benefit they would have been likely to obtain at the proper tribunal. I do not think it necessary for us to enter either upon the case of *Mackenzie* v. *Lang* or of the case of *Marr* v. *M'Arthur*. They were stated to be in contrast. I do not think so. The case of *Marr* v. *M'Arthur* was a case in which, rightly or wrongly—and I assume rightly, for it is not *hujus loci* to inquire,—the Court were of opinion that the thing charged was no offence at all. It had not the aspect of an offence. It was as if a man had been taken up and tried and sentenced to imprisonment for whistling in the street, or walking at the rate of five miles an hour on the street, or doing anything that appeared to be perfectly innocent. The Court thought there was no offence set out, and that upon ground altogether distinct from criticism of a libel for murder or robbery or assault. Criticisms upon the style of a charge, or the omission of particulars which ought to have been given, are totally different from a case where there was no charge at all. Again, rightly or wrongly— for into that we have no occasion to inquire here,—the Court in the case of *Marr* v. *M'Arthur* were of opinion that there was no charge presented to the magistrates at all. It was not a case of objection to the relevancy of the indictment. They said there was no offence at all, and the Court determined that it had jurisdiction to set aside a sentence for what in their judgment was no offence by common or statute law at all. Here the most that could be made of the case was a criticism upon the mode of libelling a substantial charge—that of assaulting constables in the execution of their duty. The libel may be more or less subject to criticism, but that there is a substantial charge—a charge of a crime more or less serious —nobody doubts ; it was criticism upon the libel and the mode of libelling. Therefore the case of *Marr* does not interfere with the present case, and the conclusion at which we have arrived makes no reflection on the case of *Marr* v. *M'Arthur*. That conclusion is that we have under the statute regulating this matter no jurisdiction to entertain this suspension ; but feeling it proper for the satisfaction of parties to indicate the opinions which we entertain, we are of opinion that if we had jurisdiction we should not have been favourable to the objection which had been stated against this conviction and sentence. It was a sharp sentence in this sense, that it went to the extreme penalty that was allowed, but we have no reason to form or express any opinion—and certainly formed and expressed none—that the sentence was at all severe ; but, at all events, we have no jurisdiction to interfere with that. The result is that this suspension—and all the others, we were told, must follow this one—must be dismissed.

Lords Craighill and Adam concurred in the opinion of Lord Young.

The Court refused the note of suspension.

Counsel for Suspenders — Asher — Baxter. Agent—A. Fleming, S.S.C.

Counsel for Respondent — Solicitor-General (Balfour, Q.C.)—Mackintosh. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Wednesday, October 27.

SECOND DIVISION.

[Lord Young, Ordinary.

SUTTIE *v.* SUTTIE.

Entail—Provisions to Younger Children—Act 5 Geo. IV. c. 87—Aberdeen Act.

G, an heir of entail in possession granted a bond of provision in favour of his younger children for £20,000, and thereafter became a party to the marriage-contract of his son and apparent heir, whereby certain provisions were made for the benefit of the son's widow and younger children ; he subsequently disentailed and re-entailed the estate under the terms of an agreement with his three elder sons whereby all these provisions were made burdens on the estate. *Held*, on a construction of the terms of the agreement and the deed of entail following on it, that G was not thereby barred from increasing the provision of £20,000 to the extent allowed by the Aberdeen Act.

This was an action at the instance of Francis Grant Suttie and others, the younger children of the deceased Sir George Grant Suttie of Prestongrange and Balgone, against Sir George Grant Suttie, a pupil heir of entail in possession of the estates of Prestongrange and Balgone, and Lady Susan Grant Suttie and others, his tutors and curators, concluding for payment of the sum of £20,000, being the sum contained in an additional deed of provision dated 10th May 1875, granted by Sir George Grant Suttie, grandfather of the defender, in favour of his child or children who should be alive at his death and should not succeed to his entailed estates, with interest thereon from 30th October 1878, the date of the defender's succession to the estates ; or otherwise, for payment of so much of the sum of £20,000 as together with the sum of £20,000 contained in a bond and disposition in security executed by the defender's grandfather Sir George Grant Suttie in 1865 in favour of trustees, for his younger children, should amount to three years' free rent of the said entailed estates as at 19th June 1878, the date of the death of the grandfather, with interest from 30th October 1878, the date of the defender's succession.

Sir George Grant Suttie the elder was married during the life of his father, then heir in possession of the estates, to Lady Harriet Charteris. By his marriage-contract, dated in 1829, his father, Sir James, and himself bound themselves and their heirs and representatives, and also the heirs of entail in the estates, so far as they or either of them had power to do, to pay the child or children procreated of the said intended marriage, other than the heir-male succeeding to the estates, "in case there shall be four or more children other than the heir, the sum of £20,000 sterling, and that at the first term of Whitsunday or Martinmas that shall happen after the death of the longest liver of the said Sir James Grant Suttie and of the said George Grant Suttie," with the penalties and interest therein specified. It was further declared by the said contract of marriage that "it shall be in the

power of the said Sir James Grant Suttie and George Grant Suttie, or either of them, to charge the said provisions primarily against the said entailed lands, baronies, and estate of Prestongrange, and the said other entailed lands and estates of Myles, Birsely, and others, whenever the same can be validly and effectually done." The said marriage-contract also reserved to the said George Grant Suttie "full power and liberty to make such other and further provisions in favour of the said Lady Harriet Charteris, and the issue of the marriage hereby contracted, as he may at any time think fit, or may be within his powers as heir of entail in the said lands, barony, and estate."

