

Thursday, January 29.

OUTER HOUSE.

[Lord Kinnear.

CAMPBELL v. CAMPBELL.

Entail—Consent—Child in utero—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sec. 3—Entail Act 1853 (16 and 17 Vict. cap. 94), sec. 19.

An heir in possession presented a petition for disentail, and obtained the consents of the three heirs who were next heirs at the date of the petition and of the consents. Before the disentail was signed a child who was *in utero* at the time the petition was presented, and who if born before that date would have been second in the succession, was born. *Held* that this child had no right to the value of his consent.

On October 20th 1884 a petition was presented by the Rev. Sholto Douglas Campbell to disentail the entailed estate of Douglas-Support, of which he was heir of entail in possession. The petitioner stated that he was of full age and unmarried, and that the three next heirs were in order his immediate younger brother Robert Douglas Campbell, his next brother Barrington Bulkeley Douglas Campbell, and his nephew Archibald Douglas Campbell, who was a son of the last named, and was in minority. Robert Douglas Campbell was married, but had no son at the date of the petition. The petitioner stated that he had obtained the consents of Robert Douglas Campbell and Barrington B. D. Campbell, but that it would be necessary to appoint a curator *ad litem* to Archibald Douglas Campbell.

On 29th October answers were lodged for the wife of Robert Douglas Campbell. She stated that she had been obliged to leave her husband, and had raised a process of separation and aliment against him; that the children of her marriage had been three daughters, who were not called by the entail, but that she was pregnant, and that her child would be born in about four weeks from the date of her answers, and would be, if a son, next in the succession to his father, *i.e.*, would be second in order of succession; that the petitioner had control of her husband, his brother, who was of intemperate habits, and not fit for business, had obtained his consent without paying the proper value of it, and was endeavouring to carry through the disentail before her child should be born, the result of which would be, that her child, if a son, would be deprived of the value of his consent to the disentail.

When the petitioner was known to be negotiating with the curator *ad litem* to Archibald Douglas Campbell, a motion was made by Mrs Campbell, the respondent, that the petition should not be sisted till after the birth of her child, but the deed of consent had been then signed, and the Lord Ordinary refused the motion, both on that ground and also on the ground that he was bound to appoint a curator *ad litem* to Archibald Douglas Campbell by the Entail Act of 1882, and could not interfere with him.

No money was paid to Robert Douglas Campbell for his consent.

The curator *ad litem* to Archibald Douglas Campbell lodged a deed of consent for him as third heir.

Thereafter Mrs Campbell's child, a son, was born before the disentail was carried through. Mr Donald Mackenzie, W.S., was appointed curator *ad litem* to him.

He appeared, and claimed that his ward should be held as the second heir of entail, and that his consent was necessary for carrying out the disentail.

Argued for the curator *ad litem*—Although the Entail Act 1853 enacted that the birth of a child was to make no difference to the proceedings after the first interlocutor in the process had been pronounced, still this child was *in utero* when the proceedings commenced, and therefore must be held to have been in life, so that this child must be held to be the second heir of entail, and the consents already given were of no avail—*Bruce v. Johnstone*, March 6, 1874, 1 R. 740; *Shand v. Horne*, March 4, 1876, 3 R. 544.

The Lord Ordinary granted the prayer of the petition, and warrant to disentail.

“*Opinion.*—The petitioner has obtained the consents of the three nearest heirs, who, at the date of such consents, and at the date of presenting the application, were for the time entitled to succeed to the estate in their order successively immediately after the petitioner. He has therefore satisfied the requirements of the third section of the Rutherford Act, and is entitled to disentail. But since the date of the last consent a son has been born to Mr Robert Douglas Campbell, the immediate younger brother of the petitioner, and it is said that his birth puts an end to the proceedings, because he is now the second of the three heirs entitled to succeed in their order after the petitioner, and therefore one of the three whose consent must be obtained, or valued and dispensed with in order to the success of the petition. If the question had depended solely on the Rutherford Act, I should have had difficulty in assenting to this contention, because the conditions upon which an heir in possession in the position of the petitioner is empowered to disentail are very clearly defined in the third section of the Act; and there can be no question that the consents which he requires for that purpose are those of the three persons who at the dates specified stand in the position of the three nearest heirs for the time, although they may be liable to be displaced from that position before the succession opens, by the birth of a nearer heir. But if there were any doubt as to the effect of the Rutherford Act, it is removed by the 19th section of 16 and 17 Vict. cap. 94, which provides that the date of the first interlocutor shall be held to be the date of presenting the application, and 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 to the same, whether by the birth of any intervening heir, or by the death of the grantor of such consent,’ shall have any effect on the rights of the heir in possession presenting a petition for disentail. There is an exception in the provision, but it is not suggested that it has any application to the question. The event which has occurred is thus expressly provided for by

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 quaeritur*.'—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 Mac-kenzie, 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 (KINNĒAR) 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-