which had become almost part and parcel of the institution of marriage. It was not surprising such a rule had been adopted, seeing the extraordinary severity with which adultery had been treated in that law. The husband's fund fell within the rule of a *donatio propter nuptias*, and was forfeited upon the divorce for his adultery. It was not for the House, which was bound to administer the law of Scotland, to arrogate the right of overturning a law which had existed so many years, and which had become an established basis for dealing with property in that country. The decision should therefore be affirmed, with costs.

Judgment affirmed with costs accordingly.

HARVEY *v.* LIGERTWOOD.

The LORD CHANCELLOR said he had very little to say in this case. The appellant sought to reduce and set aside a disposition which he had executed of all his goods under a well-known process for the relief of insolvent debtors, called a *cessio bonorum*. He said that that disposition included something that was incapable of alienation, and therefore the deed was to that extent void. The House had already decided that the appellant had no vested interest in the funds arising out of his marriage contract, but it was said that he had still a contingent interest in the event of his surviving his former wife. The case had been very ably argued by the junior counsel for the appellant; but there was really no substantial ground for interfering with the judgment of the Court below. The contingent interest referred to would not be an alimentary provision at all, but would be alienable, and therefore was carried by the *dispositio omnium bonorum*. The interest, in any event, is very small, and the Lord Ordinary took the proper view of the case, and his interlocutor should be affirmed.

LORD CHELMSFORD concurred, and said that by the previous decision of the House the appellant had forfeited all the interest which he took by virtue of the marriage-contract. If there was a contingent interest which he might have over and above in the event of his surviving his wife, that was an interest which he could dispose of, and which he had disposed of. The decision below was perfectly right; and it was painful to think of the money and time that had been wasted in such a litigation as this.

LORD WESTBURY also concurred, and said one of the reasons for reducing this deed was that it had been executed in a dark and dirty dungeon, when the husband was a debtor; but the law expressly provided that the debtor could, in such circumstances, execute a valid deed called a *dispositio omnium bonorum*. The other ground was that a wrong construction had been put on the marriage-contract; but that was no ground for reduction. If the interest which the appellant still has in his marriage-contract is inalienable, then it has not been alienated. If it was alienable, then it was conveyed by the disposition, and cannot now be altered. This case was an instance of great pertinacity in litigation, and it was to be regretted that, owing to the respondent not appearing, it could not be dismissed with costs.

Judgment affirmed.

Monday, March 11.

CATTON *v.* MACKENZIE.

(*Ante*, vol. vii, p. 687, also pp. 250 and 410.)

Entail—Provision to Children—Entail Amendment Act (11 *and* 12 *Vict. c.* 36, § 43).

Terms of a clause in an entail authorizing provisions to younger children, *held* not to render the entail invalid under 11 and 12 Vict. c. 36, § 43.

The late Hugh Mackenzie died on 30th July 1869, possessed of the entailed estate of Dundonnell, valued at about £150,000. He held the estate of Dundonnell as institute under an entail executed by his father in 1838, and on the death of the latter, in 1845, he completed a feudal title to the lands under the entail. He also acquired certain lands called Mungusdale, in fee simple, of much smaller value.

Mr Mackenzie was never married. He left a natural daughter, Miss Mary Mackenzie, who was married in November 1865 to Mr Alfred Catton.

By a trust-disposition and settlement dated July 1854, Mr Mackenzie conveyed to trustees the estate of Mungusdale, as also his whole heritable and moveable estate, directing them to hold the same for behoof of his daughter.

In December 1869 Mrs Catton and her husband raised a declarator against Kenneth Mackenzie, brother of the late Hugh Mackenzie, being the first substitute in the entail of Dundonnell, to have it found that the entail of Dundonnell was invalid, and that the estate was carried by the trust-settlement of 1854.

The objections maintained by the pursuers to the validity of the entail were chiefly these:—

The usual prohibitions were inserted, with this "exception" (1) "That it shall be lawful to the said Hugh Mackenzie and to the heirs of tailzie above specified, notwithstanding the limitations before written, to provide their younger children with three years' free rent of the said lands and estate; but declaring that where such power has been exercised, it shall not be lawful or in the power of any subsequent heir of tailzie to burden the lands and estate with new provisions until the former provisions are satisfied and paid; and in case a part thereof shall be paid, then it shall be lawful to the said heirs of tailzie to provide their younger children in so far as the prior provisions are extinguished, so that the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent thereof after deduction of all other burdens,—and declaring further, as it is hereby expressly provided and declared, That no adjudication or other legal execution shall [lie] or be competent against the fee or property of the said lands and estate, or of any part thereof, for payment of such provisions to younger children;—nor shall it be lawful to, nor in the power of any of the said heirs of tailzie, to sell or dispone the said lands and estate or any part thereof for payment of the said children's provisions."

