The Court found in each case that the decision of the referee was right and affirmed it.

Counsel for the Appellants (Anstruther's Trustees)—Blackburn, K.C.—C. H. Brown. Agents—Russell & Dunlop, W.S.

Counsel for the Appellant (W. R. Paton)—Chree, K.C.—Hon. W. Watson. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Respondents—Solicitor-General (Anderson, K.C.)—J. A. T. Robertson. Agent — Sir Philip J. Hamilton Grierson, Solicitor to the Inland Revenue.

COURT OF SESSION.

Thursday, June 27.

SECOND DIVISION.

[Junior Lord Ordinary.

MORISON *v.* CRAIG.

Entail—Disentail—Old or New Entail—Private Act—Consents of Next Heirs—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 28.

The lands of A, B, and C were entailed by trustees in terms of a direction contained in a trust-disposition and settlement which first came into operation on the testator's death in 1842. Under authority of a private Act of Parliament, the lands of C were disentailed in 1873 and the lands of D purchased and entailed in 1875 on the same series of heirs under the same conditions and prohibitions. This Act contained a clause that the heirs of entail in the entailed estate of A and the estate of D, "hereby directed to be entailed, shall, notwithstanding anything in this Act contained, be entitled to avail themselves of all the benefits and privileges conferred upon heirs of entail by any public Act now in force, and in particular by the Acts 11 and 12 Vict. cap. 36. . . ."

The heir of entail in possession, who was born in 1840, presented a petition for leave to disentail with consent of his eldest son, who was born in 1867. The two next heirs in the order of succession were the two children of the petitioner's son.

Held (*rev.* judgment of Lord Skerrington, Ordinary on the Bills) that the entail of D, being under the private Act, was a new entail, and that the consents of the three next heirs were necessary for disentail.

The Entail Amendment Act 1848 (11 and 12 Vict. c. 36), section 28, enacts—"For the purposes of this Act the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

John Broun Broun Morison of Murie, Errol, in the county of Perth, heir of entail in possession of the estate of Murie, presented a petition for authority to disentail the estate. The petitioner succeeded to the entailed estates of West Errol, Whiteriggs, and Cupargrange in 1866 in virtue of deeds of entail executed in 1856 and 1861 by the trustees of David Morison, who died on 22nd October 1842, leaving a trust-disposition and settlement dated 11th December 1841, and registered in the Books of Council and Session 28th October 1842, whereby he directed his trustees to allow his estate to accumulate for ten years, and then to purchase and settle lands in Scotland by deed of strict entail on a certain series of heirs. In 1873 the trustees obtained a private Act called Morison's Estate Act 1873 (36 and 37 Vict., cap. i), by virtue of which they sold the estate of Cupargrange, and purchased, and in 1875 executed in terms of the Act a deed of entail of the estate of Murie on the same series of heirs and subject to the same restrictions as the estate of Cupargrange.

The private Act contained, *inter alia*, the following clauses:—Section 20—"The said John Broun Broun Morison and the heirs of entail entitled to succeed to him in the said entailed estate of West Errol, and the said portion of the estate of Murie hereby directed to be entailed, shall, notwithstanding anything in this Act contained, be entitled to avail themselves of all the benefits and privileges conferred upon heirs of entail by any public Act now in force, and in particular by the Acts eleventh and twelfth Victoria, chapter thirty-six, sixteenth and seventeenth Victoria, chapter ninety-four, twenty-third and twenty-fourth Victoria, chapter ninety-five, and thirty-first and thirty-second Victoria, chapter eighty-four."

The petitioner stated that he was born on 22nd January 1840, and that the only heir of entail whose consent was required to the application was Guy Edward Broun Morison, his eldest son, the next heir in succession to the estate of Murie under the deed of entail, who was born on 4th March 1867, and was willing to consent to the application. The petitioner further stated that the two heirs next entitled to succeed to the estate after his son were the latter's children Guy Edward Broun Morison and Rosemary de Annand Broun Morison, who were born respectively on 26th August 1908 and 13th October 1910, and were thus in pupillarity at the date of the petition.

The petition was served on Guy Edward Broun Morison and his two pupil children, and Mr M. Millar Craig, advocate, was appointed curator *ad litem* to the pupils.

The curator *ad litem* lodged the following minute:—"The curator *ad litem* having seen the process, submits that the petition is incompetent, in respect that in virtue of the Entail Acts, and particularly

the Act 11 and 12 Vict. cap. 86, sections 1, 2, 3, and 28, and the Act 45 and 46 Vict. cap. 53, section 3, the date of the entail under which the petitioner is heir of entail in possession of the estate of Murie, is the date at which the Act 36 and 37 Vict. cap. i, commonly called Morison's Estate Act 1873, came into operation, viz., 21st July 1873, and that therefore the petitioner is not entitled to acquire the said estate in fee-simple without the consents of the said Eve Muriel de Annand Broun Morison and Rosemary de Annand Broun Morison, and the curator *ad litem* craves to be allowed to be heard by counsel at the bar if necessary."

