Judges below, which seems to go upon that ground. Lord Young gives it as his opinion that that is an unimportant question, and he says that it was continued—that the County Road Trustees were authorised to continue the same duties and powers as their predecessors the old trustees. It does not strike me so. It strikes me that the enactment which was made was that they were to continue to do what was requisite and proper in the way of "maintenance and repair," but that they were not to do what had been done before unless and only so far as the statute introducing the new system made it part of what they were bound to do.

Then upon the second question—whether the County Road Trustees are to have power to expend money in localities where such lighting would seem proper—it does not appear to me that that question is properly raised at all. It strikes me that there is great force in the observations which have been made by the noble and learned Lord who has just spoken. I think that the powers which are given by the statute to the County Road Trustees with regard to the application of their money is to apply it for work which the enactment makes it right and proper to do; and it strikes me very much, indeed, that in this case the work which is required to be done is not within their powers, or such as the Act enables them to do. I therefore come to the same conclusion as the noble and learned Lord who has just moved that in this case the interlocutor be reversed.

Lord Watson—My Lords, I am bound, with all respect to the learned Judges who constituted the Second Division upon the hearing of this cause, to say that in my opinion the answer to neither of these questions is attended with any difficulty. Both ought, in my opinion, to be answered in the negative. As regards the first of them, it appears to me that the learned Judges have misconstrued the 32d section of the Roads and Bridges (Scotland) Act 1878. The object and effect of the provisions of that clause are simply this, to save all collateral contracts, engagements, and liabilities which have been properly and lawfully created by virtue of the powers of any Act by the trustees who administered it. The intention of the section was not to keep up the statutory obligations as continuing obligations, or the statutory powers as continuing powers. If I could come to the same conclusion as the learned Judges, which I am altogether unable to do, I should also be compelled to come to the conclusion that the power to exact tolls was likewise kept up and carried forward, because it is only from that source that there is any statutory warrant for defraying the cost of lighting and watching.

As to the second question, I entirely agree with your Lordships that it is impossible to hold that lighting is included in the "maintenance and repair" of a road according to any reasonable construction of those terms. I do not say whether or not they might have been altered and expanded if there had been something in the context of the statute to show that the Legislature did intend that the trustees should also light the roads. In that case there might have been some ground for coming to the conclusion of the Court below. But there is not the slightest indication that such was the intention of the Legislature. On the contrary, the powers which they have conferred upon, and the duties which they have given to the new trustees under the Act of 1878 are so minute as to exclude, in my humble opinion, the supposition that the granting of any such power was intended.

The House *reversed* the interlocutor of the Second Division, and found that the questions in the Special Case which the Court of Session answered in the affirmative, ought to be answered in the negative.

Counsel for Appellants—Sol.-Gen. Robertson, Q.C.—Horace Davey, Q.C. Agents—Grahames, Currey, & Spens, for Mackenzie & Black, W.S.

COURT OF SESSION.

Friday, November 12.

FIRST DIVISION.

[Lord Shand, Ordinary on the Bills.

EARL OF GLASGOW, PETITIONER.

Entail—Disentail—Bonds of Provision—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 6.

In a petition for disentail, *held* that in estimating the amount of security which ought to be provided in respect of certain Aberdeen Act provisions granted by the petitioner in favour of his wife and children—(1) the year of the disentail must be taken as the "year of the death of the grantor" in computing the free rental of the estate; but (2) that no deductions should be made therefrom of the amount of terminable rent-charges affecting the estate, and a subsisting annuity in favour of the widow of a former proprietor, nor (in estimating the security for the children's provision) the amount of the annuity to the petitioner's wife, nor (in estimating the security for the said annuity) the interest on the estimated amount of said provisions; and *observed* that, as a condition of authorising the disentail, provision ought to be made to secure over the estate the utmost amount which the widow or children might yet have as a claim against it.

This was a petition under the Entail Acts—11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, 38 and 39 Vict. c. 61, and 45 and 46 Vict. c. 53—presented on 1st May 1886 by the Right Honourable George Frederick Rosse and Lindsay Crawfurd, Earl of Glasgow, heir of entail in possession of the estate of Kelburne, and other lands situated in the counties of Ayr and Bute, with the consent and concurrence of the trustees acting under a trust-disposition and conveyance granted by the said Earl in their favour, for authority to record an instrument of disentail of those estates.

