Charles John Innes Ker, younger son of the said late Duke of Roxburghe, and Miss Blanche Mary Williams, daughter of Thomas Peers Williams of Temple-house, in the county of Berkshire, Esq., to which contract the said late Duke of Roxburghe was a party, he, the said late Duke of Roxburghe, bound and obliged himself, and his heirs, executors, successors, and representatives whomsoever, and likewise the heirs of entail succeeding to him in the said entailed lands and estates, to make a provision of £40,000, to be held by the marriage-contract trustees. From each of these three younger children the Duke took a discharge of the provisions to which they were entitled under his marriage-contract.

In the year 1867 the said late Duke of Roxburghe entered into an arrangement with the three next heirs of entail entitled to succeed to him, for the purpose of disentailing his then entailed estates, and resettling the same, with other fee-simple lands, under a new deed of entail; and with a view to carrying out this arrangement he granted bonds of corroboration and dispositions in security in favour of the trustees under each of the said marriage-contracts, securing the foresaid sums of £25,000, £25,000, and £40,000 respectively as burdens on the said entailed estates. By virtue of this agreement the estates then entailed were charged with debt to the amount of £120,000.

The instrument of disentail was executed of date 11th June 1867, and duly recorded, and the late Duke thereafter executed a new disposition and deed of entail of his entailed estates, including certain fee-simple lands, dated 18th and 27th June, and recorded 16th July 1870, in favour of himself, whom failing to his eldest son, the present Duke of Roxburghe, then Marquis of Bowmont and Cessford, and the heirs-male of his body, whom failing as therein mentioned. By this deed of entail the said entailed lands and estates were conveyed, *inter alia*, with and under the real and express burden of the contract of marriage of the said late Duke of Roxburghe before specified, and particularly of the provisions to his younger children therein contained, and for portions of which provisions he had granted the bonds of corroboration and dispositions in security before narrated to the extent of the sum of £90,000.

The said late Duke of Roxburghe died on the 23d day of April 1879, survived by his wife, by his eldest son who succeeded him as heir of entail in the said entailed lands and estates, and by three younger children, viz., the said Lady Charlotte Susan Harriet Grant Suttie, Lady Isabella Russell, and Lord Charles John Innes Ker.

He left a trust-disposition and settlement, dated 17th June 1874, and recorded in the Books of Council and Session 6th May 1879, whereby, on the narrative of his contract of marriage, and of the powers therein contained, and also on the narrative of the several contracts of marriage of his said younger children, and of the securities granted for the sums thereby provided to them, and of the real burden created therefor on his said entailed lands and estates by the said disposition and deed of entail thereof, he declared "that in the event of the said three years' rents, provided as aforesaid, of the foresaid lands and estates exceeding the sum of £90,000 sterling (being the total amount of the said two sums of £25,000 and the sum of £40,000 which have been secured over the said lands and estates as aforesaid), and of a further sum falling to the younger children of my said marriage in excess of the sums provided and secured as aforesaid, then and in that event the excess or surplus of the said provision of three years' rents beyond the said sum of £90,000 shall be and is hereby appointed to my said two daughters in the following proportions—that is to say, two-fifth equal parts or shares thereof to the said Lady Susan Harriet Innes Ker or Grant Suttie, and the remaining three-fifth equal parts or shares thereof to the said Lady Charlotte Isabella Innes Ker or Russell—and shall be paid to the trustees under their respective contracts of marriage in said proportions, to be held and disposed of by the said trustees upon and for the like trusts as and upon which the said two sums of £25,000 are directed to be held and disposed of by and under the said respective contracts of marriage; and I direct and appoint accordingly."

The present Duke thereafter made this application for authority to charge the whole of the entailed estates with the amount of provisions due to younger children. The petition set forth that the free yearly rent or yearly value of the said entailed lands and estates as at the death of the said late Duke of Roxburghe amounted, after making the deductions required by the said Act 5 Geo. IV. cap. 87, to £34,700, 1s. 2d., and three years' free rental of said entailed lands and estates thus amounted to the sum of £104,100, 2s. 6d., which is the sum of the provisions falling to the younger children of the said late Duke of Roxburghe under his contract of marriage, and that as of this sum there had already been charged on the said estates, under the marriage-contracts above set forth, two sums of £25,000 each and one sum of £40,000, amounting in all to £90,000, the balance remaining to be charged under the present application was £14,100, 3s. 6d., which in terms of the late Duke's trust-dis-

position fell to be paid to the marriage-contract trustees of the two ladies in the proportions of two-fifths and three-fifths respectively.

