Charles Ker and her two sons should discharge their respective rights under the marriage-contract. It is perhaps open to argument whether the sons could do so on the ground that no right under the marriage-contract has yet vested in them. But assuming that such rights have vested, and could now be validly discharged, I am of opinion that no such discharge can validly be granted by Lady Charles Ker. Her right of liferent is a marriage-contract provision, which, *stante matrimonio*, she can neither alienate nor discharge. I think that was conclusively settled in the case of *Menzies* v. *Murray*, a decision which, in my opinion, rules the determination of the first question now put to us. The second question presents a distinction between the present case and the case I have just referred to. There is practically here an offer to purchase for Lady Charles an annuity equal in amount to that provided to her under the marriage-contract. In *Menzies*' case there was no such offer. This, however, does not affect my opinion that the second question also should be negatived. Such an annuity as is offered to be purchased for Lady Charles would not secure her provision to her as the marriage-contract does. In the first place, the value or security of a purchased annuity depends on the stability of the office or insurance company which grants it; its insolvency would render the annuity valueless. This, I admit, is a very remote contingency to provide against, but so long as the trustees hold the marriage-contract fund no such contingency could arise. The security of the trust funds held by the trustees is therefore greater than that afforded by a purchased annuity. But granting them to be equal as regards the security for the full and regular payment of the annuity, they are very unequal in security in another and more important respect. A purchased annuity could be disposed of by Lady Charles, which would just be another way of alienating her marriage-contract provision. I think she has by the marriage-contract placed herself in a position which protects her, as Lord Deas said in *Menzies*' case, "against marital influence on the one hand, and self-sacrifice on the other," and that that protection cannot now be surrendered or impaired by her.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered both questions in the negative.

Counsel for the First Parties—Rankine—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second and Third Parties—D.-F. Asher, Q.C.—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 13.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

TAYPORT LAND COMPANY, LIMITED *v.* DOUGALL AND OTHERS.

Superior and Vassal—Feu-Charter—Reduction—Singular Successor—Implied Entry—Trust—Trustees—Ultra Vires—Prescription.

A body of trustees, "as authorised by" a private Act of Parliament, granted a feu-charter of a plot of ground, declaring that the charter was granted only in so far as consistent with the said Act, and that the piece of ground was feued in terms of, and subject to all the conditions of, the said Act. They further granted warrandice only in so far as consistent with the said Act.

The vassal, after possessing the feu and paying the feu-duty for more than twenty years, disponed the feu to a third party, who raised an action of reduction of the feu-charter against the trustees on the ground that it exceeded the powers conferred on them by the Act of Parliament, in respect that it feued a larger piece of ground than the Act permitted.

Held (*aff.* judgment of Lord Moncreiff, though for different reasons) that the defenders must be assoilzied, on the grounds (1) that even if the feu-charter were reduced, the pursuer would still continue to be a vassal of the superior by virtue of the disposition to him and his implied entry under the Conveyancing Act 1874; (2) that inasmuch as the feu-charter contained an express reference to the statute, neither the first vassal, nor the pursuer in his right, could challenge its validity on the grounds set forth in the action; (3) that for the same reason the pursuer could not challenge the disposition to him by the first vassal.

Opinion that the plea of positive prescription could not in the circumstances be maintained by the trustees as excluding inquiry at the vassal's instance into the validity of his title.

In 1857 Mrs Elizabeth Kinnear Heriot Maitland Dougall and others, the Scotscraig trustees, obtained a private Act of Parliament, styled "The Scotscraig Estate Act 1857," empowering them to feu certain detached portions of the estate of Scotscraig. The Act provided that the lands feued under its authority "shall only be feued for houses, buildings, erections, yards, enclosures, and gardens, in parcels to an extent not greater than one imperial acre and a half or thereby for each feu."

In 1867 the trustees, with consent of Mrs Maitland Dougall, the liferentrix of Scotscraig, feued to David Stewart Littlejohn and James Henderson, Dundee, two pieces of ground, each of the extent of one acre, three roods, six poles, and seven yards or

thereby of imperial measure. The feu-charters bore to be granted by the trustees, "heritable proprietors of the subjects after disponed, and as authorised by" the Scotscraig Estate Act 1857. They further contained a clause "declaring that these presents are granted only in so far as consistent with the Scotscraig Estate Act, and that the said piece of ground is hereby feued in terms of and subject to all the conditions of the said Act." The clause of warrandice was as follows:—"And we, as trustees foresaid, with consent foresaid, grant warrandice as accords in so far as consistent with the said Scotscraig Estate Act."