The entail was dated prior to the 1st August 1848. The petitioner was born on 9th October 1825. Deeds of consent by the three nearest heirs consenting to the disentail were produced in process.

The Lord Ordinary (Lord Trayner) remitted

to Mr John Galletly, S.S.C., to inquire into the circumstances set forth in the petition, whether the procedure had been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt, and to report.

Mr Galletly returned a report, which after narrating the facts proceeded as follows—"A schedule and affidavit is produced, in terms of section 12, sub-section 5, of the Entail Amendment (Scotland) Act 1875, from which it appears that the only unsecured debts or provisions of the nature referred to affecting the entailed estates or heirs of entail, are (1) obligation by the petitioner contained in his antenuptial marriage-contract to grant in favour of his wife the Right Honourable Montagu Abercromby, Countess of Glasgow, at the sight of the trustees named in the contract, a bond of annuity, or such other deed as might be permitted by the deed of entail, or under or in virtue of any Acts of Parliament or other powers competent, binding himself and the respective heirs of tailzie and provision succeeding to him in the said entailed lands, to make payment to the Countess and her assignees during all the days of her lifetime after the death of the petitioner, in case she should survive him, of a free jointure or annuity of £3000; and (2) an obligation by the petitioner in favour of his younger children, contained in the said contract of marriage, and a relative bond of provision subsequently granted by the petitioner, whereby he obliges himself and the whole heirs of entail succeeding to him in, *inter alia*, the foresaid lands, to make payment of the provisions following to the children of the marriage who should be alive at the time of his death and should not succeed to the estate, and to the representatives of any who should predecease him, the provision bearing interest in terms of the statute, and payable one year after his death, viz., if one child, one year's free yearly rent or value of the whole of the estates; if two children, two years' free yearly rent or value; and if three or more children, three years' free yearly rent or value, it being declared that the provisions should be divided and apportioned, and should affect the rents and proceeds of the several entailed lands and others therein mentioned, in proportion to the free yearly rent or free yearly value thereof respectively, as the same might happen to be at the death of the petitioner, the amount of the said free rent or value to be ascertained at the date of his death in the manner pointed out by the statute, and the provisions being granted under all the conditions and provisions, and subject to all the restrictions and limitations whatsoever, contained in the statute.

"The parties now in right of the provisions are (1) the Countess of Glasgow, and (2) the only two children of the petitioner, Lady Gertrude J. G. Boyle or Cochrane, wife of the Honourable Thomas Cochrane, and Lady Muriel Boyle. Lady Cochrane is of full age; Lady Muriel Boyle is in minority. The petitioner is now in his sixty-first year; the Countess is now fifty years of age. They were married in 1856. Lady Muriel Boyle was born on 18th November 1873. It is therefore improbable that there will be further issue of the marriage."

The report then stated that subject to the opinion of the Lord Ordinary it was now proposed to secure the annuity and provisions "by the petitioner granting (1) bond of annuity and disposition in security in favour of the Countess for an annuity of £2869, 15s. 11d. during her life after his decease, being the full amount of the annuity or jointure which he, as heir of entail foresaid, is entitled to provide and secure to his wife out of the said entailed lands and estate of Kelburne—that is to say, one-third of the free yearly rent or value of the said entailed estates, after making the deductions mentioned in section 1 of the Act, *the rental being adjusted as afterwards explained;* and (2) bond and disposition in security by the petitioner in favour of trustees for his children for the sum of £25,829, 3s. 6d., being the amount of three years of the present free yearly rent or value of the said entailed estates after making the statutory deductions, the rental being adjusted as afterwards explained, and the said sum, restrictable as hereafter mentioned, being payable at the first term of Whitsunday or Martinmas which shall happen after the petitioner's death, with interest and penalty in case of failure." . . .

[The report then explained that the draft bond in favour of trustees for the children was for three years' rent, being the maximum amount allowed to be charged for three or more children under the statute, but contained declaration that if at the date of the petitioner's death there should be only two children surviving of the marriage who would not have succeeded under the deed of entail, or the lawful issue or representatives of two such children claiming right in virtue of special settlement by marriage-contract, the obligation therein contained should be restricted to the sum of £17,218, 15s. 8d., being the amount of two years' free yearly rent or value of said entailed lands of Kelburne and others, and if there should be only one such child, or the lawful issue or representatives of one such child, claiming right as aforesaid, the obligation should be restricted to the sum of £8609, 7s. 10d., being one year's free yearly rent or value of said entailed lands as aforesaid; and that if the petitioner should not be survived by any child of the marriage who would not have succeeded under said deed of entail, or by the lawful issue or representatives of any such child claiming right as aforesaid, the obligation should lapse.]

