Lord Mure concurred.

The Sheriff's interlocutor was recalled, and decree given in terms of the conclusions of the summons, with expenses in both Courts.

Counsel for Pursuer—Fraser—Lang. Agent—David Turner, S.L.

Counsel for Defender—J. P. B. Robertson. Agents—Keegan and Welsh, S.S.C.

Wednesday, March 15.

FIRST DIVISION.

[Lord Rutherfurd Clark.

HOME *v.* HOME.

Entail—Fetters—Disentail—Denuding—Election.

Held that where an heir in possession of one entailed estate succeeds to another, the fetters in the entail of which prevent him from holding both, and oblige him either to forfeit and denude of the one or to relinquish the other, he is bound to elect upon the opening of the succession, and before making his election he cannot make up a title nor proceed to disentail.

Observed (*per* Lord President) that, although the denuding does not require to be done in an unreasonably short time, the heir is not entitled to interfere with the estate except in so far as is necessary for purposes of administration.

This was a petition by George John Ninian Home, sometime George John Ninian Logan, heir of entail in possession of Broomhouse, Berwickshire, for disentail of that estate. The petitioner was twenty-one years of age, and no consents were therefore necessary to the application.

Answers to the petition were lodged for Ferdinand Cospatrick Logan Home, the petitioner's younger brother, and the next heir-substitute, with consent of his curator, he being under age.

The deed of entail of the estate of Broomhouse, which was dated 16th February 1830, contained the following clause:—"With and under the 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 heirs to any other heritable estate than the lands and others above disponed, of the annual value of three hundred pounds 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 a day after his succession to and possession of the same jointly with my foresaid lands and estate hereby disponed."

The entailer General Home died in 1850, and was succeeded in the estate by his nephew Colonel George Logan of Edrom, who thereupon assumed the additional surname of Home; and in accordance with a relaxation in his favour of the provisions of the entail, contained in a deed of revocation and alteration dated in 1846, held the two estates of Broomhouse and Edrom till 1870. Upon his death his eldest son William succeeded as heir of entail in both estates, but as the conditions of the Broomhouse entail prevented him from holding both, he conveyed Edrom to his younger brother George, the petitioner, by a disposition in favour of him and the other heirs of entail called under the Edrom entail. On this disposition the petitioner was infeft.

In the Edrom entail there was, *inter alia*, the following condition:—"*First*, That the said George Logan, my eldest son, and the whole heirs of taillie and heirs whomsoever succeeding to the said lands and barony of Edrom, shall be bound and obliged to use, bear, and constantly retain in all time after their succession thereto the surname of Logan, and arms and designation of Logan of Edrom, with power, nevertheless, to conjoin any other surnames, arms, or designations therewith if they shall think fit."

William, therefore, retaining Broomhouse, dropped the surname of Logan; and George, dropping that of Home, thereafter bore the surname of Logan, in compliance with the deeds of entail.

William James Home of Broomhouse died unmarried on 29th September 1875, the succession to the estate of Broomhouse thereby devolving upon the petitioner, then George John Ninian Logan of Edrom. It was stated in the answers that he had adopted the surname "Home" in this petition for the first time.

The petitioner, it was averred, could not disentail Broomhouse, since, under the conditions of the two entails, he could not hold both estates, and he was bound either to forfeit Broomhouse as at the date of his succession to it, and to convey it to the respondent, or to relinquish Edrom to the next heir of entail, who was likewise the respondent. The petitioner was therefore not heir of entail in possession of Broomhouse in the sense of the 2d section of the Act 11 and 12 Vict. c. 36.

The respondent had further raised an action against the petitioner, which was in dependence at the date the petition was presented, the summons of which, *inter alia*, concluded for declarator that the petitioner had forfeited and lost all right, title, and interest to Broomhouse, and that he was bound and obliged to denude himself of it and convey it to the respondent, and that he should be ordained to do so. There was a further conclusion, that failing the execution by the petitioner of the necessary deeds of denudation and conveyance, the estate of Broomhouse should be adjudged to the respondent.

In these circumstances, the respondent submitted that the prayer of the petition should be refused, or, at all events, that it should not be granted before the result of the action of declarator and adjudication was ascertained.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th February* 1876.—The Lord Ordinary having considered the petition and answers, and heard counsel, Finds that the petition cannot proceed until the petitioner has judicially declared that he elects to take the estate of Broomhouse, and to surrender the estate of Edrom.

