LORD CHELMSFORD.—My Lords, I concur entirely with my two noble and learned friends, and I must add, that from the moment when the case was fully opened, I have not brought myself to entertain the slightest doubt upon any of the questions which have been raised in this case. And I must concur with my noble and learned friend on the woolsack in expressing my regret, that the appellant in this case did not submit to the four decisions in Scotland against her, and that she has imposed upon the respondents the necessity of defending themselves at very considerable expense against the appeal which she has thought proper to make.

There are three questions in this case; and though I really hardly think it is necessary to add anything to what has fallen from my noble and learned friend on the woolsack, I will very shortly advert to each of them. The first question is, whether Mrs. Greenlees was bound by her signature to the deed of 1835? Now, upon that it is perfectly clear, that that question is concluded by the decision in *Johnstone* v. *Coldstream;* and although the Lord Ordinary in that case, Lord Ivory, expressed an opinion, that the testing clause ought to be confined to its immediate object, yet the learned Judges of the Court of Session, after a very careful consideration of the whole case, came to a different conclusion, and decided, that the statement of the consent and approval of the wife in the testing clause was quite sufficient to bind her. No doubt has ever been entertained with regard to the propriety of that decision. It was recognized in the case of *Leighton* v. *Russell*, and in the present case not one of the Judges who has had to decide the question, has expressed the slightest doubt as to the propriety of that decision. There was the decision first of the Sheriff substitute. Then that of the Sheriff, then that of the Lord Ordinary, and then the unanimous opinion of the Judges of the Court of Session. Certainly, under these circumstances, even supposing that we entertained any doubt as to the propriety of the decision in *Johnston* v. *Coldstream*, it would be a very dangerous thing, (as my noble and learned friend on the woolsack has said,) even to express any disposition to throw a doubt upon that decision, because it might affect the validity of many deeds which have been executed in the same way upon the strength of that decision.

Then the next question is, whether, supposing that Mrs. Greenlees was bound by the deed of 1835, she was relieved from the effect of her signature by the deed of 1851. It is quite clear, that that deed was not an entire revocation of the deed of 1835. It is expressly said to be revoked and recalled only in favour of the children and the survivors of them and the appointment of them as executors and universal legatees. The deed of 1835 is expressly approved. The truster says, "I hereby approve of the foregoing settlement in all other respects so far as not expressly altered by this codicil." It is perfectly clear, that there was no revocation of the deed of 1835. There were additional benefits given to the wife by the provisions of the deed of 1851. It is clear, therefore, that she was not relieved from the effect of her signature to the deed of 1835 by the deed of 1851.

Then the only remaining question is, whether the representative of Mrs. Greenlees has any power to revoke her consent. Now, it seems to me, that there is no doubt about this. Supposing it was a donation, and not a remuneratory contract,—supposing that Mrs. Greenlees had the power to revoke her consent, it is quite clear, that that power was personal to herself, and that her representative would have no right whatever to exercise it.

I feel that I ought to apologize (this being so very clear a case) for adding anything to the opinion which has been expressed by my noble and learned friend.

Interlocutors affirmed, with costs.

Appellant's Agents, M. Macgregor, S.S.C.; W. Robertson, Westminster.—*Respondents' Agents*, Morton, Whitehead, and Greig, W.S.; J. B. Greig, Westminster.

JUNE 12, 1865.

The EARL OF GALLOWAY, *Appellant*, *v.* HORATIO GRANVILLE MURRAY STEWART, *Respondent.*

Obligation—Bond—Provision for Younger Children—Obligation of Relief—Construction—*Earl G., on the marriage of his son, W., by bond stipulated to pay £5000 to the children of the marriage, provided if W. or the heirs of his body should succeed to the entailed estate of B., then they should be bound to charge the sum on the B. estate, and Earl G.'s obligation should cease. The marriage contract of W. repeated the same obligation, but declared the trusts of the £5000 to be for the younger children in the foresaid event of succeeding to the B. estate. W.'s grandson having afterwards succeeded to the B. estate, Earl G. claimed repetition of the £5000.*

HELD (reversing judgment), *That the obligation on W. to relieve Earl G. was an absolute personal liability, whether he or his heirs could effectually charge the sum on the B. estate or not.*
HELD FURTHER, *That as part of the sum of £5000 had, before the obligation attached, been paid away to one who could not have obtained any part of what was charged on the B. estate, the balance only could be recovered by Earl G.* (LORD CHELMSFORD *dissentiente.*)

In 1804, Colonel William Stewart, afterwards Sir William Stewart, second son of John Earl of Galloway, married Miss Frances Douglas, and the Earl agreed, besides settling annuities on Sir William and his intended wife, to settle a sum of £5000 on the children of the marriage.

