would lead to his succession in the event of his death being regulated by the law of this country, I should have greater difficulty in forming an opinion." The respondent's case, however, depends, as his counsel admit, upon the establishment of this complete legal domicile, in which they appear to me to have completely failed, and I therefore agree with my noble and learned friend on the woolsack, that the interlocutor appealed from ought to be reversed.

LORD KINGSDOWN.—I do not at all regret, that your Lordships have arrived at the conclusion which you have arrived at with respect to this appeal, and I believe the result is equally for the benefit of both parties. With respect to the question of domicile, I must confess, that I entertain much more doubt upon that point than has been felt by either of your Lordships who have addressed the House, and I was very much struck not only with the able judgment of the Lord Ordinary, but with the powerful arguments which were addressed by the respondent's counsel at your Lordships' bar. Having, however, expressed those doubts to your Lordships, and not meeting with any support from your Lordships, of course I very readily yield my own opinion upon that point, which, I dare say, is erroneous.

With respect to the last point adverted to by my noble and learned friend on the woolsack, I confess I think it necessary to enter my humble protest against being considered to concur in the doubts which my noble and learned friend has expressed upon that point. It is not necessary to decide it, and therefore I do not think it necessary to express any decided opinion upon the point, but I confess, if it were so, I should not be prepared to hold, that if the domicile were established, as the Lord Ordinary held it to be established, the jurisdiction might not probably be maintained. I mention this only in order that it may not be supposed, that the domicile of the wife would not follow the actual domicile of the husband.

The *Attorney General.*—I presume your Lordships' order will be to reverse the interlocutor, and to remit the case to the Court below, with the direction that the appellant be assoilzied with expenses.

LORD CHANCELLOR.—We have pronounced the order which in our opinion the Court below ought to have pronounced, and that is, that the appellant ought to be assoilzied from the conclusions of the action with expenses.

Interlocutor reversed.

Appellant's Agents, C. and A. S. Douglas, W.S.; Rogers and Jull, 40, Jermyn Street, London.—*Respondent's Agents,* Macrae and Ross, W.S.; Tennant and Darley, Gray's Inn.

MAY 27, 1864.

CHARLES WILLIAM CAMPBELL, *Appellant*, *v.* JOHN ALEXANDER GAVIN CAMPBELL, *Respondent.*

Succession—Competition of Heirs—Status of Legitimacy—Presumption of Law—Sequestration of Entailed Estates—Judicial Factor—*A claimed to be heir apparent of M, the last heir of entail in certain estates, having for fifty years been treated by all interested parties as next heir, and been cited as such by M, in proceedings under the Montgomery and Rutherfurd Acts. Four months after M's death, before A was served heir, B, the heir next in succession to A, petitioned the Sheriff of Chancery to be served heir to M, on the ground, that the father of A, and through whom A claimed, was illegitimate, owing to the mother of A's father being already married to another man alive at the time of her marriage to A's grandfather. The petitions of A and B for service being conjoined, B then petitioned the Court of Session to appoint a judicial factor, till the question of competition in the succession should be settled.*

HELD (affirming judgment), *That A having long enjoyed the status of legitimacy, and the case set up by B not being strong enough to displace the* primâ facie *right of A, the Court ought not to appoint a factor*—(LORD WENSLEYDALE *dissentiente*).[1]

The appellant, Charles William Campbell, younger, of Boreland, and John Alexander Gavin Campbell of Glenfalloch, were both claimants to the succession of the Breadalbane estates. The late Marquis of Breadalbane died on 8th November 1862, and the deeds of entail under which his estates were held, described the next successor to be "the heir male of the body of William

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[1] See previous reports 1 Macph. 991: 35 Sc. Jur. 577. S. C. 4 Macq. Ap. 711: 2 Macph. H. L. 41: 36 Sc. Jur. 538.

Campbell of Glenfalloch." It was admitted, that John Alexander Gavin Campbell would be the heir entitled under that destination, provided his father had been legitimate. On the other hand, the appellant, in the event of such illegitimacy, would be the next heir entitled. Both parties had presented petitions to the Sheriff of Chancery to be served heir, the respondent on 4th March, and the appellant on 25th March, but the appellant had presented a previous petition on 27th February. The petitions were conjoined, and advocated to the Court of Session, and had not yet come on for hearing. Meanwhile the appellant had petitioned the Court of Session to appoint a judicial factor for the Breadalbane estates, pending the competition of brieves. The estates were valued at £50,000 a year.

