to the putting up of such power looms within the works of the company, be, and the same is hereby, reversed; and instead thereof, it is hereby declared, that the said Robert Beveridge had no power or authority against the remonstrances of the pursuer, James Adamson Beveridge, to make purchases of new and additional power looms or other machinery on account of the copartnership, or to remove from the partnership premises the hand looms or other machinery previously used therein in order to the reception of such new and additional power looms or machinery, or to alter or adapt the factory for the reception of any machinery of a different character from that placed under the care of the defender, Robert Beveridge, as manager of the works.

"And it is further ordered and adjudged, that the said interlocutor of the 20th of July 1869, so far as it finds, that the said Robert Beveridge acted properly and within his powers of fixing the salaries and emoluments of the persons in the employment of the said company, and so far as it assoilzies the defender from the conclusions of the libel, declaratory and petitory, in reference to the said purchases and in reference to the salaries and emoluments aforesaid, and *quoad ultra* dismisses the action, and also so far as it modifies the expenses to which the pursuer, James Adamson Beveridge, is found entitled to the extent of one fourth of the taxed amount, be, and the same is hereby, also reversed.

"And it is hereby further declared, that the defender, Robert Beveridge, has not, apart from his co-trustees, the right to act as a partner of the firm of Erskine Beveridge and Company, and that the rights of the pursuer, James Adamson Beveridge, as such partner, are not superseded, or in any respect impaired, by the appointment of the said Robert Beveridge as general manager thereof, and that the said Robert Beveridge had no right, power, or authority to enter into any written or other contracts or agreements with the managers, heads of departments or clerks of the said copartnership, which the firm or the pursuer, James Adamson Beveridge, as a partner therein, disapproves of or objects to, and that the said Robert Beveridge is bound to accept, and that the other defenders, as trustees and partners with the pursuer, the said James Adamson Beveridge, are bound to join with the said pursuer in granting to the said Robert Beveridge a written procuration, mandate, or authority, authorizing him to sign writs and documents as manager for and on behalf of the copartnership, and specifying the mode in which he shall sign them, the terms of such procuration, mandate, or authority to be adjusted by the Court of Session in case of difference between the parties.

"And it is further ordered and adjudged, that it be remitted to the Court of Session to give effect to the above declarations, and to grant interdict restraining the defender, Robert Beveridge, from doing any act contrary thereto.

"And it is further ordered and adjudged, that the said cross appeal be and the same is hereby dismissed this House: And it is further declared, that under the special circumstances of this case it appears to this House to be right, that the expenses of both parties of the proceeding in the Court of Session, and also the costs of both parties (appellant and respondent) of both the appeals to this House, should be paid out of the estate of the copartnership now subsisting, and it is hereby directed accordingly.

"And it is also further ordered, that with these declarations and directions the cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent herewith."

Appellants' Agents, Wotherspoon and Mack, W.S.; Simson and Wakeford, Westminster.—*Respondents' Agents*, T. J. Gordon, W.S.; W. Robertson, Westminster.

MARCH 11, 1872.

Mrs. MARY MACKENZIE CATTON and Husband, *Appellants*, *v.* KENNETH MACKENZIE, M.D., *Respondent*.

Entail—Prohibitions—Power to grant provisions to younger children—11 and 12 Vict. c. 36, § 43 —*M. made an entail which was sufficient in its prohibitions and clauses, but added, that, notwithstanding the limitations, it should be lawful to the institute and heirs of tailzie to provide their younger children with three years' free rent of the estate.*

HELD (affirming judgment), *That the entail was not defective in one of its prohibitions under* 11 *and* 12 *Vict. c.* 36, § 43, *for the relaxation of fetters to the extent of the provision to younger children was not inconsistent with the validity of the prohibition against contracting debt, etc.*[1]

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[1] See previous report 8 Macph. 1049: 42 Sc. Jur. 618. S. C. L. R. 2 Sc. Ap. 202; 10 Macph. H. L. 12; 44 Sc. Jur. 191.

The late Murdo Mackenzie, formerly of Ardross, then fee simple proprietor of Dundonnell in Ross-shire, in 1838 executed a deed in the form of a procuratory of resignation by way of entail, which deed was recorded in the Register of Taillies. The eldest son, Hugh Mackenzie, succeeded in 1845, and completed his title, and died in 1869, leaving a trust settlement conveying to his natural daughter, Mrs. Catton, and others, all and sundry lands and heritages, etc., presently belonging, etc., to him. Mrs. Catton raised an action, concluding, that the procuratory executed in 1838 was an invalid entail under the Act 11 and 12 Vict. c. 36, § 43, and that the general clause in the trust disposition and settlement of Hugh Mackenzie operated to convey to her the estate of Dundonnell.

The procuratory of resignation contained prohibitions against altering the order of succession, sales, and contraction of debt, and had this clause :—" But with and under this exception from the foresaid limitations, that it shall be lawful to and in the power of the said Hugh Mackenzie and the heirs of tailzie, etc., to provide their wives in a liferent locality, etc., and with and under the further *exception*, 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 e :tinguished, 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 burden ; 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 Lord Ordinary repelled the pleas in law for the pursuers, and assoilzied the defender. The First Division, on 19th July 1870, recalled the Lord Ordinary's interlocutor, and sustained the second and third pleas for the defender, namely, that even if the entail was defective, the trust disposition of Hugh Mackenzie did not operate as a conveyance of the estate.

The pursuers thereupon appealed to the House of Lords.

