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HOUSE OF LORDS.

Monday, February 17.

(Before Lords Herschell, Watson, and Macnaghten.)

SIR A. D. STEWART *v.* KENNEDY AND OTHERS.

(*Ante*, vol. xxvi. p. 338, 16 R. 411.)

Entail—Sale of Entailed Estate "subject to Ratification of Court"—Contract—Alleged Misunderstanding of Conditions—Specific Performance—Entail Amendment Acts 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 4; 1853 (16 *and* 17 *Vict. c.* 94), *sec.* 5; 1875 (38 *and* 39 *Vict. c.* 61), *secs.* 5 *and* 6—*Entail Act* 1882 (45 *and* 46 *Vict. c.* 53), *secs.* 13, 19, 20, 21, *and* 22.

An heir of entail in possession by holograph letter offered to sell an entailed estate at a certain price under the condition that the sale was made "subject to the ratification of the Court." The offer having been accepted, the heir of entail presented a petition to the Court under sections 19 and 22 of the Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), craving the Court to ratify and confirm the contract of sale, and to grant an order of sale of the estate. To this application the next heir lodged answers, and founded on section 22 of the Act of 1882, under which he had a right to object to a sale by private bargain. The heir of entail asserted that in making the aforesaid application, and being ready and willing to take all necessary steps thereunder, he had fulfilled all the obligations under which he had come to the purchaser.

The latter brought an action for declarator that the missives constituted a valid contract, and that the defender was under a legal obligation to apply to the Court for authority to sell and dispone the estate, and for implement of the contract.

Held (*aff.* the judgment of the Court of Session) that the procedure provided by sections 19-22 of the Entail Act 1882 did not apply, and that the defender was bound to present and prosecute a petition under the Entail Amendment Act 1848, sec. 4, and the Entail Amendment Act 1853, and the Entail Act 1882, sec. 13, for authority to sell the estate, with provision for compensating the next heir; and further, that the pursuer should forthwith lodge in process a draft of a disposition by the defender of the estate.

This case is reported *ante*, vol. xxvi. p. 338, and 16 R. 421.

Sir A. Stewart appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, the appellant is the heir of entail in possession of the estate of Murtly and other estates in the county of Perth. On the 19th of September 1888 a contract was constituted between the appellant and respondent by missives in the following terms:—"Dear Sir—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof, for ever, on the basis of 25 years' purchase of the present, or even an appraised valuation of the nett rental thereof as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court. Yours truly, A. D. STEWART." "Dear Sir Douglas—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof, for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at 25 years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto. Yours faithfully, JOHN S. KENNEDY."

It is not in dispute, and indeed could not be, that these letters created a binding obligation on the one part to buy and on the other to sell, but it is equally clear that the sale was "made subject to the ratification of the Court." It is on the meaning of these words that the controversy between the parties arises. In order to make the point at issue clear it is necessary to call attention to the provisions of the law relating to the sale of entailed estates in Scotland.

By the Entail Act of 1848 power was given to an heir of entail to sell the entailed estates, provided he obtained the consent of the heirs of entail if less than three, or of the three next heirs of entail if there were more then in existence, and also obtained the authority of the Court of Session in the manner prescribed by the statute. If these conditions were fulfilled the heir was entitled to make and execute at the sight of the Court all such deeds of conveyance and other deeds as might be necessary for giving effect to the sale.

By the Act of 1853 an heir of entail who was in a position to sell under the former Act was empowered to execute a deed of conveyance without the previous sanction of the Court, and to produce such deed to the Court with an application to the Court for its sanction to the sale or at any time in the course of the proceedings under such an application, and on the Court being satisfied that the procedure was regular and in conformity with the provisions of the Acts it was to pronounce an interlocutor "approving of such sale . . . and of the deed executed for carrying the same into effect," and the deed was then to have the same force and effect as if it had been executed at the sight of the Court.

By the Act of 1875 the Court was empowered, and indeed required, to dispense with the consent of all the expectant heirs whose consent was requisite under the former legislation except the nearest heir for the time being entitled to succeed to the estate. Directions were to be given by the Court for ascertaining the value in money of the expectancy of the entailed estate of the heirs declining to consent, and for the payment into bank, in the name of such heirs, of the sum so ascertained; and the Court was then to dispense with these consents, and to proceed as if they had been obtained.

