give a new bill for the balance, stating at the same time that he was aware the bill had not been duly presented for payment, but that he would not suggest any difficulty on that account: Finds that the pursuer did not examine himself or adduce any evidence to contradict this testimony: Finds that the witness Mathew Anderson depones that, on the 27th August 1867 (being two or three weeks after the defender's interview with Tatham), the pursuer did not deny his legal liability to pay the bill, but gave reasons why delay should be granted, and repeated the offer to pay £100 to account of the bill, and give a new bill at two months, signed by all the parties to the former bill, for the balance: Finds it instructed by the letter, No. 7/8, that this offer was substantially accepted, but though the acceptance wss communicated to the defender, the offer was not carried out: Finds that, in the above circumstances, the defender must be held to be barred from falling back on any technical objection founded on the defective negotiation of the bill; therefore, and for the reasons stated by the Sheriff-Substitute, adheres to the said interlocutor, dismisses the appeal, and decerns."

The defender appealed.

Brand for him.

R. V. Campbell in answer.

The Court held (1) that, as sufficiently appeared from the proceedings, the bill had been given for the accommodation of the drawer, and therefore he was not entitled to plead any failure duly to negotiate as relieving him from liability; and (2) that the pursuer had proved that the defender had, after knowledge of the failure to present on the proper day, asked and obtained time to pay, and thereby waived any objection otherwise open to him as drawer. Appeal dismissed, and interlocutor of the Sheriff adhered to, with expenses.

Agent for Appellant—A. Kirk Mackie, S.S.C.

Agents for Respondent—Campbell & Smith, S.S.C.

Wednesday, March 2.

FIRST DIVISION.

SPECIAL CASE—MACKINTOSH & OTHERS.

Heir of Entail—Relief—Annuity—Real Burden—Drainage. In an entail of one of his estates, a party bound himself and his heirs and executors to relieve the lands of his debts and obligations. Subsequently, in an antenuptial contract of marriage, he burdened the entailed estate with an annuity to his widow. *Held* the heir of entail was not entitled, out of the general estate, to relief either of this annuity or of a burden on the rent-charges for money advanced for drainage purpose.

The deceased James Mackintosh, proprietor of the estate of Grange, called Romanno Grange, or Lamancha, situated in the parish of Newlands and county of Peebles, died on the 17th day of February 1869. He was also proprietor of the heritable subjects No. 38 Charlotte Square, Edinburgh, and of real and personal estate in Calcutta of considerable amount; and he possessed personal estate in this country amounting, as given up in the inventory for confirmation in favour of his executors to the Commissary of Midlothian, to the sum of £27,477, 15s. 2d. Mr Mackintosh was thrice married. He was survived by his third wife, Mrs Mary Ann Burn or Mackintosh, and by the following children, who were all by his first marriage, viz.—(1) James Mackintosh, his elder surviving son; (2) Mrs Sarah Isabella Mackintosh or Hay Miln, wife of Alexander Hay Miln; (3) George Donald Mackintosh, presently residing in Oneida, Knox county, Illinois, United States of America; and (4) Miss Emily Maria Mackintosh, who is unmarried. All Mr Mackintosh's children, except George Donald Mackintosh, were parties to the case. Mrs Sarah Isabella Mackintosh or Hay Miln and Alexander Hay Miln were married in the year 1859.