The petitioner in his petition alleged, that he was the son of Charles William Campbell of Boreland, who was the eldest son of John Campbell, who was the sixth son of the William Campbell of Glenfalloch already mentioned. With respect to his opponent's genealogy, the petitioner set forth, that the respondent was the son of William John Lambe Campbell, who was the illegitimate son of James Campbell, who was the second son of the William Campbell of Glenfalloch before mentioned. The mode in which he proposed to prove the illegitimacy of the respondent's father was as follows:—The respondent's grandfather, James Campbell, in 1782 married one Eliza Maria Blanchard, and died in 1806. This Eliza Maria Blanchard was alleged to be in 1782 the wife of one Christopher Ludlow, whom she had married in 1776. In proof of this, the petitioner produced the following certificate from the marriage register of Chipping Sodbury, in Gloucestershire:—"Christopher Ludlow of this parish, and Elizabeth Maria Blanchard, of the same parish, were married in this church, by license, this 5th day of June 1776, by me, R. Coates, curate." Shortly after the birth of their first child, Mrs. Ludlow eloped from her husband, which event caused her husband such distress, that he gave up his practice as a medical man at Sodbury, and went to America, where he became a garrison surgeon in New York. He returned to England in 1783, and died in 1784. In proof of which an obituary notice from a Bristol newspaper of the time was produced:—"Tuesday se'ennight, died at Portsmouth, Mr. C. Ludlow, son of Dr. D. Ludlow, senior, of Sodbury, in Gloucestershire." In further proof of the date of Ludlow's death, his will was produced, which was dated in June 1783, and proved in the Prerogative Court of Canterbury on 26th February 1784, so that it was inferred he must have died in the interval, as recorded in the newspaper. In further proof of his statement, the petitioner produced a letter from the War Office from the widow of James Campbell, dated 1807, stating, that she was in great distress, and requesting pecuniary relief; that she had been married by a Gaelic minister to Mr. Campbell in 1782, and next year they went to America; and that he died insolvent in 1806, leaving three children. And she added to her letter—"I beg, sir, you will excuse my being thus particular, as my motive is to obviate any doubts of my being Mr. Campbell's lawful wife." The petitioner, in reference to Eliza Maria Blanchard's marriage to James Campbell in 1782, and the death of Ludlow, her first husband, in 1784, said—"It is, of course, unnecessary to say, that, in these circumstances, the alleged marriage of James Campbell and Elizabeth Maria Blanchard was null, and their offspring illegitimate."

In answer to the above statement, the respondent set forth, after stating his genealogy, as follows:—During the life of the said William John Lambe Campbell, (the respondent's father,) his legitimacy was unquestioned and undoubted. As the nearest and lawful heir male of his father and grandfather, he inherited, and for nearly forty years enjoyed, the estate of Glenfalloch, and the respondent has, since his father's death, also enjoyed the same. That James Campbell, the son of William Campbell of Glenfalloch, died in 1806. In 1812 the estate of Glenfalloch dev lved on the heir male of the said James Campbell, and thereupon William John Lambe Campbell, as his only son, was duly served heir, and continued in possession till his death in 1850. "That the statements in the petition with respect to the respondent's grandfather, James Campbell, and, in particular, the statements to the effect, or importing, that he married or professed to marry a lady who had a husband alive at the time, and that his offspring are illegitimate, are denied." That in 1812, when the respondent's father succeeded to Glenfalloch as lawful son of James Campbell, the appellant's grandfather was alive; and had the respondent's father been illegitimate, the appellant's grandfather would have been entitled to succeed to Glenfalloch. Yet no attempt to claim such succession was ever made. That during his life the late Marquis of Breadalbane had treated the respondent as the legitimate heir of James Campbell, and in his will described him as his (the Marquis's) heir and successor to the entailed estates; that on the Marquis's death, the trustees and executors also treated the respondent as the heir apparent, and as such the respondent had been in possession of Taymouth Castle by arrangement with the late Marquis's servants; and that the respondent was also in course of renewing leases and doing similar acts as the heir apparent, when the present appellant first set up his claim. The respondent further produced various letters tending to shew, that the illegitimacy of his father was never suspected during his life, even by the appellant's family, nor had the statement now set up by the appellant been heard of until very recently.

The First Division refused the application for a judicial factor, Lord Deas dissenting; whereupon the present appeal was brought.

The appellant in his *printed case* prayed a reversal for the following reasons:—1. Because the interests of justice require, that the subjects in dispute, and regarding which the competition has arisen, shall be preserved until the rights of the competitors shall be determined. 2. Because, by the uniform practice of the Court of Session as the Court of Equity, sequestration of the estates has been awarded, and a factor appointed, wherever neither of the competing parties has attained possession. 3. Because in the present case neither the appellant nor respondent has obtained possession of the estates in dispute, so as to be entitled to claim any preference or privilege over the other. 4. Because, looking *primâ facie* to the evidence which the parties have produced along with the petition and answers, there is a *primâ facie* case against the respondent, and in favour of the appellant. 5. Because, if a judicial factor is not appointed, there will really be no one who, while the competition is undecided, will be entitled, in point of law, to draw the rents, to remove tenants, to grant leases, and generally to administer and manage effectually the large estates in question. 6. Because, without a judicial factor, serious disputes and conflicts will arise between the appellant and respondent, serious embarrassment will be caused to the tenants and occupants, and serious loss to the estates. 7. The appointment of a factor can be prejudicial to neither party. The refusal to appoint a factor may be productive of the most flagrant and irreparable injustice.

