Saturday, June 3.

HENRY PADWICK AND FRANC NICHOLS STEUART *v.* SIR ARCHIBALD DOUGLAS STEUART.

Judicial Factor—Entail—Contract of Sale. Petition presented by a party with whom a deceased heir of entail had entered into a contract of sale of the entailed estate under certain conditions, and by the general disponee and executor of the deceased, for the appointment of a judicial factor on the estate, pending the result of an intended action against the next heir of tailzie to have the validity of the sale ascertained, *refused.*

The late Sir William Drummond Steuart died on the 28th April 1871 infeft in the lands and baronies of Grandtully, Murthly, Strathbraan, and others, under a deed of entail and relative deed of nomination, both executed by John Steuart of Grandtully, on the 31st May 1717, but recorded at different times.

In January 1871 Sir William Steuart executed a *mortis causa* deed of settlement by which he conveyed to Mr Nichols Steuart his whole estate, heritable and moveable, declaring that the conveyance should extend to all lands with which he had power to deal; and he therein nominated Mr Nichols Steuart to be his sole executor.

On the 3d April 1871 an agreement was executed between Sir William Steuart and Mr Henry Padwick. By the deed of agreement Sir William Steuart sells to Mr Padwick the whole lands of Grandtully, Murthly, Strathbraan, and all others belonging to him in the county of Perth, with entry at Sir William Steuart's death, for the sum of £350,000, but declaring that the price shall only be payable to Sir William Steuart's executors at the first term of Whitsunday or Martinmas six months after the validity of the sale shall be finally and irreversibly ascertained; and that the free rental accruing prior to that time, but after the death of Sir William Steuart, so far as received by Mr Padwick, shall be paid over to Sir William Steuart's executors. It is further agreed that the expense of ascertaining the validity of the sale, including the costs in the House of Lords, shall form a deduction from the price, and that the price shall only be payable on Padwick obtaining a valid title. A clause follows, providing that in the event of any judicial proceedings being instituted in the lifetime of Sir William Steuart affecting his right to the lands, it shall be in the power of Sir William Steuart to annul this agreement.

A petition was now presented by Mr Padwick and Mr Nichols Steuart for the appointment of a judicial factor on the estates comprised in the above agreement. The petition founded on the agreement, and set forth that the petitioner Padwick was about to take proceedings to have the invalidity of the entail declared, and to obtain a valid title to the estates. A number of objections to the validity of the entail were set forth.

Answers were lodged to the petition for Sir Archibald Douglas Steuart, only surviving brother and heir under the entail to Sir William Steuart. In the answers it was stated that in 1851 Sir William Steuart had raised an action against the substitute heirs to have it declared that the estates in question were held by him free from the fetters of the entail. The defects alleged in that action were among those now alleged by the petitioners. The result of the proceedings was that the Lord Ordinary (COWAN) found that the entail was not defective on any of the grounds stated by the pursuer, and assoilzied the defenders. This interlocutor became final. In 1870 Sir William Steuart made another attempt to free himself from the fetters of the entail, but this was abandoned.

The Lord Ordinary (MACKENZIE) refused the petition; adding the following note:—

"*Note.*—The Lord Ordinary is of opinion that the petitioners have not shown any good or sufficient grounds upon which the estates of Grandtully, Murthly, Strathbraan, and others, should be sequestrated by the Court, and put under the management of a judicial factor.

"The last proprietor, Sir William Drummond Steuart, from whom the rights founded on by the petitioners are derived, held these estates under the deed of entail and relative deed of nomination mentioned in the petition, and his title thereto was made up in the year 1839 by instrument of sasine following upon the retour of his special service as nearest and lawful heir-male of tailzie and provision of the deceased Sir John Archibald Steuart, his elder brother, and precept from Chancery following thereon. In the year 1851 he raised an action of declarator against the present respondent and certain other heirs of entail, to have it found and declared that the said deeds were defective in the clauses requisite for the constitution of a valid and complete entail, and that the said deeds were invalid and ineffectual as regards all the prohibitions therein contained or referred to, and that the estates thereby conveyed were subject to his deeds and debts as freely as if he held them in fee-simple. In that action it was found by the Lord Ordinary, whose interlocutor is final, 'that the several deeds of entail libelled are not defective in any of the clauses requisite by statutory law and practice for the constitution of a valid and complete entail;' and the defences were sustained, and that the defenders were assoilzied from the conclusions of the libel, with expenses.

