divided by assignation, and only one of the assignees called up his debt. That being so, I do not think that what was contemplated in the fifth head of the deed has occurred. The trustees were not embarrassed or necessitated to find £2000, as the testator contemplated they might be. In addition, the information we have as to what occurred in 1853 to 1854 is not very complete or definite. No blame attaches for that to the parties, for almost everybody is now dead who could have given information on the subject; but if our information is imperfect and defective the presumption arises that what the trustees did in their discretion was rightly done. It is only fair to the trustees to presume that, and that they had at the time complete information. On the whole matter I am disposed to think, and without difficulty, that it has not been made out by the party contending that sale should have taken place in 1854 that the events had then occurred which were contemplated by the testator in his settlement.

I think, therefore, we should answer the third question in favour of the fourth parties, which disposes of the whole matter.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court pronounced this interlocutor:—

"Find and declare that the properties in Graham's Road and Bainsford, Falkirk, did not vest in John Bryson Clark, and were not carried by his disposition and assignation or his testament, and that William Clark is entitled to a conveyance of these properties: Find and declare that the fourth parties are entitled to one-fourth share of the reversion of the price of the Abbotsford Place property, and decern: Find the third parties liable in expenses to the second and fourth parties," &c.

Counsel for First and Third Parties—Mackintosh—Pearson. Agent—J. Gillon Fergusson, W.S.

Counsel for Second and Fourth Parties—Kinnear—Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, November 27.

SECOND DIVISION.

[Lord Lee, Ordinary.

PETITION—HOPE JOHNSTONE.

Entail Statutes (11 *and* 12 *Vict. c.* 36)—*Entail Amendment Act* (16 *and* 17 *Vict. c.* 94)—*Provisions to Younger Children, Payable under the Entail within Specified Time and in Specified Manner, Chargeable against the Fee of the Estate.*

A held the estate of A under an entail by which the heir in possession was bound to pay off all provisions in favour of younger children within a period of ten years, and that by yearly instalments of 10 per cent. per annum, and this obligation was enforced by an irritancy to be incurred if any of the heirs of entail in possession should omit for three years to pay the said instalments. *Held* that it was competent notwithstanding this claim to charge provisions to younger children as a permanent burden on the fee and rents of the entailed estate by granting a bond and disposition in security for the amount in terms of the Acts 11 and 12 Vict. c. 36, and 16 and 17 Vict. c. 94.

Remarks *per curiam* on the case of *Campbell*, Jan. 26, 1856, 16 D. 396.

This petition was presented by John James Hope Johnstone, as heir of entail in possession of the Annandale estates, for authority to charge the fee and rents of these estates, other than the mansion-house, offices, and policies, in virtue of sec. 21 of the Act 11 and 12 Vict. cap. 36, with the sum of £16,280, 17s. 9d., being the balance of £56,280, 17s. 9d., as representing three years' free rents of the estates due under four bonds of provision granted by the petitioner's grandfather in favour of his younger children, the estates having been already charged with £40,000 of the said provisions.

The entail under which the estate of Annandale was held was executed by James Johnstone Hope, Earl of Hopetoun, on the 18th July 1799, and registered in the Books of Council and Session 28th June 1816. In it power was given to the heir in possession to provide in competent provisions for younger children:—"But providing always that the whole sum to be granted as portions and provisions to the younger children of my eldest son, or of any heir of taillie in possession at the time, shall not exceed a sum equal to three years' free rent of the said lands, earldom, lordships, baronies, and others, after deduction of all jointures or provisions granted to wives or husbands, and the yearly rent of all former provisions to younger children, which may at the time affect the said lands, earldom, lordships, baronies, and others, and after deduction of all public and parochial burdens; and that the whole sum to be granted as portions or provisions to younger children of any one eldest son or grandson who shall be heir-apparent of my eldest son, or of any of the said heirs of taillie in possession at the time, shall not exceed a sum equal to three years' free rent of the said lands, earldom, lordships, baronies, and others, after deduction as aforesaid; and providing also that such portions or provisions to younger children as aforesaid shall be secured only by bonds of provision, binding for the regular payment thereof by instalments, in manner after mentioned, the heir of entail who for the time shall be in possession of the said lands, earldom, lordships, baronies, and others, and that such bonds of provision shall contain an express condition that it shall not be in the power of the said younger children, or their heirs or assignees, to obtain adjudications against the said lands, earldom, lordships, baronies, and others, or to use any other method of diligence whatever against the same except for levying the rents and the yearly profits thereof; and that such bonds of provision shall also contain this express condition, that the sums contained in the same shall not be exigible at once, but shall be payable only by yearly instalments of 10 per cent. of the capital sum of such provisions, together with the interest due at the time, and that such instalments of 10 per centum of the capital sum of such provisions to younger children, together with the interest due at the time,