Finally by the Act of 1882 the Court was required to dispense with the consent of the nearest heir ascertaining his interest, and proceeding in other respects as if his consent had been obtained, and the provisions of sections 5 and 6 of the Act of 1875 were made applicable to the nearest heir as well as to other heirs.

It will be seen that the result of this legislation was that an heir of entail of an entailed estate could dispose of it at his pleasure without the consent of any other of the heirs of entail, by applying to the Court of Session, and taking the proceedings prescribed by and complying with the requirements of the Acts to which I have called attention.

The Act of 1882 besides enabling consents of the next heirs to be dispensed with if steps were taken under the prior Acts for a sale of the estate, contained also provisions authorising an entirely different course of procedure when an heir of entail was desirous of selling his estate. Section 19 empowered such heir "to apply to the Court for an order of sale of the estate." And by section 22 it was provided that in the case of such an application the Court should fix the time, place, and manner of sale, and (if a sale by private bargain was directed) the price to be paid. The section contains the following important proviso—"Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction." The next heir is therefore in a position to interpose an insuperable obstacle to a sale otherwise than by public auction, if an order for the sale of the estate is made under this part of the Act.

The appellant applied to the Court under these latter provisions to make an order for the sale of the estate in terms of the letters which I have already brought under your Lordship's notice. The application was met by the next heir with the objection that the sale was by private bargain, to which he was not willing to assent.

The appellant insists that by making this application, and being ready and willing to take all the steps that can be taken on his part under it, he has fulfilled all the obligations under which he came to the respondent.

The real contest between the parties turns on this, whether "the ratification by the Court," to which the sale was to be subject, had reference to an application under the 19th section of the Act of 1882, or to proceedings under the earlier Entail Acts as modified by the provisions of section 13 of that Act.

It was contended on behalf of the appellant that the word "ratification" implied that the Court was to exercise its discretion with regard to the terms of the proposed sale, and to be free to confirm or not to confirm it, according to the judgment formed thereon, and that it was inapplicable to a course of procedure under which the Court has authority only to see that the requirements of the Act have been complied with, and if they have been, has no option but to confirm the sale. But it is to be observed that under the alternative procedure the Court is not left to a free exercise of its judgment whether a sale should be allowed on any particular terms. However well satisfied it may be with the terms of any private bargain, the next heir can render the Court powerless to authorise such a sale. And inasmuch as it is beyond dispute that the words under discussion had reference to one or other of the alternative methods of rendering a sale by an heir of entail effectual, it appears clear that this contention of the appellant cannot influence their construction.

Whichever of the rival constructions be the correct one, the words employed are not the most apt that could be devised to indicate the procedure in contemplation. But the construction suggested by the appellant certainly does not enjoy any advantage in that respect. The procedure upon an application under section 19 of the Act of 1882 certainly would not take the form of a ratification of a past sale. For the Court would not only have to order a sale, but to fix its time as well as its place and manner, and it could hardly order that the estate should be sold at a time already past. I do not say that this difficulty is an insuperable one, or that such procedure could not possibly be regarded as a "ratification" if the appellant's construction otherwise commended itself to acceptance, but it shows that his construction has no special claim to be accepted by reason of the suitability of the language found in the agreement. On the other hand, it is to be observed that the interlocutor pronounced by the Court of Session, where the heir of entail sells under the powers of the earlier

Acts, is one not merely approving of the deed for carrying the sale into effect, but also in terms "approving of such sale." If, then, I had to choose between the two constructions having regard exclusively to the appropriateness of the language used to the one or the other, I should adopt that contended for by the respondent in preference to that which the appellant insists upon. But there is another consideration which weighs heavily in the balance. It is manifest that the parties intended that there should be a completed bargain. All the terms were definitely concluded, the price and date of possession were fixed, the sale was "made" subject to one thing only "the ratification of the Court." But if the appellant's view be correct, it was made subject to something else, viz., assent, or at the least the absence of dissent, on the part of the next heir. When I bear in mind the language of the missives I find myself unable to hold that this was the intention of the parties. It seems to me more reasonable to adopt the construction of the Court below, that the ratification of the sale was to be sought and obtained under the provisions of the Entail Acts, which enabled the transaction to be carried out without the intervention of a third party in a position to bar the proceeding,

I have not overlooked the argument founded upon the expression that the sale was made "subject to" the ratification of the Court. It was said that these words showed that it was in contemplation that ratification might or might not take place, whereas if the respondent's construction were adopted it must—but this is not so. If the appellant died before he was able to obtain the ratification the transaction would be at an end, and the insertion of the words was necessary to protect the representatives of the appellant in that case from possible liability.