"The petitioner, Mr Padwick, claims right to the said entailed estates as the purchaser from Sir William Steuart, under an agreement of sale, whereby, as he avers, they were sold to him, with entry at the date of Sir William's death, at the price of £350,000, which is to be paid only at the first term of Whitsunday or Martinmas occurring six months after the validity of the sale thereby made should be finally and irreversibly determined, and upon a valid title being obtained by him; the free rents realised by Mr Padwick between Sir William's death and that time being payable by him to Sir William's executor; and he avers that he is about to take proceedings to have the invalidity of the entail declared, and his title completed by adjudication in implement of the said sale to him. The petitioner, Mr Franc Nichols Steuart, claims to be Sir William's executor under a general *mortis causa* deed of settlement, whereby Sir William conveyed to him his whole heritable and moveable estates, including all lands and estates with which he had power to deal, and of which he could dispose; and he maintains that in virtue of this settlement he is entitled, in respect of the invalidity of the entail, to receive payment of the price agreed to be paid by Mr Padwick, and the rents accruing between the date of Sir William's death and the date of the completion of Mr Padwick's title.

"It is not necessary for the decision of this case that the Lord Ordinary should give any opinion as to the validity of the objections stated by the petitioners against the entail. It is said that these objections were not raised and considered or decided in the declarator at the instance of Sir William. Even supposing this to be the case, and that the entail could be again challenged, both on these objections and on those raised and disposed of in the above-mentioned action of declarator, the issue of that challenge is uncertain. Further, these objections are not of such a nature as could warrant the Court in now interfering with the rights of the respondent as heir-apparent under the entail, the standing investiture under which Sir William possessed the estates from 1839 down to the date of his death on 28th April 1871. As Mr Erskine remarks (Inst., iii, 8, 58), an heir-apparent 'is entitled by his apparency to continue his ancestor's possession,' and 'this right of possession continues with the apparent heir though the ancestor should have made over the lands to a third party; because that grant, if it be not completed by seisin, imports only a personal obligation on the heir to divest himself, which is quite consistent with his possessing the subject till he be compelled to make up his titles and convey to the disponee; Fount., June 24, 1698; *Home* (Dict., p. 5235), July 18, 1727; *Ogilvie* (Dict., p. 5242).' The respondent's rights as heir-apparent are particularly strong in the present case in respect of the decision in the foresaid action of declarator and of the peculiar nature of the agreement of sale, and in respect that he avers that it was executed by Sir William on deathbed, he being at the date of its execution ill of the disease of which he died within a month thereafter, and that it is not a *bona fide* onerous agreement for the purchase and sale of the estates, but that it was entered into in pursuance of another attempt by Sir William to get rid of the fetters of the entail, for the purpose of transferring the estates to the other petitioner, Mr Nichols Steuart, on Sir William's death. It is also alleged by the respondent that the price stated in the agreement is £150,000 less than the true value of the estates, and that an understanding and arrangement existed between Sir William and Mr Padwick that the latter should, in the event of obtaining possession of the estates under the agreement of sale, convey them to the petitioner, Mr Nichols Steuart. This arrangement, it is stated, the pursuers are now endeavouring to carry into effect.

"See *Mackay* v. *Dalrymple*, 9th March 1796, Dict. 5239; *Munro* v. *Graham*, 28th June 1849, 11 D. 1202; *Borthwick* v. *Glassford*, 28th February 1861, 23 D. 632; *Campbell* v. *Campbell*, 27th June 1863, 1 Macph. 991; and *Catton* v. *Mackenzie*, 16th March 1870, 8 Macph. 713."

The petitioners reclaimed.

