thinking that the sums awarded by the jury are excessive, and that a new trial ought to be allowed unless the pursuers consent to modify their claim to the amount indicated by your Lordship.

LORD SHAND—If this case had rested upon the letters alone, I should have had considerable difficulty in sustaining the verdict, for I think it might fairly enough have been said that the term "theftuous" was not used calumniously, but was intended to be a strong expression made use of by the defender for what he considered the pursuers' improper interference with his property. But not only is the charge repeated, but we have also the circumstances which accompanied it, namely, the defender going to the Police Office, and his preferring a charge against the pursuers. I think that the jury were entitled to find that the language used was calumnious. If that is so, then the question comes to be, Is malice proved? Now, I agree with your Lordships in thinking that the case, though a narrow one, has sufficient in it for the consideration of a jury, and the jury having considered the matter, I agree with your Lordships in thinking that their verdict ought not to be disturbed.

On the question of damages there can be no doubt that far too large an award has been made, and I think that the parties would do well to agree to the suggestions of the Court upon this point, and so avoid the expense of a new trial.

LORD LEE—I agree in the result at which your Lordships have arrived. I had some difficulty in coming to the conclusion as to the sufficiency of the proof of malice, and as to whether there was here such recklessness of consequences as to entitle the jury to infer malice. Upon the whole matter I am inclined to think that there was. The fact that the letter of 9th August which your Lordship has referred to was written by the defender after the explanation offered by the pursuers as to the cause of the removal of the gates is of great importance. The defender should have inquired as to the purpose of removing the gates before he used the expressions complained of, and if he made no inquiry on the subject before charging the pursuers with theft, that, I think, was negligence of such a kind as to warrant the jury in inferring malice.

The pursuers put in a minute restricting the damages to the amount suggested by the Court.

The Court refused the motion for a new trial, and pronounced the following interlocutors:—

(1) On the rule—"The Lords having heard counsel for the parties, in respect the counsel for the pursuers have agreed to restrict the amount obtained by the verdict of the jury to £40 for the pursuer James Ritchie and £25 for the pursuer Robert Ritchie, discharge the rule formerly granted, and refuse to grant a new trial: Find no expenses due to either party in discussing the rule."

(2) On the motion to apply the verdict—"The Lords of consent apply the verdict found by the jury, and decern against the defenders (1st) for payment of the sum of £40 to the pursuer James Ritchie, and (2d) for the payment of the sum of £25 to the pursuer Robert Ritchie: Find the defender liable in expenses."

Counsel for Pursuer—Young—Ure. Agents—Nisbet & Mathison, S.S.C.

Counsel for Defenders—Campbell Smith—Strachan. Agent—Party.

Friday, March 16.

FIRST DIVISION.

BUCHANAN, PETITIONER.

Entail—Disentail—Date of Entail—Statute 11 *and* 12 *Vict. c.* 36 (*Entail Amendment Act* 1848), *sec.* 28.

Trustees acting under the powers of a private Act of Parliament obtained in 1866, sold the lands of A, which were held under an entail dated 1784, and with the proceeds purchased the estate of T., and entailed it on the same series of heirs. In a petition for authority to record an instrument of disentail, presented by the heir of entail in possession of the estate of T.—*held*, under sec. 28 of the Entail Amendment Act 1848, that 16th July 1866, the date of the private Act of Parliament, was the date of the existing deed of entail of the lands of T.

The Entail Amendment Act 1848, section 28, provides—"For the purposes of this Act the date at which the Act of Parliament, deed, or writing placing money or other property under trust, or directing lands to be entailed, came into operation, shall be held to be the date at which the lands should have been entailed in terms of the trust, and it shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

By a private Act of Parliament, known as "Buchanan's Estate Act 1866," the late Major Herbert Buchanan, heir of entail in possession of the estate of Arden, in the county of Dumbarton, under a deed of entail granted by George Buchanan of Arden, dated and recorded in 1784, was authorised to sell that entailed estate, and to invest the proceeds in the purchase of land in Scotland to be entailed. Certain trustees were appointed by the Act, in whom the lands of Arden, free from the conditions, limitations, and clauses, irritant and resolutive, of the entail, together with certain unentailed lands, were vested, and who, in pursuance of its provisions, conveyed to different purchasers certain portions of the lands, and consigned the price, amounting to £49,000, in the Commercial Bank of Scotland. Of this sum £42,000 was subsequently applied by them in the purchase of the lands of Throsk and Popiltrees, in the county of Stirling, and a further sum of £1047 was expended in improvements on these lands. The balance, amounting to about £4507, was at the date of this petition deposited in the said bank at their branch at Dumbarton. A deed of entail was thereafter, in pursuance of the Act, executed by the trustees, in which the heirs of entail called to the succession of the lands of Throsk and Popiltrees were the same as those called to the succession of the estate of Arden by the disposition and tailzie of that estate. This deed was dated and recorded in 1869.

