

his (*i.e.* Mr Bryan's) instructions in connection with the firm, and did exactly what I was told." Mr Gibson therefore signed the document in question on the direct authority of that partner who could have validly signed it himself, and the signature of an authorised agent is equal to the signature of the principal and binding upon him. Mr Gibson's general procuration is not needed to validate his signature in the present instance. The direct authority on which he acted was a procuration *quoad hoc*. I come therefore to the conclusion that the writ produced is the writ of the defenders, and that it establishes the loan to them of the sum sued for.

The plain justice of the case points also to the pursuer being entitled to decree. Her £100 was not returned by her husband. It was actually delivered by him to the cashier of the firm, and went into the firm's bank account and should now be accounted for by them; that their cashier subsequently allowed one of the partners to deal with that money as his own by putting it to his private account and afterwards withdrawing it, is a matter with which the pursuer has no concern. The pursuer can scarcely be called on to suffer for what she could in no way control. But that the pursuer's money was a *bona fide* loan to the defenders' firm, and was so treated when the money first reached the hands of the defenders' cashier, is quite evident from the facts which have been proved, among which are these important items, namely, that the acknowledgment for the money was copied into the firm's financial letter book which all the partners might see, and the money itself duly entered when received in the columns of the firm's cash book.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Appellant—Fleming. Agents—Forrester & Davidson, W.S.

Counsel for the Respondent—G. R. Gillespie—Dykes. Agents—E. A. & F. Hunter & Company, W.S.

Tuesday, February 23.

## FIRST DIVISION.

[Lord Low, Ordinary.]

### DUKE OF SUTHERLAND *v.* MARQUESS OF STAFFORD.

*Entail—Power to Disentail Estate Entailed in Pursuance of Agreement—Entail Amendment Act 1882, sec. 13.*

By minute of agreement the Duke of Sutherland, heir of entail in possession of an entailed estate, and the Marquess of Stafford, the heir-apparent under the entail, and whose consent was necessary to the disentail of the estate, agreed for certain onerous causes that the estate should be disentailed, and thereafter

re-entailed along with other lands which the Duke held in fee-simple. In the narrative of the agreement one of the inducing causes was stated to be "that it is desirable for the preservation of the dignity and honour of the Earldom of Sutherland that the said estates should be secured by fetters of entail, so far as legally may be done, from being alienated from the Earldom of Sutherland, or wasted or charged with debt except as after mentioned." In pursuance of the agreement the estate was disentailed, and afterwards re-entailed along with the fee-simple lands. The Entail Act of 1882, sec. 13, gave power to the heir of entail in possession to have the consent of the apparent heir dispensed with in an application to disentail. In 1891 the Duke of Sutherland presented a petition to disentail a portion of the estate entailed in pursuance of the agreement of 1878. The application was opposed by the Marquess of Stafford. *Held* that the application was not barred by the agreement of 1878.

*Entail—Petition to Disentail a Portion of an Entailed Estate—Power of Court to Dispense with Consents of Next Heirs—Entail Amendment Acts 1848, sec. 3; 1875, sec. 5; and 1882, secs. 3 and 13.*

*Held* that the power of the Court to dispense with consents of next heirs is not confined to the case of an application to disentail the whole of an entailed estate, but applies to the case of an application to disentail a fourth of such estate.

The Duke of Sutherland was institute of entail in possession of the entailed estate of Reay, under a deed of entail dated 16th October, and recorded in the Register of Entails 6th December, and in the Register of Sasines 20th December 1861, and in the Books of Council and Session 22nd January 1863, executed by the Duke in favour of himself and the heirs whatsoever of his body, whom failing the other heirs of entail therein mentioned.

The Duke of Sutherland was also institute of entail in possession of the entailed estate of Sutherland in virtue of a deed of entail dated 16th July, and recorded in the Register of Entails 3rd October, and in the Register of Sasines and the Books of Council and Session 5th November 1878, executed by the Duke in favour of himself, whom failing the Marquess of Stafford, his eldest son, and the heirs whomsoever of his body, whom failing the other heirs therein mentioned. This deed of entail was executed in respect of a minute of agreement between the Duke of Sutherland and the Marquess of Stafford, dated 20th and 23rd February, and recorded 25th July 1878. The minute of agreement set out that considering that the Duke was heir of entail in possession of the estate of Sutherland in virtue of a deed of tailzie dated in 1835, that the Marquess was the heir-apparent next entitled to succeed to the entail estate, and that having been born after 1st

August 1848, and being of full age, he would succeed to and take the same in fee-simple; that it was competent for the said Duke and Marquess by joint-agreement to disentail the entailed estate; "that it is desirable for the preservation of the dignity and honour of the Earldom of Sutherland that the said estates should be secured by fetters of entail, so far as legally may be done, from being alienated from the Earldom of Sutherland, or wasted or charged with debt except as after mentioned;" that it was desirable that certain lands and other properties which had been acquired by the Duke should form part of the entailed estate; that since his succession to the entailed estate the Duke had expended very large sums on its improvement which he was entitled to charge upon it, and in consideration of various prestations in favour of the Marquess granted by the Duke in connection with the re-entail of the family estates in England, the Duke and Marquess agreed as follows:—(1) The Duke bound himself to take the necessary proceedings for disentailing the said lands, and the Marquess bound himself to concur therein. (2) The Duke agreed to renounce and in valid and sufficient form discharge his right to charge the estate with improvement expenditure made by him up to the date of the agreement. (3) The Duke bound himself to execute a valid deed of entail of the estate formerly entailed and the fee-simple lands and properties upon himself, whom failing the Marquess, whom failing the heirs and substitutes specified in the former deed of entail. (4) Power was reserved to the Duke to charge the fee of the estate with a sum not exceeding £100,000, and the Duke bound and obliged himself to re-entail the said estate free and discharged of all incumbrances with the exception of the said sum of £100,000. (5) The statutory powers of heirs of entail to grant provisions to husbands and widows of heirs in possession or heirs-apparent were restricted, so that no jointure should exceed £4000 a-year, [that the whole jointures on the estate should never exceed £7500 a-year, and that the statutory powers of providing for younger children should be entirely excluded.