The bond granted by the Earl, reciting the marriage, bound the Earl to pay to certain trustees £5000, for behoof of the children of the intended marriage, and for better security, to grant heritable security over his estates in Scotland, with this proviso:—"But declaring, as it is hereby specially provided and declared, that in the event the said Colonel William Stewart, or the heirs of his body, shall happen, through the failure of the present heirs, to succeed to the lands and estates of Broughton and others, which belonged to the late James Murray, Esquire of Broughton, in virtue of the settlements of that estate, then the said Colonel William Stewart, and the heir of his body in the possession of the said estate of Broughton for the time, shall be bound and obliged, as by the foresaid deed of settlement after the English form he has bound and obliged himself, and his heir in possession in the foresaid event, to provide and secure the said Frances Douglas in a free yearly annuity of £1200, in place of the foresaid annuity of £800, and to secure the foresaid trustees appointed for behoof of the children to be procreated of the said intended marriage in the foresaid sum of £5000 sterling, all to be chargeable upon the said lands and estate of Broughton, or a sufficient part thereof; and from and after the execution of such deeds, and the said Colonel William Stewart and his heir in possession for the time, well and effectually charging the said estate of Broughton with the foresaid annuity and provision, then the foresaid annuity of £800 sterling, hereby provided by me to the said Frances Douglas, and the said sum of £5000 sterling of provisions for children, shall thenceforth wholly cease and determine."

The marriage settlement, reciting the bond, contained a covenant by the marriage trustees to stand possessed of the £5000, and permit the same to be a charge on the estate of the Earl, until the children, being males, should attain the age of twenty-one, or, being females, should marry; and there was this proviso:—"Provided also, and it is hereby further specially covenanted, declared, and agreed by and between all the said parties to these presents, that in case the said William Stewart or the heirs of his body shall, at any time or times hereafter, happen, through the failure of the present heirs, to succeed to the lands and estates of the late James Murray, Esquire of Broughton, deceased, under or by virtue of the settlements made by him of such lands and estates, then, and in such case, the said William Stewart, and the heirs of his body in the possession of the said estate of Broughton, shall and will forthwith, after such succession, well and effectually settle and assure a clear yearly jointure or annuity of £1200 per annum, to be issuing out of and charged upon the said lands and estates, or a sufficient part thereof, unto her, the said Frances Douglas, the intended wife of the said William Stewart, for and during the term of her natural life, in lieu and stead of the aforesaid annuity of £800 hereinbefore mentioned to have been secured to her; and the said William Stewart, or the heirs of his body in possession of the said estates, shall and will also forthwith well and effectually charge the said lands and estates to which he shall so succeed, or a sufficient part thereof, with the payment of the said sum of £5000 to the said George Lord Viscount Garlies, William Philips Inge, Edward Lord Harewood, and Henry Lascelles, and the survivors and survivor of them, his executors and administrators, upon the trusts, and to and for the ends, intents, and purposes, and with, under, and subject to, the several powers, provisoes, limitations, declarations, and agreements hereinbefore expressed, declared, and contained, of and concerning the same, or so many of them as shall be then subsisting and capable of taking effect, save and except only, that an eldest or only son of the said intended marriage shall, in the event aforesaid, be excluded from any participation of the said trust premises, the benefit of which shall, in the event of such succession, be wholly confined to the other child or children of the said marriage, not including the eldest or only son; and upon such settlement respectively being so duly and effectually made and executed as aforesaid, but not otherwise, the said annuity of £800 so, as aforesaid, charged upon the said lands and estates of the said John Earl of Galloway, and also the said charge of the said sum of £5000, shall forthwith wholly cease and determine, and all and every the clauses, conditions, and agreements, matters and things, in these presents, or in the said hereinbefore in part recited bonds or writings obligatory, so far as the same respectively relate to or concern the said annuity and sums of money, or either of them, shall become absolutely null and void, to all intents, constructions, and purposes whatsoever, as if these presents and the said bonds or writings obligatory respectively had never been made."

After the marriage, John Earl of Galloway charged his estates with the said sum of £5000.

[1] See previous report 24 D. 93: 34 Sc. Jur. 54. S. C. 3 Macph. H. L. 73: 37 Sc. Jur. 484.

His trustees afterwards made the sum a burden on the Earl's estates of Baldoon and Newton Stewart. The interest had been paid by the Earl's son and his grandson, the appellant.

Sir William Stewart died in 1827, leaving his children, Captain Horatio Stewart and Mrs. Baillie. In 1846 Sir William's grandson, the son of Captain Horatio, viz. Horatio Granville Murray Stewart, born in 1834, succeeded to the entailed estate of Broughton. By the entail of the Broughton estate, the heir of entail could not make the said sum of £5000 a burden on that estate.

Of the £5000, the marriage trustees had applied a portion in purchasing a commission for Captain Horatio Stewart; £1700 was appointed to Mrs. Baillie on her marriage; the rest was paid to Captain Horatio Stewart in 1834.

The pursuer, the present Earl of Galloway, raised the present action to have it declared, that the defender was bound to relieve him of the said sum of £5000. The Lord Ordinary (Neaves) held the defender was not bound to relieve the pursuer, unless the defender could effectually charge the sum on the estate of Broughton. The First Division held, that the defender was not bound to relieve the pursuer, because the time of payment of the provisions had already passed, and the obligation became extinguished. The pursuer now appealed.