The pursuers maintained that no limitation was imposed by the entail on Hugh Mackenzie, the institute, as to the mode in which, or the time when, he might have granted and made payable the provisions to younger children; that he was permitted to contract debt for children's provisions, for which the entailed estate might be adjudged during his life or after his death, and, further, they maintained, that although the subsequent

heirs of entail were prohibited from selling the lands in payment of children's provisions, there was no such prohibition directed against the institute.

2. The resolutive clause declared that the "person" contravening should forfeit all right to the estate, and the right thereof should devolve upon the next "heir of tailzie."

The pursuers maintained that the resolutive clause is not directed against the institute, seeing that the right to the estate is declared to devolve upon "the next heir of tailzie,"—words which, they said, could not apply to the first institute.

3. The irritant clause was expressed as follows—"and it is also hereby expressly provided and declared, that all the debts and deeds of the said Hugh Mackenzie, or any of the heirs of entail, or either of them, contracted, made, or granted, as well before as after their succession to the foresaid lands and estate, in contravention of this present tailzie, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications or other legal executions or diligences that shall happen to be obtained or used against the fee or property of the said lands and estate, or any part thereof, upon the same, shall not only be void and null," etc.

The pursuers maintained that the words "debts and deeds" do not include alterations of the order of succession.

On these grounds, the pursuers maintained that the entail was wholly invalid under section 43 of 11 and 12 Vict. c. 36.

The Lord Ordinary (MACKENZIE), by interlocutor dated 7th June 1870, repelled the pleas in law for the pursuers, and assoilzied the defender from the whole conclusions of the summons.

His Lordship took the view that the entail was effectual, and that therefore the estate of Dundonnell could not possibly be carried by the trust deed of 1854, whatever Mr Mackenzie's intentions may have been.

The pursuers reclaimed.

The First Division, on 19th July 1870, held that the general disposition contained in the trust-deed of 1854 was not intended to convey, and did not convey, the estate of Dundonnell, had it been subject to Mr Mackenzie's deeds, and that it was unnecessary to decide the validity of the entail.

The pursuers appealed to the House of Lords.

PEARSON, Q.C., and J. M. DUNCAN for the appellants.

The LORD ADVOCATE, Sir ROUNDELL PALMER, and SHAND for the respondent.

At advising—

LORD CHANCELLOR—My Lords, this case comes before your Lordships' House in a condition which is somewhat remarkable. The action is an action in respect to certain lands of very considerable value called Dundonnell, which Mrs Catton, the original pursuer, sought to recover. The ground upon which she proceeded was this—That she was entitled, by virtue of a deed of disposition of a testamentary character made by her father Mr Mackenzie (she not being legitimate), to the whole of the property of which he was entitled to dispose. She says that this property, Dundonnell, was in such a position that he was, notwithstanding a certain deed of taillie, entitled, under the Rutherfurd Act, to make this disposition; and that, although the testamentary disposition contained no direct mention of Dundonnell, but did contain direct mention of another property called Mungusdale, still it contained general words of disposition which were sufficient to dispose of the Dundonnell estate had it been in his power to dispose of it. Against this claim on her part two propositions were maintained by the respondent, the heir of taillie under the original entail of Dundonnell. First, it is said that the entail was a perfectly good entail under which he claims his right and interest; and secondly, that even if it were not so, even if the property were subject to the disposition of Mr Mackenzie, yet he has not in effect by the general disposition contained in the testamentary instrument made an effective disposition of this property.

The Lord Ordinary was of opinion with the respondent upon the first point, namely, that the taillie was a good and subsisting taillie, and was on that account placed sufficiently beyond the control of Mr Mackenzie, and could not therefore possibly pass by any testamentary disposition in favour of Mrs Catton.

The second point urged was, that the general words employed in that disposition were not sufficient to carry this property, even if the taillie were in any way defective. The Lord Ordinary being of opinion with the respondent upon the first point, and upholding the taillie to be valid and effective, put an end to the question upon that ground.

