till 5th December. Along with this petition there was heard a note of suspension and interdict, which had been presented by the petitioner against J. A. G. Campbell of Glenfalloch, on Saturday, 30th November, craving interdict against the respondent entering or interfering in any way with the charter-room at Taymouth Castle, or with the titles and other documents therein contained relating to the Earldom or the family of Breadalbane, at least without the consent of the trustees of the late Earl. The note of suspension and interdict was presented to the Lord Ordinary in consequence of intimation having been sent by Glenfalloch's agents to the agents for the trustees of the late Marquis, that if the trustees did not consent along with Glenfalloch to go into the charter-room, and make an inventory of the documents therein, and that by Monday the 2d December, Glenfalloch would direct the charter-room to be opened on his own responsibility. When the suspension and interdict was presented to the Lord Ordinary, his Lordship, after hearing parties, and on the assurance of Glenfalloch's agents that nothing would be done in the matter complained of until the note and answers were disposed of, appointed answers to be lodged. Parties were afterwards heard before his Lordship, and he reported the note and answers to the Court, because of its bearing on the petition for recovery of documents.

Counsel were heard on the petition.

Solicitor-General (Millar), Moncreiff (Dean of Faculty), and Mair for petitioner.

Reid for John Campbell, elder brother of petitioner.

Clark and Adam for Glenfalloch.

Watson for trustees.

In accordance with a suggestion from the Bench, it was arranged that Glenfalloch should obtain access to the charter-room at sight of the trustees; and, in respect of that arrangement, the suspension and interdict was refused, and, on the motion of the petitioner Donald Campbell, the Court superseded, *hoc statu*, consideration of the other petition.

Agents for Petitioner—J. & W. C. Murray, W.S.

Agents for Glenfalloch—Adam, Kirk, & Robertson, W.S.

Agents for Trustees—Davidson & Syme, W.S.

Friday, December 6.

BRODIE, PETITIONER.

Entail—Provisions to Children—Aberdeen Act—Entail Amendment Act. Held that when an heir of entail in possession of an entailed estate has, in virtue of the Entail Amendment Act, charged the fee of the estate with children's provisions, constituted under the Aberdeen Act, the sum charged is no longer to be dealt with as a *provision*, in calculating the amount to which a succeeding heir may grant children's provisions, but only as a *debt*, the interest of which alone falls to be deducted in estimating the free rental of the estate.

This was a petition at the instance of James Campbell John Brodie, Esq. of Lethen, heir of entail in possession of the entailed estates of Lethen and others, in the counties of Nairn and Moray, for restriction of the provisions payable to the children of his predecessor in the estates, and for warrant to charge the estates therewith. On the death of Thomas Stewart Brodie (the petitioner's brother and predecessor), his widow and children became entitled to certain provisions out of the entailed estates, so far as authorised by statute. The petitioner, in stating the deductions to be made from the gross rental in bringing out the net rental upon which the amount of the provisions was proposed to be calculated, stated certain provisions to younger children which had been granted by his father when previously heir in possession of the estates, and which had been made a charge thereon, under the provisions of the Entail Amendment Acts, as a burden or encumbrance, the interest of which diminished to that extent the income of the heir in possession. The amount of these provisions so charged was £2300; and accordingly the sum of £92, being the interest at 4 per cent. on that sum, was stated as a deduction along with the other burdens which were stated against the rental. This course was adopted on the principle that the amount of these provisions had ceased to form a charge as such against the heirs of entail under the provisions of the Aberdeen Act, 5 Geo. IV., c. 87, and had, by the exercise of the powers as to charging the estates therewith, conferred by the Entail Amendment Act, been rendered simply heritable securities affecting the lands, and the sums obtained for which had been applied in the payment and discharge of the said children's provisions. After the petition was presented to the Court, the petitioner lodged a minute suggesting that these provisions ought to be treated as still subsisting provisions, and not as forming merely a burden on the estates. This view was founded on the 6th section of the Aberdeen Act, which provided that when provisions had been granted by former heirs in possession to the full extent allowed by the Act, it should not be in the power of any heir in possession to grant further provision to his child or children, except to the extent to which the power to grant provisions had not, having regard to the rental, been exhausted by the provisions already granted, or to the extent to which any part of them might have been previously paid or extinguished. The difference in result in the present case, according as the one or the other principle was adopted, would be considerable. According to the first principle, what would be deducted from the three years' free rental allowed to be granted for children's provisions was only £276, being three years' interest of the said sum of £2300; while, on the other principle, the whole sum of £2300 would be deducted from the three years' free rental, and only the balance remaining after that deduction would be held within the power of the petitioner's predecessor. Mr Kermack, to whom the Lord Ordinary remitted to report upon the petition, gave no opinion upon the question, but reported it to the Lord Ordinary (Mure), who reported it to the Court.

Clark and Rutherfurd for petitioner.

G. Dundas and Spens for younger children.

Lord President—This petition, at the instance of James Campbell John Brodie, is presented to us under the 7th section of the Aberdeen Act, for the purpose of settling the extent to which provisions made by his immediate predecessor are to be set against the rents of the estate. But a question of considerable importance is raised, not depending on the details of the case, and in order to decide the question it is necessary to attend precisely to certain Acts.

