Tuesday, May 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KELMAN *v.* MACHARG (BARR'S TRUSTEE).

Sale—Mutual Contract — Right of a Purchaser of Heritage to Resile— Where neither Entry nor a Good Title to be had at the Stipulated Term.

By minute of agreement, dated in February 1877, A agreed to sell to B certain houses, the term of entry to be "at May 1877." The minute bore that A had then only a verbal offer of the subjects in question, and that in the event of his being unable to purchase them or to give a good title the missive should be void. B's known object in buying was to sell again at a profit. The state of the fact in regard to A's title was that a missive of sale had been entered into bearing the same date with the minute above referred to, by which A agreed to purchase the subjects in question from the original seller, but this missive was repudiated by the latter before May, and an action of implement at A's instance was not decided in A's favour till the following November.

Held, that in the circumstances, time was of the essence of the contract, and A being unable in May 1877 to fulfil his part of it by giving entry and a good title, B could not be compelled to implement the purchase.

James A. Kelman, writer in Glasgow, the appellant in this case, on 22d January 1877 entered into the following agreement to sell to Joseph Barr, draper there, the subjects therein mentioned:—"That the first party (Barr) has agreed to purchase from the second party (Kelman) these three tenements of dwelling-houses fronting Westmuir Street, Parkhead, and the three tenements fronting Wellington Street there, with the ground behind the tenements in Westmuir Street extending to Wellington Street, in all about 2000 yards. The price is £2800, and the feu-duty £3, 16s. The entry to the property shall be at May 1877. The present rental is declared to be £167, but in the event of its being found to be less the second party shall have the option of cancelling the bargain. As the second party only holds at present a verbal offer of the property, it is hereby expressly declared that in the event of his not being able to purchase it from the present proprietor, or in the event of its being found that the title is defective, this missive shall be void and null.

"In the event of the first party not being able to arrange a bond for more than £2000 over the property, the second party will allow £500 of the price to remain on bond over the property for one year. The first party will pay off the existing bond.

"In the event of the first party selling the property before getting a conveyance or not taking the conveyance in his own name, he shall pay to the second party in name of commission a sum equal to 5 per cent. on the profit of the price obtained above £2800. In witness whereof," &c.

On the same date the appellant entered into a purchase of these same subjects by missive from a Mr Tait at the price of £2080. The missives between the appellant and Mr Tait was as follows:—

"*January* 22, 1877.

"Mr Kelman,—I hereby offer to sell you the three tenements in Westmuir St., and the three tenements in Wellington St., with back ground extending to about 2000 yards, with entry at May next — the rental is £167, including water, the feu-duty under £4—at the price of £2080. It is on condition that you pay the expenses of wiping off the present bond, and also you pay the expense of my half of the conveyance and stamp. Of course I guarantee a good title. You are to do the work of the conveyance for me.—Yours truly,

"WILLIAM TAIT."

"*Glasgow*, 22 *Jany.* 1877.

"William Tait, Esq.—I hereby accept of the foregoing offer.—Yours truly,

"JAS. A. KELMAN."

Barr's estates were sequestrated on 4th May 1877, and the respondent in the present appeal, Mr E. S. Macharg, accountant, Glasgow, was appointed trustee.

The bankrupt, after the date of the missive between himself and the appellant, endeavoured to sell the property in order to make a profit on the transaction, but was unable to do so. Mr Tait, the original seller, afterwards refused to implement the missive of sale, and the appellant was in consequence unable to give delivery of or a title to the property in May 1877.

On 25th May 1877 the appellant raised an action against Tait to compel implement of the missives between them, to which Tait lodged defences.

On 31st May the appellant wrote to the respondent asking if he, as trustee on Barr's estate, intended to implement the purchase, and intimating that if not he claimed to be a creditor on Barr's estate for £720, the profit which he would have made if the sale had been concluded and the price paid. On 26th June following the appellant made an affidavit and claim on the bankrupt estate for that amount.

The respondent on 17th September 1877 as trustee pronounced a deliverance rejecting the appellant's claim.

Against that deliverance Kelman appealed, and a record was made up, in which the appellant, *inter alia*, averred that the bankrupt had by his conduct put it out of his power for himself or his trustee to resile from the bargain.

The Sheriff-Substitute (ERSKINE MURRAY) after a proof had been led of the averments of parties, for the purpose of inquiry into the appellant's allegations referred to, refused the appeal, and sustained the deliverance of the trustee. He added the following note:—

"*Note.*—The Sheriff-Substitute has had some hesitation in this case. The legal points are by no means free from difficulty, and he cannot altogether adopt the grounds of the trustee's refusal. But, on the whole, he considers that he is bound in this matter to follow the rule laid down in *Hunter* v. *Carsewell*, January 17, 1822, 1 S. 248, where it was held that a seller who had obliged himself to give entry at Whitsunday, and who was prevented from doing so by an unfounded interdict at the instance of a third party, could not enforce the sale against the purchasers. Here the appellant bound himself to give entry in May; and was unable to do so till after he got his decree in November. He was certainly unable to

do so on the last day of May, when he called on the trustee to take up the purchase, or at the date of the latter's refusal.

