appellant the whole obligations and liabilities undertaken by the lessees in the lease or minute of agreement libelled, dated the 4th, 9th, and 14th of November 1870, and also the whole obligations and liabilities undertaken by them in the minute of agreement libelled, dated the 1st of August and 13th of December 1877, excepting only such obligations and liabilities as are contained in the 13th article of the said minute; and also that the respondents William Mackinnon and Nathaniel Spens, as liquidators of the said Monkland Iron and Coal Company, Limited, are bound to make due provision for implementing and fulfilling the foresaid obligations and liabilities, and for that purpose to set aside the surplus assets of the company remaining in their hands at the time when this action was raised, or so much thereof as may be necessary for implementing and fulfilling said obligations and liabilities; and also that the appellant ought to have decree against the respondents for the expenses of process incurred by him in the Court of Session, after the 30th of October 1884; that subject to these declarations, the cause be remitted to the Second Division of the Court of Session; and that the respondents do pay to the appellant his costs of this appeal.

Counsel for Pursuer (Appellant)—Sol.-Gen. Asher, Q.C.—Dundas. Agents—W. A. Loch, for Dundas & Wilson, C.S.

Counsel for Defenders (Respondents)—Lord Adv. Balfour, Q.C.—Ure. Agents—Grahames, Currey, & Spens, for Mackenzie, Innes, & Logan, W.S.

Tuesday, June 29.

(Before Lord Chancellor Herschell, Lords Blackburn and Watson.)

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

(Ante, xxi., p. 647, 20th June 1884.)

Parent and Child—Legitim—Discharge of Legitim—Antenuptial Contract of Father—Heir-Apparent—Aberdeen Act (5 *Geo. IV. c.* 87)—*Entail Amendment Act* 1848 (11 *and* 12 *Vict. c.* 36).

By antenuptial contract of marriage an heir of entail in possession bound himself and the heirs of entail who should succeed him in the entailed estates to pay to the child or children of the marriage, other than and excluding the heir who should succeed to him in the entailed estates, certain provisions. Tutors and curators were appointed to such of the children of the intended marriage as should be in pupillarity or minority at the husband's death, and they were directed to maintain and educate suitably the heir who should succeed him, and keep up an establishment for him till he reached majority; "which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, security," &c. The eldest son of the marriage succeeded under the entail and also claimed legitim. *Held* (*aff.* judgment of First Division) that the marriage-contract contained no provision for him in lieu of legitim, and therefore that he was not excluded by the contract therefrom. *Held*, further, that the provisions for children made by the father in his marriage-contract under the Aberdeen Act not being or being capable of being (without the father's consent) available to the eldest son, they were not effectual to confer an interest in him under the contract in consideration of which legitim could be excluded; and (2) that assuming that under the Entail Amendment Act 1848 the father could have disentailed the estates, a right to share in the marriage-contract fund provided to children would not thereby have been conferred upon the heir, and therefore that in no view was anything provided under the contract in his favour in discharge of legitim.

This Case is reported in Court of Session, *ante*, vol. xxi., p. 647, June 20, 1884, 11 R. 1013.

The defenders appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, this is an appeal against certain interlocutors of the Lord Ordinary and the Court of Session, holding that the respondent was entitled in name of legitim to one-half of the free moveable estate of his father.

It seems clear that the respondent is entitled to his claim of legitim unless that claim has been expressly excluded by the marriage-contract of his parents. The question therefore is, whether the clause in the marriage-contract, which undoubtedly excludes legitim in the case of the other children of the marriage, excludes it in the respondent's case also. The clause is in these terms:—"Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry, and everything else that they could ask or claim by and through the decease of their said father, or the predecease of their mother, any manner of way, their father's goodwill excepted."