On 6th October 1891 the Duke of Sutherland presented a petition to the Court of Session for authority to execute an instrument of disentail of certain portions of the said entailed estates of Reay and Sutherland.

In the petition it was set forth, *inter alia*, (1) that the petitioner was of full age and subject to no legal incapacity; (2) that the three nearest heirs of entail who at the date of presenting this application were entitled to succeed in their order successively immediately after the petitioner under both deeds of entail were (1st) the petitioner's eldest son the Marquess of Stafford, the heir-apparent under the said deeds of entail, (2nd) Earl Gower, the eldest son of the Marquess of Stafford, and heir-apparent immediately after his father, and (3d) Lord Alistair St Clair Leveson Gower, the second son of the Marquess of Stafford; (3) that the Mar-

quess was of full age, and subject to no legal incapacity, but that Earl Gower and Lord Alistair St Clair Leveson Gower were both pupils, and had no guardians other than their father; (4) that it would be necessary for the Court, in terms of the 31st section of the statute 11 and 12 Vict. cap. 36, and the 12th section of the Statute 45 and 46 Vict. cap. 53, to appoint a *curator ad litem* to Earl Gower; (5) that deeds of consent by the Marquess of Stafford and the *curator ad litem* to Earl Gower to the disentail would be produced in the course of the proceedings, failing which the values in money of the expectancies and interests in the foresaid subjects of the Marquess and Earl respectively with reference to the application would be ascertained and provided for in terms of section 5 of the Act 38 and 39 Vict. cap. 61, and section 13 of the Act 45 and 46 Vict. cap. 53.

On 24th October 1891 the Junior Lord Ordinary (Low) appointed the Duke of Fife *curator ad litem* to Earl Gower, and the Duke of Westminster *curator ad litem* to Lord Alistair St Clair Leveson Gower.

Thereafter answers were lodged on behalf of the Marquess of Stafford and the Dukes of Fife and Westminster as *curators ad litem* foresaid, in which they averred that the portions of the entailed estates proposed to be disentailed lay in the heart of the estates, and that it would be extremely injurious and indeed disastrous to the entailed estates and to the interests of the heirs of entail that the said portions should be disentailed so that they might become the property of persons other than the heir of entail in possession of the entailed estates. The respondents further submitted that as far as the disentail of the portion of the Sutherland estate was concerned, the petitioner was barred from insisting in his application by reason of the agreement between himself and the respondent the Marquess of Stafford, under which the entail of 1878 was granted, and that upon a just construction of the petitioner's titles and the various clauses of the Entail Acts applicable to disentail, the petitioner had no right and title to disentail parts of the entailed estates of Reay and Sutherland or either of them, and that on these grounds the prayer of his petition ought to be refused.

By the Entail Amendment Act 1848 (11 and 12 Vict. cap 36—the Rutherford Act), sec. 3, it is enacted—"That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the said 1st day of August 1848, to acquire such estate in whole or in part in fee-simple by applying to the Court of Session for authority to execute, and executing and recording in the Register of Tailzies under the authority of the Court, an instrument of disentail in the form and manner hereinafter provided; provided always that such heir of entail in possession shall be the only heir of entail in existence for the time, and unmarried, or otherwise shall have obtained the consents of the whole heirs of entail, if there be less

than three in being at the date of such consents, and at the date of presenting such application, or otherwise shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir-apparent under the entail, and of the heir or heirs in number not less than two, including such heir-apparent who in order successively would be heir-apparent; provided also that the nearest heir of entail for the time entitled to succeed to such estate immediately after such heir in possession, where any such other heir exists, shall be of the age of 25 years complete and not subject to any legal incapacity."

By the Entail Amendment Act 1875 (38 and 39 Vict. cap 61), sec. 5, it is enacted—"Whereas it is expedient that section 3 of the Act of the 11th and 12th years of the reign of Her Majesty, chapter 36, should be amended, Be it enacted as follows:—(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may competently be given after such application has been presented to the Court, and in the course of the same; (2) In the event of any of the foresaid heirs, except the nearest heir for the time, whether an heir-apparent or not, entitled to succeed, declining or refusing to give, or being legally incapable of giving his consent, the Court may dispense with such consent in terms of the provisions following (that is to say):—(a) When any of the foresaid heirs entitled to succeed, except the nearest heir for the time, declines or refuses to give, or is legally incapable of giving 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; (b) Upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application, for the amount so ascertained in favour of the heir or heirs aforesaid; (c) Upon such value in money being so paid or secured to the satisfaction of the Court, the Court shall dispense with the consent

or consents of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, and shall thereupon proceed as if such consent or consents had been obtained: Provided always that nothing herein contained shall render it competent to dispense with the consent of the nearest heir for the time entitled to succeed to any entailed estate sought to be disentailed."

By the Entail Amendment Act 1882 (45 and 46 Vict. cap 53), sec. 3, it is enacted—"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 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."

By section 13 of the same Act it is enacted—"In any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir, or the curator *ad litem* appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security therefor shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sections 5 and 6 of the Entail Amendment (Scotland) Act 1875, shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August 1848, as well as to entails dated prior to that date."

On 15th December 1891 the Lord Ordinary (Low) repelled the objections of the respondents to the competency of the petition.

"*Opinion.*—This is an application by the Duke of Sutherland, as heir of entail in possession of (1) the estate and country of Reay, and (2) the earldom and estate of Sutherland, for authority to disentail a certain part of these estates.

"The application is opposed by the Marquess of Stafford, the eldest son of the petitioner, and also by the curators *ad litem* appointed by the Court to the eldest and second sons of the Marquess.