Rolt, Q.C., and *Bullar*, for the appellant, contended, that the respondent was bound to relieve the appellant, either because the obligation was absolute to repay the sum, or because the event had happened on which repayment was to be made.

The Attorney General (Palmer), and *Wickens*, for the respondent.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, this appeal is presented from an interlocutor of the First Division of the Court of Session, and also from an interlocutor of the Lord Ordinary. The two interlocutors arrived at the same conclusion, although they were based upon different grounds embodied in those interlocutors. The question is one of some nicety, as it affects the equitable jurisdiction of the Court of Session in Scotland.

In the year 1804 Lieutenant Colonel Stewart, who was the second son of Lord Galloway, entered into a contract of marriage with a lady of the name of Douglas. It appears, that at that time Lieutenant Colonel Stewart was not possessed of any property beyond an allowance of £800 a year made to him by his father, except that he was one of a series of heirs of entail in the destination of a very considerable estate called the Broughton estate. Accordingly the Earl of Galloway undertook the duty of making a provision for the lady in the event of her surviving Sir William Stewart, her intended husband, and for the children of the marriage. That provision so made by the Earl was embodied in a bond executed by the Earl of Galloway upon the marriage of Sir William Stewart, dated 18th April 1804.

It is unnecessary to call your Lordships' attention to the form of the bond in any detail. I may state, that part of the provision was first to pay to Miss Douglas, in the event of the marriage taking place, and of her subsequently becoming the widow of Sir William, an annuity of £800 during her life. Then it provided, that in the event of Sir William dying leaving any child or children of the marriage, the Earl should make a payment out of a certain estate of a sum of £5000. And then it went on to declare the trusts of that £5000, providing, however, that in the event of Sir William Stewart or the heirs of his body happening through the failure of the present heirs to succeed to the Broughton estate, then Sir William and the heirs of his body in possession of the estate of Broughton, should be bound, as by the deed of settlement he had bound himself, (reference being thereby made to a contemporaneous deed of settlement in the English form,) to provide and secure to Miss Douglas a free yearly annuity of £1200, in lieu of the annuity of £800, and to secure to the trustees for the children of the marriage the aforesaid sum of £5000 sterling, all of which sums are chargeable upon the lands and estate of Broughton, or any part thereof. And then it is provided, that upon that being done, and the annuity and provision being duly charged upon the estate of Broughton, the obligation so entered into by the Earl for the same purpose should wholly cease and determine.

It is quite clear, therefore, that this bond was intended to be auxiliary and supplementary only to the charges to the same effect made upon the Broughton estate, if Sir William or the heirs of his body should become entitled to the possession of that estate.

These provisions so made by the Earl were included in a contemporaneous deed of settlement entered into between Sir William and his intended wife, and to which his father, the Earl, was also a party, which likewise bears date 18th April 1804. That is an instrument of considerable length. I may state briefly, that it recites the bond fully, and the defeasance of the bond in the event of a similar provision being made by a charge upon the Broughton estate. And then it went on to direct and declare the trusts of the £5000 more fully, which in reality are funds for the benefit of all such children of the marriage as should attain the age of 21, being sons, or, being daughters, should attain that age or marry, with a provision for their maintenance during minority, and also for the advancement of any son by the purchase of a commission in the army during his minority, and then there was power given to Sir William and his intended wife to make

appointments of this sum of £5000 unto, between, and among all and every, or one or more, of the children of the said Sir William by his said intended wife, at such time as they should think proper to appoint. And after declaring the trusts fully, and creating cross limitations between the children of the marriage, the settlement went on to provide for the event of Sir William becoming entitled to the Broughton estate. And it will be necessary to call your Lordships' attention to the language of this provision, "provided also, and it is hereby specially covenanted and declared, and agreed by and between all the said parties to these presents." These words, therefore, contain a covenant by Sir William Stewart with his father the Earl, "that in case the said William Stewart or the heirs of his body shall at any time or times hereafter happen through the failure of the present heirs to succeed to the lands and estates of the late James Murray, Esq., of Broughton, deceased, under or by virtue of the settlements made by him of such lands and estates, then and in such case the said William Stewart and the heirs of his body in the possession of the said estate of Broughton, shall and will forthwith, after such succession, well and effectually settle and assign a clear yearly jointure or annuity of £1200 per annum to be issuing out of and charged upon the said lands and estates, or a sufficient part thereof, unto her, the said Frances Douglas, the intended wife of the said William Stewart, for and during the time of her natural life, in lieu and stead of the aforesaid annuity of £800 hereinbefore mentioned to have been secured to her. And the said William Stewart, or the heirs of his body in possession of the said estates, shall and will also forthwith well and effectually charge the said lands and estates to which he shall so succeed, or a sufficient part thereof, with the payment of the said sum of £5000 to the trustees, namely, to the said George Viscount Garlies, W. Philips Inge, Edward Lord Harewood, and Henry Lascelles, and the survivors and survivor of them, his executors and administrators, upon the trusts, and to and for the ends, intents, and purposes, and with, under, and subject to the several powers, provisoes, limitations, declarations, and agreements hereinbefore expressed, declared, and contained."

