whether the Poor Law Act of 1845 was really and substantially just a continuation of the old law, maintaining the old assessments. I think that question has been decided finally, so far as this Court is concerned, by the cases to which your Lordship has referred. Not only in the case of *Hunter* v. *Chalmers*, but also in the cases of *Paterson* v. *Hunter* and *Wilson* v. *Magistrates of Musselburgh*, it seems to have been expressly held that the Act of 1845 did not create a new tax for the poor, but merely continued the old law with a different administration. I think I am bound by these decisions to hold that under a clause such as that which we have in this feu-contract the superior undertook to relieve the vassal of poor's assessment in respect of property; and I find myself obliged, in respect of these decisions, to adhere to the Lord Ordinary's interlocutor as regards the poor-rates. I do not think, however, that the full force of the argument in these decided cases has been fairly taken into account, for there is one statute which is never referred to in any of the cases, and that is the statute abolishing the competency of assessing upon means and substance, for although that does not in terms infer a new tax, it in substance abolished one source from which the funds were formerly derived, and in consequence threw upon the other forms of assessment which are still competent the whole of that burden of which under the former system they only formed a part. But we cannot reconsider the long chain of decided cases on this point.

Then the only remaining point is, whether the obligation to relieve, if it exists—and I think we are bound to hold that it does exist—is to be limited to the amount of feu-duty. I concur with your Lordship in thinking that we have no alternative but to hold that there is no such limitation in the contract. I assume now that the contract must be read as an obligation to pay all poor-rates, and I do not find in the contract any limitation of that obligation. I think that when I am asked to say that that obligation to relieve shall be limited to the amount of the feu-duty, I am really asked to put a condition in the contract which the parties had not chosen to put in it. I agree with Lord Westbury that a bargain of this kind must be given effect to even although it may have been improvident on the part of those who entered into it. I think therefore that the interlocutor of the Lord Ordinary should be adhered to as regards the poor-rates, but altered as regards the road money.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Sir George Dunbar's Trustees, and another against Lord Curriehill's interlocutors of 9th April and 29th May 1877, Alter the interlocutors of the Lord Ordinary in so far as they find that the pursuers, the superiors of the lands feued to the defenders, have been and are bound to relieve the defenders of all sums which have been or may be paid or have become due or may become payable by the defenders, or others deriving right from them, in repect of these lands in name of County of Caithness and Burgh of Wick Road Assessments, and in regard to such assessments decern and declare in terms of the conclusions of the summons: *Quoad ultra* adhere to the interlocutors complained of, except as to expenses, as to which recal the interlocutor of 29th May 1877, and find the defenders entitled to expenses, subject to a deduction of one-third of the taxed amount; and remit to the Auditor to tax the expenses now found due, and to report; and decern."

Counsel for Pursuers (Reclaimers) — Lord Advocate (Watson)—Balfour—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Respondents)—Trayner—J. P. B. Robertson. Agents—Horne, Horne, & Lyell, W.S.

Wednesday, December 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

WILSON *v.* DE VIRTE.

Entail—Disentail Statutes, 11 *and* 12 *Vict. c.* 36, *(Rutherfurd Act) sec.* 3, *and* 38 *and* 39 *Vict. c.* 61, *sec.* 5—*Valuation of Substitute Heir's Expectancy in Entailed Estate.*

Held that the value of the "expectancy or interest" in an entailed estate of any heir refusing or declining to give his consent to a disentail by the heir in possession, is, in the meaning of the 5th section of the Entail Amendment Act 1875, the value to such heir of his chance of succession, excluding the interests of decendants, but comprehending therein the value of such powers as the heir would be entitled to exercise if the succession should open to him.

Observed that in ascertaining the value of the interests of the substitute heirs of entail in a petition for disentail under the 3d section of the Rutherfurd Act, and the 5th section of the Entail Amendment Act 1875, the interests of the heirs should be valued upon the footing of their being liferenters, and with reference to the expectancy of life of each, and that the surplus sum which must be allowed in addition as representing the money value of the powers open to each in the event of his succeeding to the estate, should be allocated upon the same principle of division.

Entail—Disentail—Objection by heir disentailing to Valuation of Interest of Substitute after Amount already Consigned.