shall be consigned yearly by the heirs of entail in possession, at the peril of the consignee, in one of the public banks, if the younger children entitled thereto shall not at the term be ready to receive the same, ... and in no case shall any of the heirs or members of taillie suffer any of the said instalments and interest due along therewith to remain in arrear for three years from the time when he or she by this deed of entail ought to have paid the same: And also, it is hereby provided and declared that it shall not be lawful to the eldest son whom I may have by any subsequent marriage, nor any one of the aforesaid heirs of taillie, to grant any liferent annuity or jointure to his or her wife or husband, or to the wife of his or her eldest son or grandson and heir-apparent, or to grant portions or provisions to his or her children, or to the children of his or her eldest son or grandson and heir-apparent, or to grant any right or security for the aforesaid liferent annuities or jointures to wives or husbands, or provisions to younger children, except in manner before directed; and that it shall not be lawful to any of the said wives or husbands, or any of the said children, or their heirs or assignees, to effect or use any adjudication or any other manner of diligence whatever against the aforesaid lands, earldom, lordships, baronies, or others, or any part or portion of the same, except for levying the rents and yearly profits thereof for payment of their jointures and provisions in manner before allowed: And it is hereby specially provided and declared that in case the eldest son whom I may have by any subsequent marriage, or any of the aforesaid heirs of entail, shall fail or neglect to insert the several conditions herein mentioned in the several bonds of liferent, provisions, or jointures to wives or husbands, or bonds of provision to younger children, to be granted by them respectively, or shall grant any other security for payment of the aforesaid provisions to wives or husbands or younger children, except in manner hereinbefore directed; or in case any of the aforesaid wives or husbands, or their heirs or assignees, shall use any adjudications or other manner of diligence against the said lands, earldom, lordships, baronies, and others, or any part of the same—then, and in all and each of these cases, all and every one of such liferent annuities or jointures, portions or provisions, bonds, rights, or securities, adjudications, or other diligence, shall be void and null, and of no force and effect in so far as they can affect the aforesaid lands, earldom, lordships, baronies, and others, or any part or portion thereof, in the same manner as if such portions or provisions, bonds, rights or securities, adjudications, or other diligence had never been granted, led, or obtained: And also, it is hereby specially provided and declared that the eldest son whom I may have by any subsequent marriage, or any of the said heirs or members of taillie who shall fail or neglect to insert the several conditions hereinbefore mentioned in the several bonds of liferent, provisions, or jointures to wives or husbands, or bonds of provision to younger children, to be granted by them respectively, or shall grant any other security for payment of the aforesaid provisions to wives, husbands, or younger children, except in the manner hereinbefore directed, or shall omit for three years complete to pay or consign, in manner before directed, any of the aforesaid instalments of ten per centum of the aforesaid provisions payable to younger children, with the interest due along therewith, shall immediately amit, lose, and forfeit all right and title which he or she shall have or can pretend to the lands, earldom, lordships, baronies, and others before mentioned, or any part thereof, and the same shall become void and extinct, and *ipso facto* fall, accresce to, and devolve upon the next immediate heir or member of taillie in manner and under the conditions before mentioned; and such next immediate heir or member of taillie shall be obliged to establish a right in his or her person, by declarator or otherwise, within the time, and in the same manner, and under the like irritancy as is hereby provided respecting the other contraventions hereinbefore mentioned."

The petitioner's grandfather John James Hope Johnstone while in possession of the estates made a provision of £40,000 for his younger children, which he charged upon the entailed estate by bonds of provision. This he did in fulfilment of an obligation undertaken by him in his marriage-contract, and in a bond executed shortly thereafter, by which he undertook to provide three years' free rents of the estate to the younger children of his marriage.

On 11th July 1876 the said Mr Hope Johnstone died, and was succeeded in his entailed estates by his grandson, the petitioner.

By the Act 5 George IV. cap. 87, sec. 4 (the Aberdeen Act), passed in 1824, it is enacted—"That it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bonds of provision or obligations binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the granter's death, as to him or her shall seem fit; provided always that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates after deducting the public burdens, liferent provisions, including those to wives or husbands, authorised to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens, of what nature soever, affecting or burdening the said lands and estate, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession—that is to say, for one child one year's free rent or value, for two children two years' free rent or value, and for three or more children three years' free rent or value in the whole; provided always that such provision shall, except in the case of the settlement thereof by a marriage-contract, as hereinafter mentioned, be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir."

By the Act 11 and 12 Vict. cap. 36 (the

Rutherfurd Act) it is enacted (section 21) that "In all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay or to provide, by assignation of the rents and proceeds of such estate, for any sum or sums of money granted by any former heir of entail by way of provisions to younger children, in terms of the said recited Act passed in the fifth year of the reign of His Majesty King George the Fourth, or in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds; and in all cases where any heir of entail in possession as aforesaid shall in the marriage-contract of his younger child have validly granted provision for such younger child out of the rents and proceeds of such entailed estate, in terms of the said recited Act, or in terms of such deed of entail, it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or to charge the fee and rents of any portion of such estate other than as aforesaid, with the amount of such provisions, by granting bond and disposition in security over such estate, or such portion thereof other than as aforesaid, for such amount, with the due and legal interest thereof from the date of such bond and disposition in security, or any subsequent date, till repaid, and with corresponding penalties; and such bond and disposition in security may be in ordinary form, binding the granter and his heirs of entail in their order successively to repay the principal sum therein, with interest and penalties as aforesaid, and may contain all clauses usual in bonds and dispositions in security granted over estates in Scotland held in fee-simple."