Now the trusts thereinbefore expressed and declared are the trusts that were declared of the £5000 secured by Lord Galloway. Bnt then there was an exception applicable only to the £5000 thus covenanted to be raised under the settlement of the Broughton estate. And the exception was, that an eldest or only son of the said intended marriage should, in the event aforesaid, be excluded from any participation in the trust premises, the benefit of which should be wholly confined to the other children. There was, therefore, this difference between the provisions of the trusts. The £5000 secured by Lord Galloway's bond, if it became payable, would vest in all the children, including the eldest son; but the £5000 to be raised under the settlement, if that became payable, would vest in the younger children exclusively, the eldest being excluded from any participation therein. Then the settlement provided, that the £800 per annum so charged upon the lands of the Earl of Galloway, "and also the said charge of the said sum of £5000, shall forthwith wholly cease and determine."

I think it is apparent from the case, as I have already stated it to your Lordships, that it was clearly intended, that, in the event of Sir William Stewart or the heirs of his body becoming entitled to the Broughton estate, Lord Galloway's provision by his bond was to be superseded by the other provision; and that, therefore, Lord Galloway's provision, having regard to that fact, is, in reality, in the nature of a security for the performance of the engagement entered into by Sir William Stewart with reference to the Broughton estate. And the annuity for the wife and the provision for the children were properly undertaken by Sir William Stewart, the husband and father, contingently upon the succession of the Broughton estate opening in his favour. It is quite clear, that Lord Galloway's provision was intended to be superseded, if that event took place. And, therefore, it was in the nature of a collateral security, and an engagement for the performance of the engagement on the part of the principal, the husband and father.

The events that happened were these: There were two children of this marriage. There was one son, Horatio Captain Stewart, who died in 1835. Lord Galloway died in 1819. Sir William Stewart died in 1827. Upon the death of his son in 1835, Horatio, the present respondent, who is the son of Captain Horatio, became the heir at law of Sir William Stewart. He is also his personal representative; and on the succession to the Broughton estate opening in favour of Sir William Stewart and the heirs of his body in 1846, the respondent, as heir of the body of Sir William, became entitled to that estate.

Now, under the deed of entail of the Broughton estate, having regard to the destinations in that deed, there would have been no power in Sir William Stewart, if he had succeeded to that estate, to do more than to make certain provisions for his younger children. But, of course, it is obvious, that, as Sir William Stewart did not succeed to that estate, the heir of the body of Sir William could not exercise that power in favour of the children of Sir William, who would stand in the relation to him of brothers or sisters. The power given by the Broughton deed of entail was a power to be exercised by the heir at law, the heir of the body of Sir William. And Sir William Stewart himself having died before the succession opened, neither Sir William nor the heir of his body could exercise that power in favour of the children of Sir William.

The question then immediately arises, whether, under this form of covenant, between Sir

William and his father, there does or does not arise, and whether there was or was not intended to arise, a personal obligation on the part of the son. Now that has been a subject of much consideration. I may venture to say, that I entertained for some time some doubt upon that point. But it is impossible to arrive at the conclusion, that there was no personal liability on the part of Sir William, without striking out of the clause the important words "or any heir of the body at any time thereafter." It is, I think, perfectly clear in the language as it stands, that there does arise a clear personal contract and obligation by covenant on the part of Sir William, an obligation which his assets must answer, although he himself or the heirs of his body never had the power of fulfilling in specie that obligation. If you were to hold, as the Lord Ordinary has done, that there was no personal obligation affecting Sir William; that it was a contract entirely dependent upon a contingency; and that the personal liability did not arise, because the contingency did not happen within the lifetime of Sir William, then, of necessity, as I have already observed, you must strike out material words from the covenant, the presence of which words, I think, having regard to all established rules of construction, necessarily brings you to the conclusion, that it was intended, that Sir William should contract that obligation, which, indeed, it might be reasonable that he should contract; because if the event that formed the subject of the contingency had happened, there would have been a considerable property. The respondent, his grandson, is his general personal representative, and also his heir at law. The *universitas* of the estate of Sir William is therefore vested in the respondent. It might be reasonable, that, as between the son and the father, in the event of the son's marriage being provided for by his succeeding to the Broughton estate, the assets of the son might be held liable to answer the obligation, which, in the first instance, had been taken for him by his father.

The next question which arises is as to the *ratio decidendi* of the Court of Session. The Inner House, agreeing in the conclusion, though not concurring in the mode of arriving at it which the Lord Ordinary adopted, has come to this conclusion, (if I understand it rightly,) that inasmuch as the provision made under Lord Galloway's bond had been paid before the succession of the Broughton estate opened, the time for the performance of the covenant by Sir William, had gone by; and that, therefore, when the covenant came into operation by the succession to the Broughton estate being vested in him, there was no longer any necessity for it, inasmuch as the object of it had already received the money destined for him.

