Counsel for Petitioner—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Counsel for Deputy Clerk Register—Darling. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, July 13.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

LOGAN HOME *v.* LOGAN HOME.

Entail—Clause of Denuding—Birth of Nearer Heir.

H. succeeded to his father as heir of entail entitled to succeed to the two estates of B. and E. A clause in the B. entail provided that "if any of the heirs of entail shall succeed to another estate of the annual value of £300 they shall forfeit the estate of B., but the irritancy shall not be incurred if the heirs shall renounce the same." H. elected to take the estate of B., and accordingly conveyed the estate of E. to his brother and the other heirs of entail called under the E. entail. About two years afterwards he married, and a daughter was born of the marriage. In an action by him as his daughter's tutor-at-law, *held* that as she was a nearer heir of entail than her uncle, the latter was bound to denude of the estate of E. in her favour.

Lieut.-Colonel George Logan Home was heir of entail in possession of the estates of Edrom and Broomhouse at the date of his death, which took place on 28th June 1870. He succeeded to the Edrom estate under the name of George Logan of Edrom by virtue of deed of entail granted by his grandfather dated 3d August 1802, and recorded in the Register of Taillies the 4th July 1818. He afterwards succeeded to the Broomhouse estate on the death of his maternal uncle Lieut.-General (formerly Colonel) James Home of Broomhouse, who died without issue in 1849, under a deed of taillie dated 16th February 1830. By this deed the lands and estate of Broomhouse were conveyed "with and under this condition, as it is hereby expressly provided, that the heirs-male of my body, and the whole other heirs of tailzie above mentioned, shall be obliged constantly to use, bear, and retain the surname of Home, and arms and designation of Home of Broomhouse, and none other, in all time after their succession or attaining possession of the said estate, but with power to the heirs-male of my own body, and the other heirs-male of tailzie above mentioned, to conjoin any other arms therewith but no other surname; and in case any of my heirs-male of tailzie have already succeeded or shall succeed to another estate where they shall be obliged by the entail thereof to assume another name and designation than 'Home of Broomhouse,' then and in that case he or they shall forfeit, amit, and lose all right, title, and interest which they can have to my lands and estate, and shall be holden and obliged immediately thereupon to denude themselves of my said lands and estate hereby disponed, and to convey and dispone the same *habili modo* to the next heir-male called to the succession of the said lands and estate by these presents, unless they choose to relinquish the said other estate and continue 'Home of Broomhouse,' which they are at liberty to do, in their option; excepting always in the cases of titles of honour conferred by the King's Majesty on any of my said heirs-male of tailzie, which they shall be at liberty to use and conjoin with the said name and designation of 'Home of Broomhouse;' and with and under this further condition, that in case any of the heirs-male of my body, or of the other heirs-male of tailzie above mentioned, have already succeeded or shall succeed as heir to any other heritable estate than the lands and others above disponed, of the annual value of £300 sterling or upwards, then, and so often as the same shall happen, such heir-male of tailzie so succeeding shall forfeit, amit, and lose all right, title, and interest in and to my said lands and estate above described, and the same shall fall, accresce, and devolve to the next heir-male hereby called to the succession thereof, in the same manner as if the heir-male succeeding as aforesaid to such other estate had been naturally dead: Declaring, nevertheless, that this irritancy shall not be incurred if the heir-male who has already succeeded or so succeeding to another heritable estate of the value above mentioned shall renounce and relinquish the same within a year and day after his succession to and possession of the same jointly with my aforesaid lands and estate hereby disponed."

