Saturday, January 26.

SECOND DIVISION.

GRANT AND OTHERS, PETITIONERS.

Nobile Officium—Guardian and Pupil—Authority to Grant Bonds and Dispositions in Security over Ward's Estate.

A pupil proprietor of a fee-simple estate succeeded thereto under burden of certain provisions for the younger children of the disponer, payable one year after the death of the latter, and bearing interest at 5 per cent. The interest amounted to £689, 10s. 11d. per annum.

The tutors and curators of the pupil presented a petition to the Court for authority to raise by bonds and dispositions in security over his estate a sum sufficient to pay off these provisions. It appeared that the interest payable on such a loan would amount to £482, 13s. 8d. per annum, and the annual saving to the ward would therefore be £206, 17s. 3d. for the period of eight years.

The Court *granted* the prayer of the petition.

This was a petition at the instance of Mrs Mary Jane Jackson or Grant, widow of the late Henry Alexander Grant, of Western Elchies, and others, tutors and curators of James William Hamilton Grant, now of Wester Elchies, for authority to grant bonds and dispositions in security for younger children's provision.

The late Mr Grant of Wester Elchies, formerly heir of entail in possession, and thereafter heritable proprietor of these lands, executed a disposition thereof in favour of himself in liferent, and to James W. H. Grant and his heirs in fee, of date 14th June 1884. Mr Grant reserved power to grant a bond or bonds of provision in favour of his child or children who should not succeed to the lands and estates, under such terms as he should think proper—if one child one year's free rent or value, if two such children two years' free rent or value, and if three or more children three years' free rent or value of the said entailed estates, to be ascertained in the manner prescribed by the Statute 5 George IV., chap. 87, entitled "An Act to authorise the proprietors of entailed estates in Scotland to grant provisions to the wives or husbands and children of such proprietors," and payable therein mentioned, and to charge the same upon the estate by bond or bonds and dispositions in security in ordinary form when the amount had been ascertained and fixed; it being declared by the foresaid disposition that any such bond or bonds of provision already granted by the disponer should be as valid and effectual as if granted after the execution of the disposition.

Mr Grant by bond of provision executed on 26th day of January 1878, and recorded in the Books of Council and Session the 25th January 1888, bound and obliged himself and the heirs of entail succeeding to him, to make payment to the child or children procreated or to be procreated of his body who should be alive at his death, and should not succeed to the said entailed estates, the following provisions bearing interest at the rate of 5 per centum per annum, and payable one year after his death, viz., if one such child one year's free rent, if two such children two years' free rent or value, if three or more such children three years' free rent or value of the said entailed estates.

By declaration dated 19th November 1884, annexed to the said bond of provision, and recorded along with it, Mr Grant declared that the bond of provision should remain in full force and effect against him and the heirs succeeding to him in the said estates of Wester Elchies and others.

Mr Grant died on 7th July 1886, survived by his widow, the petitioner, and seven children, including James W. H. Grant, and leaving a settlement by which he appointed the petitioners tutors and curators to his children.

The petitioners, *inter alia*, averred—"James William Hamilton Grant was born on the 3rd day of April 1876, and now is 12 years of age. Henry Alexander Grant having been survived by six younger children, the provision to which they were entitled was three years' free rent of the said estate of Wester Elchies, which has been found to be £13,790, 18s. 3d. Said provision was payable one year after the death of the said Henry Alexander Grant, viz., on 7th July 1887, and under the said bond of provision, interest is payable at the rate of 5 per centum per annum until the said provision is paid. As money could now be borrowed at a less rate of interest if the tutors and curators of the said James William Hamilton Grant could grant bonds and dispositions in security over his estates for the amount of said provisions, a large saving of interest would in this manner be effected. The present application is therefore made for authority to grant bonds and dispositions in security for £13,790, 18s. 3d.—the amount of his brothers' and sisters' provisions."

The Court remitted to Mr George M'Intosh, W.S., to report on the circumstances set forth in the petition.

The reporter, after narrating the circumstances as already set forth, proceeded:—"As Master James William Hamilton Grant, who is now proprietor of the lands and estate of Wester Elchies, is a pupil, he is not in a position to implement the obligation upon him in the said bond of provision by making payment to his brothers and sisters of the amount of their provision, and the petitioners as his tutors-nominate have no power, without obtaining the authority of the Court, to borrow money on their ward's estate for the purpose of making payment of the provision. . . . . Master James William Hamilton Grant is not possessed of any moveable estate from which he can pay the amount of his brothers' and sisters' provisions. . . . . The petitioners do not set forth in the petition that there is any urgent necessity for their obtaining such authority in order to save their ward's estate, but they state that the amount of the younger children's provisions can now be borrowed at a less rate of interest than 5 per centum per annum if they are empowered to grant a bond and disposition in security over the estate for the amount, and a large saving of interest will in this manner be effected to the ward. . . . . Interest at the rate of 5 per cent. on the sum of £13,790, 18s. 3d. is