When once the construction which has received the sanction of the Court below is adopted, the case is, in my opinion, concluded in favour of the respondent.

It was insisted, however, for the appellant that this was not so. Two points were made. First, it was said that inasmuch as not only an application to the Court of Session, but various steps thereunder, would be necessary before the sale could be carried out, it was not a case in which the Court would grant specific implement.

No authority was cited which gives colour to such a contention, and it does not raise in my mind any serious difficulty. Where several acts, such as would be required here, are necessary in order that a party may carry out that to which he has bound himself, I do not see why the Court should not enforce them just as much as if a single act only was necessary, or that there would be any greater difficulty in its doing so.

The other point was this—Assuming, it was argued, that the construction put upon the contract by the Court below was correct, still if the appellant intended to sell only on the terms that an application should be made to the Court under section 19 of the Act of 1882, and that the procedure consequent thereon should be pursued and understood, the contract to have this effect ought not to grant specific implement, but to leave the respondent to his action for damages. It would be very hard, it was urged, in such a case to compel the appellant to sell, inasmuch as the effect might be so very different to that which he anticipated. He might have to part with the estate and suffer a considerable loss of income. I think this point was an afterthought. I can find no trace of it in the pleas-in-law for the defender. It was probably the result of a study of the English cases relating to decrees for specific performance. I do not think it would be of any advantage to devote time to an analysis of the English decisions, or to inquire whether a Court of Equity in England would require a decree for specific performance under the circumstances which are alleged to exist in the present case. For I think if that proposition could be established it would afford no conclusion to the conclusion which ought to be arrived at where a decree for specific implement is sought in the Courts of Scotland. Specific performance was not a remedy to which a party was entitled at common law in England. To obtain it he was compelled to resort to the separate jurisdiction of the Court of Chancery, which at times refused its assistance even where a legal right was established, leaving the party to his ordinary legal remedies. In Scotland, on the contrary, specific implement is one of the ordinary remedies to which a party to a contract is entitled where the other party to it refuses to implement the obligation he has undertaken. And no authority has been cited to show that such considerations as it is suggested would induce the Court of Chancery to refuse specific performance have ever been regarded as material where the ordinary remedy of specific implement is sought in an action in the Scottish Courts. I do not of course mean to say that it would not be open to maintain there that in the circumstances of a particular case it would be inequitable to enforce that remedy, but a party to a contract certainly does not establish that proposition by showing that he imagined its legal effect and operation to be other than they are.

For these reasons I think the judgment ought to be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, the appellant, who is heir of entail in possession of the lands of Murtly and others, by missive offer duly accepted, agreed to sell the whole estate to the respondent for twenty-five years' purchase of the net rental. There is no allusion made in the missives to the fact of the estate being held under strict entail, except in these the concluding words of the offer—"In the event of your acceptance the sale is made subject to the ratification of the Court."

The sale of an entailed estate by the heir in possession is ineffectual and cannot take away the rights of succeeding heirs of tailzie, unless by means of a petition under the Entail Acts the seller either acquires the estate in fee-simple, or obtains the authority of the Court in one or other of the modes permitted by these statutes. Accordingly, the parties are agreed that the words in question refer to an application of some kind to be made to the Court for its sanction to the sale, and also that the application must be at the instance of the appellant, he being the only person having a statutory title to institute and carry out such a proceeding. But they differ as to the nature of the application which is indicated by the expression, "ratification of the Court." It is therefore necessary to consider the different proceedings which the parties severally allege to be within the contemplation of the missives of sale.