"With reference to the rental of the said entailed estates and the sums contained in the bond of annuity and bond and disposition in security respectively before referred to, the reporter begs humbly to refer your Lordship to sections 1 and 4 of the Aberdeen Acts. Two points have arisen in connection with the rental and the sums contained in the bonds on which the petitioner and his trustees desire your Lordship's judgment—The rent which should form the basis of the amount of the widow's annuity and the children's provisions is the rent of the year in which the heir of entail may die. It is of course impossible to say what the rent of the estates may be as at that date, and in the circumstances of the present case, a large part of the estates having been sold, and being to be conveyed whenever the disentail is accomplished, the rental when the petitioner may die cannot rule the matter. In fixing the amounts of the annuity and the children's provisions therefore as at the sums before mentioned the present rental of the estate has been taken, a

statement thereof, certified by the petitioner's agents, being produced.

"There are terminable rent-charges affecting the estate, amounting at present to £877, 5s. 3d. per annum. Some of these may have run off before the petitioner's death, while, on the other hand, new annual-rents may be charged upon the estate before that event. But in bringing out the free rental as above, the total amount of these rent-charges has not been deducted, but interest only on £9179, 8s. 9d., being the capital sum which the petitioner could at present substitute for the balances remaining due under the rent-charges and charge by bond and disposition in security upon the fee of the estates. . . .

"The two questions upon which the petitioner and his trustees desire your Lordship's judgment are—(1) Whether the whole annual payment on account of the rent-charges should not be deducted in fixing the amount of the annuity and children's provisions, or whether it is properly dealt with in the rental produced; or if not, how it should otherwise be dealt with? and (2) Whether the annuity to the Countess, or interest on the actuarial value of the annuity, should not also be taken into account in fixing the amount of the children's provisions?"

The method of adjusting the rental to which the reporter referred was shown in the following abstract:—

Kelburne		£2,876 11 2
Cumbrae		1,571 0 10
Dalry		1,410 10 7
Do. Minerals		343 15 0
Fenwick		4,507 9 7
Total .		£10,709 7 2
Deduct—Debts secured on the fee of the Estates, £56,197—Interest thereon at 3¾ per cent. .	£2107 7 3	
Interest on £9179, 8s. 9d., amount due under Rent-charges and Bonds of Annual-Rent which Lord Glasgow is entitled to charge upon Fee of Estates, at 3¾	344 4 7	
		2,451 11 10
		£8,237 15 4
Add—Interest of £9390, balance of consigned money, after deducting claim for Improvement Outlay by Lord Glasgow, £1850, at 3¾		352 2 6
Free Rental .		£8,589 17 10

On 21st August 1886 the Lord Ordinary officiating on the Bills (Lord Shand) pronounced this interlocutor:—"Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and Acts of Sederunt: Interpones authority: Approves of the instrument of disentail, and grants warrant to, authorises, and ordains the Keeper of the Register of Tailzies to record the same in the said register in terms of the statute: Ordains the petitioner, prior to such recording, to execute and record in the appropriate registers or Register of Sasines, at the sight of Mr Galletly, a bond of annuity and disposition in security in favour of the Countess of Glasgow, charging the fee and rents of the estate of Kelburne and others, mentioned in the petition, with an annuity in her favour of the sum of £2984, 11s. 9d., and a bond and disposition in security over the fee and rents of the said estate for the sum of £26,860, 17s. 3d., in favour of certain trustees for Lady Gertrude I. G. Boyle or Cochrane and Lady Muriel Boyle, the petitioner's children; said bond of annuity and disposition in security, and said bond and disposition in security, containing declarations *in gremio* that the said annuity and provisions shall, on the death of the petitioner, be restrictable, in terms of the provisions of the Aberdeen Act, and decerns: Remits to Mr Galletly to revise and adjust the drafts of the said bonds, and to see the same executed and recorded as aforesaid, and to certify that that has been done: Supersedes extract of this interlocutor until the said bond of annuity and disposition in security, and bond and disposition in security, have been so recorded, and a certificate to that effect by Mr Galletly has been lodged in process.