On 3d June 1844 Sir George being then heir in possession under the then subsisting entail, on the narrative of the Act 5 Geo. IV. c. 87 (the Aberdeen Act), and of the obligations contained in the marriage-contract of 1829, granted a deed of provision whereby he bound and obliged himself and the succeeding heirs of entail to make payment out of the rents and profits of the estates to the lawful child or children procreated or to be procreated of his then present marriage other than the heir-male succeeding to the entailed estates, "in case there shall be four children other than the heir, the sum of £20,000 sterling, with a fifth part more of penalty in case of failure, and the legal interest of the said principal sum from the term at which the right of such succeeding heir to the rents of the estates shall commence . . . . provided always the amount of the said provisions should not exceed in any case three years' free rent or value of the estates."

In 1857 Sir George was a party to the marriage-contract of his son James Grant Suttie, whereby in the exercise of his powers under the entail, and with consent of his son James Grant Suttie, his eldest son and apparent heir under the entail, he settled upon his son's wife, in the event of her surviving her husband, a right of liferent or locality redeemable on payment of an annuity of £1500, restrictable in the event of her entering into a second marriage to £750, and whereby James Grant Suttie himself settled on his wife should she survive him, and in the event of his surviving his father and succeeding to the entailed estates, a liferent annuity or jointure of £2000, restrictable in the event of her second marriage to £1000, which annuity should in the event of its becoming payable supersede the right of liferent settled by Sir George as above mentioned.

This contract of marriage also, on the narrative of the powers conferred on heirs of entail in possession by the Aberdeen Act, contained the following provisions on behalf of the children of the marriage between James Grant Suttie and his wife Lady Susan Innes Ker:—"That in case the said James Grant Suttie shall survive the said Sir George Grant, Suttie his father, and succeed to the entailed lands and estates of Prestongrange and Balgone and others before mentioned, he shall thereupon be bound and obliged, as he does hereby in that event, and in exercise of the powers which, on his surviving his said father and succeeding to the said lands and estates, shall be vested in him by the said Act of Parliament or otherwise as heir of tailzie then in possession thereof, bind and oblige himself, and the heirs of tailzie and provision succeeding to him in the said entailed lands and estates (but subject to the restrictions and limitations hereinafter mentioned or referred to), to make payment out of the rents or proceeds of the said lands and estates to the children to be procreated of the said intended marriage who shall be alive at the death of the said James Grant Suttie and shall not succeed to the said entailed lands and estates, and to the representatives or assignees of such of the said children as shall predecease the said James Grant Suttie, claiming right in virtue of special settlement by marriage-contract, of the sum of £20,000 sterling, but to be restricted to £15,000 if there shall not be more than two such children; which provision shall bear interest from and after the death of the said James Grant Suttie, and shall be payable at the first term of Whitsunday or Martinmas that shall happen after that event: Declaring always that the said provision is granted by the said James Grant Suttie under all the conditions and subject to all the restrictions and limitations contained in the said Act of Parliament."

In 1864 Sir George being desirous to make a new entail which should embrace certain lands not included in the then subsisting entail, to simplify the titles under which the lands were held, to alter the destination to the effect of including therein heirs-female, and to constitute certain new burdens over the estates, entered into a deed of agreement with his three elder sons, being at that time the three heirs next entitled to succeed, for a disentail of the estate and for re-entailing it. This agreement by article 1 provided that the lands should be disentailed by Sir George with consent of his sons. The other articles of this agreement which were material to the decision in this case were the second, third, sixth, and seventh, which were in these terms:—"*Second*, That forthwith, after the completion of the said disentail, the said George Grant Suttie shall, under the real burdens after specified, execute and record in the register of entails, and also in the Books of Council and Session, and complete, by infeftment or registration in the appropriate registers of sasines, a new deed of entail of the said estates in favour of the said Sir George Grant Suttie and the heirs-male of his body, whom failing to the heirs whomsoever of his body, whom all failing then to his nearest heirs and assignees whomsoever, the eldest heir-female, in case of the succession opening to females, excluding heirs-portioners and succeeding always without division; and the said deed of entail to be executed as aforesaid shall be so framed as to give effect to the special provisions of this agreement, and in all other respects the same shall be in the same terms in substance and effect as the existing entail of Prestongrange, being the entail first hereinbefore mentioned, and shall be so framed as to be effectual against the said Sir George Grant Suttie himself as the institute of entail, as well as against the heirs of entail to be called after him; and the precise terms of the said new deed of entail shall be adjusted and settled," &c. "*Third*, That the said estates of Prestongrange and others shall, in the new deed of entail thereof, be burdened with the charges after specified, and with the securities which may have been previously granted over the entailed estates therefor, viz.—(First) The sum of £20,000 sterling, being the amount of the provision settled, or agreed to be settled, upon the younger children of the marriage between the said Sir George Grant Suttie and the now deceased Lady Harriet