By a separate deed of alteration of this deed of entail of Broomhouse executed by the entailer Lieut.-General James Home, dated 23d January 1846, and recorded in the Register of Tailzies of the same date as the deed of entail was recorded therein, viz., 9th March 1850, so much of the entail as prevented and prohibited Lieut.-Colonel George Logan Home (then George Logan), the entailer's nephew, from holding and enjoying the estate of Broomhouse along with his own estate of Edrom was revoked, recalled, and withdrawn, but there was a provision that in case Lieut.-Colonel George Logan Home should have more than one son, the estate of Broomhouse should not be divided, but should descend and devolve whole and entire as it then stood to one proprietor. This prohibition was fenced with an irritant clause; and the granter confirmed and approved the deed of entail so far as not altered. Accordingly Lieut.-Colonel George Logan Home of Edrom assumed the additional surname of "Home," and in accordance with the relaxation in his favour of the provisions of the entail of Broomhouse contained in the deed of revocation and alteration he held the two estates of Broomhouse and Edrom till his death on 28th June 1870.

He was survived by four sons. The eldest, William James Logan Home, succeeded him as heir of entail and was infeft on both estates, but in compliance with the entail of Broomhouse he conveyed the estate of Edrom by disposition and deed of denuding, dated 3d February 1873, to his next younger brother George, who was infeft on 6th March. At the same time William dropped the surname of "Logan," and was thereafter known as "William James Home of Broomhouse;" and George, dropping the surname of "Home," thereafter bore the surname of "Logan," as required

by the Edrom entail, and was known as "George John Ninian Logan of Edrom."

William James Home of Broomhouse died unmarried in India on 29th September 1875, when the succession to the estate of Broomhouse devolved on George John Ninian Logan of Edrom, who thereupon dropped the surname of Logan and assumed that of Home of Broomhouse, and continued to possess both estates for some months thereafter. On attaining majority he presented a petition to the Court for authority to record an instrument of disentail of the estate of Broomhouse. But the Court held that the petition could not proceed until the petitioner had judicially declared his election of the estate of Broomhouse and his surrender of the estate of Edrom—*Home* v. *Home*, March 15, 1876, *supra*, vol. xiii. 376, 3 R. 591. In consequence he executed a deed of denuding of the estate of Edrom in favour of Ferdinand Cospatrick Logan, dated 27th March 1876, as being the next heir of tailzie entitled to succeed after him to the lands of Edrom. Thereafter, authority being given, he recorded his deed of disentail of the estate of Broomhouse in the Register of Entails on 6th June 1876. On the 12th June 1876 he disponed to himself and his heirs and assignees whomsoever the lands of Broomhouse, and recorded the disposition on the 15th June 1876, and he held the estate thereafter in fee-simple as George John Ninian Logan Home of Broomhouse. In 1878 he married Miss Eva Seton, and on 31st July 1879 there was born of the marriage a daughter Margaret Annie Logan Home. The present action was raised by him as tutor-at-law to his daughter against Ferdinand Cospatrick Logan and his curator, to have it declared that his daughter Margaret Annie Logan was a nearer heir of entail to the estate of Edrom than the defender, who ought to be ordained to denude himself of that estate in her favour.

He pleaded—"(1) The said Margaret Annie Logan Home being a nearer heir of tailzie and provision to the estate of Edrom than the principal defender, he is bound, with concurrence of his curator, to execute a deed or deeds of denudation and conveyance thereof in her favour, with and under the whole burdens, conditions, provisions, restrictions, limitations, exceptions, reservations, declarations, and clauses irritant and resolutive, contained in the disposition and deed of entail of said estate; and the other defender is bound, as such curator, to consent to the deed or deeds necessary to carry out the said denudation and conveyance."

The defenders pleaded—"(1) The pursuer having elected to take the estate of Broomhouse, in the exercise of the option conferred on him by the entailer, and having denuded himself of the estate of Edrom, the defender became entitled to Edrom to the same effect as if the pursuer had been naturally dead, and neither the pursuer nor his heirs have now any right or title thereto. (2) On a sound construction of the Broomhouse entail and relative deed of revocation and alteration, the entailer's heir and the family of that heir who are provided for by taking Broomhouse cannot at the same time hold the estate of Edrom. (4) The entailer of Broomhouse having, according to the true import of the deed, declared his intention that Broomhouse and Edrom should not be held by one and the same heir or stirps, the pursuer cannot approbate the entailer's deed in his favour while reprobating the condition annexed. (5) The pursuer is barred *personali exceptione*, whether on behalf of himself or his heirs, from repudiating a condition-precedent to his obtaining possession of Broomhouse under the entail."