Any heir of entail, being the heir in possession, who has contracted to sell the entailed estate, may execute a deed of conveyance for the purpose of giving effect to the sale, and then apply to the Court by petition for its sanction to the executed deed. At one time it was requisite in such applications that the petitioner should obtain and produce to the Court the express consents of certain heirs nearest to him in the line of tailzied succession, but these consents are no longer essential. The Act of 1882 has provided that in the case of such heirs refusing or failing to give their consents, the Court shall ascertain the value in money of their interests in expectancy, and upon its being paid into bank in their names, or upon proper security therefor being given over the estate, shall dispense with the consents of these heirs, and shall proceed as if their consents had been obtained. In an application of this kind the Court is not required to consider the merits of the transaction of its sale, or its effect upon the patrimonial interests of the heirs under the tailzied destination. Its sole concern is to see that before the sale and conveyance are approved due provision has been made for paying or securing the debts and encumbrances charged upon the fee or rents of the estate, also that the requisite consents have been given by heirs-substitute, or otherwise that the respective values of their expectancies have been ascertained and either paid or secured to them. When sufficient provision has been made by the petitioner for satisfying or securing these charges and interests, it becomes the statutory duty of the Court to "pronounce an interlocutor approving of" the sale, and of the deed executed for the purpose of carrying it into effect. It is, in my opinion, a circumstance of some weight in this case that the death of the petitioner at any time before final decree of approval has been pronounced makes the whole proceeding abortive.

The next succeeding heir of tailzie, even where he happens to be the heir of line of the deceased, does not represent him in the entailed estate. Consequently, the purchaser can no longer claim specific implement, although if the sale was in terms absolute he has a claim of damages for breach of contract against the representatives of the seller.

The respondent maintains that an application in the terms just described is the only procedure which the missives contemplate. When regularly contemplated it has the effect of putting an end to the entail. The purchaser gets the estate freed from its fetters, and the seller pockets the price under deduction of heritable debts and family provisions, and of the sums payable to heirs-substitute, whether adjusted by private agreement or ascertained by the intervention of the Court in order to their consents being dispensed with.

The Entail Act of 1882 for the first time empowered an heir in possession to apply to the Court for "an order of sale" either of the whole or of part of the entailed estate. When such an order has been made and carried out, the price, or in the case of there being encumbrances, its surplus, is consigned in bank, subject to the orders of the Court, or is invested in the name of trustees appointed by the Court, in trust for the applicant and the heirs of entail in their order. In short, the price or its surplus is entailed money which comes in place of the estate, and the successive heirs of entail become entitled to the interest arising from it, just as they would have become entitled to the rents of the estate; and beyond that substitution of money for land, there is no disturbance of the restrictions imposed or of the course of succession prescribed by the deed of entail. The Court has power at any time to grant authority for applying the money in the purchase of other lands to be settled in conformity with the subsisting destination.

In an application for an order of sale intimation requires to be made not only to creditors but to the same heirs of entail whose consents would have been required to a petition for approval of a sale and conveyance. These heirs are entitled to appear "for the purpose of seeing that their respective interests are respected," but are not allowed to oppose the application. The Act next prescribes that the Court shall procure a report as to the value of the estate and as to the rights and charges affecting it, and shall, "unless it appear that any patrimonial interest would be injuriously affected thereby," grant an order for sale in such manner as it may think proper. The Court must therefore refuse the application if it appear that the present conversion of the estate will be prejudicial to the patrimonial interests of the heirs of tailzie to whom intimation is directed to be made. When a sale is ordered it may be either by public auction or by private bargain as the Court in its discretion shall think best, and in the one case the upset and in the other the stipulated price must be fixed by the Court, but it is expressly enacted that the sale shall not be by private bargain if within a month after the date of the order of sale either the applicant or the next heir shall intimate that he desires sale to be by public auction.

The condition that the sale is to be subject to the ratification of the Court plainly implies that the seller's right to the price and the purchaser's right to the estates are alike suspended, and are not to come into existence unless and until such ratification is actually obtained. It does not suspend the obligation which is admittedly incumbent on the appellant to take the proper steps for submitting the sale to the Court with a view to its ratification or the correllative right of the respondent to demand that these steps shall be taken without unreasonable delay.