By the Act 16 and 17 Vict. cap. 94, entitled "An Act to extend the benefits of the Act of the 11th and 12th years of Her present Majesty for the Amendment of the Law of Entail in Scotland," it is enacted (section 7)—"That where an heir of entail in possession of an entailed estate in Scotland, entitled or allowed under the said recited Act to charge the fee and rents of such estate, or of any portion thereof, with the amount of any provision to a younger child, and corresponding interest and penalties, has granted or shall grant bond and disposition in security therefor over such estate or any portion thereof, under the authority of the said Act, such bond and disposition in security shall be valid and effectual whether the same be granted to such younger child or any other party in right of such provision, or to any party or parties advancing the amount thereof in order to the payment of such younger child; provided always that if such bond and disposition in security be not granted directly to such younger child or other party in right of such provision, such provision be formally discharged by such younger child, or the amount of such provision, with any interest due thereon, be paid over to or consigned or invested for behoof of such younger child or other party in right of the same at the sight of the Court."

Desirous of availing himself of the provisions of the above statutes the petitioner on the 17th July 1877 presented a petition to the Court craving authority to charge the fee and rents of the entailed estate with the above-mentioned provision to the amount of £40,000 and interest thereon. On 31st October 1877 the Lord Ordinary (Adam) granted the prayer of the petition, and bonds and dispositions were granted for the amount by the petitioner in the ordinary form, with interest thereon from their respective dates.

On the 30th January 1880, however, an action of declarator and payment was raised at the instance of Miss Lucy Hope Johnstone (the second daughter of the said deceased John James Hope Johnstone) against the heir of entail in possession, the three next heirs of entail, and the surviving trustees acting under John James Hope Johnstone's trust-disposition and settlement, in order to have it declared that the sum equivalent to three years' free rent of the estates amounted to the sum of £56,280, that the younger children under the marriage-contract and the bond following thereon were entitled to that sum, and that the defenders should be ordained to pay the sum of £16,280, 17s. 9d. as the balance still due to the younger children after deduction of the sum of £40,000 and interest which had been already paid to them.

On 30th January 1880 the Lord Ordinary (Young) found that the sum sued for, viz., £16,280, 17s. 9d., was due by the petitioner as heir of entail and the heirs succeeding him in the said lands and estate of Annandale; and the defenders having reclaimed to the Second Division, the Lord Ordinary's interlocutor was on 19th May 1880 sustained.

[Reference is made to the case as reported May 19, 1880, vol. xvii., p. 547, 7 R. 766.]

Under these circumstances the present petition was presented by the petitioner for authority to charge the fee and rents of his entailed lands and estates with the said sum of £16,280, 17s. 9d., by granting a bond and disposition in security for the amount in terms of the Acts 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94. The heirs of entail next in order objected, on the ground that by the terms of the entail of the estate of Annandale, the marriage-contract, and the bonds of provision, which all referred to the entail, the heir of entail in possession for the time was bound to pay off all provisions in favour of younger children within a period of ten years, and that by instalments of 10 per cent. per annum, as therein mentioned, there being further an irritancy to be incurred if any of the heirs of entail in possession should omit for three years to pay the said instalments of 10 per cent. per annum of said provisions to younger children.

The Lord Ordinary (Lee), after having remitted to Mr Archibald Steuart, W.S., to inquire into the circumstances set forth in the petition, and having heard counsel thereon, refused the prayer of the petition, appending the following note to his interlocutor:—"The petitioner in this case proposes to make the balance of the provisions recently ascertained to have been granted by the deceased John James Hope Johnstone in favour of his younger children a burden on the entailed estates, by granting a bond and disposition in security therefor containing all the clauses usual in the case of fee-simple estates. His application is founded on the 21st clause of the Rutherfurd Act. That clause applies to 'all cases where an heir of entail in possession of an entailed estate shall be liable to pay or to provide, by assignation of the rents and proceeds of such estate, for any sum or sums of money granted by any former heir of entail by

way of provisions to younger children,' whether in terms of the Aberdeen Act or in virtue of powers to that effect in the entail. It is said in the present case that the petitioner is within the scope of the clause, inasmuch as he is liable to pay the balance of the provisions constituted by bond of provision executed by the deceased John James Hope Johnstone of date 11th January 1819, and the other bonds granted in implement of his marriage-contract, and referred to in the judgment of Lord Young, adhered to by the Second Division of the Court on 19th February 1880. It was contended, on the other hand, on behalf of the next heirs of entail, that under the bonds of provision, and the marriage-contract to which they refer, the petitioner is not liable to pay the sum mentioned in the petition, excepting by instalments of ten per cent. per annum, and is therefore not authorised by the clause founded on to charge the amount as a permanent burden on the estate. It was also contended that this point as to the manner and time of payment is settled by the terms of the decree contained in the judgment already referred to.

