COURT OF SESSION.

Friday, January 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF EGLINTON, PETITIONER.

Entail — Sale of Portion of Entailed Estate — Agreements with Third Parties—Protection of Interests—Real Burden—Entail Act 1884 (11 *and* 12 *Vict. c.* 36), *sec.* 25; *Entail Act* 1882 (45 *and* 46 *Vict. c.* 53), *secs.* 19 *to* 25.

In a petition by an heir of entail in possession for authority to sell a portion of the entailed estate, a railway company who had entered into agreements with the petitioner's predecessor, and who had, in reliance on agreements with him, executed certain works on the lands proposed to be sold, compeared by minute and craved the Court to refuse the prayer of the petition unless the obligations contained in the agreements were made real burdens on the lands. The Court *held* that it could not, in granting warrant to sell, express any opinion on the true nature of the obligations contained in the agreements founded on, and therefore *adjusted*, for insertion in the disposition to purchasers, clauses which should give the compearers such protection as they were already entitled to under their agreements.

This was a petition by the Earl of Eglinton and Winton, heir of entail in possession of, *inter alia*, the lands and lordship of Ardrossan and of other lands lying in the shires of Ayr, Lanark, Renfrew, and Bute, for authority to sell the harbour of Ardrossan. The petition was brought under the Entail Amendment (Scotland) Act 1848 (11 and 12 Vict. c. 36), sec. 25, and the Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), secs. 19 to 25.

The petitioner was of full age, and service on the three nearest heirs of entail entitled to succeed to the foresaid lands and estates, all of whom were of full age and not subject to any legal incapacity was made.

The petitioner stated that his entailed lands and estates were burdened with debt, amounting in whole to upwards of £124,000 conform to schedule produced. In these circumstances the petitioner alleged that he was desirous of availing himself of the provisions in the foresaid Entail Acts authorising the sale of an entailed estate, or part thereof, and of obtaining authority to sell the harbour of Ardrossan, with the docks and other works and appurtenances thereof and thereto belonging, with the powers, rights, and privileges, and with and under the conditions contained in the several Acts relating thereto, all in so far as applicable, with the rates and duties exigible thereat, and of applying the price to be obtained therefor in payment *pro tanto* of the said debts affecting said lands and estates. He further stated that he believed that it would be for the interest and benefit of himself and the heirs of entail to sell the harbour, and that it should be sold by private bargain.

The prayer of the petition contained, *inter alia*, the following clause . . . "And upon said sale being effected, to authorise the petitioner to execute and grant a disposition or other deed of conveyance in favour of the purchaser or purchasers, containing all usual and necessary clauses, and the clause of warrandice specified in the Entail (Scotland) Act 1882." Section 25 of that Act provides that on payment of the price to be obtained for entailed lands sold under the Act the applicant shall grant a disposition containing all usual and necessary clauses, and, "in particular, clauses providing that the purchaser shall have warrandice against the price, so long as the same shall remain extant, deposited or invested as aforesaid [sec. 23], and binding the applicant and his heirs of provision in warrandice to the extent of the shares of the price received by them respectively in the event of the price being disentailed and divided among the applicant and his heirs of provision, according to their respective interests therein."

The Lord Ordinary, after intimation and advertisement, and a report from Mr Wright, W.S., granted an order of sale "with and under the conditions contained in the several Acts relating to the said harbour, docks, and other works authorised to be sold, in so far as applicable." After the order had been granted a minute was lodged by the Glasgow and South-Western Railway Company, in which it was stated that the company did not propose to oppose the petition, but desired that the Court in granting the prayer thereof should make provision for the preservation of valuable rights and interests which they had acquired in connection with Ardrossan harbour under certain agreements with the petitioner and his predecessors made under authority of certain Acts of Parliament, particularly 5 Vict. c. 62, and 27 and 28 Vict. c. 308.

The minuters alleged that in reliance on these agreements they had laid down lines of railway, erected sheds, and constructed works on the subjects proposed to be sold.