On 24th July 1857 the deceased James Mackintosh, being then a widower for the second time, executed a disposition and deed of entail of his estate of Lamancha. Mr Mackintosh, by his last will and settlement after mentioned, revoked all wills and settlements executed by him of prior date, except the disposition and deed of entail, and he directed his trustees to record the same in the Register of Entails after his death. The disposition and deed of entail was accordingly, under the authority of the Court, recorded in the Register of Tailzies on 16th March 1869; and James Mackintosh completed a feudal title in his person to the estate of Lamancha, as heir of entail. Mr Mackintosh executed, on the 13th day of July 1865, a last will and testament, by which he conveyed to trustees the whole estates, heritable and moveable, real and personal, other than his estate of Lamancha, which then belonged, or should belong to him at the time of his death, in trust for the ends, uses, and purposes therein specified. The surviving executors and trustees all accepted the office thereby conferred upon them, and are in course of realising and distributing the trust-estate under their management. On 12th January 1867 the deceased James Mackintosh and Mrs Mary Ann Burn or Mackintosh executed an antenuptial contract of marriage, in which he provided her, if she survived him, with, *inter alia*, two annuities of £150 and £70, and, for greater security, obliged himself and his foresaids to infeft her in the estate of Lamancha, "but declaring that it shall be in the option and power of the said James Mackintosh, and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said Mary Ann Burn, by purchasing at his and their own expense, from any respectable insurance company to be selected and approved of by her, an annuity payable to her, the said Mary Ann Burn, in the terms before provided, equal in amount to the said annuity of £150, and yearly sum of £70 hereinbefore provided to her; and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself, and the trustees after-named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects and others before-mentioned and described of the said provisions secured over them as aforesaid." On 7th December 1849 the deceased James Mackintosh obtained an advance for drainage purposes from the Commissioners of Her Majesty's Treasury of the sum of £326; and on 13th September 1853 he obtained a further advance, for these purposes, of the sum of £497. These advances form rent-charges on the estate of Lamancha, in terms of the Act 9 and 10 Vict., c. 101, and are repayable, principal and interest, to Her Majesty by half-yearly payments of £10, 11s. 11d. and £16, 3s. 1d. respectively, extending over periods of twenty-two years, from 6th April 1850 and 10th October 1853 respectively, at

the termination of which periods the charges become extinguished in terms of the said statute.

Mr Mackintosh, the heir of entail in possession of the estate of Lamancha, maintained that he was entitled to relief, out of his father's general trust-estate, of the annuities and burdens on the rent-charges under the following clause in the deed of entail—"I oblige myself, and my heirs, executors, and representatives whatsoever, to free and relieve my lands before disponed of all my debts and obligations." The deed also contained power of revocation, obligation on heirs of entail to redeem adjudications, and powers to provide for their wives liferent annuities to the extent of one-third of the free yearly rent.

SOLICITOR-GENERAL and ASHER for Mr Mackintosh.

DEAN OF FACULTY and MACKAY for Trustees and Others.

At advising—

LORD PRESIDENT—The decision of the question raised in this case depends upon the construction and effect of the testamentary deeds left by the late Mr Mackintosh of Lamancha. He died on the 17th of February 1869, leaving two sons and two daughters. He also left a widow, who was his third wife, and his contract of marriage with her—an antenuptial contract—requires to be taken along with what are properly his testamentary deeds in disposing of the first of the questions before us.

The deed which is earliest in time is a disposition and deed of entail of the estate of Lamancha in favour of himself, and, failing him, his eldest son and the heirs of his body, and certain other substitutions which it is unnecessary to mention, because the eldest son did, in point of fact, succeed upon his father's death. There is nothing very special in the construction of this deed of entail, and it is only necessary to notice two or three of its provisions as bearing upon the questions that we have to determine. There is a provision, for example, that the heirs of entail are to be entitled to infeft their wives or husbands, and the wives or husbands of heirs-presumptive, in a liferent annuity out of the rents of the lands, not exceeding the third part of the free yearly rents. There is also a provision that the heirs are to be entitled to burden and affect the fee and rents of the lands and estates by bonds and dispositions in security, or in other habile form, for payment, at the death of the granter, of provisions to the surviving children. There is also a provision that in case any adjudication shall pass against the lands for payment of any debt or claim affecting the same, or for payment of any public or other legal burden, the heirs of entail for the time shall be obliged to redeem such adjudications, and to disburden the lands thereof, and that within three years from the date thereof. And lastly, there is this clause—which for the purpose of the present case is the most important—in which the maker of the entail thus expresses himself, "I oblige myself, and my heirs, executors, and representatives whatsoever, to free and relieve my lands, before disponed, of all my debts and obligations." That deed was executed on the 24th of July 1857.

