

successfully proceeded with against the parties who had a complete and valid feudal title to the subjects in their possession, I have never been able very well to understand. But that is not the ground on which the case has been disposed of by the Lord Ordinary. He has disposed of it upon a construction of the 126th section, in connection with the 107th and subsequent sections. Now, I am not going to read again the 126th section, but that part of the section which bears on this particular case is perfectly clear; and it provides that in the event of the lands used or taken by the railway company being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, and whatever other difficulty there may be in this section, I think these words are perfectly clear and distinct, and are not capable of interpretation. I do not understand that the Lord Ordinary thinks they are capable of interpretation in any other sense than that maintained by the defenders here, because he avoids the words rather than says that they bear no other meaning—for the ground on which he has disposed of it is this, that this last proviso of this section, that before entering into possession of any lands full compensation shall be made to the superior, means that that is a condition precedent to the prior part of the section coming into force at all, and he grounds that upon the connection of the 107th and subsequent sections. Now, I think he is wrong in that. I think what the statute meant was that where parts only of lands are taken—small bits taken here and there from large estates—the policy of the Act was that the railway company shall not be obliged to pay a few shillings or a few pence of feu-duty to the superiors for such lands, and it is provided by this section that instead of that full compensation shall be made to the superior once for all for the lands so taken. That is the meaning of the section. Now, I think the course here was clear enough. It was in the power of the superior, if the full compensation had not been made to him, to have prevented the railway company from entering into possession of the lands; that was his course. I am far from expressing any opinion as to whether or no he may still recover his compensation under the 117th and other sections which provide for the purchase of rights in land omitted to be purchased. It may be—I have no opinion on the matter—that the superior may still recover his full compensation under these and other clauses of the Act. But I am very clear that this provision, which provides that before the company shall enter into possession they shall make full compensation, does not apply as a condition precedent to the previous part of the clause coming into effect. I agree with your Lordship that these other sections referred to by the Lord Ordinary do not apply. I am quite clear that the 107th section applies (and applies only) to the case where the whole lands are taken, and in that case there is no difficulty, because it is just the same payment that used to be made by the vassals before. The railway company comes entirely into their place, and there is no difficulty. If they prefer going on paying, and if the superior chooses to allow them to continue to pay the

feu-duties and casualties payable before, there is no difficulty about the matter, but that section is totally inapplicable to a case where only a portion of lands are taken, and nobody can tell till they come to the 109th section what amount of feu-duty or casualty is payable on it. It appears to me that the 107th section was quite inapplicable to this case. The clear course was, as your Lordship has pointed out, to go under the 109th section, to have the feu-duty apportioned, and if the parties agreed that the rest of the land should continue liable for it, well and good; if they did not, they could go under the 108th section and ascertain the money compensation payable for the discharge of the right.

The Court pronounced this interlocutor—

“Recal the interlocutor; sustain the defender's fourth plea-in-law; dismiss the action, and decern.”

Counsel for Pursuers and Respondents—  
Mackintosh—Orr. Agents—Philip, Laing, &  
Trail, S.S.C.

Counsel for Defenders—Trayner—Patten.  
Agent—J. K. Lindsay, S.S.C.

Friday, June 20.

## FIRST DIVISION.

[Lord Fraser, Ordinary.

EARL OF KINTORE *v.* COUNTESS-DOWAGER  
OF KINTORE AND OTHERS.

*Parent and Child—Legitim—Exclusion of Legitim  
by Antenuptial Contract of Marriage—Provision  
—Heir of Entail—Personal Bar.*

By antenuptial contract of marriage an heir of entail in possession of entailed estates bound and obliged himself, and the heirs of entail who should succeed to him in the entailed estates, to make payment of certain provisions to the child or children of the marriage other than and excluding the heir who should succeed to the entailed estates. There was no provision in favour of the eldest son, the heir who should succeed to the entailed estates. The contract contained this declaration—“Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry,” &c. The eldest son of the marriage succeeded under the deed of entail to the entailed estates on the death of his father, and raised an action against his mother, brother, and sisters for payment of legitim. *Held* that as the marriage-contract contained no provisions in favour of the eldest son, his right to legitim was not excluded by the clause of exclusion.

*Circumstances* which were held not to bar a claim for legitim.

*Opinion* (per Lord Fraser, Ordinary) that a claim for legitim cannot be excluded by an antenuptial marriage-contract which debars legal rights without making a provision for the child.

This was an action at the instance of the Earl of Kintore against his mother, the Countess-Dowager of Kintore, sole executrix of his father, the preceding Earl, who died in July 1880, and against his younger brother and sisters, for payment of legitim.

In 1851 the pursuer's father, the late Earl of Kintore, was married to the defender the Countess-Dowager of Kintore. By antenuptial contract of marriage, dated 23d June 1851, the said Earl made provision to the Countess, in the event of her survivance, of two liferent provisions, by way of annuities, amounting to £4700, and payable out of the entailed estates of Kintore and Haukerton, of which he was the heir of entail in possession, which provisions were accepted in full satisfaction to her of all these lands, half or third of moveables, and every other claim or provision whatever which she could by law ask or demand by or through the decease of the said Earl. By this contract of marriage the late Earl, in virtue of his powers under the Aberdeen Act, and also of power given him by the deed of entail, bound and obliged "himself, and the heirs of entail who shall succeed to the said entailed earldom, baronies, and others in the county of Aberdeen, and *subsidiarie* his heirs and successors whatsoever, to make payment to the child or children procreated of the said intended marriage, other than and excluding the heir who shall succeed to the said Earl in the said entailed earldom, baronies, and others in the county of Aberdeen, and to the representatives of those children who shall predecease the said Earl, claiming right in virtue of special settlement by marriage-contract," of provisions amounting to £15,000 in the event of there being three children of the marriage; as also, the said Earl bound and obliged "himself, and the heirs who shall succeed to him in the said lands, baronies, and estates in the counties of Kincardine and Forfar, and *subsidiarie* his heirs and successors whatsoever, to make payment to the said child or children, other than and excluding the heir who shall succeed to the said Earl in the said last-mentioned lands, baronies, and estates, and to the representatives of those children who shall predecease the said Earl, claiming right in virtue of special settlement by marriage-contract," of further provisions amounting to £27,000 in the event of there being three children of the marriage. Further, the said Earl bound and obliged himself to execute such deed or deeds as might be necessary for more effectually securing these provisions. By the contract of marriage the defender the Countess-Dowager and certain other persons were nominated tutors and curators to such of the children of the then intended marriage as might be in pupillarity or minority at the time of the death of the said deceased Earl of Kintore. It further provided—"And also the said tutors and curators shall be bound to pay over to the said Louisa Madaline Hawkins [Lady Kintore], or to the party appointed to take the immediate superintendence of the said children, such a sum out of the rents and profits of the said entailed earldom, baronies, lands, and others as they may consider proper, and as they may be by law allowed to do for the maintenance and education of the heir who shall succeed to him in the said entailed properties, and for upholding an establishment suitable to his age and rank so long as the said heir