Where, in a petition for disentail, the value of an heir's expectancy or interest in the entailed estate, under the provisions of the 5th section of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), had been fixed under a remit, and the money had been consigned in bank by the petitioner—*held* that it was then too late for the latter to dispute the correctness of the valuation.

Statute—Private Act of Parliament—Notice.

It is no objection to the validity of a private Act of Parliament, in a question with parties affected by its provisions, that notice was not given to them before it passed.

On June 12, 1877, the Baroness de Virte, heiress of entail in possession of the lands and estate of Benholm, in the county of Kincardine, presented a petition to the Court under the 3d section of the Rutherfurd Act, 11 and 12 Vict. cap. 36, for leave to disentail these estates, the value of which was £31,000. On the previous day, the 11th June, the petitioner, who was the wife of Jean Thomas de Virte, Baron in the kingdom of Italy, had obtained a private Act of Parliament containing letters of naturalisation for her husband, herself, and her daughter Emma Maria de Virte, who was the next heir of entail after her mother. In order to entitle the petitioner to disentail it was necessary for her to obtain the consents of the three next heirs, who were her daughter the said Emma Maria de Virte, and her two sisters Miss Elizabeth Macleod and Mrs Anna Maria Macleod or Wilson. The first two gave their consents, but Mrs Macleod refused hers.

Answers were lodged for Mrs Wilson, objecting to the petition on the ground (1) that the petitioner's daughter was an alien, and unable to give any valid consent to the prejudice of the respondent's rights; (2) that no notice had been given to her of a private Act of Parliament which had been passed, and by which the petitioner and her husband and daughter had been naturalised; and (3) that being a female, Miss de Virte was not the heir-apparent of the petitioner, and so not entitled to consent to a disentail.

The Lord Ordinary on the Bills (SHAND) had, on 6th August 1877, repelled these objections, the petitioner consenting that the application should be disposed of on the footing that her daughter, though next heir entitled to succeed to her, was not heir-apparent to the estates.

By the same interlocutor a remit was made "to Mr Spencer C. Thomson, accountant and actuary, to hear the parties interested, and to inquire and report as to the value in money of Mrs Wilson's expectancy or interest as substitute heir of entail in said lands and estate."

Both parties objected to this report when issued, and on the 13th October Lord Rutherfurd Clark in the Bill Chamber issued an interlocutor of new remitting to Mr Spencer Thomson to value the respondent's expectancy, having regard to the principles indicated in the following note:—

"*Note.*—The only matter remaining to be ascertained is the value of Mrs Wilson's expectancy or interest in the entailed estate as the third substitute heir of entail. A remit was made to Mr Spencer Thomson, who has made a report. Mr Thomson does not in name value the expectancy or interest of Mrs Wilson, but returns £837 as the value of her consent to the disentail.

"Both parties have objected to the report. On one point, however, they came to be agreed. Mrs Wilson withdrew her objections to the value of the estate. It may be taken therefore at £31,000. The accuracy of the rental was not disputed.

"The parties were at variance as to the principles on which Mr Thomson had proceeded. In consequence the Lord Ordinary had an interview with him, and received the necessary explanations.

"Mr Thomson first ascertained the value of what he terms the life interest of the heir in possession and the three next heirs. These values were calculated on the footing that their respective rights were equivalent to the possession of and succession to an annuity of the same amount as the rents of the entailed estate.

"The sum thus brought out was deducted from the fee-simple value of the estate, and after debiting the surplus with the capitalised value of a drainage charge terminable in ten years, and the value of a contingent annuity granted by the petitioner in favour of her husband, the remainder is divided in different portions among the three next heirs. In effect, therefore, leaving out of view the burdens, which are an accident, Mr Thomson has distributed amongst the three substitute heirs the entire fee-simple value of the estate, after deducting the life-interest of the heirs calculated on the terms above referred to.

"As the result of his calculations Mr Thomson reports the value of Mrs Wilson's consent to be £837. The two first heirs have consented to the disentail, and therefore it was not necessary to make any report as to their interests. But as the value of Mrs Wilson's consent or interest could not be ascertained without considering theirs, Mr Thomson has brought out the value of the consent of each. The one is reported to be £19,418, the other £203.

