the enactment just quoted; and it appears to me, therefore, that the birth of the child in question can have no effect upon the petitioner's right to disentail, which was completed and became absolute when he had obtained the consents of the three heirs in existence at the date when the last consent was given.

"But it is said that the child was *in utero* when the application was presented, and that by the law of Scotland a child *in utero* is to be regarded for the purposes of succession as if it were in existence. The general rule is not disputed that 'it is a good objection against a service that there is a possibility of a nearer heir *in utero*; for *qui in utero est, pro jam nato habetur, quoties de ejus commodo quæritur*,'—Erskine, iii. 8, 76. But this is not a question as to the child's right of succession. The petitioner is the fiar of the estate, subject to the fetters of an entail. He proposes to get rid of the fetters, in the exercise of a right conferred upon him by statute; and the conditions of the right can only be ascertained from the provisions of the statute by which it is created, and not from the common law, to which it is unknown. The statute gives him an absolute right to disentail, with the consents of the nearest heirs in existence for the time, notwithstanding that they have no immediate right of succession, and no rights of succession at all, which is not dependent upon the failure of nearer heirs. I cannot see how the express enactment of the statute is to be qualified by a rule of the common law applicable to a totally different right. It is said that the provision that the right of an heir in possession, in the position of the petitioner, to disentail is not to be affected 'by the birth of a supervening heir,' does not apply to the case of the birth of an heir procreated at the date of presenting the petition. But it clearly applies in terms; and the argument that the exceptional position of a child *in utero* is well known to the law only goes to enforce the reasoning of the petitioner, that if it had been intended to except the case of an heir *in utero* from the enactment, it would have been excepted in terms.

"The curator *ad litem* relied upon certain *dicta* of Lord Ardmillan in the case of *Shand*, 3 R. 544, and of Lord Shand in the case of *Bruce*, 1 R. 742. But Lord Ardmillan expresses no opinion upon the question, but expressly reserves his opinion. And Lord Shand's opinion refers to a totally different matter, viz., the right of an heir who has been served and who is in possession of the estate to disentail while there is a nearer heir in *spe*, in whose favour, if he came into existence, the actual fiar would be bound to denude."

Counsel for Petitioner — Graham Murray. Agents—Gibson & Strathern, W.S.

Counsel for Mrs Campbell—Guthrie. Agents—Henry & Scott, S.S.C.

Counsel for the Curator *ad litem* to Mrs Campbell's Child—Low. Agent—Donald Mackenzie, W.S.

Saturday, February 28.

OUTER HOUSE.

[Lord Kinnear.

MOORE *v.* BELL AND OTHERS.

(*Ante*, p. 59, Nov. 8, 1884.)

Succession—Heir-at-Law—Liability for Ancestor's Debt.

In the distribution of the intestate estate of a domiciled Scotsman a person established his claim as heir-at-law of property in Burmah, he being a different person from the heir to heritage in Scotland. *Held* (1) that he was not bound to contribute along with the executors to payment of the general debts, nor (2) with the heir-at-law of estate in Scotland to debt secured thereon.

In the distribution of the intestate estate of the deceased John Bell, who had real property in Burmah, as well as large estate, heritable and moveable, in Scotland, Andrew Perston established his claim as heir to the property in Burmah according to the law of that place. The present question arose between him and the representatives of Bell in Scotland. It was maintained (1) by the next-of-kin of Bell that Perston was bound to contribute to the general debts of the deceased; (2) by the heir-at-law of the heritage in Scotland, that Perston must contribute to payment of debts charged on the heritage in Scotland.

The Lord Ordinary (Kinnear) pronounced this interlocutor:—"Finds that the claimant Andrew Perston is not liable to relieve the claimants James Bell's trustees, as in right of the heir-at-law of the deceased, of debts affecting the heritable estate in Scotland, or of any portion thereof: Finds that the said claimant is not liable to relieve the claimants James Bell and others as nearest of kin of the deceased, of the personal debts of the deceased or of any portion thereof, and decerns: Finds the said claimants other than Andrew Perston liable to him in the expenses incurred in the process since 27th May 1884," &c.

"*Opinion.*—There are two points that were argued in this case as to the interest of the heir in a property at Rangoon, it being maintained in the first place that he must take that property subject to liability to contribute with the executors for the payment of the whole of the general debts of the deceased, and secondly, that he must take it subject to liability to contribute along with the heir-at-law for the payment of heritable debts charged upon the Scottish heritable estate. As to the first of these points I was not referred to any authority, but having made some careful examination for myself, I find no authority to support the proposition maintained by the executors. The general rule is quite clear that the general debts of the deceased, that is, his personal debts, affect the moveable estate in the hands of his executors, there being no difficulty raised by the terms of any testamentary settlement, for the deceased died intestate, and that the executors who are called upon to pay such personal debts have no claim for relief either against the heir of line or against the heir of any special denomination who takes up any real estate. I do not think there is any distinction in that re-

spect between real estate situated within the territory and real estate situated beyond the territory. Therefore I am unable to give effect to the contention of the executors.