may be in pupillarity and minority." It further provided that notwithstanding the nomination of the several persons therein appointed to be tutors and curators, the personal charge and custody of the children born of the marriage should be entrusted exclusively to the Countess during her life, and in the event of her death to the Countess's mother exclusively during her life, and it was declared that while the said children were under the personal charge and custody of either of these ladies, the duties of the tutors and curators "shall be limited to the management and control of the lands and estates of the said children, and of the sums of money above provided to them, or of such sums as they may otherwise acquire right to, and to payment to" the mother or grandmother, as the case might be, of the "yearly interest or produce of the principal sums of money before provided, or such portion thereof as they may deem expedient for behoof of the said younger children, and of a sum as above mentioned, out of the rents of the said entailed estates for behoof of the heir as aforesaid." It was further provided that in certain events the tutors and curators should be bound to satisfy themselves fully of the arrangements made for the comfort and welfare of the children, of their education in the Protestant faith, and of the due application of the sums paid for their maintenance and education, and if they should be dissatisfied with respect to any of these matters, then they should be bound, as they were thereby empowered, to exercise the fullest discretion, and if it should appear to them proper or expedient, to make other arrangements for the charge and custody of the children, and for the application of moneys towards their maintenance and education. The contract of marriage also contained the following clause:—"Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry, and everything else that they could ask or claim by and through the decease of their said father, or the predecease of their mother, any manner of way, their father's goodwill only excepted."

The pursuer averred—"By said contract no provision of any kind was made in favour of the pursuer, the only provision therein made being in favour of the Countess and the younger children of the marriage other than the heir succeeding to the entailed estates." He also averred that the inventory of the personal estate of the deceased Earl of Kintore, as given up by the defender the Countess-Dowager of Kintore as executrix, amounted to £84,000, of which about £26,000 consisted of heritable bonds, and that after deducting them the one-half of the moveable estate less debts and expenses would exceed £26,000; and further, that the right of the Countess-Dowager to *jus relictæ* being renounced and excluded by the marriage-contract, the legitim fund consisted of one-half of the free moveable estate of the deceased, and that the right of the younger children to any share of the fund being excluded by the marriage-contract, the pursuer as eldest son was entitled to the whole of the fund.

The pursuer pleaded—" (1) The defender the Countess-Dowager of Kintore having in her antenuptial marriage-contract with the late Earl

of Kintore renounced her *jus relictae* by the acceptance of special provisions in satisfaction thereof, the moveable estate and effects of the deceased fall to be divided into two parts, one-half being legitim and the other dead's part. (2) The right or claim to legitim on the part of the younger children of the said deceased Earl of Kintore having been renounced and discharged by the said antenuptial marriage-contract, the pursuer, the eldest son and heir of the deceased, is entitled to the whole legitim fund, and there is thus no room for collation."

The defenders pleaded—" (1) On a sound construction of the said antenuptial marriage-contract the pursuer's claim to legitim is effectually excluded. (2) The pursuer is barred by his actings condoned in in the defenders' statement of facts [quoted *infra*] from insisting in his present claim."

The more material of the statements relied on, on which this latter plea was founded, and the pursuer's answer to them, were as follows:—“(Stat. 14) The late Earl died on 18th July 1880, and the pursuer thereupon became proprietor of the entailed estates of Kintore and Haukerton, and of the lands of Ardtanners and others in Inverurie and Kintore, in the unrecorded entails. Thereafter and down to the month of May 1883 all the parties acted on the footing that the pursuer had no interest in his father's moveable estate.” “(Ans. 14) Admitted that the late Earl died on 18th July 1880, and that the pursuer succeeded as heir of entail to the lands referred to subject to bonds. Explained that it was not until April 1883 that the pursuer's attention was called to the terms of his father's and mother's marriage-contract with reference to the present question.” During this period of two years and ten months the pursuer and defender were not separately represented, except in so far as their interests were attended to by different partners of the same firm of law-agents in Aberdeen. “(Stat. 19) In the belief and on the footing that the pursuer had no other source of income beyond the postponed rents of the said estates, the defender the Countess Dowager of Kintore offered to give to the Countess of Kintore, the pursuer's wife, a sum of £2000. This sum was received by the present Earl on the same footing as that on which it was given, namely, that he was not entitled to any portion of his father's estate other than the said entailed estates. It was given expressly as a donation.” “(Ans. 19) Denied that the pursuer received, or that it ever was intended he should receive, the £2000 here mentioned, or that it was to be expended for his family expenses. It was given to the present Countess by her mother-in-law with the express injunction that she should not inform the pursuer she had received it, and it was lent on heritable security in name of a trustee for her behoof.” “(Stat. 21) Under the last will and testament of the late Earl, the defender, his widow, was entitled to the whole furniture, books, plate, and in general the whole moveable means, estate, and effects belonging to the late Earl in the houses of Keith Hall and Inglismaldie or elsewhere. The said defender was anxious that the pursuer should reside at Keith Hall, and under the belief that he had no claim on his father's moveable estate, such as to put him in funds to purchase furniture and other articles to furnish Keith Hall and Inglismaldie

anew, she resolved to hand over the greater part of the furniture, books, pictures, and plate in Keith Hall, and the whole of the household goods and furniture in Inglismaldie, to him. In order to carry out this arrangement a memorandum of agreement was entered into between the pursuer and the said defender dated 21st and 27th December 1880. Under this agreement the said defender gave over to the pursuer for his absolute use and disposal the whole household goods and furniture and other effects belonging to her in the house or castle of Inglismaldie, and in the gardens, green-houses, and offices there. She also, under certain specified reservations, gave over to him the household goods and furniture in the house of Keith Hall, and the moveable effects in and about the gardens, &c., to be used and disposed of by him at pleasure. And lastly, with respect to the family plate and pictures specified in a list signed by the parties, the said defender desired that the same should remain in the pursuer's possession for his use during his own lifetime, and in the possession of his successors in the estate and title of Kintore for their lifeferent use only, and that none of them should have power to dispose of the same, and that the said family plate and pictures should not be subject to the claims or diligence of any party whatever, and, on the other hand, the pursuer agreed to the whole articles above mentioned, and bound himself and his successors accordingly.” “(Ans. 21) Admitted, but explained that neither party was aware of the pursuer's claim to legitim. Further explained, that a gift was intended to be made, and was made and accepted, and that the pursuer has offered to account for the value of what he received, as he believes it would not have been given gratuitously had the claim for legitim been known.” It was also stated by the defenders that the defender the Countess-Dowager had, on the understanding and belief that the pursuer had no such claim as was now made, undertaken payment of various payments and allowances to relatives and others to whom her late husband had been in use to make such payments, and that this had been done in pursuer's knowledge.