"The reporter explained to the Lord Ordinary that he took the 'life-interest' of the petitioner as the full amount of her interest in the estate, and that he assumed that he was bound to divide the surplus among the three substitute heirs. He assigned a large share of the surplus to the next heir, because she was born after August 1848, and could acquire the estate in fee-simple by executing a deed of disentail, and because the estate 'may fall to her own issue should she marry and predecease' the petitioner. He gives no share of the surplus to the second heir, because she is unmarried, and is now of such an age that there is no prospect or indeed possibility of issue, and in consequence the balance of the surplus is assigned to the third heir, who has children. The reason of this apportionment, as stated in the report, is that 'she represents her son or other descendant not called to disentail,' and, as the reporter more fully explained to the Lord Ordinary at the personal interview, he held that the interest of a substitute heir 'represented' or included the interest of descendants. On this principle it will be seen that the interest of the third heir is reported as four times greater than the interest of the second heir, though there is no material difference between their ages.

"It appears to the Lord Ordinary that the principles on which the reporter has proceeded are not sound. He makes a nominal error in valuing the consent instead of the expectancy or interest. These will be the same if the same elements go to the computation of both. But the error is real if the reporter, as the Lord Ordinary thinks he does, takes into account elements which may be of the greatest consequence in fixing the value of a consent, but do not form any part of the heir's expectancy or interest according to the legal construction of these words.

"Under the law as it stood before the Act of 1875, the petitioner could not have disentailed without the consent of the three nearest heirs. Such consent they were entitled to give or withhold as they thought proper, and by the refusal of their consent they might protect not only their own interests but the interests of remoter

heirs. Thus the respondent might have refused to consent, not because she had much or any prospect of succeeding to the estate, but because she desired to preserve the succession for her children.

"But the Act of 1875 has made an important change in the position of the second and third heir. Provided that he obtains the consent of the nearest heir, the heir in possession is entitled to disentail on paying to the second and third heirs the value of their 'expectancy or interest.' This means, as the Lord Ordinary conceives, their own individual expectancy or interest, or, in other words, the value of their own chance of succession.

"It was urged by the respondent that the words should be construed as equivalent to consent; that the true meaning of the Act is that the heir shall be forced to consent on being paid the fair value; and that in computing the value there shall be taken into account all the considerations which might reasonably weigh with a prudent person in giving or withholding his consent. But the Act has not said so. It dispenses with the consent of the second and third heirs, and substitutes for it the value of *their* expectancy or interest. The interest of all succeeding heirs is cut off, and cannot, it is thought, be protected or taken into account in fixing the expectancy or interest of those heirs who, for the purpose of disentailing, are alone recognised by the statute.

"To the Lord Ordinary, therefore, it appears that the reporter has fallen into error in taking into account the interests of the respondent's children. He has practically introduced the interest of a fourth heir.

"He has also, in the opinion of the Lord Ordinary, erred in assuming that the surplus, after deducting the life-interest of the heir in possession, must be divided among the three substitute heirs. There are, it is thought, two fallacies in this view—the first, that the interest of the heir in possession is equivalent to a mere annuity; and the second, that the surplus belongs to the three next heirs. The interest of the four does not necessarily absorb the fee-simple value of the estate. It may never do so; but it manifestly will not when all are of a very advanced age. Again, the interest of the substitute heirs is not necessarily equivalent to the surplus after deducting the liferent interest of the heir in possession. It may or it may not be; but it will depend on age and other considerations. But it was asked—If there be a surplus, who is to get it? The answer is that it will enure to the heir in possession. He is not a liferenter, but proprietor, though subject to fetters, and when by following the statutory conditions he gets rid of the fetters, he becomes the proprietor in fee-simple, and he must, as a necessary consequence, obtain all the advantage arising from the change, under deduction of the payments which he has to make in order to effect it. The amount which he has to pay to the next heir must be a matter of arrangement; but he can force the others to accept the value of their expectancy.

