Counsel for Mrs M'Gowan's Issue—H. Johnston—W. Campbell. Counsel for Mrs Martin's Issue—F. Martin. Agents for the Issue of Mrs M'Gowan and Mrs Martin—J. & J. Galletly, S.S.C.

Counsel for the Representatives of the Residuary Legatees—Jamieson—C. N. Johnstone. Agents—Scott & Glover, W.S.

Wednesday, July 15.

FIRST DIVISION.

[Lord Low, Ordinary.

BAIRD *v.* BAIRD AND OTHERS.

Entail—Disentail—Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), sec. 13—Consignment in Bank of Amount Claimed by Heirs.

The Entail Act 1882, sec. 13, 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 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." . . .

In a petition for authority to disentail, the petitioner, with the object of preventing delay, and before the amount of the three next heirs of entail was ascertained, consigned in a bank a *cumulo* sum in excess of the amount claimed by them. *Held* that this was not such a compliance with the provisions of the statute as to enable the Court forthwith to dispense with the consent of these heirs.

In July 1889 a petition was presented to the Court by George Alexander Baird, for authority to disentail the lands of Strichen, Stitchell, and others, of which he was institute of entail in possession.

The petitioner was entitled to disentail these lands with the consent of the three next heirs of entail, and as they declined to give their consent, a remit was made by the Lord Ordinary to an actuary to report as to the value in money of the interests of these heirs. In his report the actuary estimated the value of the heirs' expectancies alternatively on a different footing in each case as to what was embraced by the expectancies. In the one case he brought out a sum of £36,000, and in the other a sum of £31,000, as the *cumulo* value of the interests of the three heirs.

Objections were lodged to this report, in which it was averred, *inter alia*, that £50,000 was the sum at which the value of these interests ought to be estimated.

The petitioner then lodged a minute offering to consign in bank "£50,000, or such other sum as may appear to the Court satisfactorily to fully secure the value in money of the next heirs' expectancies."

By the 13th section of the Entail (Scotland) Act 1882 it is provided—"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." . . .

On 18th June 1891 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that the value in money of the interests or expectancies of the respondents John George Alexander Baird, James Douglas Baird, and Henry Robert Baird, the three next heirs of entail in the entailed estates mentioned in the petition, do not exceed the sum of £55,000 sterling in all; and in respect of the offer made by the petitioner in the said minute, No. 36 of process, and upon the petitioner consigning in bank in the joint names of the agents of the petitioner and the respondents, the three next heirs of entail, and subject to the future orders of the Court, the sum of £55,000 sterling, to meet the value of the said interests or expectancies of the said respondents in the said entailed estates, dispenses with the consents of the said respondents as next heirs of entail foresaid, to the disentail of the said estates: Finds that the procedure has been regular and proper, and in conformity with the provisions of the Acts of Parliament and relative Acts of Sederunt: Interpones authority to and approves of the instrument of disentail, No. 23 of process: Grants warrant to, and authorises and ordains the Keeper of the Register of Tailzies to record the same in said register in terms of the statute, and decerns *ad interim:* But supersedes extract and execution hereof until the said consignation has been made, and the receipt therefor lodged in process and transmitted to the Accountant of Court.

"*Note.*—I have carefully considered the motion which was made by the petitioner in this case, and I have come to be of opinion that in certain circumstances it is not incompetent for the Court to follow the procedure which was proposed by the Dean of Faculty.

"It is true that the Act of 1882, sec. 13, provides that where the consents of the next heirs are required to an application under the Entail Acts, and the next heirs have refused to give their consents, the Court shall ascertain the value of their interests or expectancy, and shall order the amount to be consigned in bank, or secu-

rity to be given for it, and shall thereafter dispense with their consents and proceed with the application as if they had been given.