"It is stated in the answers that the portion of the Reay estate which it is proposed to disentail is situated in close proximity to the mansion-house of Tongue, and the portion of the Sutherland estate close to the policies of Dunrobin, and at no great distance from the castle itself. To disentail the portions proposed would, it is averred, cause the greatest injury to both the entailed estates. If it were neces-

sary to determine at the present stage of the case to what extent the proposed disentail would be injurious to the estates, I should have to order inquiry before proceeding further, but as the question which was argued before me related to the competency of the application I shall assume that the position of the portions of the estate in question, and the injury which their disentail would cause, are correctly stated in the answers.

“The grounds upon which it is maintained that it is incompetent for the petitioner to proceed with the present application are two in number.

“(1) It is maintained that the petitioner is barred from disentailing the Sutherland estates or any part of them in respect of an agreement entered into between him and the Marquess of Stafford in February 1878, in pursuance of which the present entail of the Sutherland estates, which is dated in July 1878, was executed.

“(2) It is maintained that upon a sound construction of the Entail Acts it is incompetent for the Court to dispense with the consents of the next heirs upon the value of their interest or expectancy being paid or secured, where the application is for authority to disentail a portion only of the entailed estates the actual consents of the next heirs being, it is maintained, in such a case still necessary.

“I shall deal with these objections in the order in which I have stated them.

“1. The agreement of 1878 was undoubtedly an onerous deed. The estates were then held under an entail dated in 1835, and the Duke of Sutherland could have disentailed with the consent of the Marquess of Stafford, but as the law then stood he could not disentail without the Marquess's consent. By the agreement the parties agreed that the estates should be disentailed, and again re-entailed, the Duke, on the one hand, agreeing to bring under the entail certain estates which he held in fee-simple, and to discharge his right to charge against the estate large sums which he had expended in improvements; and the Marquess, on the other hand, agreeing that the Duke should have power to charge the fee of the estates with a sum of not more than £100,000. In pursuance of the agreement the estates were disentailed, and along with the fee-simple lands re-entailed, power being given under the new entail to the Duke of Sutherland, whom failing the Marquess of Stafford, to charge the fee of the estates to the extent of £100,000.

“The question is, whether there is anything in the contract which prevents the Duke of Sutherland taking advantage of the power which the Entail Act of 1882 gives to heirs of entail in possession of having the consent of the nearest heir for the time dispensed with, in an application to disentail? In my opinion that question must be answered in the negative. The agreement has been fully implemented, and the Marquess of Stafford having got all that he bargained for, I do not see how he can demand anything more. The

Legislature has given to an heir of entail in possession certain powers, and the Duke of Sutherland is heir of entail in possession, and he is in that position, not contrary to, but in accordance with and in pursuance of the agreement. How, then, can the agreement prevent him exercising a power which has been conferred by subsequent legislation? The respondents relied greatly on the part of the narrative of the agreement in which one of the inducing causes is stated to be ‘that it is desirable for the dignity and honour of the Earldom of Sutherland that the said estates should be secured by fetters of entail, so far as legally may be done, from being alienated from the Earldom of Sutherland, or wasted or charged with debt except as after mentioned.’ But the counterpart of this consideration in the operative part of the agreement was the obligation of the Duke to re-entail the estates upon a certain series of heirs, and under certain conditions. The Duke came under no obligation not to exercise any powers which subsequent legislation might confer upon heirs of entail, and it seems to me to be impossible to read any such obligation into the deed. I am therefore of opinion that the present application is not barred by the agreement.

“2. In the next place, the respondents contend that the power of the Court to dispense with consents is confined to the case of an application to disentail the whole of an entailed estate. The power to dispense with consents was first given by the Act of 1875, and, so far as I am aware, it has never until now been suggested that the enactment did not apply to an application to disentail a part, as well as to an application to disentail the whole of an entailed estate. If, however, the construction put upon the Act by the respondents is sound, I apprehend that the fact that for many years an erroneous construction has in practice been acted upon is of no moment.

“The argument of the respondents I understand to be as follows:—

“By the third section of the Rutherford Act power is given to an heir of entail in possession of an entailed estate to acquire in fee-simple ‘such estate in whole or in part’ with certain consents, if he is not the only heir in existence. By the fifth section of the Act of 1875, which amends the third section of the Rutherford Act, power is given to the Court, upon certain conditions, to dispense with the consents required by the Rutherford Act, except the consent of the nearest heir for the time. In that section no mention is made of part of an entailed estate, the case with which the section deals being spoken of as an application for authority to disentail ‘an entailed estate.’ Further, in the same section the Court is directed, in the event of an heir (other than the nearest) whose consent is required under the Rutherford Act, refusing to consent, to ascertain the value in money of the expectancy or interest of that heir ‘in the entailed estate.’ The respondents contended that an applica-

tion to disentail only part of an entailed estate was designedly omitted from the section, the reason being the great injury which the next heirs might sustain if the heir in possession had power capriciously to disentail without their consent any part of the estate such as the mansion-house and policies. The Legislature, therefore, while recognising that it was quite reasonable that part of an entailed estate should be disentailed if everyone interested consented, and while providing that if the whole of an estate was disentailed, the precise money value should be ascertained and the next heirs compensated in proportion to their interests, had not provided any machinery for ascertaining the compensation to be paid to the next heirs in the case of a partial disentail for injury suffered by reason of the remainder of the estate being injuriously affected by severance or otherwise.

“The respondents submitted a similar argument upon the third section of the Act of 1882, which empowers an heir of entail in possession ‘of an entailed estate,’ under a new entail ‘to disentail the estate and acquire it in fee-simple’ if he shall obtain the like consents as are required by the third section of the Rutherford Act. The respondents also pointed out that in section 12, sub-section 5, of the Act of 1875, certain provisions are made for the case of an application to disentail an estate in whole or in part, while section 19 of the Act of 1882 provides for an application for an order of sale of an entailed estate or part of it. These sections, the respondents contend, show that the Legislature did not omit to refer to part of an entailed estate in the fifth section of the Act of 1875, or the third section of the Act of 1882, through inadvertence, but because it was intended to exclude the case of an application to disentail part of an entailed estate.

