defence stated is that the amount charged is just enough. However, that matter can go to probation if it is disputed, but the answer which the defenders make to this claim is substantially contained in the answer to the second article of the condescendence.

The first averment there is "that the defenders conduct a large business in the manufacture and sale of chemical manures which contain from 10 to 50 per cent. of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless, the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company (Limited), mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies." Now, these averments do not comprehend the averment that the goods of the two parties are carried under the same circumstances and over precisely the same line of railway, or anything else that would bring it within the operation of the 83rd section of the Act of 1845, and therefore it must be held to apply to the provisions of the Act of 1854 against undue preferences. It is quite settled, I think, by the case of *Murray*, that no claim can be brought in this Court against a railway company for the violation of the Act of 1854. The only remedy provided by that Act—the only remedy up to the present date, so far as I know—is that the company which violates that provision shall be restrained from doing so by interdict, and shall also be subjected to a penalty of so much per day. Therefore I think that part of the averment by the defenders is entirely irrelevant. If the party who makes that averment could not in an action in this Court enforce any claim against the railway company, just as little can it be pleaded in defence against an otherwise just claim of the railway company.

But there is another part of the averment which the Lord Ordinary has held to be relevant, and has admitted to probation, and that is the averment founded on the Act of 1845, and we must hold therefore in the form of the Lord Ordinary's interlocutor that what he has done is to refuse a proof of the first part of that averment as being irrelevant, and allow a proof of the second part. The Lord Ordinary has had some doubt, I think, as to whether the averment under the Act of 1845 is quite satisfactory or complete, but that has not been raised before us on any argument. Therefore I see no reason for doubting the propriety of the Lord Ordinary's appointment of the proof in this case, unless we are to deal with the motion of the defenders in this case that it should be sent to the Railway Commissioners under the Act of last year. Now, it does not appear to me what benefit the defenders could very well have by this transference of the case to the Railway Commissioners, because their complaint under the Act of 1854 cannot be made the subject of an action, and just as little can it be made the subject of a claim for money to meet the claim of the pursuers. The question would arise in the same way before the Railway Commissioners, and this averment under the Act of 1854 would be just as irrelevant and just as much regarded so by the Railway Commissioners as it is by this Court, in so far as it is made the foundation of a money claim. It is quite open of course to the defenders to bring some proceeding before the Railway Commissioners for the purpose of preventing the continuance of an illegal practice of which they complain, and whether it is precisely the same under the Act of 1888 as under the Act of 1854 or under the Act of 1873 it is needless to inquire, but it must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money. Therefore I am for refusing that motion and adhering to the Lord Ordinary's interlocutor.

Lord Rutherfurd Clark and Lord Adam concurred.

Lord Mure and Lord Shand were absent from illness.

The Court adhered.

Counsel for the Pursuer—Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders—Asher, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Friday, March 15.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MACKINTOSH *v.* ROSE AND OTHERS.

Entail — Disentail — Expectancy — Surplus — Agreement—Payment in Error.

In a petition for disentail of an estate the heir of entail in possession and the three next heirs agreed that the interests of the latter parties should be valued. In terms of the actuary's report the parties agreed by minute that the surplus funds remaining after valuation should be distributed proportionately to the several interests as already valued, and the surplus was distributed accordingly.

The Court, after remit to a man of business, approved of the proceedings, and disentailed the estate.

Four years thereafter the former heir in possession sued the three next heirs for repayment of the surplus funds, on the ground that the payment had been made in error, and that he had not been properly represented, as the same agent acted for all the parties.

Held that as the payments had been made under an agreement approved of by the Court, and that as the pursuer at the time of the transaction was *sui juris*, and had enjoyed independent advice, the action was incompetent, and the defenders *assoilzied*.

On 10th January 1880 Francis Henry Pottinger Mackintosh succeeded as heir of entail in possession to the estate of Farr, Inverness-shire. The next heirs of entail were Major Rose of Kilravock, and his sons Hugh and John.

In July 1882 Mr Mackintosh communicated

with the next heirs as to their consents to a disentail. They were willing to agree to this course on the value of their interests being provided for. In September 1882 he presented a petition for authority to record an instrument of disentail of the estates. In the proceedings a curator *ad litem* was appointed to each of the second and third heirs, both of whom were in minority.