Grant Suttie by their contract of marriage, with the consent of the parties therein mentioned, dated the 1st day of September 1829, and by any later deed granted, or which may be granted, by the said Sir George Grant Suttie in implement of the said contract of marriage, but subject always to restriction in terms of the Act 5 Geo. IV. c. 87, in the event of the said provision exceeding the amount permitted by the said Act: (Second) The provisions by way of liferent or annuity settled, or agreed to be settled, upon Lady Susan Harriet Grant Suttie, wife of the said James Grant Suttie, in the event of her surviving him, conform to the contract of marriage entered into between them, with the consent of the parties therein mentioned, dated the 5th day of August 1857, viz., a right of liferent or locality, redeemable, as therein mentioned, on payment of an annuity of £1500, restrictable in the event of her entering into a second marriage to £750, provided to the said Lady Susan Harriet Grant Suttie by the said Sir George Grant Suttie, in virtue of the powers contained in the entails of the said estates, and a liferent annuity or jointure of £2000, restrictable to £1000 in the event of her entering into a second marriage, agreed to be settled upon the said Lady Susan Harriet Grant Suttie by her said husband, in the event of his surviving his said father and succeeding to the said estates; but which last-mentioned annuity, in the event of the same becoming payable, shall be held as superseding the right of liferent, redeemable as aforesaid, settled on her by the said Sir George Grant Suttie as before mentioned; and which said annuity of £2000, restrictable as aforesaid, shall, in the said new deed of entail, be so charged upon the said estates as that the same shall become operative and effectual only in the event of the said James Grant Suttie surviving his father and succeeding to the said estates; and the said liferent locality, redeemable as aforesaid, and the said annuity of £2000, restrictable as aforesaid, shall be subject to all the restrictions and declarations applicable thereto contained in the said contract of marriage: (Third) The sum of £20,000 sterling, being the maximum amount of the provisions settled by the said James Grant Suttie in his said contract of marriage on the children of the marriage other than the heir who shall succeed to the said entailed estates, but subject to restriction to the extent and in the event mentioned in the said Act of Parliament 5 Geo. IV. c. 87, and in the said contract of marriage, and subject to the whole other declarations applicable thereto contained in the said contract, hereby specially declaring that the said provisions shall in no case form a charge on the said estates except in the case of the said James Grant Suttie surviving his father." "*Sixth*, The said new deed of entail shall contain clauses declaring that the Acts of Parliament 10 Geo. III. c. 51, and 5 Geo. IV. c. 87, being respectively the Montgomery and the Aberdeen Acts, shall be applicable to the entail, but it shall be provided that in exercising the powers of the Aberdeen Act the said Sir George Grant Suttie shall not be entitled to grant larger provisions to his younger children on the whole, including the provisions already granted by him as aforesaid, than he would have been entitled to grant had the estates remained under the existing entails, the provision already granted by him being held as so far exhausting his powers; and in the like mannner the said James Grant Suttie shall not be entitled to grant larger provisions to his wife or younger children on the whole, including the provisions already settled on them respectively as aforesaid, than he would be entitled to grant had the estates remained under the existing entails, the provisions already settled or agreed to be settled on them being held as so far exhausting his powers." "*Seventh*, In respect that, looking to the terms of the destination in the new entail, there may be a difficulty in form in carrying out the provision of the Montgomery Act with reference to future improvements, the parties hereto agree that the new entail shall contain such clause or clauses as may, in the opinion of the referee hereinafter named, be calculated to obviate such difficulty, and to enable the institute and heirs of entail to exercise the powers given by the Montgomery Act, or powers similar thereto."

This agreement, which was recorded in the Books of Council and Session in February 1866, did not bear to be granted for onerous causes.

In accordance with this deed of agreement Sir George in 1865 presented to the Court a petition for power to disentail. It being necessary, in order to the granting of such power, that the existing marriage-contract obligations, which were the only burdens on the estate, should be secured to the satisfaction of the Court, Sir George granted two bonds and dispositions in security, both dated 2d June and recorded 11th July 1865. By one of these he bound himself to make payment to certain trustees for behoof of his younger children the sum of £20,000, being the maximum amount of the provisions contained in his own marriage-contract of 1829. By the other bond and disposition in security Sir George, without prejudice to the obligations undertaken by his eldest son James Grant Suttie in his contract of marriage above referred to, and in anticipation of his acquiring the entailed lands in fee-simple by authority of the Court, but only in the event of his son James Grant Suttie surviving him and succeeding to the entailed estates, bound and obliged the heirs succeeding to him in the lands to pay to certain other trustees the further sum of £20,000, being the amount of provisions settled in James Grant Suttie's contract of marriage on the children of that marriage who should survive their father and should not succeed to the entailed estates. This bond and disposition in security contained the following express declarations:—"Declaring, however, as it is hereby expressly provided and declared, that as it is not intended that the foresaid lands and others hereinbefore disponed in security should be burdened with a larger provision in favour of the said children than the amount which the said James Grant Suttie could by law have settled on them if the whole estates had remained entailed under the existing entails, and if he had succeeded to the same under these entails; therefore it is hereby provided and declared, that in case it should be found on the death of the said James Grant Suttie that the said sum of £20,000 exceeds the amount which the said James Grant Suttie could by law have settled on his said children in the event foresaid, then the said trustees shall not be entitled to exact payment of the excess, but shall, to the extent of such excess, be bound to discharge

these presents in favour of the heirs succeeding to my said son in the lands and others hereinbefore disponed in security; but without prejudice to the personal obligation on the said James Grant Suttie, and his heirs, executors, successors, and representatives whomsoever, under the said contract of marriage, to make payment out of his means and estate whatsoever of the foresaid provision, in so far as the same may be found to exceed the amount which by the foresaid Act of Parliament he shall be entitled to provide out of the said estates: Declaring further, that in case the said James Grant Suttie shall succeed to me in the lands and others to be embraced in the new entail to be executed by me as aforesaid, and shall thereafter grant provisions to his said children in terms of the said Act 5th George the Fourth, chapter 87, exceeding in amount the provisions to which they may be entitled under the foresaid contract of marriage and these presents, and shall record the deed or deeds containing such new provisions in the Books of Council and Session, then and in that case these presents shall become absolutely null and void: Declaring further, as it is hereby expressly provided and declared, that these presents are granted subject to and under reservation of all my powers of granting a provision to any wife I may marry, and of granting provisions to my younger children; and that these powers shall be noways limited or restricted or otherwise prejudiced or affected by my granting these presents, but the same are hereby expressly reserved to me as fully and entirely as if the provision of £20,000 had never been granted."