The father of the petitioner was at one time heir

in possession of this estate, and he granted bonds of provision in favour of his younger child, amounting to £2300. On Mr Brodie's death he was survived by his eldest son, Thomas Stewart Brodie. On his succession he proceeded to make a settlement by way of provision on his wife and younger children, and these are the provisions that are to be regulated under this petition. Stewart Brodie died, and James Campbell John Brodie, his younger brother, succeeded, Stewart having left no son, and his daughters being incapable of taking the estate.

By the 4th section of the Aberdeen Act it is provided that, on any younger 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. Of course, if the petitioner had in ordinary circumstances succeeded to this estate while that provision subsisted as a provision burdening the rents of the estate, it would have been extinguished under this clause, and there would have been no difficulty in arranging the matter now before us. That being extinguished could not have been computed as a deduction from the fund which Stewart Brodie was entitled to settle as a provision. The peculiarity arises from the fact, that Stewart Brodie, the last heir, availed himself of the powers contained in the 21st section of 11 and 12 Vict., c. 36, and the 7th section of 16 and 17 Vict., c. 94. The first of these Acts enables an heir of entail in possession of an entailed estate, when there is a provision affecting the rents of the estate under the Aberdeen Act, to make the amount of that provision a charge on the fee of the estate by executing a bond and disposition in security with all the usual clauses. But it was not by that Act expressly said whether he could grant such a bond to any one but the person in right of the provision. That difficulty is removed by the later statute, and there is no doubt now that the heir in possession may grant a bond and disposition in security in favour of any one who will advance the money. Accordingly Stewart Brodie did grant a bond and disposition in security for £2300 in favour of a stranger. That stranger advanced the money, and received a bond and disposition on which he was infeft. And accordingly that burden now subsists against the fee of the estate, as a permanent burden in all human probability, because it is not the interest of an heir of entail to pay off burdens on his entailed estate. Stewart Brodie, however, having availed himself of his right, was enabled to raise a sum of £2300, but he was bound to apply it in a particular manner, and he applied it in paying off the provision of his younger brother. Now, it is just because that is paid off and extinguished that it does not fall under the 4th section of the Aberdeen Act and become lost. If it were not paid off, it would become extinguished by his succession to the estate. Therefore it is impossible to hold that it is an existing provision.

But it is said, that still it subsists as a burden, and has not been extinguished in this sense of not being a burden on the heirs of entail. It is contended that it is a burden, but not so serious as if it were in its former shape; that, though in the form of a bond and disposition in security, it still retains its character of a provision. That cannot be maintained. I am not moved by the consideration that, if this is not to be considered a provision, and provisions to the full extent of three years' rents of the estate may be made by each successive heir as he comes into possession only on the condition that he makes the previous provision a burden on the estate, the result will be to eat up the fee in the end. To a certain extent that will follow. But, on the other hand, an equally absurd result is reached by the opposite view. For suppose that each provision that is constituted into a burden is to be taken into consideration in fixing the free rents, the result will be that, after a certain number of generations, when the provisions created have been made burdens, there will be such an amount of burdens to be deducted as will extinguish that altogether, and so nullify the Aberdeen Act. One result is as absurd as the other, and the question is, Which is most opposed to the policy of the Entail Acts? Now, I cannot read the Acts we are dealing with without seeing that they do not deal with entails as favourites of the law; and if the effect of our judgment be to bring entails to an end as regards particular estates, I do not think that is against the policy of these Acts, but rather in harmony with it. It does not seem in harmony with the policy of these Acts to keep up an entail in all its rigour, and prevent an heir in possession from making provisions for his younger children. While willing, therefore, to admit these startling results, I have no hesitation in adopting one as in harmony with the law, and rejecting the other. Therefore, the position of the petitioner originally is correct, that he is entitled to deduct the interest of the bond and disposition in security, but not the capital of that sum, in estimating the net rental upon which the provisions to the widow and children of Stewart Brodie are proposed to be calculated.

Lord Curriehill—This a question of importance to heirs of entail. The question is as to the amount of deductions to be made in order to fix the amount of certain provisions by an heir of entail. The Act of Parliament is explicit. You are to deduct the amount of the interest of all burdens affecting the estate, and, if there are provisions to younger children, you are to deduct the amount of them. The question is, How these are to be treated in this particular case? The interest on heritable bonds and dispositions in security must be deducted. They are burdens affecting the fee and rents of the estate, and therefore, in conformity with the express direction in this Act, the interest must be deducted. The question is, Whether the capital sum of former provisions is to be deducted? It is impossible to hold that they are to be deducted, for they are discharged. Not only was this bond and disposition in security granted for the capital sums to pay them off, but they have been paid off, and there is a formal discharge. How the Court are to deduct the capital sum of a debt which has been paid off and discharged, I cannot conjecture.

Lord Deas—I agree in holding that under these statutes the former provisions must be held to be paid off and converted into heritable debts affecting the fee of the estate, the interest of which alone is to be taken into consideration in calculating the amount of the provisions now to be granted.

Lord Ardmillan concurred.

Agents for Petitioner—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Younger Children—D. J. Macbrair, S.S.C.