Pearson Q.C., and *Duncan*, for the appellants.—The Lord Ordinary's interlocutor was wrong. This procuratory of resignation was an invalid entail, because there was no effectual prohibition against the contraction of debt with which the lands may be burdened, or for which they may be adjudged by creditors. The Rutherfurd Act, 11 and 12 Vict. c. 36, § 43, renders entails void which are defective in any one of the prohibitions. Here the institute and heirs substitute are left free to contract debt by way of provisions to younger children to the amount of at least three years' rents. Therefore, to that extent each may sell or burden the estate, and the creditor may sell part of it or adjudge. The power to grant deeds of locality to widows and provisions to children is *pro tanto* a relaxation of fetters—*Ferguson* v. *Newton*, *ante*, p. 1758 : 7 Macph. H. L. 66 ; 42 Sc. Jur. 404. Besides, the phrase ".younger children" must mean children of each heir of entail at the time of exercising the power—*Martin* v. *Kelso*, 2 Macq. Ap. 556, *ante*, p. 691. If this is so, then the heir of entail may make the provision payable in a short term, and sell part of the estate to pay it, and as soon as paid, grant another provision, and so on, till the estate might be exhausted. The entail is also invalid for not declaring an irritancy of any adjudication obtained against the estate in respect of the provisions, and for not resolving the right of the institute on a contravention of the prohibitions, and for not containing any irritancy applicable to sales or the alteration of the order of succession. 2. The interlocutor of the First Division was also wrong, because the clause of general conveyance effectually conveyed to the disponee all the property which belonged in fee simple to the maker of the deed at the time when the deed took effect. That general clause included the lands of Dundonnell and Aultchonier—*Thoms* v. *Thoms*, 6 Macph. 722. In construing the clauses of Mackenzie's settlement, no extraneous evidence can be resorted to, but even if it be resorted to, there was nothing to exclude the effect of the general clause as embracing the lands of Dundonnell.

The *Lord Advocate, Sir R. Palmer* Q.C., and *A. B. Shand,* for the respondent, were not called upon.

LORD CHANCELLOR HATHERLEY.—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 tailzie, 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 tailzie 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 tailzie was a good and subsisting tailzie, 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 tailzie were in any way defective, and he had power of disposition over the property, had he been pleased so to exercise it. The Lord Ordinary being of opinion with the respondent upon the first point, and upholding the tailzie 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 tailzie 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.

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, viz. 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 tailzie, and he admitted, that the question was one affecting the validity and sufficiency of a very large number of entails which have been made under the Act of 1685, and 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 jeopardized 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 sustained.

Now the point which arises on the deed of tailzie is this: It is contended, that that deed is perfect and effectual in the destination of the property as regards the tailzie *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 the provision 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 on the estate, which could be realized 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, 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 Act of the 11th and 12th Vict. cap. 36, § 43, enacts, "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 provisions are 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 disposing of the estate, yet you find a subsequent relaxation to the extent of a provision for 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 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 disposing of 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 instrument, 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 uncertain and unsettled, that one of the heirs of tailzie in 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 the 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 taillie of doing that which any one of the heirs of taillie 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 43d 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 relaxatiou 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 the younger children in the way in which it has been here made is not a case to which the 43d 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 against charging and affecting 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 creditor I apprehend, that there is a mode in which he should deal with the property, in order that his security may be realized 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 incumbrance, and so on, but the words "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 incumbrance as regards those whom the person in possession could not effectually charge under the restriction 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 interest. But the charge in this case, as your Lordships will observe, is a charge entirely for the benefit of younger children, and authorities were cited in the case of the respondent which seem to hold in the Scotch law as well as 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 the 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 againt disponing and charging the estate. But these are mere matters of detail. But 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 43d section. I think that the 43d 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 section (I think it is the 20th) in the Rutherfurd Act very 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 provisions made in the bulk of Scotch settlements for younger children, which the very Act we are now considering, the Rutherfurd Act, recognizes as an object worthy to be pursued and facilitated, should have this result, that by some unforeseen effect of the language of the 43d 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 applies 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 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 the younger 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 respondent 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 entails 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 one 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 limitations and restrictions, that it shall not be lawful for Hugh Mackenzie or the heirs of entail to sell, dispone, alienate, burden, dilapidate, and put away the lands, or to contract debts, etc., 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 shewn 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 limited 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 the 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 reference to the provisions afterwards.

But assuming that the proper construction of the provisions 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 prohibitions 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 prohibitions 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 at 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 provisions 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 contended, 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 of the fetters are 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 burden or dispone the estate by virtue of the 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 provisions 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 disponing or alienating any portion of the principal of the estate, but the remedy for the sums which the heir of taillie 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 dispone 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' rents 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' rent, and to raise it in a manner which shall not admit of adjudication or of alienations 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 of the estate from the fetters of the entail.

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 objections 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 those 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 Acts of 1685.

I think therefore that this attempt to impugn this tailzie has failed in every respect. There is no colour of 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 the 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. Duncan.—Will your Lordships allow me respectfully to point out, that the interlocutor of the Lord Ordinary, which your Lordships propose 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 couclusions of the summons, and decerns." Now the last plea in law for the pursuers 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 pursuers, 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.

Interlocutor of the First Division of the Court of Session of the 19*th of July* 1870 *recalled, except so far as to direct the payment of expenses by the pursuers. Interlocutor of the Lord Ordinary of the* 7*th of July* 1870 *affirmed, appellants to pay the respondent the costs of the appeal.*

Appellants' Agents, Murray, Beith, and Murray, W.S.; John Graham, Westminster.—*Respondent's Agents,* Skene and Peacock, W.S.; Loch and Maclaurin, Westminster.