They also alleged that the obligations undertaken by the petitioner and his predecessors were obligations affecting the entailed lands in question, and were binding on all heirs of entail in possession; that there was no provision in the Acts for the said agreements being obligatory on purchasers of the said harbour; and that it was reasonable that in the event of the harbour being sold that it should be sold under reservation and burden of the said obligations.

The company accordingly moved the Court not to grant the prayer of the petition except on the condition that in the disposition or deed of conveyance appropriate clauses were inserted to secure—"(1) That the said agreements be made binding on the purchaser or purchasers of the said harbour and others mentioned in the prayer of the petition. (2) That the said agreements be made binding on all subsequent disponees of the said harbour and others, and that by the obligations in favour of the compearers therein contained being validly constituted real burdens on the said harbour and others. (3) That in the present and all subsequent deeds of conveyance the clause of disposition of Ardrossan harbour, or the parts and pertinents thereof, shall not include the lines of railway and other subjects declared by the said agreements to be and remain the property

of the said Glasgow and South-Western Railway Company."

The chief agreements were dated in 1854 and 1866. The former provided by clauses 1 and 3 that certain lines of railway, shown on a plan thereto annexed, were the property of the predecessors of the company; by clauses 2 and 4, that the *solum* thereof belonged to the Earl, and that he might in certain circumstances use the railway. The other clauses, so far as they need be referred to, provided that the company might build additional sheds on the Earl's ground at their own expense, and that he should not charge for the ground.

The agreement of 1866 confirmed that of 1854.

The Lord Ordinary allowed the minute to be received, but reserved all questions as to its competency, and again remitted to Mr Wright, W.S., to inquire into the statements contained in the minute for the Glasgow and South-Western Railway Company.

Mr Wright reported—"(1) That the application by the compearers in its present form at this stage is incompetent. (2) That, apart from the question of form, it would not be competent or practicable to make the conditions and obligations contained in the agreements real burdens upon the petitioner's lands. (3) That even if the obligations in their nature were capable of being made real burdens, the parties themselves not having made them so, or come under obligation to do this, the Court will not increase the obligations by making them more stringent or binding than the parties have done. (4) It is not necessary in this process to determine whether the compearers' title and possession are sufficient to protect them from challenge by a singular successor of the petitioner, but it is evident that their possession does not rest solely upon the agreements now founded on."

By interlocutor of 11th July 1884 the Lord Ordinary refused the craving of the Glasgow and South-Western Railway Company.

"*Opinion.*—I do not think it incompetent for the Court to entertain the railway company's application notwithstanding that an order of sale has been already granted. But I think that the company have shewn no sufficient ground for qualifying the order by any further conditions. No such qualification is required in order to protect from a sale by the petitioner lines of railway which, although they are laid down upon his ground, do not belong to him, but are declared by the agreements under which they are laid down to be the property of the railway company. If the company has already acquired any real right in the subjects which it is proposed to sell, such right will remain effectual notwithstanding a sale. If they have no such right, they cannot acquire it under these proceedings. Provision may be made for charges which already affect, or which may be made to affect, the land; but the Court has no power to convert into real burdens rights which the parties have left by their contract to stand upon personal obligation."

The Railway Company reclaimed, and argued —All that was desired by the company was that they should be put in no worse position by the sale of the lands than they were at the present time. The arguments entered into were good against the entailed estate, and good therefore against the heirs of entail. These rights were indefeasible, and what was desired was that they should be made real burdens upon the land.

Replied for the petitioner—To comply with the railway company's proposal and make the obligations in their favour real burdens on the land would put the heir in possession in a very much worse position than he was at present. If the company had demanded at the time the agreements were made that they should be made real burdens upon the land, the petitioner or his predecessors would have secured some additional benefit. The petitioner was prepared to implement the agreement as it stood, but he objected to the company securing any additional benefit. Both the agreements were made after the Rutherfurd Act, and the parties might therefore reasonably have contemplated the termination of the entail.

Draft clauses to be inserted in the articles of roup and disposition of Ardrossan Harbour were lodged both by the Earl of Eglinton and the Glasgow and South-Western Railway Company.