The respondent in his *printed case* supported the judgment of the Court of Session for the following reasons:—Because for upwards of fifty years the legitimacy of William John Lambe Campbell, the father of the respondent, has been recognized and acted on by the family of the appellant and respondent, and the said William John Lambe Campbell and the respondent have, on the footing of that legitimacy, been in the possession of the family estate of Glenfalloch, under a title the same as that which must govern the succession to the estates now in dispute, and such recognition and possession have in the most unequivocal manner proceeded from and been assented to by the appellant, and his father and grandfather: Because the respondent, moreover, was, during the life of the late Marquis of Breadalbane, recognized and treated as his heir and successor in the Breadalbane estates, and upon the death of the late Marquis entered into and now is in the possession of the estates; and because for the Court to interfere *brevi manu* with the possession of the estates under such circumstances, and on averments and evidence wholly unworthy of being weighed against the legal presumption of legitimacy, would be contrary to principle and authority.

Lord Advocate (Moncreiff), *Rolt* Q.C., and *Anderson* Q.C., for the appellant.—The Court of Session ought to have appointed a judicial factor in pursuance of the appellant's petition. There is a *bonâ fide* dispute between the parties as to who is the heir-male of William Campbell of Glenfalloch, and as yet there is nothing but assertion on both sides, for the time for proving the allegation has not yet arrived. Therefore, there is no reason why the Court should give more weight to one side than the other. Neither party has yet obtained possession, for though the respondent alleges he obtained partial possession, this is denied, and there is no reliance placed on that assertion in the Court below. At most, there was here only a scramble for possession, but no peaceable possession obtained by either party, and therefore it ought not to be regarded—*Re Innes and Kerr*, 13 F. C. 643 (23d June 1807); *Brown* v. *Robertson*, 7 D. 745; *Elliott* v. *Scott*, 5 D. 1075. There is less possession here than there was in the *Roxburgh case*. It being admitted, therefore, that there is a *bonâ fide* dispute as to the succession, and that there has been no peaceable possession obtained by either side, the Court has power to appoint a judicial factor. The power of the Court is undoubted to appoint a factor in these circumstances—Ersk. ii. 12, 55. There is no ground for saying, that the respondent is the heir apparent, for that is the very matter disputed, and therefore he is not entitled as such to any rights whatever connected with the succession, for such rights only attach to one who is an undisputed heir apparent—Bell's Prin. § 1677-8; Ersk. iii. 8, 54; *Geddes* v. *Bull*, M. 12,641.

[LORD CHANCELLOR.—Suppose here that there had been no allegation of illegitimacy of the respondent's father, then the respondent would be the heir apparent, and as such entitled to possession as one of the incidents of that character. Then is he to be deprived of his status and rights incidental thereto on the mere allegation of illegitimacy of the father?]

It would, perhaps, not be sufficient to make a general allegation of illegitimacy, for that might be treated as frivolous. But when a case like that of the appellant is stated, not at random but with circumstantiality and detail, and colourably sustained by documents, it sufficiently rebuts the case of the respondent, so as to raise the issue and make the matter doubtful. Even if there were no allegation of illegitimacy, still it would be necessary to give some evidence of the apparency—More's Stair, 321, 394 (Notes); *Boyd* v. *Gibb*, M. 3989.

[LORD CHANCELLOR.—Even if every word of your petition is proved, yet it does not follow that the respondent may not be the lawful heir. There is no statement of the time of his birth.]

The case of the appellant is stated with as much detail as is necessary. Allegations alone are in question at the present stage, and if the allegations on both sides are equally likely to be proved,

and the contrary cannot be said, then there is enough to justify the appointment of a judicial factor. It sufficiently appears from the petition of the appellant, that the respondent is alleged to be not the legitimate heir by reason of his father being illegitimate. It is not necessary to set out every step of the proof of that fact. It is enough that it is substantially alleged. While the refusal to appoint a judicial factor will give a great advantage to the respondent, the appointment will do neither party any harm. If the respondent be able to draw the rents, he may consume them before the dispute is ended, and then it may be impossible for the appellant to recover them back, if he should be ultimately found the legitimate heir. The appellant's petition is founded on a rule of universal justice, which is also acted on in England, viz. that where the property is in danger, and there is a dispute as to the right to it, the Court will appoint a receiver—*Bambrigge* v. *Baddeley*, 3 Mac. & G. 413; *Wood* v. *Hitching*, 2 Beav. 289; *Atkinson* v. *Henshaw*, 2 V. & B. 85; *Rutherford* v. *Douglas*, 1 Sim. & St. 111.