The other question raised by the heir-at-law appears to me to be virtually settled by the previous judgment affirmed by the Second Division, because the principle upon which that went was this, that where a debtis charged upon a heritable estate the heir taking up that estate is liable for payment of the debt, and his liability is not limited to the amount of the particular estate charged, provided he takes up at the same time other estate belonging to the deceased ancestor upon the same title. That being decided in a question between the heir-at-law and the executors, I think the same principle is directly applicable to the present question between the heir-of-line and the heir of another denomination, that is to say, the heir of the particular real estate situated beyond the territory which is carried by the law of the place where it happens to be situated, and a different heir from the Scottish heir-of-line. Therefore I ought to say that the cases which have been cited do not appear to me to have really any direct bearing or any bearing at all upon the question in dispute. The case of *Ogilvie* v. *Dundas*, proceeded entirely upon the construction of the particular marriage settlement upon which the question arose, and the judgment of the House of Lords reversing the judgment of the Court here proceeded exclusively upon the terms of that settlement. Therefore it does not appear to me to be an authority for any other case, and certainly not an authority for a case in which the rights and liabilities of the heir are not regulated by the testamentary settlement of the deceased but by the ordinary rules of law. The cases in which heirs of a different denomination have been held bound to contribute rateably to the payment of the debts appear to me to be all cases falling under one or other of two categories. Either they are cases where the debts to the payment of which they were to contribute have been charged by the deceased on their constitution upon the several estates which have descended to different heirs, or else they are debts the payment of which he has regulated by a testamentary settlement. I have found no case, and no case was cited to me, in which that principle was applied in such a case as the present where there is nothing to affect the debt specially charged upon one estate. Therefore I have not been able to see any ground for excepting this from the general principle to which I have referred. The result will be to sustain the claim of Mr Perston.

"I think Mr Perston is certainly entitled to the expenses properly incurred in the discussion of the question that was really litigated with him; but that he is bound to establish his propinquity and right according to the law of Burmah. He cannot have the expenses applicable to that part of the discussion."

Counsel for Perston—Pearson—W. Campbell. Agent—J. B. Mackintosh, S.S.C.

Counsel for other Claimants—Mackintosh—Dickson. Agent—William Finlay, S.S.C.

Saturday, March 7.

OUTER HOUSE.

GALBRAITH (BUCHANAN'S TRUSTEE) *v.* CAMPBELL'S TRUSTEES.

Bankruptcy—Cessio superseded by Sequestration—Bankruptcy and Cessio Act 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 11—*Bankruptcy Act* 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 29 *and* 42.

On 14th April 1884 a petition for decree of *cessio bonorum* against a debtor was presented by a creditor, and the Sheriff pronounced a deliverance on the same date. On 9th May, on a motion made in the *cessio* process the Sheriff awarded seqestration of the debtor's estates in terms of sec. 11 of the Bankruptcy and Cessio Act 1881. *Held* that 9th May and not 14th April was in the winding up of the debtor's affairs to be held as the date of sequestration.

*Bankruptcy—Diligence—Poinding—Sequestration—*Pari passu *Ranking—Bankruptcy Act* 1856, *secs.* 12 *and* 108.

Decree was obtained by a creditor against a debtor on 15th February 1884. The days of charge on the decree having expired without payment, the debtor, who was insolvent, was rendered notour bankrupt, and a poinding was executed on 1st March, the poinded effects being afterwards sold. On 14th April a petition for *cessio* was presented by another creditor, and in the *cessio* process on 9th May the Sheriff awarded sequestration. *Held* that the 9th May being the date of the sequestration, the creditor's poinding was effectual, because it had been executed more than sixty days prior thereto, but that the sequestration being equivalent to an executed poinding fell by operation of sec. 12 of the Bankruptcy Act 1856 to be ranked *pari passu* therewith in the proceeds of the sale of the poinded effects.

A. G. Buchanan, distiller, was tenant, under the trustees of the late Sir George Campbell of Succoth, of (1) the farm of Tambowie near Milngavie, at a rent of £280; (2) of Tambowie Distillery there, at a rent of £20.

On 29th January 1884 Campbell's trustees pursued Buchanan in the Sheriff Court of Stirlingshire for payment of (1) £596, 10s., with interest from Martinmas 1883, that sum being made up of rent and arrears of rent; (2)£140, with interest from Whitsunday 1884, but superseding extract till said term of Whitsunday.

On 15th February 1884 decree was obtained for the £596, 10s. and interest amounting to £12, 9s. 9d. This decree was extracted, and Buchanan charged to pay it on 22nd February 1884. He did not pay it, and on 1st March 1884, the charge having expired, Campbell's trustees executed a poinding of his stock and other effects, which was reported on 5th March.

On 5th April the poinded effects were sold. According to the roup roll the proceeds were £587, 17s. 7d., out of which expenses and preferable charges fell to be paid. Campbell's trustees maintained in this action that the sum received amounted, after proper deductions, to £503, 18s. 5d.