The case was then brought by way of appeal before the Lords of the First Division, and they passed by the question as to whether or not the instrument of taillie was effective under the Rutherfurd Act; and, passing by that question, they came to a conclusion in favour of the respondent equally effectual for his purpose of resisting this action. They held that the general words employed in the deed of disposition would not pass Dundonnell even if it was subject to the disposition of Mr Mackenzie. They therefore recalled the interlocutor of the Lord Ordinary, but decided upon the other point in favour of the respondent.

My Lords, the appellant now seeks at your Lordships' Bar to sustain that interlocutor in so far as it recalls the decision of the Lord Ordinary, but to reverse that interlocutor in so far as it sustains the pleas in law in favour of the respondent upon the second point.

Now, we have heard a very elaborate argument on behalf of the appellant with reference to the second point, namely, whether or not the deed of disposition would pass the estate supposing it were subject to the disposition of Mr Mackenzie. But we were very desirous to hear a full argument upon the first point, namely, the validity of the deed of entail, for certainly the doctrine that was contended for on behalf of the appellant was exceedingly wide in its extent and consequences. Mr Duncan most ably argued the case, and most clearly brought out the points which he undertook to sustain in objection to the deed of taillie, and he admitted that the question was one affecting the validity and sufficiency of a very large number of entails which had been made under the Act of 1685, which, if we were to hold the construction now contended for of the 43d section of the Rutherfurd Act, would be more or less very seriously jeopardised, if not rendered wholly ineffective, as the result of any decision that we might come to in the present case in favour of the views which Mr Duncan maintained.

Now the point which arises upon the deed of tailzie is this—It is contended that that deed is per-

fect and effectual in the destination of the property as regards the taillie *per se*, supposing it to stand by itself. It is conceded also—I think I may say, because there was no very great stress of argument upon that part of the case—that with the exception of provisions which might be made for younger children upon the part of the institute or of the subsequent heirs of tailzie, there was a sufficient prohibition against encumbering the estate, charging it with debt, or alienating it. So far the deed is admitted to be an effective and valid deed under the Act of 1685. But there was contained in the instrument a provision by which a sum, not exceeding three years' free rent, might be charged for the benefit of younger children, either upon the part of the institute or upon the part of the heir of tailzie. When I say 'charged,' of course it was a question which was raised in the discussion of the case in the court below, as to how far a direct and distinct charge for making this a burden to the estate, which could be realised by adjudication should the money be raised by means of any security given, for the purpose of obtaining a provision for the younger children, was effectively provided for in the deed, and if it was so provided in the deed, whether the releasing of the fetters by which the estate was bound, to the extent of enabling such a burden to be laid upon the estate, was or was not a relaxation of the fetters of the entail which brought the case within the provisions of the 43d section of the Rutherfurd Act, and placed the tailzie wholly at the disposal of the institute or of the heirs of tailzie in consequence of the instrument falling within the description of being an instrument which was rendered invalid by the operation of the 43d section of the Rutherfurd Act.

Now the section of the Rutherfurd Act is correctly set forth in the 11th condescendence at page 14 of the Appellants' case. It is there stated that by the Act of the 11th and 12th of the Queen, cap. 26, section 43, it is there enacted 'That where any tailzie shall not be valid and effectual, in terms of the said recited Act of the Scottish Parliament passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt and alteration of the order of succession in consequence of defects either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then, and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions; and the estate shall be subject to the deeds and debts of the heir then in possession and of his successors, as they shall thereafter in order take under such tailzie, and no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same by reason of any contravention of all or any of the prohibitions."

Now the question is, Whether or not what is here done in this tailzie, brings the tailzie within the provisions of the Act? The argument has been this, that if you look to the words by which provision is allowed to be made for younger children to the extent of three years' rent, although you do find general clauses resolutive and irritant, all of them effectively created with regard to charging or encumbering or alienating or disponing the estate, yet you find a subsequent relaxation to the extent of a provision of three years' free income for the benefit of younger children, remitting the person in possession to his original position with regard to his right to that extent at least of encumbering the property; and that therefore the the deed of tailzie is an invalid instrument under the Act of 1685 as not having complete and perfect prohibitions properly and adequately fenced with regard to charging and encumbering the property.

One main point to be considered before entering into the details is this, whether or not it is a sound and rational construction of the clause in the Rutherfurd Act, that a relaxation for a limited purpose, and to a limited extent, of the prohibitory clauses with regard to encumbering or disponing the estate, is to have the effect not merely of releasing the fetters and opening the tailzie to all those who may be in possession to the extent to which it is opened, and for the purpose for which it is opened by the provision which is so made for children, but whether it shall also have the effect of opening the whole property to absolute disposition upon the part of every heir of tailzie who shall be in the ordinary course in possession.