The SOLICITOR-GENERAL and LEE, for them, argued,—The present competition is between an heir of entail and a purchaser from the deceased heir of entail. This makes the case essentially different from those in which the competition was between an heir of entail and a gratuitous disponee. There is no presumption that the objections to the entail are not well founded. To allow Sir Archibald Douglas to take possession of the estates would be to presume that the entail is a valid entail, for unless the entail is valid he is not entitled to an hour's possession. All that Lord Cowan decided was the effect of certain clauses in the deed of entail. That decision, though it might bind Sir W. Steuart and his representatives, cannot affect an onerous purchaser. Moreover it does not touch the other objections which are now stated to the validity of the entail.

SHAND and BALFOUR, for the respondent—The estate has been possessed by the heirs of entail for upwards of a century under the entail as a strict entail. This circumstance is alone sufficient. The argument of the petitioners comes to this, that whenever a party can say that he has purchased an entailed estate from a deceased heir of entail a judicial factor is to be appointed. Again, the deceased recognised the entail by making up titles under it; and the matter does not stop here—he made at least one unsuccessful attempt to treat the estate as if it were not well fettered. Everything then is to be presumed in favour of the validity of the entail. The present case is really not a question with a purchaser. We aver that Mr Padwick is under agreement to transfer the estates to the executor, Mr Nichols Steuart. The deed of agreement itself contains a provision that the rents of the estate between Sir W. Steuart's death and the time that the price becomes payable—which may be a period of several years—are to be paid to the executor. So that the case, as far as regards the present application, is really between an heir of entail and a gratuitous disponee.

At advising—

LORD PRESIDENT—This case belongs to a class of pretty frequent occurrence. In some respects the circumstances are very special. I am not aware of an application for a judicial factor presented by a purchaser from a deceased heir of entail, upon a conveyance, the petitioner being either infeft or in a position to take infeftment. When that case occurs, it will require careful consideration. In the present case the petitioner is a purchaser under very peculiar circumstances. He has not got a conveyance. The only way in which he can make up a title is by adjudication. The right stands on a bare personal contract of sale, and that contract seems to be subject to a suspensive condition of a very peculiar nature. The price is not payable till after a final judgment on the validity of the sale. His title as purchaser necessarily remains in abeyance till that condition is purified. He is not therefore even in the position of a party holding a conveyance from an heir of entail. There is another great peculiarity in the deed of agreement. It is provided that the free rents of the estate accruing between the death of Sir William Steuart and the time that the price becomes payable in consequence of a final judgment on the validity of the sale are to be paid over by the said Henry Padwick to the executors of Sir William Steuart. If the agreement receives effect the rents will be uplifted by the petitioner Padwick, and paid over to the executors. Now I do not see that this kind of arrangement can in any point of view be given effect to. Plainly the petitioner does not feel that he is in a position to act upon this part of the agreement, and accordingly he does not attempt to uplift the rents himself, but asks the Court to appoint a judicial factor. I cannot say that this case depends on any other principles than those which have been given effect to in a competition between an heir of entail and a general gratuitous disponee. I do not wish to say anything to prejudice any proceedings which may be taken by the peti-

tioner. But, in these circumstances, I think we should adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The Court adhered.

Agents for Petitioners—Tods, Murray & Jamieson, W.S.

Agents for Respondent—Dundas & Wilson, C.S.

Saturday, June 3.

SECOND DIVISION.

GRAHAM *v.* MACKENZIE.

Bankrupt—Discharge—Re-investment—Title to Sue—Retrocession. Held that a bankrupt who had been discharged without being re-invested in his estate was not entitled to pursue an action concerning a claim falling under the sequestration. Circumstances in which the procedure in such an action was delayed to enable the pursuer to obtain a retrocession.

In February 1849 Graham and Mackenzie were concerned in a joint adventure in potatoes; and in May 1849 Mackenzie paid to Graham £165, 11s. 6d. as his share of the profits. Graham was sequestrated in March 1851; and on 31st May 1854 he obtained his discharge on payment of a dividend of 5s. 4d. in the £1. Graham had, pending the sequestration, tried to prevail upon his trustee to sue Mackenzie for a sum of £125, 4s. 0½d., due to him under the joint adventure; and accordingly, after his discharge, he brought an action for said sum in the Sheriff-court of Ross-shire.