The Lord Ordinary (FRASER) on 5th February 1884 pronounced this interlocutor:—“Finds that the late Earl of Kintore died upon the 18th July 1880, and was survived by his wife, the Dowager-Countess, one of the defenders in this action, and by two sons and three daughters: Finds that the defender the Dowager-Countess is not entitled to *jus relictae*, in respect that she by antenuptial contract accepted the provisions therein made in her favour in full satisfaction of her terce and *jus relictae*: Finds that all the children except the pursuer are barred from claiming legitim, in respect that the provisions made in their favour by the marriage-contract of their parents are declared to be in full satisfaction of legitim: Finds that the pursuer is not excluded by said marriage-contract from claiming legitim, and that he is now entitled thereto, and that the same amounts to one-half of the personal estate of his late father: Finds the averments stated in defence to this action against such claim to be irrelevant: Appoints the cause to be put to the roll for further procedure, and reserves all questions of expenses: Grants leave to reclaim.

“*Opinion*.—The claim made by the pursuer is

for legitim; which is met by the defence that the claim is excluded by the antenuptial marriage-contract of his parents. His mother is alive, but she has no claim for *jus relictae*, she having accepted the provisions under the marriage-contract as in lieu of terce and *jus relictae*. The pursuer has one brother and three sisters; and they have no claim for legitim, because such claim on their part is clearly excluded by the marriage-contract. Consequently, if the pursuer is entitled to legitim, his claim amounts to one-half of the personal estate left by his father, the other half being dead's part. The clause in the marriage-contract upon which the plea in defence is founded is in the following terms:—'Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry, and everything else that they could ask or claim by and through the decease of their said father, or the predecease of their mother, any manner of way, their father's goodwill only excepted.'

'This clause requires construction. It is the clause to be found in the Juridical Styles, in a contract of marriage which settles the heritable estate upon the heir of the marriage and makes money provisions for the younger children. By that style the father disposes to the heir-male of the marriage 'All and Whole' his lands; and after making provisions for his wife he binds and obliges himself to make payment of certain sums of money 'to the child or children to be procreate of the said intended marriage who shall not succeed to the said lands and estate;' and then follows the clause—'And which provisions before written, conceived in favour of the children of the said intended marriage, are hereby declared by the contracting parties to be in full satisfaction to them of legitim, executry, and everything else that they could claim by and through the decease of their said father or mother.' This clause was apt and proper in reference to what was provided to the children according to the contract in the style book. The heir receives the landed estate, and the younger children receive their money provisions; and in consequence of what is so provided to the one and to the other it is declared that these provisions shall be in full satisfaction to them of legitim. But the difference between the style from which the conveyancer who drew the marriage-contract of the late Earl of Kintore took the clause above quoted, and the marriage-contract which that conveyancer framed, consists in one most essential particular,—in that, while by the former the heir obtains a provision of the landed estate, there is not one sixpence given to the heir by the latter. The estates of the late Earl of Kintore were entailed, and the pursuer took them as heir of entail, not by virtue of any disposition contained in the marriage-contract of his father and mother, but by virtue of deeds of entail which they had no power whatever to control. So far from receiving any provision in full satisfaction of the legitim, to which as a child of the marriage the pursuer was entitled, his father in the marriage-contract imposes restrictions upon his use and enjoyment of his own property, viz., the rents of the entailed estates, which the father had no legal right to impose.

'After making a provision in favour of his widow, the late Earl in the marriage-contract proceeds to deal with the case of the children. He first narrates the Aberdeen Act, and obliges himself and the heirs of entail succeeding to him to make payment to the child or children, other than and excluding the heir who shall succeed in the entailed earldom and baronies, of certain sums proportioned to the number of younger children that should be born. He then nominates tutors and curators 'to such of the children of the said intended marriage as may be in pupillarity or minority at the time of his death.' This he had power to do in regard to all his children, including his eldest son; and he then authorises these tutors and curators to appoint factors and to grant leases of any lands they may possess,—which was an assumption of authority on the part of a father which the law does not recognise. He had power to appoint the tutors and curators, but the law declares what shall be their powers in dealing with the ward's property, so far as that property did not come from himself. He then exempts these tutors and curators from liability for omissions, and declares that they shall be liable only for intromissions; and this he can do—so far as regards property coming from himself—because he is authorised to do it by express statute (1696, c. 8), which statutes and ordains 'that the tutors or curators so nominat shall not be lyable for omissions, but only for their actual intromissions with the means and estate *descending from the father*.' After this the tutors and curators receive power to invest sums of money to which the children of the marriage may have right, and to pay over the interest or yearly produce, or such portion as they may deem expedient, 'of the sums before provided and payable to the said children,' to their mother or to the party appointed to take the immediate superintendence of them. The word 'children' here applies to the younger children, for the sums 'before provided and payable' were only to them. Then comes a clause which is applicable to the heir—wherein the father directs the tutors and curators to pay to the mother, 'or to the party appointed to take the immediate superintendence of the said children, such a sum out of the rents and profits of the said entailed earldom, baronies, lands, and others as they may consider proper, and as they may be by law allowed to do, for the maintenance and education of the heir who shall succeed to him in the said entailed properties, and for upholding an establishment suitable to his age and rank, so long as the said heir may be in pupillarity or minority.' Now, this is not a provision in favour of the heir of the marriage; it is in the nature of a restriction and limitation which the father had no right to make. But take it in any way it can be looked at, it is simply a direction to the tutors to perform their duty by employing the ward's own rents to his own maintenance. Then comes a clause disposing of the charge and custody of the children when in minority; and so long as children are in pupillarity the Court have upheld this exercise of parental authority. In reference to this the clause is added, that the duties of the tutors and curators shall be confined to the management of the 'lands and estates of the said children, and of the sums of money above provided to them,' and to the payment to the mother having their

custody, 'of the yearly interest or produce of the principal sums of money before provided, or such portion thereof as they may deem expedient for behoof of the said younger children, and of a sum, as above mentioned, out of the rents of the said entailed estates, for behoof of the heir as aforesaid.' Now, the only children who have sums of money before provided to them are the younger children. The heir is here distinguished from them only by the declaration that the tutors and curators are to apply his own rents to his own behoof.

"After this follows the clause declaring the 'provisions before conceived in favour of the children of this marriage' to be in full satisfaction to them of legitim. Now, when it is seen that there is no provision before provided in favour of the eldest son which can be taken in full satisfaction of anything, the conclusion is inevitable that this excluding clause, as it is called, can have reference only to the younger children, who obtain something in the shape of money provisions for the legal right of legitim which is debarred. The only clauses which precede this one, and which were within the right of the father to enact, are the appointment of tutors and curators to the eldest son along with the others, and the direction as to his custody and bringing up when a minor. These cannot, in any reasonable sense, be regarded as an equivalent—that is, in full satisfaction of the right of legitim, which the law gives him. The blunder committed—if it were intended to exclude the eldest son—was in copying the clause in the Juridical Styles and applying it to a case totally different. But whether it was intended or not, it certainly has not been done; and there is very great doubt as to whether, if it were intended, it was within the father's power to exclude the heir without giving him some equivalent.