Now the mischief which it was intended by the Act to remedy was certainly not one of that character. It was not one as to which it was contemplated that the interposition of the Legislature was required, on a special provision being made for a specific and given purpose, to open the whole disposition of the estate to those who might come into possession. The mischief which was intended to be dealt with was this—that there were, not unfrequently, entails under the Act of 1685 in which, although care had been taken in their preparation to make a decided and close entail of the whole property, yet through some degree of hesitancy at one particular moment on the part of those who prepared them, or from some accidental slip of some kind or another in the directions given by the parties for the preparation of the instruments, a case sometimes arose in which one particular person in possession might not have been sufficiently provided against in reference to his acts or deeds in regard to dealing with the property. The Rutherfurd Act struck immediately at this, and said that it should not be left to this uncertain and unsettled state, that one of the heirs of tailzie in the the course of succession should not have the absolute and entire disposal of the whole property, but that if one heir could dispose of it, then it should be open to every heir who came into possession to deal with it as if it were an estate which was not subject to restrictions imposed upon it by the stringent operation of the Act of 1685. So, again, with reference to encumbering or charging. If it was in the power of any one of the heirs of entail to charge or encumber or dispone the whole or any part of the property without any definite purpose being specified (like a provision for younger children), then, in order to avoid the inconveniences which were found to arise from having estates unreasonably fettered in the manner I have described, advantage should be taken by each and all of the heirs of tailzie, of doing that which any one of the heirs of tailzie might do from the want of adequate provision being made with regard to securing the property against his acts or encumbrances. But to say that, if there is any power reserved of relaxing the fetters for any special given purpose, such as a provision for younger children, defined and limited as it is here—for the 43rd

section in that case strikes against the whole disposition and destination of the property under the deed of tailzie—appears to me to be an unreasonable conclusion to arrive at. It was candidly admitted by Mr Duncan that the determination in support of which he has argued is one which has never yet been arrived at, although there are numerous instances in which, if your Lordships should now for the first time so decide, the point might arise, and tailzies which exist in large numbers under the Act of 1685, hitherto unimpeached by the operation of the 43d section of the Rutherfurd Act, would be effectually destroyed. That of itself seems to me to be a sufficient reason why one should be very careful in holding that if there be any remission or relaxation of the fetters imposed upon an estate with regard to this distinct and specific purpose, that circumstance should not lead your Lordships to come to the conclusion that the whole entail of the estate is destroyed.

Now the particular questions which are raised in this case are some of them of the very minutest description; and I prefer resting upon the broader ground, that a case in which a provision is made for younger children in the way in which it has been here made is not a case to which the 43rd section of the Rutherfurd Act has any application at all. But even supposing it had any application, it is a matter for serious consideration whether the argument of Mr Duncan has satisfied your Lordships that this is in effect a power inconsistent with the prohibitory clauses of charging and effecting this estate. It is expressly provided in the instrument that no creditor shall have the power of adjudication. Of course one agrees at once with the argument of Mr Duncan, that you cannot give a man a charge and say that he shall not exercise all his remedies for that charge—but there is no more difficulty in the Scotch law, any more than in the English law, in providing in the instrument by which you are supposed to raise this fund for the benefit of younger children, security for the payment of the money and the mode of payment, so that there shall never be execution against the estate on the part of the creditors; *volenti non fit injuria*; and as regards the creditors, I apprehend that there is a mode in which he should deal with the property in order that his security may be realised without affecting the estate. But further than that, it is said that, as regards Mr Mackenzie at least, there is no provision against his raising the money in any mode in which he thinks fit, because when you come to the provision as regards the specific power (there being a general provision which affects undoubtedly Mr Mackenzie as well as anybody else in the succession) it is said that none of the heirs of tailzie shall be able to raise this particular charge by way of charge or encumbrance and so on—but the word "heirs of tailzie" would not include Mr Mackenzie, who was the original institute in the entail. I think that the Lord Ordinary has dealt with that question in a satisfactory manner by saying that as regards the first taker, Mr Mackenzie, there wanted no relaxation at all to prevent his dealing with the property in any way he might think fit during his lifetime, as regarded the rents and profits. The charge is only to be effective by way of encumbrance as against those whom the person in possession could not effectually charge under the restrictions imposed upon him by the deed of entail. As against them it would, no doubt, be necessary that he should have power and authority if the money is to be raised by way of charge as against their interests. But the charge in this case your Lordships will observe is a charge entirely for the benefit of younger children—and authorities are cited in the case of the respondent which seemed to hold in the Scotch law, as we do in the English law, that the position and status of younger children is a matter not to be ascertained until the death of the parent; because the construction in Scotch law, as in English law, is that the younger child is a child unprovided for in this sense, that the child does not take the estate—the heir according to the destination succeeds to the estate under the tailzie, and the younger children are unprovided for at the death of the person, whether he is the institute or one of the heirs in succession. At his death it is ascertained who are the younger children who are unprovided for—so that, leaving this matter open as regards Mr Mackenzie, the institute, it would not be a fatal objection (if it could at all prevail, which I think it could not) as to the relaxation not having been made in his case in such a manner as to enable him to charge the estate contrary to the general prohibitions against disposing and charging the estate. But these are mere matters of detail. And when the case stands upon a ground of such importance as this case does stand upon, as affecting all dispositions of Scotch property under deeds of tailzie, I very much prefer resting the decision upon this ground—which I trust will be your Lordships' opinion—that the 43d section of the Rutherfurd Act, dealing with invalid and ineffective entails, does not include the case of a provision being made for younger children in the mode and form in which it is here made, and that when the fetters are relaxed to that extent and for that purpose they are not so relaxed as to enable the estate to be dealt with in a manner contrary to the provisions and purpose of that 43rd section. I think the 43rd section is intended only to have the general view I have attributed to it, and if any corroboration is wanted of that view, there is certainly something remarkable in this, that one very section (I think it is the 20th) in the Rutherfurd Act, carefully looks at provisions being made for younger children, and even actually gives the power of disposing of the fee in the very case which the Lord Ordinary described of the three years' rent—only in that form, and not accompanied by any power of disposition. It would be a very singular thing indeed if the provision made in the bulk of Scotch settlements for younger children, which the very Act we are now considering, the Rutherfurd Act, recognises as an object worthy to be pursued and facilitated, should have this result, that by some unforeseen effect of the language of the 43rd section the whole of the entail should be destroyed and swept away simply because there is this particular provision made for a particular case.