The Sheriff-Substitute (TAYLOR) pronounced this interlocutor:—

"*Tain, 13th June* 1853.—The Sheriff-Substitute having considered the preliminary defence of want of title in the pursuer, with the answers thereto, and heard parties thereon, sustains the defence: Finds that the pursuer has produced no title or authority to sue for the debt libelled, and no evidence that he has been re-invested by his creditors in his estate: Therefore dismisses the action: Finds the pursuer liable in the expenses of process, and allows an account thereof to be given in for taxation in common form, and decerns."

Against this interlocutor the pursuer reclaimed, and thereafter the Sheriff-Substitute pronounced the following interlocutor and note:—

"*Tain, 1st July* 1853.—The Sheriff-Substitute having considered the Reclaiming Petition for the pursuer, refuses the desire thereof, and adheres to the interlocutor complained of, reserving to the pursuer to bring a new action in the character of assignee to the debt libelled, or otherwise in proper form, if so advised.

"*Note.*—The pursuer admits that his estates were judicially sequestrated on 14th March 1851, which is subsequent to the date of the account sued for, and that the assets have yielded a dividend of only 5s. 4d. per pound to his creditors. In these circumstances, although he might obtain a discharge, the pursuer could not under the statute have been re-invested in his estate, and if the trustee, with the sanction of the creditors, made over the debt in question to the pursuer, he should have sued in the character of assignee, and produced proper evidence of his title."

The Sheriff-Depute (MACKENZIE) adhered.

In 1870 Graham raised the present action against Mackenzie for the sum alleged to be due to him under the joint adventure. He met with the pleas of want of title and of *res judicata*, in respect of the interlocutor in the Sheriff-court above narrated.

To obviate the latter plea, on the suggestion of the Lord Ordinary, the pursuer brought an action of reduction of said decrees, and the two actions were conjoined.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 16th May* 1871.—The Lord Ordinary having considered the conjoined processes, repels the first plea in law stated for the pursuer in the second action at his instance: Repels also the second and fourth pleas in law stated for the defender in the said second action; and, before further answer, appoints the pursuer to call a meeting of the creditors in his sequestration to determine whether a new trustee should be appointed in room of Mr James Christie the last trustee in the said sequestration, who is now dead; or whether any other, and if so what, proceedings should be adopted with reference to the present conjoined actions at the pursuer's instance against the defender, and the claim therein insisted in against the defender.

"*Note.*—The pursuer pleads that, by the interlocutor granting him his discharge his sequestration was declared to be at an end, and that therefore the interlocutors or decrees complained of, which were pronounced in the Sheriff-court, ought to be reduced. The pursuer was not discharged on composition, but without composition, and he was not re-invested in his estate. That discharge was granted on his own petition, no appearance or opposition having been made by the trustee or the creditors; and the mistake of the Sheriff-Substitute in declaring, at the close of the interlocutor granting the pursuer his discharge, 'the sequestration to be at an end,' can have no effect, the Lord Ordinary considers, upon the dependence of the sequestration. In one sense the sequestration was at an end by the granting of the discharge, inasmuch as no future acquisitions of the pursuer fell under the sequestration, and to that extent the said declaration may have a meaning. But to all other intents and purposes it was ineffectual, and the sequestration subsists for behoof of the pursuer's creditors.

"The defender objects that, as the pursuer's sequestration is thus subsisting, the trustee or creditors in his sequestration have the only right and title to insist in any claim which the pursuer may have against the defender. But although their right is preferable to that of the pursuer, they have not the only right. The radical right and interest in that claim are in the pursuer, and he may insist in it if the trustee or creditors will not do so, or interfere in the action. Mr Christie, the last trustee in the sequestration, has been dead some years. Intimation must therefore be made to the creditors, in order that they may determine whether a new trustee should be elected, or whether any other, and if so what, proceedings should be adopted with reference to the pursuer's claim. Should they decline or fail to interfere after due intimation, any objection to the pursuer's title to sue will be obviated; *Gavin* v. *Greig*, 10th June 1843, 5 D. 1191.

"The defender also pleads that reduction of the Sheriff-court interlocutors is barred by *mora*, and he refers to the case of *Mackenzie* v. *Smith*, 23 D. 1201, in support of his plea; but the present case