Thereafter a disentail having been obtained under authority of the Court, Sir George executed and recorded a new entail in December 1865. By this deed the following were declared to be real burdens on the lands entailed:—(1) The provision of £20,000 in favour of Sir George's younger children. (2) A certain sum of money expended by Sir George in improvements on the estate. (3) A liferent right of locality in favour of Lady Susan Harriet Grant Suttie, redeemable on payment of an annuity of £1500 a-year. (4) An annuity of £2000 a-year in her favour, payable on a certain event, and which, if it became payable, was to supersede the foresaid right of locality. And (5) The provision of £20,000 in favour of James Grant Suttie's younger children contained in the bond and disposition in security before mentioned by Sir George Grant Suttie, dated 2d June 1865, in favour of trustees for their behoof. With reference to the last-mentioned provision it was provided, that it shall be subject to restriction in the event and to the extent mentioned in the said bond and disposition in security, and to all the other provisions and declarations therein contained or referred to.

That deed of entail contained this provision, that it should be lawful for Sir George and the heirs of entail succeeding to him to exercise all the powers conferred upon the proprietors of entailed estates by the Aberdeen Act:—"Declaring, as I hereby expressly provide and declare, that the said Act of Parliament shall be applicable to this present tailzie; but declaring that it shall not be in the power of me, the said Sir George Grant Suttie, to grant provisions in favour of my younger children in such manner as to entitle my children to receive on the whole a larger provision than the amount permitted by the said Act, including the foresaid provision of £20,000 already granted by me, which provision already granted by me shall be held to the extent thereof as granted in exercise of the powers hereby given to me, and as so far diminishing my powers of granting future provisions to younger children; and declaring in like manner that it shall not be in the power of the said James Grant Suttie hereafter to grant any provision in favour of his present wife, or any provision in favour of his younger children, in such manner as to entitle them respectively to any larger provisions than the amounts allowed to be granted to them respectively by the said Act, including the provisions already settled on them respectively as before mentioned, which provisions already settled on them, so far as the same shall respectively become operative and effectual, shall be held as granted in exercise of the powers hereby given to him, and as so far diminishing his powers of granting future provisions to his said wife and younger children respectively."

Thereafter by an additional bond of provision, dated 10th May 1875, and recorded in the Books of Council and Session 18th July 1878, Sir George granted the provisions in favour of his younger children which were the subject of dispute in this action. The deed proceeded on a narrative of the obligations in Sir George's marriage-contract of 1829, of the bond of provision of 1844, of the arrangement for disentail and re-entail, of the bond and disposition in security for £20,000 in favour of his younger children in 1865, of the new entail of 1865 under burden of that provision of £20,000, by which deed of entail it was provided that it should be lawful "to me, and the heirs of entail foresaid, to exercise all the powers and faculties conferred on the proprietors of entailed estates in Scotland by the Act of Parliament passed in the fifth year of the reign of His Majesty George the Fourth, chapter 87, entituled 'An Act to authorise the Proprietors of Entailed Estates in Scotland to grant Provisions to the Wives or Husbands and Children of such Proprietors;'" and that it was by the said deed of entail expressly provided and declared that the said Act of Parliament should be applicable to the said tailzie, but "declaring that it should not be in my power to grant provisions in favour of my younger children in such manner as to entitle my children to receive in the whole a larger provision than the amount permitted by the said Act, including the foresaid provision of £20,000 already granted by me, which provision already granted by me should be held to the extent thereof as granted in exercise of the powers thereby given to me, and as so far diminishing my powers of granting future provisions to younger children; and now seeing that the rental of my said entailed estates has increased to an extent sufficient to enable me to grant an additional provision to my younger children, and that I am now desirous to increase the provisions in favour of my younger children to the extent of a further sum of £20,000, at least so far as such increase can be made consistently with the provisions of the foresaid deed of entail and Act of Parliament"—It then proceeded—"Therefore, without prejudice to the said provision of £20,000 already granted by me, and to the several deeds under which the same is secured on my entailed

estates as aforesaid, I do hereby, in virtue of the said deed of entail and of the said Act, and of all other powers competent to me, provide and bind and oblige the heirs of entail succeeding to me in the said entailed estate of Prestongrange, Balgone, and others, to make payment out of the rents or proceeds of the same, to the child or children procreated or to be procreated of my body who shall be alive at my death and shall not succeed to the said entailed estate, and to the representatives of those children who shall predecease me claiming right in virtue of special settlement by marriage-contract (and that in such shares and proportions as I shall appoint by any writing under my hand at any time of my life, and failing of such appointment, then equally between and among them, share and share alike), of the further sum of £20,000 sterling, bearing interest in terms of the said provisions of the said Act, and payable one year after my death, and that over and above and in addition to the said provision of £20,000 already secured by me on the said entailed estates; provided always that the amount of the said provisions of £20,000 already secured on my said entailed estates, and the said further sum or provision of £20,000 hereby granted, being in all £40,000 sterling, shall in no case, when taken together, exceed the proportion following of the free yearly rent or free yearly value of the whole of the said entailed estate, as the same may be ascertained in the manner provided for by the said Act,—that is to say, for one child one year's free rent or value, for two children two years' free rent or value, and for three or more children three years' free rent or value in the whole; declaring that, in so far as the said provisions, when taken together as aforesaid, shall be found to exceed respectively one, two, or three years' free rent or value of the said entailed estate as the case may be, and as the amount of the said free rent or value shall be ascertained at the date of my death in the manner pointed out by the said Act, the same shall be restricted so as to correspond therewith; hereby declaring that these presents are granted by me under all the conditions and provisions, and subject to all the restrictions and limitations whatsoever, contained in the said deed of entail and Act of Parliament: And it is hereby expressly provided and declared that these presents shall not be held as superseding or making null and void in any way the foresaid provision of £20,000 already secured on my said entailed estates, or the several deeds under which the same is secured; but these presents shall be held to be a further exercise of the powers conferred upon me by the said deed of entail for the purpose of making an additional provision to my younger children to the extent of the said further sum of £20,000, subject to restriction as aforesaid, and to that extent and effect only."