The feuars continued to possess the feus and to pay the specified feu-duties till November 1888, when, in consideration of the sum of £1000, they disponed both the feus to the Tayport Land Company, Limited, who recorded the disposition in the Register of Sasines, entered into possession of the feus, and paid the feu-duties, until in June 1894 they intimated to the defenders' factor the fact of their removal therefrom and their refusal to pay any further feu-duties.

On 25th March 1895 the Tayport Land Company raised an action of reduction against the Scotscraig Trustees, for the purpose of reducing the feu-charters granted by the latter to Littlejohn and Henderson in 1867, as having been "made and executed to their great hurt and damage."

The pursuers averred that in the course of 1894 they had ascertained that the feu-charters were inept and invalid, as being *ultra vires* of the trustees, in respect that the trustees were only empowered to grant feus of an acre and a half each, while they had actually granted feus of one acre, three roods, six poles, and seven yards.

The pursuers pleaded, *inter alia*—"(1) In respect the said feu-charters were made *ultra vires* of the grants thereof under the Act of Parliament, they are invalid and ineffectual to constitute feu rights of the pieces of ground in question, and ought to be reduced."

The defenders averred that Littlejohn and Henderson were members of the Tayport Land Company, that the action was a device on the part of Littlejohn and Henderson to get rid of the feu-duties, and that the company was formed solely for their benefit, and with the view of the present action being raised.

The defenders pleaded, *inter alia*—"(2) No relevant case. (3) On a sound construction of 'The Scotscraig Estate Act 1857,' the said charters being unchallengeable, the defenders should be assoilzied from the conclusions of the action, with expenses. (4) The pursuer and the pursuer's authors having possessed the ground contained in said charters on *ex facie* valid irredeemable titles, recorded in the appropriate Register of Sasines for the space of more than twenty years continually and together, peaceably and without any lawful interruption made, and *separatim*, they having accepted said charters from the defenders, the pursuer is barred from insisting in the present action of reduction and declarator."

On 17th July 1895 the Lord Ordinary (MONCREIFF) pronounced decree of absolvitor, with expenses.

Note.—. . . "Put baldly, the question is, whether when the trustees are empowered to grant feus of an acre and a half or thereby, the grant is to be set aside after an interval of twenty years because the extent of the feu granted was an acre and three-quarters, and this not at the instance of a beneficiary, but because the feuar wishes to be quit of his bargain? When a purchaser, having equally with the seller means of forming an opinion as to the powers of the seller, accepts a feu, there is much force in the plea that he is personally barred from raising such an action. But passing from that, the words 'or thereby' are usually somewhat narrowly construed, as, for instance, the case of *Yeaman* v. *Gilruth*, 1792, Hume's Dec. 783. In that case the Court, in confining the expression to 'minute errors or fractional deficiency,' may have been partly influenced by the consideration that, in their opinion, the gross rent was fixed with reference to the particular number of acres specified. Here there is not the same necessity for such a rigid construction, and there may have been reasons which at this distance of time it may not be easy to establish, such as the position and shape of the ground, which led to and justified feus of that exceptional extent being granted. Still, an addition, equal to one-sixth of the whole extent permitted by the Act, is somewhat liberal, and I prefer to rest my judgment on other grounds. I am of opinion that the pursuers' case is excluded by prescription, which operates in more ways than one. The pursuers' authors and themselves have possessed the ground in question for more than twenty years upon *ex facie* valid titles, and therefore by force of the Acts 1617, c. 12, and the Conveyancing Act of 1874 (37 and 38 Vict. c. 94), sec. 34, the titles to their feus are unchallengeable.

"Therefore, the sole ground of reduction, viz., that the feu-charters are invalid, entirely fails; and the pursuers have no valid excuse for refusing to pay the feu-duties stipulated for in their titles, to which feu-duties again the defenders have prescriptive right.