I apprehend that the doctrine would be similar, and similarly applied, with regard to any similar limitations of excepted portions of the estate. One of my noble and learned friends put the case of a small portion of feuing or building-ground. It would be very singular if the relaxation of fetters of the entail for that particular purpose were to have the effect of destroying the whole of the limitations of the entail. But, without pursuing that argument with respect to other supposable cases, I think in this particular case, as regards the provisions for young children, it would be an erroneous construction that this Act should have that enlarged application

given to it for the first time. And it is sufficient to say, therefore, that upon that ground, and for that reason, the decree of the Lord Ordinary was perfectly right. If that be so, I presume that the course now to be taken will be to recall the decision of the Inner House in all respects, except so far as it decrees expenses to be paid, and to affirm the decree of the Lord Ordinary, and to give to the respondents the expenses of this appeal.

Lord Chelmsford—My Lords, as your Lordships have arrived at the conclusion that this appeal may be satisfactorily determined upon the question of the validity of Murdo Mackenzie's entail, I cannot help regretting that we have not the advantage of the opinions of the learned Judges of the Court of Session on the subject,—as it is admitted that there are no previous authorities to guide us, but that the case is one of the first impression, to be decided upon principle,—upon which the judgment of those familiarly conversant with the law of Scotch entail would have been pre-eminently useful.

After the best consideration I have been able to bestow upon the subject, and notwithstanding the very able arguments of Mr Duncan, I have satisfied myself that there is no ground for impeaching the validity of the entail.

Before the passing of the Rutherfurd Act, a tailzie made under the Act of 1685, c. 22, in which any of the prohibitions contained in it were not fenced by proper irritant and resolutive clauses, was void only as to that prohibition, and effectual for the rest. But by the 43d section of the Rutherfurd Act (11 and 12 Vict. c. 36), "where any tailzie shall be invalid and ineffectual as regards any of the prohibitions against alienation and contraction of debt and alteration of the order of succession, it shall be deemed and taken to be invalid and ineffectual as regards all the prohibitions."

The objection made to the present tailzie is that it contains no effectual provision against burdening the estate with the payment of debts. The tailzie is made "under the limitation and restriction that it shall not be lawful for Hugh Mackenzie, or the heirs of entail, to sell, dispone, alienate, burden, delapidate, and put away the lands, or to contract debts, &c., or any ways to affect or burden the same, under this exception, that it shall be lawful for them, notwithstanding the limitations before-written, to provide their children with three years' free rent of the said lands and estate." The irritant clause provides, that "if Hugh Mackenzie or the heirs of tailzie shall contravene any of the conditions, provisions, or limitations, by acting contrary to them, or any of them, excepting as is above excepted, the person so contravening shall forfeit all right, title, and interest to the foresaid lands and estates."