"This raises a question of some importance, and which has not yet been directly decided by the Court; and there is no necessity for deciding it in the present case, if the construction now suggested as to the limited scope of the clause of exclusion in the contract be adopted.

"That question is, whether parents by an antenuptial marriage-contract can, without making a provision for the children of the marriage, exclude legitim by simply inserting a clause in their contract as follows:—'And we do hereby exclude the legitim of the children of the intended marriage.' That the parents had no such power seems to be assumed in all the cases, and by all the writers who have treated of the subject, since the introduction of legitim into the law of Scotland at the beginning of the 17th century. Professor Bell (sec. 1587) states his view of the law shortly thus:—'The right to legitim is discharged or satisfied in one or other of the following modes:—By express discharge; by a provision accepted, having a condition annexed that acceptance shall discharge the legitim; by a reasonable provision being made for the child in an antenuptial marriage-contract of the parents, accompanied by an express exclusion of the right to legitim.' The case first stated, of an express discharge, has only raised questions as to whether the words employed were sufficient to exclude the legitim, the general rule being, that unless this legal right were plainly excluded, the Courts would

not aid any ambiguous construction towards exclusion. The *Breadalbane* case is a very good illustration of this, where a child in her own marriage-contract accepted a large sum of money as her 'portion'; this was held to be no bar to her claim for legitim. *Breadalbane v. Marchioness of Chandos*, 14 S. 309, *affd.*, 2 S. & M.L. 377. A child being the creditor for the legitim, may discharge the right upon any terms he or she pleases—may do so for an equivalent received, or may do so gratuitously. But these cases of an express discharge by a child do not touch the case of exclusion by an antenuptial contract by the parents without any equivalent; which, on the assumption that the late Earl of Kintore did in his marriage-contract exclude the legitim of his eldest son, is the present case. The opinion of Professor Bell is clearly to the effect that the parents have no such power of absolute exclusion, and this seems the doctrine which has obtained—putting aside some *obiter dicta* of recent times—the highest sanction. The first case where the powers of a parent to bar legitim by antenuptial contract came to be considered is one which has not been reported except by a mere note in Elchies (*voce Legitim*, No. 1), but the import of which is stated by Erskine (iii. 9. 23). From this decision he draws general doctrine in the following terms:—'As one, while he has neither wife nor child, has absolute power over his whole estate, he may by marriage-contract settle provisions on his younger children to be procreated of the marriage, in satisfaction of the legitim, which, though never accepted of by them, will effectually exclude their right to it. On this ground a daughter was found excluded from the legitim where the father had in his marriage-contract provided the whole conquest to the children of the marriage, notwithstanding her plea that he had in the distribution of it among his children given her the smallest share—June 17th, 1732, *Stirling* (Dict., App. II., *voce Legitim*).' Here Erskine does not contemplate the case of an exclusion without an equivalent, and his authority impliedly is to the effect that such equivalent must be given in order that the exclusion may be valid.

"The main point insisted on in the case of *Stirling* (as appears from the Session papers) was, that the father had made an unequal division of the conquest that had been provided in lieu of legitim. The Court held that the father had power of such a division, though he could not have apportioned or divided the legitim itself. In the Session papers the case is thus put by the party upholding the father's act in a pleading drawn by Duncan Forbes—'The petition says, it is not to be understood why legitime should not be subject to the father's power of division, and why at the same time conquest should; and suggests, that if this should be held to be the law, a father has no more to do in order to disappoint a legitime but to make a provision of conquest in his contract of marriage to children; which once being done, he can disappoint the legitime by a division. And the answer is, that legitime taking only place where the parents by *marriage-settlement* have not agreed on *provisions in satisfaction*, it infers no absurdity, that where they have agreed on such provisions the child should have no further claim; and if in place of leaving the conquest

to the distribution of law, they have settled it by a clause of conquest, the effect of which is (as the Lords have found) to commit the power of division to the father, the conquest so left cannot fall under legitime, because it is disposed of by persons who had authority so to do; and the taking by that Act the prerogative of division to the father is not *fraudulent* or *unjust*, because our law, from very laudable considerations, encourages and supports that prerogative in the father.' The Court here allowed the father to divide the conquest provided in lieu of legitim amongst his children, according as he thought their circumstances required it. It was long a question of difficulty whether a father who had settled a sum of money in his marriage-contract upon the children of the marriage, could exclude any one of the children from a share of the fund; and if he could not do so, whether he was entitled to appoint what was called an illusory sum for the child's behoof. Opinions of a contrary character were given by eminent Judges, but at last the point was settled by Act 37 and 38 Vict. cap. 37. The case of *Stirling* did no more than affirm the doctrine, with reference to a general fund provided by antenuptial marriage-contract to the children as in lieu of their legitim, that a father had the power to appoint a fund in lieu of legitim, and of unequally distributing it among the children.

"Lord Stair's opinion is to the following effect (iii. 8, 44):—'The bairns' part is their legitima or portion natural, so called because it flows from that natural obligation of parents to provide for their children, which is not extended to restrain the parent to dispose of any part of his means, but only so as to leave a portion thereof to his children; which, because the law orders and determines it, it is called the legitim;' and again (sec. 45) he says that 'Nothing can take away the bairns' legitim unless it be discharged; and that a presumption of accepting a tocher, or portion in satisfaction, will not be sufficient, unless it bear "in satisfaction of the portion natural and bairns' part." (1) Because the legitim is so strongly founded in the law of nature and positive law that presumption or conjecture cannot take it off. (2) This is more suitable to the civil law, which we follow in this case, whereby the difference betwixt children being emancipated or forisfamiliated, or *sui juris*, and betwixt them that are under the paternal power and in the family, is taken off as to the succession and legitim.' Bankton says—'If one, in his contract of marriage, provides all his moveables that he shall have at his death to the heir of the marriage, with certain provisions to the wife and younger children, such settlement will exclude both wife and children from their respective legal claims, there being no possible suspicion that there was any fraud intended against them, and the marriage articles must be observed, and all effectual obligations executed *bona fide* are good against those claims.' Vol. ii., p. 384.

"In none of the style books, from Dallas downwards, does there appear any clause excluding the legitim except upon an equivalent being given for it. In the form of contract of marriage given by Dallas a provision is made by fathers in favour of the intending spouses, and the clause of exclusion is expressed as follows:—'Likeas the said daughters hereby accept of their said

portions and provisions, in the terms above expressed, in full contentation and satisfaction of all other executry, legacy, portion-natural, bairns' part of gear, and what else they may ask, seek or crave by or through their said father his decease, when the same at the pleasure of God shall happen.' (Dallas' Styles, ii., p. 401, ed. 1774).