The language of the condition affords no positive definition of the ratification upon which the efficiency of the sale is to depend except that it is to be a proper judicial act. Its efficacy is to be dependent upon the action of the Court and not upon the will or choice of an individual. In ordinary parlance "ratification" is used to express the giving of consent by one without whose consent a transaction entered into by others would be incomplete or invalid, and also the confirmation of a provisional agreement or of an imperfect obligation by the same parties who made the one or were not legally bound by the other. Ratification by a court of law may in my opinion signify that the court is to examine the transaction submitted to it, and to decide according to its discretion whether the terms of the transaction are such that the parties ought or ought not to be bound by the agreement which they have made, or it may mean that the Court is to give its formal approval without reference to the terms of the transaction on being satisfied that due provision has been made for protecting and securing the legal interests of third parties which would be prejudicially affected if no such provision were made.

There is an important distinction between these two courses of procedure already noticed. In the one the only interest which the law recognises as belonging to heirs whose consent is requisite is a right to receive payment in money of the estimated value of their *spes successionis*. If that be secured to them they have no concern with the amount of the price or with the terms of the sale made by the heir in possession. In the other, these heirs retain the very same interest in the price which they previously had in the entailed estate, and it is on that account that the Court is charged with the duty of seeing that no sale is made on terms injurious to their patrimonial interest, and that the heir nearest in the line of destination has the power given him to forbid a sale otherwise than by public auction.

An interlocutor of the Court of Session approving of the contract of sale embodied in the missives, and of a conveyance executed by the appellant in conformity therewith, would in my opinion constitute a ratification within the meaning of the concluding stipulation. In that case the validity of the sale would in the strictest sense of the words be "subject to" the ratification. It would depend upon an uncertain event, because the requisite proceedings necessarily occupy some period of time, and no interlocutor of approval could be pronounced by the Court unless the appellant, who was upwards of eighty years of age at the time when he signed the offer, was then alive. The condition would not be in that view inofficious. In the event of the appellant dying before the approval of the Court was obtained, it would word the contract of sale and protect his succession from the claim of damages which would otherwise be competent to the respondent.

The appellant maintains that his adoption of proceedings for the sale of the estate under the new provisions of the Act of 1882, and the submission of his private bargain with the respondent for the approval of the Court in the cause of these proceedings would be in literal compliance with the obligation laid upon him to take steps for obtaining the ratification of the Court. It was argued with considerable force that if he were to follow the other alternative, the Court, proceeding (as it necessarily would do) on the basis of a new valuation of the estate, might possibly assign such a sum to the next heir as the value of his interest in expectancy as would leave the appellant nothing or but a trifling sum after discharging encumbrances, and that such a result cannot reasonably be supposed to have been within the intention of the contracting parties. Acting upon that view the appellant shortly after the date of the missive of acceptance presented a petition purporting to be founded upon the provisions of the Act of 1882, in which he craved the Court to grant an order for the sale of the estate to the respondent in terms of the missives, and to authorise him to execute a conveyance for the purpose of carrying it into effect. Besides the appellant there is only one other heir of entail in existence who lodged answers to the petition, in which, whilst disputing its competency, he objects to its prayer on the ground that a sale in the manner and at the price proposed would very injuriously affect his patrimonial interest.

I see no reason to doubt that an heir in possession who has made a private contract in terms of these missives with the approval of the other heir of entail, and who is in a position to provide for all debts and charges affecting the estate, might obtain a ratification of the sale by proceedings under the Act of 1882. A purchaser in the position of the respondent has no concern with the application of the price and no interest in the particular form of procedure adopted, beyond seeing that it is reasonably calculated to serve the end of procuring the sanction of the Court without undue delay. But no such case occurs here; and one consideration is, to my mind, conclusive that in the circumstances of the present case the course which the appellant proposes to take is unwarranted, which is, that it practically adds a new and material term to the contract of sale which is not to be found in the missives. It makes the efficacy of the contract depend, not as stipulated, upon the ratification of the Court, but upon the joint approval, first of the Court, and then of the next heir of entail. Although the Court should be of opinion that the sale ought to be confirmed, it cannot pronounce an interlocutor to that effect if the next heir makes the statutory intimation that he desires the sale to be by public auction. It is, in my opinion, impossible to hold that the missives contemplate any proceeding for ratification in which an expectant heir has the power, which he is likely to use, of putting an absolute veto upon the sale.