The next deed in order is what is called the last will and testament of Mr Mackintosh, which is dated the 13th of July 1865. It contains a revocation of "all wills and settlements executed by me at any time heretofore, excepting a disposition and deed of entail," being that which I have just adverted to, and it contains a conveyance of the whole heritable and moveable estate of the truster, excepting Lamancha, the subject of the entail. Then it appoints the trustees, "as soon as convenient after my death, to make payment, without constitution, of the whole debts which may be due by me at the period of my death." There are some provisions following that regarding a house in Charlotte Square, which are not very material. But the residue is disposed of in this way: he appoints his trustees to "allow the same to remain on the investments I may have made at the period of my death, or, in their discretion, to realise and convert the same into money, &c., and to divide the same into six equal shares, one of which, subject to the provision and declaration after-mentioned, is to be paid or made over to my son James Mackintosh," that is the first substitute of tailzie; and then one-sixth is provided to his only other son George; and the remaining four-sixths are to be divided equally between his two daughters." But there is this further provision, that if under that division of the residue the daughters shall not receive as much as £10,000 each, their provisions are to be made up to £10,000 at the expense of the shares allotted to their two brothers; and on the other hand, if the two-sixths which each daughter gets should exceed £20,000, then the balance over £20,000 is to go to increase the portions of the sons. It is only necessary to say, in conclusion, about that disposal of the residue, that in point of fact the provisions in favour of the daughters of two-sixths to each of them turned out to be of greater value than £10,000 and of less value than £20,000, so that the provision which I last mentioned did not come into operation either on the one side or on the other.

Two years after this Mr Mackintosh entered into his third marriage with the lady who afterwards became his widow, and on that occasion an antenuptial contract was executed dated 12th January 1867. In that contract Mr Mackintosh binds and obliges himself, his heirs, executors, and successors whomsoever, to make payment to his promised spouse, in the event of her surviving him, of £300 for mournings; and further, to pay to her in the event of her surviving him, and during all the days of her lifetime after his decease, a free yearly annuity or alimentary provision of £150. And there is, in an after portion of the deed, a further provision of an additional annuity of £70 sterling in a particular event which occurred; and, therefore, the annuities left to Mrs Mackintosh are £150 and £70. Now, for these annuities he proceeds to create a security over the estate of Lamancha in the shape of an infeftment of annual rent. It is thus expressed:—"And for the said Mary Ann Burn, her further security and more sure payment of the foresaid annuity of £150 sterling, and also of the yearly sum of £70 sterling hereinafter-mentioned and provided to her, on the terms hereinbefore and after written, the said James Mackintosh hereby binds and obliges himself and his foresaids, on his own expenses, to infeft and seise the said Mary Ann Burn in the said free liferent annuity of £150 sterling, and also of the said yearly sum of £70 sterling, both payable and with interest and penalties as hereinbefore and after written, to be uplifted and taken furth of All and Whole the lands of Grange," &c. There is a declaration in an after part of the contract, that "it shall be in the option and power of the said James Mackintosh, and his heirs, executors, and

successors, to secure the said annuity of £150, and yearly sum of £70 to the said Mary Ann Burn, by purchasing at his and their own expense, from any respectable insurance company to be selected and approved of by her, an annuity payable to her, the said Mary Ann Burn, in the terms before provided, equal in amount to the said annuity of £150 and yearly sum of £70 hereinbefore provided to her; and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects and others before mentioned and described of the said provisions secured over them as aforesaid."

These are the whole provisions of the three deeds, to which I think it necessary to call attention for the purpose of determining the first question which is before us,—"Whether the heir of entail in possession of the estate of Lamancha is entitled to be relieved of the said annuities by the general trust-estate of the said deceased James Mackintosh, and to obtain repetition therefrom of such sums as he may have advanced in payment of said annuities?"