Now, I fully agree with what was said by more than one of the learned Judges in the cases of *Maitland* v. *Maitland*, Dec. 14, 1843, 6 D. 244, and *Keith's Trustees* v. *Keith*, July 17, 1857, 19 D. 1040, that the words "the children of the marriage" in such a clause are general words *prima facie* applying to all the children of the marriage. It strikes me, too, that the object of such conditions in a marriage-contract is, as was said by Lord Curriehill in *Keith's Trustee's* v. *Keith*—"to fix the amount of what the wife and the issue are to have right to claim from the estate of the husband and father, leaving all the rest at his own disposal. The party in whose favour the discharge of the legitim is intended to operate," he continued, "is the father himself and not any of the children; and it would be a strange result if a condition intended to relieve the father's estate from a claim of legitim should leave his estate still subject to that claim, and merely transfer the right to it to the heir of the marriage. Such a construction cannot be put on such a clause unless it will not fairly admit of a more reasonable reading." I confess, therefore, I approached the construction of the settlement

with the expectation of finding some provision conceived in favour of all the children of the marriage. I do not think this necessarily means a provision for a money payment. If, under the terms of the settlement any rights were conferred upon the eldest son to which he would not otherwise have had a legal title, it appears to me that this would properly be described as a provision conceived in his favour. But upon a careful consideration of the arguments urged at the bar I have been unable to arrive at the conclusion that any right has been acquired by the respondent to which he could not otherwise have laid claim, and I think it follows upon a true construction of the clause relating to legitim that his right to legitim is not excluded.

In the arguments urged on behalf of the appellants reliance was first placed on the provisions relating to the education and maintenance of the heir. But these do not secure to him any right to which he was not otherwise entitled. Next it was said that even though the respondent was himself excluded from the pecuniary provision made for the children of the marriage, he still came within the terms "children procreated of the intended marriage," and that if he had predeceased the Earl having made a settlement by marriage-contract, his representatives might have obtained in certain events the benefit of the provision. I desire to reserve my opinion whether if a settlement had been lawfully made upon his marriage and he had predeceased his father, the children of such marriage might have obtained the benefit of a portion of the sum charged on the entailed estates. It is not in my opinion necessary for the determination of the present case to decide that question. For it appears clear that such a marriage-contract by a child cannot be validly effected without the consent of the father. And the late Earl of Kintore came under no obligation by the marriage-contract which we have to construe to give his consent. I think it is impossible to say that a provision in the settlement which could only become effectual so far as the respondent was concerned by the subsequent consent of the settler, which consent the settler was free to give or to withhold, is a provision conceived in favour of the respondent within the meaning of the clause excluding legitim.

The remaining argument of the appellants was that a provision was secured to the respondent by the settlement in case his father disentailed the estates under the Rutherfurd Act. It was urged that in that event, not being excluded as "the heir succeeding" to the entailed estates, he would have been entitled to share as one of the children of the marriage. I am not prepared to say that under no form of settlement could such an argument prevail. I desire to leave the point open for consideration should it hereafter arise. But the effect of bringing in the heir in the case of a settlement, couched in the terms of that now in question, might be to increase the amount of the charge, and I do not think it is possible to hold that the burden upon the entailed property or the subsidiary obligation on the settler's heirs and successors could be increased by the disentail. I think, therefore, that a construction which might involve such a consequence cannot prevail.

I think that there is no sufficient ground to support the contention that the claim of legitim has been barred by acquiescence. Upon the whole, therefore, I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN—My Lords, at the close of the argument I had come to the same conclusion at which the Lord Chancellor has arrived, and since the case was argued I have had an opportunity of reading in print the opinion of my noble and learned friend Lord Watson, which will be delivered directly, and in it I agree so thoroughly that I do not think it necessary to add anything.

LORD WATSON—My Lords, it has not been disputed that according to the law of Scotland a child's claim to legitim cannot be barred by inference, but only by direct renunciation, or by express exclusion of the right in the ante-nuptial contract of the parents. In the present case I think the Lord Ordinary and the Judges of the First Division were right in holding that the clause of exclusion occurring in the marriage-contract of his father, the late Earl of Kintore, dated the 23d June 1851, does not expressly bar the respondent's claim, unless it can be shown that by the terms of the contract the respondent took some pecuniary or other benefit which can in a reasonable sense be considered a "provision" within the meaning of the clause.

I am also of opinion, and for the same reasons which were assigned by the Judges of the Court of Session, that an exercise of the *patria protestas*, consisting in the appointment of tutors to a pupil heir of entail in possession, with directions as to his religious education and his maintenance out of the rents of the entailed estate, does not constitute in any proper sense a provision by the father to the child. The appellants did not maintain in either of the Courts below that, apart from such appointment and directions, the marriage-contract made any provision whatever in favour of the respondent, who was the eldest son and child of the marriage, and accordingly it appears to me that, upon the arguments which were addressed to them, the interlocutors of both Courts were well founded.