The parties to the petition agreed to get a valuation of the interests of the next heirs on a statement to be adjusted between them, it being also agreed that neither party should be committed to accept the valuation, and that it should be made on the assumption that the estate was worth £40,000, as Mr Mackintosh, estimated it to be, but that if it were sold for less the values put on the heirs' interests should be reduced in proportion to the price.

Mr Deuchar, actuary, was asked to make the valuation on this assumption. On 14th February 1883 he intimated that he estimated the interest of Mr Mackintosh at £10,155, that of Major Rose at £820, that of Hugh Rose at £8425, that of John Rose at £2800. These sums amounted to £22,200. The actuary intimated that these sums did not exhaust the value of the estate, which, deducting a debt upon it, he took to be £28,000. There was a difference, after making a certain allowance for an annuity on it, of £4500 falling to be distributed among the heirs of entail. The actuary intimated that he "considered it fair that the distribution of this sum should be made proportionately to the interests of the parties" as he valued them. His final adjustment was:—

	As valued.	Additional share of surplus.	Total.
Present heir's interests,	£10,155	£2,056	£12,211
Major Rose's ,,	820	169	989
Mr H. Rose's ,,	8,425	1,707	10,132
Mr John Rose's ,,	2,800	568	3,368
	£22,200	£4,500	£26,700

After certain negotiations, during which another actuary, Mr Wallace, was consulted, it was agreed that the interests of heirs should be taken as they had been first estimated in an original draft report by Mr Deuchar, viz., Major Rose £989, Hugh Rose £10,132, and John Rose £3368. The minute of agreement was signed by Mr Andrew Macdonald as agent for the heir in possession, and Mr David Flett as agent for the consenting heirs.

The estate was disentailed and sold for £32,300 on 29th April 1884. Prior thereto the heir in possession had become bankrupt. His trustee employed Mr Deuchar to calculate the amount payable to heirs in proportion to the price, and on 26th September 1884 paid to the consenting heirs their amounts brought out as due to them, and which were, to Major Rose £707, Hugh Rose £7243, John Rose £2497.

In December 1887 Mr Mackintosh brought an action against Major Rose, Hugh Rose, and John Rose, claiming payment of £2310, in the proportion of £159, 10s. from Major Rose, £1613 from Hugh Rose, and £537, 15s. from John Rose. He stated that Mr Macdonald, his Inverness agent, had employed as agents in Edinburgh in the disentail proceedings the family agents of the defenders, and instructed them to act for him; that the report of the actuary was obtained by them; that the sum paid to the next heirs was grossly in excess of the true value of the defenders' expectancies in the said entailed estate; that he knew nothing of the arrangements, having handed over the whole matter to Mr Macdonald; and being himself unfit from mental weakness at the time to attend to business, that he never consented to the sums being fixed for the defenders' interests, and had been debarred by their agents from having skilled independent advice as to the correctness of the actuary's report; and that certain portions of land were included in the valuation which had not been part of the entailed estate.

He averred that the actuary's report proceeded on the footing that the surplus of the estate which remained after providing for the pursuer's and defenders' interests and other charges should be distributed proportionally among the pursuer and defenders. "The value of the estate was taken at £40,000, or less debts thereon at £28,000. The interests of the different heirs, together with other charges, amounted to £23,500, leaving a surplus of £4500, which was distributed in terms of the said report among the present and next heirs in proportion to their several interests as therein valued. Of said sum of £4500 the defenders were to receive in terms of said report £2444 subject to modification on the estate being afterwards sold, as the selling price was in that event to be taken as the basis of calculation. Out of the sum of £32,300, being the price which the estate actually realised, the defenders received a share of the said surplus amounting to £1768, 5s. in the following proportions:—Major Rose £122, 10s., Hugh Rose £1234, and John Rose £411, 15s. The defenders were not entitled to any part of the said surplus the whole of which legally belonged to the pursuer alone, and should have been allocated to him. He believes and avers, that had his interests been protected by a separate agent in said disentail proceedings, the surplus would have been so allocated according to law. The above sum of £1768, 5s. was thus overpaid to the defenders in essential error as to the pursuer's legal rights to said surplus, or at least under a mutual mistake as to the relative and respective rights of parties in said surplus."