The Lord Ordinary (Rutherfurd-Clark) found in terms of the declaratory conclusion of the summons. He subjoined this note:—

"*Note.*—The late Colonel Logan Home died in June 1870. He was the heir in possession of two entailed estates, viz., Broomhouse and Edrom. These estates were held under two separate entails executed by different entailers.

"Colonel Home left two sons, the pursuer and the defender. The pursuer was the heir of entail entitled to succeed to both entailed estates. But a clause in the Broomhouse entail, which was not applicable to his father, debarred him from holding Broomhouse along with Edrom. It declares that if any of the heirs of entail shall succeed to another estate of the annual value of £300 they shall forfeit the estate of Broomhouse, but that the irritancy shall not be incurred if the heir 'shall renounce the same.'

"The pursuer elected to take the estate of Broomhouse, and by disposition and deed of denuding conveyed the estate of Edrom to the defender and the other heirs of tailzie called under the Edrom entail. After the pursuer the defender was then the nearest heir in existence under that entail.

"But a daughter was born to the pursuer on 31st July 1879. He sues the present action as her tutor-at-law. She is admittedly a nearer heir of entail under the Edrom entail than her uncle, the defender. The question is whether as such she is entitled to dispossess the defender of that estate?

"It appears to the Lord Ordinary that this question must be decided by reference to the Edrom entail alone. The conditions of the Broomhouse entail cannot affect the rights of the heirs under the Edrom entail. That being so, the right of the pursuer's daughter as the nearer heir is preferable to that of the defender. According to the ordinary rule applicable to estates held under a destination, the defender is bound to surrender the estate to a nearer heir who has come into existence since his own succession.

"But it was argued that the defender held the estate under a disposition and deed of denuding executed by the pursuer, and had thereby a better title. The Lord Ordinary cannot see that he has. The pursuer could not grant any deed to the prejudice of the heirs of entail. The deed of denuding merely propelled the succession to the person who was the nearest heir for the time. If it did more it was a contravention of the entail.

"It was urged that the defender is entitled to possess the estate as in right of the pursuer. But the pursuer did not do more than relinquish his own right of succession, and did not confer any right on the defender. Indeed he could not do so without taking up the estate of Edrom, and thereby incurring a forfeiture under the Broomhouse entail, and if he did not take up Edrom the succession to that estate must be regulated by the entail alone.

"The Lord Ordinary has given decree of declarator only. He thought it better not to go further until it be seen whether the view he has taken of the case is affirmed by the Court."

The defenders reclaimed, and argued—(1) By the deed of 1876 the pursuer effectually denuded himself and his whole stirps of the estate of Edrom. As regards the obligation incumbent on the heir in possession to denude in favour of a nearer heir emerging, this was a case where he possessed in virtue of an express conveyance, and not a case where the heir had succeeded by favour of the law—*Mountstuart* v. *Mackenzie*, Nov. 13, 1707, M. 14,903; *M'Kinnon* v. *M'Kinnon*, June 16, 1756, M. 6566; *Campbell* v. *Campbell* (*Boquhan Entail*), July 10, 1868, 6 Macph. 1035. (2) The infant pursuer had no title to sue, and her father was barred *personali exceptione* from exercising his right of challenge on the ground that his renunciation of Edrom in 1876 formed an onerous consideration which enabled him to obtain possession of Broomhouse.

At advising—

Lord Gifford—We have had a very able argument in this case on the part of the reclaimer, and everything has been urged, I think, that could be urged against the interlocutor; but I am of opinion that the Lord Ordinary has rightly disposed of this case, and has stated briefly, but very completely, the grounds upon which his judgment rests.