"*Note.*—The question raised by the reporter arises under the 6th section of the Entail Amendment Act (11 and 12 Vict. c. 36), which provides that in cases of disentail and the like 'it shall be lawful for the Court to order such provision as may appear just to be made for debts or provisions which affect, or may be made to affect, the fee of the estate or the heirs of entail, or for the protection of the parties in right of the same.' In the present case it is necessary, in authorising the disentail of the estates held by the petitioner, that provision be made to secure the annuity to which the present Countess of Glasgow is entitled under the obligation contained in her antenuptial contract of marriage with the petitioner, and also to secure the provisions in favour of the younger children of the marriage, of whom there are two in life, viz., Lady Gertrude I. G. Boyle or Cochrane, who is of full age, and Lady Muriel Boyle, in minority, under the obligation in favour of younger children in the petitioner's contract of marriage and the relative bond of provision mentioned by the reporter. The annuity and provision must be secured by bonds and dispositions in security so as directly to affect the fee of the estate; and the question which arises between the parties is as to the amounts for which the deeds in favour of the Countess of Glasgow and the younger children respectively are to be granted. The annuity and provisions have been granted under the power contained under sections 1 and 4 of the Aberdeen Act, under the former of which the widow is entitled only to one-third of the free yearly rent or free yearly value of the estates after the deductions mentioned in the Act [viz. 'public burdens, liferent provisions, yearly interest of debts and provisions, including the interest of provisions to children hereinafter specified and the yearly amount of other burdens of what nature soever, affecting and burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heirs of entail in possession']; while under the latter the children are entitled at the utmost, in the case of three children, to three years of the free yearly rents or free yearly value of the estate, also after making the deductions specified in the statute. In both cases the rental to which the statute refers in fixing the measure of the widow's and children's provisions is that of the year in which the heir of entail may die and his successors take up the estate. In the case of a disentail such as is now to be carried out it becomes impossible literally to take the rule of the Aberdeen statute. The property goes into other hands, and may be sold and subdivided into many parcels, and it would

be unreasonable to suppose that the rental in the hands of purchasers or successors fifteen or twenty years hence should, after a disentail, form the measure of the provisions to the widow and children of the heir disentailing. There is, I think, no alternative but to take the rental of the year of the disentail as a rule.

"The petitioner further contends, however, that the burdens which affect the estate in the year of the disentail ought also to be taken into view in fixing the deductions from the rental; and his counsel has maintained that in the case of the annuity secured to the Countess of Glasgow there should be deducted—first, the interest on the children's provisions, and second, the amount which the petitioner has this year to pay in respect of rent-charges under the improvement statutes, and certain bonds of annual-rent enumerated in the statement produced, amounting in all to £877, 5s. 3d. The Countess of Glasgow was not represented by counsel, but the Court is charged with the protection of her interests under the section of the Entail Amendment Act already referred to.

"Again, it was maintained that in like manner, in fixing the amounts to be secured for the children's provisions, there ought to be deducted from the rental—first, the amount of the annuity to the Countess of Glasgow, and second, the amount of the annual rent-charges and annual-rents just referred to. The counsel for the younger children maintained that none of these deductions ought to be made.

"In disposing of this question it is not necessary—and I do not think it would be competent—for me even to attempt to settle the ultimate rights of parties. All that can now be done or that ought now to be done is to order 'such provision as may appear to be just' for ultimately meeting the obligations in favour of the Countess of Glasgow and the younger children above referred to. If, however, I had to decide the question I should certainly hold that the proposed deductions from the rental, which would seriously cut into the annuity and provisions, ought not to be allowed. It is true that the disentail renders it necessary to take the rental of the year of disentail as the measure of liability to start with. It does not, however, by any means follow that the burdens of that year must also be taken as deductions. There is a necessity to take the rental. There is no such necessity to take the year of disentail with reference to the burdens; and it appears to me that it would be most unreasonable that the heir of entail disentailing the estate should be thereby entitled not only to the advantage of acquiring the estate in fee-simple, but also to accelerate the date at which the deductions from the rental should be made to the serious prejudice of the creditors, the widow and younger children of the heir of entail. If it were so, a disentail would have the remarkable effect of reducing the amount of certain debts on the estate. In the present case I observe the petitioner shrinks from carrying his argument to its full extent, for he does not propose to deduct the annuity now affecting the estates or the heirs of entail, in favour of the Dowager Countess of Glasgow, amounting to upwards of £3000; while, if his argument be sound, he would be entitled to deduct that sum or a considerable portion of it, although it is understood the annuitant is upwards of eighty-six years of age. It appears to me that as a condition of authorising this disentail provision ought to be made to secure over the estate the utmost amount which the widow or children may yet have as a claim against the estates.

