

Wednesday, July 4.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

EARL OF ROSEBERY, PETITIONER.

Entail—Compensation for Land Taken—Investment—Loan by Trustees to Heir of Entail in Possession.

Part of an entailed estate was acquired by a railway company under its compulsory powers, and the compensation money was invested in consols in the names of trustees for behoof of the heir of entail in possession and the succeeding heirs.

In a petition for authority to lend this money to the heir of entail in possession on the security of fee-simple lands belonging to him, the Lord Ordinary reported the case to the First Division, on account of the decision in the case of *Innes*, 10 D. 870. The Court remitted to the Lord Ordinary to sanction the loan on his being satisfied of the sufficiency of the security.

The Earl of Rosebery, as heir of entail in possession of entailed estates situated in the counties of Edinburgh and Linlithgow, presented this petition praying for authority to sell the sum of £5110, 18s. 9d. of consols, and to borrow the proceeds on the security of his fee-simple estate of Malleny.

This sum represented the compensation money paid for part of the entailed estates acquired by the Forth Bridge Railway Company. It had been invested in consols in the names of the Honourable Bouverie Francis Primrose, C.B., and Mr James Auldjo Jamieson, W.S., as trustees for the petitioner and the succeeding heirs of entail.

On 1st May 1888 Mr John Montgomerie Bell, W.S., was appointed curator *ad litem* to the heirs of entail first and second next entitled to succeed, who were then in pupillarity.

On 12th May 1888 the Lord Ordinary (TRAYNER) granted the prayer of the petition in so far as it related to the sale of £5110, 18s. 9d. consols.

With reference to that portion of the prayer in which the Court were asked to authorise the loan of this money by the trustees to the petitioner, the Lord Ordinary reported the petition to the First Division.

"*Note.*—The petitioner prays the Court (1) to authorise the sale of certain stock held by trustees for behoof of the heirs of entail of the estates of Newhalls and others, of which he is at present the heir of entail in possession; and (2) to authorise the said trustees to lend the proceeds of such sale to the petitioner 'on the security of his fee-simple estate of Malleny.' The first part of the prayer I have granted, but with regard to the second part it is pointed out by the reporter that in the case of *Innes*, 10 D. 870, a case in all essential particulars the same as the present, it was announced by the Lords of the Second Division (after consultation with the other Judges) that it had been 'determined never again to sanction the money being lent to the heir of entail himself.'

"That being so, I regard myself as precluded from considering whether the authority prayed

for is unreasonable in itself, or from doing anything except giving effect to the determination of the Court so announced. The Court, however, may reconsider, and if it think fit alter the decision announced in *Innes'* case, and I have reported this matter that the petitioner may have the opportunity which he desires of being heard thereon before the Court."

Argued for the petitioner—The case of *Innes* was decided before the passing of the Rutherford Act, which made material alterations on the law of entails. Besides, in that case the same party was both borrower and lender, while in the present case there was in existence an independent trust. The only practical question was the sufficiency of the security; that could be ascertained by a remit to the Lord Ordinary, and all other interests were fully protected by the trustees—*Innes, Petitioner*, March 8, 1848, 10 D. 870.

LORD PRESIDENT—The difficulty that occurs to me is that this is a petition at the instance of Lord Rosebery without the concurrence of the gentlemen who are named as trustees in the petition. It would be desirable to have a minute put in by the trustees expressing their concurrence, and we shall continue the case to allow of this being done.

A minute was lodged by the trustees, expressing their concurrence in that part of the prayer of the petition which related to the loan.

At advising—

LORD PRESIDENT—The money in the hands of the trustees comes from lands taken by a railway company, and the compensation money was lodged in the hands of the trustees, and invested by them in consols, and the object of the prayer of this petition is for authority to sell the consols, and to lend the proceeds to the Earl of Rosebery on the security of his fee-simple estate of Malleny.

I should not have any doubt about the advisability of this proceeding provided the trustees are satisfied with the sufficiency of the security.

But it has been suggested that what we are asked to do is in opposition to the decision in the case of *Innes*, in 10 D. 870. That case, however, occurred before the Entail Amendment Act, and it may fairly be contended that objections which would have been considered good then would not now be entertained.

This case, however, is quite distinct from that of *Innes*. In it the bond was granted by the heir in favour of himself, and so the deed came to be a somewhat anomalous one. But that is not the case here, for we have an independent trust intervening, and what is suggested is, that the trustees should lend this money to Lord Rosebery on the security of his fee-simple lands. The trustees are a separate and independent body, and so the respective relations of debtor and creditor may quite well exist.

I propose therefore that we should remit to the Lord Ordinary to sanction the loan provided that he is satisfied with the sufficiency of the security.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent on circuit.

The Court remitted to the Lord Ordinary to sanction the loan on his being satisfied of the sufficiency of the security.

Counsel for the Petitioner—Graham Murray—Maconochie. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, July 4.