"In the case of *Raeburn* v. *Reid*, cited for appellant, there was no question of entry at all, but simply one as to the examination of titles, a matter of some time; and in that case, as actual entry moreover was not to be given for a while, time was of little importance.

"The appellant has not attempted to prove any of the averments referred to in the note to the last interlocutor."

Kelman appealed to the Court of Session.

Appellant's authorities—*Raeburn* v. *Baird*, July 5, 1832, 10 S. 761; *Hunter* v. *Carsewell*, January 17, 1822, 1 S. 235; *Black* v. *Dick*, May 17, 1814, Hume 699; Bell's Lect. 2703.

Respondent's authorities—*Hall, &c.* v. *Donaghy*, November 24, 1866, 5 Macph. 57; *Drummond* v. *Hunter*, January 12, 1869, 7 Macph. 347.

At advising—

Lord Ormidale—Although this case is not altogether unattended with difficulty, I have, after full consideration, come to be of opinion that the judgment of the Sheriff-Substitute affirming that of the trustee in Barr's sequestration is well founded.

By minute of agreement between the appellant Kelman and the bankrupt Barr, dated 22d January 1877, Kelman sold to Barr the house property in question at the price of £2800. It was stipulated by the agreement that the purchaser's entry "to the property shall be at May 1877;" and the minute also bears that as Kelman "only holds at present a verbal offer of the property, it is hereby expressly declared that in the event of his not being able to purchase it from the present proprietor, or in the event of it being found that the title is defective, this missive shall be void and null."

It appears to me that the contingencies thus referred to, and the purchaser's term of entry, must be held to have had reference to the same date, viz., May 1877. The entry of Barr to the property in question was, I have no doubt, fixed to be, in the words of the minute of agreement, "at May 1877," because the important term of Whitsunday—important as an entry and removal term from house property in Glasgow—occurs about the end of that month. And the declaration in the minute that the transaction shall be void and null in the event of its being found that the vendor had not got the property at all, or that the title to it was found to be defective, must also, I think, be referable to the same thing, for otherwise the period within which he would have to acquire the property and establish a good title to it, so as to give the purchaser Barr the requisite entry, would be left quite indefinite—a view of the matter which cannot, I think, be reasonably entertained, especially bearing in mind that the appellant Kelman had from the 22d of January to the end of May to make the necessary preparations, and that, as was admitted on the part of the appellant at the debate, the known object of Barr was to sell again at a profit; but of course it was impossible for him to sell without previously obtaining right to the property under a good title. It is indisputable, however, that the appellant's title was, when the time of settlement arrived at the end of May 1877, "defective," that is, imperfect and incomplete, for it consisted of a simple missive merely by a person of the name of Tait, which that individual refused to implement and resisted an action for its implement on various grounds till November 1877, five or six months after the time when the transaction between the appellant and the respondent ought to have been closed.

I must hold therefore, having regard as well to the express stipulations of the minute of agreement as to the object of the parties in entering into it, that time was of the essence of the contract in the sense that the appellant was bound to be ready to give entry to or possession of the property with a good title by the end of May 1877. Without such entry the purchaser Barr could neither sell again or do anything, however necessary or urgent it might be in the protection of or otherwise in regard to the property or the collection of rents due by the tenants in the occupation of it. And if this be so, there can be no doubt, I think, that the appellant, who as the vendor of the property was not then in a position to fulfil or implement his part of the contract, and he could not call upon the respondent, as in the place of Barr the purchaser, to implement the counterpart—that is to say, to pay the price subject to the condition that if he did not he would be liable in £720 of damages. On the contrary, it appears to me that the respondent, as trustee on Barr's sequestrated estate, was entitled not only to decline, as he did, to go on with the transaction, but also that he was entitled to take up that position without subjecting the sequestrated estate in damages, seeing that neither he nor Barr committed any breach of contract. The breach was on the part of the appellant, who when he called on the respondent to adopt the contract neither offered nor had it in his power to offer implement of it. He did not, and could not, in return for the price, offer entry or possession of the property with a good title. And that the word "entry" as used in the minute of agreement must be held to mean legal possession under a good title is clear from the case of *Tilley* v. *Thomas*, November 4, 5, 11, 1867, L.R. 3 Chan. App. 61, where the observations of the Lords Justice Cairns and Rolt are valuable, not only as to that, but also as to other features of the present case.

In the language therefore of Mr Erskine (Institutes, b. iii. t. 3, s. 86)—"No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other if he himself either cannot or will not perform the counterpart, for the mutual obligations are considered as conditional." And the case of *Hunter* v. *Carsewell*, January 17, 1822, 1 S. (2d ed.) 235, founded on by the Sheriff-Substitute, is at once a good illustration of this rule, and an apt precedent for the present case.

For these reasons, I am of opinion that the judgment of the Sheriff-Substitute appealed against is right, and that the appeal ought accordingly to be dismissed.