On 3rd April 1912 the Lord Ordinary on the Bills pronounced the following interlocutor:—"Finds that the Morison Estate Act 1873 must be construed as enacting that the heirs of entail in possession of the estate of Murie, by virtue of the entail executed under authority of the Act, shall have the same benefits and privileges under the Public Entail Acts, 1848-1868, available to them, with reference to the estate of West Errol, which was entailed pursuant to the trust deed of 1842, and which remained so entailed: Therefore repels the objections stated by the curator *ad litem* in said minute, and decerns."

Opinion.—"I have come to the conclusion that the petition to disentail the estate of Murie is competent, but I dissent from the assumption of fact made in the petition to the effect that the entail was executed under the authority of a trust deed which came into operation in the year 1842. The very opposite is the truth. The entail was executed under the authority of a private Act of Parliament which came into force in the year 1873, and which rode rough shod over the trust deed of 1842 and what had lawfully followed thereon. It is, however, within the power of Parliament to enact that the 'thing which is not' shall be deemed to exist, and *vice versa*. I construe section 20 of the private Act not as idle verbiage, but as enacting that the heirs of entail in possession of the estate of Murie, by virtue of the entail to be executed under its authority, should have the same 'benefits and privileges' under the Public Entail Acts, 1848-1868, available to them with reference to that estate as were available to them with reference to the estate of West Errol, which had been entailed pursuant to the trust deed of 1842, and which remained so entailed.

"In 1873 heirs of entail in possession, by virtue of new entails, enjoyed only a fraction of the 'benefits and privileges' which the public Acts conferred upon heirs in possession by virtue of old entails. Further, it is implied in the preamble and clauses of the private Act that the estates of West Errol and Murie were intended to form 'one compact estate,' with its mansion-house on Murie, and that they were intended to be held and enjoyed as one estate.

"Three questions therefore had to be determined by the private Act, viz. — (1) Ought the heirs of entail to have different and larger powers as regards West Errol in comparison with their powers as regards Murie? or (2) ought Murie to be considered as held under the original entail? or (3) ought West Errol to be considered as held under the new entail which for the first time provided a mansion-house and a compact estate? I interpret section 20 as answering the second question in the affirmative and as deciding in favour of unity and liberty. I accordingly repel the objection stated for the curator *ad litem* in his minute, but as the objection was one which it was his duty to state, I find him entitled to his expenses.

"Counsel for the *curator bonis* cited the case of Buchanan, (1883) 10 R. 809. The earlier case of Buchanan, (1864) 2 Macph. 1197, seems to me to be more in point."

The curator *ad litem* reclaimed, and argued — The effect of section 28 of the Entail Amendment Act 1848 (11 and 12 Vict., cap. 36) was that the date of the entail should be held to be the date of the Act directing the entail, and section 20 of Morison's Estate Act 1873 (36 and 37 Vict., cap. i) did not have the effect of taking the entail of Murie out of this rule. This section of the private Act merely meant that the entail was to be treated as falling under the public Entail Acts though executed on the authority of a private Act. The following authorities were referred to — *Buchanan, Petitioner*, June 11, 1864, 2 Macph. 1197; *Buchanan* v. *Jameson*, March 16, 1883, 10 R. 809, 20 S.L.R. 534; *Duke of Athole, Petitioner*, January 12, 1866, 1 S.L.R. 102.

Argued for the respondent—The effect of the reclaimer's argument was to delete section 20 from the private Act altogether. Its only meaning was that the heirs in possession of Murie were to be put in the same position as regards the public Entail Acts as they occupied in respect of the West Errol estate, which was an old entail.

At advising—

LORD DUNDAS—The point here raised is a short and sharp one. The petitioner maintains that he is entitled to disentail with the sole consent of his son, who is his heir-apparent. The curator *ad litem* appointed to the two pupil children of that son, who are the next heirs of entail for the time being, contends that the petitioner cannot lawfully disentail unless the consents not only of his son but of the two grandchildren be obtained, or duly dispensed with in terms of the Entail Acts. To put the matter in other words, the question is, whether the lands sought to be disentailed are held by the petitioner as heir of entail in possession under an "old" or a "new" entail. *Primâ facie* the latter is the case, for the deed of entail is dated in 1875, and proceeds upon the narration and under the authority of the private Act of Parliament obtained in 1873. But the theory of the petition is based upon section 28 of the Rutherfurd Act, by which it is enacted that for the purposes