Now in order to make this point intelligible, it is necessary to state to your Lordships, that it appears, that two thirds, I think, or a very considerable proportion, of the £5000 which Lord Galloway bound himself to provide, had been appointed to Captain Horatio Stewart for the purpose of giving him advancement in the army, and for other purposes, and that the remainder of the sum of £5000, namely, the sum of £1700, was appointed to the daughter of Sir W. Stewart upon the occasion of her marriage with a gentleman of the name of Baillie. This sum of money appears to have been raised in two charges upon the Galloway estates, and to have been made the subject of an assignation in favour of the present appellant. The question then arises—Is the Court of Session right in holding, that the trust for the children created by Sir William's marriage settlement has come to an end, and is no longer available in consequence of those children having received the sum destined for them under the collateral obligation of a person who was in reality a surety for their father?

Now, with great deference to the learned Judges of the Court of Session, I apprehend, that they have not sufficiently considered the equity arising out of the relation itself. The Court of Session appears to have held, that as there was no provision for repetition, the receipt of the money in the manner I have mentioned by the children of the marriage did, in effect, put an end to the trust arising under the covenant of Sir W. Stewart, and that consequently it was not competent to any child of the marriage to claim the benefit of that covenant and of the trusts created by Sir W. Stewart's settlement of the £5000. Now, I apprehend, that if the succession to the Broughton estate had taken place, and the £5000 had been actually charged upon the Broughton estate, and if a child of the marriage had previously received from the surety the amount payable to that child under the settlement, the person who as surety has paid the child would have had a right, in the name of the child, to receive the money payable under the prior obligation, namely, the obligation of the father. That would agree with the form of equity which is administered in the Court of Chancery in England, and its meaning is this: If the debt is paid by the surety or under the obligation of the surety, the debt is not extinguished by that payment, but the debt is receivable by the party who has so paid it in the character of assignee of the person entitled under the obligation. If, therefore, it really was the intent, that Lord Galloway's engagement should be subsidiary to Sir W. Stewart's engagement, and if Sir W. Stewart's covenant is to stand in the place of the Broughton estate in case the Broughton estate cannot be reached, and if it be true, that the circumstance, that the Broughton estate cannot be reached, does not relieve Sir W. Stewart's estate from that liability, then it follows, that the party who, under the obligation of surety, has paid the person entitled under the obligation, is entitled, in right of that payee, to the benefit of the covenant entered into by the person who was intended, as between the two obligors, to be the principal debtor. And that right in equity arises, as I have said, not by virtue of any

particular covenant, but by virtue of the relation in which the two contracting parties stand to each other as surety and principal debtor.

The only mode, therefore, which I apprehend your Lordships can take of viewing the matter is to consider this question, Was it intended, that the Earl of Galloway should be relieved from his obligation by the succession of Sir William or his heir to the Broughton estate? That question, I apprehend, would certainly be answered in the affirmative. Then if the Broughton estate cannot be reached, so as to relieve the Earl, does not the liability of Sir W. Stewart arise? That question also, I apprehend, must be answered in the affirmative. Then the liability of Sir William under the covenant stands in lieu of the Broughton estate, and if the Earl of Galloway would have been entitled to be indemnified out of the Broughton estate in case of its being reached, he is also entitled to be indemnified under the covenant of Sir W. Stewart, which in the event that has happened stands in lieu of the Broughton estate. These observations, your Lordships will observe, are applicable only to the £1700, because it is impossible to reach Sir W. Stewart or his estate except by virtue of the trusts which he has declared for the £5000 which was to be raised out of the trust estate. Now, that £5000 would not enure, as to any part of it, for the benefit of the son; and though Lord Galloway has paid the son, Captain Stewart, two thirds of that £5000, and has paid to the daughter only £1700, yet, inasmuch as he could claim only in the character of assignee of the daughter, he could claim only that which the daughter would become entitled to by virtue of the trusts in her favour. I am afraid, therefore, that I must advise your Lordships to recognize, as the foundation of the order which I have to propose to your Lordships in this case, that the relief must be confined to the £1700, and cannot be extended to the sum of money paid to the son; because you cannot extend the liability of the father's covenant beyond the limits of the £5000 that would have been raisable out of the Broughton estate. Now, the £5000 raisable out of the Broughton estate could not enure, as to any part of it, for the benefit of the son; and though Lord Galloway has paid £3300 besides the £1700, yet as the son was not entitled to any portion of the £5000 raisable out of the Broughton estate, therefore the assignee of the son is not entitled to any part of the benefit arising from the covenant of the father. I must therefore submit to your Lordships, that these interlocutors be reversed, and that it be declared, that, to the extent of the sum of £1700 paid by the Earl of Galloway to Mrs. Baillie, the Earl of Galloway is entitled to the benefit of the covenant of Sir W. Stewart, that covenant being in point of fact a liability which the Broughton estate was intended to bear.