SECOND DIVISION.

YUILLE v. RUSHBURY AND OTHERS.

Patent—Royal Letters-Patent—Theatre—Assignment—Patrimonial Estate.

The proprietor of a theatre in Glasgow obtained royal letters-patent to himself, "his executors, administrators, and assigns," for the performance of plays in his theatre or in any other to be built within the city. On the lands on which the theatre was built being acquired for other purposes, he became tenant of another theatre. On this theatre being sold he assigned to the purchaser the letters-patent. The purchaser, in security of an advance, executed in favour of the lenders a bond and disposition in security over the theatre, conveying it with the "parts, pertinents, and privileges" thereof, but without reference to the assignation of the letters-patent. The debt being unpaid the bondholders entered into possession of the theatre and let it. In an action at the instance of their debtor in the bond to interdict them and their lessee from using the letters-patent of which he claimed to be sole assignee, the Court *dismissed* the action.

The Lord Justice-Clerk was of opinion that the pursuer had no title to sue in respect the letters-patent had reference alone to the carrying on of the business of the theatre, which had passed to the defenders; Lord Young was of opinion that the letters-patent were not patrimonial estate separable from the theatre and capable of being retained as a separate rent-yielding subject, but had passed under the bond to the bondholders; and Lord Rutherford Clark was of opinion (1) that under the clause of "parts, pertinents, and privileges" the letters-patent were assigned to the defenders, and (2) that apart from this clause the defenders were entitled to use them, as without them the beneficial use of the security subjects could not be enjoyed.

On 24th June 1868 William Glover, proprietor of the Theatre Royal, Dunlop Street, Glasgow, obtained royal letters-patent under the Acts 43 Geo. III. cap. 142, and 6 and 7 Vict. cap. 68, for the performance of plays for the period of twenty-one years in that theatre, "or within any other theatre built or to be built at any other suitable place within the city of Glasgow, the suburbs or neighbourhood thereof, instead of the said theatre in Dunlop Street." The letters were in favour of William Glover, "his executors, administrators, and assigns."

The Act of Geo. III. enacts as follows—"Whereas a licensed play-house in the city of Glasgow would be of convenience to the said city, and to persons resorting there, may it please your Majesty that it be enacted that it shall and may be lawful to His Majesty, his heirs and successors, to grant letters-patent for establishing a theatre or play-house in the city of Glasgow, suburbs, or neighbourhood thereof, subject to such restrictions as to the number of persons to be interested therein, and in the profits thereof, and with such privileges and under such provisions and regulations for the due and orderly conducting and managing the same as to His Majesty shall seem fit: Provided always, and be it enacted, that the said theatre or play-house, and management thereof, shall be under and subject to the control and inspection of the Lord Provost, Bailies, Dean of Guild, and Deacon Convener of the Trades and City of Glasgow, and of the Sheriff-Depute of the county of Lanark for the time being."

The Act 6 and 7 Vict. cap. 68, enacts by sec. 2, that "it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain for the public performance of stage plays without authority by virtue of letters-patent from Her Majesty, her heirs and successors, or predecessors, or without licence from the Lord Chamberlain of Her Majesty's Household, for the time being, or from the justices of the peace as hereinafter provided." The letters-patent contained a clause declaring "that these our letters-patent shall be revocable by us, our heirs and successors, at our and their pleasure, and without any cause given, and that thenceforth the right of the said William Glover, his executors, administrators, and assigns, shall cease and determine."

In 1869 the theatre in Dunlop Street was acquired by the Union Railway Company, and Glover leased a theatre in Hope Street, Cowcaddens, which became known as the Theatre Royal, and to which the letters-patent applied.

By conveyance dated 31st July 1878 and duly recorded, Mr Andrew Yuille and a Mr Rae purchased the theatre. Mr Glover on 10th May 1878, in consideration of the sum of £400, assigned the letters-patent to them, "their heirs and assignees." Twelve days later, on 23rd May, in security of an advance of £13,000 obtained from a Mrs Anderson, Messrs Yuille and Rae granted a bond and disposition in security over the property. This deed contained no reference to the assignation of the letters-patent, and bore merely to convey the property by description, with the whole houses and buildings erected or to be erected thereon, "parts, pertinents, and privileges thereof, and free ish and entry thereto," in security of the sum lent. The theatre was burnt down in 1879, and rebuilt in 1879-80. In July 1881 Mrs Anderson's trustees entered into possession of the theatre under the bond and disposition in security. From them the property passed to the marriage-contract trustees of a Mr and Mrs Richmond. On 20th August 1887 William Thomas Rushbury became lessee under them of the theatre.

This action was raised by Yuille, Rae being dead, to have Rushbury interdicted "from producing stage plays in the buildings known as the Theatre Royal, Hope Street, Glasgow, in virtue of the licence and authority contained in the royal letters-