It was also argued for the appellant that the circumstances of this case do not entitle the respondent to a decree for specific performance, and that his remedy must be sought in an action for damages. We were informed that this plea was discussed before the learned Judges in the Inner House, although it is not noticed in the judgments delivered by them. As I understand the argument, it was rested mainly on the grounds that the kind of ratification contemplated in the missives was so ambiguous that the appellant in entering into the contract might fairly suppose he was not undertaking to buy out the next heir at the risk of great loss to himself, and also upon the impossibility, or at least the serious difficulty, of giving practical effect to a decree directing him personally to follow out a protracted course of action. No Scottish authority was cited, but the appellant relied on *Thomas* v. *Deering*, 1 Keen, 729. In that case a tenant for life, with remainder to his first and other sons in fee, with remainder to himself in fee, assuming that his trustees would give their consent, which they subsequently refused to do, contracted to sell the fee-simple. The purchaser sought to enforce specific performance of the contract to the extent of the life estate and remainder in fee with an abatement, but Lord Langdale, M.R., dismissed his suit. Apart from the merits of the decision, which has been questioned by Lord St Leonards ("Vendors and Purchasers" 14th ed.), p. 316, the bare statement of the case is sufficient to show its inapplicability here. It was there impossible for the vendor to give a title to the entire estate which he had contracted to sell, whereas it is within the appellant's power to do so by simply using the machinery which the law supplies. It must also be observed that the remedy of specific performance of part of the contract, with a compensation, which has in many cases been given to a purchaser by English Courts of Equity, is unknown to the law of Scotland. That law rejects the *actio quanti minoris*, and its principle, for the reason apparently that to assess compensation to the purchaser for part of the estate sold, which the vendor has it not in his power to convey, would virtually be to make a new bargain for the parties which they had not made for themselves.

I do not think that upon this matter any assistance can be derived from English decisions, because the laws of the two countries regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim of damages; specific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract for the sale of a specific subject such as landed estate, gives the party aggrieved the legal right to sue for implement, and although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shown to be impossible, in which case *loco facti subit damnum et interesse.* Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds, although I know of no instance in which it has done so. It is quite conceivable that circumstances might occur, which would make it inconvenient and unjust to enforce specific performance of contract of sale, but I do not think that any such case is presented in this appeal. The fact that the construction of a term in the contract is attended with doubt and difficulty, evidenced it may be by the different meanings attributed to it by Courts or individual Judges, ought not in my opinion to prevent its receiving its full legal effect, according to the interpretation finally put upon it by a competent tribunal. The argument that in this case a decree for specific performance would necessarily impose upon the appellant the duty of performing a long series of personal acts under the supervision of the Court does not appear to me to have a solid basis in fact. The Acts which such a decree enjoins would be entirely within his power, and practically might be performed *uno flatu*, viz., by his signing a conveyance in favour of the respondent, and at the same time giving instructions to his agents to take the necessary steps for obtaining its approval by the Court.

The case stands at present in this position. The Lord Ordinary ordained the appellant to implement the contract, and forthwith to present an application to the Court in the form to which I first referred, "or otherwise to make such application to the Court, in terms of the Entail Acts, as shall entitle him to carry out and implement the said contract." Seeing that the appellant has not suggested any alternative except one, which in the opinion of the House he is not entitled to adopt, the latter part of the Lord Ordinary's decerniture does not seem to be necessary. His interlocutor, so far as it relates to the mandatory conclusions of the action, was recalled, but *hoc statu* only, by the Lords of the First Division, who at the same time appointed a draft disposition to be lodged, which they are or were in course of adjusting.

I think their Lordships acted rightly in proceeding to settle the terms of the conveyance before making an order for its execution, or for procedure being taken with a view to its approval.

For these reasons I concur in the judgment which has been moved.

LORD MACNAGHTEN—My Lords, the only question in this case, as it seems to me, is what is the true construction of one expression in the letter of the 19th of September 1888 containing the offer of the Murtly estates to Mr Kennedy?