But it has been argued here that the money provisions made by the late Earl in the marriage-contract of 1851, under the statutory powers conferred upon him by the Aberdeen Act (5 Geo. IV. cap. 87), are such as would, in certain possible events, have enured to the benefit of the respondent, and were therefore, although contingent upon circumstances which did not occur, provisions conceived in his favour within the meaning of the clause excluding legitim. It was said, in the first place, that a share of these provisions might, during the lifetime of his father, have been effectually settled by the respondent in his own contract of marriage; and, in the second place, that in the event of his father having before his birth disentailed the estates of Kintore and Haulkerton, under the powers of the Rutherfurd Act (11 and 12 Vict. cap. 36), the respondent would have been entitled to a share of these provisions, along with the younger children of the marriage, upon the same condition which attached to their right, viz., survivance of their father, the settler.

By the marriage-contract the late Earl, upon

the recital of section 4 of the Aberdeen Act, bound himself, and the heirs of entail who should succeed him in the estates of Kintore and Haulkerton, to make payment to the children procreated of the marriage, other than and excluding the heir who should succeed to him in the entailed estates, and to the representatives of children who should predecease him, claiming right in virtue of special settlement by marriage-contract (such provisions bearing interest in terms of the statute, and payable one year after his death), of the sum of £5000 if there should be one child other than the heir, of £10,000 if there should be two children other than the heir, and of £15,000 if there should be three or more children other than the heir. Although section 5 of the Aberdeen Act is not recited or mentioned, its enactments are plainly referred to in the expression "special settlement by marriage-contract." The Earl also bound, *subsidiarie*, his own heirs and successors for these provisions. That secondary obligation imports nothing more than a liability to make good to the children or their representatives, entitled under the Aberdeen Act, any deficiency in the amount settled upon them arising from a fall in the rental of the entailed estates.

As I construe the provisions of section 4 of the Aberdeen Act, the heir-apparent, the eldest born son of the marriage, can never become an object of the power thereby conferred upon the heir in possession. The clause contemplates the continuance of the entail, and the only obligation of payment which it imposes is laid upon future heirs succeeding and possessing under the fetters of the entail. The provisions which it authorises are not made a burden upon the fee of the entailed estate, but are only recoverable out of rents arising during the possession of a tailzied fiar. Two conditions are *inter alia* attached to the right of a child to take a share of these provisions—the one being that he shall not succeed as heir of tailzie on his father's death, and the other that he shall survive his father. The eldest born son can never be at any moment of his life in a position to fulfil these conditions. If he survived his father he would necessarily succeed to the estate, and if he predeceased he could have no claim. A younger son is in a different position; he is from the time of his birth, and so long as he has an elder brother, a child in whose favour a provision may be made in virtue of section 4, although the provision is contingent upon his surviving his father, and his not being at the time of his father's death the heir entitled to succeed.

It was, however, argued that although the respondent could never have been himself entitled to participate in these provisions, he might yet have taken benefit from them if a share had been settled by his own marriage-contract in terms of section 5 of the Aberdeen Act, and he had thereafter predeceased his father. That argument is not in my opinion warranted by the terms of section 5. The enactments of that section are only applicable in the case where "any child to whom any such provision as aforesaid may be granted shall marry;" and as I read the preceding section, the heir-apparent is not a person to whom upon any contingency such a provision could be competently granted. Moreover, the settlement in the child's marriage-contract is only declared to be as effectual "as if such child had survived the granter." In the case of an eldest born son, I am, as I have already said, of opinion that such a provision could not have been effectual in the event of his surviving the grantee. But assuming it to be possible, under section 5 of the Aberdeen Act, to make such a settlement as it contemplates which will be effectual in the marriage-contract of an heir-apparent who predeceases his father, I do not see how that possibility can aid the appellants' argument. Such a settlement by the marriage-contract of a child is in all cases ineffectual without the consent of the father; and the marriage-contract of 1851 imposes no obligation upon the late Earl of Kintore to give such consent to the respondent or to any of his children. If it be a benefit which might have been conferred on the respondent under the powers of the Aberdeen Act, it has not been brought into settlement by his parents, or provided to him by their marriage-contract. The terms of the contract left the late Earl as free to give or withhold that benefit as to give to or withhold from the respondent his fee-simple lands, which are not mentioned in the contract.