The Lord Ordinary (LEE) on 15th July 1880 remitted to Mr H. H. Inglis, W.S., to examine into the procedure, and also to inquire into the facts and circumstances set forth in the petition.

Mr Inglis in the course of his report, after raising for consideration the question as to whether the children's provisions had been limited and restricted by the terms of their marriage-contracts, stated as follows:—

"It appears to the reporter to be doubtful if the total amount of the provisions falls to be stated, as has been done in the petition, at three years' free rents of the whole estates included in the existing deed of entail. The obligation for payment of the provisions contained in the late Duke of Roxburghe's contract of marriage was granted with reference to the then subsisting deeds of entail, which did not comprehend the whole of the lands now standing entailed, and it expressly limited their amount to three years' free rents of the estates included in these deeds of entail. The new deed of entail, although it bore to have been granted under the real burden of the Duke's contract of marriage, did not declare that the amount of the provisions as fixed by the contract should be in any way affected, and none of the other documents produced appear to the reporter to contain anything showing that it was intended that the provisions should be either increased or diminished by the disentailing and re-entailing of the estates. As bearing on this point, the reporter would beg to refer your Lordship to the case of *Irving* v. *Irving*, Feb. 22, 1871, 9 M. 539, where an estate having been disentailed and resettled by a disposition whereby the disponee took it under certain burdens in excess of those permitted by the entail, it was decided that the beneficiary under a bond of provision granted under the powers contained in the entail could neither take advantage from nor be prejudiced by the disentail, and that the free rental regulating the amount of the provisions should be calculated as if the entail had still stood.

"On behalf of the petitioner it is, however, maintained, that as the lands embraced in the new entail of the Roxburghe estates were thereby conveyed under the real burden of the late Duke's contract of marriage, the obligation for payment of the children's provisions was necessarily incorporated with the new entail, and became applicable to three years' free rents of the whole lands comprehended therein."

On the alternative view suggested by the reporter the balance to be charged on the estate amounted to £19,401, 11s., the excess being accounted for by the deduction in the petitioner's estimate of the free rental of the estate, and of the interest on the sum of £120,000 borrowed as above narrated from the gross annual rental of the lands included in the new entail. Mr Inglis further suggested that a curator *ad litem* should be appointed to Lady Charlotte Isabella Russell, and Mr A. J. Russell, C.S., was on a subsequent day nominated to that office.

On 19th March 1880 the Lord Ordinary (FRASER), having heard counsel for the petitioner and also for the curator *ad litem*, found that the procedure had been regular and proper, and that the amount of balance of younger children's provisions to be charged on the estate was £14,100, 3s. 6d.

His Lordship added this note:—"The Lord Ordinary is of opinion that the rental which ought to be taken is not the rental of the estates at the time when the late Duke of Roxburghe executed his marriage-contract, but the rental of the estates as entailed at his death. By the marriage-contracts of the three younger children they accepted the sums of £25,000, £25,000, and £40,000 as in full of all that they could claim under the obligation in their father's marriage-contract in their favour; and if the Duke had not by his deed of settlement given to the two daughters a further right, no claim would have been competent beyond the sums given them at the time of their marriage. This right so conferred by the Duke was entirely voluntary and gratuitous on his part; the obligation in the marriage-contract had been satisfied and fulfilled, and a discharge obtained from the creditors in that obligation. What, then, was the Duke's meaning when he appointed that any money beyond the sums provided to his two daughters required to make up three years' free rental should still be provided to his daughters in the proportion of two-fifths to the one and three-fifths to the other? What rental was in his mind at the time he executed this testamentary deed? He had executed a new entail, and declared the provisions in favour of his children to be burdens upon the estate contained in that new entail, and there can be no doubt whatever that the rental he was dealing with was that of the estate contained in the then existing entail."