LORD CRANWORTH.—My Lords, the covenant in this case was, that if W. Stewart or the heirs of his body should at any time thereafter succeed to the Broughton estates, then he, and the heirs of his body in possession of those estates, would forthwith, after such succession, well and effectually charge the said estates with the said sum of £5000 to the trustees, upon the trusts thereinbefore declared concerning the same, or such of them as should be then subsisting and capable of taking effect, save only, that an eldest or only son of the marriage should in that event be excluded from any participation in the trust premises.

This covenant was, that an act should, in a certain event, be done which was neither illegal nor impossible. There is no ground for suggesting, that it was illegal, and it was not impossible, for it might be accomplished by the concurrence of every successive tenant in tail. I am therefore of opinion, that the covenant was valid, and was binding on Sir William and his heirs, and so, that the interlocutor of the Lord Ordinary cannot be sustained.

But the real question is as to the true construction of the covenant. Two points appear to me clear; First, only one sum of £5000 was to be settled. Second, nothing was covenanted to be made a charge on the Broughton estate, which could not go to the children of the marriage other than an eldest or only son. Before the succession opened to the Broughton estate, the only son of the marriage had become absolutely entitled to £3300, part of the £5000, so that no part of that sum could in any circumstances become a charge on the Broughton estates. The question is therefore confined to the £1700 appointed to the daughter. The trusts as to the £3300 were, as to the Broughton estate, incapable of taking effect, or perhaps it would be more correct to say, never arose. The Judges in the Court below made no distinction as to these two sums—that which went to the son, and that which went to the daughter. They were of opinion, that as the time at which the whole of the £5000 vested in the children of the marriage had arrived long before the year 1846, when the heir of the body of Sir W. Stewart succeeded to the Broughton estate, the appellant had no claim under the covenant in question.

This case is one of difficulty, and I confess, that my mind has changed more than once in considering it. But I have finally come to the same conclusion at which my noble and learned friend on the woolsack has arrived, namely, that as to this £1700 the covenant and the trust still remain in force. I cannot discover any principle which would warrant us in holding, that when the issue of the marriage attained a vested interest in the £5000, the covenant for substitution of the Broughton estate was at an end. The argument derived from the doctrine as to the time at which funds divisible among a class are to be distributed does not appear to me to be applicable to a case like this, where there is no necessity for drawing an arbitrary line. Where a fund is to be distributed among the children of A at the death of B, the Court has held, that

as distribution was to take place on a specified event, those who were then to take could not include persons to be born thereafter; and so, that by the children of A must be meant children born before the death of B, when the fund was to be distributed. But I cannot see how that principle applies to the present case, where the lapse of time to occur before the covenant is to operate cannot create any difficulty as to who are the objects of the trust.

The only question, as it seems to me, is, whether, when the grandson of Sir W. Stewart succeeded in 1846 as heir of his body to the Broughton estate, the payment of the £1700 to Mrs. Baillie, as the only daughter of the marriage, ought to be treated as a subsisting trust? If it had never been paid to her, but had continued all along a charge on the Galloway estates, I cannot think, that the mere circumstance of its having become a vested interest in her could have enabled the Court to say, that the trust was not a subsisting trust capable of taking effect; and if that were so, the covenant to charge the Broughton estate then came into operation. The fair inference, however, seems to me to be, that this money was long ago paid to Mrs. Baillie by some third person, who advanced it on an assignment from her of her interest in it by way of security. This is substantially so stated in the 6th article of the condescendence, and is admitted by the respondent. The money, therefore, still remains a subsisting charge on the Galloway estates, due not indeed to Mrs. Baillie herself, but to the person or persons to whom she assigned it. The satisfying of this charge remains, therefore, in my opinion, a trust within the true intent and meaning of the settlement now subsisting, and capable of taking effect.

The result is, that the interlocutors appealed against must be reversed, and the case must be remitted back to the Court of Session, with a declaration, that the respondent is bound to relieve the estates of Baldoon and Newton Stewart, and the other estates comprised in the settlement of the 3d July 1804, from the sum of £1700, part of the £5000 charged thereon for the children of Sir W. Stewart.

LORD CHELMSFORD.—My Lords, I have the misfortune to differ with my two noble and learned friends, and think, contrary to their opinion, that the interlocutors appealed from ought to be affirmed.

The question (the difficulties of which have not been entirely removed by the full argument at the bar) turns upon the effect of the covenant of Colonel Stewart contained in his marriage settlement of 18th April 1804.

Although the bond of Lord Galloway, of even date with the settlement, must be regarded as part of the same transaction, yet there are some considerations which apply to it separately, and which require some attention.

By this bond Lord Galloway bound and obliged himself, in case Colonel Stewart should depart this life leaving any child or children of the marriage, to pay the sum of £5000 to the trustees named in the deed of settlement, in trust for the ends, uses, and purposes specified in such deed, and, for the better securing the provision of £5000, to grant heritable security over lands and estates belonging to him in Scotland.