"In that view, first, as regards the present Countess of Glasgow, if she outlive her children there may be no deduction on account of their provisions; and if her husband, the petitioner, now sixty-one years of age, should live to the age of eighty-one or eighty-two, the whole rent-charges and annual-rents now existing would be paid off. I am therefore of opinion that in making provision for the Countess's annuity neither interest on the children's provisions, the rent-charges, or annual-rents ought to be taken into view; and this being so, the amount for which provision must be made in the bond and disposition in security in her favour must be £2984, 11s. 9d., being one-third of the rental of £8953, 12s. 5d., after deducting interest on the debts secured on the fee of the estate.

"In like manner as regards the children, if their mother predeceased them the annuity could of course form no deduction from the rental, and the same observation already made as to the rent-charges and annual-rents applies in their case also. The provisions must therefore be made by a bond and disposition in security in their favour for the sum of £26,860, 17s. 3d., being three years of the said rental of £8953, 12s. 5d.

"In taking this course as regards the possibility of the Countess of Glasgow predeceasing the petitioner, I understand that I am proceeding on the view to which Lord Kinnear, after full consideration, gave effect in the case of *Falconer Stewart of Binny* for authority to record instrument of disentail, reported in the S. L. R., vol. xx. 867.

"The deeds to be now granted will contain provisions or conditions *in gremio* that the said bonds of annuity and provisions shall on the death of the petitioner be restrictible in terms of the provisions of the Aberdeen Act."

The petitioner reclaimed.

When the case was called, the Court drew attention to the fact that the Countess of Glasgow was not represented. A *curator ad litem* was therefore appointed to her Ladyship, and the same counsel were instructed on her behalf who appeared for the younger children.

The petitioner argued—The Lord Ordinary had rightly held that in the case of a disentail, which had not been contemplated by the Aberdeen Act, the year of the disentail must be taken, instead of that of the granter's death, in ascertaining the free yearly rent of the estate. That being so, the rental of that year should be treated as regards deductions in the manner appointed by the Aberdeen Act. The following deductions should therefore be made:—(1) the amount of terminable rent-charges now burdening the estate—*Irving* v. *Irving*, Feb. 22, 1871, 9 Macph. 539—or at all events, interest on the capitalised sum which the petitioner as heir of entail might have (and therefore in the interest of his creditors should be held to have) charged on the estate; (2) the annuity of £1500 payable to the Dowager-Countess, which was not pressed for before the Lord Ordinary; (3) in computing the security to be made for the widow's annuity, the interest on

the children's provisions should be deducted—*M'Donald* v. *Lockhart*, Dec. 15, 1835, 14 S. 150; and (4), conversely, the amount of said annuity should be deducted in computing the security for the children's provisions—*Boyd* v. *Boyd*, July 5, 1851, 13 D. 1302; *Brodie* v. *Brodie*, Dec. 6, 1867, 6 Macph. 92; *Dunbar* v. *Dunbar*, Dec. 7, 1872, 11 Macph. 200. Alternatively, the Court should ascertain the actuarial amount of the various provisions, and deduct that. The Lord Ordinary's principle was unduly harsh, as it ordained security to be made for the chance of further issue of the petitioner's marriage, which was highly improbable, and for various contingencies, all of which could not possibly occur, *e.g.*, because Lady Glasgow could not both survive and predecease her children.

The respondents' argument appears from the opinion of the Lord Ordinary. They cited *Falconer Stewart*, *supra*; *Irving*, *supra*; *D. Roxburghe*, June 28, 1881, 8 R. 862; *Christie*, Dec. 10, 1878, 6 R. 301.