"The pursuers' counsel argued that the feu-charters are not *ex facie* valid, in respect that they bear to be granted under the authority of the Scotscraig Estate Act 1857, and that when that Act is examined it is seen that the feus exceed the dimensions permitted by the Act. This contention, in my opinion, is unsound, and there is ample authority against it. On the face of the deeds there is nothing to show that they are inconsistent with the powers conferred by the Scotscraig Estate Act. The object of the positive prescription is to prevent inquiry into the validity of the warrants on which a grant of lands proceeds, and there is no authority for importing by reference into a feu-charter the terms of an Act of Parliament in virtue of which it bears to have been granted. To cite one authority, the case of the *Duke of Buccleuch*

v. *Cunningham*, 5 Sh. 57, is directly in point. In that case the defender's titles bore that the Crown had right to the superiority of the lands disponed by virtue of the Act of Annexation, 1587, c. 29. After the lands had been possessed for upwards of forty years the right of the holder was challenged, on the ground that in the Act of Annexation there is an express exception of the right of the Crown to lay patronages; that therefore the titles were inept, being derived *a non habente potestatem*, and that as the Act of Annexation was a public statute, and reference was expressly made to it in the charter, the defender must be held to have known that his titles were derived *a non habente potestatem*. But the case for the pursuer was held to be untenable. The judgment proceeded on the ground that, the title being *ex facie* valid, it was not permissible to read into it the terms of the Act of Annexation, which, if read in, would have shown that the grant was *ultra vires*.

"The pursuer's counsel also maintained that prescription was interrupted by the minority of the beneficiaries. But as prescription was running against the trustees, the minority of the beneficiaries, whose right by the terms of the trust were contingent, does not fall to be deducted—*M'Lennan* v. *Menzies*, 1756, M. 11,160. Besides, the plea of minority is personal, and as the whole of the existing beneficiaries (who are now of age) are defenders in the present action, and have not only defended the action, and thus taken the first opportunity of disclaiming any intention of challenging the pursuer's right, but have lodged a minute in process expressly stating their intention not to do so, it may be urged that that objection is not open to the pursuers. It is not necessary, however, to rely on this.

"It was also maintained that prescription cannot validate a breach of trust. That, again, is not a plea which is open to the pursuers. If their right to their feus has been validated by prescription running against the trustees, it does not matter to them what claims of damages the beneficiaries may have against the trustees. Prescription will not protect trustees from the consequences of a breach of trust against a claim at the instance of a beneficiary, and they will not be entitled to retain trust property or profit for their own benefit so obtained. But it does not follow that the party in whose favour a charter of part of the trust-estate has in breach of trust been granted, and whose right has been fortified against all concerned by the running of prescription, is entitled to found upon the breach of trust for the purpose of getting rid of his bargain when his right is not challenged either by the trustees or by the beneficiaries.

"On the whole, I am of opinion that the defenders should be assoilzied."

The pursuers reclaimed, and argued—The title here was not an *ex facie* valid irredeemable title in the sense of the Conveyancing Act 1874. It was expressly granted subject to the conditions of the Scotscraig Act. One of the conditions imposed by that Act was a limitation, not of the grant itself, but of the power of the granter; and that statutory limitation was necessarily imported into the feu-charter. But if it was so imported, it must be interpreted strictly as being imposed by Act of Parliament, and not by a private deed—*Stewart* v. *Burn Murdoch*, January 27, 1882, 9 R. 458. Consequently the words "or thereby" in the Scotscraig Act must be construed narrowly as in *Yeaman* v. *Gilruth*, 1792, Hume's Decisions, p. 783; and in granting the feu-charter the trustees must be held to have exceeded their powers.

Argued for the respondents—(1) The Lord Ordinary was right on the question of prescription. The case was precisely parallel to that of *The Duke of Buccleuch* v. *Cunynghame*, November 30, 1826, 5 S. 57, and that of *Macdonald* v. *Lockhart*, December 22, 1862, 5 D. 372, where the reference in the entail to the prior marriage-contract was at least as strong as anything in the present feu-charters incorporating the limitations on the power of the trustees. The very object of prescription was to exclude the inquiry whether the granter of a title had power to grant it or not—*Lord Advocate* v. *Graham*, December 10, 1864, 7 D. 183, *per* Lord Moncreiff, p. 205. (2) The limitation of the power of the trustees was not incorporated in the feu-charter in the manner prescribed by the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sec. 32, and was not valid against singular successors—*Tailors of Aberdeen* v. *Coutts*, 3 Rob. App. 296. (This point was argued in some detail, and with special reference to the Scotscraig Estate Act; but as it was not decided by the judgment of the Court, the argument need not here be set forth *ad longum*.) (3) At all events, the words "or thereby" should be liberally construed. (4) Apart altogether from prescription, the pursuers were not entitled to renounce the feu-charter, having taken the disposition with their eyes open.

At advising—

LORD KINNEAR—I think the Lord Ordinary's interlocutor is well founded, although I am not prepared to assent to all the reasons which his Lordship has given in support of it.