Sir George Grant Suttie died on 19th June 1878 leaving five children in all, and was succeeded in the entailed estates by his son Sir James, who died on 30th October of the same year without having presented a petition to the Court to charge the provisions granted by his father in favour of the pursuers, his younger brothers and sisters.

The question then arose whether the additional provisions of the deed of 1875 were or were not preferable to the provisions of the marriage-contract of Sir James in 1857, to which, as already explained, Sir George had been a party. The younger children of Sir George maintained that both the provisions of £20,000 made by Sir George being within his powers under the Aberdeen Act were preferable to all the provisions made for the widow and younger children of Sir James in his marriage-contract of 1859. The defenders, on the other hand, maintained that Sir George having been a party to his son's marriage-contract, those last-named provisions ranked immediately after the sum of £20,000 provided for under Sir George's marriage-contract and in the deed of entail, and preferably to the additional provisions of 1875.

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

The Lord Ordinary (Young) on 16th April 1880 pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, and considered the whole proceedings—Finds, in point of law, that the pursuers, as the younger children of the late Sir George Grant Suttie, Baronet, are entitled to payment of three years' free rent or value as at 19th June 1878 (the date of the death of the said Sir George Grant Suttie) of the entailed estates of Prestongrange, Balgone, and others, under the deeds of provision mentioned in the record: Finds, in point of fact, that three years' free rent or value of the said entailed estates, as at the said date, amounts to the sum of £27,044, 19s.: Finds further, that this sum has, to the extent of £20,000, been already charged on the said estates by bond and disposition in security executed by the said Sir

George Grant Suttie in favour of certain parties as trustees for the pursuers, and that the balance of the said sum of £27,044, 19s., which is now payable to the pursuers, amounts to £7044, 19s.: Therefore decerns and ordains the defender Sir George Grant Suttie, Baronet, the heir of entail presently in possession of the said estates, to make payment to the pursuers of the said sum of £7044, 19s., with interest thereon at the rate of 4 per cent. from the 30th day of October 1878, the date of the defender's succession, until payment: Finds the defenders liable in expenses," &c.

The defenders reclaimed.

In the Inner House no question was raised as to the amount of the rents. The defenders, however, maintained that the £7044, 19s. did not rank preferably to the obligations in the marriage-contract of Sir James. The nature of the argument will be apparent from the opinions of Lords Gifford and Young.

At advising—

LORD GIFFORD—This is an action by the younger children of the late Sir George Grant Suttie, Bart., against their nephew, the present Sir George Grant Suttie, a pupil, the present heir of entail in possession of the entailed estates of Prestongrange, Balgone, and others, and against his factors and curators, and the object of the action is to make good provisions made by the defender's grandfather, the late Sir George Grant Suttie, in favour of the pursuers, as his younger children, to the extent of three years' free rent or value of the entailed estates.

There is now no dispute as to what is the true amount or value of three years' free rents of the entailed estates. After investigation the Lord Ordinary has fixed and found that the three years' rents extend to the sum of £27,044, 19s., and in this finding both parties have acquiesced. It is also admitted that a sum of £20,000 has already been secured for behoof of the pursuers by bond and disposition in security executed by the said Sir George Grant Suttie in favour of trustees for the pursuers, dated 3d June 1844, and the only question in dispute is, whether an additional provision, in favour of the pursuers, granted by and contained in an additional deed of provision by the said Sir George Grant Suttie in favour of his younger children, dated 10th May 1875, shall receive effect to the extent of £7044, 19s., so as to make up the whole provisions for the pursuers as younger children to the full extent of three years' free rents of the entailed estates?

There is no doubt whatever that the late Sir George Grant Suttie, Baronet, as heir of entail in possession of the entailed estates of Prestongrange and Balgone, was at the date of his marriage in 1829, and continued to be, at least down to 1864, when he entered into a certain deed of agreement, entitled to provide for his younger children to the extent of three years' free rents of the entailed estates. By his contract of marriage, which was entered into during the life of his father in 1829, the late Sir George Grant Suttie, then George Grant Suttie younger of Prestongrange, bound himself to provide the younger children of the marriage, in case there shall be four or more children other than the heir, in the sum of £20,000, and the marriage-contract reserved to the said Sir George Grant Suttie "full power and liberty to make such other and further provisions in favour of his wife and of the issue of the marriage hereby contracted as he may at any time think fit, or as may be within his powers as heir of entail in the said lands, barony, and estate." In implement of the obligation contained in the marriage-contract, and on a narrative of the powers conferred upon heirs of entail by the Act 5 George IV. cap. 87, Sir George Grant Suttie, by a deed of provision dated 3d June 1844, bound himself and the heirs of entail succeeding to him to pay to his younger children, in case there should be four children other than the heir, the sum of £20,000 sterling in manner therein mentioned, providing always that the said provision shall not exceed the amount limited by the statute, that is, three years' free rent of the entailed estates. By this deed the obligation contained in the marriage-contract was implemented and fulfilled, but the deed did not affect the reservation contained in the marriage-contract under which Sir George Grant Suttie had reserved to himself full power and liberty to make such other and further provisions in favour of his wife and of the issue of the marriage as he might at any time think fit, or as might be within his powers as heir of entail.