“The respondent’s argument is ingenious, but I am of opinion that it is not well-founded.

“(1) The fifth section of the Act of 1875 proceeds upon the narrative that it is expedient that the third section of the Rutherford Act should be amended, and then it proceeds to state what the amendments are, these being—1st that the consent of any heir in any application to disentail an entailed estate may be competently given after the application has been presented; and 2nd that in the event of any heir except the nearest refusing to consent the Court may upon certain conditions dispense with his consent. The changes operated by the fifth section of the 1875 Act are thus *prima facie* co-extensive with the provisions of the third section of the Rutherford Act, and if it had been intended that the change in the law should not apply to a partial disentail, I think that the Legislature would have said so, and would not have permitted so important a limitation in the scope of the amendment to be gathered from a minute and subtle analysis of the phraseology.

“(2) It seems to be clear that whatever

is the scope of the amendment made by the fifth section of the Act of 1875, both parts of that section deal with the same thing—I mean that the first sub-section does not deal with a larger or more extensive amendment than the second sub-section. The respondents at all events cannot maintain the opposite view, because the words upon which they mainly rely, viz., ‘an entailed estate’ occur only in the first sub-section. Now, as I have already pointed out, all that the first sub-section does is to provide that the consent of any heir whose consent is required by the Rutherford Act to a disentail may competently be given after the application has been presented to the Court. But that is an enactment which has regard solely to convenience of procedure, and no reason was suggested or could, I apprehend, be suggested why it should be confined solely to the case of an application to disentail the whole estate.

“(3) Upon what principle, if the respondents’ view is sound, is it to be ascertained whether an application is for the disentail of ‘an entailed estate,’ or only ‘part of it’? The difficulties which would arise in determining that question are so obvious, that if it had been intended that the fifth section of the 1875 Act should be more limited in its scope than the third section of the Rutherford Act, that would have been clearly expressed, and some definition given whereby it could be ascertained whether a case did or did not fall within the enactment.

“(4) The respondents contend that it is impossible under the fifth section of the Act of 1875 to compensate the next heirs in the case of a partial disentail, because what the Court is directed to ascertain is the value in money of their expectancy or interest in ‘the entailed estate.’ The respondents, however, leave out of view that the value of the interest or expectancy in the entailed estate is to be ascertained ‘with reference to such application.’ Now, the only kind of applications with which the section deals are applications for authority to disentail, and the Court must ascertain the value of the expectancy with reference to the particular application to disentail. The words in which the direction to the Court is given seem to me to be carefully chosen to cover every case whether of a partial or of a total disentail, and the powers which the Court have under their discretion are, I think, wide enough to enable the Court to do substantial justice to the next heirs in every case.

“(5) As regards the Act of 1882, the respondents’ contention would have the anomalous result that by the third section the distinction between old and new entails would be abolished only in the case of applications to disentail the whole estate, and not in the case of applications for a partial disentail. The thirteenth section of the Act of 1882, however, seems to me to be conclusive of the question. It is there provided that in ‘any application under the Entail Acts to which the consent

of the heir-apparent or other nearest heir is required, such consent may be dispensed with by the Court. Now, an application to disentail part of an estate is an application to which the consent of the heir-apparent or other nearest heir was at the date of the Act required, and I fail to see how it is possible to limit the generality of the words 'any application.'

"I am therefore of opinion that the argument of the respondents upon the Entail Acts cannot be sustained.

The respondents reclaimed, and argued—  
(1) There were circumstances in which an heir of entail might contract himself out of his power to disentail—*Scott Douglas*, June 9, 1883, 10 R. 952. By the agreement of 1878 the Duke of Sutherland had bound himself not to take any steps which would destroy the entail. The positive prohibitions and negative restrictions in the deed were meaningless unless this was so. The contract must be construed according to the intentions of the parties to it. The Lord Ordinary had assumed that the agreement had been fully implemented, but this was not so. The Duke bound himself, not only to make a new entail, but to keep it intact.  
(2) The consents of the next heirs were necessary to the disentail of a part of an entailed estate. Under the 3rd section of the Rutherford Act an entailed estate held under an old entail could be disentailed in whole or in part with certain consents. Under section 5 of the Act of 1875 the consents of the second and third heirs could be dispensed with where it was desired to disentail the whole of the entailed estate, but there was no power given by that section to dispense with such consents in disentailing part of an entailed estate. The Entail Act of 1882, when in sections 3 and 13 it puts new entails in the same position as regards disentail as old ones, and also dispensed with the consent of the nearest heir, dealt only with the entailed estate, and made no reference to a part thereof. It was reasonable to suppose that the Legislature intended that where it was desired to disentail part of an estate the consents of the next heirs should still be necessary. Otherwise there might be capricious or malicious procedure on the part of an heir of entail; he might get the best parts of the estate disentailed and thus riddle it without restraint. The strict phraseology of the statute was in favour of the respondents' contention, which was also in accordance with public policy. Section 12, sub-section 5, of the Act of 1875, and sections 19, 21, and 22 of the Act of 1882, showed that where the Legislature intended to deal with part as well as the whole of an entailed estate, it did so in specific terms. Besides, the Entail Acts made no provision for severance damage as was done in the Lands Valuation Act. There was thus no machinery provided by the Act for dispensing with the consents of the next heirs to the disentail of part of an entailed estate.