"It remains to notice the principles on which, in the opinion of the Lord Ordinary, the valuation should be made. The heir in possession is the proprietor of an entailed estate burdened with the drainage charge and the contingent annuity to which reference has been made. The expectancy or interest of the substitute heirs is their chance of succeeding to that estate, and the rights which they will possess on such succession. If they never succeed, they can have no rights at all. If they do succeed, they become proprietors, with the right to exercise all the powers competent to them as heirs of entail, as, for instance, to grant provisions to husbands or wives and younger children, and with the right to take such proceedings as are open to them for disentailing. Were the Court engaged in valuing the expectancy or interest of Miss de Virte, it would be valued as her chance of succession to a fee-simple estate, because she is entitled by her own act to disentail. It is different in the case of the respondent, who was born before 1848. But it is thought that there may be taken into account her chance of being able to disentail, and the facilities which she will have for disentailing by the fact of having issue. Thus the value of the expectancy or interest of any heir of entail is the value of the chance of succession, comprehending therein the value to him of such powers as he may exercise on the succession opening to him. These powers must be valued in relation to the possessor of them. For instance, the power of granting provisions to younger children may be of great value to an heir who has or may have issue, but they can be of none to one to whom issue may be held to be an impossibility.

"The Lord Ordinary need hardly point out that the respondent's chance of succession is liable to be defeated not only by her death, but by the power which Miss de Virte has of disentailing if the succession shall open to her."

Mr Spencer Thomson then issued another report in which the value of Mrs Wilson's expectancy was settled at £291, and that sum was thereafter consigned in bank by the petitioner. Of this sum £91 was the value put upon Mrs Wilson's chance of succeeding to the estate, and £200 was the value of the power she might exercise if she should come into possession.

The actuary stated the following as his understanding of the principle for ascertaining the interests of heirs who, as in the present case, refused to consent to a disentail, but whose consent could be compelled:—"In the *first* place, as far as these heirs are concerned, no distribution is to be made of the value of the estate, and in calculating the interest of a non-consenting heir it is not necessary to take into consideration the position of the other heirs, except as directly modifying the value of the interest of the dissenting heir in question.

"*Secondly*, The value of the heir's "chance of succession" must be estimated. The Lord Ordinary does not define more minutely the principle on which this has to be done. The heir's expectation as defined by his Lordship is not that of a liferenter, but of becoming a fettered proprietor, with, of course, a prospective right, should a disentail take place in the time of his possession, to take the fee of the estate after discharging the then existing fetters. As, however, there can be but seldom sufficient data for calculating with accuracy the value of this contingency, the actuary assumes that the value of the heir's prospective liferent interest in the income of the estate (less any deductions in favour of preceding heirs) is all that it is intended he should receive under this head, any further claim as an entailed

proprietor being allowed for in considering his powers of disentailing.

"*Thirdly*, The prospects of the heir's being able to burden the estate for an annuity to his widow and provisions for his younger children have to be taken into account. In the case of heirs more remote than the heir next in succession, it is extremely difficult, if not impossible, to estimate these claims with any pretension to accuracy. In the case before the reporter, for instance, the following elements of consideration enter:—1. The prospect of Mrs Wilson succeeding to the estate, in itself a very complicated one to estimate. 2. Whether her husband will survive her, or if she will be survived by any future husband she may marry? 3. Whether she will be survived by one, two, or more children? 4. What will be the free rent of the estate when these changes take effect?

"Indeed, the estimate of this claim cannot but be in almost all cases a very arbitrary one, and in hardly any case can it be the subject of accurate mathematical calculation.

"*Fourthly*, The heir's prospects of disentailing have to be taken into account. In the case of an heir born before 1st August 1848, the determination of the value of these prospects is also one of difficulty, and in many cases the allocation given by the actuary must be greatly an arbitrary one.

"The actuary has restated the value of the interest of Mrs Wilson on these principles, and has the honour to submit his results as follows:—

"Value of Mrs Wilson's chance of succession, being her life interest under the former calculations, .	£182	0	0
"Less, for the probability of the estate being disentailed by Miss de Virte before Mrs Wilson's succession, say 50 per cent., .	91	0	0
	£91	0	0

"The annuity here valued is the full interest of Mrs Wilson in the income of £974, 4s. 4d. per annum from the entailed estate. What, in fact, Mrs Wilson will receive will not in all probability be the whole of this sum, but the residue after any existing burdens have been deducted.

"On the other hand, Mrs Wilson has the right of burdening the estate for those who come after her with provisions for her own younger children and for her husband, should they survive her. In the absence of any more accurate means of estimating these two claims against and in favour of Mrs Wilson respectively, the reporter proposes to set them off against one another, and to retain the value of Mrs Wilson's 'chance of succession,' with her power of charging the estate of her husband and children at the above sum of £91.