In 1864 the late Sir George Grant Suttie, then heir of entail in possession of the estates under the then existing entails, entered into an agreement with his then three elder sons, being the heirs next entitled to succeed to the estates in order, providing for the disentail of the estates, and for their being re-entailed in manner therein mentioned. This deed of agreement is dated 29th December 1864 and 2d January 1865, and it is upon its terms that the present question mainly turns. The agreement does not bear to be granted for onerous considerations, and its principal object seems to have been to simplify the titles under which the various entailed estates were held, to include certain other lands or pendicles not embraced in the existing entails, and to alter the destination to the effect of including therein heirs-female, and for constituting certain burdens as charges upon the estates. Provision was made for having the precise terms of the new deed of entail adjusted and settled by Edward Strathearn Gordon, Esquire, advocate, whom failing, by Andrew Rutherfurd Clark, Esquire, advocate, and there was a separate clause of reference to these gentlemen in succession in case of any dispute or difference arising. It may be noticed in passing that the terms of the new entail were in point of fact adjusted to the satisfaction of Mr Gordon, as the new deed of entail in itself bears, but it was not necessary to call into play the formal clause of reference to Mr Gordon, whom failing to Mr Clark.

The argument of the defender founded upon the deed of agreement is that by the implied terms of the deed, and on a fair and sound construction thereof, the said Sir George Grant Suttie, then heir of entail in possession of the estates, virtually renounced any right which he had under the old entails, and under the Aberdeen Act, and under the reservation in his marriage-contract of 1829, to enlarge the provision in favour of his younger children so as to make it equal to three years' free rents of the entailed estates, and that he virtually agreed that the £20,000 which he had already provided to his

younger children in terms of his marriage-contract should be the maximum provision which he should grant in their favour notwithstanding the terms of the statute, and notwithstanding the terms of the entails or other deeds or any of them. It was contended for the defenders that this was the consideration which induced the three elder sons of the said Sir George Grant Suttie to enter into the agreement for the disentail and re-entail of the estates, and although the agreement contains no express covenant that Sir George should not enlarge the provisions in favour of his younger children, such covenant must be held as implied from the whole import and tenor of the deed. This argument is sought to be strengthened by the fact that in 1857 James Grant Suttie, the eldest son of Sir George Grant Suttie, and the next heir of entail in succession to the said estates, had entered into a contract of marriage with the special advice and consent of his father, the said Sir George Grant Suttie, whereby, *inter alia*, certain provisions by way of liferent or annuity were settled upon Lady Susan Harriet Grant Suttie, wife of the said James Grant Suttie, and whereby the said James Grant Suttie bound and obliged himself, in case he should survive the said Sir George Grant Suttie, his father, and succeed to the entailed estates, to provide the younger children of the said James Grant Suttie, if more than two, in a sum of £20,000 out of the rents and proceeds of the said entailed lands; and it is urged that one of the objects of the said agreement was to secure that this provision in favour of James Grant Suttie's younger children should be effectual so far as the amount of rents would permit—postponed only to the £20,000 provided in favour of the younger children of Sir George Grant Suttie.

On considering the deed of agreement itself, however, and the other deeds relative thereto and founded on by the parties, I have found myself unable to give effect to the contention of the defenders. I cannot find any provision, either express or implied, in the deed of agreement of 1864, or anywhere else, whereby Sir George Grant Suttie renounced or gave up his undoubted right to provide for his younger children by giving them full three years' rents of the entailed estates. Under the original entails there is no doubt whatever that he was entitled to grant such provisions to the full extent of three years' rents of the estates, and he was in no way debarred from doing so, because in his marriage-contract he made a partial provision for his younger children to the extent of £20,000. This partial provision in no way excluded a further provision if Sir George should see fit to grant it, and all doubt is removed by the express reservation contained in his marriage-contract that he should make such further provisions for the issue of the marriage as he might see fit, and as might be within his powers as heir of entail.

When the deed of agreement was entered into in 1864 it might very naturally have been stipulated that Sir George should give up the right to make additional provisions for his own younger children exceeding the £20,000 already secured to them, in order that there might be something left for the younger children of his eldest son James Grant Suttie, but such a stipulation requires to be expressed and cannot be inferred by the mere silence of the deed. It was a very valuable and a very important right in Sir George to increase the provisions to his younger children by the sum of, as it now turns out, £7044, 19s., and if it had been really intended that Sir George should give up this right I think the deed should have said so.

It is true that the deed of agreement sets forth in article third the sums with which in the new deed of entail the estates should be charged—enumerating (1) the sum of £20,000 settled upon Sir George's younger children under his contract of marriage; (2) the liferent or annuity provisions in favour of Lady Susan Harriet Grant Suttie, wife of the said James Grant Suttie, in terms of her contract of marriage; and (3) the £20,000 settled by James Grant Suttie in his contract of marriage. But this enumeration of provisions already made is not exclusive of other provisions which might be made by any heir of entail in possession made within his rights as such, and does not determine the order of preference which such rights would have, and accordingly this is specially provided for in the deed of agreement itself, for in the sixth article it is provided that the said new deed of entail "shall contain clauses declaring that the Acts of Parliament 10 Geo. III. cap. 51, and 5 Geo. IV. cap. 87, being respectively the Montgomery and the Aberdeen Acts, shall be applicable to the entail, but it shall be provided that in exercising the powers of the Aberdeen Act the said Sir George Grant Suttie shall not be entitled to grant larger provisions to his younger children on the whole, including the provisions already granted by him as aforesaid, than he would have been entitled to grant had the estates remained under the existing entails, the provision already granted by him being held as so far exhausting his powers." In terms of this clause the new deed of entail does contain an express power in favour of Sir George to exercise all the powers conferred by the Act 5 Geo. IV. c. 87, and an express declaration that the £20,000 already granted in favour of younger children shall be held as granted in terms of the power, and as so far diminishing "my powers of granting future provisions to younger children."

