Saturday, March 4.

FIRST DIVISION.

[Lord Rutherfurd Clark.

SHAND *v.* SHAND'S CURATOR AD LITEM.

Entail—Act 16 and 17 Vict. c. 94, § 19—Act 38 and 39 Vict. c. 61, § 5 (Entail Amendment, Scotland, Act 1875)—Disentail—Consent.

In a petition to disentail, the third heir declined to consent, and a remit was made, under the Act 38 and 39 Vict. c. 61, § 5, to ascertain the value of his interest. Before further steps were taken a nearer heir was born.—*Held* (1) that the equivalent to consent provided by the statute could not be held to be obtained, nor consent dispensed with, before the money value was paid or secured; and (2) that therefore the case did not fall under the 19th section of the Act 16 and 17 Vict. c. 94, which applied to circumstances occurring subsequent both to the date of the application for disentail and "to the last date of the consents required for the same."

Question (*per* Lord Ardmillan)—Could the prayer of the petition have been granted even if the equivalents to consent had been completed, seeing the child was *in utero*, and its birth expected immediately?

The petitioner Robert Shand Kynoch Shand was institute of entail in possession of the entailed lands and estate of Hillside, Kincardineshire, under a deed of entail which, though dated 21st June 1869, had been made in implement of a trust-deed executed in 1845, and therefore fell (under the Act 11 and 12 Vict. c. 36) to be held as dated prior to 1st August 1848.

This was a petition for authority to record an instrument of disentail of these lands under the provisions of the statutes 11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, and 38 and 39 Vict. c. 61. The petitioner, who was upwards of thirty-five years of age, and was married, had applied for their consents to the three nearest heirs for the time entitled to succeed. He had obtained the consents of the two nearest, but the third declined to give it.

By the Act 38 and 39 Vict. c. 61, § 5, it is provided that in the event of the declinature or refusal of such an heir (other than the nearest heir, whose consent was necessary) to give his consent, "the Court shall, on a motion to that effect by the petitioner in the application, and on a statement by him of the declinature or refusal or incapacity of such heir or heirs aforesaid, and after such intimation to the heir or heirs so declining or refusing, or to the guardians or other persons interested in the heir or heirs incapacitated as aforesaid, as the Court shall think necessary, ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs declining or refusing, or incapacitated to give consent as aforesaid." The money value so ascertained was then to be paid into bank or secured over the estate, and the consent was therefore dispensed with.

A remit was accordingly made to ascertain the value of the third heir's interest, and a report was drawn up, but before any further step was taken a daughter was born to the petitioner. A curator *ad litem* was thereupon appointed to the infant daughter, who lodged a minute stating, *inter alia*—"The birth of the curator's ward, the infant heiress of entail, has entirely altered the position of matters, and the curator has been unable to find any provision in the statutes for such a peculiar contingency as has occurred in this case. The 19th section of the Act 16 and 17 Vict. cap. 94, provides that such a contingency occurring subsequent to the last date of the consents required to a petition of the nature of the present, shall not affect the proceedings in the petition, but that section does not apply to this case, as one of the heirs of entail whose consent was required had refused to give such consent, and the Lord Ordinary had remitted to Mr Samuel Raleigh, C.A., to ascertain the value in money of the interest of the said heir. The Act 38 and 39 Vict. cap. 61, which authorises the Court to assess the value of an heir who refuses to consent, makes no provision for the contingency of the birth of a nearer heir after the Lord Ordinary has ordered the value of the interest of such heir to be valued, but before he has approved of the report as to such value. In these circumstances the curator *ad litem* thinks it his duty to submit, on behalf of the ward, that the proceedings already taken under the petition are ineffectual, and that the prayer cannot now be granted in respect of the birth of the petitioner's daughter."

The Lord Ordinary issued the following interlocutor:—

"*Edinburgh, 8th February* 1876.—The Lord Ordinary having heard counsel for the petitioner and for the curator *ad litem* to the petitioner's infant child, Refuse the petition, and decerns.

"*Note.*—This petition is presented under the Entail Act of 1875. Before it was brought into Court the petitioner obtained the consent of the nearest heir then in existence. He afterwards obtained the consent of the next heir; but the third declined to give his consent.

"On 17th December 1875 the Lord Ordinary, on the motion of the petitioner, remitted to an actuary to ascertain the value of the expectancy or interest of the heir who had declined to consent, and on that day a report was made fixing it at £200, or 'something like £250,' according as the value of the estate was to be taken at twenty-five or thirty years' purchase of the free rental. Before any further proceedings were taken, a daughter was born to the petitioner, who was a nearer heir than any of the heirs existing at the time the petition was presented.

"Thereafter a curator *ad litem* was appointed to the petitioner's daughter. He maintained that the petition must be refused, inasmuch as no instrument of disentail could be recorded without the consent of his ward, who could not legally give it. On the other hand, the petitioner contended that he was entitled to have the petition granted, because he had obtained the consent of the nearest heir when the petition was presented, and had thus become absolutely entitled to carry out the proceedings for disentail.