"Now, it appears to me that the main purpose of that provision is to provide that the amount of the expectancy or interest of the next heirs shall be secured, and that the heir of entail in possession is given an absolute right to disentail (if that be the nature of the application) upon condition that the value of the expectancy of the heirs whose consents are required is secured. In so far as it provides that the value of the expectancy shall be secured, I look upon the section as imperative. So far as it contemplates certain procedure to accomplish that object, I look upon it rather as directory, and I am of opinion that if the main purpose of the section is fulfilled it is within the power of the Court, if the circumstances render it expedient to do so, to vary the procedure to some extent.

"Now, in a case of this sort, if there are questions as to the value of the expectancy which may result in prolonged litigation, I think that it is quite within the spirit of the Act to allow the petition to proceed if the heir of entail in possession is in a position to give ample security for the largest sum to which the next heirs could be entitled, because the purpose of the section of the Entail Act will be fulfilled by the amounts of their expectancies being absolutely secured to the next heirs."

"In the objections to the actuary's report lodged for the respondents they state the amount to which they are entitled as being not less than £50,000. I think, therefore, that I may hold that the value of the expectancies are ascertained to this extent, that they cannot be more than £55,000, and that consignation of that sum will absolutely secure that the next heirs will receive payment of the amount to which they may ultimately be found entitled.

"Further, it is plain from the objections lodged that the fixing of the precise amount to be paid to the next heirs will raise questions of difficulty, which will probably involve considerable delay.

"I am therefore of opinion that upon the condition of consignation being made of £55,000, I may dispense with the consents and grant warrant to disentail."

The next heirs reclaimed, and argued—The Legislature had given an heir of entail in possession authority to break the entail on condition that the formalities prescribed by the statute were strictly followed. The Legislature contemplated that some delay might ensue in carrying through these formalities, and the chance of the death of the heir in possession pending the procedure was a contingency that the next heir might with reason count upon. If the view of the Lord Ordinary was adopted, this contingency was lost to the next heir, and the consigning of a sum in bank would be held as an equivalent to the statutory procedure. The course adopted by the Lord Ordinary was in direct violation of the language of the statute—*Shand* v. *Home*, March 4, 1876, 3 R. 544; *M'Donalds* v. *M'Donald*, March 12, 1880, 7 R. (H. of L.) 41.

Argued for the respondent (the heir in possession)—The scheme of the statute was to facilitate disentails, but it was in the power of any next heir by obstructive and vexatious litigation to deprive the heir in possession of the benefits of the statute by great delay. What the statute aimed at was the safeguarding of the interests of the next heirs, and the consigning of this money, a sum more than the largest *cumulo* sum claimed by the appellants, fully protected their interests. Here, owing to a variety of complications, the delay before the whole formalities prescribed by the statute could be complied with would be very great, but by following the course adopted by the Lord Ordinary the interests of both sides were protected.

At advising—

Lord President—I regret that I cannot concur in the course adopted by the Lord Ordinary in this case. I think that he has failed to give effect to the very clear provisions of section 13 of the Act of 1882.

When a power of disentail is conferred by statute, with attendant conditions, it is imperative that a party seeking to take benefit from the Act must comply very strictly with the prescribed conditions. Now, the words of this section are imperative—[*His Lordship here read the clause quoted above*]. It follows from the language of this section that until the value of the interest of the next heir is ascertained in money no authority to disentail can be given. I do not know what more I can add to make this clearer. It seems to me that the language of this section is quite explicit and clear.

I think therefore that we must recal the Lord Ordinary's interlocutor, and remit to him to proceed in terms of the statute.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary.

Counsel for the Appellants—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—Salvesen. Agents—W. & F. Haldane, W.S.

Thursday, July 16.

SECOND DIVISION.

[Sheriff Court at Banff.

GEDDES *v.* REID.

Writ—Informality of Execution—Proof—Onus—Conveyancing and Land Transfer (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *secs.* 38 *and* 39.

By the 39th section of the Conveyancing Act of 1874 it is provided that no deed subscribed by the granter, and