The following clauses (adopting the clauses proposed by the company, subject to the qualification mentioned by the Lord President) were adjusted by the Court:—

The Disposition to be granted in favour of the Purchaser shall contain, inter alia, *Clauses in the terms after mentioned, viz.* (1) *after the Dispositive Clause, a Clause in the following terms*:—"Excepting always from the harbour, lands, and other subjects and pertinents thereof hereby conveyed, the whole lines of rails, with the relative switches and crossings, formed upon the harbour of Ardrossan, and lying between the said harbour and the east side of Princes Street, Ardrossan, including the lines of rails which are situated alongside of the docks and quays which belong to the Glasgow and South-Western Railway Company, all as delineated and coloured red upon duplicate plans signed as relative to the agreement first hereinafter specified; and all alterations upon or additions to the said lines of rails, switches, and crossings, which have been or may be made by the Glasgow and South-Western Railway Company in virtue of the provisions of the agreements first and second hereinafter specified: All which excepted subjects are hereby declared to be and to remain the property of the Glasgow and South-Western Railway Company, and their successors, notwithstanding anything herein contained, and shall be maintained in good order and repair by the Glasgow and South-Western Railway Company at their sole expense in all time coming: But declaring that the *solum* on which the said lines of rails, switches, and crossings are laid, as also the branch lines leading into the ballast-discharging berths, are not excepted from but are included in the subject hereby conveyed: And declaring always that these presents are granted with and under and subject to the whole conditions, provisions, restrictions, limitations, obligations, reserved powers, and rights, so far as conceived in favour of the Ardrossan Railway Company or the Glasgow and South-Western Railway Company, in so far as still subsisting, specified in—(*First*), An agreement entered into between the Right Honourable the Earl of Eglinton and Winton, now deceased, as sole proprietor, or about to be vested as sole proprietor, of the harbour of Ardrossan, *on the first part*, and the Ardrossan Railway Company, with consent and concurrence of the Glas-

gow and South-Western Railway Company, for all interest they had or might acquire in the premises, *on the second part*, dated 5th, 6th, and 10th July 1854, and recorded in the Division of the General Register of Sasines applicable to the county of Ayr the day of 1885; and (*Second*), An agreement entered into between the Right Honourable the Earl of Eglinton and Winton, now deceased, sole proprietor of the harbour of Ardrossan, *on the first part*, and the Glasgow and South-Western Railway Company, *on the second part*, dated 3d and 13th April 1866, and recorded in the said Division of the General Register of Sasines applicable to the county of Ayr the day of 1885: And the said (*disponee*) and his foresaids shall be bound and obliged, as by acceptance hereof he binds and obliges himself and them, to observe, implement, and fulfil the said agreements and whole clauses therein contained, so far as undertaken by and incumbent on the said deceased Earl of Eglinton and Winton or me, or his or my heirs and successors, and to free and relieve me and my foresaids of all obligations contained in the said agreements in all time coming; and the said conditions, provisions, restrictions, limitations, obligations, reserved powers, and rights specified in the said two agreements, so far as conceived in favour of the said Ardrossan Railway Company and Glasgow and South-Western Railway Company, or either of them, and in so far as presently subsisting, are hereby directed to be inserted at length or validly referred to, in terms of law, in all subsequent conveyances, instruments, and other writs and titles of the said harbour and others thereby disponed."

And (2) *after the Clause of Assignation of Writs, a Clause in the following terms:*—"I assign to the said (*disponee*) and his foresaids the whole reservations, declarations, powers, and rights, conceived in favour of the said deceased Earl of Eglinton and Winton and his successors, and in favour of me and my successors, contained in—(*First*), The said agreement between the said Earl of Eglinton and Winton, now deceased, *on the first part*, and the Ardrossan Railway Company, with consent and concurrence foresaid, *on the second part*, dated and recorded as aforesaid; (*Second*), The said agreement between the said Earl of Eglinton and Winton, now deceased, *on the first part*, and the Glasgow and South-Western Railway Company, *on the second part*, dated and recorded as aforesaid; and (*Third*), Supplementary agreement between me, *on the first part*, and the Glasgow and South-Western Railway Company, *on the second part*, dated the 19th and 26th days of August 1873, together with the said two agreements and supplementary agreement themselves, whole clauses, tenor, and contents thereof, in so far as conceived in favour of the said deceased Earl of Eglinton and Winton and his successors, and of myself and my successors: Surrogating hereby and substituting the said (*disponee*) and his foresaids in the full right and place of the said Earl of Eglinton and Winton, now deceased, and of myself, and his and my successors, in the said two agreements and supplementary agreement, and all that has followed or is competent to follow thereon, now and in all time coming."