"In the case of *Burden v. Smith* (Craigie & Stewart's App. 214 (1738), it was held by the House of Lords, reversing the judgment of the Court of Session, that although the whole stock and conquest was provided by the father in the contract of marriage to the children, yet they were entitled to legitim—there being no clause of exclusion in the marriage-contract. The case of *Stirling* referred to by Erskine in the passage already quoted, was differently decided, because there was such a clause of exclusion. The import of both cases is thus stated by Elchies (*voce Legitim*, No. 1)—'Legitim not due where the whole present stock and conquest is settled by contract of marriage, found by the Lords, but reversed upon appeal, and legitim found due, there being no clause in satisfaction of the legitim in the contract. *Vide case betwixt David Smith and Jean Burden, voce Mutual Contract*. Yet it had been decided in the same way in the case of *Stirling of Glorat*, but there was there a clause in satisfaction of the legitim.'

"There are, however, three modern cases which require to be considered. The first of these is *Fisher v. Fisher* (19th November 1844, 7 D. 129), the rubric of which is:—'By antenuptial contract of marriage the whole goods in communion were provided to the spouses, and the longest liver of them in liferent, and to the children in fee, but there was no express exclusion of the legitim: The wife having survived, Held that the children were barred by the terms of the marriage-contract from claiming legitim as at their father's death.' Here there was a provision in favour of the children, in respect that the fee of the property that was to be liferented by the widow was settled upon them, and Lord Cuninghame in reference to this thus expresses himself:—'They (the parents) may exclude the legitim altogether, perhaps for a small and inadequate provision. *Multo magis*, then, must it be competent for them to stipulate that the whole common stock shall be enjoyed by the parents and survivor in liferent, and descend to the children in fee only on the death of the surviving spouse. This is truly giving the children more than legitim, though postponing the period of payment during the time that the spouses themselves require the use of the fund.' In this case, therefore, there was an equivalent. So also in the case of *Mailland v. Mailland* (14th December 1843, 6 D. 244), a clause declaring certain provisions in favour of the children of the marriage to be in full satisfaction to them of legitim was held to exclude a claim by the eldest son, the heir in heritage, he being one of the children entitled to legitim. Undoubtedly in this case what was given to the eldest son for this exclusion was a small consideration. The father was presumptive heir of entail, and he bound himself, as soon as he should come into possession, to complete his titles and execute all proper deeds for conveying the entailed estate to the eldest son. It was said that this was no con-

sideration at all. But the argument to the contrary was, that such an obligation barred the husband from disappointing the son's succession by any objection to the validity of the deeds of entail which it otherwise might have been competent for him to state had he come into possession. This was regarded as a good equivalent for the legitim. 'Quoad the eldest son,' said the Lord President, 'this is a beneficial provision. . . . If, then, we must look upon him as provided for, the exclusion from legitim and executry applies to him equally with the other children.' Lord Fullerton said—'He has got something under the contract, however little, and that makes him a beneficiary under it. I do not know that it has ever been decided what amount of provision to a child in an antenuptial contract will make an exclusion of legitim effectual. That question is not raised here, for the younger children merely object to the eldest son taking the whole legitim.' But Lord Mackenzie's opinion went further, for he said—'Is it necessary, in order to exclude legitim or succession to moveables in an antenuptial marriage contract, to give, in lieu of it, a substantial provision? I see Mr Bell says it is. But what is the reason of the power to exclude legitim at all in such a contract? That assigned by our lawyers is, that the children cannot object to that contract by which they were brought into existence. If that be the reason, it is not necessary that the provision given in lieu of legitim should be substantial. Is there any case finding what is a sufficient provision? I do not know of any; nor any in which it was found that an exclusion of legitim in a marriage-contract was not effectual for want of a sufficient provision to the children excluded.' On the other hand, it may be replied to this, that there is not one single decision upholding an exclusion of legitim where there was no provision at all given as an equivalent. Nor is there to be found in the books any indication of opinion prior to this that such an exclusion will be valid. The arguments in every case assume that there must be some equivalent. See *Nisbet v. Nisbet*, M. 8181 (1726), where the point is thus stated:—'Where the father has given the child a sufficiency, and reasonable provision, the intent of the law is so far fulfilled, since the child has a proportion of his father's effects equal to what the law intended him to draw.'

'In *Keith's Trustees v. Keith and Others* (17th July 1857, 19 D. 1040) we find the usual clause of exclusion—'Which portions above mentioned provided to the children of this marriage, in the respective events before specified, are and shall be in full satisfaction to them of all bairns' part of gear, legitim, executry, &c. The heir of the marriage maintained that this clause did not apply to her, but it was held that it did. A sum of £16,000 was provided to the heirs of the marriage, burdened with certain provisions in favour of younger children. The Lord Ordinary held, on a construction of the deed, that this was not a 'portion' in favour of the heir, and so bringing her within the clause of exclusion. But the Inner House arrived at a different conclusion on construction of the deed, the case being put thus by the Lord President:—'Upon looking to the whole deed—and I think that is the proper way to deal with it—it appears to me, that in whatever form, it is a money provision made in the

marriage-contract for the children of the marriage. That the term "children of the marriage" may include, and ought to include, the heir, the Lord Ordinary holds to be in conformity with the case of *Maitland*. But he thinks that the peculiar structure and phraseology of this deed exclude that construction. I think this a money provision for all the children, including the heir, and although the terms of it make it a provision to the heir, burdened with certain rights in favour of the younger children, yet it is a money provision under the marriage-contract to all the children of the marriage, to the heir as well as to the younger children. They all benefited by it. They are all creditors under the contract. That being so, the object of the clause now founded on is to exclude the right of legitim from all the parties who benefit by that provision. There are no limiting words in it. It affects all the children alike.'

'Therefore if this question were to be determined irrespective of the terms of the clause in the marriage-contract, the Lord Ordinary would have come to the conclusion that the exclusion of the eldest son from legitim without giving him any equivalent was ineffectual. No question is raised here as to whether he has received a substantial provision or not—for he has received none at all; and there is no authority that the Lord Ordinary can discover, except the opinion, *obiter*, of Lord Mackenzie, to the effect that such a clause could bar legitim. Any deliberate opinion of so eminent a Judge could be dissented from only with hesitation and difficulty. But this was not a deliberate opinion of his on a question calling for judgment.

'The decisions on legitim in our Courts only commence with the 17th century. Both Stair and Bankton think that we derived legitim from the civil law directly, and this view runs throughout the cases reported in Morison's Dictionary. But there are so wide differences between the *legitima portio* of the civil law and the legitim of Scottish law that this view of its origin may be fairly questioned. An opinion to a different effect seems more consonant with the history of the origin of other portions of our law of succession, and of our consistorial law. It was from the Continent that we got the law of the *communio bonorum*, of *jus mariti*, *jus relictae*, terce, year and day, brought, no doubt, at the beginning of the 17th century to Scotland by the Scotsmen who studied in the Continental Universities. Robertson in his Treatise on the Law of Personal Succession (p. 68) says—'As far as appears, some of the most important rules in the law of succession in personal estate in Scotland have been at all times unknown in every part of England, particularly the doctrine of the communion of goods between husband and wife, and the important consequences thence resulting to the parties and their children. These have been adopted in Scotland, and remain in full force in that country at the present day. If an hypothesis is to be sought for, it appears to be not unreasonable to conclude that we have to look to a Continental source for the origin of our present system of the law of succession *in mobilibus*, and for the introduction of that modification of the Roman law of succession which now obtains in Scotland.'