Now, the special ground on which the heir maintains his right to be so relieved is that clause in the deed of entail to which I adverted before, binding the heir of entail and his heirs, executors, and representatives whomsoever, to free and relieve the lands before disponed of all his debts and obligations. The question is, Whether these annuities are among the debts and obligations contemplated by the maker of the entail in that clause? Now it must be observed, in the first place, that these annuities were by a subsequent deed of the entailer himself made a special burden upon the entailed estates. That is by no means conclusive one way or another, for we had not long ago a case in which a testator, after directing an estate to be entailed, did afterwards burden that estate with a sum of borrowed money, and in the particular circumstances of that case we held that his general trust-estate was liable to relieve the heirs of entail of that burden. Therefore, the circumstance that Mr Mackintosh did by a subsequent deed make these annuities a burden upon the estate is, as I said before, not by any means conclusive. But then, what is the nature of this debt which was so made a burden on the entailed estate? It is not, as in the case to which I have referred, a burden in the nature of a bond for borrowed money. It is not a burden for payment of any capital sum. It is for payment of an annuity—a right bearing a tract of future time,—a right conceived in favour of the widow of the proprietor of the estate,—a temporary right,—a right naturally affecting the rents of an estate, and not the fee of the estate. These are the peculiarities of this burden. It must also be observed that there does not seem in the present case any very strong reason why Mr Mackintosh should have imposed this burden upon his entailed estate, unless he meant the entailed estate to bear the burden without relief, because we see that he was a wealthy man, and must have known himself to be a wealthy man at the time when he made this marriage-contract. It was suggested, indeed, that if he had not given this security the lady might have refused to marry him; but that is not a very practical suggestion as affecting the intention of the gentleman. He had plenty of security to give besides the entailed estate, if he had desired to do so. But he does make a burden upon the entailed estate; and neither in the marriage-contract itself, in which that burden is created, nor in his last will and settlement, which no doubt was dated before the marriage-contract, but which could have been easily altered or supplemented by a codicil,—neither in the one nor the other does he make any provision whatever for relieving the entailed estate of this burden. It is said, no doubt, that in his general settlement he directs his trustees to pay off all his debts; but it has been frequently held, and I think soundly, that a general direction of that kind to trustees will never shift a burden as between heir and executor, or as between a landed estate and a moveable estate settled by the testator. The general form of expression, which is almost one of style, and which the law imports into every deed, whether it be expressed or not, can receive no such effect as that. Unless the heir of entail can make the clause in the deed of entail itself by which the entailer bound himself and his representatives to free the lands of all his debts and obligations do so, I do not see any other ground upon which his plea can be maintained.

Now, is this in any proper sense his debt or obligation within the meaning of that clause? I confess I do not think it is so. I think it is a proper burden of the owner of that estate, and a burden which the owner of the estate naturally transmits against his representative and successor in that estate. So clearly was this the mind of the testator himself, that he inserts in his entail a power of a very analogous kind, to every heir of entail, to provide such an annuity for his widow, and to transmit that obligation against his successor in the estate, so that it shall be a burden upon the rents of the estate. And what he himself has done in regard to the first substitute of tailzie after himself is nothing more than this: he has just left him, the first substitute of tailzie, that burden which he permits that substitute to leave upon the heir who shall next succeed to him,—a provision, namely, of a reasonable amount in the way of annuity in favour of his widow. Now, in these circumstances, I confess I come without almost any hesitation to the conclusion that it was not the intention of the late Mr Mackintosh to relieve the entailed estate, at the expense of his general estate, of this annuity in favour of the widow. And it is entirely a question of intention. I may just add, with reference to the entire want in any of the testamentary deeds of Mr Mackintosh of any provision or direction for relieving the heir of entail, that it seems to me exceedingly doubtful how the trustees could proceed to relieve the heir if they were bound to do so. What is it that they would be expected to do? There is only one way in which the widow is bound to relieve the estate; and if she does not consent to relieve it, nobody else can do it. The way in which she is bound to relieve the estate is by having secured to her her two annuities by a transaction with an insurance company,—a purchase of an annuity to the amount of £150 and £70 from some Insurance Company. Now every one knows that that is a transaction of a most unfavourable kind for a party dealing with an Insurance Company, and it may well be doubted whether trustees without special directions from their constituent would be entitled to enter into such a transaction. But if they cannot do that, what else are they to do? How can they relieve this estate? They cannot do it without the con-