It was argued, on behalf of the appellant, that the effect of the exception of the provision for younger children was to enable Hugh Mackenzie or the heirs of tailzie to burden the lands and estate. This, it was contended, was shown by the clause declaring that where such power has been exercised, it shall not be lawful or in the power of any subsequent heir of tailzie to burden the lands and estate with new provisions until the former provisions are satisfied and paid, and by the following words, "that the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent thereof,"—the words "three years' free rent," it was said, merely limiting the quantity of the burden. It was therefore insisted that the irritant clause referring to the above exception rendered it imperfect, and that there was no fence against the burdening of the estate; and, consequently, the whole entail was invalid.

I certainly am disposed to think, with the Lord Ordinary, that the fair construction of the exception is, that it merely confers a power on the institute and heirs of entail to grant provisions of three years' rent to those of his children who should occupy the position of younger children at the time of his death. I agree that the established rule in construing entails is, in cases of doubt, to adopt that construction which will release the estate from the fetters; but that rule does not appear to me to be applicable here. This is not a question as to the meaning of the fencing clauses of the entail, but as to the extent of an exception out of the limitations and restrictions imposed upon the institute and the heirs of entail, and the consequent reference to this exception in the irritant clause. Now, the exception is to provide the younger children with three years' free rent of the lands and estate. This is an ordinary provision for younger children in deeds of entail. And the following words against burdening the lands with further provisions till the former ones are paid, ought, in my opinion, although inaccurately expressed, to be construed as prohibiting any further provisions being made of the rents till those for the three years have been satisfied. And I put the same construction upon the words, "so that the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent;" which may mean, and I think ought to be construed to mean, that there shall be no obligation to provide free rents of the lands and estate beyond three years.

I am a good deal influenced in my view of this provision for younger children from its following a restriction upon any ways affecting or burdening the estate, and being followed by a clause that no adjudication or other legal execution "shall lie or be competent against the fee or property of the lands and estate, or any part thereof, for payment of such provisions to younger children." Now, if the provisions to younger children were a burden upon the estate, this exemption of the lands and estate from execution for payment of the provisions would be utterly void; and therefore it appears to me that the intention of the parties as to the nature of these provisions, being clearly expressed originally, it ought not to be affected by any inaccurate description in the reference to the provisions afterwards.

But, assuming that the proper construction of the provision for younger children extends it not merely to the rents, but to the estate itself, then the effect of it will be that the estate, to the extent of this provision, may be altogether removed and withdrawn from the prohibition of the entail. Consequently, the exception out of the irritant clause in no way disables it and renders it invalid and ineffectual as regards the prohibition against burdening the estate, but merely expresses that it shall not extend to the portion of the estate which would thus be withdrawn from the entail.

The conclusion to which I have arrived is, that the provision for younger children either is confined to the rents of the estate, and therefore is not a burden *upon* the estate, and consequently does not offend against the prohibitory clause, or that, if it is to be regarded as giving a power to make a

disposition of the estate itself for the provision for younger children, the irritant clause excepts it as not within its province; that clause being a perfect fence against a disposition of the rest of the estate. *Quâcumque viâ*, therefore it appears to me that the entail is valid.

I think that the appeal should be disposed of as proposed by my noble and learned friend.

Lord Westbury—My Lords, in the Court below there were two issues—one, that this was an imperfect and therefore an invalid deed of tailzie; the other, that the deed of tailzie being invalid, the estate passed under the residuary gift contained in the trust-settlement of Mr Hugh Mackenzie, and that that residuary gift was of sufficient power to evacuate the destination contained in the deed of tailzie. Now, if the first issue be found in favour of the claimant, the second issue does not arise. And the more natural course therefore is to consider the first issue. I thought that ingenuity had been exhausted in raising questions upon the Act of 1685; but that does not appear to be the case, and it probably never will be the case. And, accordingly, we have now an attempt to impeach a tailzie on the ground of its being imperfect, although, with regard to the estate, so far as it is left within the operation of the fettering clauses, there is no attempt to contend that any portion of the fettering clauses is invalid or ineffectual as a proper fetter in the deed of tailzie.