'Whichever of these views be adopted, there can be no doubt that the father had not power,

either by the Roman law or by the French *coutumes*—from which probably the law is derived—to exclude absolutely any child from his *legitima portio*. The Roman law, as finally settled, was contained in the 115th Novel of Justinian. The Emperor in the third chapter of this novel says that he prohibits absolutely the father and the mother, the grandfather or great-grandfather, to pass over in their testament their son or daughter, or to disinherit them, unless they had given to them by donation or left them by legacy or *fidei-commis*, or in some other manner, the portion which is due to them by law. If the children were ungrateful they might be disinherited; and he proceeds to say that the causes of ingratitude are dispersed through a great number of laws, and are not clearly declared. Some of these cases of ingratitude he declares to be not worthy of the name, and others which ought to be included have been omitted. He therefore thought it necessary to express definitely the present law as to what were cases of ingratitude entitling the father to deprive his child of the *legitima portio* which the law gave him. He thereupon enumerates fourteen different cases of misconduct on the part of the child which would justify the father to exclude the legitim. It is unnecessary to enumerate these here. The particular act upon which the father founded as a justification for his exclusion of the legitim was required to be set forth.

“Such was the Roman law upon this subject; and this law was adopted in France with certain additions, and also with certain subtractions, as stated by Pothier in his *Traité des Successions* (cap. 1, sec. 2, art. 4, quest. 1).

“Thus, whether the legitim be derived by Scotland from the Roman law or through the French *coutumes*, the result is the same. There could be no debarring of the legitim without some delinquency on the part of the child excluded which could be proved to the satisfaction of a Judge.

“Now, it is the same spirit that has run through the whole of the decisions of the Scottish Courts from the introduction of legitim into our law down to the present time; and the Lord Ordinary would therefore hold, that even though the clause expressly excluded the pursuer from legitim, it could not be given effect to, seeing that he got nothing in satisfaction of it.

“But there are various circumstances stated in defence which are pleaded as a bar to the action. Intimation of the claim for legitim was only made at the expiry of two years and ten months from the date of the late Earl of Kintore's death; and in the statement of facts for the defenders various matters are relied on as showing that the parties proceeded upon the footing that no claim for legitim was to be made. The pursuer admits that during these two years and ten months he had no idea that he could make such a claim, but he states that he acted in entire ignorance of his legal rights, and believed that he was, along with his brother and sisters, excluded from the legitim. The plea of bar as against a legal claim is undoubtedly a good equitable plea where the facts warrant it. But then it is necessary in order to support such a plea that the person against whom it is stated shall have had knowledge, or ought to have had knowledge, of the legal rights which are said to have been abandoned. Perhaps it may be conceded that if great

hardship could result by the assertion of legal rights that had been kept in abeyance, to the person against whom they are asserted, the plea of bar might be admitted, although there were ignorance of the rights. In the present case the pursuer had many excuses for pleading ignorance of his rights, looking to the difficulty which even a Judge has had in arriving at a conclusion on the matter. Several of the things narrated in the statement of facts for the defenders would perhaps not have been done, and several of the gifts therein mentioned might not have been made, if the Dowager-Countess of Kintore had known that, instead of being proprietrix of the whole of the personal estate of her deceased husband, amounting to over £80,000, one-half of it was to be carried away from her and given to the pursuer in the shape of legitim. This plea of bar was stated in the case of *Keith's Trustees v. Keith*, in circumstances more favourable for its reception than the present one, and yet was repelled; and it ought to be repelled in every case of this kind where it cannot be presumed from the facts that there was an abandonment of the legal rights, or unless there was gross neglect in inquiring as to such rights, and where there was in consequence, on the part of the person against whom these rights were asserted, arrangements made, the upsetting of which would entail hardships and loss which it would be inequitable to allow. It would serve no practical purpose to examine each of the matters set forth in the statement in defence as founding this plea of bar. The Dowager-Countess may or may not, in consequence of the claim now stated by the pursuer, revoke or rescind what she has given or done, on the footing that no legitim was to have been claimed; and one part of her liberality, in giving the furniture in the two houses left by the late Earl to the pursuer, is met by the offer on his part to return the whole of the furniture still extant, and to account for the value of that which has been sold.

“The result of the whole matter is that the Lord Ordinary must find that nothing has been stated in defence which constitutes a bar to the action.”

The defenders reclaimed, and argued—(1) In the clause excluding claims for legitim the word “children” meant the whole children of the marriage—*Maitland v. Maitland*, Dec. 14, 1843, 6 D. 1040; *Keith's Trustees v. Keith and Others*, July 17, 1857, 19 D. 1040. The case of *Pannure v. Crokat*, Feb. 29, 1856, 18 D. 703, was a direct contrast to the present. The arrangements with regard to the custody and education of the heir might fairly be considered as “provisions” in his favour. (2) On the assumption that no provision was made for the heir, the spouses could by antenuptial marriage-contract gratuitously exclude his right to legitim—*Fisher's Trustees v. Fisher*, Nov. 19, 1844, 7 D. 1029; *Stirling of Glorat v. Lakes*, 1732, Kames' Dict. of Decisions, i., 546; *Home v. Watson*, 1757, 5 Br. Supp. 330; *Agnew v. Agnew*, 1775, M. 8210; *Cranecour v. Graham*, Feb. 3, 1844, 6 D. 589; *Mander's Trustees v. Mander*, March 30, 1853, 15 D. 633. The clause in question was sufficient to exclude the claim. The pursuer was barred by what had taken place, especially as regards the furniture, which could not be returned, as some of it had been sold. A proof should be allowed of the



defenders' averments on this point.

The pursuer replied—(1) The heir was not a creditor under the marriage-contract, and therefore the defender must prevail on both of the two next questions, viz., (2) Whether he could lawfully be excluded without giving him any provision? (3) Whether this had been done by the clause in question? The authorities were against the gratuitous exclusion of a right to legitim.—Bell's Prin., sec. 1587; Ersk. Inst., iii. 9, 15, 23; Stair, iii. 8, 44; More's Notes, 353; Nisbet v. Nisbet, 1726, M. 8181; Kintore v. Inverurie, June 18, 1861, 23 D. 1105, aff. April 16, 1863, 1 Macph. (H. L.) 32; Pringle's Trustees v. Hamilton, March 15, 1812, 10 Macph. 621. The smallness of the provision in *Maitland's* case (*supra cit.*) demonstrated the necessity for some provision. The pursuer was not barred from insisting in this claim because he was in ignorance of his rights until 1883, and moreover there had been no transaction by which he could be held to have abandoned those rights.—*Kirkpatrick v. Sime*, July 22, 1811, 5 Paton's App. 525; *Gowrlay v. Wright*, June 23, 1864, 2 Macph. 1284; *Mackenzie v. Mackenzie's Trustees*, June 12, 1873, 11 Macph. 681.