The two entailed estates in this case—that of Broomhouse and that of Edrom—came by descent to the same heir of entail, the nominal pursuer in the present case who is suing not in his own name but in that of his daughter. By the Broomhouse entail he could not hold the Edrom estate at the same time—the conditions of the Broomhouse entail being that if he should succeed to another estate of a certain value he should forfeit Broomhouse. Consequently he had to make his choice—either to forfeit Broomhouse or to give up Edrom. The pursuer chose to give up the latter, as being the smaller estate. He obviated a forfeiture of Broomhouse by denuding himself of the estate of Edrom and conveying it to the present defender. If the pursuer had had a daughter at that time, the denuding or renunciation would, I think, necessarily have been in her favour, for she would have been the heir under the Edrom entail. It was because he had no child of his own that the pursuer denuded or renounced in favour of his younger brother, the defender, but I do not think that makes any difference in law. The party who would take under the renunciation is the next heir under the Edrom entail. The party who succeeds to Edrom in this case cannot take it while holding the larger estate of Broomhouse, and therefore he lets it go; but in order that the next heir may take it, not by force of the pursuer's gift, but by force of the destination in the Edrom entail, the pursuer, being incapable of succeeding to the estate, renounces or denudes himself of it in order that he may retain Broomhouse.

The argument of the defender came to this—that he took something by the renunciation of the pursuer. All that he took from the renunciation was that the entail was allowed to take its course and the estate came to him as the next heir of entail. He got nothing from the pursuer. He took because the pursuer could not take; he took just as he would have taken had there been no entail but the entail of Edrom and pursuer had refused to take it. He would have taken it as the next heir but subject to the contingency of a nearer heir of entail. Pursuer's daughter is the nearest heir capable of taking the estate of Edrom. That is the result of the Lord Ordinary's interlocutor, which is confined to the declaratory conclusions of the libel, and in which I concur.

Lord Shand—I am quite of the same opinion. By the *Mountstuart* case and other cases it is quite settled that although an heir of entail may take possession of an estate under the entail, if a nearer heir comes into existence the service is of no effect, and a denuding must take place so that the nearer heir may take possession. That being so, the pursuer here—for I call the daughter the pursuer in this case—is admittedly the nearest heir, or a nearer heir at all events than the defender, to this estate of Edrom, and under the Edrom entail is entitled to take the estate. The defender's argument under his first plea was rested upon the Broomhouse entail. I think the Lord Ordinary is quite right in saying that the provisions of the Broomhouse entail do not affect this question. We have nothing to do with the cause which led to Edrom being given up. The question must be determined under the Edrom entail, and the pursuer being the nearest heir is entitled to possession.

As to the alternative argument, that at least the defender is entitled to retain this estate during the lifetime of pursuer's father, I think that argument also fails. The deed which the father executed was not a conveyance of his liferent interest in the estate, but a deed of denuding only, and the moment he renounced his succession as heir that right to succeed in his place accrued to the nearest heir for the time being, and is now in pursuer. If, indeed, pursuer's father had conveyed his liferent interest in the estate instead of simply renouncing his succession, as I think he did, that would have been objectionable, and would not have been allowed by the Court, for this reason, that any person taking the benefit of his conveyance of liferent interest would really be taking up his character of heir of entail and maintaining his right through that character. The condition upon which the Court allowed him to retain Broomhouse was that he should entirely renounce his right as heir of entail of Edrom, and that necessarily implied that he could not convey his liferent. He was only entitled to renounce his right to the estate of Edrom.

Lord Young—I concur, and have nothing really to add. The Lord Ordinary in the note appended to his interlocutor states the grounds of his judgment briefly but very distinctly, and I may say happily, and in these grounds of judgment I entirely concur.

The only expression which may be open to question is that in the penultimate paragraph of his Lordship's note—"if he [that is, the pursuer] did not take up Edrom,"—and that is only questionable if a meaning is applied to it which the Lord Ordinary did not intend. He took it up in the sense of having completed his title to it; but if to the expression "if he did not take up Edrom," he added the words, "or having taken it up has duly renounced it," then it is exactly and perfectly accurate. Nobody can take any right to Edrom except by his act of renunciation

which puts him out of the entail, and therefore out of the field. I entirely concur in the judgment of the Lord Ordinary and in it being affirmed as proposed by your Lordships.