The curator *ad litem* reclaimed.

At advising—

LORD PRESIDENT—The question before us is, how the younger children's provisions made by the late Duke of Roxburghe are to be charged upon the rents of the entailed estate; and there is a complication of deeds here, to the provisions of which it is necessary very specially to attend in order to answer this question satisfactorily.

The provisions were made by the Duke of Roxburghe in the year 1836 in a marriage-contract between himself and his then intended spouse, in which, in pursuance of powers conferred upon the heirs of entail by the Aberdeen Act, he bound himself and the heirs of entail succeeding to him in the lands and estate of Roxburghe to make payment out of the rents or proceeds of the said lands and estate of the provisions following to the child or children to be procreated of the intended marriage; and then the amount of the provisions is more particularly specified. At this time the entail comprehended only what is known under the general name of the Roxburghe estate, but afterwards the Duke entered into an arrangement with the three next heirs of entail for disentailing that estate, and for adding certain fee-simple lands which he possessed to the estate of Roxburghe, and re-entailing the whole under certain conditions and provisions specified in the agreement which he made with those heirs of entail. And among other conditions of that agreement there was one to the effect that he should be entitled to burden the whole entailed lands, including the old Rox-

burghe estate and the new fee-simple lands, with a debt of £175,000. This arrangement was carried out, and a new deed of entail was accordingly executed.

Now, if there had been no more in the case than what I have just stated, it is quite obvious that the question we have to determine would be regulated by the authority of the case of *Irving*. The younger children, in respect of their provisions, would have neither taken advantage from this new deed of entail, nor could they have been prejudiced by the proceedings for disentail and the re-entailing deed, but they would just have taken their provisions as three years' free rents of the entailed lands of Roxburghe, subject to the deductions which would have been made from those provisions had the original entail stood. But in the present case, in the interval between the making of the provision and the disentail and re-entailing, there occurred a very important transaction, or series of transactions, upon occasion of the marriage of the three younger children. The Duke of Roxburghe was a party to the marriage-contracts of all the three younger children. He gave his younger son a sum of £40,000, and each of his daughters a sum of £25,000, as in full satisfaction of the provisions which had been made in their favour in his original marriage-contract, and he took from each of those younger children a discharge of their provisions. Here, again, if we stop and consider how the matter would stand, it is quite plain that the discharge contained in these marriage-contracts would have prevented the case of *Irving* from applying, and would have settled the whole matter in this way, that each daughter would receive £25,000 as in full of her provision, and the son would receive £40,000, and no question like the present could have arisen.

But what gives rise to the difficulty and peculiarity of this case is, in the first place, certain clauses which occur in the new deed of entail, and secondly, a clause which occurs in the Duke of Roxburghe's deed of settlement. The new deed of entail was executed in 1870. Prior to that the Duke had granted bonds of corroboration and dispositions in security over the new estate—the enlarged entailed estate—for each of the sums of £25,000 provided to each daughter, and for the sum of £40,000 provided to the younger son. It is necessary to mention that merely historically, because it really does not much affect the judgment. But after all that had been done, when he came to execute his new deed of entail in 1870, he provided, among other things, this declaration, declaring his marriage-contract and the provisions to younger children therein contained to be real burdens upon the whole lands and estate thereby entailed, that is, the enlarged and new entailed estate. Now, this is plainly inconsistent with the notion of those provisions having been discharged as they were in the marriage-contract, and inconsistent also with the bonds of corroboration and dispositions in security which he had granted for those sums, and as the deed goes on it becomes more clear that he does not intend to avail himself of the discharges contained in these marriage-contracts, but, on the contrary, intends that his younger children shall have the full benefit of the provisions settled in his own marriage-contract. The £90,000, which is the aggregate of the sums provided in the children's marriage-contracts, and for which they granted a discharge of their provisions, falls short, in his opinion, and has been found in fact to fall short, of what they would have been entitled to under the original arrangement in his marriage-contract. What he does, in the words I have just read, is to make the whole provisions—the full sum provided in his own marriage-contract—a real burden upon the whole lands and estates of new entailed by the new deed of entail. But while he makes these provisions a real burden upon that estate, it must be observed that he does not reconstitute these provisions. There is no constitution of a provision under the Aberdeen Act in this new entail. It is the keeping up of a provision already made and constituted. The Aberdeen Act provides a particular way in which an heir of entail in possession is entitled to constitute a provision upon the entailed estate, and it is this —he is to grant a bond or obligation, by the 4th section, binding the succeeding heirs of entail in payment out of the rents or proceeds of the same to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the granter's death, as to him shall seem fit, and so on. So that the only mode in which a provision can be constituted against an entailed estate is by granting a bond or obligation binding the heir in possession and the succeeding heirs of entail to pay the amount of the provision out of the rents of the entailed estate.