"There still remains to be added to Mrs Wilson's share whatever sum represents the value of her chance of being able to disentail—that is to say, whatever sum represents, after the price of consent of the next heir, and the interest or expectancy of the other heirs called to disentail, as well as any other burdens, are provided for, the balance of the value of the estate over and above her own liferent which would fall to her should she ever be in a position to disentail.

"The actuary regrets that he has no means of arriving at any accurate valuation of this claim, and in proposing that the heir's shares should be increased by £200 on account thereof it must be understood that the suggestion is to a very great extent arbitrary. If the suggestion is accepted, the complete value of Mrs Wilson's interest and expectancy in the entailed estate will be £291."

Objections were lodged by both the petitioner and the respondent to this report, but they were repelled, and the value of Mrs Wilson's interest found to be £291 by interlocutor of the Junior Lord Ordinary (ADAM), dated 14th November. The money was further directed to be consigned in bank, and in respect of the consignation the Lord Ordinary, on 17th November, granted warrant to record the instrument of disentail.

Mrs Wilson reclaimed, and argued — That upon a sound construction of the Entail Amendment Act 1875 there ought to be taken into account, in ascertaining the value of the expectancy or interest of a substitute heir of entail, all the elements of value which, according to the practice of actuaries, were included in ascertaining the value of consents prior to the passing of that statute; and that the principle of valuation adopted in the said report was inequitable, and did not give to the respondents the full value of their expectancy or interest.

Argued for the petitioner—That on the question of the actuary's report the valuation of Mrs Wilson's expectancy was too great, as her chance of succeeding was very remote, she being only a year or two younger than the Baroness de Virte, the heiress in possession. It was not to be kept out of view that the second heir, Miss de Virte, might marry and have heirs. It was urged that under the Act of 1875 it was not consents given voluntarily that were to be valued, for in that case the heir could dictate his own terms, but the expectancy of succession of an heir who was obliged to give his consent on his interests being valued.

At advising—

LORD PRESIDENT—This is a petition for the disentail of the estate of Benholm, in the county of Kincardine, presented by the heiress of entail in possession under the 3d section of the Rutherfurd Act 1848 (11 and 12 Vict. cap. 36). In order to entitle the petitioner to disentail under that Act it is necessary that she procure the consent of the three next heirs entitled to succeed to the property. She has in point of fact obtained the consent of the two nearest heirs, but the third has declined to consent, and in that state of matters, under the Act of 1848, the entail could not be carried through. But a very important alteration was made by the Entail Amendment Act of 1875 (38 and 39 Vict. cap. 61), the 5th section of which provides—"(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." It is then further provided that when the money value is ascertained to the satisfaction of the Court it shall be paid into bank in the heir's name, or security given for it, and the Court shall then dispense with the consent and proceed as if it had been obtained.

The course provided in that Act has been taken in the present case. The third heir entitled to succeed being Mrs Anna Maria Wilson, she appeared as respondent in the petition, and opposed it, declining to give her consent to the disentail. A remit was then made by the Lord Ordinary on the Bills, on the 6th of August 1877, to an actuary to report on the value of Mrs Wilson's interest in the estate, and after some proceedings, not necessary to notice, the amount was ascertained. Then the Lord Ordinary, on 14th November 1877, issued an interlocutor approving of the report, and finding that the value of the respondent's interest and expectancy in the estate was £291. The amount was consigned in bank, and thereupon the interlocutor of 17th November 1877 was pronounced, being the interlocutor reclaimed against. The reclaiming note brings up all the previous interlocutors, and Mrs Wilson now raises the question, whether her interest is properly valued? The question is of very general importance and application, and as it is the first case on the construction of the Entail Amendment Act of 1875 that has been brought before the Court, it is necessary to pronounce a judgment that may act as a rule in future cases.