Argued for the petitioner—(1) He had implemented the agreement of 1878 by

binding the Sutherland estate under the fetters of an entail, "so far as legally may be done," at that date. But he had never contracted himself out of the powers conferred on him by future Acts of Parliament. The case of *Scott Douglas* had no application to circumstances like the present; it was a case of a marriage-contract, which class of cases was specially provided for by section 17 of the Entail Act of 1882. (2) The words "in whole or in part" occurred in the 5th section of the Rutherford Act, which was the principal Act. The other Entail Acts amended the Rutherford Act, so that wherever the words "entailed estate" occurred in the amending Acts, the words "in whole or in part" were implied, except where repellent to the sense of the sentence. The definition of "entailed estate" in the interpretation clause of the Act of 1875 was wide enough to cover parts of such estate. In section 6 of the Act of 1875 the words "in whole or in part" were used, so that if the contention of the respondents was sound, the anomalous result would be that an heir of entail could sell part of an entailed estate without the consents of the next heirs, but could not disentail except with such consents. As regards the compensation due to the next heirs, the Act of 1875, section 5, sub-section 2, provided that "the Court shall ascertain" the money value of the expectancy or interest of such heirs. The Court were required to find a way of getting at the value of such expectancy. No difficulty was experienced in practice in arriving at the value of such expectancy where a part of the entailed estate was disentailed. As an example of frequent cases where the consents of next heirs had been refused to the disentail of part of an estate, and had been dispensed with—*Farquharson v. Farquharson's curator ad litem*, December 15, 1886, 14 R. 231.

At advising—

LORD PRESIDENT—I. The first question debated before us under this reclaiming-note was whether the petitioner is barred by the agreement of February 1878 from insisting in the present application, and I am of opinion with the Lord Ordinary that his Grace is not.

The contract binds the petitioner to do and to abstain from doing certain specified things which are articulately enumerated. It announces in the narrative that what is declared to be "desirable for the preservation of the dignity and honour of the Earldom of Sutherland," viz., "that the estates should be secured from being alienated from the earldom" is to be accomplished "by fetters of entail, so far as legally may be done." Accordingly, this appointed way of accomplishing the object is made matter of express and definite stipulation, for the leading provision is that the petitioner is to execute a sound or valid deed of strict entail. But the agreement goes on in the fifth article to circumscribe the limits within which (apart from stipulation) the heirs of entail would have been entitled under the Aberdeen Act to grant

provisions to husbands and widows. This having been done, and special clauses having been authorised to be inserted in the entail under the third and fourth articles, the parties have left the attainment of their purposes to depend on the legal effects of the deed of entail so provided for.

Now, the contention of the noble reclaimers is that there is to be read into the agreement an obligation to abstain from the exercise of one of the legal rights of an heir of entail by virtue of the Entail (Scotland) Act 1882, a statute passed subsequent to the date of the agreement. I can find no warrant for such interpolation in the contract. It has been maintained that certain passages in the agreement imply that the faith of the contract was that the lands were to remain under the entail. But I do not think that this comes to more than that the provisions of the contract all apply to the inception, execution, and continuance of the entail, and that they (quite naturally) do not deal with a legal condition which did not exist and was not in contemplation. It does not follow that the Court is to read in overt and prohibitory stipulations applicable to a state of matters of which the parties never considered, and about which there is nothing in this contract to show that they ever in fact agreed. Accordingly there is no occasion to consider how or how far it was possible by agreement in 1878 to exclude the petitioner from exercising powers conferred in 1882 by an enabling statute upon every heir of entail.

II. The second question discussed was whether under the Entail Acts 1848-1882 the Court is authorised to dispense with the consent of the next heir of entail, where the application is for authority to sell a part, as distinguished from the whole, of an entailed estate.

The Lord Ordinary has examined the statutory enactments carefully and in detail, and I substantially concur in his Lordship's exposition and in his conclusion. I do not therefore repeat his deduction of the related sections of the successive statutes, but shall state my view of the controversy as it is thus brought to a point.

The 13th section of the Act of 1882 is that on which the petitioner has primarily to found. Now, that section is, in terms, said to apply to any application to which the consent of the heir-apparent or other nearest heir was required. Unquestionably an application to sell part of an estate was an application recognised by the Entail Statutes, and was an application to which (under the law prior to the Act of 1882), such consent was required. The section goes on to say—"The Court shall ascertain the value in money of the expectancy or interest in the entailed estate." If these last words apply solely to the case of an entire estate, and do not apply to a part of an estate, then the latitude of the introductory words receives an unexpected contraction in the enactment, the scope of which they purport to define.

But this same section proceeds to apply

to the case of the next heir the provisions of the 5th section of the Act of 1875, and to this enactment it is next necessary to turn. Now, that section is announced in its preamble as an amendment of the 3rd section of the Act of 1848, and its contents are directly relative to the section which it amends. The term "entailed estate" is used just as in the Act of 1882, by which it is itself amended, and no definition is given. It is therefore natural to ascertain the sense of the term by reference to the original enactment of 1848, of which the subsequent enactments of 1875 and 1882 are pendants. Now, the 3rd section of the Act of 1848 does contain a gloss or definition of the word "estate," for where that term is first used there are added the explanatory and parenthetical words "in whole or in part." It seems to me therefore that where in the amending sections of 1875 and 1882 the term "estate" is used, it is to be read in the same sense as in the principal enactment, and that it was quite accurate that in the later statutes the parenthetical explanation should not be repeated, it having for all purposes of reference ascertained the meaning of the term referred to.

Accordingly, taking the terms of the sections primarily concerned, and on which the petitioner has to found, I think that his application is sustained by their true construction. I may add that if the subject-matter of the 5th section of the Act of 1875 be regarded, and taking that part of it which is not directly in dispute as the criterion, it is extremely difficult to suggest any reason for a limitation to estates as a whole of the provision which is there contained, for that is an improvement of procedure, the reason of which is equally applicable to partial or to total disentails.

Two arguments, however, have been advanced by the reclaimers which require consideration. They point to the fact that both in the Act of 1875 and in the Act of 1882, there are sections in which the words "in whole or in part" are expressly used, and they argue that this implies that in those sections in which the amplification is not expressed it is not intended. I am not aware, however, that such a variance can do more than supply an aid to determining the meaning of the section primarily under consideration, and the use in some passages of the more expansive of two expressions does not demonstrate an intention to abate the proper meaning of the other. Now, for the reasons which I have already stated, I think the proper meaning of the other is sufficiently clear.