Now, the provision, therefore, which is kept up by the clause which I have read, and made a real burden upon the new and enlarged entailed estate, is a bond or obligation upon himself and the heirs succeeding to him under the old entail of Roxburghe to pay out of the rents of that entailed estate of Roxburghe three years' rents of that entailed estate of Roxburghe. There is no other subsisting provision in favour of the younger children but that. Then the deed proceeds to dispone the lands with and under the burdens, conditions, prohibitions, reservations, and so forth, and first, with and under the real and express burden of a contract of marriage of 1836, entered into between him and his then intended spouse. That is his own contract of marriage, in which the provision of which I have been speaking is contained—"and particularly, without prejudice to the said generality, of the provision therein contained, whereby I, with consent of my said curators, and in exercise of the powers vested in me by the statute 5 Geo. IV., cap. 87, as heir of entail in possession of the then entailed lands and estate of Roxburghe, bound and obliged myself, and the whole heirs of entail and provision succeeding to me in the said entailed lands and estates, to make payment out of the rents or proceeds of the said lands and estates of the provisions following to the child or children to be procreated of the then intended marriage who shall be alive at my death and should not succeed to the said entailed lands and estates, and to the representatives or assignees of those children who should predecease me, claiming right in virtue of special settlement by marriage-contract;" and then follows a specification of the provisions. Then he adds these words at the

end—"And for portions of which provisions I have granted bonds of corroboration and dispositions in security to the extent of the sum of £90,000 sterling over the earldom of Roxburghe, and other lands and heritages in the first place hereinbefore disponed as under, which several bonds of corroboration and dispositions in security and sums of money therein contained are hereby declared to be real and express burdens on the said earldom and other lands hereinbefore conveyed." Now, it appears to me that one of the effects of these clauses of the new deed of entail is that the Duke of Roxburghe thereby entirely renounces all benefit from the discharges which he had taken in the marriage-contracts of the younger children. He reinstates them in the full right of the provisions which were made in his own marriage-contract, and while he declares the amount of those provisions which he very specially describes to be a real and preferable burden over the new entailed estate, he does not in the slightest degree alter the nature of the provision as originally constituted over the old entailed estate of Roxburghe. The making of these provisions a real burden upon the enlarged estate does not in the least degree alter the nature of the thing which is so made a burden. It does not extend the obligation which he created against the heirs of entail succeeding to himself in the old estate of Roxburghe. On the contrary, the thing as it stands under the marriage-contract, freed altogether of the restriction created by the discharges in the younger children's marriage-contracts, is to remain exactly as it stood from the beginning, but to be a real burden upon the new entailed estate. The discharges which were contained in the younger children's marriage-contracts were discharges in favour of the Duke of Roxburghe, their father. Nobody else is entitled to plead upon these discharges, or to take any benefit from them, and if he chooses to renounce the benefit of these discharges he is quite at liberty to do so, and so far as I can see he has most clearly and distinctly shown his purpose and intention so to do in this clause of the new entail.

Now, that brings us back exactly to the same position as if the discharges in the younger children's marriage-contracts had never been made; and also brings us to the position in which the case of *Irving* is directly applicable as an authority. It was the occurrence of these discharges that prevented the application of the doctrine of *Irving's* case; but the moment the discharges are taken out of the way, the authority of the rule of that case returns, and the younger children are entitled to say—"We cannot be either disadvantaged or prejudiced by this arrangement as to disentailing the estate and re-entailing it along with other lands. We are no parties to that arrangement. Our consent was not required, and was not asked. The whole thing is carried through between the Duke of Roxburghe and the three next heirs of entail, among whom we are not; and therefore we are entitled to stand exactly in the same position as if the entail of Roxburghe had never been destroyed or put an end to but still subsists."