The pursuer pleaded—"(1) The sum sued for having been paid to the defenders under essential error, in fact and in law as condescended on, the pursuer is entitled to repetition of the same. (3) The sum sued for to the extent of £1768, 5s. having been paid to the defenders in essential error as to pursuer's rights, or at least under a mutual mistake as to the respective rights of parties in said surplus, the pursuer is entitled to repetition of said sum."

The defenders produced certain correspondence and documents in order to show that the pursuer's interests were fully attended to by his agent in the disentail proceedings. These writings are referred to *infra* in the opinion of the Lord Justice-Clerk.

They pleaded that the pursuer's averments were irrelevant.

The Lord Ordinary (M'Laren), after hearing counsel on the relevancy of the action, found that the "defenders are not liable to repay so much of the sums received in payment of the value of their respective interests as represents their

shares of the surplus or residual estate remaining after valuation of the four life interests recognised by the statutes, and for this reason, that the sums paid to the defenders were not ascertained on the footing of a remit from the Court, but were settled under an agreement in which the defenders made equivalent concessions to the pursuer."

"*Opinion.*—I have now to consider the relevancy of the pursuer's claim.

"The action is instituted by Mr Mackintosh of Farr, a gentleman who was proprietor of an entailed estate in Inverness-shire, but who acquired the estate in fee-simple, and who afterwards sold it; and the object of the action is to recover from the three expectant heirs, whose interests were valued and paid for, a return of part of the money paid to them on the ground that there was error *in essentialibus*. . . .

"The other ground of claim involves considerations of a different and more complex character. It is said that a mistake, in principle or in law, was made by the actuary. It is not suggested that the actuary in any way failed in the duty which he had to carry out—the duty of valuing the expectancies—but that he erred in the final result brought out by him, by having divided amongst the four persons concerned the residual sum which remained after their respective interests had been valued. Now, that was not an actuarial error, but an error in law, if it were done. It is quite settled by the case of *De Virte*, if indeed there ever was a doubt on the subject, that under the present law whereby the heir in possession can compel consent, or can pay out the expectant heir without consent, he, the heir in possession, takes the whole estate, under deduction of the ascertained value of the life interests of the three heirs, whose interests alone are recognised. There is of course always a residual sum after providing for these interests, because the interests of remoter heirs, however small these may be, must be worth something. But I believe it is not in that way that the residue generally arises. It arises in this way—that it is necessary after valuing the interest of the heir in possession, and before proceeding to estimate the interests of the heirs in what remains, to consider the value of the contingent interest that might accrue to the children of the heir in possession, supposing that he should marry and leave issue.

"Now the value of that contingency may amount to a very considerable sum when the heir is a young man and likely to marry, and it is evidently a sum in diminution of the value of the expectancies of the three heirs actually next in succession. That surplus, whatever it may amount to, is a thing that inures to the heir under the statute. But in this case the surplus, which probably arises in the way I have described (but how it arises is immaterial in my view), was divided amongst the four persons concerned, and that is said to be a mistake which, when pointed out, entitles Mr Mackintosh to repayment. But before such a result is reached two elements have to be considered. In the first place, this was not a valuation by a court of law at all, but a valuation by agreement of parties, which was intended to supersede the necessity of a remit from the Court. And, in the second place, it is to be observed that the arrangement actually made between Mr Mackintosh and the expectant heirs contained a condition very much in his favour, viz., the condition that, while the valuation was to be made upon an assumed sale value of £40,000, yet when the estate came to be sold, if less was realised, the sums to be paid to the expectant heirs were to be reduced proportionally. As it turned out the estate only produced £32,000, and apparently the real difference is greater than these figures indicate, because after deducting heritable debt I rather think the net estimated value of the estate would be only £28,000, and the net proceeds of sale would be only £20,000, so that the reduction that would be made, and was actually made, in virtue of agreement upon the sums prospectively fixed by Mr Deuchar, the actuary, was a very material one, and I will even say that, as far as I can see without making a close calculation, that reduction must have amounted to a larger sum than the part of the surplus that was divided among the three expectant heirs.