sent of the widow. No doubt it may be that they might reimburse the heir the annuities which he in the first instance might be compelled to pay. But then could that possibly be described as coming within the obligation of the maker of the entail—that he is to free and relieve his lands of all his debts and obligations? That is not freeing and relieving the lands at all. That is freeing and relieving the heir who happened to be in possession for the time of each term's annuity as it falls due, and is payable by him. But the lands remain unrelieved, and the heir in possession of the lands remains unrelieved in the sense of that obligation in the entail, because he remains under burden to the widow. Now these practical difficulties in carrying out any claim of relief of this kind appear to me to illustrate and confirm the intention of the testator as derived from the absence of any provision whatever in any of his testamentary deeds for carrying through this relief of the entailed lands from the widow's annuity.

The second question relates to a matter of an entirely different kind. It is whether the heir is entitled to be relieved of a rent-charge which was imposed upon the lands by his father at the expense of the general trust-estate? Now this is a rent-charge on the estate under the provisions of the Act 9 and 10 Vict., c. 101. Under that statute certain money had been advanced to Mr Mackintosh by the Enclosure Commissioners of England and Wales, who were authorised to make advances for improvements in Scotland as well as elsewhere. And the question comes to be what was the security which was given for this advance? It is made very clear, I think, by one or two clauses of the Act of Parliament what the nature of this rent-charge is. The 34th section enacts that "upon the issue as aforesaid of any advance by virtue of a certificate under this Act, the land mentioned in such certificate shall be charged with payment to Her Majesty, in respect of such advance, of a rent-charge after the rate of £6, 10s. rent for every £100 of such advance, and so in proportion to any lesser amount, and to be payable for the term of twenty-two years, to be computed from the 6th of April or 10th October, which shall next happen after the issue of such advance, such rent-charge to be paid by equal half-yearly payments at the 6th of April and 10th of October in every year; the first of such payments to be made on the second of such days which shall happen next after the issue of such advance in respect of which the rent-charge shall be charged." Now the advance is here made a burden upon the land, and upon the rents of the land, and the payment is to be operated by obtaining out of the rents of the lands year by year for two and twenty years after the charge is laid on £6, 10s. for every £100 advanced. That is a very good and effectual security against the land and the rents, particularly when it comes to be fortified, as it is, by an after clause (the 35th), in this way,—"that every rent-charge which shall become charged on land by virtue of this Act shall, where the same shall be charged on land in Scotland, be recoverable by the same means and in like manner in all respects as any feu-duty, or rent, or annualrent, or other payment payable to Her Majesty out of the said lands would be recoverable, but shall be subsequent in order of charge to any feu-duties, but shall have preference over all other charges in the same land." A rent-charge thus is made in effect equivalent to a first heritable security on the lands—a most excellent security certainly. But is there any personal obligation imposed upon the person who obtains the advance, or would a direct personal action lie against the person who obtained the advance, for payment of the £6, 10s. annually, whether he continued to be the owner of the estate or had parted with it? Now to that I must say I give an unhesitatingly negative answer. I think there is no personal obligation at all. If there be a personal obligation, even in a limited and restricted sense, it is merely the personal obligation of the proprietor of the estate for the time, in respect of his intromission with the rents. He may be asked for payment; but the real debtor to the government under these clauses is the land itself, and not the proprietor of the land. It seems to me, therefore, to be perfectly clear that this is not one of those debts and obligations which Mr Mackintosh, the entailer, bound himself and his representatives to free and relieve the entire lands of; and consequently that the land must just, for the remaining period of twenty-two years which is yet to expire, bear the burden of this temporary payment. I therefore answer the second question in the negative also.