The other argument was, that if the sections in question do apply to part of the estate as well as the whole, there is no provision for compensating the heir whose consent is dispensed with for the injury done to his interest in the remanent part of the estate by the severance of the portion disentailed. I have come to be satisfied however, that this difficulty does not exist. When the dissenting heir is compensated, what is valued is "his expectancy or interest in the entailed estate with reference to such application." Now, I agree

that in the case in hand “the entailed estate” as used in the passage quoted, must consistently be held to mean the part of the estate which is to be disentailed. But then the interest in that part is to be valued to a man who, *ex hypothesi*, is to remain heir of entail of the rest of the estate. And if, as is suggested in the present instance, the abstraction of the part disentailed will seriously diminish the value of the remainder, that means that to the owner (and future owner) of the remainder, the retention of the part to be taken away has a correspondingly high value. It seems to me therefore that the value to be ascertained is the value, not as in the market to third parties, but the value to the man who, on the assumption of the proceeding, is to be deprived of the subject of the disentail, and is to retain the estate as an accessory to which that part has an exceptional value.

It is perhaps inconvenient that the Court should be forced incidentally to decide upon a question which will necessarily arise at a later stage in concrete form, and with the interests of the disputants reversed. But the argument of both parties has peremptorily challenged our judgment upon it. I am for adhering to his Lordship’s interlocutor.

LORD ADAM—The petitioner the Duke of Sutherland is heir of entail in possession of the estate and country of Reay, and of the earldom and estate of Sutherland, under two separate deeds of entail both dated after the 1st August 1848.

The object of this application is to obtain the authority of the Court to record in the Register of Tailzies an instrument or instruments of disentail of parts only of each of these entailed estates.

It appears to me that the first question which arises for consideration is whether it is competent for an heir of entail in possession of an entailed estate under an entail dated after 1st August 1848, to apply for authority to disentail a part only of the entailed estate, or whether it is competent for such heir to apply for disentail only of the whole estate. If an application, such as this, for authority to disentail a part only of the entailed estate is incompetent, then of course no question as to the competency of dispensing with the consents of the next heirs will arise. If however, the application be competent, then I do not think that question is attended with difficulty.

The power conferred on an heir of entail to disentail was given by the 3rd section of the Rutherford Act, which authorised an heir of entail in possession of an entailed estate, held under an entail dated before 1st August 1848, to apply to the Court to acquire such estate in whole “or in part” under certain conditions, these being, generally speaking, that he should have obtained the consents of the three next heirs of entail, or of the heir-apparent, and of the heir or heirs in number not less than two, including such heir-apparent, who in order successively would be heirs-apparent. It is not doubtful, therefore, that an application by an heir of entail in possession of an

entailed estate, held under an entail dated before 1st August 1848, to acquire a part only of the estate would be perfectly competent, for the Act says so in not so many words. Then by the 3rd section of the Entail Act of 1882 (45 and 46 Vict. cap 53) it is declared that it shall be lawful for an heir of entail in possession of an entailed estate, held under an entail dated on or after 1st August 1848, to disentail the estate and 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 3rd section of the Rutherford Act in the case of entails dated prior to the said date.

It is argued by the respondents that the words “the estate” here used mean the whole estate—and not part of it only—and we were referred to the 19th and subsequent sections of the Act, by which an heir of entail is authorised to apply to the Court for an order for sale “of the estate or part of it,” as showing that when the Legislature intended to give authority to deal with part only of an estate the Act was so expressed.

But I do not think that this argument is sound. It appears to me that the object and intention of the Act of 1882 was to confer on heirs of entail in possession of estates held under entails dated on or after 1st August 1848 the same powers as regards disentailing as those who held estates under entails dated prior to that date. Accordingly, when the Act authorised such heirs of entail to disentail the estate and acquire it in fee-simple by applying to the Court in the manner provided by the Entail Acts, it refers, *inter alia*, to the 3rd section of the Rutherford Act, which authorises an heir of entail to acquire an entailed estate either in whole or in part in fee-simple, by applying to the Court in the manner therein directed.

If the respondent’s contention were sound it would lead to this very anomalous result, that an heir of entail in possession of an estate under an entail dated after 1848 could not acquire part of the estate in fee-simple, although he had obtained the consents of the three next heirs, while an heir of entail in possession of an estate under an entail dated before 1848 could do so—so also if the heir of entail happened to be the only heir of entail in existence, he could in the one case acquire part of the estate in fee-simple, but not in the other. No plausible reason why the powers in this respect of one heir of entail should be different from those of another was suggested, and I can see none.

I am of opinion, therefore, that this application is not incompetent, because it applies for authority to disentail a part only of each of the entailed estates.

But in the circumstances of the family, the consent of the Marquess of Stafford, who is heir-apparent, and of the tutor *ad litem* to his son Earl Gower, who is a pupil, are required to the disentail. These facts are set forth in the petition, which proceeds to state that deeds of consent



by them will be produced in the course of the proceedings, failing which the values in money of the expectancies or interests in the foresaid subjects of the said Marquess of Stafford and Earl Gower respectively, "with reference to this application, will be ascertained and provided for in terms of section 5 of the said Act 38 and 39 Vict. cap. 61, and section 13 of the said Act 45 and 46 Vict. cap. 53."

The Marquess of Stafford and the tutor of Earl Gower decline to give their consents to the disentail, and it is maintained by the respondents that it is incompetent to dispense with the consents of the next heirs where the application is for authority to disentail a portion only of the entailed estates.

That contention is founded on the terms of the 5th clause of the Entail Amendment Act of 1875 (38 and 39 Vict. cap. 61), which, on the preamble that it is expedient that the 3rd section of the Rutherford Act should be amended, proceeds to enact that in any application for authority to disentail an entailed estate helden by virtue of any tailzie dated prior to 1st August 1848 certain things may competently be done.