The *Attorney General* (Palmer), and *Solicitor General* (Young), and *Sir H. Cairns* Q.C., for the respondent.—It is a mistake to represent this as a case of mere assertion on both sides which the Court must treat as evenly balanced, until the trial takes place. On the contrary, it is admitted by the appellant, that the respondent is the apparent heir but for the assertion made by the appellant, that the respondent's father was illegitimate. The status of legitimacy has been enjoyed by the respondent and his father for half a century, and on the death of the Marquis the respondent assumed, as a matter of course, the status of apparent heir, and as such obtained possession in a peaceable and orderly manner. There was no race or scramble for possession, for the respondent, without any objection until 27th February, four months after the Marquis's death, acted as apparent heir.

[LORD CHANCELLOR.—You can scarcely call it a peaceable possession, for before any rent accrued the adverse claim of the appellant was set up.]

At all events, the appellant was bound to set forth in his petition all that was necessary to found his claim. Now, nothing was relied upon in that petition except the respondent's want of service, and the fact of competition. The appellant did not allege the fact, that there had been no possession acquired by the respondent. It is admitted, that the respondent was always treated as apparent heir by the Marquis personally, and also by the proceedings under the Montgomery Act and the Rutherfurd Act. The respondent's father was served heir to the estate of Glenfalloch when the appellant might have, according to his present case, disputed the service, but did not do so. That service established the fact of propinquity to the Marquis. Therefore, the respondent's status is clearly admitted, and he ought not to be deprived of it on mere assertions. The case of the appellant does not answer the *primâ facie* case of the respondent. It is not stated when the discovery of the illegitimacy of the respondent's father was made. He says, one Eliza Blanchard was married to one Christopher Ludlow, but he does not shew the identity of that person with the wife of James Campbell. Nor is the identity of Christopher Ludlow clear. Nor does it follow, even if the identity is made out, that the respondent's father must necessarily have been illegitimate, for the date of birth of the respondent's father is not asserted, nor the date of Ludlow's death. Therefore, the case of the appellant amounts to little more than a general assertion of illegitimacy, which any one may make. No case is cited where the Court below has interfered to appoint a judicial factor, though it is not denied, that the Court has a discretion. This is not the case of an estate falling into ruin for want of some one to take care of it, as it was in *Bambrigge* v. *Baddeley*.

[LORD CHANCELLOR.—Must it appear from the statements of the petition, that it is more than probable that they are true, before the Court will interfere?]

What must appear must, at all events, be more than mere assertion.

[LORD WENSLEYDALE.—What more can a man do in the circumstances than assert, seeing that he has no opportunity of proving his case at the present stage?]

The burden lies on the petitioner to set up a good *primâ facie* case, which he has not done. Though the appellant has produced no case in his favour, there is a clear authority for the respondent in *Munro* v. *Graham*, 11 D. 1202, where the next heir of entail, after the child of the last heir, set up a claim on the ground that the child was supposititious, but the Court refused, on such an assertion, to appoint a factor. In *Hawarden* v. *Dunlop*, 24 D. 1267, though the parties had both asked for a judicial factor, it was indicated, that in the first instance the heir apparent might well have resisted such an appointment.

Lord Advocate replied.—There was nothing like peaceable possession here, and therefore the Court has jurisdiction to interfere. As to the status of apparent heir, all that is said on that point applies only where his character is admitted; but when that radical title is the sole point in dispute, his legal rights are *nil* at the present stage. The allegations of the illegitimacy of the respondent's father are sufficiently set out, at least in substance, and the respondent does not answer that allegation, except by a vague general denial. He ought to have stated that the parents were subsequently married before his father's birth. As to the service of the respondent's father as heir in the Glenfalloch estate, that was a proceeding in absence, and so not binding on the appellant, and, therefore, it does not prove the fact of propinquity. The assertions

on the one side are therefore met by assertions on the other, and the Court should favour neither side, and appoint a judicial factor.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, the late Marquis of Breadalbane was tenant in tail of very large estates in Scotland, under two deeds of entail, one dated the 5th May 1775, and the other dated 7th March 1839. In both these deeds of entail the destination was the same. The late Marquis died in November 1862. He left no lawful issue on his death, and by reason of the failure of certain intermediate substitutions, the succession opened to the next substitutes called in the deeds of entail, viz. to William Campbell of Glenfalloch, and the heirs male of his body. This William Campbell had seven sons, but the issue of his eldest son failed before the death of the late Marquis. The respondent alleges, that he is the grandson and heir of James Campbell, the second son of Glenfalloch, and therefore nearer in the substitution than the appellant, who claims as the grandson and heir of John Campbell, who was the sixth son of Glenfalloch.

The contest between the parties arises from the appellant alleging, that James Campbell, the natural grandfather of the respondent, was never lawfully married to the respondent's grandmother, and that therefore the respondent's father was an illegitimate son of James Campbell, and consequently, that the respondent is not entitled to the succession. The competition arises by both parties having presented petitions under the Statute of the 10th and 11th Vict. cap. 47, entitled "An Act to amend the law and practice of Scotland as to the Service of Heirs." The respondent's petitions were presented on the 4th March 1863; the appellant's petitions were presented on the 25th March following. There had been an earlier but informal petition presented by the appellant on the 27th February 1863.