LORD DEAS—The first question is, Whether the annuities to the widow are to form a burden on the heir of entail or on the general estate of the entailer? and that, as your Lordship has said, is a question of intention to be judged of from the deeds. We start with this, however, that these annuities are naturally, according to the general law, if nothing appears to the contrary, burdens upon the land; and the party who maintains that they are not to be burdens upon the land must shew special cause for giving effect to that view. The whole question here is, whether there are sufficient reasons for holding that the entailer did not mean the general law to operate) which would lay the burden upon the lands), but meant the burden to fall upon his general estate, which in this case mainly consists of executry? There appear to me to be just two things in favour of the view that the entailer did not intend these annuities to be burdens upon the entailed estate. The first is the clause in the entail by which he binds himself and his heirs, executors, and representatives, to free and relieve his lands of all his debts and obligations; and the second—which I think is the stronger of the two—is the clause in the marriage-contract, by which, while he lays the burden of the annuities upon the land in the first instance, he reserves a power to himself, his executors, and successors, to secure these annuities by a life insurance, in which case the wife, if she survive her husband and become a widow, is to discharge the burden upon the heritable estate. These are the two things, and I think the only two things, in favour of the idea that it was the intention of the truster to relieve the entailed estate at the expense of the general estate. But although I think it is a very nice question, I am of opinion with your Lordship that these two things are not sufficient to relieve the entailed estate, and to throw the burden off the entailed estate, upon which it naturally falls. The entail was executed in July 1857. The will was made eight years afterwards, and it is right to notice that the will contains a repetition of an appointment as to payment of the whole debts, and deathbed and funeral expenses, in general terms. The contract of marriage is not made till two years, I think, after the will, and ten years after the execution of the deed

of entail. In that antenuptial contract of marriage he expressly burdens the lands with these annuities. If there had not been in the same contract the option of securing the annuities by a policy of insurance, it could hardly have admitted of argument that he meant to burden the general estate. It comes really, therefore, to this, that the only thing that goes the other way is the clause about the life insurance. But, upon the other hand, there still remains the fact—the weight of which is diminished by that clause, though not taken away—that ten years after he executed the deed of entail he expressly laid the burden upon the entailed estate; and there is likewise the fact, noticed by your Lordship, that by that deed of entail he gave to each successive heir of entail the power to burden the estate for widows and children to the extent of one-third of the free rent. Parties were agreed, according to my understanding, that the free rents of the entailed estate should be estimated at £600, the third of which would be £200. The two annuities amount to £220, but the £70 annuity was a contingent one; therefore they do not very much exceed the third of the free rent, supposing that they had been granted by an heir in possession under the entail. I do not say that the power which is given to heirs of entail to burden the estate with annuities in the way I have mentioned, can be held to be applicable to heirs as to the institute. But still it is perfectly plain, I think, that so long as those annuities affect the entailed estate there is no room for an heir of entail in possession exercising that power of burdening it with annuities, and consequently the burden that lies upon the heir of entail is the amount of these two annuities excluding (so long as they affect the estate) the laying of any other burdens upon it. That being so, I am not disposed to think that the power of securing the annuities by insurance is sufficient to turn the whole matter the opposite way from what it would otherwise have been. The option is an option to the executors. I do not suppose that they will desire to exercise that option; and I do not see any way of compelling them to exercise that option by purchasing the annuity. The widow cannot do it; and I am not prepared to say that the heir can do it; but unquestionably, unless they are compelled, they will not do it, because it is totally contrary to their interest. It looks, therefore, more like a power which the granter of the entail wished to have in his own hands in his own lifetime. He might have exercised it undoubtedly; and if he had exercised that power the entailed estate must have been discharged by the widow of these burdens. But it is not very easy to see that by conferring the option on his executors he was taking them bound to do it, and so to have brought about a different result. Therefore my opinion is, that though the law would hold these annuities to affect the entailed estate, there are not sufficiently clear indications of intention on the part of the entailer that it shall be otherwise to authorise us so to deal with it.

As to the other question, about the money got under the statute for improving the estate, I think it is quite clear, and I entirely agree with your Lordship. I do not think it necessary to add anything on that point.