At advising—

**LORD PRESIDENT**—The question raised under this reclaiming-note is whether the legitim of the present Earl of Kintore is barred by the terms of the antenuptial contract executed by his father and mother? and that question depends primarily upon the construction of one clause of the deed which follows immediately after the provisions made by the husband in that contract, and before the provisions made by the intended wife. But before proceeding to the construction of that clause it is desirable to see what are the provisions that are made by the husband, and these may be stated very shortly. In the first place, he provides an annuity of £4700 a-year to his intended spouse in the event of her surviving him, and the lady "accepts that provision in full satisfaction to her of all terce of lands, half or third of movables, and every other claim or provision which she could by law ask or demand." The husband in the next place proceeds to provide for payment of provisions under the Aberdeen Act, and under powers contained in the two deeds of entail under which he held the estates, in favour of the younger children of the marriage. These are conceived distinctly in favour of "the child or children procreated of the said intended marriage other than and excluding the heir who shall succeed the said Earl in the said earldom, baronies, and others;" and these provisions, in the event of there being three children of the marriage (which turned out to be the fact) amount in all to £42,000; and he obliges himself "to execute such deed or deeds as may be necessary for more effectually securing the above-mentioned provisions." The Earl then proceeds to appoint tutors and curators to his children in the event of their being in pupillarity or minority at the time of his death, and he gives certain directions as to the way in which these tutors and curators are to manage the property and income belonging both to the heir and to the younger children until they attain majority. He provides also that the charge and custody of the children until they attain majority shall be in the hands of their mother; and that is substantially

the whole deed in so far as regards the provisions made on the part of the then Earl of Kintore. Now, there is, it will be observed, in this part of the deed no provision of any kind in favour of the eldest son, or, in other words, of "the heir who shall succeed to the said entailed earldom, baronies, and others." The succession to these estates and honours was of course secured to that eldest son by the deeds of entail themselves, and it required no act upon the part of the then Earl of Kintore to secure the succession to these estates to his eldest son. There is not only no provision in favour of the eldest son who is to succeed to these estates contained in this marriage-contract, but there is a very heavy burden laid upon him—not a burden greater than the Earl of Kintore was quite entitled to lay upon the heirs of entail, but still it was the full amount of the burden which he could so lay upon him. And therefore the eldest son is not a beneficiary under this deed, or, in other words—for the two terms are identical in an antenuptial contract—he is not a creditor under this contract. Every beneficiary in an antenuptial contract is necessarily a creditor, not indeed in competition with the general class of creditors, but in competition with the heirs he is a creditor. And the eldest son so far from being a creditor in this deed is to a very large amount a debtor and nothing else.

Now, these facts being premised, we come to the particular clause on which the question turns, which is in these terms:—"Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural," &c. Now, it is contended upon the part of the defender that this is an exclusion of the legitim of the whole children of the marriage; and reliance is placed upon the generality, "the children of this marriage." But it is necessary to attend in the first place to the grammatical construction of this sentence. The sentence does not predicate anything of the children of the marriage. The children of the marriage are not the nominative; the nominative case or substantive is "which provisions before conceived." What is predicated in this sentence is of these provisions that they shall have a certain effect, and the sentence affirms nothing else except that the provisions before conceived shall have a certain effect, and that effect is that they shall be in full satisfaction of legal claims. The provisions above conceived are to be in full satisfaction of legal claims, including legitim. Now, it naturally occurs to one, at first sight of this sentence, that provisions can hardly be in satisfaction of claims except in satisfaction of the claims of those to whom provisions are given. It is not easy to understand that a provision in favour of A shall be in satisfaction of a claim of B; and yet that is still apparently the nature of the contention upon the part of the defender. The term "children of the marriage" in this sentence is plainly open to construction. It is not all the children of the marriage, nor is it some of the children of the marriage; and still less is it the children of the marriage other than the heir. Any one of these terms would have been perfectly conclusive as to the meaning and intention of the parties. But the phrase used is not conclusive at all as to the meaning of the parties. It is "the children of the marriage," a

term obviously construable, and I think very clearly construable, in one sense, and one sense only, by reason of the sentence in which that term occurs. It does not appear to me possible to conceive that the parties to this contract meant that the provisions conceived in favour of the younger children should be in full satisfaction of the eldest son's claim, or any claim of the eldest son whatever. Now, there are no provisions in this deed, as I have already shown, except provisions in favour of the younger children. If the parties had really intended to provide that the provisions in favour of the younger children should be in full satisfaction not only of their claims but also of the claim of the eldest son, that could have been very easily and distinctly expressed. There could have been no difficulty about that whatever. Parties might have provided that in respect of the provisions before conceived in favour of the younger children of this marriage, no child of this marriage shall have any right to legitim—neither the heir nor the younger children. This has not been said. Whether it would have been effectual if it had been so provided is a question that the Lord Ordinary has discussed very learnedly in his opinion. I do not think it necessary to enter upon that question at all. It is possible that authority may be found for the proposition that a child's legitim may be excluded or barred by an antenuptial contract without any provision being made for that child at all. Upon that I give no opinion. But at all events it is so unusual and so unnatural a stipulation in an antenuptial contract of marriage that it is not lightly to be implied. On the other hand, if parties to an antenuptial contract conceived such a purpose, I think they were bound to express themselves in very clear and distinct terms. This they not only have not done here, but I think they have expressed themselves in such terms as it is impossible to construe except in one way. I think the true meaning of this clause is, that the provisions before conceived in favour of the children of this marriage are to be in full satisfaction to these children of legitim and other legal rights. This is a very slight variation in the language of the clause, because the language itself is this—“Which provisions before conceived in favour of the children of this marriage are declared to be in full satisfaction to them,” and so on. Now, full satisfaction to them surely can mean nothing else than full satisfaction to those in whose favour the provisions are conceived. I therefore come without any hesitation to the conclusion that according to the true construction and meaning of this clause the legitim of the heir is not excluded, and therefore I refrain altogether from going in to that much more difficult question which has been dealt with by the Lord Ordinary in his opinion, as to whether if the clause admitted of a different construction, or if the construction were that the heir's claim of legitim was excluded, this could be competently done in the manner in which it is here said to be done—that is to say, without providing—I will not use the term equivalent, but without providing—anything in place of the legitim. That is a matter which may require consideration some day, but fortunately the duty of considering and determining it does not devolve upon us at present.