The defeasance (as it would be called in England) provided, that in the event of Colonel Stewart or the heirs of his body succeeding to the estate of Broughton, he and they should be bound to secure to the trustees appointed for behalf of the children of the intended marriage the said sum of £5000, to be chargeable upon the estate of Broughton[1]; and in the event of Colonel Stewart and his heirs in possession for the time being, well and effectually charging the estate of Broughton with the said provision, the £5000 of provisions for children should thenceforth wholly cease and determine.

The proviso in Lord Galloway's bond of provision was, of course, not binding upon Colonel Stewart, who was no party to it, and, in the event of the contemplated charge upon the estate of Broughton not being created, Lord Galloway was absolutely bound to pay the £5000 to the children of the intended marriage.

But it was evidently the intention of all parties, that in the event of Colonel Stewart succeeding to the estate of Broughton, he should transfer the charge of the £5000 to that estate, and relieve the estates of Lord Galloway from it. Accordingly in the marriage settlement he entered into the covenant in question. He covenants, that in case he "or the heirs of his body shall, at any time or times hereafter, happen through the failure of the present heirs to succeed to the lands and estates of the late James Murray, Esquire of Broughton, deceased, under or by virtue of the settlements made by him of such lands and estates, then and in such case the said W. Stewart, and the heirs of his body in the possession of the said estate of Broughton, shall and will forthwith after such succession well and effectually settle and assure a clear yearly jointure or annuity of £1200 per annum to be issuing out of, and charged upon, the said lands and estates, or a sufficient part thereof, unto her, the said Frances Douglas, the intended wife of the said W. Stewart, for and during the term of her natural life, in lieu and stead of the aforesaid annuity of £800 herein before mentioned to have been secured to her; and the said W. Stewart, or the heirs of his body in possession of the said estate, shall and will also forthwith well and effectually charge the said lands and estates to which he shall so succeed, or a sufficient part thereof, with

the payment of the said sum of £5000 to the said George Lord Viscount Garlies, W. Philips Inge, Edward Lord Harewood, and Henry Lascelles, and the survivors and survivor of them, his executors and administrators, upon the trusts and to and for the ends, intents, and purposes, and with, under, and subject to the several powers, provisoes, limitations, declarations, and agreements hereinbefore expressed, declared, and contained of and concerning the same, or so many of them as shall be then subsisting and capable of taking effect."

If Colonel Stewart had himself succeeded to the estate of Broughton, there probably would have been no difficulty in holding, that he must either have charged the £5000 upon it, or if, from the nature of the estate, he had been unable to create such a charge upon the estate of Broughton, he must have discharged Lord Galloway from his obligation in some other way. But the succession to the estate of Broughton having first opened to Colonel Stewart's grandson in 1846, the question arises, whether, upon the events which have occurred, the covenant is still subsisting, and can be enforced personally against him.

I think it must be taken as a fact, and one on which the Court of Session proceeded, that the £5000 had become payable under the terms of the marriage settlement, to which Lord Galloway's bond of provision refers, and, that the trusts in favour of the children of the marriage had become vested in them, and had been satisfied by the trustees. It is true, that it is stated in the statement of facts for the defender merely, that £1700, part of the £5000, was appointed by Lady Stewart to Mrs. Baillie upon her marriage, and not, as in the case of the appointment to Captain Horatio Stewart, that it was assigned by the trustees of the bond and marriage settlement. In my opinion this makes no difference. I collect from the statement, that, whether Mrs. Baillie has received the £1700 or not, the £5000 which was to be a charge for the children of the marriage now exists upon the bond of Lord Galloway for the benefit, not of them, but of assignees and singular successors.

Supposing, that the only objection, which could have been urged against the liability upon the covenant, had been the inability of the respondent effectually to charge the estate of Broughton by reason of the strictness of the entail, the Court of Session in my judgment would have been quite right in recalling the interlocutor of the Lord Ordinary, which "finds, that upon the footing, that the said provision cannot be made a good and effectual burden or charge upon the said lands and estates, the defender is not bound to pay the said provision to the pursuer, or to relieve him of the same in any other way."

The covenant of Colonel Stewart is absolute and unqualified, that in case he or the heirs of his body succeeded to the estate of Broughton under or by virtue of the settlements made of such estate, (an event which occurred in the heir of the body,) he or they would well and effectually charge the lands with the payment of the said sum of £5000. Having thus undertaken absolutely for himself and the heirs of his body to make this charge, the impossibility of his or their doing so could not afterwards be urged as an excuse for the nonfulfilment of the covenant, but he or his representatives would have been liable in damages for the breach of it. He might have protected himself by qualifying the condition, "if he or they shall succeed to the estate of Broughton," with the words "and be enabled under the entail to charge the same," or some equivalent expression. In such case, although the heir of the body succeeding to the estate might have been unable to create the charge, the condition would not have arisen on which alone the covenant must have been performed.

The Court of Session having recalled the Lord Ordinary's interlocutor, proceeded to find in favour of the respondent, on the grounds, that "the stipulated terms of payment of the £5000 had arrived and gone by long before 1846, when the succession to the Broughton estate opened, and that in this situation the purposes for which the obligation and the relative marriage trust had originally been constructed had, so far as regarded the children's provisions, become exhausted and extinct."