The substance of the case seems to me to be as follows—The petitioner holds that the statute can have but one construction, and that nothing can be valued under the section in question except the true value of the substitute heir's chance of succession, and that it is that which has been valued. On the other hand, Mrs Wilson says that the statute cannot be so construed, looking to the practice under the former Act when parties gave their consent on receiving value in money. But the practice referred to cannot be said to have had judicial sanction in any sense, for it was in fact confined to a bargain between the heir in possession and the three next substitute heirs. Under the Rutherfurd Act the heir in possession could not proceed at all to disentail without the consent of the three next heirs. The heirs-substitute could therefore meet him with a direct negative, and the heir was then completely checkmated. It therefore became necessary for the heir to buy the requisite consents at any price, and no doubt in many cases he was made to pay very highly, probably a great deal more than the interest really amounted to. In these circumstances we are informed that a system had grown up of valuing consents. This system is set forth in the note to the interlocutor by the Lord Ordinary on the Bills (Lord Rutherfurd Clark), dated 13th October 1877. The substitute heir whose consent was required put a price on it in this fashion:—He said—"I do not want the estate to be disentailed. I should like to succeed myself, and also that others in whom I have an interest should do so, and I will not give my consent unless the value, not only of my chance of succession, but also of all others in whom I have an interest—of my son (supposing he had one), or of my children to be born—be given."

Now, that was quite right, having regard to the bargaining necessary in those cases, because the heirs whose consents were required were quite entitled to dictate their own terms, and in doing so they had the heir in possession at their mercy. The consent was therefore a mere matter of bargain as to what sum should be paid. The Court knew nothing at all of it. All that they could do or were entitled to do was to see that the heir in possession, being the petitioner, had obtained the regular number of consents required by the statute, and they had neither occasion nor right to inquire into the cost of these consents. Therefore an appeal to the old practice of valuing cannot be binding on the Court now, and the practice, if it did exist, could have just as little effect on the construction to be put upon future legislation.

We are now called on to see whether the expectancy in this case is properly valued, and this duty we have to undertake for the first time. We must "ascertain the value in money of the expectancy or interest in the entailed estate of such heir or heirs declining or refusing to give consent as aforesaid." Now, if this clause can be applied at all, it can be applied but in one way. We just have to find the value of the chance of succession of an heir refusing to give his consent to the disentail. This the actuary, acting under the orders of the Lord Ordinary, has distinctly ascertained, and there is no question on the subject. The value is £91. The sum is very small, but so is Mrs Wilson's chance of succeeding. In the first place, the petitioner is not much older than the respondent; and, in the second, the first heir is the petitioner's daughter, who is quite young. There is also a second heir, besides the chance of the first heir having children. Thus Mrs Wilson's chance is very remote, and she cannot be surprised that the value of her life-interest is very low. But the actuary further says that there may be beneficiary interests over and above the life-interest, and that is true, for the heir who succeeds becomes not only a liferenter, but he has besides very valuable powers. He may make provisions for his wife and family, or again, he may have the chance of acquiring the fee by disentail, and his chance of being able to do these things must be taken into consideration. I assent to all this, but I think that the actuary has acted very properly in this matter. He says that although Mrs Wilson may some day have the chance of doing these things, there is also a chance that others who succeed before her may put burdens on the estate, and consequently that the income may come to her in a diminished state, and that that would impair the value of her chance, which has been ascertained to be £91. Therefore it is only fair to set the one thing against the other. If there is a chance of her making provisions if she succeeds, which ought to be taken into account, there is also a chance that others may use the privilege before her. It is a very fair conclusion that one may be set against the other, and therefore no value has been set on the prospective power to make provisions.

But there still remains the possibility that if Mrs Wilson succeeds she may disentail. This consideration has not been left out of view, and the actuary has valued it at £200. It is not an easy task to value this chance; indeed, the actuary says it is impossible to find any principle of valuation. I certainly cannot suggest such a thing myself, and therefore I should be very sorry to interfere unnecessarily with the conclusion come to by a man of skill. Still the sum does strike me as rather a large one. The case is a very special one altogether, as the value of the power must depend on so many circumstances. If Mrs Wilson should succeed, could she command the consent of the next heir, or be able to fulfil the conditions of the 2d and 3d sections of the Act of 1848? It is very difficult to say so. And if I had been called to value the chance for the first time, I should have been inclined to name a lower figure.

But it seems to me clear that the request now made as to reconsider the valuation is made too late. The petitioner has implemented the order of the Lord Ordinary by consigning the money in the bank, and I think it is too late after that to return to it. The petitioner, too, had opportunities of bringing it under consideration, because if when the Lord Ordinary pronounced the interlocutor of 14th November he had asked leave to reclaim, no doubt he would have obtained it; but even if he had not obtained leave he should have refused to consign the money. The consequence would have been that the petition would have been refused, and then he might have reclaimed. But he lost his remedy by consigning the money, and I am not inclined to interfere with the valuation.