Lord Ardmillan—I think the real question here is one of construction, or rather of ascertainment of intention on the part of the entailer, as expressed in the obligation on himself, his heirs, executors, and representatives, to free and relieve his lands of all his debts and obligations, whether he meant to include among the debts and obligations which his executors were to relieve his lands of the annuities in favour of his widow? He has planted these annuities upon the landed estate by a deed executed ten years after the date of his entail. He has left a settlement in which he does not say anything which appears to destroy the directions in the deed of entail; and he has in the entail given power to the heirs of entail to execute bonds of annuity as provisions for their widows in liferent, affecting the rents of the estate. Now, this being a question of intention, I think it is right to observe—(1) that the debt is a natural burden upon the land, (2) that it is planted by himself in words upon the land; and its relation to the land is greatly strengthened, in my opinion, by the fact that he gave the next heirs in succession the power to do the same thing; for although it is quite true that he, as the entailer, was not in law exercising the power which the heirs-substitute had, yet, in a question of his intention, when we find him doing the very thing which he empowered the heirs-substitute under the entail to do, I think it not unreasonable or unnatural to conclude that he meant to place this burden permanently upon the entailed estate. It is a temporary burden; it ceases with the life of the widow. It is not a bond and disposition in security for a sum of money borrowed. It is not a debt in that view. It is a temporary burden charged upon the rents of the entailed estate, and necessarily ceases when the annuitant dies. I agree with Lord Deas that there is very little difficulty in disposing of the case up to this point. The real difficulty arises from the power given to purchase off the lady by a bond of annuity. I think that creates the greatest difficulty, but I do not think the difficulty is such as to overcome the inference of intention to which I have already adverted. The widow has no power given to her to enforce the purchase of a bond of annuity. The heir has, I think, no power to compel the purchase of a bond of annuity. It is altogether a reserved power, or privilege, or option, to the entailer himself in the marriage contract, and his heirs, to make an arrangement by which, on purchase of an annuity, the landed estate is discharged. I cannot say that I think that implies an intention to relieve the landed estate necessarily. I think it only implies a reserved privilege to the maker himself (Mr Mackintosh), who might certainly have chosen to do this himself, or perhaps to his executors (though I do not see that they have any interest), to make an arrangement of that kind with the widow. That power to make such an arrangement with the widow is not of such a character as to derogate from the true nature of this annuity as it stood before, because, as I read it, it was a burden on the entailed estate.

Upon the other question I have no doubt at all. I think your Lordship in the chair has very clearly explained the grounds on which this rent-charge must remain a charge upon the lands.

Lord Kinloch—There are two claims of relief made by Mr James Mackintosh, as his deceased father's heir of entail, against his father's general representatives. They are both founded on the clause in the deed of entail, by which Mr Mackintosh senior declares, "I oblige myself, and my heirs, executors, and representatives whatsoever,

to free and relieve my lands before disponed of all my debts and obligations."

One of these claims, which, though stated last in the Special Case, I would avert to first, is for relief of certain annual payments arising by way of rent-charge on the entailed estate, in respect of an advance for drainage purposes obtained from the Improvement Commissioners by the late Mr Mackintosh, under the Act 8 and 10 Vict., c. 101. In regard to these, I am clearly of opinion that no right of relief belongs to Mr James Mackintosh, on whom they are at present a burden. I consider them as not being in any sound or legal sense debts or obligations of the late Mr Mackintosh. They form a burden on the entailed estate, originating in an advance procured for the benefit of that estate, and laid out for its improvement. The form of reimbursement of the advance is, under the statute, a rent-charge on the estate at the rate of £6, 10s, per cent. on the sum advanced, payable for twenty-two years, by means of which annual payment the statute assumes that the advance will be wiped off. And by section 38 the Act provides that these annual amounts shall be payable by every heir successively for the period of his own possession. In seeking relief from the rent-charges thus made by the statute to fall on him, the present Mr Mackintosh is, I think, attempting to saddle the general estate, not with a debt of his father, but a debt of his own. He cannot evolve the claim out of the clause of relief in the entail either by any legal or by any reasonable construction.