At the end of the former of these clauses, after the word "disponed," the railway company had in their draft-clauses suggested that the words "under pain of nullity" should be inserted, and they maintained in argument that these words should be part of the clause.

At advising—

Lord President—In this case an order of sale was pronounced by the Lord Ordinary, and after that order had been pronounced the Glasgow and South-Western Railway Company appeared and lodged a minute in which they asked that the prayer of the petition—that is to say, Lord Eglinton's petition—for sale be not granted except on the condition that in the disposition or deed of conveyance of said subjects to be granted to purchasers of the said harbour of Ardrossan appropriate clauses should be inserted for the purpose of securing—first, "That the said agreements be made binding on the purchaser or purchasers of the said harbour, and others mentioned in the petition; second, that the said agreements be made binding on all subsequent assignees of said harbour and others, and that by the obligations in favour of the compearers therein contained being validly constituted burdens on the said harbour and others; and third, that in the present and all subsequent deeds of conveyance the clause of disposition of Ardrossan harbour or parts and pertinents thereof shall not include the lines of railway and other subjects declared by the said agreements to be and to remain the property of the Glasgow and South-Western Railway Company." Now, the Lord Ordinary by the interlocutor under review refuses the prayer of the minute *in toto*, and his reason for doing so is explained in a short note added to his interlocutor. He says he does not think it incompetent to entertain the application, notwithstanding that an order of sale has been pronounced upon the petition. But he says he thinks the company have shown no good ground for qualifying the order by any further conditions; that such qualification is not required to protect from a sale by the petitioner lines of railway which, although they are laid down upon his ground, do not belong to him, but are declared by the agreements under which they are laid down to be the property of the railway company. Now, I hardly agree with the Lord Ordinary in that view, because I think in a property of this kind which is so much complicated by its division between the two parties who are before us, and by the terms of the agreements referred to, it is not desirable to leave that in the way the Lord Ordinary has left it. I think it ought to be very distinctly specified in the conveyance what are the subjects conveyed and what are excepted in the conveyance. But his Lordship says further, "If the company has acquired any real right in the subjects which it is proposed to sell, such right will remain effectual notwithstanding a sale, and if they had no such right they cannot acquire it under these proceedings. Provision may be made for charges which already affect or which may be made to affect the land, but the Court has no power to convert into real burdens rights which the parties have left by their contract to stand upon personal obligation." Now, I agree in that view of the Lord Ordinary so far, that we are not entitled in a proceeding of this kind, merely when adjusting the terms of articles of roup, or a conveyance to be made to a purchaser from Lord Eglinton, to convert into real

burdens obligations which are not so in their own nature. To that extent I agree with the Lord Ordinary. Whether the obligations conveyed in these contracts are in the full sense of the term merely personal obligations is a matter upon which I do not desire to give any opinion. I do not think we can competently determine that in such a proceeding as the present. What we have to do is to protect the legitimate interests of the railway company under these agreements, so far as that is possible in adjusting the terms of the conveyance. Whether what we are going to do will have the effect of absolutely protecting the railway company against any violation of the provisions of these agreements, of course the Court cannot give the parties any assurance; all we can do is to do the best we can for the party whose interests we are seeking to protect. If the effect of the clauses to be inserted in the articles of roup or the conveyance is to make the obligations in those agreements conditions of the title of the first and all subsequent purchasers, of course that will be a very effectual protection to the railway company. But if the effect is not to make these obligations a condition of the title, then I confess I do not very well see my way to an absolute protection of those rights. But, as I said before, all we can do is to give the railway company the best clauses we can, consistently with the petitioner being free to sell, and to sell in terms which shall give a perfectly good title to the purchaser.