The Sheriff having conjoined the petitions, the proceedings were advocated to the Court of Session, where the case will proceed to a jury trial, and the concluding claims of the appellant and respondent will be adjudicated upon.

In the mean time, the appellant made an application to the Court of Session, that a judicial factor or receiver might be appointed to receive the rents, and administer the estate during the pendency of the litigation, and the present appeal is presented from an interlocutor of the Court of Session, by which that application was refused.

The application for a judicial factor or receiver, *pendente lite*, is an appeal to the prætorian or equitable jurisdiction of the Court of Session, and it does not appear to me to be possible to extract from the decided cases, or to lay down upon principle, any general rule that should govern such applications. The decision of each case must, in my opinion, depend on its own peculiar circumstances.

By the law of England, if on the death of an owner of land in fee simple, a controversy arises between the heir at law and alleged devisee, the former denying the validity of the alleged will, power is given by the recent Statute of the 20th and 21st Vict. cap. 77, to appoint a receiver of the real estate of the deceased owner, but no such power existed anterior to that Statute, nor has any Court in England power to interfere by the appointment of a receiver of real estate, where the ownership is disputed by two persons, each claiming to be heir at law of a deceased owner; or, where the dispute lies between two persons claiming under successive limitations in a settlement of real estate, the more remote remainderman, for example, alleging that the prior remainderman is illegitimate, there is no power in any Court in England to appoint a receiver of real estates pending the litigation. No example or analogy, therefore, can be derived from the law of England which is applicable to the subject of the present appeal. Some few general principles may be collected from the cases decided by the Court of Session on this subject.

First, a judicial factor will not be appointed by the Court as against competing parties, where one of such parties has already obtained possession. Such possession, however, must be unequivocal and peaceable, that is to say, possession must have been clearly attained before the competition arose. Such does not appear to have been the case in the present instance, the petitions for service being so nearly contemporaneous.

Secondly, it may be deduced from the cases, particularly the case of *Munro* v. *Graham*, that the Court will not act upon mere allegation.

Here the case of the appellant rests entirely on the averment, that the respondent's father was illegitimate. He has undoubtedly stated a circumstantial case, but it at present rests entirely on allegation. All presumptions and probabilities are in favour of the apparent prior title of the respondent. For fifty years preceding the present claim of the appellant, the legitimacy of the respondent's father was recognized and treated as an undisputed fact. The lands and barony of Glenfalloch are held under an entail containing the same limitation to James Campbell, and the heirs male of his body, as is contained in the entail of the Breadalbane estates, and under which those estates are now claimed, both by the appellant and respondent. If the appellant, therefore, is entitled to the Breadalbane estates, he would also claim, in the same right, the barony of Glenfalloch.

But on the death of William Campbell, the common ancestor of the appellant and respondent, in the year 1812, William John Lambe Campbell, the father of the respondent, who is now alleged by the appellant to have been illegitimate, was duly served nearest and lawful heir of taillie and provision in the lands and barony of Glenfalloch, and was afterwards infeft in the same lands and barony. He continued in the undisputed possession and enjoyment of the Glenfalloch estate as heir of the body of William Campbell until his death in 1850; and upon his decease, the respondent was in 1850 served nearest and lawful heir of taillie and provision to his said father, and in that right completed his title to the said land and barony, and has ever since had the undisputed enjoyment thereof.

Practically, therefore, there has been for the last 50 years an assertion of right by the respondent and his father adverse to the title which is now set up by the appellant. To this must be added the fact, which is not disputed, that the respondent's father was throughout his life recognized and treated as being without question the legitimate son of his father, James Campbell, and that, in several legal proceedings, he was called by the late Marquis of Breadalbane as the heir next entitled to succeed to him in the estates in question. These are undisputed facts, and they constitute a strong *primâ facie* title in the respondent. They are met by a statement of circumstances which, to adopt the words of the Lord President, are at present mere matters of assertion. But the uncontested facts which I have stated furnish strong *primâ facie* evidence, that the respondent is the heir apparent of the late Marquis, and he ought not to be deprived of any rights which belong to that character, until some stronger proof to the contrary has been adduced on the part of the appellant. The appellant and respondent are not on an equal footing before the Court. The respondent, if his father was legitimate, is confessedly the person entitled, and the fact of that legitimacy is not at present brought into any reasonable doubt. It is on this ground, and not on the ground of the insufficiency of the averments of the appellant, that I concur with the majority of the Judges in the Court below, and am of opinion, that the interlocutor should be affirmed, and the appeal dismissed, with costs.

LORD WENSLEYDALE.—My Lords, the rule of law on this subject, as explained by Mr. Erskine, is, that "sequestration of lands, under which may be comprehended heritable subjects, is a judicial act of the Court of Session, whereby the management of the subject sequestrated is taken from the former possessor, and intrusted to the care of a factor or steward named by the Court, who gives security for his administration, and is by his commission accountable for the rents to all having interest. This diligence is competent where it is doubtful in whom the property of the lands is vested, if sequestration be demanded before either of the competitors has attained possession."—ii. 12, 55.