The correctness of this interlocutor must, of course, depend upon whether the covenant of Colonel Stewart ceased to have any effect so soon as the £5000 provision for the children of the marriage had been paid or provided for by the trustees of the settlement.

To construe the averment as one which was intended to take effect at whatever distance of time the succession to the estate of Broughton might open to any heir of the body of Colonel Stewart would lead to all the absurd consequences which were pointed out in the course of the argument. Under the entail of the Broughton estate there were an institute and three substitutes, and the heirs of the body of each of them, to be removed out of the way before Colonel Stewart, or any heir of his body, could succeed to the estate. It might be a hundred years or more before the covenant could operate, and how at that distance of time the persons liable to perform it, or those entitled to enforce its performance, could be ascertained, it is difficult to imagine. It is reasonable, therefore, to suppose, that the parties had some definite period in view, within which they contemplated the possibility of the covenant being capable of performance.

In order to determine this period by reference to the covenant itself, it must be observed, that it was intended, on a given event, to substitute a charge upon the estate of Broughton of the

same sum, and for the same purposes as the charge which Lord Galloway had bound himself to create upon his estates for the benefit of the children of the marriage, with the exception of an eldest or only son. The charge upon Lord Galloway's estate was to remain until such times as the children should attain twenty one years or marry, or until the £5000 should be required for the advancement in the world of a son or sons, and the trustees were at such time or times to call or levy and raise the principal sum, and pay, apply, and dispose of the same according to the provisions of the settlement. The covenant of Colonel Stewart is, that he will effectually charge the estate of Broughton with all payments of the said sum of £5000, upon the trusts thereinbefore declared, (with the exception mentioned,) "or so many of them as shall be then subsisting and capable of taking effect."

The parties may have intended, that the covenant should be one of indemnity, and not of substitution. They may have meant, that Lord Galloway, if compelled to pay the £5000 under his obligation, should be repaid out of the estate of Broughton, whenever it should fall to Colonel Stewart, or to any heir of his body, however remote. But if this were their intention, they have failed to express it. They have merely stipulated, that there should be substituted for the charge on Lord Galloway's estates a charge upon the estate of Broughton, upon the same trusts, and for the same ends, intents, and purposes. The intended charge upon the estate of Broughton being thus one of mere substitution for a similar charge for a defined and limited purpose, it appears almost necessarily to fix a limit to Colonel Stewart's covenant. That limit must be the period of time when the trusts for which the £5000 was to be provided, are all satisfied. The charge, then, has no object to which it can be applicable, and if created, would be created in vain. Therefore the trusts for which the original charge was created, having, in my opinion, been performed and satisfied long before the succession to the estate of Broughton opened to the respondent, there was no trust then subsisting and capable of taking effect to which the proposed substituted charge could be applied.

On this ground alone, and without adverting to other arguments on the part of the respondent which support this conclusion, I cannot bring myself to agree with my two noble and learned friends, whose opinion, however, must of course prevail, and the interlocutor be reversed.

Mr. Rolt asked, that the expenses in the Court below be repaid.

Order, that the interlocutors be reversed, so far as extends to the pursuer's right to claim payment of £1700, and interest thereon, and that the expenses paid by the appellant under the interlocutor of the Court below be repaid to him.

Appellant's Agents, J. Ronald, S.S.C.; Loch & Maclaurin, Westminster.—*Respondent's Agent*, H. Scott Turner, Westminster.

JUNE 13, 1865.

HUNTER and Others, *Appellants*, *v.* The EARL OF HOPETOUN, *Respondent.*

Landlord and Tenant—Perpetual Renewal of Lease—Dispensation of Condition—Equitable Relief of Tenant—*T., a tenant under a lease for nineteen years, with right of perpetual renewal on twelve months' previous demand before the expiry of each term, raised an action to compel L., the landlord, to renew from* 1842 *to* 1861. *L. pleaded in defence, that the lease was forfeited for breach of the stipulations as to timber; but that action went to sleep, and the parties negotiated as to a draft of renewal, L. threatening, that if his proposed alterations in the draft were not agreed to, he would fall back on his defence, that the lease was forfeited. During the negotiations, and the delay not being caused by T., the time arrived for a new demand by T. of a further renewal from* 1861 *to* 1880, *which T. omitted to make.*

HELD (reversing judgment), *That while the* lis pendens *as to the existence of the former lease existed, T. was excused from making further demand of renewal, and that he had not lost his right of renewal.*[1]

This was an appeal from a decision of the Court of Session, as to the right of the appellant to have a renewal of a lease of the farm of Cotterwell, or Westfield, of Ormistoun. The action was raised by the Earl of Hopetoun against the tenant, to have it declared, that such tenant had no right to have the lease renewed, but was bound to leave the farm at Whitsunday 1861. In the

[1] See previous report 1 Macph. 1074: 35 Sc. Jur. 612. S. C. 4 Macq. Ap. 972: 3 Macph H. L. 50: 37 Sc. Jur. 489.