"The Lord Ordinary is of opinion that the contention of the respondents is well founded, and that the petition in its present shape must be refused.

"In the first place, it appears to him that the terms of Lord Young's judgment, adhered to by the Second Division, distinctly constitute the debt against the petitioner and the heirs of entail succeeding to him, but only 'at the terms and by the instalments all as specified and provided in said bond of provision.'

"In the second place, the Lord Ordinary is of opinion, that according to the sound construction of the bonds of provision no obligation is imposed upon the petitioner to pay the amount found due otherwise than by instalments, as provided in the marriage-contract to which they relate. The marriage-contract provided that the provisions should be payable in manner mentioned in the deed of entail, and should be made out in exact conformity thereto. But the Lord Ordinary does not doubt, and it was not disputed on the part of the next heir, that after the date of the Aberdeen Act it was in the power of the deceased Mr Hope Johnstone to grant provisions up to the limit authorised by that statute, without the condition of payment by ten yearly instalments required by the deed of entail. The fact is, however, that although the later bonds refer also to the powers of the Aberdeen Act, none of them professes to grant provisions in excess of the obligation contained in the marriage-contract, and the latest of all, which purports to increase the provisions as far as the increase of rental then warranted, makes it an express condition that the 'provisions herein conceived, so far as the same shall be payable out of the lands, teinds, and others contained in the deed of entail second above mentioned, or from the heir of entail in possession thereof, shall not be exigible at once, but shall be payable only by yearly instalments of ten per cent. of the capital sum.' The bond of 1853 contains a similar provision, and the bond of 1819 bears to be granted exclusively under the powers of the deed of entail, and in implement of the marriage-contract. It was suggested that the bond of 1839 might be read by itself, and as creating an obligation under the Aberdeen Act altogether unsecured by reference to the terms of the marriage-contract. It rather appears to the Lord Ordinary that this bond admits of being so read. But as it professes to be in implement of the marriage-contract, and does not to any further extent than £36,000 free the marriage-contract obligation from the condition of payment by instalments, the Lord Ordinary cannot hold that this bond sanctions the proposed charge of the balance of £16,280, 17s. 9d. It must be kept in view that the petitioner has already been allowed under a former application, referred to in the petition, to charge £40,000 on the fee and rents of the estate, and that the interlocutor of Lord Young expressly decerns for payment of this balance by instalments.

"If the Lord Ordinary's view be well founded, it is necessary to look at the terms of the marriage-contract for the purpose of ascertaining the character and conditions of the petitioner's liability for this balance of £16,280, 17s. 9d. This is what the Lord Ordinary understands the Court to have done in decerning for payment of the sum by instalments, as concluded for in the action at the instance of Miss Lucy Hope Johnstone. In so far as the Lord Ordinary may have any right to examine a matter which appears to be already *res judicata*, he may say that the terms of the marriage-contract satisfy him that the obligation of the petitioner, in so far as standing upon that deed, is subject to the condition of payment by yearly instalments of ten per cent. in terms of the deed of entail. The marriage-contract distinctly requires that the provisions shall 'be payable in manner mentioned in said deed of entail itself,' and the deed of entail not only imposed the condition of payment by yearly instalments at ten per cent., but provided that any heir who should grant provisions except in the manner therein directed, or should omit for three years to pay or consign in manner therein directed any of the required instalments, should forfeit all right to the estate.

"The result is that the only obligation imposed on the petitioner and the other heirs of entail with regard to the balance of the provisions is an obligation to pay by ten yearly instalments; and the question of law raised by the present petition is, whether such an obligation enables the heir now in possession to take advantage of the 21st clause of the Rutherfurd Act, to the effect of granting a bond and disposition in security constituting the amount a permanent burden on the estate? This appears to the Lord Ordinary to be precisely the same question which was decided in the case of *Campbell*, January 26, 1854, 16 D. 396. The decision in that case was unanimous, and was concurred in by Lord Rutherfurd. The opinions are quite conclusive of this case in the Lord Ordinary's view of it. For although the limitation under the entail in that case was for a period of twenty-five years, the case of a shorter period was taken as affording a stronger illustration of the inapplicability of the statute. Lord Rutherfurd said—'It is plain that the bond contemplated by the Act was chargeable on the rents in all time coming, and the Legislature, having that in view, says it may be charged directly on the fee; but when the entailer, looking to this transaction, says no bond shall be granted by the heir to affect the rents for longer than twenty-five years, it is not only out of the statute in words but in substance.