I have only further to say, that as regards the mode of arriving at the valuation of the expectancy, I entirely concur in the Lord Ordinary's note. I think that the distinction between the valuation of expectancy under the Act of 1875 and the valuation of consent under the original Entail Amendment Act (11 and 12 Vict. cap. 36) has been most ably and lucidly stated by him, and I entirely agree in the views he sets forth.

LORDS DEAS and MURE concurred.

LORD SHAND—Down to the interlocutor of 6th August 1877, which was pronounced in the Bill Chamber, the respondents Mr and Mrs Wilson maintained a defence which denied the power of the petitioner to disentail at all. It was maintained that as the petitioner and her daughter were aliens they were subject to disabilities which deprived them of the power to disentail, but by the interlocutor of that date this objection was repelled, and although it was competent to bring that finding under review, no argument on the point has been submitted to the Court. This being so, the only point in the case is that to which your Lordship has referred. The consequences of this judgment will be very important, and I think it right to state my view as to the grounds on which, in my opinion, an expectancy should be valued.

It is maintained by the respondents that the interest or expectancy ought to be valued in the same manner as consents were under the Rutherfurd Act 1848 (11 and 12 Vict. cap. 36). This is not well founded. For it is plain that there is an essential distinction between the valuation of the consent of an heir under the older Act of 1848 and the valuation of his expectancy of succession under the Amendment Act of 1875, where the consent is refused. Under the first Act the consent was entirely optional, and therefore the substitute heir might insist on extravagant terms if he thought fit. He might take advantage of the necessities of the heir in possession or of the strong wish he might have to disentail, and ask more than his interest was really worth. No cases where a valuation was arrived at upon that footing could settle any principle. It would serve no useful purpose to consider whether the practice was founded on sound principles, as each case must be regarded as special, the price of the consent being dependent on the consenter's view of the particular circumstances; and, moreover, no particular mode or principle of valuation ever received the sanction of the Court.

But the matter is not now in the same position. It is entirely changed by the provisions of the 5th section of the Entail Amendment (Scotland) Act 1875. The Court may now dispense with the consent, and in that case will ascertain the money value of an expectancy of succeeding to the entailed estate. In reaching that money value the Court ought not, in my opinion, to take into view any heir beyond the heir in possession and the three successive heirs next entitled to succeed, for the simple reason that these persons have the complete power of dealing with the estate as they think fit. On this point I entirely concur with the views of the Lord Ordinary in the note to his interlocutor dated 13th October. The Court has to settle the expectancy of the three next heirs, and take no account of any other. There is much difficulty in doing this, for though we have tables dealing with expectancy of life, we have none which enable us to deal with an estate vested in four persons having rights in succession, so as to allocate their interests.

I think the method taken by the actuary in his report is fair enough—namely, in the first instance to deal with their interests as if they were liferents, and to value them with reference to the expectancy of life. But as these heirs are not only liferenters, but would have other rights were they to succeed, there is a surplus beyond these liferent interests which must be taken into account, and that surplus has raised a question of some difficulty. It appears to me that £200 is too large a sum to represent Mrs Wilson's share of this surplus in this case, and the actuary, as your Lordship points out, has not given the grounds upon which he reached that result. His grounds would probably justify £500 as must as £200. I think that the way in which the surplus should be treated is, that it should be divided precisely as the principal sum was dealt with in reaching the liferent interests. In this case it would have been stated thus in figures, the life-rent interest being £91—"If £31,000, being the value of the estate, gives £91, what will £8000, the surplus, give?" By this question of proportion you will exhaust the surplus on exactly the principles of life interest. This seems to me to be the sound rule—first, reach the value of the liferent; and second, divide the balance just as the principal was divided.

But in this case the petitioner has implemented the order of the Lord Ordinary by consigning the money, and therefore I think we should simply adhere to the interlocutor reclaimed against.

Mr Kinnear, for the reclaimer, stated that though he did not consent to the interlocutor by Lord Shand, dated 6th August 1877, he did not intend to argue the point it decided, unless the Court required him to do so. He wished, however, to bring it under review in case of appeal to the House of Lords.