£689, 10s. 11d. per annum. . . . . Assuming that the petitioners, on obtaining authority to grant bonds and dispositions in security over their ward's estate, could borrow the amount of the younger children's provision at 3½ per cent., which is the current rate of interest on first-class landed securities in Scotland, the interest on £13,790, 18s. 3d. would amount to £482, 13s. 8d. per annum, and the annual saving to the ward would therefore be £206, 17s. 3d. So far as your reporter is aware, the Court has not hitherto granted authority to tutors-nominate of a pupil proprietor in fee-simple to borrow upon the security of their ward's estate, except on being satisfied that there was necessity or high expediency. Your reporter respectively refers your Lordships to the case of *Bellamy and Others*, November 30, 1854, 17 D. 115, where the Court authorised tutors-nominate to borrow money on the security of the heritable property, to pay off debts of the testator. In that case it was stated that it was of great importance that the debts and provisions should be paid off, in order that the creditors might not proceed to do diligence to attach the estate and accumulate expenses, with accumulated interest at the highest legal rate. The reporter in that case stated that there was no reason to doubt that the raising the sum required on the security of the heritable property of the ward would be a proper and necessary act of administration on the part of the petitioners. Your reporter further respectfully refers your Lordships to the case of *Sinclair Wemyss*, July 18, 1882, 9 R. 1131, where an application by a tutor-nominate for power to build a mansion-house on the estate of the pupil was refused, as being neither a matter of necessity nor of high expediency. In that case the Lord President stated—'That to justify an application by a tutor to borrow in order to execute operations on the estate of a pupil, he must make out a case either of necessity or of such obviously high expediency as in the eye of the law amounts to necessity. That is substantially what has been laid down over and over again, both in this and in the other Division of the Court.' His Lordship further stated—'There are certainly no facts before us which instruct a necessity, or a high expediency, and I am therefore for refusing the prayer of the petition.' In the present petition it is not set forth, and your reporter understands that there is no ground for supposing, that the younger children require immediate payment of their provisions. Your reporter therefore begs respectfully to report that the circumstances set forth in the petition do not indicate any such urgency as to render it a necessary act of administration on the part of the petitioners to borrow on the security of the ward's heritable estate. If this view is correct, the question for your Lordships' determination comes to be—Whether, in the circumstances above set forth, the saving, or probable saving, of £206, 17s. 3d. per annum for about eight years to the ward is sufficient to make it highly expedient, in the interests of the ward, that the petitioners should be authorised to grant heritable securities over his estate?"

The petitioners argued—It was highly expedient in the interests of the pupil that the prayer of the petition should be granted. The saving of interest would amount to more than £2000 before the ward came of age. A positive advantage was thus secured to the pupil, and there was practically no risk to the estate. Provisions to younger children were in the same position as the debts of an ordinary creditor. The younger children here might at any time proceed to do diligence to recover the principal sums due to them, as these were payable the year after their father's death. The present case was more favourable than those in which powers had been granted to tutors previously—*Mackenzie*, January 27, 1855, 17 D. 314; *Lord Clinton*, October 30, 1875, 3 R. 62; *Campbell*, February 26, 1881, 8 R. 543; *Morrison*, July 19, 1861, 23 D. 1313; *Crawford*, July 6, 1839, 1 D. 1183; *Threipland*, July 7, 1848, 10 D. 1234; *Bellamy and Others*, November 30, 1854, 17 D. 115; *Somerville's Factor*, February 6, 1836, 14 S. 451. Further, the tutors of a pupil heir of entail in possession could now obtain power to borrow upon the security of their ward's estate—Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), sec. 11. A pupil proprietor of a fee-simple estate should not be put in a worse position than a pupil heir of entail.

The Court granted the prayer of the petition.

Counsel for the Petitioners — Macfarlane. Agents—Tait & Crichton, W.S.

HIGH COURT OF JUSTICIARY.

Monday, January 28.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

MAXWELL *v.* MARSLAND.

Justiciary Cases—Act 2 and 3 Will. IV. c. 68—Day Trespass Act—Poaching by Person having Permission to Kill Rabbits—General Conviction.

Held that a person who had permission from his father, the tenant of a farm, to shoot rabbits, and who while upon the farm shot two grouse, was guilty of a trespass under the Day Trespass Act.

Held that a charge under the Day Trespass Act of entering upon lands in "pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies," is not an alternative charge, and that a general conviction following upon it is good, even though the person convicted has a right to kill conies.

James Maxwell, residing at Hunthills, in the parish of Tinwald and county of Dumfries, was charged before the Sheriff Court of Dumfries and Galloway at Dumfries on a complaint which set forth that he had "contravened the first section of the Act Second and Third William the Fourth, chap. 68, entituled 'An Act for the more effectual prevention of trespass upon property by persons in pursuit of game in that part of Great Britain called Scotland (17th July 1832),' in so far as on the twenty-first day of November 1888 years, or about that date, the said James Maxwell did commit a trespass by entering or