"Now, I have observed that this was not a valuation by order of the Court, but by agreement, and when this concession is made by the expectant heirs that they are willing to be dealt with on the footing of the sum that the estate may realise, it is not unlikely that in valuing the interests allowance may be made for this circumstance. If Mr Deuchar valued the estate on the footing that it was to be disentailed by consent, under an agreement which none of the parties was obliged to sign, I am by no means clear that the case of *De Virte* would apply, because I think that under Lord Rutherfurd's Act, when consents could not be compelled but were purchased, the practice of actuaries was to divide the whole estate amongst the four persons interested in the proportions of their interests, and that it appears to me would have been a sound practice as between parties any one of whom could place a veto upon the sale or disentail. But without inquiring too strictly into the principles which ought to regulate the valuation of life interests in cases where the matter is to be regulated by agreement, it is enough for this case to say that the matter was not dealt with on the same footing as if it had been done under a remit from the Court, and that there were variations on the strict rights of parties on both sides. I am not satisfied that the pursuer has suffered any injury from these variations, or that they were things done without his consent. It appears that he was first dissatisfied with Mr Deuchar's report, and then obtained a valuation from another actuary, Mr Wallace, which seems not to have been so favourable to him, and I think that when he eventually agreed to accept Mr Deuchar's report it must be taken that the parties had settled the compensation after due consideration, and notwithstanding the view originally entertained by the pursuer that Mr Deuchar had not given him as much as he had a right to expect. I think that no sufficient reasons have been shown for re-opening the matter with which I am now dealing. Of course I cannot altogether overlook the observations that have been made about the position of Mr Macdonald, the agent in Inverness, who authorised and carried through these proceedings. If there were any real and substantive statement of Mr Macdonald having exceeded his powers for the promotion of the interest of creditors or other persons, that is a

thing that ought to be inquired into. But the pursuer says he left the management of this transaction entirely in Mr Macdonald's hands. Mr Macdonald had no interest except to promote the pursuer's pecuniary concerns to the best advantage, and I think that an agreement signed by an agent who has full powers cannot be set aside upon the mere allegation that the pursuer was not personally consulted, and that the agent acted for him as he could do himself.

"In this connection it is instructive to observe that after Mr Macdonald had signed the agreement accepting the sum that Mr Deuchar had brought out in his report, security had to be given, and the deeds of security over the estate were of course signed by Mr Mackintosh himself. He had the opportunity of objecting to the transaction and stating that he never authorised it, and of taking exception to the deeds, but nothing of the kind was done. The deeds were signed and acted upon without the slightest objection." . . .

The pursuer thereafter pressed before the Lord Ordinary only one of his contentions as to land having been included in the calculation which did not form part of the entailed estate.

On 15th November 1888 the Lord Ordinary (Lord Kinnear for Lord M'Laren) found that the only remaining portion to which that objection applied had formed part of the entailed estate, and assoilzied the defenders.

The pursuer reclaimed. In the Inner House he did not insist in any of the objections that land had been valued which did not form part of the entailed estate.

Argued for the pursuer—Mr Deuchar in preparing his report had proceeded upon a wrong principle in allocating the surplus as he did. It was decided that all the next heirs of entail were entitled to was the value of their expectancies; whatever was the value of the estate over that went to the former heir in possession as the fee-simple proprietor of the disentailed estate—*De Virte* v. *Wilson*, December 19, 1877, 5 R. 328. In this case the actuary had given part of the surplus to the next heirs. He was led into that error by the statements made to him by the agents in the petition proceedings, who had led him to understand that the consents of the next heirs must be valued as if they could have refused to give them, but under the Entail Acts the petitioner could have dispensed with their consents. The agents acted for the petitioner and for the next heirs; they had favoured the latter at the expense of the former. The ground of the Lord Ordinary's judgment was the agreement said to have been signed on behalf of the parties; in the first place, nobody had acted upon it, and secondly, the pursuer was not bound by it as he had had no independent legal advice, and from his intemperate habits and state of health was not able to look after his own interests. If the pursuer signed the agreement, or consented to its being signed on his behalf under the erroneous idea that he was bound to give the defenders the extra payments stated in the actuary's report, he was entitled to get back the over-payments so made, because an error in law of this kind vitiated a deed. There was no case made by the pursuer that the defenders were aware they were receiving a larger sum than their due, but that was not necessary if it was shown there was mutual error—*Baird's Trustees* v. *Baird & Company*, July 10, 1877, 4 R. 1005; *M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265.