"*Note.*—This petition has been presented with the view of disentailing the estate of Broomhouse. It is not disputed that the petitioner is the heir under the destination. But it is maintained that he has forfeited the estate; or otherwise, that he has no right to disentail it until he declares his election to take it and surrender the estate of Edrom.

"Accordingly the respondent has raised an action to have it declared that the petitioner has forfeited the estate of Broomhouse; or otherwise, that he is bound to convey Edrom to the respondent. The respondent pleads that the petition should be sisted to await the issue of the declarator.

"The petitioner does not disguise that he intends, if possible, to retain both estates. His purpose is by disentailing to get rid of the condition in the Broomhouse entail, which disables him from holding Edrom along with Broomhouse. He urges that the object of the respondent might be gained if the petition were sisted, and asks that his right to proceed with the disentail shall be decided in the petition itself. It is plain that the petition may be defeated by mere efflux of time, and the Lord Ordinary is not disposed to allow this to happen. He thinks that he is bound to consider at once whether the petitioner is entitled to go on with the proceedings which he has instituted.

"At the date when the succession to Broomhouse opened to him the petitioner was heir of entail in possession of Edrom. By that entail he is bound to bear the surname and arms of Logan of Edrom.

"The entail of Broomhouse contains the following clause:—[*Here follows clause as cited above.*]

"It is clear from that clause that the petitioner could not, so long as both entails stood, hold both estates. But if he could disentail the estate of Broomhouse, he might get rid of the condition, and thus retain the entailed estate of Edrom.

"The Lord Ordinary is of opinion that the petition cannot be allowed to proceed until the petitioner elects to take the estate of Broomhouse and relinquish the estate of Edrom. The petitioner has not declared his election, and refuses to declare it. The Lord Ordinary put it to the petitioner's counsel whether he had elected to take Broomhouse, and the counsel declined to answer the question. This was quite right, because an answer in the affirmative would involve the petitioner in an obligation to denude of Edrom, which he is anxious to avoid.

"The Lord Ordinary is of opinion that the petitioner is entitled to proceed with the disentail of Broomhouse, provided that he declares his election to take that estate and surrender Edrom. But the petitioner maintains that he is not bound to make any declaration one way or another, and that the consequence of his proceeding with the disentail must be made the subject of another action with reference to the estate of Edrom. The Lord Ordinary has not been able to adopt that view.

"It is quite true that an heir can disentail, though liable in a certain event to denude. No better illustration can be given than the case of *Preston Bruce*. But here there is a material difference. The event has arisen which forces the petitioner to surrender the one estate or the other. He may take the estate of Broomhouse, or he may retain Edrom. He cannot under the entails retain both. He is thus put to his election. Before he can deal with Broomhouse he must, as the Lord Ordinary thinks, declare that he elects to take it, and that in such a manner as to insure that all the legal consequences of the election shall follow. In the opinion of the Lord Ordinary he has not forfeited his right to Broomhouse. But he cannot, it is thought, be considered the heir in possession of that estate until his election is declared. It is possible that, on a construction of the clause above quoted, the petitioner may not be put to an immediate election. But until it is made his rights as heir, except for purposes of mere administration, must remain in abeyance.

"The Lord Ordinary has, for the reasons above stated, thought it right to decide the question rather than sist the petition until the issue of the declarator."

The petitioner reclaimed, and argued—He was in the position of an heir of entail, who, under the Statute 11 and 12 Vict. c. 36, was entitled to disentail. The case of *Preston Bruce*, 6th March 1874, 1 R. 740, was in point. In any case, the clause of the Broomhouse entail allowed him a year and a day before making his election.

The respondent's counsel were not called on.

At advising—

LORD PRESIDENT—I do not think that there can be any doubt about the soundness of the Lord Ordinary's interlocutor in this case. It is necessary to attend to the precise words of the clause,

and the state of the facts of the case. The petitioner's father Colonel George Logan possessed both estates, although under the entail of Broomhouse it is impossible for the heir of entail in possession to hold both the estates of Broomhouse and Edrom. An exception was, however, made in favour of that heir by the entailer. Upon his death, in June 1870, his elder son William took Broomhouse, but he conveyed Edrom to his younger brother, the present petitioner, who has been in possession of the latter estate since 1873. William died in September 1875, and thereupon the succession to Broomhouse opened to the petitioner, who now proposes to make up a title to that estate, and then to disentail it under the second section of the Act 11 and 12 Vict. cap. 36. In this way he wishes to get rid of the fetters of the Broomhouse entail, and to relief himself of the obligation which lies upon him upon his succeeding to it, either to give up Edrom on the one hand, or to forfeit Broomhouse and remain in possession of Edrom.