At advising—

Lord President—In disposing of this question decided by Lord Shand, we must be guided by the 6th section of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36). This section provides, "That where any heir of entail in possession of an entailed estate in Scotland shall apply to the Court of Session under this Act in order to disentail such estate, in whole or in part . . . he shall make and produce in such application an affidavit setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the fee of the said entailed estate or the heirs of entail; or if there are such debts or provisions, setting forth the particulars of the same, with the amounts thereof respectively—principal, interest, and expenses—and the vouchers by which the same are instructed, and the names, designations, and residences of the parties in right of the same; . . . and it shall be lawful for the Court to order such provisions as may appear just to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same." . . .

These are very general words, and they must be read so as to give full effect to the object of the enactment, and accordingly provision should be made for meeting these burdens upon the estate, such as should in the circumstances be just. That means that full provision should be made for the claims of the parties in right of these burdens upon the estate, or, as Lord Shand has expressed it, "that as a condition of authorising this disentail provision ought to be made to secure over the estate the utmost amount which the widow or children may yet have as a claim against the estates." Now, the provisions in the present case which require to be secured are, in the first place, an annuity to the present Countess of Glasgow, and in the second place, a bond of provision in favour of the younger children, or rather in favour of children who cannot succeed to the entailed estate. The provision for them is one year's rent if there is one child, two years' rent if there are two children, and three years' rent if there are three or more children.

Now, the first thing to be ascertained is what is the rental of the estate, and in dealing with the provisions of the Aberdeen Act, the rental of the estate is to be taken as at the death of the granter of the provision. It is quite obvious that that principle cannot be followed here, for in the present case the granter is still alive. Accordingly some other period must be taken at which to ascertain the rental, and in accordance with the usual practice the Lord Ordinary has taken the date of the disentail. To that course no objection was made.

But it is quite obvious that in considering what deductions are to be made the same rule cannot apply. For the debts which at present affect the estate, and in respect of which annual payments require to be made out of the rents, will 'in all probability, to some extent at least, have ceased to effect the rental when the provisions fall to be paid. For example, the annuity to the Dowager-Countess of Glasgow, who is a very old woman, will in all probability be no longer payable at that date. In like manner it is very doubtful whether the rent-charges which at present affect the estate, and which are not of a permanent nature, may not have ceased to affect it before Lord Glasgow's death. Then there is the question whether in the case of Lady Glasgow's annuity we are to assume that her children will then be surviving—there may be three then instead of two—and whether on that account it will be necessary, in ascertaining the rental at that date, to take into account the provisions for the children. Are we to take for granted that these provisions are to be taken into account in fixing Lady Glasgow's annuity. In reference to all such questions we must keep in view the principle that there may be a sum to be paid on the footing that the rental of the estate at Lord Glasgow's death is unaffected by any of these deductions. It is very probable that the Dowager-Countess's annuity will be at an end. There is every possibility that the rent-charges shall have ceased, and it may be that when Lady Glasgow's annuity comes to be paid there may be no children.

In like manner, in dealing with the provisions for the children, we must take into account the same probabilities, and also that there may be no burden on the estate in the shape of a provision for the mother.

I therefore agree with the Lord Ordinary that we must take all these considerations into account, and refuse to give any deduction for the present.

No doubt there is some apparent hardship in placing on the estate so large a burden as this course necessarily entails, and it may to a certain degree embarrass the relations between seller and purchaser. But I think there is no real hardship, for an actuarial view of the matter may be taken, and a probable estimate of what his burdens may be at Lord Glasgow's death may be formed. Certainly we are not entitled under the 6th section of this Act to go into this matter.

For these reasons I am entirely of opinion with the Lord Ordinary that the sum mentioned in the interlocutor shall be secured by bond of annuity and disposition in security, and by bond and disposition in security, these said bonds being, on the death of the petitioner, restrictable in terms of the Aberdeen Act.

Lord Mure and Lord Shand concurred.

Lord Adam—This is a petition under the Entail Amendment Act 1848 to disentail the estates of Kelburne, and section 6 of that statute provides that before authorising such disentail to be recorded the Court may order such provisions as may appear just to be made for parties in right of such burdens as we are dealing with here. That is the duty that is laid upon us. And I agree that it would not be just to make provisions for less than the maximum amount which the widow and children may possibly claim. I think that if an heir of entail wishes to disentail, that is no reason why his widow and children should suffer. Now, the maximum amount to which his widow may be entitled depends on whether his children survive the date of payment. If there should be none the amount would be larger, and I think it would be manifestly unjust to provide for the widow on any footing other than that of assuming that all the children had predeceased the date of payment. In the same way I think it would be manifestly unjust to provide for the children on any assumption other than that of his widow's death prior to the date of payment. Now, that view necessitates the charging on the estate of provisions which can never be required. But nobody can say which of the possible events may happen, and therefore it is necessary to provide for all. But I agree with your Lordship that the hardship is more apparent than real. For if his heir of entail is about to enter into a contract of sale he can have an actuarial calculation of the whole probabilities of the case. I most certainly concur with your Lordship in thinking that whether such a calculation is to be made or not, we cannot deal with the interest of the widow and children in any other way than that which your Lordship has proposed.