The attempt that has been made here is, that the appellant seeks to avail himself of the exception in the deed of tailzie of making a modified provision for younger children. He says that that exception relaxes the fettering clause so far as to admit of the estate being dealt with to a limited extent, and that, therefore, that exception prevents the operation of the deed as a complete deed of tailzie. And then he contends that a deed of tailzie which is an imperfect deed of tailzie in that sense, is a deed of tailzie falling within the operation of the 43d section of the Rutherfurd Act.

Now, the 43d section of the Rutherfurd Act is limited entirely and expressly to all cases where some one of the fetters is imperfect in consequence of a defect, either in the original deed of entail or in the investiture following thereon. It says, "Where any tailzie shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament, passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt," and so forth. Now, I do not mean to say that if there be an exception enabling you to relax the estate from the fetters of the entail to a considerable extent, and enabling you to burden or dispone the estate by virtue of that exception, so as to withdraw from the fetters a portion of the principal of the estate, there might not be some validity in the argument, or at all events some reason for considering it well before you came to the conclusion that such general provision might be inserted in the deed of tailzie. But that is not the case here. The exception here, making the estate liable to a particular charge, limits the amount of the charge, and is so carefully worded that it does not open the door to charging the principal of the estate, or disposing or aliening any portion of the principal of the estate; but the remedy for the sums which the heir of tailzie is enabled to raise for younger children, is to be sought only in the ordinary remedy as against the rents and profits of the estate. Accordingly, the exception is guarded by a due set of restrictions—first, that no advantage shall be taken of it to subject the estate to any adjudication; neither shall advantage be taken of it to enable the heir of tailzie to depone or sell any part of the estate. Consequently, the ordinary remedy of a mortgagee, or of a bond creditor, or of a judgment creditor, or of an alienee, is entirely taken away. The only thing that is given is the power to raise three years' rent out of the rents of the estate. Therefore it is impossible to say that the exception can be made the means of withdrawing any portion of the principal of the estate from the fetters of the deed of tailzie.

Well, now is there any objection to this? It has been done in hundreds of tailzies. It exists at this present moment in, I dare say, a very great number of deeds of tailzie; and if it were possible now at this time of day to open the door to another doubt upon the effectual operation of the Act of 1685, we should unsettle an enormous number of titles by reason of our entertaining a doubt which has not been thought of up to the present moment. For it was candidly admitted by the counsel for the appellant that they could cite no case, nor even a dictum, to the effect of warranting the general proposition that a limited provision for younger children, so guarded that it cannot be made a means of destroying the effect of any one of the fettering clauses, would be an objection to the validity of the entail under the statute.

Your Lordships will observe that it is not a faculty. It is an exception. It is a provision undoing the fetters to a certain extent, and the limitations upon the use of the power are part of the exception itself. The fetters are relaxed and fall off from so much of the estate as will enable you to raise the amount of the three years' free rent, and to raise it in a manner which shall not admit of adjudication, or of alienation, or of mortgage of any part of the principal. It is impossible to hold that that has the effect of withdrawing any part of the principal or the estate from the fetters of the entails. Entails are made, and have been made for centuries, with provisions for limited purposes, relaxing the fetters in a certain definite and restricted manner in order to accomplish those purposes, as in the case of granting feus of small plots of land for building purposes; but these provisions are quite consistent with the maintenance of the entails.

It was objected that the fencing clauses which accompany the exception itself were bad, because they did not apply to the institute. It is quite clear that they could not apply to the institute, for the provision, or exception, only becomes available in the case of the institute, at the death of the institute, when the objects entitled to the benefit of the exception can for the first time be ascertained.

There were two or three other exceptions which I think were not much relied upon here, but which appear to have been taken before the Lord Ordinary. One was as to whether the words "acts and deeds," extended to prohibit alienation and so forth. Those points I think are hardly worthy of the attention they seem to have been regarded with by the Lord Ordinary, and here, I think, they were very rightly not insisted upon.

What, then, is the result? It is unquestionable that this deed of tailzie contains everything which

the statute requires. It contains, with regard to the whole *corpus* of the estate, completely valid and effectual fettering clauses. It relaxes these clauses only to the extent of three years' rent to be received and recovered as rent, and that for a purpose which was consistent with the object of the settlement. We should do very great mischief if we encouraged ingenuity further than it has hitherto been encouraged in discovering doubts as to the operation of the Rutherfurd Act. The statute requires that which I have stated to your Lordships—and we have it here. In this case the fetters of the entail are relaxed for a purpose which is usually provided for in all settlements, and which will certainly be found in a great majority of the settlements constructed under the Act of 1685.