Then finally there is the trust-settlement of the Duke of Roxburghe, which also throws a good deal of light upon this subject. I think the matter stands very clearly indeed upon the clause of the new entail which I have just adverted to; but the provision which I am about to call attention to in the Duke's trust-settlement is strongly corroborative of that view. The clause is a single clause; there is no other clause in the deed apparently making any reference to these provisions at all, and it is not unimportant to observe that although this clause is a pretty long one and has a good deal of recital in it, the operative part of it is extremely simple. It is simply the making of an apportionment; that is the only operative part of it. The younger son had got £40,000 settled upon him by his marriage-contract; and the Duke did not think fit to give him any greater share of the provisions contained in his own marriage-contract. He intended to divide the balance over the £90,000 between his two daughters; and that is the operative effect of this clause. The whole of it is important, keeping in view that that is the sole purpose for which it is introduced into the deed of settlement. He says—"Whereas since the dates of the said several contracts of marriage I executed an instrument of disentail of the said entailed lands and estates of Roxburghe"—now that is the old estate—"which was recorded in the register of entails under the authority of the Court of Session on the 24th day of February 1868, previous to the recording of which instrument of disentail I executed bonds of corroboration and dispositions in security in favour of the trustees under the contracts of marriage of my said daughters and son for the said respective sums of £25,000, £25,000 and £40,000, being the shares of the said three years' rents of the said entailed lands and estates thereby and by the said contracts of marriage apportioned to my said children, which bonds and dispositions in security are all dated the 17th, and recorded in the General Register of Sasines the 20th days of December 1867; and whereas the said whole lands and estates contained in the said instrument of disentail"—now that is the old estate of Roxburghe—"and also certain other lands previously held by me in fee-simple, have since been entailed by me under burden of the foresaid contract of marriage and bonds of corroboration and dispositions in security, therefore I do hereby declare that in the event of the said three years' rents provided as aforesaid of the foresaids lands and estates"—now, observe, the only provision of three years' rents of any lands and estates that ever was made by the Duke of Roxburghe was the provision contained in his own marriage-contract—"exceeding the sum of £90,000 sterling (being the total amount of the said two sums of £25,000 and the sum of £40,000 which have been secured over the said lands and estates as aforesaid)"—that is, secured over the new entailed estate—"and of a further sum falling to the younger children of my said marriage in excess of the sums provided and secured as aforesaid, then and in that event the excess or surplus of the said provision of three years' rents beyond the said sum of £90,000 shall be and is hereby appointed to my said two daughters in the following proportions," and so on. The whole of these deeds, taken together, I think make it perfectly clear in the first place that the only provision under the Aberdeen Act that was ever made by the Duke of Roxburghe was the provision contained in his own marriage-contract of 1836, and that that provision as regards its essential character and effect was never altered.

Now, that provision consists of three years' rents of the old entailed estate of Roxburghe, and is in the form of an obligation under the 4th section of the Aberdeen Act, binding himself and the succeeding heirs of entail in the old estate of Roxburghe to pay that sum out of the rents of that estate. That provision, however, has been dealt with in various ways by the Duke, but never altered as to its character or its extent except in so far as it was to a certain extent discharged in the marriage-contracts of the younger children. He bought off the provision at one time in these marriage-contracts by payment of a sum of £90,000 in all—that is to say, by a prospective payment of £90,000 in all—but then he went back upon that, and he expresses very clearly his intention of not standing upon those discharges, but of giving effect to the full provision contained in his own marriage-contract, and in order to make that provision more certainly effectual to the younger children, he made it a burden upon the whole lands included in the new deed of entail, very clearly expressing at the same time that it was not his intention to alter the nature of that provision, but on the contrary to maintain it exactly as it stood in his marriage-contract of 1836.

Now, in these circumstances, I am quite unable to agree with the view that has been taken by the Lord Ordinary. I think the alternative which is presented by the reporter of a balance calculated upon the footing of taking the estate in the old deed of entail as it stood at the time when the provision was made, and taking three years' rents of that estate as they would have stood at the death of the granter supposing no disentail had ever been made, is the true measure of the provisions now to be settled.