The LORD JUSTICE-CLERK and LORD ORMIDALE were absent.

The Court adhered, and remitted the cause to the Lord Ordinary to proceed further therein.

Counsel for Reclaimers—Keir—Kirkpatrick. Agents—Dalgleish & Bell, W.S.

Counsel for Respondents—Mackintosh. Agents—T. & R. B. Ranken, W.S.

Wednesday, July 14.

FIRST DIVISION.

GUTHRIE AND OTHERS, PETITIONERS.

Process—Case Remitted by Court in England—Order of English Court—22 and 23 Vict. c. 63, sec. 1.

The Act 22 and 23 Vict. c. 63, sec. 1, enacted that "If in any action depending in any Court within Her Majesty's dominions, it shall be the opinion of such Court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, . . . and upon such case being approved of by such Court or a Judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act." An order pronounced by Mr Justice Fry in a cause depending before him in the Chancery Division of the High Court of Justice in England was in these terms:—"And it is ordered that a case be settled before the Judge in Chambers for the opinion of the Court of Session in Scotland as to whether the heritable bond for £19,000, of which it is admitted that the testator was possessed at his death, was included in and passed by the deed-poll dated the 1st May 1872, in the bill referred to, or whether the said sum of £19,000 when paid off formed part of the testator's personal estate." The case as settled was authenticated by the chief-clerk of the English Court, but there was no order by Mr Justice Fry remitting the case to the Court of Session and desiring the opinion of that Court. *Held* that until such an order was pronounced the Court of Session could not consider the case.

Counsel for Petitioners—Jameson. Agents—Cowan & Dalmahoy, W.S.

Thursday, July 15.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

MOIR'S TRUSTEES *v.* M'EWAN.

Property—Feu-Contract—Alterations in Buildings—Use.

The superiors in a feu-contract took the vassal bound to erect on the ground feued out to him, and thereafter to maintain, two detached villas of a certain size and value, according to plans to be submitted for their approval. Soon after the defender removed the interior stair and built an outside stair at the back of the house to form a communication to the dwelling-house above, thus converting the structure into two flats for the accommodation of two separate families. In an action raised against him to have the house restored to its original condition—*held* (*rev.* Lord Ordinary) that under the feu-contract the structure was unobjectionable, and that the use proposed to be made of it was no violation of any restriction in the feu-contract.

The pursuers in this action were the accepting and acting trustees of the deceased John M'Arthur Moir, Esquire of Milton, Argyll, under a trust-disposition and deed of settlement executed by him dated the 31st January 1872. The defender was John M'Ewan, stevedore, Broomielaw, Glasgow.

By feu-charter dated 31st March 1877, and duly recorded in the General Register of Sasines, the pursuers feued to the defender a certain piece of ground on the Gallowhill, Dunoon, being part of the lands and estate of Milton belonging to the pursuers. The defender was taken bound to pay the superiors £13, 17s. 8d. of yearly feu-duty, and his entry was declared to be at the term of Whitsunday 1877. The defender held and possessed these subjects under the reservations, restrictions, conditions, provisions, and declarations of the feu-charter, and, *inter alia*, it was thereby provided—"First, that the said disponee and his foresaids shall be bound and obliged, within twelve months from the date of these presents, to erect, and thereafter uphold and maintain, upon the piece of ground hereby disponed, two detached dwelling-houses or villas, fronting Royal Crescent, with suitable offices, of stone and lime, and covered with blue slates, and which shall for the actual erection cost at least the sum of one thousand two hundred pounds sterling each, and forthwith to enclose the said ground with suitable and sufficient fences, and to uphold and maintain the said dwelling-houses and offices and fences in good and complete repair in all time coming; which dwelling-houses or villas shall be built at least sixty feet back from the line of Royal Crescent, and at least five feet