"The question depends on the construction of the 19th section of the Entail Act of 1853, with reference to the rights of heirs in possession under the Act of 1875.

"By the 19th section of the Act of 1853 it is provided that 'no alteration of circumstances which has occurred, or which shall occur, subsequent both to the date of presenting such application, and to the last date of the consents required for the same, whether by the birth of any intervening heir, or by the death of any granter of such consent,' shall have any effect upon the rights of the heir in possession presenting a petition for disentail.

"There is an exception in the provision, but it relates only to the rights of minor heirs, and is of no importance in this question.

"The petitioner argued that by virtue of the provisions of the Act of 1875, which enabled him to disentail without the consent of any heir other than the nearest heir in existence at the time, he was in the same position as if he had obtained the consent of the three nearest heirs before his child was born. The argument is plausible, but the Lord Ordinary has been unable to sustain it.

"It is true that if an heir of entail has obtained the consent of the nearest heir for the time he can carry through the proceedings for disentail without the consent of the remoter heirs, by taking such steps as are necessary to enable the Court to dispense with the consent of these heirs. But before an interlocutor can be pronounced dispensing with that consent the value of the expectancy or interest of the remoter heirs must be ascertained in money, and the sum so ascertained paid into bank, or security given for due payment. It is only on that being done that the Court can dispense with the consent of the heirs, and can proceed as if such consent had been obtained. The provisions of the 3d section of the Act of 1875 are very express on this subject.

"In the opinion of the Lord Ordinary the interlocutor dispensing with consent must for the purposes of this question be taken as the equivalent of the consent of the remoter heirs. The 19th section of the Act of 1853 does not, of course, deal directly with this question, but it enacts that it is only after the consents have been given and the petition presented that emerging circumstances shall not defeat the rights of the heir in possession to carry out a disentail. The just construction seems to be that the equivalent shall be taken to be a consent given at the date of the interlocutor dispensing with the consent. For it is only after such an interlocutor has been pronounced that the Court can proceed as if the consent has been obtained.

"The Lord Ordinary has therefore refused the petition."

The petitioner reclaimed, and argued—(1) The three consents or their equivalents had been got before the birth of the child. It had been decided (*Carmichael*, Petitioner, Dec. 22, 1853, 16 D. 296) that when three consents had been obtained, the death of an heir before service made no difference. (2) The consent of the nearest heir was all that was required under the Entail Amendment (Scotland) Act 1875. The other consents might be dispensed with. The only obstacle to disentailing now was that the nearest heir might refuse consent.

The counsel for the curator *ad litem* was not called on.

At advising—

Lord President—The position of this petitioner was such that if he had been proceeding under the Act 11 and 12 Vict. cap. 36, he would have availed himself of the 3d section of that Act. Passing over, in the meantime, the intermediate Statute of 16 and 17 Vict. cap. 94, and looking to the provisions of the Act of last session (38 and 39 Vict. cap. 61), we find that the 5th section of that Act introduces a change upon the previous law as under the Act 11 and 12 Vict. with regard to disentail. The change is that the heir of entail in possession, who desires to disentail, instead of buying off the next heirs by voluntary agreement, is entitled, as regards the second and third of the three heirs whose consent he was obliged to get, to have their interests compulsorily valued in the event of their declining or refusing consent.

This petitioner presents this petition, in which he states that he has obtained the consent of the nearest heir, which is still an indispensable requisite. The consent of the second heir has also been got. It was still necessary for him to obtain the value of the interest of the third heir, who refused consent, and the proceedings for this purpose were in progress, but not completed (the report having been prepared but not presented to the Lord Ordinary) when a new heir came into existence. Now, the value in money of the third heir's interest was not paid into bank nor secured, and it seems to me quite clear upon the statute that it is only when this has been done that the Court have it in their power to dispense with consents, and to proceed as if these had been obtained.

If under the former statute the third heir was not bought off, the petition could not go on. Must the same result not follow here if the petitioner has not succeeded in buying off the heir under the statute of 1875? The dispensation of the consents of the second and third heirs is as essential a requisite now as the consents under the previous Act were.

It has been suggested that aid is to be got from the 19th section of the Act 16 and 17 Vict. cap. 94, but to my mind the difficulty is not removed by that section, because if the purchase and dispensation of consents is a necessary preliminary, and comes in place of the consents themselves, this section must be construed as requiring that the date of the petition and the date of the completion of consents must have passed before the clause in question can have any effect so far as to validate the petition.

I agree in the result at which the Lord Ordinary has arrived.