The argument of counsel ranged over a much wider field, and objections were taken to the decree under appeal for which no foundation is laid in the pursuer's pleas-in-law. It was contended by the learned counsel for the appellant that whatever construction may be placed on the expression in question the agreement between the appellants and Mr Kennedy is not an agreement of which the Court can decree specific performance, because it involves, as it was said, a continued series of acts which it is impossible for the Court to superintend. I do not think that there is any substance in this objection. Apart from the steps necessary in order to obtain "the ratification of the Court" whatever be the true meaning of the expression, there is nothing required of the vendor but what is ordinarily incident to the carrying out of a decree for the specific performance of a contract for the sale of real property. In another branch of their argument the learned counsel for the appellant contended that if the purchaser's construction be adopted the purchase would be purely formal, and that the ratification of the Court would be a matter over which the vendors would have complete control. In that view it is difficult to see the objection to a decree for specific performance. But I think it is quite clear that whether the purchaser's construction or that suggested by the vendor be accepted the acts required on the part of the vendor to complete the sale are not of such a character as to make a decree for specific performance improper. I may add that it seems to me that the old cases in Chancery cited by Mr Rigby, where in suits for specific performance a defendant has been ordered to levy a fine, are not without some bearing on this part of the argument.

It was then contended that even if the purchaser's constructions be accepted it would be wrong to order the vendor to perform the agreement specifically if he avers and proves that his understanding of the contract was different. In support of this view several English authorities were referred to. It cannot be disputed that the Court of Chancery has refused specific performance in cases of mistake when the mistake has been on one side only, and even when the mistake on the part of the defendant has not been induced or contributed to by any act or omission on the part of the plaintiff. But I do not think it is going too far to say that in all those cases, certainly in all that have occurred in recent times, the Court has thought, rightly or wrongly, that the circumstances of the particular case under consideration were such that it would be highly unreasonable to enforce the agreement specifically. The Court will not be active in assisting one party to an agreement who has always his remedy in damages to take advantage of the mistake of the other which would involve him in serious and unforeseen consequences. In the present case I do not think there is anything unreasonable in holding Sir Douglas Stewart to his bargain. No English decision was cited which lends any colour to the suggestion that if this question had arisen in England specific performance would be refused. But I must say that I think the Lord Advocate was well founded in his observation that if any such case could be produced it would be no guide to the decision of the present question. In England the remedy of specific performance is an extraordinary remedy. It is always a matter of discretion, and defences are admitted in a suit for specific performance which are inadmissible according to the doctrines and practice of the Courts of Scotland where specific performance is part of the ordinary jurisdiction of the Court.

I now come to the real question in dispute, what is the meaning of the expression "subject to the ratification of the Court," as used in the letter of the 19th September 1888.

It was common ground that both parties were aware that the estate was entailed.

Now, by the law of Scotland, as it has existed since 1882, there are two ways in which an heir of entail in possession may have the entailed estate sold. Under the Rutherfurd Act as amended by subsequent legislation an heir of entail may execute a deed of conveyance to an intending purchaser, and then apply to the Court for its sanction to the sale on being satisfied that due provision has been made for the burthens on the estate if any, and for the interests of the succeeding heirs or heir in tail as the case may be, the value of such interests being ascertained by the Court in case the parties differ, and on being satisfied that the procedure is regular and in conformity with the provisions of the Acts the Court is bound to pronounce an interlocutor approving the sale. That approval gives validity to the conveyance.

The Act of 1882 also contains a separate list of provisions wholly independent of the Rutherfurd Act, under which, on the application of the heir of entail, the entailed estate may be converted into entailed money. But under those provisions the Court is bound to investigate the propriety of the proposed transaction, and the next heir of entail has had an absolute right to require that the sale shall be by public auction.

To which of those two modes of procedure does the letter of the 19th of September 1888 more properly point.

The word "ratification" is not to be found either in the Act of 1882 or in the earlier Acts. In the Rutherfurd Act and in the amending Act of 1853 we find these expressions—"The Court shall interpose their authority," and "the Court shall pronounce an interlocutor approving" the sale.