Suppose it had been for three years, could the Court have held that it was the intention of the Legislature to make that a charge on the fee of the estate for ever?'

"On these grounds the Lord Ordinary has refused this petition."

The petitioner reclaimed, and argued—He was within the scope of the 21st section of the Rutherfurd Act, as he was liable to pay the balance of provisions constituted by bonds of provision executed by his grandfather in implement of his marriage-contract. The case of *Campbell* was not in point. In it there was a provision that if the debt should not be paid off within a certain fixed period it should then become null and void so far as related to the entailed estate and rents and profits thereof. Here there was no such irritancy which could affect the rights of the creditors or the extent of their security. It would be simply a valid assignation of the rents to the younger children in all time coming until these provisions were paid off.

It was argued for the respondents, the next heirs of entail—On a sound construction of the entail and marriage-contract and bonds of provision the petitioner cannot found on the 21st clause of the Rutherfurd Act to charge the amount as a permanent burden on the estate. He must pay at the terms and in the instalments specified and provided in the bonds of provision. In the cases of *Campbell* and *Baillie* the same question was raised and decided against such a power. In them the entailer's intention, as disclosed by the entail, was held to overrule the statute.

Authorities—*Campbell*, Jan. 26, 1854, 16 D. 396; *Baillie*, Feb. 4, 1854, Duncan's Manual of Entails, p. 339.

At advising—

Lord Young—The petitioner, who as heir of entail in possession of the estate of Annandale is liable, according to a recent judgment of this Court, to pay a sum of £16,280, 17s. 9d. granted by his grandfather, his immediate predecessor, by way of provisions to younger children, asks authority, under sec. 21 of the Entail Amendment Act 1848, to charge that sum on the estate. It was assumed in the argument addressed to us that the sum in question (which is truly only the unpaid balance of provisions to a much larger amount) was not exigible immediately on the petitioner's accession, which occurred in July 1876, but by instalments extending over ten years from that time, interest, however, running from the first—the indulgence being accompanied by a condition of forfeiture of the debtor's right to the estate should he allow any instalment to remain unpaid for more than three years. The Lord Ordinary, proceeding on the assumption and on the authority of the case of *Campbell*, 16 D. 396, has refused the application for leave to charge. The question is whether the refusal was right, and I am of opinion that it was not.

The assumption to which I have referred is probably right, and at all events I accept it as the Lord Ordinary did. It was the condition of the argument. The parties were, however, in controversy on one point, viz., whether, if the provisions or any of the instalments should be left unpaid beyond the prescribed period of three years, the debt, *i.e.*, the whole provisions or the instalments with respect to which such default was made, would, according to the provisions of the entail, survive or be cancelled. It was indeed conceded by the respondent that it would survive against the defaulting heir and his general representatives, but they contended that should he die or the irritancy be enforced against him by the heir next in succession, the debt, in whole or in part, according as the default was total or partial, would cease to be payable by the heir in possession. The point is material only with reference to the applicability contended for of the case of *Campbell*, but for which I should have thought it clearly immaterial. I am of opinion that the contention of the respondents is erroneous. It would, I think, require a clear and distinct provision to that effect to annul a debt against the heir of entail in possession by means of default made in the due payment of it, and there being here none such, I can attach no such consequence, and reject the argument by which it was attempted to be deduced from provisions which were, I think, plainly intended only to give ample indulgence to the debtor on the one hand, and on the other to prevent that indulgence from being exceeded.

The question really depends on the true meaning of sec. 21 of the Act of 1848. The material words are—"In all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay any sum or sums of money granted by any previous heir of entail by way of provisions to younger children, in virtue of powers to that effect contained in any deed of entail under which the heir of entail in possession holds, it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate" "with the amount of such provisions," &c. That these words exactly apply to the petitioner in the position which he occupies is, I think, not doubtful. He *is* heir of entail in possession of an entailed estate in Scotland, and he *is* liable to pay the sum of £16,280 17s. 9d. granted by the preceding heir by way of provisions to younger children in virtue of the powers of the entail under which he holds. Prior to the statute an heir in possession had to meet his liability to pay provisions to younger children as he best might out of his income or general estate, being of course at liberty to pledge his life interest on the entailed estate for that as for any other debt of his. The creditors in the provisions might also, like creditors in any other debts, but no otherwise, have attached by diligence any estate of his, including his rents from the entailed lands. But the fee of the estate was sacred, so that no relief could be had out of it. The purpose of the Act was to remedy this, for the heir's relief, by enabling him to meet his liability by charging the estate—*i.e.*, by borrowing money on it. But the only condition and measure of his right to charge is his liability to pay, which prior to the statute he must have met out of his income or general estate, if he had any. Now, here the fact of the petitioner's liability is not doubtful, nor the amount of it, for both are fixed by a decree of this Court. The indulgence to pay by instalments does not affect the existence or amount of his liability, but is only a provision for his convenience, should he choose to avail himself of it, in meeting it, and he might