This was a petition presented by George Buchanan, heir of entail in possession of the estates, for authority to record an instrument of disentail of Throsk and Popiltrees. The petitioner succeeded his father Major Herbert Buchanan in 1882. He was born in 1860, and was unmarried. The three nearest heirs were his brother Herbert Buchanan and his sisters Elizabeth and Flora Buchanan. He set forth that being of full age and born after 1st August, and heir of entail in possession by virtue of a tailzie dated prior to 1st August 1848, no consent required to be obtained to the application. He further set forth that he was entitled to acquire the estate and the balance of consigned money in fee-simple, and for these purposes he made the present application to the Court in terms of the statutes 11 and 12 Vict. cap. 36, 16 and 17 Vict. cap. 94, 38 and 39 Vict. cap. 61, and relative Acts of Sederunt.

The Lord Ordinary (KINNEAR) appointed Mr J. H. Jameson, W.S., to be curator *ad litem* to Herbert, Elizabeth, and Flora Buchanan.

The curator *ad litem* lodged this minute—"The curator *ad litem* has examined the process, and objects to the petition as incompetent, in respect that the petitioner holds the entailed lands mentioned in the petition under a deed of entail dated after the first day of August 1848, and that the petition is not conform to the provisions of the Acts of Parliament 11 and 12 Vict. cap. 36, sections 1 to 3; 38 and 39 Vict. cap. 61, section 4; and 45 and 46 Vict. cap. 53, section 3, which regulate petitions for authority to disentail, and the curator *ad litem* craves the Lord Ordinary to be heard by counsel at the bar."

The Lord Ordinary on 19th February 1883 reported the petition to the First Division.

"*Note.*—The sole object of the Buchanan Estate Act appears to have been to substitute other lands for those originally entailed by the entail of 1784, but without making any change in the destination or in the conditions of the entail. For the accomplishment of this object it was necessary that a new deed of entail should be executed, but the legislation appears to have intended that the rights of the heirs under the new deed should be the same as under the old; and the Lord Ordinary would have been disposed to hold that the petitioner is in a position to disentail on the same conditions as if he had still held the estate of Arden under the original entail. But as the question is a novel one, it is undesirable that the validity of the disentail should depend upon the opinion of a single Judge; he has therefore thought it proper to report the petition to the Court. The case seems to be distinguishable from that of *Lord Dunmore* (3 R. 345)."

Authorities—Rutherfurd Act (11 and 12 Vict. cap. 36), secs. 27, 28; *Black* v. *Auld*, Nov. 5, 1873, 1 R. 133; *Fincastle* v. *Dunmore*, Jan. 14, 1876, 3 R. 345; 10 Geo. III., cap. 51, sec. 32; 6 and 7 Will. IV., cap. 42, sec. 5.

At advising—

LORD PRESIDENT — In the year 1866 the late Major Herbert Buchanan, the petitioner's father, was the heir of entail in possession of the entailed estate of Arden, in the county of Dumbarton, which he held under a deed of entail executed in the year 1784, and recorded in the same year. He applied in the course of 1866 for an Act of Parliament to enable him to sell that estate, having previously entered into a provisional agreement with a person of the name of Lumsden to buy one portion of the estate, and being desirous to sell the other portion as soon as possible, with a view, however, to reinvest the price in the purchase of other lands within Scotland. The purpose of the Act is quite sufficiently disclosed in the last paragraph of the preamble, which sets out "that it would be very advantageous to the said Herbert Buchanan, as well as to the heirs of tailzie entitled to succeed to him as aforesaid, if power were given to carry into effect the said agreement with the said James Lumsden for the sale of parcel first, as well as to sell parcels second and third of the said estate for the best prices that can be obtained therefor, and to invest the prices of the three several parcels of land in the purchase of other lands in Scotland, to be settled on and secured to the said Herbert Buchanan and the other heirs of tailzie appointed to succeed by and in terms of the said disposition and tailzie"—meaning the tailzie which I have already mentioned as executed and recorded in the year 1784. There are a number of clauses in the Act, which it is needless to refer to in detail, for the purpose of carrying out the objects stated in the preamble, and enabling Major Buchanan to sell the estate, to vest the prices in trustees, to remain in their hands until other lands should be purchased with that money. The trustees did buy lands in Scotland called Throsk and Popiltrees, in the parish of St Ninians and shire of Stirling, and there was a small balance over of something like £1000, which was uplifted in terms of the arrangement embodied in the statute by the heir of entail in possession. The trustees having purchased these lands, proceeded further, in pursuance of the Act and under authority of the Court, to execute a disposition and deed of entail of the lands which they had purchased in favour of Major Herbert Buchanan and the heirs whomsoever of his body, and the other heirs substituted as in the original entail; and that new entail is dated 20th and 23d February and 18th March 1869. The petitioner is now the heir of entail in possession of these lands of Throsk and Popiltrees, and he says that he was born on the 31st of January 1860, and is 21 years of age, and was born, of course, subsequent to the 1st August 1848. He alleges that being heir of entail in possession by virtue of a tailzie dated prior to the 1st of August 1848, and having been born subsequent to that date, and of full age, he is entitled to disentail the estate without any consent, and he appeals to the second section of that Act 11 and 12 Vict. c. 36, which enacts that "Where any estate in Scotland is held by virtue of any tailzie dated prior to the 1st of August 1848, it shall be lawful for any heir of entail born on or after the said first day of August, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate, in whole or in part, in fee-simple, by applying to the Court of Session for authority to execute, and executing, an instrument of disentail" without any consent of substitute heirs at all. Now, the whole question arises upon a suggestion that was made by the curator *ad litem* of the minor heirs of entail, that the entail in this case cannot be held to be an entail executed prior to the 1st of August 1848, but, on the contrary, is of a much more recent