The Court have gone over the clauses suggested on both sides here, and they adopt the clauses proposed by the railway company with certain alterations. Perhaps the best way to explain these alterations is to read the clauses as altered. The clauses are to be inserted in the articles of roup if there be any, and if not, corresponding clauses must be inserted in the dispositions. [*His Lordship then read the draft clauses as amended.*] It is right to mention that there is a slight difference of opinion, which I was not aware of, as regards the deletion of the words at the end of the first clause, "under pain of nullity." I do not think these words can stand, because I do not know what the meaning of them is. Lord Shand is of a different opinion.

Lord Mure—I quite agree with what your Lordship proposes. I agree with the Lord Ordinary that we cannot by any clauses that we may frame force people to make real burdens which did not previously exist; but although we cannot do that in adjusting the matter between Lord Eglinton and the Glasgow and South-Western Railway Company, who have been dealing with their harbour for many years by Acts of Parliament, now that Lord Eglinton has obtained power to sell the harbour we ought to endeavour to adjust a clause which will at all events place the railway company as in a question with the new purchaser in the same position in which they now stand to Lord Eglinton and his heirs, and we ought to frame a clause which will be so wide as to have that effect—that is to say, that the purchaser and his assignees, whoever they may be, should be placed under the same obligations towards the railway company as Lord Eglinton and his heirs now stand towards the company. I think what your Lordship proposes will have that effect, and therefore I concur in it. I think there is no necessity for putting in the words "under pain of nullity." I do not know what the effect of these words would be.

Lord Shand—The Glasgow and South-Western Railway Company have themselves presented a clause which they think ought to be inserted in the articles of roup if the subjects are sold publicly, or in the disposition to be granted to the purchaser in the event of their being sold by private bargain, and your Lordships have adopted that clause in substance. I entirely agree that it should be so; but I am further of opinion that the words "under pain of nullity" to which your Lordship has referred ought to go into the clause. It appears to me that the Glasgow and South-Western Railway Company, in so far as they have obligations constituted by Act of Parliament, and the agreements which are narrated in these proceedings, are creditors for the fulfilment of these obligations against the heirs in possession of this entailed estate and the subsequent heirs of entail. They are creditors entitled to enforce against these parties all the obligations contained in the agreement. I further think that it is not the intention of the parties or the effect of the disentailing statutes or any of them to enable heirs of entail in possession and the heirs-substitute to get rid by means of an order for disentail, or an order for sale of subjects, of any obligation under which those heirs of entail lie to creditors. If we were to hold that by this disentail or order for sale such obligations can be got rid of, it is quite evident that we would not only strike off the fetters of entail which the statute intends, but we would enable heirs of entail to get a much higher price for the subjects than legitimately they ought to get, upon the footing that they could now sell the subjects to third parties free from any obligations under which it was held by them. I do not think the statutes can be read as having any such effect; and I do not agree in the view expressed by the Lord Ordinary that if it were necessary to prevent an effect of that kind the Court could not make it a condition of any sale of a subject of this kind that a burden should be made a real burden even, although it is not expressly so in the titles. I think that when an heir of entail appeals to the Court under the statutes for authority to disentail or to sell subjects, he should only receive that authority under such conditions as will secure for a creditor of that estate the right to enforce the obligations he has against the heirs of entail in possession and their successors against any others who should become successors. Accordingly, I should have been disposed, if it were necessary, to insert what would be sufficient to make real burdens. But I agree in the judgment of your Lordships in reference to these clauses, upon the footing that substantially what we are doing should have that effect. I think there should be conditions inserted in the articles of roup or the conveyance which will secure to this railway company that the conditions which affect the heirs of entail shall affect all succeeding purchasers of these lands. I have some doubt about how far that will be operative without the words "under pain of nullity." I think the effect of these words would have been this, that the Glasgow

and South-Western Railway Company as creditors in these obligations would be entitled, in the event of these clauses not being inserted in the deed, to complain of that, and to hold that these deeds should be held null and void, because the protection here intended was a protection in their favour. I am of opinion that these words "under pain of nullity" should be part of the clause. It may be that the Glasgow and South Western Railway Company may be advised that without these words their object is served; that is a matter for their consideration. But if they insist on these words forming part of the obligation, in my opinion they should be inserted.