It appears to me that clause sixth of the deed of agreement, and the express clause in the new deed of entail, which is in exact accordance therewith, are really quite conclusive on the question now at issue. So far from renouncing his right to grant further or additional provisions to his younger children, Sir George from first to last has expressly reserved his right to do so, and that up to the full extent of three years' free rents of the entailed estates. The deed of agreement so far from restricting this right continues it, and expressly provides that the new entail shall contain clauses fully recognising it, the only declaration being that the £20,000 already granted shall be held as partial exercise of the right, and to that extent but no further exhausting the powers—the powers remaining, however, entire so far as not partially exhausted. The result is that as three years' free rents have been now found to amount to the sum of £27,044, 19s., while the first bond in favour of the younger children only amounts to £20,000, the second or additional deed of provision dated 10th May 1875 must now receive effect, and that to the extent of £7044, 19s. I think therefore the Lord Ordinary's interlocutor should be adhered to.

Lord Young—The action is at the instance of the younger children of the late Sir George Grant Suttie, who died in June 1878, and is directed against his grandson, the present Sir George Grant Suttie, as heir of entail in possession of Prestongrange under an entail executed by his grandfather in 1865. The conclusion is for payment of a bond of provision for £20,000, made to the pursuers by their father in 1875; and the question is, whether under the bond and the entail the defender is due the amount in whole or in part? By the deed of entail itself the estate is charged with £20,000 in favour of the pursuers, due to them under a deed of provision made by their father in 1844, in fulfilment of his marriage-contract obligations to them; and the parties are agreed, and it is clear, that the bond of 1875 is, at most, good for only so much as (together with the sum of £20,000 already charged on the estate) will make up three years' free rent of Prestongrange at the time of the late Sir George's death, viz., £7044 19s.—three years' free rent at that time being £27,044, 19s. The question is, whether it is good for so much?

When the case was before me in the Outer House I thought it clear that the question depended exclusively on the consideration whether the bond sued on was, to the extent of £7044, 19s., within the granter's power by the deed of entail on which he possessed the estate at his death, and on which the defender now possesses it; and it being admitted and clear that it was, I gave decree against the defender for that sum. It was, indeed, argued to me, as it was subsequently to your Lordships, that the deed of entail must, for the purposes of this case, be disregarded if it was made out that it did not satisfy and fulfil the terms of an antecedent agreement between the maker of it and his three sons, in pursuance of which it professes and ought to have been made. I confess that I rejected this argument very summarily—First, because I thought the condition of it—viz., a supposed variance between the entail and the prior agreement—failed, there being, in my opinion, perfect harmony between them; and second, because as an opposite assumption I had no authority, in this action at least, to set aside the entail or reform it, but was bound to take it as it stands, and proceed on it as the sole and only title upon which the defender succeeded to and now possesses the estate.

I remain of the opinion on which I decided the case as Lord Ordinary.

The proceedings taken in 1865 for a disentail and immediate re-entail of the estate were of an intelligible and I should have said familiar character, although the motives are different in different cases. Here, besides the simplification of title by substituting one deed of entail for three such deeds and a contract of excambion, the unique motive was to avoid the risk of the estate passing out of the existing family on the failure of issue-male by calling, in case of such failure, the female issue of the family in preference to the heirs-male of the entailers outside the family, to whom under the existing entails the estate would in that event pass. It was a happy thought, from the existing family's point of view, that this might be accomplished by a disentail and re-entail, and it would have been passing strange if Sir George Suttie's three sons had hesitated to concur with him in the necessary formal proceedings, or demanded compensation for doing so. They could not be prejudiced, and the benefit designed was, in truth, to themselves exclusively—for it was, that should their male issue fail, their female issue should be preferred to strangers.

The estate was in the exceptional position of being unburdened. There were, however, certain marriage-contract obligations incurred with reference to the then existing entail under which rights might arise, and it was proper that these should be preserved and provided for, so that the creditors therein should take no prejudice by the contemplated proceedings whereby the estates were to be put under a new entail, This was agreed to be done by the third article of the agreement between Sir George and his three sons, which it is unnecessary to quote, and was in fact done by the deed of entail that followed. The three bonds to the same end were, in truth, necessary parts of the disentail procedure, in order to satisfy the requirements of the Entail Act and the practice of the Court, whereby contract obligations which are or may eventually come to be exigible, according to the entail, must be secured to the satisfaction of the Court before a disentail is authorised. It is almost superfluous to remark that these securities do no more than secure fulfilment of these contract obligations according to their legal exigencies, and that anything more would have been foreign to their purpose. It was conceded that they do not aid the defender, but, on the contrary, are adverse to his contention.