I take it to be clear, that there is in this case no possession of such a nature as to deprive the Court of its right to exercise its prætorian jurisdiction. All the Judges have concurred in that opinion, that there is no undisputed possession. There is some possession in the respondent, no doubt, which, as evidence of title, I will afterwards notice, but that is not enough.

Under the circumstances of this case, ought the Court to interfere? Is there a fair, disputable question between the competitors as the case now stands, on which either may succeed? If there is, it is certainly most desirable to put an end to the inconvenience that arises from the heir of entail, whoever he is, being incapable of giving valid discharges for rent. Payment by the tenant to one may be questioned by the other hereafter; no leases in renewal can be granted; no rights of a landlord can be exercised by either competitor so as to be valid; no improvements can take place until the question is decided. This is a great evil. If sequestration is granted, there will be ultimately no mischief whatever. The rents may be received, and all proper measures taken for the good of the tenancy, and when the question is decided the real party entitled will have all his rights.

I think there is a fair disputable question between the appellant and respondent. The respondent has a very good *primâ facie* case and a strong one, on which, if unanswered, he must certainly prevail. He has been always reputed a legitimate heir. He was so treated by Lord Breadalbane in his lifetime. His father was cited by Lord Breadalbane under the Montgomery Act 10 Geo. III. as heir of entail. He succeeded to the entail of Glenfalloch as heir of entail to his father and grandfather, and was in possession many years. Lord Breadalbane's executors put him in possession of part of the estate on his death. He is alleged to have granted leases. He was also recognized as his heir in the will of the late Marquis.

It is, however, to be noticed, that some of the acts done by him after the late Marquis's death may have been done when the estate was in contest after caveat. But even allowing, that a case was made out on the part of the respondent, amply sufficient to constitute him, *primâ facie*, heir of entail to the late Lord Breadalbane, (and if unanswered, that case must unquestionably prevail,) yet, on the part of the petitioner, by way of answer to this case, it is averred, that the father of the respondent was illegitimate, being the son of a marriage contracted with his grandmother when she was already married to another man who was living at the time of that marriage. If that fact is sufficiently averred, and it, being denied by the respondent, should be proved on the trial in competition, the respondent's *primâ facie* case would be entirely done away with, and

be of no avail wherever the respondent's father may happen to have been born. Unless the respondent could prove a subsequent marriage between his grandfather and grandmother after the first husband's death, he would most certainly be illegitimate. The respondent has not alleged or suggested that there was any subsequent marriage of any sort, regular or irregular, after the first husband's death ; but suppose, that he can on the trial give evidence of an irregular marriage, very nice and difficult questions would arise as to its validity.

There is a preliminary question made, whether the fact of the previous marriage has been sufficiently averred. I had some doubt at one time, but now I think sufficient facts, or evidence of facts, are stated, which, if true, establish that previous marriage. It is alleged, that the competing claimants' grandmother herself stated that she was married to Captain James Campbell, in September 1782, which is clearly admissible evidence as to the period of her marriage. The non-production of a regular register of that marriage is accounted for.

It is averred, that at the time of this alleged marriage in 1782, she was a married woman, and her husband did not die until some time afterwards ; that her husband was Christopher Ludlow, of Chipping-Sodbury, to whom she was married on the 5th June 1776, the register of which is stated. It was averred that the real husband died in January 1784.

The fact of that previous marriage is denied by the respondent in very loose and general terms, but whether it be true or not, is the principal and may be the sole question. The case, upon the present allegations of both parties, depends entirely upon its truth, and the only method of trying the truth is by the trial in competition.

Surely, therefore, the truth of the fact ought, in proper course, to be ascertained by proceeding to proof ; and the respondent ought not to be allowed to uplift the rents, and to attempt to act as owner in all respects to the great inconvenience of the tenants and their possible injury, whilst the question, upon which all at present appears to depend, remains undecided. If the fact alleged of the previous marriage is true, the appellant ought not to have any profit by wrongfully denying it ; he ought not to have all the advantage of taking possession and receiving the enormous rents pending the litigation of that question which he has improperly put in issue. His denial of the allegation of a previous marriage, therefore, seems to me to be wholly immaterial with respect to the question of appointing a judicial factor. Had he admitted the previous marriage of his grandmother, and not alleged a previous valid marriage after the death of the first husband, he would have been out of Court. This important question of the previous marriage on which all at present appears to turn, ought to be regularly tried ; and, in the mean time, I feel very strongly that a judicial factor should be appointed, and the trial proceed.

LORD CHELMSFORD.—My Lords, the question which the House is called upon to determine is of some nicety and difficulty. It is appealed to, to supersede the exercise of a judicial discretion by a majority of the Judges of the First Division of the Court of Session, in refusing to sequestrate and place under the management of a judicial factor estates of considerable value, which are the subject of a pending litigation.