The LORD PRESIDENT intimated that the matter was settled by statute, which allowed a party to bring up all previous interlocutors when he reclaimed against the last, but he must take his case on that ground, and the objection must be stated now if the judgment of the Court was to be asked on it.

It was thereupon shortly argued for the reclaimer that the petitioner's daughter was an alien, and as such incapable of giving a valid consent to the disentail. This was urged against a prior petition which had been presented for disentail in October 1875. It had been withdrawn, and a second was presented the day after an Act of Parliament containing letters of naturalisation for the parties was passed. It was stated in the respondent's answers that "the said petition was presented and the said Act obtained without notice to the respondent, and the proceedings were taken in such a form as to conceal from the Legislature that the object of the petitioner was to defeat or prejudice rights already vested in the respondent."

The petitioner referred to the case of *The Edinburgh and Dalkeith Railway Company* v. *Wauchope*, March, 22, 1842, 1 Bell's Apps. 252, where it was decided that no such notice was required.

LORD PRESIDENT—The general proposition so emphatically given in the case of *The Edinburgh and Dalkeith Railway Company* v. *Wauchope* I entirely assent to, but I cannot assent to what is stated by their Lordships in their opinions in that case, namely, that the contrary appeared to them to have been held in the Scotch Courts. For I remember in the Second Division of this Court, in a case the name of which I forget, that it was held that no Act of Parliament could be objected to on any such ground as that notice had not been given.

LORDS DEAS and MURE concurred.

LORD SHAND—The private Act was passed in 1877, at a time when there was no pending process of the petitioner, and it was on the 12th of June, after the passing of the Act, the application for disentail was made. Now, in the first place, I am clearly of opinion that we cannot entertain any question after the Act was passed as to whether notice of the intention to apply for it was given or not; and, in the second, that there was no call on the petitioner to give notice to the heirs of entail called in the destination to this estate of her intention to get an Act to alter her status, and to make her and her daughter naturalised subjects, with all the rights of such subjects. The purpose of the statute was to give the petitioner and her daughter the status of naturalised subjects, and I think it is out of the question to say that notice must be given to every one who might be indirectly affected by this status being conferred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Mrs Anna Maria Isabella Macleod or Wilson against Lord Adam's interlocutor of 17th November 1867, as also on the said reclaiming note as bringing under review previous interlocutors in the cause, Refuse the said reclaiming note and adhere to the interlocutor under review: Find the petitioner entitled to expenses, with exception of the expenses of the two remits to an actuary and his reports thereon; and remit to the Auditor," &c.

Counsel for Mrs Wilson (Reclaimer)—Kinnear. Agents—Mackenzie & Kermack, W.S.

Counsel for Petitioner and Respondent—Lord Advocate (Watson)—Hall. Agents—Mitchell & Baxter, W.S.

Wednesday, December 19.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GILLIES *v.* DUNBAR.

Patent—Specification, Insufficiency of—Disclaimer—Reference to Drawings which were said to be Essential to the Validity of the Patent.

A party claimed a patent for improvements in screwed bushes or shields for the bungholes of casks. In his provisional specification he stated his invention to be "an improvement in the bushes or shields for the bungholes of casks or other vessels," and to consist "in forming a screw or spiral thread on the outside of the shield, of such diameter that it may be screwed into the said hole." In his final specification he repeated the description of his invention *totidem verbis*, and also referred to drawings, which were described to be "one form of the improved bush or shield." He afterwards lodged a disclaimer, the effect of which was that his claim was stated to be "the screwed thread, as hereinbefore described and shown at figures 1 and 2 of the appended sheet of drawings." The features of the invention were stated by the complainer in his evidence to consist of the form of the screw thread and the grade and pitch of the screw. In an action for infringement of the patent, in which the defences were, *inter alia*, insufficient description of the invention, and disconformity between the provisional specification and claim as stated in the disclaimer—*held* that the patent was bad, upon the grounds, *inter alia*, (1) (*per* Lords Ormidale and Gifford) that there was no indication of the invention as now explained in the original specification; and (2) (*per curiam*) that the final specification did not sufficiently describe the invention, as, although the essential features were shown by the drawings, still they were nowhere distinguished from other particulars also shown, nor were they said to be essential.

Opinion per Lord Gifford, that there was a fatal discrepancy between the provisional