Lord Deas—There was an heir in this case whose consent was not obtained, and it was necessary for the petitioner either that that should be obtained or that we should have the statutory equivalents. The question comes to be, what were the equivalents necessary to come in place of consents. The statute fixes what is to be done if an heir, whose consent is necessary, refuses to give it. The Court is then to ascertain what is the value in money of his expectation. The next step, on the value being ascertained to the satisfaction of the Court, is that it shall direct that the money be paid into bank or security found

for it. On either of these alternatives being complied with, the Court are then, in the third place, to dispense with consent. These three things require to be done, and then the Court may proceed as if the consents had been obtained. Before any of them were done in this case the daughter was born whose birth gives rise to the present question.

I am very clearly of opinion, with the Lord Ordinary, that the equivalents to consent which the statute requires are not present here. The case does not, therefore, come under the provisions of the 19th section of the Act of 1853.

Lord Ardmillan—Where consent is necessary no consent can avail unless it has been granted, or unless a substitute for consent has been obtained through the medium of a statutory proceeding of the nature of *compulsitor* on valuation. The requirements of the statute for valuation of interest and dispensing with consent had not been complied with, and no sufficient consent had been obtained. At this point of time, and under these circumstances, the infant here was born. I concur in your Lordship's opinion that we cannot grant this petition. I have some doubt whether, if the procedure under the statute for valuing and discharging had been completed before the child was born, we could have granted this petition, seeing that the child was *in utero*, and its birth expected immediately. But on this point I merely reserve my opinion.

Lord Mure concurred.

The Court adhered.

Counsel for Petitioner—M'Laren. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Curator *ad litem*—Kinnear. Agent—John Home, W.S.

Tuesday, March 7.

SECOND DIVISION.

[Lord Craighill.

GILLESPIE *v.* MERCER & OTHERS.

Succession—Settlement—Conditio si sine liberis.

A truster directed her trustees, in the event of the death of her grandson without leaving issue, to pay over her estate to her nephew, and failing him to his children W. and H., "equally betwixt them, and to the survivor of them, and failing both to the truster's own nearest heirs and assignees whomsoever." The truster's nephew and his two children W. and H. all predeceased her grandson, who died without leaving issue.—*Held*, in a competition between the children of W. and H. and one of the next-of-kin, that this bequest was not qualified by the *conditio si sine liberis*, but that the estate fell to be divided amongst the truster's heirs and assignees.

This was an action of multiplepoinding brought by John Gillespie, Writer to the Signet, judicial factor on the trust-estate of the deceased Mrs Jean Hepburn or Weir, and the question raised in it related to the construction of a residuary bequest in her settlement. By this settlement, which was executed in 1811, Mrs Weir nominated trustees, and gave the liferent of her estate to her two sisters.

She then went on to provide that upon the death of the survivor of her two sisters, her trustees "shall pay the yearly produce and interest of my said property, sums of money, and effects, to Alexander Mercer, only surviving child procreate of the marriage betwixt the deceased Captain John Mercer and Elizabeth Weir, my daughter, as an alimentary provision to him, but which shall neither be assignable by him nor be attachable by diligence for any debts contracted or to be contracted by him, with power, however, to the said trustees, if they shall think advisable, to assign and pay over to the said Alexander Mercer the whole or any part of my said property, sums, and effects. In the *fifth* place, that the said trustees, on the death of the said Alexander Mercer, shall pay over and convey my said property, sums, and effects (unless they shall have assigned and paid the same to himself in his own lifetime), or what part thereof which shall remain after any partial payment thereof to him, and that to the child or children lawfully to be procreated of his body, equally amongst them, if more than one, share and share alike, whom failing to William Hepburn of St Vincents, my nephew, and failing him to William and Harriet Hepburn, his children, equally betwixt them, and to the survivor of them, and failing both to my own nearest heirs and assignees whomsoever."

The truster died in 1813, and the income of the estate was paid by the trustees to her sisters until the death of the survivor of them in 1825, when the liferent provision in favour of Alexander Mercer, the truster's grandson, opened to him. At that time he was insane, and continued so down to the date of his death in 1869. He was married and had issue, but it would appear that his children predeceased him without issue. Upon his death the money in the hands of the judicial factor upon Mrs Weir's estate was claimed by William Hepburn and Mrs Mary Hepburn or Cook, son and daughter of William Hepburn, the truster's grandnephew, and also by Mrs Hill or Reily, daughter of the truster's grandniece Harriet Hepburn. The truster's nephew and his two children, William and Harriet, had all predeceased her grandson Alexander Mercer. These claimants sought to have the whole estate divided amongst them, as representing William and Harriet Hepburn, and in virtue of the *conditio si sine liberis decesserit*, or otherwise to share amongst the next-of-kin of the truster. The only other claimants were Lieutenant-General Hutchinson and the other marriage-contract trustees of Mrs Amelia Jane Gordon or Hutchinson, who, for herself, and as representing a deceased brother, Sir John William Gordon, was entitled to claim as one of the next-of-kin of the truster.

On 29th October 1875 the Lord Ordinary pronounced the following interlocutor:—

"The Lord Ordinary having heard parties' procurators on the closed record, joint minute of admissions, No. 26 of process, and productions, and having considered the debate and whole process,—Finds that the residuary bequests in the