The defenders argued—Although the consents of the next heirs could have been valued by order of the Court, that was not done here, as the parties entered into an agreement as to the way in which they were to be valued. Mr Deuchar took the usual way of dealing with those matters. The way in which the actuary dealt with this surplus was the way approved of in *De Virte's* case, *supra cit.* (Lord Shand's opinion, 336). The word "surplus" was not the proper word to be used here; it was really the final calculation of the actuary as to the next heirs' expectancies. After the actuary had reported all the parties agreed to take his report as correct, and their actings showed that the heirs consented to forego payment in cash, and took a bond and disposition in security for the value of the shares. In the circumstances they actually lost money, because Mr Mackintosh became bankrupt, and the estate had to be sold at an unfavourable time, with the result that only £32,000 was obtained for it, and the heirs got actually less than Mr Deuchar's report gave them, leaving out of account the way in which the actuary had dealt with the surplus. The agents had no doubt acted for both parties in the proceedings for the disentail, but, as the correspondence showed, the petitioner had had independent advice. The whole matter had been arranged and finished, and could not now be gone back upon; there was no question raised of fraud on the part of the defenders.

At advising—

Lord Justice-Clerk—Mr Mackintosh, the heir of entail of the estate of Farr, became embarrassed in his circumstances some years ago, and executed a trust-disposition in favour of his creditors in 1881. The opinion was then formed that it would be a good thing to have the estate disentailed, in order to do which he would have to buy out those heirs who under the Entail Acts were entitled to have their interests considered. The arrangements for the disentail were carried out in an entirely friendly spirit, and all parties concurred in taking Mr Deuchar as their actuary. After the interests of the heir in possession and the next three heirs in succession had been valued it was found that the value of the estate, which was estimated at £40,000, had not been exhausted, but that a sum of £4500 was left over. Mr Deuchar in his report stated that this sum fell to be rateably apportioned among the persons having an interest in the estate, and he accordingly added a sum of £1760 to the value of the interests of the three next heirs. Then, further inquiry was desired and a report was got from Mr Wallace, but ultimately all parties agreed to accept Mr Deuchar's report as the one to govern the matter.

Two questions are now raised—First, was the principle upon which Mr Deuchar proceeded in allocating this surplus of £4500 an erroneous one, and did the heirs get money which they should not have got? and, secondly, the pursuer says that he was not properly represented in the transaction, as the same agent acted for him in

carrying out the disentail, and for the next heirs.

As regards the first of these questions, whether the accountant was right or not in his way of dealing with the surplus, I should be inclined to hold that his opinion was erroneous. I should think that after the calculation of the interests of the next heirs in the estate, including the clause of their children succeeding, and any other rights incident to their position, if there was a surplus upon the estimated value of the estate, that that went to the heir in possession as fee-simple proprietor of the estate. If the fact that Mr Deuchar had taken an erroneous view in his dealing with this surplus had been sufficient for the decision of the case we must have found for the pursuer. But I think the case cannot be decided on that view alone.