not choose, having to pay interest possibly at a higher rate than he could borrow for. He might no doubt die before payment—just as an heir to whom no such indulgence was accorded might—and then the liability would attach to the succeeding heir, with a corresponding right to charge in order to meet it. I can find no ground for thinking that an heir liable to pay provisions to younger children is deprived of the benefit of the Act by any special indulgence as to the time or times of payment, and indeed if indulgence to pay by ten instalments would exclude the application of the Act, I should be at a loss to find a reason why indulgence to pay by two should not have the same effect. The more extended the indulgence, the more likely are the succeeding heirs to have benefit by the charge which they object to—for the more likely is liability for the debts (to a greater or less extent) to pass to them. The heir in possession is most immediately and certainly relieved by the Act at the possible cost of his successors when his full liability is enforcible instantly and at once on his succession.

The only doubt which I had was whether we could allow an immediate charge beyond the amount presently exigible from the petitioner under his liability, *i.e.*, the amount of the past due instalments. This point was not adverted to in the argument, and no doubt both parties thought that if the Act applied there was an obvious convenience in making one charge for the whole amount, which is past due to the extent of about a half, and that with respect to the rest it will be advisable to arrange to pay it up at once. It is immaterial whether interest is paid to the creditors or the pursuers, or to the lender of the money by which they are at once paid off, and, in short, I do not, and assume the parties did not, see how anyone can take prejudice by following the most convenient course with respect to the mere business arrangement, viz., borrowing and paying the whole at once.

With regard to the case of *Campbell*, on which the Lord Ordinary has founded his judgment, I am of opinion that it is inapplicable, inasmuch as the peculiar feature of that case, and on which alone it was decided, does not occur here. That feature was a valid provision, as the Court held (rightly or wrongly we are not concerned to inquire) that the debt then in question should subsist for a certain specified period and no longer, and that if not paid within that period it should altogether cease to exist. The provision was, so far as I know, unique, and it is unlikely to be of frequent occurrence. Should it again occur, the case of *Campbell* may possibly be thought to require reconsideration. I should myself incline to the opinion that the liability of the heir in possession was not the less a liability within the meaning of the Act passed for his relief, because the disposition of the creditor to enforce it was likely to be quickened by a provision that if he did not within a time limited he would lose his right altogether.

Lord Gifford—This petition raises a very important question under the 21st section of the Entail Amendment Act of 1848. The petitioner, who is heir of entail in possession of the entailed estates of Annandale, asks authority to charge the fee and rents of the estate, other than the mansion-house, offices, and policies, with a sum of £16,280, 17s. 9d., being the balance of the provision of £56,280, 17s. 9d. made by the late Mr J. J. Hope Johnstone of Annandale for his younger children, the amount of which provision was held fixed and validly constituted against the present petitioner, and against the heir of entail succeeding to him in the entailed estates, by final judgment of this Court dated 19th May 1880. The petitioner, founding on the 21st section of the Entail Amendment Act of 1848, proposes to grant a bond and disposition in security, or bonds amounting in all to the said sum of £16,280, 17s. 9d., in order to the payment of the amount to the younger children of the late heir of entail or to those in their right.

The heirs of entail next in order object to this, on the ground that by the terms of the entails of the estate of Annandale the heir of entail in possession for the time is bound to pay off all provisions in favour of younger children within a period of ten years, and that by instalments of ten per cent. per annum as therein mentioned; and this obligation against the heirs of entail in possession is enforced by an irritancy to the effect that if any of the heirs of entail in possession shall omit for three years complete to pay the said instalments of ten per cent. per annum of the said provisions to younger children, such heir in possession so failing to pay off the provisions shall forfeit the entailed estates at the instance of the next heir.

It thus appears that it was the intention of the entailer, and was expressly provided by him, that provisions in favour of younger children should not be permanent burdens upon the entailed estate or upon the rents thereof, but should be paid off or discharged within a period of ten years, so as thereafter to leave the whole estate free and disencumbered thereof for the benefit of the future heirs of entail; and it is said that wherever an entailer has made a provision like this then the enactments in the 21st section of the Entail Amendment Act do not apply, and the heir of entail in possession is not entitled to create the provisions to younger children a permanent burden upon the entailed estate by granting bond and disposition in security therefor in manner provided in the 21st section.

The true objection is, not merely that the provisions in favour of younger children are payable only by instalments, and spread over a greater or less number of years, for that is merely an indulgence to the heir or heirs of entail in possession, and prevents their being unduly pressed for payment of the capital. The true force of the objection lies in the fact that by the terms of the entail the heirs of entail in possession are bound at all hazards, and within a definite time, to pay off the provisions in favour of younger children so that they shall no longer affect the entailed estates.