Now, the only other matter that requires con-

sideration is raised by what is called the plea of bar on the part of the defender, and that arises in this way—Both the parties, Lady Kintore and her eldest son, proceeded upon the assumption that she was entitled under the will of her deceased husband to the entire moveable estate left by him, with certain small exceptions, and there can be no doubt that the lady proceeded upon that understanding, and that the present Earl of Kintore also was under the decided impression that she was entitled to all this under his will, and that he himself, the present Earl, was not entitled to interfere with or compete with her in that matter. Now, I do not think that is sufficient to exclude a claim of this kind, even although the misunderstanding and ignorance upon both sides may have led to the defender being more liberal in some of her arrangements than she otherwise would have been. If the fault of ignorance lay upon one side only the case might be different, but I think both parties here are equally to blame. It was ignorance of law, or at least of legal right upon both sides, but it cannot be said that that ignorance was induced on the one side by the representations or conduct of the other. They were both equally in ignorance of what were their rights under this settlement, and I think that may be accounted for in some degree by the circumstance that the mother and son were truly advised by the same legal advisers. I do not say that there was anything unnatural in that, or anything improper in it, but it is in vain to represent that because one member of the firm of Aberdeen practitioners was specially concerned with the financial affairs of the mother, and another with the financial affairs of the son, there thus existed anything like the sort of antagonism of representation of interests which is very desirable in a case of this kind, and without which mistakes are very apt to be committed. I think that circumstance accounts a good deal for the ignorance in which both parties were left as to the true nature of their rights under the late Lord Kintore's settlement. But however that may be, the important thing to consider is this, that this is not an attempt on the part of the pursuer to get the better of any transaction or discharge in which it may very well be pleaded *ignorantia juris non excusat*. He must know his legal rights before he discharges them, or before he made them the subject of a transaction. There is no transaction and no discharge. So far as legal obligations are concerned, the parties stand exactly where they were at the time of the late Earl's death, and therefore I do not think there is any ground for this plea at all. I think the pursuer is quite entitled to maintain his legal rights as they stood at the time of the late Earl's death, notwithstanding any ignorance or misunderstanding into which the parties have been led in the interval which has elapsed. And therefore upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

**LORD MURK**—The main question which we are called upon to decide is, whether the pursuer as the eldest son of the late Lord Kintore is excluded from claiming his legitim? and that depends, as your Lordship has distinctly pointed out, exclusively upon the terms of the clause in the marriage-contract, which declares—“Which pro-

visions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim," &c. The words are, "which provisions before conceived in favour of the children of this marriage," and we must look to the earlier part of the deed to see what provisions are made for the children of the marriage, and what children of the marriage are so provided for? Now, we have a provision by which the granter undertakes and binds and obliges "himself, and the heirs of entail who shall succeed to him" in the entailed estates "to make payment to the child or children procreated of the said intended marriage other than and excluding the heir who shall succeed to the said Earl in the said entailed earldom, baronies, and others, and the representatives of those children who shall predecease the said Earl," of certain sums. Therefore there is an express exclusion of the eldest son from the provisions thereby made in favour of the children, and consequently by the conception of the deed it is the eldest son on whom the obligation is laid. He binds and obliges himself and the heirs of entail who shall succeed him. The person who succeeds as heir of entail is the eldest son, and he is to make provision for his brother and sisters. The clause is express, "other than and excluding the heir." That clause therefore fixes down the provisions, and not only so, but fixes the children to whom the clause which I have mentioned refers, the children who have had provisions conceived for them in the earlier part of the deed. The heir therefore being expressly excluded from the pecuniary provisions of that part of the deed, I can find no words in any other part of the contract which can in my opinion, on any fair construction, be held to constitute a provision of any kind made by the father for the eldest son, or making him a beneficiary in any respect under the marriage-contract. Upon that short ground I have come to the same conclusion as your Lordship, that the Lord Ordinary is right in the view which he has taken in the first part of his opinion relative to the construction of this clause, and it is not therefore necessary to enter into any examination of the more general questions raised by the parties and dealt with in the interlocutor. The question depends upon the construction of a clause which is very distinctly worded in the marriage-contract itself, and upon the fair construction of that clause I think the opinion which your Lordship has expressed is well founded.

Upon the other point, namely, the plea in bar, I also agree with your Lordship. There is no appearance of any knowledge on the part of the present Lord Kintore of the existence of a claim of this sort that could be made on his account. It was within three years after the death of his father that the question was raised, and I think both parties were plainly in ignorance of what the marriage-contract provided in that respect, or what the respective claims were to legitim. And as the Lord Ordinary points out, with the exception of the furniture in certain houses which the present Lord Kintore expressly states on the record his readiness to return, the annuities, and the £2000 which was presented by the present defender to the Countess of Kintore, the pursuer's wife, I think there is nothing that can be held substantially to amount to a taking possession of

the movable estate or entering into any arrangement with reference to it which can bar the present Lord Kintore from raising this question. I think the principles which were laid down on that subject in the opinions in the case of *Lord Panmure*, in one branch of it, and in the case of *Keith*, are quite conclusive on that point.

**LORD ADAM**—The question here depends primarily upon the construction of the clause in the antenuptial contract which is printed in the appendix; and the question is, whether or not Lord Kintore is included under the description in that clause of children of the marriage? Now, upon a construction of that clause I agree with your Lordship that "children of the marriage" there can only apply to those children in whose favour provisions are conceived in the preceding part of the contract. Now, the only suggestion which was made at the bar of any provision in Lord Kintore's favour was this, that his father and mother in the previous part of the contract had named tutors and curators to him, and had provided in a certain way for his upbringing while he was in pupilarity. My own view is that it is idle to call that a provision constituted in his favour in the sense of this contract. I think all the provisions in this contract instead of being in his favour are in one sense against his interest. He is in no sense a creditor under the contract or a beneficiary under the contract, and therefore I can only come to the conclusion that as no provision has been conceived in his favour in this contract, he is not included under the words "children of the marriage" in this clause, and that therefore his claim to legitim is not excluded by the clause.

Now, that appears to me to be the whole case that it is necessary for us to decide, and I think we are not called upon, and it would not be desirable in this case, to decide the other question which the Lord Ordinary has decided, viz., taking the case on the supposition that he had been included in the clause as one of the children of the marriage. I think it is quite unnecessary to enter upon that.

With reference to the other question—that of bar—I agree with your Lordships and the Lord Ordinary, and have nothing to add.

**LORD DEAS** was absent.

**LORD SHAND** having been absent at the debate, gave no opinion.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Darling. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders—Sol.-Gen. Asher, Q.C.—Keir—Guthrie. Agents—Morton, Neilson, & Smart, W.S.

Friday, June 20.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUNLOP AND ANOTHER *v.* DUKE OF HAMILTON.

*Property—Servitude—Excambion—Reservation of Liberty to Work Minerals—Incorporeal Right.*

By contract of excambion a proprietor conveyed lands which contained minerals to