of that Act the date at which the Act of Parliament, deed, or writing, placing money or other property under trust or directing land to be entailed, first came into operation shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made thereafter "in execution of the trust," whatever be the actual date of the entail. The Lord Ordinary has held that this section has no application to the present case, because the deed of entail in 1875 was not executed under the authority of the original trust deed of 1842, but under the authority of the private Act of 1873, which, as his Lordship puts it, "rode rough-shod over the trust deed of 1842 and what had lawfully followed thereon." I understood Mr Sandeman (for the petitioner) ultimately to concede that this view could not be successfully resisted; and whether he did so or not, it is, in my judgment, plainly right. The basis of the petition as framed is therefore undermined. The Lord Ordinary, however, has decided in the petitioner's favour upon another and different ground. He "finds that the Morison Estate Act 1873 must be construed as enacting that the heirs of entail in possession of the estate of Murie, by virtue of the entail executed under the authority of the Act, shall have the same benefits and privileges under the Public Entail Acts 1848-1868 available to them with reference to that estate as were available to them with reference to the estate of West Errol, which was entailed pursuant to the trust deed of 1842, and which remained so entailed." I am unable to agree with the Lord Ordinary in this view. The matter turns upon the construction to be put upon section 20 of the private Act. There is, in my judgment, no need to construe the language of that section as "idle verbiage" if it is not to be read as the Lord Ordinary seeks to read it. I think the section may quite possibly have been introduced in order to make it clear that the deed of entail which was to be executed, though not of the normal kind, but proceeding upon the terms and authority of a private Act of Parliament, was to be deemed and treated as in all respects falling under the provisions of the public Entail Acts. Such a provision may have been unnecessary, but it is intelligible; and a similar anxiety to be upon the safe side may be noticed elsewhere in the private Act, *e.g.*, in sections 21 and 22. But assuming the intention of the private Act, and particularly section 20, to have been what the petitioner now says it was, one must, I apprehend, in order to give effect to his contention, find words in the Act sufficient to give effect to the intention either expressly or by reasonably clear implication, and these are, I think, awanting. I am unable to attribute such effect to the words occurring in section 20, "notwithstanding anything in this Act contained"; or to read the section as definitely assimilating the rights and position of the heirs under the contemplated deed of entail of Murie to those of the heirs of entail under the subsisting deed regulating the succession to West Errol. The petitioner's construction of section 20 seems to me to be violent and inadmissible. I find support for the view I hold in the case of *Buchanan* (1883, 10 R. 809), and particularly in the observations of Lord Shand. If the petitioner's view is correct, it might very easily have been expressed in section 20, but this has not been done.

The curator *ad litem* in his minute submits that, if his contention is correct, as I hold it to be, the petition is incompetent. It would be unfortunate if all the trouble and expense which have been incurred must be thrown away, and proceedings begun *de novo*, because a mistake has been made as to the conditions upon which the petitioner is legally entitled to disentail these lands. I do not see that we are driven to the necessity of throwing the petition out of Court. I think we ought to recal the interlocutor; find that the petitioner is not entitled to acquire the estate in fee-simple unless the consents of the two wards respectively are obtained, or are legally dispensed with as provided for by the Entail Acts; and remit the petition to the Junior Lord Ordinary to proceed therein as seems to him just. His Lordship will consider whether it may not be possible, as I should think it may be, to utilise the frame-work of the existing petition, adapting it, with the aid of such amendments as he may judge necessary, to the situation involved in our present judgment. The curator *ad litem* must have his expenses in both Courts.

LORD GUTHRIE — I concur. If I had thought the Lord Ordinary right in holding that the petitioner's construction of section 20 of the Morison's Estate Act of 1873 was the only construction which was intelligible in its origin and effect, and that the construction put upon it by the curator *ad litem* for the petitioner's grandchildren reduced the section to what the Lord Ordinary calls "mere verbiage," I should have decided as he has done. But I think the view that Lord Dundas has taken of its origin, and of its probable or at least reasonably possible effect, removes the section, as construed by the curator *ad litem*, from the category in which the Lord Ordinary has placed it. The Lord Ordinary enforces his view thus:—"Further, it is implied in the preamble and clauses of the private Act that the estates of West Errol and Murie were intended to form 'one compact estate,' with its mansion-house on Murie, and that they were intended to be held and enjoyed as one estate." I agree with the Lord Ordinary's statement of fact, but I do not see any assistance to be had for the construction of the section from this consideration, which is as fully satisfied under the one view as the other. What the petitioner needs is to find expression to the view that Murie was to be put in all respects, including all proceedings for disentail, into the same position as Cupargrange, for which it was no doubt in several ways a surrogatum.

That might have been natural, but it did not necessarily follow; it could have been easily said; it is not said in section 20, nor elsewhere in the Act, and I do not think there is sufficient reason for inferring it, when there is another intelligible view of the meaning of the section.