Now, apart from the decision in the case of *Campbell*, I confess I should have been disposed to think that the words of the 21st section of the Entail Amendment Act are sufficiently broad and strong to cover all cases where an heir of entail in possession is obliged to pay provisions to younger children granted by a former heir, whether the amount of these provisions is payable at once and in one sum or is payable by instalments and over a series of years. I should have been disposed to think that the provision of the Entail Amend-

ment Act even applied to cases where the heir or heirs in possession were taken bound to pay off the provisions within a definite number of years, for the words of the statutory enactment do not make any such exceptions.

The provision is that "In all cases where an heir of entail in possession of an entailed estate shall be liable to pay or to provide, by assignation of the rents and proceeds of such estate, for any sum or sums of money granted by any former heir of entail by way of provisions to younger children in terms of the said recited Act passed in the fifth year of the reign of His Majesty King George the Fourth, or in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds; and in all cases where any heir of entail in possession as aforesaid shall, in the marriage-contract of his younger child, have validly granted provision for such younger child out of the rents and proceeds of such entailed estate, in terms of the said recited Act or in terms of such deed of entail, it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate, other than the mansion-house, offices, and policies thereof, or to charge the fee and rents of any portion of such estate other than as aforesaid, with the amount of such provisions by granting bond and disposition in security over such estate" in manner therein mentioned. This provision seems quite unqualified and unconditional. It applies apparently to every case where an heir of entail in possession is either (1) liable to pay, or (2) liable to provide by assignation of the rents for provisions to younger children; and *prima facie* the petitioner in the present case is undoubtedly in the position supposed. He is liable to pay this provision of £16,000 odds, and he is liable to provide for it by assigning the rents under the statute or otherwise. Nothing is said in the statute about cases where payment is to be made by instalments, or where it is spread over a period of years, and at first sight I have a difficulty in seeing how these circumstances can affect the express enactment. If the statute applies where the whole sum is instantly exigible, or where the relief of the heir in possession is only by tendering an assignation of a third of the rents under the 10th section of the Aberdeen Act, it is difficult to see why a provision for payment by ten yearly instalments should deprive the heir of the benefit of the Entail Amendment Act. In truth, the statutory mode of payment by assigning one-third of the rents, will in general be very nearly equivalent to paying off the provisions by ten yearly instalments.

But the decision in the case of *Campbell*, followed, as it seems to have been, by the case of *Baillie* (Duncan on Entails, p. 339), creates a very serious difficulty in the present case. In *Campbell's* case it was held that where an entail provided that provisions for younger children should not affect the entailed estate or the rents thereof for a longer period than twenty-five years after the death of the granter, any provisions not under this condition to be void and null; in such a case the heir in possession could not grant bond and disposition in security under the 21st section of the Entail Amendment Act, the Court apparently holding that it was only where the rents of an estate might be pledged in all time coming or for an indefinite period that the Act of 1848 authorised the fee to be charged by a bond and disposition in security. This is an authoritative decision, and it is not possible for this Division to go back upon it, though if appropriate circumstances arose I think it might be worthy of reconsideration by both Divisions or by the whole Court.

But I do not think that the case of *Campbell* or the case of *Baillie* are really applicable to the present case. The specialty in these cases was that the heir of entail in possession was by the express terms of the entails disabled from validly or effectually assigning or affecting the rents of the entailed estate for more than a definite limited period. If the debt to the younger children was not paid off and discharged within a certain and fixed number of years, then it came to an end, and became null and void so far as related to the entailed estate and to the rents and profits thereof. The estate and its rents became by the lapse of the appointed period free and disburdened, leaving only a personal claim against the heirs in possession individually; and Lord Rutherfurd explains that it was only where the rents might be charged with the debt in all time coming or indefinitely that the Legislature says the debt may be charged directly on the fee.

Now, in the present case there is no provision that the bond in favour of the younger children, or the assignation of the rents in security thereof, shall become void or null if the provision be not paid within a definite period. There is no irritancy of the bond itself or of the security thereby afforded to the younger children—these are not touched, and will remain effectual to the younger children so long as their debt is unpaid. It will be a valid assignation of the rents to the younger children in all time coming until their provisions are paid, and thus in the present case the heir of entail in possession is entitled to do what he was not entitled to do in the case of *Campbell*—grant an effectual security to the creditors which will remain effectual to them for an indefinite period or in all time coming until the debt is paid.

No doubt while the security of the younger children is not affected thereby, the heir or heirs of entail are taken bound to pay off the provision within ten years, and it is true that this obligation on the heir of entail is fenced with an irritancy directed against him. But I do not think that this makes any difference, the essential point being that there is no irritancy directed against the creditors in the bond, and that the failure of the heir to pay it off in ten years will in no way affect the rights of the creditors or the extent and efficacy of their security.