Another objection is that the pursuer was not properly represented in the negotiations which resulted in the disentail. These negotiations took place seven years ago, and even upon that ground I would not be inclined to listen to the objection, but I think that it is most effectually disposed by the documentary evidence before us. I think that evidence shows that Mr Macdonald of Inverness did look after the pursuer's interest, and that although Messrs Macrae, Flett, & Rennie did act for both parties, they did so only in the sense of seeing that matters of ordinary form were properly carried through, and as general advisers, but that Mr Macdonald did advise Mr Mackintosh is quite settled. It is stated by Mr Deuchar in his letter of 22nd March 1888—"I have some recollection of a meeting taking place after the issue of the report (and after the parties had got another report from Mr Wallace), when a gentleman from Inverness, Mr Allan of Inglis & Allan, W.S., and a member of Macrae, Flett, & Rennie's firm (whether Mr Flett or Mr Rennie I cannot say) were all present. It took place at my office, and the report was discussed, but I have no notes of what passed; and I think the gentleman from Inverness was Mr Macdonald." I think that we not only have it shown thus, but also in the pursuer's own letter of 27th June 1883, in which he writes to the agents—"Dear Sirs,—Upon the invitation of my agent Mr Andrew Macdonald, solicitor, Inverness, I have come here and considered the terms of your letter of the 23rd inst. to him." In that letter he distinctly states that he has been in communication with his solicitor in regard to the conditions of the disentail. Accordingly these proceedings were incorporated in the petition for disentail; a remit was made by the Lord Ordinary to a man of business, and he reported that everything was in order, and authority was granted to the disentail.

There appears to be nothing in this case out of the usual course of events, but the subsequent proceedings show that this matter was dealt with as one of arrangement, because Mr Mackintosh could have forced these next heirs to take what was found to be their interest in the estate, and he would then be free. They, on the other hand, could have prevented any disentail taking place until they had been paid the money so found due to them. But the parties very properly made a different arrangement. The defenders did not insist upon being paid their shares at once as in the estimated value of the estate, but agreed that if the estate when sold should realise a less sum than the estimated ammount, then their shares were to suffer a corresponding diminution.

That was in fact what took place, for Mr Mackintosh's difficulties increased, his estate was sequestrated, and a trustee appointed. Now, the trustee, whom we must hold to have acted for everybody's interest, the bankrupt's as well as the creditors, carried out what had been done previously. He had power to get legal advice as to the proper mode of proceeding, and no doubt he did so, if he found it necessary, and he so adjusted matters that what took place was this—The estate was sold for £32,000, and the defenders in good faith and in fulfilment of their agreement took from the trustee as their shares in the estate a less sum than they had been found entitled to in Mr Deuchar's report. In point of fact they each received a less sum than Mr Deuchar had brought out in his original calculations without considering their share in the surplus at all. Now, the trustee in 1884 plainly indicated his opinion that the allocation of the sums due to the different persons interested had been come to by a special arrangement, and conducted by Mr Deuchar in the interest of all parties. On 17th July 1884 he writes to Mr Deuchar—"Your calculations were made on the basis of the estate of Farr being worth £40,000, but by agreement of parties the results brought out were liable to modification should the estate fetch a less price when sold." Then he asks him to modify the shares of the three next heirs in accordance with the sum actually received for the estate. The three heirs who by agreement bound themselves to accept of the sums brought out upon an amended calculation got these, and got nothing more.

That is enough to settle this case, because if we are to put aside the agreement, and decide the case upon the strict rights of parties, then the defenders would be entitled to take up the position that in deciding as to their shares the estate had been valued at £40,000, and that they had received no more than had been given to them upon that assumption. All this took place a long time ago, and although I do not say that that would absolutely bar the pursuer from succeeding, I think the lapse of time is of some importance; but in this case it is plain that the parties came to a friendly arrangement, and I do not think we can disturb it.

Lord Young—I am of the same opinion, and after what consideration I have been able to give to the case, I confess I come to that conclusion without any difficulty. I am clearly of opinion that the action is irrelevant, but I may say that I am as clearly of opinion that it is incompetent.

The action relates to certain incidents which took place in a judicial proceeding before this Court before a Lord Ordinary some years ago, with a view to the disentail of the then entailed estate of Farr in Aberdeenshire under the provisions of the Entail Statutes. One incident was that certain persons who had an interest in the estate as being the three next heirs had to be settled with before the petition could be proceeded with. That operation could be done in two ways, either by a judicial remit to an accountant to value their interest, or it could be done outside the Court altogether by arrangement between the parties. In this case the parties

arranged what should be the price taken by the three heirs next entitled to succeed under the deed of entail for giving their consent to the disentail, and they therefore gave their consents upon terms which were satisfactory to them and to the heir of entail in possession of the estate. That was reported to the Court, and the Court after making a remit to a man of business approved of that proceeding, as well as of the rest of the proceedings, and disentailed the estate.