The Court approved the clauses printed above.

Counsel for Petitioner — Muirhead — Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Railway Company—Mackintosh—Jameson. Agents—John Clerk Brodie & Sons, W.S.

Tuesday, February 17.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

DAY AND OTHERS *v.* BENNIE.

Jurisdiction—Foreign—Court of Chancery—Injunction against Domiciled Scotsman and Order for Costs—Interdict—Preventive Jurisdiction.

A trader in England applied to the Court of Chancery for an injunction to prevent a trader domiciled and carrying on business in Scotland, circulating in England and Wales catalogues which he alleged to be pirated from his. The writ was served in Scotland, by leave of the Court of Chancery, under the rules of Court made in pursuance of the Judicature Act 1875, and no appearance having been entered a decree of injunction restraining the publication complained of within the territory of the Court of Chancery was pronounced with costs. An action having been brought in the Court of Session to recover these costs, the defender pleaded that the proceedings in the Court of Chancery were of no effect, since he was not subject to the jurisdiction thereof. *Held* that the Court of Chancery had jurisdiction to prevent a wrong being done within its own territory; therefore that this plea ought to be repelled.

William Day and others, who were domiciled and carried on business as engineers in England, at Newington Ironworks, Falmouth Road, London (under the firm of R. Waygood & Co), instituted an action in the Chancery Division of Her Majesty's High Court of Justice, being one of the Divisions of the Supreme Court of Judicature in England, against John Bennie, who carried on business in Glasgow as an engineer at the Star Engine Works, Moncur Street, in which they claimed an injunction to restrain him, his tenants or agents, from printing, publishing, disposing of, or circulating in England or Wales any catalogues published by the plaintiffs. (2) damages. (3) the delivering up to the plaintiffs by him of all catalogues containing such infringement, together with the manuscript of the same, (4) such further order or other relief as the case required, and (5) costs.

On motion made and cause shown, leave was granted by Mr Justice Kay for service out of the jurisdiction of the said Court, and on 21st December 1883 the writ was served personally upon the defendant at his works in Glasgow. He did not enter appearance or deliver a defence, and on 24th January 1884 notice of motion for judgment in default of appearance was served upon him, and a detailed statement of the claim was filed. Upon motion for judgment on the default of delivery of a defence, judgment was pronounced by Mr Justice Kay on 2d February 1884, restraining him from publishing, disposing of, circulating, or permitting to be published, disposed of, or circulated, &c., "within the jurisdiction of this Court," the catalogues complained of, and ordering him to pay the plaintiffs "their costs of this action, such costs to be taxed by the taxing-master." Damages were not insisted for. In pursuance of the order the bill of costs was, on 12th August 1884, taxed at the sum of £61, 1s. 2d., conform to certificate by the taxing-master.

This action was raised by Day and others (who stated that the action was necessary because the Judgments Extension Act 1868 does not apply to judgments of the Chancery Division) to have Bennie ordained to pay that sum. They stated in their condescendence—"(2) The said Chancery Division was the competent and appropriate Court having jurisdiction to entertain the said action. Certain Acts of Parliament which extend to Scotland, more particularly the 'Supreme Court of Judicature Act 1875,' and amending Acts, including the rules made in virtue thereof, as after mentioned, have conferred on the said Chancery Division authority or jurisdiction in a limited class of cases to grant leave to serve a writ of summons on a defendant out of the territorial jurisdiction of the said Court. The class of cases in which, and the conditions on which, such leave is granted, and the forms and modes of procedure, are defined by the rules of the said Supreme Court, made under the authority of the foresaid Acts, which came into operation on October 24, 1883, and which are referred to, specially Order xi. rule 1 (*f*), which states that 'service out of the jurisdiction of a writ of summons may be allowed by the Court or a Judge whenever,' *inter alia*, 'any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof;' rule 2, which enacts that the said Court or Judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant; and rule 4, which provides that no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction. Under the said Acts and rules the pursuers proceeded."

The defender denied sending his catalogue into England.

He stated (Stat. 4)—"The defender took no