The question here raised is whether he is entitled to do this. The obligation in the Broomhouse entail relating to this must be read by itself, and the clause which follows, providing for the event of the heir of Broomhouse succeeding to another estate of the annual value of £300, in which case the heir is allowed a year and a day before making his option, has nothing to do with the present matter. It is unquestionably true that the present petitioner has already succeeded to an estate other than Broomhouse, which obliges him to assume another name than that of "Home of Broomhouse," and there cannot be a doubt that he is in the predicament contemplated under the clause of the entail. He has succeeded to Edrom and entered into possession of it; the succession has now opened to Broomhouse, which compels him to take the name of "Home of Broomhouse," and deprives him of the name of "Logan of Edrom."

The obligation is to the effect that the heir must denude of Broomhouse when the succession opens, and if he does not denude, the only other alternative is that he must give up Edrom. It is plain that the option must be exercised immediately, equally in the one case as in the other. The election must take place the moment the succession to Broomhouse opens. That is the conclusion of the whole question. The petitioner is not entitled to make up a title to Broomhouse. The deed of entail excludes him from doing so unless upon a condition which he will not gratify. I confess that if the next heir had applied for an interdict to prevent the petitioner making up his title I should not have hesitated to grant it.

While denuding is a thing which does not require to be done in a few days, or in an unreasonably short time, it is plain that the petitioner is not entitled to do anything with the estate beyond what is necessary for purposes of administration. He cannot make up a title, and I am therefore clearly of opinion that the Lord Ordinary is right.

Lord Deas concurred.

Lord Ardmillan—This is a clear case. I cannot say that I entertain any doubt upon it. The latter clause which has been mentioned does not touch the point before us. It does not relate to succession to Edrom, or to an estate held on an entail requiring the adoption of a different name and arms. As your Lordship has explained, it has nothing to do with this question.

Before this petition was presented the petitioner had succeeded to Edrom, another estate of which it was a condition that the name of the heir in possession should be other than "Home of Broomhouse." In that case he must elect. He must either forfeit Broomhouse, or, taking it, must relinquish Edrom to the next heir of entail.

In that position the petitioner holding Edrom also claims Broomhouse, and being in the course of making up a title to Broomhouse he declines to elect, and occupies the period during which he may elect in proceedings intended and calculated to get rid of the obligation altogether. He is proceeding to make up a title to Broomhouse without surrendering either estate, and without electing to take Broomhouse—a proceeding to get rid of the entail and to defeat the rights of succeeding heirs which I do not think the petitioner is entitled to adopt.

The case of *Preston Bruce* was different from the present. In that case there was no heir in existence, and no present date of election; and the event contemplated in the entail had not arisen, as it has here.

Lord Mure concurred.

The Court adhered.

Counsel for Petitioner (Reclaimer)—Balfour—Keir. Agents—T. & R. B. Ranken, W.S.

Counsel for Respondent — Asher — Hunter. Agents—Dalgleish & Bell, W.S.

Thursday, March 16.

FIRST DIVISION.

SIR G. N. BROKE-MIDDLETON, BART. *v.* THE INLAND REVENUE.

Assessment—Property and Income-Tax Act, 5 *and* 6 *Vict. cap.* 35—*Lease—Deer Forest.*

Held that a lessee of a deer forest is liable to be assessed under the Property and Income-Tax Act upon the amount of rent payable, as the annual value of the subject.

Observed, that so far as lands and heritages are concerned, the rule of assessment under the Property and Income-Tax Act is the same as under the Poor Law Act.

This was a case stated by the Commissioners for the county of Inverness for the opinion of the Court under the provisions of "The Customs and Inland Revenue Act 1874."

At a meeting of the Commissioners under the Property and Income-Tax Act, 5 and 6 Vict. cap. 35, and subsequent Acts, held at Inverness on 2d December 1875—Sir G. N. Broke-Hamilton, Bart., appealed against the assessment of £4, 15s. duty, under Schedule B, on £1520, made on him as occupier of the deer forest of Invermoriston, &c., for the year ending 5th April 1876. He paid a rent of £2000 for the furnished house of Invermoriston, with deer forest, including the privi-