date, viz., the date of the Act of Parliament which enabled Major Herbert Buchanan to sell the old entailed estate, and with the price of that entailed estate to buy other lands in Scotland to be entailed. I am of opinion that the old entail is not the entail of this estate, and that seems almost something like a truism at first sight. It is not the existing entail. It contains a conveyance of the lands of Arden, and it subjected the heirs who succeeded to the estate of Arden to the fetters of a strict entail. But Arden is fee-simple and not under the fetters of the entail, and the only lands that are entailed now are those lands which were bought under the Act of Parliament of 1866. They have no connection with the old lands—they are even situated in a different county—and how the entail of 1784, which entailed the estate of Arden in Dumbartonshire, can be held to be the deed of entail of the estate that the petitioner now holds in Stirlingshire it is not very easy to see. But the truth is, this matter is quite settled upon the construction of the 28th section of the Act 11 and 12 Vict., which provides —"For the purposes of this Act the date at which the Act of Parliament, deed, or writing placing money or other property under trust, or directing lands to be entailed, came into operation, shall be held to be the date at which the lands should have been entailed in terms of the trust; and it shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail." The case of *Lord Dunmore*, which occurred in this Division of the Court not a great many years ago, and the previous case of *Black* v. *Auld*, I think, are conclusive authorities on the question before us. It appears to me not to admit of serious doubt that the date of the existing deed of entail of the lands of Throsk and Popiltrees in the county of Stirling is the date of the Act of Parliament which received the royal assent upon the 16th of July 1866.

Lord Deas—I concur in the opinion which your Lordship has given.

Lord Mure—I am quite of the same opinion. I think the estate is held by the express words of the Act of Parliament under a new entail, and a different entail altogether from that which existed in 1784 as regards the estate of Arden.

Lord Shand—I entirely concur. The question turns exclusively, I think, upon the effect of the 28th section of the Act of 1848, and I think, in terms of that section, it is quite clear that the date of this entail is the date of the Act of Parliament providing that the lands shall be entailed. The effect upon the petitioner might have been saved if the private Act of Parliament had in one or other of its clauses declared that any new entail of the lands to be bought in lieu of those which had been sold should be taken as of the date of the old entail; but there is no clause of that kind, and that being so, the case must be ruled by the Act of 1848.

The Court remitted to the Lord Ordinary to refuse the petition.

Counsel for Petitioner—Jameson. Agent—F. J. Martin, W.S.

Counsel for Respondents—Begg. Agent—J. H. Jameson, W.S.

HOUSE OF LORDS.

Monday, March 19.

(Before the Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

FLEMING *v.* NEWPORT RAILWAY COMPANY.

(*Ante*, Nov. 12, 1879, vol. xvii. p. 93, 7 R. 179.)

Superior and Vassal—Feu-Contract—Railway—Access—Railway Clauses Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 6.

A railway company having obtained an Act enabling them to pass through certain lands, served a statutory notice to take part of a field which the proprietor was engaged in feuing. Before the notice was served the proprietor had granted a feu of part of the field as laid down on a plan referred to, "with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned," which reserved power was "full power and liberty to vary and alter the said plan or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The railway was not formed for five years after this feu was granted, during which time there was an access for carts across the part of the field on which the railway was to be formed, but there was no road. When the railway was formed the vassal claimed compensation under section 6 of the Railway Clauses Consolidation Act 1875, on the ground that the operations, though they did not touch his feu, were injurious, as they cut off the existing access and prevented the superior from making the roads he was bound to make under the feu-charters. *Held* (*dub.* Lord Chancellor) (*aff.* judgment of First Division) that as the superior was not bound under the feu-contract to construct a road, the vassal had no claim under section 6 of the Act against the company.

Observed (*per* Lord Watson) that if the vassal's feu-right had conferred a right to have the street opened up at a future date, the superior's reservation of power to alter the feuing plan would have afforded the company no answer to the vassal's claim for compensation.

In Court of Session November 12, 1879, *ante*, vol. xvii. p. 93, and 7 R. 179.

Mr and Mrs Fleming appealed to the House of Lords (suing *in forma pauperis*).

Mr Fleming was heard in person in support of the appeal, and counsel for the respondents were also heard.

At delivering judgment—

Lord Blackburn—My Lords, in this case the majority of the First Division of the Court of Session (Lord Deas dissenting) pronounced an interlocutor affirming that of the Lord Ordinary (Rutherfurd Clark) interdicting the appellants from proceeding with a claim against the railway company for compensation in respect of their lands having been injuriously affected within the meaning of the Railways Clauses Consolidation Scotland) Act.