Now, it is to be observed that that which is to be "subject to the ratification of the

Court is the sale," not the agreement. The writer of the proposal for sale declares that on acceptance within a specified time the offer "will be binding" upon him, but "the sale is made subject to the ratification of the Court." It was objected that the term "ratification" implies at least a power of rejection, and that the Court cannot properly be said to "ratify" when its action is merely formal. But the same objection might have been urged with even greater force if the word used had been "approved," and yet the Legislature itself speaks of the Court "approving" a sale under the Rutherfurd Act. I think that the word "ratification" simply means confirmation. It seems to me that that is the proper and ordinary signification of the word, and the sense in which it is used in the letter of the 19th of September 1888, and so used it has, I think, as was pointed out in the course of the argument, a real operation.

On the other hand, I do not think that the word "ratification" as used in the letter of the 19th of September is properly applicable to proceedings under the Act of 1882. I do not say that a pre-arranged sale may not be carried out under that Act with the consent and concurrence of the next heir of entail. But even then, strictly speaking, the Court would not be ratifying a sale under a subsisting agreement, though it might be sanctioning a sale on precisely the same terms. But if the next heir of entail refuses his consent and insists upon a sale by public auction the agreement is at an end—neither party is bound—the whole matter is at large.

Then it was said that there was an application on the part of the appellant which was still pending to have the entailed estate converted into entailed money, and that therefore the appellant must have been referring to those sections of the Act of 1882 under which that application was made. Very likely the appellant had some idea more or less indistinct of the powers of the Court under those sections. But it is impossible to suppose that at the time he made his offer to Mr Kennedy he had present to his mind the actual provisions of the statute, and that he contemplated the intervention of the next heir of entail. If he had that in contemplation—if by the expression "subject to the ratification of the Court" he really meant "subject to the consent of the next heir of entail," which is what the argument comes to—all I can say is that his offer was very misleading. But I acquit Sir Douglas Stewart of any intention to mislead, for I find by his letter of the 20th of October that he was surprised—and I have no doubt he was honestly surprised—to learn that in the proceedings which he then had distinctly in view the next heir of entail was entitled to appear and to prevent a sale by private bargain.

In the result, I am of opinion that the interlocutors appealed from are right, and that the appeal must be dismissed with costs.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Sir Horace Davy, Q.C. — D.-F. Balfour, Q.C. — Finlay, Q.C.—Dundas. Agents—Loch & Goodhart, for Dundas & Wilson, C.S.

Counsel for the Respondents—The Lord Advocate Robertson, Q.C.—Rigby, Q.C.—Graham Murray. Agents — Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Monday, February 17.

(Before Lords Herschell, Watson, and Macnaghten.)

WARRAND AND OTHERS *v.* MACKINTOSH.

(*Ante*, vol. xxv., p. 626; and 15 R. 833.)

Fishings—Salmon Fishings — Competing Titles—Prescriptive Possession.

In an action by the burgh of Inverness and others for declarator of exclusive right of salmon fishing in a part of the river Ness from both banks from a stone C to the sea, the pursuers founded on a Crown title granted in 1591 to the town of Inverness, which conveyed the water of Ness and all partes and each bank with the whole salmon and other fishings, including the fishings in dispute. The defender was proprietor of the lands of Holme on the south bank, which lay partly above and partly below the said stone. His title was a Crown charter in favour of the Earl of Moray, granted in 1566, which conveyed half of the lands of Holme, with the salmon and other fishings "pertaining" to the same. The defender held the other half of the lands of Holme under a title from Fraser of Balnain, which made no mention of fishings. The disputed part of the fishings was below the said stone, and was opposite part of the lands held by the Earl of Moray; the upper part of the fishings was not in dispute, and lay partly opposite the Earl of Moray's feu and partly opposite Fraser's feu. Under his title from Lord Moray the defender claimed a joint right of salmon fishing along with the pursuers in the Ness *ex adverso* of Holme below the stone C. It was proved that from 1840 to 1843 the lower half of the Holme fishings and the town fishings were let to the same tenant; in 1843 the defender had been unsuccessful in an attempt to interdict the tenant of the town fishings from fishing on the Holme side of the river. It appeared from the evidence in the interdict that one of the witnesses deponed that the defender's predecessor had pointed out the stone C as the boundary of the witness's tenancy; since 1843 the defender had granted successive leases of the Holme fishings, and that the tenants had unchallenged fished salmon with net and coble down to 1853, and since then with rod and