Lord Gifford—I concur in the result arrived at by Lord Ormidale, and I merely wish to add that I rest my opinion upon the special circumstances of this case, and do not want to interfere with the ordinary rule that an incompleteness in a bargain does not necessarily void it. In a mere question of completing a title when the party

selling has the substantial right to the subject a delay of a few days will not void the bargain.

With this precaution, I agree with your Lordship that the Sheriff-Substitute is right.

Lord Justice-Clerk—I concur in the result arrived at, and that very clearly. I also agree with Lord Gifford that when a sale is made with entry at a certain date, the mere fact that the title is not completed at that date will not necessarily render the sale void.

But this is a totally different case. Here the purchaser bought for the purpose of speculating—and I may remark that there are some things in the case which do not make the action a favourable one—and then found that his own title could not be obtained. I think in these circumstances the second purchaser is clearly not bound.

The Court adhered.

Counsel for Kelman (Appellant)—Keir. Agents—H. & A. Inglis, W.S.

Counsel for Macharg (Barr's Trustee) (Respondent)—Balfour—Rhind. Agent—George Begg, S.S.C.

Friday, May 24.

FIRST DIVISION.

[Lord Young, Ordinary.

GRAY *v.* GRAY'S TRUSTEES.

Entail—Disentail followed by a General Trust-Disposition—Evacuation of a Special Destination in a Deed of Entail—Proof of Intention of Granter of Deed.

An heir of entail in possession disentailed the estate with consent of her son, the next heir of entail, and left a general disposition and settlement altering the line of succession contained in the deed of entail. She then burdened the fee of the estate with debts which she had contracted. In an action at the instance of the son to have it found, *inter alia*, that the general disposition did not evacuate the line of succession under the deed of entail—*held* that that was a question of the granter's intention, and that the facts and circumstances of the case showed that an alteration of the succession was intended.

Observations per curiam upon the case of *Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 704.

Mrs Carsina Gray was born in the year 1831, and was heiress of entail in possession of the entailed estate of Carse, or Carse Gray, in Forfarshire, under a deed of entail executed in May 1765. She was married first to Lieutenant William Hunter, afterwards William Hunter Gray, by whom she had several children, and by her second marriage, which took place in 1865, she had also several children. In 1875, under the provisions of the Entail Amendment (Scotland) Act of that year, she executed a deed of disentail of the said lands with the consent of her eldest son, the next heir of entail and her apparent heir. The deed of consent was executed upon the 18th August 1875, and next day Mrs Gray expede an instrument of disentail, which was recorded under warrant of the Court in the Register of Entails early in 1876. On the 10th March of that year Mrs Gray executed a trust-disposition and settlement in favour of Graham Binny, W.S., and James Webster, S.S.C., whereby she conveyed to them her whole estate, heritable and moveable. The deed conveyed "All and sundry lands, houses, and tenements, messuages, and other heritable and real estate of every description which shall belong to me at the time of my death, wherever situated, whether in Scotland, England, or Australia, or elsewhere; as also my whole household furniture, plate, stock, chattels, and effects, rents, and other personal estate of whatever kind and denomination, heirship moveables included, which shall belong to me at the time foresaid of my death, and wheresoever the same may be situated, together with the whole titles, writs, and evidents, vouchers and instructions of my estate and effects hereby generally conveyed, and all that has followed or may be competent to follow thereon." There was, *inter alia*, this further clause—"And I hereby confer on my trustees full power to sell or dispose of the whole or any part of the trust-estate in such lots and portions as my said trustees shall consider most advantageous, and to grant or execute all deeds necessary for rendering the said sale or sales effectual; and binding me and my heirs in absolute warrandice thereof in the same manner and as amply and effectually as I could have done myself, with power also to borrow money upon the security of the said trust-estate, and to grant leases thereof for such term of years as they may find necessary or approve of; also to give easements to tenants, to enter into arbitrations, and generally to do everything falling within the duties of trustees in like cases; and I hereby reserve to myself, not only my own liferent of the trust-estate above conveyed, but also full power at any time of my life to alter, innovate, or revoke these presents in whole or in part as I shall think proper." Among the other purposes of that deed were the providing an annuity of £1000 a-year to her second husband, the payment of £4500 to her children by the second marriage, and the division of the residue among the whole children of the marriage, including the eldest.

Mrs Gray died on 16th May 1876, and the trustees under her trust-disposition thereafter made up a title to the estate of Carse, and became infeft in it. This action was raised at the instance of Charles William Gray, Mrs Gray's eldest son, against the trustees under the trust-disposition above mentioned, and concluded for reduction (1) of the deed of consent to the disentail, and of all that followed thereon, and (2) of the trust-disposition and settlement mentioned above, and relative notarial instrument.

There was also an alternative conclusion for declarator that the lands contained in the deed of entail were not conveyed to the defender by the trust-disposition and settlement, and that they passed to the pursuer on the death of his mother, under the destination in the deed of entail.

The latter conclusion alone was the subject of the present argument and decision, and it is unnecessary here to state the averments or pleas by which the former was supported.

It appeared from the defenders' statement of