The next argument of the appellants was founded upon the Rutherfurd Act of 1848, which gave to heirs in possession, under an entail dated prior to the 1st day of August 1848, power to disentail with the consents of the three nearest heirs for the time being entitled to succeed, provided the next in succession should be of the full age of twenty-five years and not subject to any legal incapacity. It does not appear that the late Earl was in a position to avail himself of that power at any time between the date of his marriage-contract and the birth of the respondent; but it was within the limits of possibility that he might have been so. In these circumstances counsel for the appellants maintained that the effect of disentailing the Kintore and Haulkerton estates between these dates would have been to give the respondent, who could never in that event have become entitled to succeed under the entail, a right to share in the provisions made by the marriage-contract under the Aberdeen Act.

The suggestion that after the passing of the Rutherfurd Act, provisions made in terms of section 4 of the Aberdeen Act became available to the heir-apparent of tailzie who would have succeeded his father as heir in possession had it not been for the disentail of the lands before he came into existence, appears to me to be founded on a misconception of the enactments of the Statute of 1848. In my opinion the purpose of that Act was to give to heirs in possession disentailing, with or without consents, power to acquire the entailed estate in fee simple, and to destroy absolutely the rights of succession of all heirs substitute of tailzie; but at the same time to preserve intact all other rights and claims, whether present, future, or contingent, which had at the time of the disentail been made valid charges either upon the fee of the estate, or upon the interest of succeeding heirs of entail. That such was the purpose of the Act is an inference which may be derived from many of its clauses; but section 32, which defines the legal effect of an instrument of disentail when duly executed and recorded, appears to me to be conclusive. It enacts that the estate shall thereupon be disencumbered of the whole fettering clauses of the entail, and that the heir disentail-

ing shall be entitled to alter the course of succession prescribed by the tailzie, to alienate and dispone onerously or gratuitously, to burden with debt, and to do any other act or deed competent by law to any absolute proprietor in fee-simple. The heir of entail continues, notwithstanding the execution and recording of the instrument, to be heir under the tailzied investiture, but his right of succession is reduced to that of a simple substitute, and may be defeated at will by the heir disentailing. On the other hand, section 32 expressly provides that the instrument of disentail shall in no way defeat or affect injuriously charges, burdens, or incumbrances, or rights or interests held by third parties, and lawfully affecting the fee or rents of the estate, or the heir disentailing or his successors, other than the rights and interests of the heirs-substitute of entail; and it further declares that all such charges, burdens, and incumbrances, and rights and interests other than as aforesaid, shall remain at least as valid and operative in all respects as if no instrument of disentail had been executed or recorded. Provisions to children under the Aberdeen Act are burdens, not upon the estate, but upon succeeding heirs of tailzie; and, notwithstanding the entail, the heir-apparent who survives the heir in possession is debtor and not creditor in the obligations which they impose. To admit him as a creditor because the estate has been disentailed would, I conceive, be contrary to the enactments of section 32. The effect of bringing in the heir as a creditor in the event of there being one or two other children alive at the death of the settler, would be to increase the amount of the provisions, and create a charge which could never have affected heirs of entail; and in the event of there being three or more other children alive at that date, would be to diminish the amount to which each of such children would have been entitled had the entail subsisted.

For these reasons, I am of opinion that the new arguments addressed to the House on behalf of the appellants fail to establish that any provision was made by the marriage-contract of 1851 in favour of the respondent. I do not think it necessary to notice in detail the appellants' contention that the respondent's claim to legitim is barred by acquiescence. The facts of the case afford no foundation for such a plea. It is not alleged that the respondent was aware of his rights before he preferred the claim which these proceedings were brought to enforce; and the circumstances of the case, as appearing from the record and productions, seem to me to afford a sufficient explanation of the fact that he remained in ignorance of his rights for a considerable time after his father's death. Other questions of importance relating to the laws of legitim were discussed in the course of the argument, but seeing that, in the view of the case which I have taken, none of these arise for decision, I express no opinion with regard to them.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuer (Respondent)—J. P. B. Robertson, Q.C.—Darling. Agents—Martin & Leslie—Murray, Beith, & Murray, W.S.

Counsel for Defenders (Appellants)—Sol.-Gen. Davey, Q.C.—Sol.-Gen. Asher, Q.C.—R. Wallace. Agents—Andrew Beveridge—Morton, Neilson, & Smart, W.S.

END OF VOLUME XXIII.