I am of opinion, therefore, though not without considerable hesitation, that the authority of the case of *Campbell* does not extend to or govern the present case, that the petitioner is within the purview and provisions of the 21st section of the Entail Amendment Act, and that he is entitled to grant the bond and disposition in security as proposed by him. I think the object of the Entail Amendment Act was to give relief to an heir of entail in the situation of the petitioner, by enabling him to make the provisions to the younger children a permanent charge upon the fee, and thus enjoy the estate under burden only of the interest of the provisions, instead of being bound to pay off the capital thereof in ten years or in any other limited period. I incline to think that a proprietor making an entail after 1848 could not

defeat the provisions of that Act by merely taking his heirs of entail bound to pay off provisions to younger children within a definite or limited time.

Lord Justice-Clerk—I concur entirely in the result of your Lordship's judgment. A good deal of difficulty has been introduced into the question—which without that element I think would not have presented much difficulty—by the authority of the case of *Campbell*. I do not think that the object of the clause which we are now considering—I mean the object of the qualities introduced into the power to charge the estate—was solely the advantage of the heir in possession who was bound to pay. That was part of the object, and with that object his obligation instead of being prestable immediately, is prestable by ten yearly instalments, and his creditor is restricted to that. But, on the other hand, I cannot doubt that the object of the provision was to secure that after the lapse of ten years the obligation should be entirely extinguished as far as the entailed estate was concerned. That was an obligation or a provision in favour of the succeeding heirs of entail. These were the two objects—and indeed that lies upon the very surface of the provision. But I should have thought that that was precisely one of the cases for which the Entail Amendment Act, in the provisions of the 21st section, was expressly intended. It is manifest that the evil which the Entail Amendment Act was intended to remedy applies with very great force to a burden under those conditions. For instance, supposing the rental of the entailed estate is £1000 a-year, three years of the free rent is £3000, and that means yearly instalments of £300 a-year for ten years. In other words, the heir in possession is to be crippled during probably the whole of his tenure of the entailed estate; whereas if it were made a charge upon the estate itself, and only the interest upon that charge to be paid, it is quite plain that the burden would be very much lighter, although no doubt it would burden all the heirs in succession. But the principle of the Entail Amendment Act was that it was for the benefit, not merely of the heir in possession, but for the benefit of the whole succeeding heirs that the burden year by year should be lightened, although its permanency was increased. The case of *Campbell*, however, raises a great difficulty about that, and I must fairly own for myself that where a principle is rested on a single decision, and that at a considerable interval, if I had come to be clearly of opinion that that was the law, I should not have hesitated to have thrown that decision aside and done what I thought justice in the case. But I am willing to accept the differences which Lord Gifford has pointed out as opening the question anew, and I am perfectly persuaded that the principle of that clause of the Entail Amendment Act applies with singular force to the circumstances of the present case.

The Court recalled the judgment of the Lord Ordinary, and granted authority as craved.

Counsel for Petitioner and Reclaimer—Lord Advocate (M'Laren, Q.C.)—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents — Kinnear — Keir. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Saturday, November 27.

SECOND DIVISION.

[Sheriff of Midlothian.

HERON *v.* GRAY.

Property—Urban Tenements—Implied Grant—Servitude of Light.

Held that in towns where houses are disposed of in flats to various purchasers, and where the proprietor of the ground flat is proprietor of the *solum* of the ground to the back, there is an implied right of servitude in favour of the proprietors of the upper flats that he shall not erect buildings on that ground so as to interfere with their lights.

A proprietor acquired a house and garden in a town, and converted it into two lots—the first consisting of a shop which he erected on the plot in front, and warerooms which had formed part of the sunk storey of the house, and had had for more than forty years windows looking out upon the garden ground to the back of the house. He sold this lot, "together with (1) the *solum* of the ground on which the said shop is built; (2) a right of property, in common with the proprietors of the dwelling-house, to the *solum* of the piece of ground on which the said cellars or warerooms are situated," &c. Thereafter he sold the remaining lot of the property, consisting of the dwelling-house above the shop, to a different purchaser, "together with a right of property along with" the purchaser of the shop "to the *solum* of the piece of ground on which said house is built, together with the piece of ground or green lying to the" back of the house, "with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on, or any right of servitude affecting, the said piece of ground." *Held* that the title of the purchaser of the shop gave him by implication a servitude of light over the piece of ground to the south on which the windows of the wareroom looked, and that the express grant of that piece of ground, with the declaration that there was no servitude affecting the ground in the title which the common author of the parties had given to the purchaser of the house, could not interfere with the servitude implied in the earlier right of the proprietor of the shop.

On 16th May 1877 the Scottish National Heritable Company acquired from Lachlan M'Kinnon junior, advocate in Aberdeen, trustee of the deceased Mrs Brown or Murray, that lot of ground with house thereon known as No. 1 Arniston Place, Edinburgh. This house and ground had been occupied as a villa residence since 1810, when the feu was given off by the proprietor of the lands of Belleville and the house was built. There were at the date of the purchase of the house and ground certain small apertures in the south gable of the house for the purpose of admitting light and air to the sunk flat. These small windows overlooked that piece of ground which lay between the house and Salisbury Road