I think, therefore, that this attempt to impugn this tailzie has failed in every respect. There is no colour for it either in the language of the statute, or in the language of the deed of tailzie. Nor is there any support for it to be derived from authority, nor even from what are called in Scotland (with very great comprehensiveness of name), text writers. And I think your Lordships will feel considerable satisfaction in discouraging attempts of this kind, by dismissing the appeal as thoroughly unfounded, and by dismissing it with costs. But in doing so we must provide for the peculiar mode in which the case has been disposed of in the Court below. The Lord Ordinary pronounced for the validity of the entail. It went to the Inner House, and the Inner House recalled the Lord Ordinary's interlocutor, not because it was wrong, but because they thought it preferable that the judgment should be upon the second issue instead of the first. I submit to your Lordships that we must recall that interlocutor, because that interlocutor recalls the interlocutor of the Lord Ordinary; and, therefore, I should propose to your Lordships to make your order in this form:—"Recall the interlocutor of the Inner House, save so far as it finds the pursuer liable to expenses; and affirm the interlocutor of the Lord Ordinary; and direct that the respondent's costs in this appeal be borne and paid by the appellants."

Mr Pearson—Will your Lordships allow me respectfully to point out that the Interlocutor of the Lord Ordinary, which your Lordship proposes to set up, really decides the question of the conveyance which, I understand, your Lordships do not intend to pronounce any opinion upon, because you will find at page 34, "The Lord Ordinary repels the pleas in law for the pursuers, assoilzies the defender from the whole conclusions of the summons, and decerns." Now the last plea in law for the pursuer was that which related to the disposition of conveyance. And I would humbly suggest that it should be "Repels the first six pleas in law for the pursuer, and in respect thereof assoilzies the defendant."

Lord Westbury.—We could not do that, we must exhaust the whole action. I see no objection to the form of the order which has been proposed.

Agents for Appellants—Murray, Beith, & Murray, W.S.—John Graham, Westminster.

Agents for Respondent—W. F. Skene & Peacock, W.S.—Loch & Maclaurin, Westminster.

Thursday, April 25.

SMITH CUNINGHAME *v.* ANSTRUTHER'S TRUSTEES.

MERCER *v.* ANSTRUTHER'S TRUSTEES.

(*Ante*, vol. vi, p. 446, and vol. viii, p. 405.)

Marriage-Contract — Provisions to Children — Discharge—Power of Apportionment—Reduction—Essential Error.

By antenuptial contract £4000 belonging to the husband, and the wife's whole estate, were settled on the spouses respectively and the survivor in conjunct fee and liferent, and the children of the marriage in fee, declaring that the father should have power to apportion among them the £4000; while, in regard to the wife's estate, the same power was conferred on the parents jointly, or the survivor; failing apportionment, the funds were to be divided equally. There were three children, all daughters. The mother had at her marriage about £8000, and she succeeded to about £50,000. The marriage-contract of the eldest daughter, to which her father and mother were parties, contained a discharge of her whole claims under the marriage-contract of her parents in consideration of £5000 paid to trustees for her in liferent, and her children in fee.

The marriage-contract of the second daughter was in like terms, but her father only was a party to the deed, her mother being dead.

Thereafter the father contracted a second marriage, and left a settlement by which he directed £20,000 to be paid to his youngest daughter in full of her claims; £30,000 was settled upon his second wife in liferent and the youngest daughter in fee, and his two elder daughters were expressly excluded from any interest in his succession. The youngest daughter signed the trust-deed in token of her acceptance of the provisions in her favour.

The eldest daughter raised an action after her father's death against his trustees, to have it declared that there had been no valid apportionment in terms of the marriage-contract, and that she was entitled to a third part of the provisions in favour of the children, deducting £5000, and to have her marriage-contract reduced on the ground of essential error so far as adverse to her claims.

The second daughter raised an action with precisely the same conclusions.

Held (altering the judgments of the Court of Session) that the provisions of £5000 in the marriage-contracts of the two elder daughters, and the subsequent provision of £20,000, were valid appointments, *pro tanto*, in exercise of the power contained in the marriage-contract of the parents, but that none of the daughters were debarred from participating in any residue of the funds comprised in that deed there might be after deducting the sums mentioned, and that the said residue fell to be divided equally among the three daughters.

A narrative of the circumstances of these cases will be found *ante*, vol. viii, p. 405, 6th March 1871.

In the case of *Smith Cuninghame*, the Court of Session, on 10th July 1870, assoilzied the defenders from the conclusions of the summons.