In my opinion it is incompetent to bring an action in which we are asked to say that there was an error in making an arrangement which was reported to the Court, and upon which the Court proceeded. Suppose there had been a judicial remit to Mr Deuchar to ascertain the value of the expectancies of the next three heirs, the parties not having agreed what these should be, suppose that Mr Deuchar had reported in the very same terms we have here, and that the Court had approved of his report, and had afterwards disentailed the estate upon the conditions stated in his report, it is clear that it would be incompetent for us to go back upon the proceeding. The matter had been adjudged of by the Court, and was at an end. The matter was arranged in a different manner, but I think that that makes it all the clearer if the only allegation of error that can be brought forward against the report was that of mismanagement of his affairs by one who was *sui juris*. I disregard all that was said by the pursuer's counsel about his intemperate habits and weakness of mind; he managed his own affairs, and was *sui juris*.

There is nothing ambiguous in Mr Deuchar's report. He proceeded in a manner which I confess I do not think the best manner of proceeding in a case like the present, for he valued not only the interest of the three next heirs in the entail, but also the value of the interest of the heir in possession, that was his chance of continuing to live on. After doing that, the value of the estate was not exhausted; there was a surplus, and with regard to that he says, "In the circumstances I consider it fair that the distribution of this sum should be made proportionally to the several interests of the parties as valued above." Did the parties consider that a fair arrangement? If the pursuer did not think so, then his proper course was to ask Mr Deuchar what circumstances in the case made him think it a fair arrangement. The parties were satisfied with that arrangement, and they made a minute expressing their satisfaction, and do not even ask Mr Deuchar to write out his report; they are satisfied with the draft report.

Is there one word in all these proceedings to oblige us to reduce the whole proceedings in this entail petition, or to call upon the defenders to repay the sum they received as having been erroneously paid to them. I am clearly of opinion there is no reason for such a course.

We are not called upon here to decide whether the question that came before the Court in the case of *De Virte* was rightly or wrongly decided, but I have no hesitation in saying that I think it was rightly decided. The three next heirs of entail are not entitled to more than the value of their expectancies as ascertained; they have no claim to anything more, and the heir in possession is not only entitled to his interest, but to everything that remains after the heirs have been paid off. But I can imagine that after seeing this report of Mr Deuchar, and the statement that the parties were satisfied with it, the Court would not have inquired any further.

But there is an unusual multiplication of circumstances against this application. The heir who had executed the disentail became bankrupt shortly afterwards, a trustee was appointed upon his estate, and the next heirs had to be paid their shares by this trustee. He considered the matter, and did pay them. They had agreed that instead of being paid their shares in cash at once that they would take a bond and disposition in security over the estate of Farr instead. Well, it was the business of the trustee to pay the debt over the estate or not as he thought the claim just or not, so that if we were to disturb the present arrangement we should have to go back not only upon the proceedings in the petition for disentail, but also upon the sequestration proceedings. The matter has been conclusively settled, and I think there is no ground for holding that the defenders got paid more than they were entitled to.

Lord Lee—My view is a short and simple one. I hold that the action is irrelevant, because it is in my opinion an attempt to attack in an incompetent manner the proceedings in the former petition of disentail.

The pursuers attempt is to see if he can make out a sort of *condictio indebiti*, founding upon *De Virte's* case and Mr Deuchar's report. I have no doubt whatever that the decision in *De Virte's* case was a right decision. But the proceedings were not carried out in this case in the same way as in *De Virte's* case. The disentail there proceeded upon consents, and not under the provisions of section 5 of the Act of 1875, by which the Court might dispense with the consents of the next heirs if they would not give them. Nothing of the sort took place here; what was done was a transaction by which the requisite consents were given by arrangement. I cannot find anything wrong in the wording of the agent's letter to Mr Deuchar that consents were required. Consents were required if they were not forced. I agree with the Lord Ordinary that we cannot now go back upon the proceedings.

The Court adhered.

Counsel for the Pursuer — Kennedy — Orr. Agent—J. D. Macaulay, S.S.C.

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