

Saturday, June 9.

FIRST DIVISION.

[Lord Ordinary on the Bills.]

SCOTT DOUGLAS AND HUSBAND,
PETITIONERS.

Entail—Disentail—Obligation in Marriage Settlement—Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), secs. 3 and 17.

By the terms of a marriage-contract entered into in 1859 the funds of the wife weresettled upon the children of the marriage, and power was given to the trustees to invest the same in the purchase of lands, and to settle such lands, if situated in Scotland, by a deed of strict entail. Under this power an estate in Scotland was purchased by the trustees, who executed a deed of entail by which it was entailed on the wife and the children of the marriage. In 1883, no children having been born of the marriage, the wife, with concurrence of her husband, presented a petition for disentail under the 3d section of the Act of 1882, as being the only heir of entail in existence. *Held* that the descent of the estate having been secured by the marriage settlement to the children of the marriage, the proposed disentail was barred by the 17th section of the same Act, and could not be carried through without the consent of the trustees under the marriage-contract.

By marriage settlement, dated 2d November 1859, executed in the English form, and entered into between Edward Octavius Douglas of the first part, Hannah Charlotte Scott Douglas of the second part, and Sir George Henry Scott Douglas of Springwood Park, Baronet, and the other trustees therein mentioned, of the third part, the whole capital of the funds put into settlement by Mrs Scott Douglas were settled upon the children of the marriage. It was agreed and declared that the trustees, with the consent of the spouses, should have power to lay out the trust funds contributed by Mrs Scott Douglas, or any part thereof, in the purchase of lands, houses, or heritable estate in England, Wales, Ireland, or Scotland, and to stand possessed of the lands and others so purchased upon trust, and to convey, surrender, or otherwise settle and assure the same for the benefit of the husband and wife during their respective lives, or for any less period, and subject thereto for the benefit of the said children, as thereby covenanted.

It was also agreed by the marriage settlement that the power so given to the trustees should, in the event of the purchase of lands in Scotland, be held to include a power to settle such lands by a deed of strict entail.

The estate of Killiechassie in Perthshire was purchased by the trustees out of the trust-funds contributed by the wife, and was subsequently, at the request of the spouses, conveyed to Mrs Scott Douglas and the children of the marriage by disposition and deed of entail dated the 28th of May, and the 16th, 21st, and 27th days of June, and recorded in the Register of Tailzies the 11th, and, along with warrant of registration thereon on behalf of Mrs Scott Douglas, recorded in the Particular Register of

Sasines for Perthshire the 16th, and registered in the Books of Council and Session the 22d days of July, all in the year 1864.

This was a petition presented by Mrs Scott Douglas and her husband for authority to disentail the estate of Killiechassie under the Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), which provides by section 3—"It shall be lawful for an heir of entail in possession of an entailed estate held under an entail dated on or after the 1st day of August 1848, to disentail the estate, and to acquire it in fee-simple, by applying to the Court in the manner provided by the Entail Acts, if he shall be the only heir of entail in existence, or if he shall obtain the like consents as are required by the third section of the Entail Amendment Act 1848 in the case of entails dated prior to the said date."

Mrs Scott Douglas was forty-eight years of age, and the only heir of entail in existence, no children having been born of the marriage. Her husband was fifty-two.

A rémit having been made to Mr James W. Moncreiff, W.S., the reporter directed the attention of the Lord Ordinary to the terms of the marriage settlement, and raised the question whether the 17th section of the Act of 1882 did not apply to the case and bar the proposed disentail.

Section 17 enacts—"When any heir of entail in possession of an entailed estate, or the heir-apparent to such estate, shall, together or separately, have secured by obligation, in any marriage-contract entered into prior to the passing of the present Act, the descent of such estate upon the issue of the marriage in reference to which such contract is entered into, it shall not be competent for such heir of entail in possession or heir-apparent, or either of them, to apply for or to consent to the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who, by himself or his guardian, shall consent to such disentail, or until such marriage shall be dissolved without such child being born, unless the trustee or trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution, shall concur in such application or consent."

The marriage-contract trustees had not consented to the petition, their consent not having been asked.

The Lord Ordinary on the Bills (LORD SHAND) on 12th April 1883 reported the application to the First Division of the Court.

The petitioner contended that section 17 was not applicable unless as heir of entail actually in possession of an entailed estate, or the heir apparent, had secured the descent of such estate upon the issue of the marriage—*Stirling Stuart*, March 10, 1853, 15 D. 536.