The pursuers seek for reduction of two feu-charters, dated in 1867, as having been "made and executed to their great hurt and prejudice." But they were not parties to the contract in performance of which the charters were granted; they do not represent either of the parties; and they do not allege any antecedent right or interest in the lands. Their case is that, in 1888, twenty-one years after the execution of the charters, they purchased the lands from the original feuars for a sum of £1000, and accepted a disposition, which they recorded in the Register of Sasines. It follows that if they have been prejudiced, it is not by the making and execution of the charters, but by a subsequent contract of purchase and sale, to which the granters of the charters were no parties. But they do not complain of the transaction by which they

have been brought into the position of vassals. They do not propose to reduce the contract, or the disposition by which it was carried into effect. If they obtained decree, therefore, the original charters which form the foundation of their title would be reduced, but they would still continue to hold the lands of and under the defenders as superiors, by virtue of charters by progress, because the registration of the disposition in their favour is equivalent to infeftment and entry by confirmation, and neither the infeftment nor the entry would be touched by the decree. This would be a fatal objection to the present action if the pursuers' case were otherwise well founded. They cannot obtain a decree which would impugn the validity of the feu right without effectually clearing the record; and it is unnecessary to say that a general conclusion for the reduction of all that may have followed upon the charters would be totally unavailing to strike a recorded deed out of the Register of Sasines. But it is evident from the condescendence that this is not merely a technical defect in the structure of the summons. The objection goes to the very foundation of the pursuers' case on the merits. For they have alleged no ground in fact or law on which they could pretend a right to set aside their contract with the sellers, or to reject the title which has been given to them in fulfilment of it, and which they have in fact accepted. The Lord Ordinary suggests that the pursuers are practically the same persons as the sellers. But the facts to which his Lordship refers are not before us; and in a discussion on relevancy we must take their own account of themselves and their relation to the other parties to be correct, Now, they represent themselves to be perfectly independent purchasers from the original vassals. Their complaint is that the defenders, who hold the estate of Scotscraig in trust, have exceeded the power to feu conferred upon them by a private Act of Parliament—the Scotscraig Estate Act—inasmuch as the Act authorises them to feu "in parcels to an extent not greater than one imperial acre and a half or thereby," whereas each of the feu-charters in question bears to feu a piece of ground extending to an acre and three-quarters. The defenders answer that the deviation of a quarter of an acre from the fixed standard does not exceed the reasonable latitude allowed by the qualifying words "or thereby," and they point out that such decisions as that referred to by the Lord Ordinary, where these words were used with reference to a specific area which had been actually measured, and were intended to allow for errors of measurement and nothing else, can have no bearing on their construction when they are used to regulate the discretion of trustees in the administration of a feuing estate. This answer is at least plausible, but I express no opinion as to its validity on the one hand or the merits of the objection on the other, because the persons who would have a title to impugn the charter on this ground are not now before us, and would not be bound by a decision in this action if they are not bound by the actings of the trustees. I assume, therefore, for the present purpose, although I am by no means satisfied, that the charters may be challengeable at the instance of the fiar to whom the estate of Scotscraig may open on the expiry of the liferent. But this infirmity of the pursuers' title, if it exists, does not arise from any failure or breach of contract on the part of their vendors. It is a quality of the right which formed the subject of the contract of sale; and on their own showing, it is a quality which is patent on the face of the charters, and was perfectly well known to them when they made the purchase. For they aver, and it is the fact, that each of the feu-charters contains a clause "declaring that these presents are granted only in so far as consistent with the Scotscraig Estate Act, and subject to all the conditions of the said Act," and therefore the original vassals, and purchasers who may acquire right from them are duly certiorated that the authority of the granters is defined by the Act of Parliament, and further, that they do not undertake to warrant the validity of the grant except in so far as it may be consistent with the Act. The purchaser of a feu-right so constituted cannot set aside his contract on the ground that he has discovered an inconsistency between the Act of Parliament and the grant, because the bargain is that he shall take the title subject to that inconvenience. The pursuers do not allege that the Act of Parliament was withheld from them, or that there was any material error or any concealment or misrepresentation which would enable them to avoid the contract. They do not even aver explicitly that they were not perfectly well aware before the contract was completed of the alleged discrepancy between the charter and the Act of Parliament. What they say is, that in the course of last year they ascertained that, and that may perhaps imply that they did not know it before. But we must assume that the charters and the Act of Parliament were both before them. They either read the Act or took the risk of what it might contain, and they cannot be allowed to say, after they have accepted a conveyance, that anything the Act contains is a new discovery to them. Accordingly they do not attempt to set aside the contract of sale, and they do not allege any ground on which they would be entitled to do so. The assumption of the action is that the sale is perfectly valid and binding, and consequently that they were required to accept and record a conveyance, and so take over the land with its liabilities and enter with the superior in place of the disponers, because otherwise they would have no title or interest to complain of the charters. They have no contract with the superior except that which they have made by entering to the lands, in accordance with their obligation to the original vassal. But they cannot be bound to the vassal disponing to accept the title as it stands, and at the same time entitled to reject it as insufficent, and set it aside as against the superior, because they have no right against the superior