The LORD JUSTICE-CLERK concurred.

LORD SALVESEN was not present.

The Court recalled the interlocutor of the Lord Ordinary, found that the petitioner was not entitled to disentail the estate of Murie without the consents of the wards, and remitted the petition to the Lord Ordinary to proceed therein.

Counsel for Petitioner (Respondent)—Sandeman, K.C.—Smith Clark. Agents—M. J. Brown, Son, & Co., S.S.C.

Counsel for Respondent (Reclaimer)—Macmillan, K.C.—A. R. Brown. Agents—Cockburn & Meikle, W.S.

Saturday, June 29.

FIRST DIVISION.

(Before Seven Judges.)

[Lord Skerrington, Ordinary.

GOVERNORS OF GEORGE HERIOT'S TRUST *v.* PATON'S TRUSTEES.

Superior and Vassal—Composition—Sub-Feu—Partial Redemption of Sub-Feu-Duty—Measure of Composition—Act 1469, *cap.* 36.

A vassal sub-feued his land for a feu-duty of £20, which was a fair and adequate return at the date of the feu-disposition. The feu-duty was subsequently redeemed to the extent of £19, 15s.

Held that the superior was not entitled on the entry of a singular successor to a year's rent of the lands, but was bound to accept the sum of £20 tendered by the vassal.

City of Aberdeen Land Association, Limited v. *Magistrates of Aberdeen (re Brown Lands)*, July 2, 1904, 6 F. 1067, 41 S.L.R. 647, *overruled.*

Campbell v. *Westenra*, June 28, 1832, 10 S. 734, *approved.*

Earl of Home v. *Lord Belhaven and Stenton*, May 25, 1903, 5 F.(H.L.) 13, 40 S.L.R. 607, *distinguished.*

On 7th December 1910 the Governors of George Heriot's Trust, incorporated under the Educational Endowments (Scotland) Act 1882, superiors of certain subjects at the corner of Queensferry Street and Shandwick Place, Edinburgh, *pursuers*, brought an action against Mrs F. E. Ingram or Paton, widow of James Paton of Avonhill, and others, Mr Paton's trustees, *defenders*, in which they sought declarator that in consequence of the death of the said James Paton, the vassal last vest and seised in the said subjects, a casualty of £936 odd, being one year's rent of the said subjects, became due to the pursuers as superiors foresaid on 4th July 1908, the date of the defenders' infeftment. A petitory conclusion followed.

The following *narrative* is taken from the opinion (*infra*) of the Lord President—"This is an action for payment of a composition by Heriot's Hospital, the superiors of ground now forming part of the houses and streets of Edinburgh, directed against the trustees of the late James Paton, the mid-superiors of the same, and being liable in a composition as singular successors of the last-entered vassal, the said James Paton.

"The lands consist at present of various houses, all held under feu contracts and charters of subinfeudation. No question arises except as respects one part of the lands; as regards the rest the pursuers are content to demand a payment of a sum equal to a year's feu-duty receivable by the defenders. But as regards one portion of the lands now known as 1 Shandwick Place, being those originally subfeued to one Andrew Ferris, the parties are at issue.

"The history of these lands is as follows—By feu-disposition, of date 14th and 16th August 1816 and 1st October 1817, Mr Russell, commissioner and factor for Cockburn Ross, the then proprietor of the *dominium utile* of the said subjects, subfeued to A. Ferris, the stance No. 1 for the feu-duty of £20. The deed contained a clause allowing the feuar to redeem the feu-duty at any time up to the extent of £19, 15s., at the rate of twenty years' purchase. This power was, at certain dates ending in 1841, taken advantage of, and the feu-duty at present stands at 5s.

"The pursuers contend that as the existing feu-duty is only 5s., which sum does not represent the yearly value of the lands at the time they were feued, they are entitled to demand a sum equal to a year's rent of the lands as they would let at the present time, a sum which may be taken as fixed by the valuation roll. In other words, they demand as a condition of entry to an estate which can only bring in to the vassal 5s. a-year a payment of the capital sum of £936.

"The vassal tenders the sum of £20, being content to admit that to the 5s. he yearly receives he must add £19, 15s.—which may be looked upon either as making up the original feu-duty of £20, or as representing 5 per cent. on the redemption price paid."

The pursuers pleaded, *inter alia*—"(3) The composition payable by the defenders being (1st) the sub-feu-duties payable to them for subjects feued out without payment of grassum, and of which no part has been redeemed, and (2nd) the year's rent where the sub-feu-duties now payable to the defenders do not form the whole consideration for which the sub-feu-rights were granted, the pursuers are entitled to decree as concluded for."

The defenders pleaded, *inter alia*—"(3) The sum payable by the defenders, as