Lord Deas concurred.

Lord Mure—I have also come to the same conclusion with your Lordship. The sum, as I understand the case, which under the marriage-contract of the late Duke of Roxburghe was to be charged under the Aberdeen Act amounts to three years' free rent of the entailed estates as they then stood, and as the same shall be ascertained at the date of the death of the Duke of Roxburghe. That is quite distinct upon the terms of the marriage-contract. Of the sum so to be charged, £25,000 was settled upon each of the Duke's two daughters at their marriages as their share of those three years' free rents, and £40,000 was settled upon his younger son, and from each of those children a discharge was taken of their respective provisions under the marriage-contract. So the matter stood till proceedings were taken in 1867 with a view to the new entail, which have been fully explained by your Lordship, and those appear to me substantially to come to this, that certain fee-simple lands belonging to the Duke of Roxburghe were to be added to the entailed estate, and that a power was taken to burden the whole estate so to be obtained to the extent of the value of the fee-simple lands which were added to the entail. The gross sum with which power was taken to burden the whole estates under the new entail was £175,000. But of this under the same arrangement £55,000 was to be paid off by insurances, so that £120,000, being a sum about equal to the value of the fee-simple lands which were to be added to the entailed estate, was all that actually required to be charged against the estates under the new entail and relative arrangements. This I think is clear from the facts set out in the various parts of the report which have been laid before us. In particular, we have a distinct statement of the nature of the agreement which was entered into amongst the family, the younger children of the present Duke being represented in that arrangement; and it will be seen that an arrangement was made by which insurances were to be effected on the life of the Duke to the amount of £55,000 for the benefit of the estate; and the statement goes on—"By the said deed of agreement the late Duke of Roxburghe also bound himself 'to assign and convey the several policies mentioned in the schedule number two hereto annexed, and signed by the parties as relative hereto, and the sums that may become due under the same, to John Brown Innes and Charles Bowman Logan, both of the city of Edinburgh, Writers to the Signet, as trustees for the purposes after mentioned, with power to receive the sums that may fall due under the same, and which policies, and the sums to be received by the said trustees, shall be held and applied by them in payment of the said sum of £55,000, part of the said sum of £175,000, which the said Duke is to have power to charge on the said entailed estate as aforesaid,'" and any surplus beyond £55,000 is to be settled in a certain way. That being the nature of the arrangement, it is stated—"This reserved power was afterwards fully exercised by him, and at the time of his death the whole estates included in the new entail stood burdened with the sum of £175,000. After his death, which happened on or about this date, the policies of assurance on his life above referred to became payable, and the proceeds thereof to the extent of £55,000 were, in terms of the before-mentioned arrangement, applied in extinction *pro tanto* of the said debts of £175,000 secured upon the entailed estates, thus reducing these debts to £120,000, at which amount they still remain." Now, that being the nature of the arrangement which was gone into, as your Lordship has remarked, the provisions being discharged, the younger children could have no claim against the Duke beyond the sum of £90,000 which was charged against the old estate. But by the trust-deed that discharge is set aside apparently—that is to say, his intention is apparent not to act upon it. He provides that any sum of the free rents beyond the £90,000 should be divided in certain proportions amongst his two daughters. The question therefore is raised at the Duke's death, whether those free rents are to be taken as the free rents of the estate which existed at the time of the marriage-contract, or the free rents of the new estate with the fee-simple lands over which the entail was created. Now, looking to the words and expressions used in the whole of these transactions where the Duke speaks of the marriage-contract provisions, I think he has in view the old entailed estates, for it was upon those estates that the marriage-contract proceeded, and upon those, too, the burden was to be laid with reference to which the discharge was obtained, and when those discharges were waived by the Duke it appears to me that his intention

was to give his younger children the difference between the £90,000 and the three years' free rent of the old estates. That is the construction which I am disposed to put upon the deed.