except that which they derive from the disponers, and that is only the right to enter in room and place of the disponers under the charter as it stands. There is no suggestion on record that the original vassals could have set aside the charters. It appears that they continued to possess for twenty years without raising any question whatever as to their liability as vassals, and we are bound to assume, in the first place, that their title expresses exactly the terms of the contract on which they agreed to take the lands, and secondly, that they were perfectly well aware when they accepted it of everything that is contained in the Act of Parliament, and therefore that they had no right to complain of the defect which the pursuers allege. But if that be so, the original vassals cannot get rid of their liability except by finding a disponee to take their place. But the disponee can have no other right as against the superior but that of the disponer in whose place he stands, and therefore it seems to me to be out of the question to maintain that he can reduce a feu-charter which was unimpeachable at the instance of the disponer, and so to extinguish the feu-right and relieve the disponer, as well as himself, of all liabilities of the contract of feu. But I do not think their case would be better if we were to assume, contrary to the fair implication of their own statement, that they were entitled to get rid of their contract as against the original vassals. They appear to me to be in this dilemma. If the contract with the original vassals is unimpeachable they have no ground of complaint, because they have obtained exactly the right which they contracted to purchase. If, on the other hand, they are entitled to get rid of the contract of sale and its consequences, their remedy is to reduce the dispositions on which they are entered, and in that case they have no concern with the lands, and no title or interest to object to the charters.

On the whole, therefore, I am unable to see any tenable ground on which the action can be supported.

In the view I have taken, the question whether the pursuers' right has been validated by the positive prescription does not arise, and I think we should not consider it, both because it is not necessary to the decision of the case and also because it cannot in my opinion be well raised or effectually decided between the parties to this action. It can only arise on the assumption that the defenders have in the first place exceeded their powers by including too large an area in one feu, and in the second place failed to protect the trust-estate by importing the conditions of the statute into the title which they granted to the pursuers' authors, in such a way as to make them binding upon singular successors, because it is obvious that the vassal cannot prescribe against his own title, and therefore cannot acquire a right inconsistent with the conditions of the Act of Parliament if these have been well expressed in the title. Accordingly, to enable the defenders to maintain their plea of prescription, they found it necessary to argue that the conditions of the Act of Parliament have not been made to affect the title, because they have not been so expressed as to satisfy the requirements either of the Act itself, which prescribes the method by which its conditions are to be made effectual, or of the general law established by the Conveyancing Statute. I doubt whether the trustees have any title to state that plea. The assumption is the argument that the pursuers' title may be challenged as *ultra vires* of the trustees at the instance of some future beneficiary who will not be bound by their actings, or by the concurrence of all the existing beneficiaries in the defence stated in this action. But, if such a hypothetical beneficiary, at whose instance the title might be challenged, is not bound by the acts of the trustees, he will not be bound by a judgment pronounced upon a plea stated by the trustees to support their acts. I should, therefore, have thought that, if the trustees were otherwise entitled to insist in their argument founded upon prescription, this is not a competent action for its disposal, because the judgment would not afford a conclusive answer to the beneficiary whose challenge is assumed as the ground of the trustees' title to maintain the argument in question.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuers—H. Johnston—W. Campbell — Cullen. Agent — James S. Sturrock, W.S.

Counsel for the Defenders — Dundas — Craigie. Agents—J. W. & J. Mackenzie, W.S.

Friday, December 13.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeenshire.

GILL *v.* CUTLER.

Jurisdiction—Sheriff—Foreign—Interdict.

A firm of paint manufacturers in Aberdeen, who had taken out a patent for a paint for gilding, raised an action of interdict in the Sheriff Court against a firm of painters and colour merchants in Aberdeen, to prohibit them from making, using, and selling a certain paint which they alleged was an infringement of their patent. This paint was manufactured in Birmingham, and the Birmingham manufacturer craved to be sisted as a defender in the action, on the ground that he had the real interest in opposing the patent. He was accordingly sisted, and thereafter the original defenders withdrew from the action, interdict being pronounced against them of consent. The action then proceeded against the remaining