The Court adhered.

Counsel for Petitioner — Raukine — Dundas. Agents—J. & F. Anderson, W.S.

Counsel for the Countess and Children — Graham Murray—W. C. Smith. Agents—Tods, Murray, & Jamieson, W.S.—Hope, Mann, & Kirk, W.S.

Thursday, July 15, 1886.

OUTER HOUSE.

[Lord Kinnear.

FINDLAY'S TRUSTEES *v.* FINDLAY AND OTHERS.

Parent and Child—Succession—Conditio si sine liberis decesserit—*Implied Will—Posthumous Child.*

A father by a holograph will directed his trustees to make over his whole estate to his children George and Jessie, naming them. They were his whole family, and he was then a widower. Six years later he married again, providing a sum of £3000 to trustees under his marriage-contract to pay an annuity to his wife, and the fee to the whole children of both marriages if his wife should survive, that provision being declared to be in satisfaction of legitim; if she predeceased, no provision was made for the children. He died six months after this marriage, survived by his wife, who bore a posthumous child to him. The amount of his estate carried by his will was about £5000. The posthumous child having claimed a third of the provision by the will in addition to a third of the provision settled by the marriage-contract, the claim was *repelled.*

George Findlay, hatter in Aberdeen, died on 15th May 1885 leaving a holograph will in the following terms—"I, George Findlay, with the full intention if spared to make a proper will fully detailed, do hereby appoint Mr George Findlay Shirras, my nephew, and Mr Patrick Morgan, 11 Richmond Terrace, to be trustees on my estate, and my son George to be trustee when the age of twenty-one, but to be present at all meetings till then but not to vote only to express his wish but to have full power @ twenty-one. The trustees to give my sister Ann Findlay the sum of forty pounds per annum during her lifetime, George Findlay, my son, and Jessie Ann Findlay, my daughter, to have share and share alike both of heritable and moveable, or the survivor of them. George Findlay. *P.S.*—The trustees to have a gift of nineteen guineas each."

At the date of the will the testator was a widower, his wife having died in 1875, and the two children named in it were his only children. In 1884 he contracted a second marriage, and by an antenuptial contract he bound himself to make payment of an annuity of £150 to his second wife in case she should survive him, and in security of the annuity he assigned to trustees certain stocks and shares of the value of £3000 or thereby. In the event of the wife surviving the trustees were directed on her death, leaving issue, to realise the trust funds and divide the proceeds among all the children of both marriages equally, share and share alike; and it was declared that the provisions of the contract so far as in favour of the children of the marriage should be in full satisfaction of legitim, executry, and everything else they could claim through the father's decease, goodwill excepted. In the event of his wife's predecease the trustees were to refund the stocks and shares so handed to them, and that whether there were any children of the marriage or not.

Findlay died about six months after his second marriage, survived by his wife. She gave birth a few months after her husband's death to a posthumous daughter. She shortly thereafter died.

Findlay's moveable estate was worth about £5066. He had two heritable properties, the title to the first of which, a house in Victoria Street, Aberdeen, was taken in 1867, in favour of him and his first wife in conjunct fee and liferent, but for her liferent use only, and after the death of the longest liver, of the children procreated or to be procreated between them, equally, share and share alike, in fee. The title to the other, a house in Aberdeen, let to tenants, and which was purchased in 1874, was in favour of Findlay, the testator, and his heirs and assignees whomsoever.

Findlay's trustees raised a multiplepoinding to determine the rights of his children in his estate. Mr Harry Cheyne, W.S., was appointed *curator ad litem* to Jane, the posthumous daughter, and claimed a third of the estate, heritable and moveable. George and Jessie claimed share and share alike of the estate to the exclusion of Jane.