The respondents found on the words application to disentail an "entailed estate," which they say, as before, does not include an application to disentail part only of the estate.

The 3rd section of the Rutherford Act, among other things, required that the instrument of disentail should be executed at the sight of the Court, and that the petitioner should have obtained the requisite consents at or before presenting the application. The first of these requisites was amended by the 4th section of 16 and 17 Vict. cap. 94; the second of them is one of the matters dealt with by the 5th clause of the Act now under consideration, which enacts that the requisite consents of the heirs of entail "may competently be given after such application has been presented to the Court, and in the course of the same."

Now, it is impossible to doubt, as I have said, that an application to disentail a part of an entailed estate was competent under the 3rd section of the Rutherford Act, and no reason has been suggested why, in a matter purely of procedure like this, consents should not be produced in the course of the proceedings in an application to disentail part of an estate, as well as in an application for the disentail of the whole estate. It is difficult to accept a construction of the Act which leads to that result. Accordingly, I think that when the 5th section refers to an application to disentail an entailed estate, it refers to an application to disentail an estate which in terms of the 3rd section of the Rutherford Act may be either an application to disentail an estate in whole or in part.

But if this first amendment applies to both kind of applications, so also must the next, which is the one with which we are more immediately concerned, and by it the Court is empowered, in the event of any of the heirs of entail, except the nearest heir

for the time, refusing to give or being legally incapable of giving his consent, to dispense with such consent in terms of the provisions therein set forth, viz.—that the Court shall ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs, and shall provide for such value in money being properly paid or secured. It is said, however, that the provisions in respect of which the consent of the heir may be dispensed with do not provide for the case of the disentail of a part only of an estate, in respect that they do not provide any means for ascertaining the value in money of the expectancy or interest of such heir in the part of the estate disentailed. It appears to me that the difference in value of the entailed estate before the disentail, and the value of the part remaining after the disentail, represents the loss to the heirs of entail by the disentail, and that this furnishes the means of ascertaining the money value of the interest of any particular heir or heirs in the part of the estate disentailed.

These provisions, however, only apply to the consent of Earl Gower, and the question remains as to the competency of dispensing with the consent of the Marquess of Stafford. If, however, I am right in holding that the present application is a competent application, then no difficulty arises as to his consent, because the 13th section of the Act of 1882 provides that in any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall dispense with the consent of the heir, and shall proceed as if such consent had been obtained, and that the provisions of sections 5 and 6 of the Entail Act of 1875 shall apply to the nearest heirs as well as other heirs. It is indisputable that this is an application under the Entail Acts to which the consent of the heir-apparent is required, and therefore the clause applies in terms to it. I think, moreover, that the clause is also conclusive as regards the consent of Earl Gower, because it goes on to provide that the 5th and 6th sections in question shall apply to all applications to which consents are required, and to entails dated on or after 1st August 1848, as well as to entails dated prior to that date. Assuming the competency of the application, I think it is that the consents of the heirs of entail may be competently dispensed with, and as I think the application is competent, I think the Lord Ordinary's interlocutor is right.

But it is said that the petitioner is barred from disentailing in respect of the agreement entered into between him and Lord Stafford in 1878. This objection, if well founded, only applies to the proposed disentail of part of the Sutherland estates. But I concur with your Lordship that it is not well founded.

At the date of the agreement the peti-

tioner could not have disentailed the Sutherland estates without the consent of the Marquess, but they together could do so. They accordingly agreed that the estates should be disentailed and again re-entailed along with the lands of Embo and others, which the petitioner held in fee-simple, under the conditions set forth in the agreement. No doubt one of the objects sought to be effected by the agreement was, as set forth in the narrative, that the estates should be secured by fetters of entail from being alienated from the earldom of Sutherland, or wasted, or charged with debt.

The agreement was implemented in all its parts. The estates were disentailed and re-entailed, and as the law then stood it was out of the power of the petitioner to have disentailed them or any part of them. But the change of the law introduced by the Entail Act of 1882 put it in his power to do so, and this change in the law, which neither party could have foreseen, has given rise to the present question. The petitioner has done everything that he was bound to do by the agreement, and I can see nothing in it to debar him from taking advantage of the change in the law and disentailing the estates with the requisite consents.

LORD KINNEAR—I am of the same opinion. The Duke of Sutherland agreed to re-entail certain estates, and to bring into the new entail certain other estates which he held in fee-simple. I think that obligation was fully performed by the execution of the deed of entail which followed upon it, and, indeed, I do not understand that to be disputed. I think the obligation was not only performed but exhausted by the execution of that deed of entail, and that the Duke cannot be required to do anything further to give effect to his agreement. The legal effect of the entail so executed is determined, not by the contract, but by a series of Acts of Parliament, which limit and define the powers of heirs in possession of entailed estates, and I find nothing in the contract which subjects the heir in possession under the new entail to any further restrictions than may be imposed on him by the law in force for the time being, or which gives the substitute heirs any other or more effective right against the heir in possession than that law gives them. The contract appears to me to have been that the Duke of Sutherland should execute a deed of entail which would have all the efficacy which the law allows or may in future allow to deeds of entail, but no other or further efficacy than that.

Upon the second point also I agree with your Lordship. The power of the heir in possession to disentail his estate in whole or in part is given by the Rutherford Act under certain conditions. The subsequent Acts altered the conditions by dispensing on certain terms with consents which were essential under the Rutherford Act, but they do not restrict or enlarge the power of the heir of entail in possession, in so far as regards the subject over which it is to be

exercised. I agree with your Lordships on the construction that you have put in the Act of 1875, but if there were room for any doubt as to the effect of that enactment, I think it would be entirely removed by the Act of 1882, because that Act is applicable in express terms to all applications under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required.

Now, that is the position of the present application. The consent of the Marquess of Stafford, who is the nearest heir, is required, and accordingly the petitioner is entitled to found on the 13th section of the Act of 1882, which provides that in any application under the Entail Acts to which the consent of the heir-apparent is required, the Court is to ascertain the value in money of the heir's expectancy or interest, and to proceed in terms of the previous Act of 1875.