The discretion which is vested in the Court upon applications of this description is not an arbitrary discretion, but one that ought to be guided by a careful consideration of the circumstances of each particular case, of the respective positions of the litigant parties, of the nature of the claim of the competitor who invokes its interposition, and of the necessity of intermediately protecting the property in dispute for the common security. The exercise of such a discretionary jurisdiction ought not to be disturbed, unless it can be clearly made to appear, either that it proceeded upon erroneous principles, or that the evidence upon which the discretion of the Court was founded should have conducted a correct and reasonable judgment to the opposite conclusion.

Upon a careful consideration of the case, and of the able arguments at the bar, I cannot find any sufficient reason why your Lordships should overrule the discretion of the Court of Session, and direct a sequestration of the estates in controversy.

The competency of the application for the appointment of a judicial factor with reference to the character of the respondent's possession of the estate is asserted by all the Judges, and upon this ground there is no impediment to the appellant's right to invoke the intervention of the Court. By his petition he stated certain facts as the ground of his claim to have the property placed in security until the contest for it shall be decided. He alleged that the respondent is not the lawful heir of entail of the estates in dispute, because his father was the illegitimate offspring of his grandfather and grandmother, whose marriage took place at a time when his grandmother's former husband was still living, and he produced certain documents in support of his allegation, which, he contended, raised a sufficient *primâ facie* case to entitle him, if unanswered, to the interposition of the Court.

It must be observed, that there is a great deal wanting in the statements in the petition and in the documents to establish a complete *primâ facie* case, or anything more than a probability, that upon a future occasion a case of the description suggested will be forthcoming. The allegations of facts and circumstances are so loosely and imperfectly made, that the appellant seems to have considered it necessary to do nothing more in support of his application than to give the Court a general description of the nature of the case with which he proposed at the proper time to

encounter the claim of the respondent. He did not establish, nor profess to establish, any such title as would call upon the respondent for the same sort of answer as may be hereafter necessary upon the competition of brieves.

In this incidental proceeding the respondent, in my opinion, is not called upon to do more than rebut the incomplete and presumptive case of the appellant, by shewing a state of things utterly inconsistent with the supposed illegitimacy of his father. This he appears to me to have fully done by the facts and circumstances which he has presented to the Court. He is legally clothed with the character of heir apparent, and entitled to the enjoyment and exercise of all the rights which belong to that character. His father lived and died not only with his legitimacy unchallenged, but with a solemn and deliberate recognition of it on many important occasions. The event which is supposed to impeach that legitimacy occurred more than 80 years ago, and during this long period all the acts of the family, which speak more strongly than declarations, are nothing but repeated admissions of the legitimate claims of the respondent's line of succession.

The circumstances connected with the lands and barony of Glenfalloch are peculiarly striking, because the destination in the deeds of entail of those estates in question are the same, and it was as heir male of the body of James Campbell that the respondent's father succeeded to the lands of Glenfalloch, and it is in the same character that the respondent has now become the apparent heir of the Breadalbane estates. The service of the respondent's father as heir of taillie and provision to the lands of Glenfalloch, was carried through by the grandfather of the appellant, who would himself have been entitled to the property if the respondent's father had been illegitimate. For 38 years the respondent's father held these estates to which it is now alleged he had not a shadow of title, and was succeeded peaceably in 1850 by the respondent who has been in possession ever since. More than half a century has therefore elapsed since the title which is now in competition has been acquiesced in by the family of the appellant, whose right it displaced.

The proceedings of the late Marquis of Breadalbane, under the Montgomery and the Rutherfurd Acts, in which the respondent's father at first, and himself and his sons afterwards, were called as the heirs of entail next in order of succession to the Marquis, are very important. In all the petitions under the Rutherfurd Act, in which the consent of the three next heirs of entail is required, the father of the appellant was cited as next in succession to the respondent and his sons, and was thereby almost challenged to dispute the right of the respondent to the position which was given him, and by which he was recognized as having a voice in the burdening an estate to which it is now said he had no sort of title.

So in the proceedings for the purchase of the portion of the entailed estates sought to be sequestrated under the power contained in the deed of entail, which required, that the purchase should be made at the sight and by the authority of the Court of Session, or of the Judge Ordinary, upon citing the two nearest heirs of entail to the estate of Breadalbane, a species of judicial sanction seems to be given to the same order of succession.

I quite agree, that all these recognitions, however strong, will be of no avail against clear and satisfactory proof, that the respondent's grandmother was married to his grandfather at the time when the former husband was living; and that if such proof should hereafter be given, it will be necessary for the respondent to shew a subsequent lawful marriage between them. But the present question is, whether, as an answer to the application for a sequestration based upon the materials presented to the Court, the circumstances stated by the respondent are not abundantly sufficient to rebut the presumption raised by the appellant's statement, and to warrant the Court in refusing to displace the respondent from his position of apparent heir, and to deprive him of any of the rights which belong to him in that character. The Judges who decided against the sequestration proceeded entirely upon the case as it then stood; and all of them expressly stated that the application of the petitioner might be renewed, if, in the course of the competition of brieves, its aspect should be changed, and the statements of the appellant receive further confirmation. And, accordingly, the interlocutor reserves to the petitioner leave to present another application in the event of any such change in the state of the proceedings or circumstances as may make the appointment of a judicial factor proper. I think the discretion exercised by the Court, more especially with this reservation, was a sound one, and I agree with my noble and learned friend on the woolsack, that the interlocutor ought to be affirmed.