At advising—

LORD PRESIDENT—If the trustees under this marriage-contract had consented to this application there would have then been no question for us to decide, for that would have fulfilled the requirements of the 17th section of the Entail (Scotland) Act 1882. They have not, however, given their consent, and as the petitioner is anxious to have a decision on the point, I see no reason why she

should not get the benefit of a judgment, and that judgment, in my opinion, must be against her.

The money belonging to Mrs Scott Douglas brought under the trust was by the terms of the marriage-contract vested in the children of the marriage, and it was agreed that the trustees should have power to lay out the trust-funds in the purchase of heritable estate in England, Wales, Ireland, or Scotland. It was then further agreed "that the powers so given to the trustees should, in the event of the purchase of lands in Scotland, be held to include a power to settle such lands by deed of strict entail, so as to form a valid and effectual entail according to the law of Scotland."

Under that power lands were purchased by the trustees with Mrs Scott Douglas' money, and were entailed on the petitioner as institute, and failing her on the children of the marriage.

The question now is, whether this estate can be disentailed under the powers conferred by the Act 45 and 46 Vict. c. 53, the 3d section of which provides—"It shall be lawful for an heir of entail in possession of an entailed estate held under an entail dated on or after the 1st day of August 1848, to disentail the estate, and to acquire it in fee-simple, by applying to the Court in the manner provided by the Entail Acts, if he shall be the only heir of entail in existence, or if he shall obtain the like consents as are required by the third section of the Entail Amendment Act 1848 in the case of entails dated prior to the said date." And that is the position of Mrs Scott Douglas, because she has no children. But the question is whether the case does not fall within the provisions of the 17th section of the same Act, which provides—"When any heir of entail in possession of an entailed estate, or the heir-apparent to such estate, shall, together or separately, have secured by obligation in any marriage-contract entered into prior to the passing of the present Act, the descent of such estate upon the issue of the marriage in reference to which such contract is entered into, it shall not be competent for such heir of entail in possession or heir-apparent, or either of them, to apply for or to consent to the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who, by himself or his guardian, shall consent to such disentail, or until such marriage shall be dissolved without such child being born, unless the trustee or trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution shall concur in such application or consent."

Now, the argument for the petitioner was that the meaning of the section is that the heir of entail actually in possession of the entailed estate or the heir-apparent must have secured the descent of that estate by marriage-contract or otherwise. That, in my judgment, is far too limited a reading of the words, which are, "shall have secured by obligation in any marriage-contract entered into prior to the passing of the present Act the descent of such estate upon the issue of the marriage." I think they apply to cases when at any time prior to the passing of the Act the descent of the estate shall have been secured to the issue of the marriage.

I have no doubt that this application cannot be carried through without the consent of the trustees under the marriage-contract.

LOKDS DEAS and MURE concurred.

LORD SHAND—I am of the same opinion. The purpose of section 17 is to protect those rights of the issue of a marriage which have been secured by marriage-contract, and I think the section clearly applies to the present case. The funds out of which the estate was purchased were secured to the children, and if the estate had not been entailed it must have been held for behoof of or settled on the children in fee. The entail was executed in carrying out the petitioners' obligation in the marriage-contract to secure the descent of the estate to the issue of the marriage, and I am clearly of opinion that the petitioner cannot disentail the estate without the consent of the trustees, on whom the duty lies of seeing that the provisions of the marriage-contract are carried out.

The Court found that the petitioners were not entitled to proceed with the disentail of the estate of Killiechassie without the consent of the trustees under the marriage-contract, and remitted the application to the Junior Lord Ordinary.

Counsel for Petitioners—Graham Murray.
Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 9.

FIRST DIVISION.

SNADDON, PETITIONER.

Poor's Roll—Remit to Reporters on Probabilis causa litigandi.

Remit to the reporters on the *probabilis causa refused* in the case of an able-bodied man having four children dependent on him, who was earning 20s. per week.

In an application by Alexander Snaddon for the benefit of the poor's roll, it was stated that the applicant was an able-bodied man 38 years of age, with four children all under eleven years of age, and that he was earning 20s. per week of wages. The application was made with the view of enabling him to raise an action of reduction of his father's will, the proposed defender being his sister. She opposed the application. *Walker v. Brown*, February 3, 1860, 22 D. 678; *Williamson v. Irvine*, November 21, 1863, 2 Macph. 126; *Collins v. King & Co.*, February 28, 1867, 39 Jurist 257.

LORD PRESIDENT—I never saw such an unfavourable case for the poor's roll. The man is able-bodied, in the prime of life, and earning 20s. a-week. The poor's roll is not intended for such a person at all.

The other Judges concurred.

The Court refused the application.

Counsel for Petitioner—Donaldson. Agent—R. H. Miller, S.S.C.

Counsel for Respondent—Thorburn. Agent—A. Wallace, Solicitor.