But then there follows another clause which is directly applicable not only to the case of the Marquess of Stafford but to the case of all other persons who may be affected by such a petition, because the statute proceeds to enact that certain sections of the Entail Amendment Act of 1875 should apply to all applications in which consents are required whether on or after the 1st of August 1848. Now, I confess I can see no room for doubt that these provisions are applicable to the present case, although the petitioner does not propose to disentail the whole of the lands which are affected by the fetters of the deed of entail under which he holds the subjects included in this petition. I agree with your Lordship that while the Act of Parliament authorises the disentail of a part of an estate, although the remaining part may still be held under the fetters, it does not preclude the heir of entail whose interest is to be valued from getting the full value of his interest whatever that may be. The value to be ascertained is not that of the heirs' right in any part of the estate as a separate subject. The value to be ascertained is the heirs' expectancy or interest in the entailed estate, and if it be the case that when the estate is divided upon an application of this kind, so that one portion of it is left within the fetters, and another portion relieved from them, the aggregate value of the two separate portions is less than the value of the estate as a whole—which is the suggestion that is made to us—I can see no room to doubt that the substitute heir of entail is entitled to say that what is to be valued for the purpose of dispensing with his consent is his interest in the portion to be taken away, not as a separate subject but as part of the entailed estate; and I agree with what your Lordships have said, that he does not get the full value of his interest in terms of the Act of Parliament if he receives anything short of the difference between the value of the estate to which he is still to succeed after the portion to be disentailed has been severed from it, and the value of the whole estate to which he would have succeeded if there had been no such separation.

The Court adhered.

Counsel for Petitioner—The Lord Advocate—Sol.-Gen. Graham Murray, Q.C.—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent, Marquess of Stafford—Asher, Q.C.—Dundas. Agents—Macpherson & Mackay, W.S.

Counsel for Respondent, Duke of Fife—D.-F. Balfour, Q.C.—Ure. Agents—Mackenzie & Black, W.S.

Counsel for Respondent, Duke of Westminster—D.-F. Balfour, Q.C.—Blackburn. Agents—Mackenzie & Black, W.S.

Friday, February 26.

### FIRST DIVISION.

ROSS (FRASER'S JUDICIAL FACTOR).

*Judicial Factor—Cautioner—Woman.*

*Held* that an unmarried woman might be accepted as cautioner for a judicial factor's intromissions.

This was a note presented by Hugh Houstoun Ross, judicial factor on the trust-estate created by the antenuptial contract of marriage of Mr and Mrs Edward Fraser.

Mr Ross stated that he had been appointed judicial factor in 1884, and had acted as such ever since, "his cautioners having been (first) his father Hugh Ross, W.S., now deceased, and (second) his mother, Mrs Ross, also now deceased. . . . New caution having again to be found, Mary Charlotte Ross, spinster, residing at No. 16 Northumberland Street, Edinburgh, aged 44, has been offered as cautioner, but the Clerk of Court having expressed doubts as to accepting her as such, it is necessary to have the proposal sustained by the Court. The estate under the factor's charge consists of £3156, 5s. 11d. 2½ per cent. consols, and £41 of same consols, and £15, 14s. 4d. in bank. . . . The cautioner offered has means and estate to the value at least of £5000."

The judicial factor craved the Lord President to move the Court "to authorise the Clerk of Court to accept of the said Mary Charlotte Ross as cautioner for the said Hugh Houstoun Ross, as judicial factor foresaid." . . .

At advising—

LORD PRESIDENT—That no disqualification attaches to a woman as cautioner is pretty clearly shown by what has been done in this factory, in which a woman has already been accepted in that capacity, and we are told that that was done with the approval of the late head of the Court. There might be difficulties perhaps if this lady were to marry, but until that event occurs we are not called upon to decide in regard to them.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court granted the authority craved

Counsel for the Judicial Factor—Dudley Stuart. Agents—Macrae, Flett, & Rennie, W.S.

Saturday, February 27.

### FIRST DIVISION.

MARQUESS OF STAFFORD v. DUKE OF SUTHERLAND.

(*Ante*, p. 422)

*Appeal to the House of Lords—Leave to Appeal—Entail.*

Circumstances in which the Court, in a petition for authority to disentail, *refused* an application for leave to appeal to the House of Lords against an interlocutor repelling objections to the competency of the petition.

On 26th February 1892 the Marquess of Stafford presented a petition for leave to appeal to the House of Lords against the interlocutor pronounced by the Lord Ordinary on 15th December 1891, and the interlocutor of the First Division adhering to the same.

He argued—It was the practice of the Court to allow an appeal where there was a separable case for appeal, and where the result of the appeal might save litigation by putting an end to the whole proceedings—*The Lord Advocate v. The Duke of Hamilton*, December 17, 1891, 29 S.L.R. 272.

The Duke of Sutherland opposed the application, and argued—The Court was always disinclined to grant an application of this kind where that might lead to there being two appeals instead of one. Especially was this the case in proceedings of the present kind where the death of one of the parties would render the whole proceedings abortive. The case of *The Duke of Hamilton* was quite different. There the reversal of the decision of the Court of Session would render a long and intricate inquiry unnecessary, but here there was no reason why the inquiry should be long or difficult.

At advising—

LORD ADAM—This is an application by the Duke of Sutherland for authority to disentail, and we have decided that he has a title to insist in it, and to have the part of the estate disentailed which he desires to have disentailed. It appears to me that in such a matter the Duke has a pre-eminent interest to have the case decided with as little delay as possible, for the reason which has been suggested, namely, that if any mischance occurs the whole proceedings may prove abortive, and by allowing the delay which an appeal occasions we are increasing the chance of such an occurrence. That, I think, is a very material consideration for refusing leave to appeal at this stage.

When we look at the interest of the other side, no doubt we find that they have