The disentail being duly authorised, the new deed of entail was executed in December 1865, and immediately thereafter recorded in the register of entails, the register of sasines, and the books of this Court. It has since formed the only title to the estate. The defender succeeded under it in 1878, and has no other title. Whether he may impeach it by reduction, and with what consequences in case of success, we cannot in this action decide, and so need not inquire. We must take it as his title to the estate, and subject him to any obligation which has according to its terms been lawfully put upon him. He has no title whatever under the agreement of 1865, which was executed in the sense of being fulfilled to the satisfaction of the parties thereto before he was born. In my opinion, the agreement was not departed from in any respect, but fulfilled in spirit and to the letter—although had it been otherwise it would have been nothing to the defender, the parties being at liberty to depart from it if they pleased. It was urged that the entail is a unilateral deed, and so it is, but only in the unimportant sense that a seller's disposition or a debtor's bond is so. Such deeds given and taken in fulfilment of a contract are, in the absence of anything to the contrary, assumed to have been adjusted and settled to the satisfaction of both parties to the contract, although executed by only one of them. Nor is a variance from an antecedent missive of agreement material, unless fraud or undesigned error in carrying out the wishes of the parties is alleged, in which case the variance may be evidence of more or less value, according to circumstances. Here the terms of the deed were, as the deed bears, adjusted and settled by a counsel selected for the purpose by the parties to the agreement on which it proceeds

and it has been recorded and acted on for fifteen years. And what is the argument on which in these circumstances we are asked to go outside the deed? It is this, that if it be assumed to proceed on a true construction of the antecedent agreement, we must make up our minds to accept the proposition that the late Sir James gratuitously agreed to gratify his father by benefitting himself—the alternative which we are asked to prefer being that he stipulated for a further benefit to himself at the cost of his younger brothers, who were also parties to the agreement. It is not apparently thought unreasonable to suppose that the younger brothers gratuitously concurred in the disentail, and even agreed to make a sacrifice of their provision as younger children to induce their elder brother to join them and their father in preferring the females of his own family to stranger males.

It was not suggested that Sir George had expressly renounced or limited his right to provide for his children to the extent of three years' rent, or that there were any words which *prima facie* implied such renunciation or limitation. The argument was of this sort—that having agreed to burden the estate immediately with £20,000 as the maximum marriage-contract provision to the younger children of James, he thereby consented that this burden should be taken account of in estimating the rental at his own death, on which the amount of the authorised provisions to his children should be estimated. But it is certain that the £20,000—let the estate be burdened with it never so clearly—was not to be payable or to bear interest till James died. In other words, James' younger children could take nothing till their father's death, and they were the only creditors in the burden. How such a burden could affect the free rental at Sir George's death was not explained. It existed as a contingent security, but was otherwise inoperative while James lived, and he might have survived his father half-a-century and then died without leaving any younger children. As it happened, he survived his father only six months, and he left a family—and he died without having paid off the provisions of his sisters and younger brothers. His son, who has succeeded to the family estate in infancy, has thus to pay at once two sets of provisions, the payments of which are usually separated by a generation. But the pursuers are not to be prejudiced by James' premature death and his infant son's early succession. Their right arose and vested on their father's death on 19th June 1878, and is to have three years' free rent of the estate estimated as at that date. James could not have urged the contingent burden in favour of his children (if he should have any) as a diminution of the rental, which was not in fact thereby diminished while he lived, and the matter is in no way affected by his early death and the consequent necessity of his son to pay two sets of provisions at once. James' younger children also will have their right, which is that they shall be paid £20,000 if three years' free rental at their father's death amounts to so much, as it probably does, seeing it amounted to £27,000 in the preceding June. There is a temporary hardship to the infant heir, against which is to be set the advantage in a money view—although it may be in that only—of an early succession.

LORD JUSTICE-CLERK—I concur in the result at which your Lordships have arrived, and to a large extent for the same reasons, but the ground on which I wish to place my opinion is the following—This question has arisen on the deed of agreement between Sir George Grant Suttie and his three elder sons; that deed of agreement stipulated for the execution of a new deed of entail, to be revised by a learned person named, and it was so revised, and was afterwards executed and recorded. Therefore I imagine that so far as the terms of that deed of entail are concerned, they constitute an interpretation or glossary by all the parties of any ambiguity in the agreement itself. Now, reading that deed of entail, which is the title of the defender, the heir in possession, I can find no ground for supporting the argument on which his contention proceeded. I think those terms are clear, and in this process and in this demand it is, in my opinion, first, impossible to get behind the terms of the deed of entail; and second, I think that we must accept the deed of entail as a statement by all parties of the true meaning and intention of the deed of agreement. On that ground I entirely concur in the judgment proposed.

MACKAY for pursuers pointed out that the Lord Ordinary had allowed interest only at the rate of 4 per cent., and asked that it be increased to 5 per cent. as ordinary legal interest in such cases.

LORD YOUNG—I recollect that when I was reporter in the First Division the same demand was made, and that Lord Mackenzie said, "Four per cent. is just as legal as five."

The Court adhered.

Counsel for Pursuers—Asher—Mackay. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Counsel for Defenders—Solicitor-General (Balfour, Q.C.)—W. J. Mure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, October 27.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DICKISON *v.* THE SCOTTISH PROVINCIAL ASSURANCE COMPANY.

Fraud—Agent and Client—Reduction.

In 1870 D., through his law-agent R., borrowed £1000 from M., on bond and disposition in security over house-property belonging to him. In 1876 R. fraudulently represented that M. desired payment of his money, and under a general authority from D. borrowed £1000 on bond and disposition in security over the same subjects from an Assurance Company, acting as agent for both parties in the transaction. R. thereafter did not pay the money to M., whose bond over D.'s property was not discharged till 1878, when a bond and disposition was granted to him by R.'s partner on the security of his own estate. R.'s firm having become bankrupt, their trustee