I have had a great deal more difficulty with the other claim of relief advanced by Mr James Mackintosh; the claim, namely, for relief of two annuities of £150 and £70 respectively, for which his father became bound in his marriage-contract with his third wife, now his widow, and which in that contract, which was executed about ten years posterior to his deed of entail, he constituted a burden on his entailed estate, made real by infeftment, or what was equivalent.

I have no doubt that the general intention of the late Mr Mackintosh, expressed in the clause of relief already quoted, was to give over the entailed estate to the heirs of entail unburdened with debt. And I think the clause applies equally to posterior debts as to prior. I cannot doubt that as to any personal debts left by Mr Mackintosh, and threatened to be made real against the entailed estate by adjudication, the clause would be applicable to entitle the present Mr Mackintosh to obtain relief from the general estate. If the debt was one for a capital sum, for which the late Mr Mackintosh granted an heritable bond on the entailed estate, I think the same principle would apply, and relief would be justly claimed.

But the peculiarity of the present case is, that the debt is an annuity-debt; and not only so, but forms a marriage-provision, such as the entail itself contemplated as a lawful burden on the estate to be imposed by the heirs of entail. The late Mr Mackintosh, being himself the entailer, did not of course proceed under the entail when he constituted this charge on the estate. But the analogy of the heirs of entail very fairly raises the inference that he was intending to make the provision a charge of the same sort with the similar burden imposed by a proper heir of entail. When the clause of relief in the entail binds Mr Mackintosh's general representatives to relieve the estate from his debts and obligations, the clause cannot reasonably be made applicable to a debt imposed by himself on the entailed estate, and a debt of the character of those sanctioned as a charge by the entail. The debts and obligations to which the clause of relief applies cannot be fairly considered to be those which the entail itself allows *in gremio* to be charged on the estate. It must refer to other and extrinsic debts not recognised by the entail, and of which therefore the heirs of entail were to be relieved at the cost of the general representatives.

The chief ground of doubt in regard to this matter unquestionably lies in the clause in the marriage-contract, declaring it to be optional to the late Mr Mackintosh, "his heirs, executors, and successors," to substitute for this charge on the entailed estate an annuity purchased from a respectable insurance company of the like amount. The inference is, that the charge was made for the security of the creditor, and not with the intention of primarily burdening the entailed lands. But the clause in question has a double edge. It merely gives an option to the general representatives thus to convert the annuity, which in many conceivable circumstances it might be expedient to accomplish. It does not lay on these representatives the obligation of so disburdening the entailed estate. And it may fairly be argued that the want of such an obligation implies a primary charge on the entailed lands. Considering that Mr Mackintosh himself constituted this burden on the entailed estate at a date posterior to that of the entail, and that by so doing he raised the general presumption which applies to every debt heritably secured—that it is to be paid by the heir, and not the executor—there is strong ground for holding that Mr Mackintosh purposely left this debt at the time of his death as a debt payable by his heirs of entail, and not by his general estate. The nature of the debt as an annuity-debt, and so not easily attachable to the executry of the deceased, but very naturally dischargeable out of the rents of the entailed lands, strongly confirms this presumption.

I entirely agree in holding that the general clause in the settlement as to payment of debts is of no value in solving the present question. And, on the whole, I have come to the conclusion that this annuity-debt cannot be considered as amongst the debts and obligations of which the late Mr Mackintosh intended that his general representatives should relieve his heir of entail. On the contrary, I think it must be regarded as a debt put on the entailed estate, by his own act, posterior to the date of the entail, and left by him at his death as a debt payable out of that estate, and not out of the general funds.

The result is, that both the questions put to us must be answered in the negative.

Agents for Mr Mackintosh—T. & R. B. Ranken, W.S.

Agent for Trustees—Alex. Howe, W.S.

Wednesday, March 2.

BOYD *v.* BOYD.

Heir of Entail—Cutting Wood—Mansion-House. Circumstances in which an heir of entail authorised to cut part of the wood in the neighbourhood of the mansion-house.

This was an action at the instance of the next substitute heir of entail to interdict his brother,