LORD WENSLEYDALE.—My Lords, I wish to inquire whether it is usual to give costs where there is a difference of opinion between the Judges in the Court below. Of course, I wish to conform exactly to usage, and I know that the general rule is, that the costs should follow the result; but as here the learned Judges have been divided in opinion, surely there was ground for the person, against whom a majority of the Judges have pronounced, coming to the Court of Appeal.

LORD CHELMSFORD.—My Lords, I believe there is no doubt whatever, that the invariable course is, that unless there are some very peculiar circumstances, the costs should be given to the respondent, if the successful party.

LORD WENSLEYDALE.—The general rule is so, undoubtedly; but there have been two or three instances since I have sat in the House, in which exceptions have been made.

LORD CHANCELLOR.—My Lords, I should be extremely sorry if any sanction were given by your Lordships to the suggestion now made by my noble and learned friend. There is hardly an appeal from Scotland in which there is not some difference of opinion between the learned Judges. Having regard to that fact, and to the smallness of the amount of property frequently involved in these cases, it would be productive of the greatest possible mischief, if your Lordships were to abstain from abiding by the rule, which is the only wholesome one, namely, that, save under particular circumstances, the costs should follow the decision when the appeal is dismissed.

LORD CHELMSFORD.—My Lords, I entirely agree with my noble and learned friend upon the woolsack. The general rule unquestionably is to give the costs to the respondent when the successful party; but there have been particular cases in which, under peculiar circumstances, that rule has been departed from. I see nothing peculiar in this case, except a difference of opinion amongst the learned Judges of the Court of Session, which, as my noble and learned friend upon the woolsack says, frequently occurs, and I therefore think that there is no ground for departing from the general rule in this case.

LORD WENSLEYDALE.—I will not press it further; but, certainly, there have been cases within my recollection in which, where there has been a difference of opinion between your Lordships and also in the Court below, the costs have not been insisted upon; but, of course, I acquiesce in the decision of your Lordships.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, H. Buchan, S.S.C.; Martin and Leslie, Westminster.—*Respondent's Agents*, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin, Westminster.

MAY 27, 1864.

CATHCART BOYCOTT WIGHT, and his Tutors and Curators, *Appellants*, *v.* The EARL OF HOPETOUN, *Respondent*.

Landlord and Tenant—Demand of Renewal of Lease—Entry at Whitsunday—Entry as to Arable Land—*H., in* 1842, *granted a lease of a farm to W. for nineteen years, the time of entry as to houses and grass to be Whitsunday, and as to arable land at separation of the crop of* 1842. *H. bound himself to renew the lease on a demand made "at least twelve months before the expiry of the above term of nineteen years." The demand of renewal was made on* 1st *August* 1860, *the lease expiring in* 1861.

HELD (affirming judgment), *That the "twelve months before expiry" were to be computed as ending on Whitsunday* 1861, *and, therefore, the demand being too late, the landlord was not bound to renew.*[1]

This action of declarator was raised by the Earl of Hopetoun against Cathcart Boycott Wight, tenant of the Mains of Ormiston, seeking to have it declared, that the pursuer was not bound to renew a lease which expired at Whitsunday 1861, and that the defender was bound to remove.

The original lease was granted in 1747 by George Cockburn, Esq., now represented by the pursuer, to Alexander Wight, now represented by the defender. The time of entry was declared to be, as to the grass and houses, at Whitsunday 1747, and as to the arable land, at the separation of the crop 1747. The lease contained the following stipulation:—"Upon the said Alexander (Wight) and his foresaids, their tendering and paying to him, the said George (Cockburn) or his foresaids, the sum of thirty two pound sterling money as a year's rent of the subjects hereby set by way of fine and consideration to the said George and his foresaids, over and above the yearly rent after mentioned, and demanding a renewal of this lease from the said George and his foresaids, in a legal manner, before a notary and two witnesses, at least twelve months before the expiry of the above term of nineteen years, that then, upon the said Alexander and his foresaids making such tender, payment, and demand, the said George and his foresaids shall reiterate and renew this lease in favours of the said Alexander and his foresaids, upon their own proper charges and expenses, for other nineteen years longer for payment of the same yearly rent, att

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[1] See previous reports 1 Macph. 1097: 35 Sc. Jur. 612, 623. S. C. 4 Macq. Ap. 729: 2 Macph. H. L. 35: 36 Sc. Jur. 543.