But even if that were doubtful, I think that the case which the reporter has called attention to—the case of *Irving*—lays down a rule which we may act upon here to the extent of not allowing any further charge to be made upon the new entailed estate than was actually made upon the old entailed estate. I come to the conclusion to which your Lordship has come, that as between the two views we should take the suggestion of the reporter, by which the rental of the old entailed estates shall be taken as at the date of the Duke's death, and on which the marriage-contract was originally settled.

Lord Shand—I have come to the same conclusion that your Lordships have expressed in this case. The Lord Ordinary has held that the provisions of the younger children are to be taken as being three years' free rents of the whole estates contained in the new entail of 1870. But it appears to me that there is an insuperable objection to that view being taken, which is this, that there has been no bond or other deed of provision executed by the Duke of Roxburghe affecting the lands which were for the first time entailed in 1870. A new entail having then been created by which lands of considerable rental were added to the old estates, in order to create a good provision upon these new lands, it appears to me that it was necessary that the Duke of Roxburghe should execute a deed of obligation applicable to those new lands — in short, should create a provision with reference to those new lands which would bind the heirs of entail succeeding to them. No such deed has been executed. There has never been a deed of provision granted to affect those lands or the heirs of entail succeeding to them, and therefore we cannot, I think, hold this to be a provision affecting the whole of the entailed estates. There are subsisting deeds of provision affecting the old entailed estates, and these are the only effectual deeds.

Now, that being so, reading the disposition and deed of settlement by the Duke of Roxburghe in the light of the whole circumstances, and having regard to the various considerations pointed out by your Lordship, I have come to hold a very clear opinion that the three years' free rents referred to in his Grace's deed of settlement are the three years' free rents of the old estates, and of the old estates only.

But though that be so, the question remains, What burdens are to be deducted from those rents? The deeds of provision declare that the amount of the free rents shall be ascertained as at the date of the death of the Duke of Roxburghe, and when the said Duke died he had a considerable amount of debt, no doubt under the new arrangement with the heirs of entail, but still he had added a considerable amount of debt to those lands contained in the old entail, and that debt subsisted at his death; and I confess I have felt it a question attended with considerable difficulty whether in reference to this matter of taking the amount of the free rents at the death of the Duke it was not necessary to look at all the debts as they subsisted at his death, and make a deduction on account of these, including the debt that was added when the new entail was executed. If that course had to be followed, I have no doubt that would have involved an apportionment of that debt—that is to say, that while you take the three years' free rents of the old estate as the thing that was given, subject to the debt affecting it, it would not do to take the whole debt affecting the whole estates and deduct it from those three years' free rents, but it would have been right to make an allocation of the debt, so much of it applicable to the old estates, and so much to the new, in proportion to their respective rentals. I have, however, come to the conclusion with your Lordships that that is not a sound view to be taken of this matter. The case of *Irving* seems to be an authority which I think we are bound to follow in this case, and, as Lord Cowan puts it, "The solution of this question will be found by allowing those deductions only which could competently have been made had the entail still subsisted;" and accepting the authority of the case of *Irving*, I have come to the conclusion that that is the course which ought to be adopted in this case. The result will be, I think, that the amount of the provisions has been correctly brought out by the reporter, because I observe that the reporter has laid aside entirely the new debt that was created in 1870 and then laid upon the estate, and has deducted only the public burdens affecting the lands in question.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary of 19th March last: Find that the provision which is sought to be charged on the entailed estate is constituted in terms of sec. 4 of the Act 5 Geo. IV. cap. 87, by the marriage-contract of the late Duke of Roxburghe in 1836, whereby he bound himself, and the heirs succeeding to him in the lands and estate of Roxburghe under the then existing entail of the said estate, to pay to the younger children out of the rents of said entailed estate certain sums not exceeding three years' free rents of the said estate, as the amount of the same shall be ascertained at the death of the said Duke: Find that the provision so constituted still subsists, and is the provision proposed to be made a charge under the petition: Find that the amount of the said provision consists of three years' free rents of the said lands and estate of Roxburghe comprehended in the entail subsisting at the date of the marriage-contract of 1836, as the same would have stood and would have been ascertained at the death of the said Duke, granter of the said provisions, if the estate of Roxburghe had not been disentailed and re-entailed along with other lands: Remit to the Lord Ordinary to proceed as shall be just and consistent with the above findings," &c.

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