dator, whereas if the supervision order which is asked is granted the liquidation will be in the hands of the Court, under whose supervision it will in future be conducted. The appeal which is made to the Court to set aside the liquidation as a fraudulent transaction is not now competently before us, and if it is to be brought before us for consideration it must be in another shape. There being a standing voluntary liquidation, the only question for us now is whether it should be put under supervision, and I have heard no answer to that application on the assumption that the voluntary liquidation is to stand.

An attempt has been made to satisfy the Court that the resolutions that the company is unable by reason of its liabilities to continue its business is ill-founded in fact, and that the company is really not in that position. But all that the Court requires to know is, that it has been proved to the satisfaction of the company that it is unable to carry on its business. That fact stands recorded by the resolution that has been arrived at by the great majority of the shareholders. The answer made to the petition is, in my opinion, altogether irrelevant—it raises no valid objection to the voluntary liquidation, however good it may be as an answer to the resolution.

Mr Watson has been appointed liquidator under one of the extraordinary resolutions which have been carried, and his appointment is also objected to, but upon what grounds does not appear, except that he is said to be a person in sympathy with the great majority of the shareholders. I do not know that this is such an objection as we could give effect to, even assuming that we had jurisdiction to do so, or thought fit to exercise it. But the necessity for that has been removed by the consent which has been judiciously given to the appointment of another person as liquidator to act along with Mr Watson.

Lords Mure, Shand, and Adam concurred.

The Court granted the order.

Counsel for Petitioner—Asher, Q.C.—M'Nair. Agents—Davidson & Syme, W.S.

Counsel for Respondent — R. V. Campbell. Agents—Morton, Neilson, & Smart, W.S.

Thursday, December 16.

FIRST DIVISION.

FARQUHARSON, PETITIONER.

Entail—Disentail—Value of Heir's Expectancy—What is "Proper Security" for Interest of Apparent Heir—Entail Act 1875 (38 *and* 39 *Vict. c.* 61), *sec.* 5—*Entail Act* 1882 (45 *and* 46 *Vict. c.* 53), *sec.* 13.

The Entail Act 1882 provides by section 13 that where the consent of the heir-apparent or other nearest heir is required to an application under the Entail Acts, and his consent is refused, the value of his interest shall be ascertained in money, and the Court shall direct the sum so ascertained to be paid into bank in his name, "or that proper security therefor shall be given over the estate," and shall thereafter dispense with his consent, and proceed as if it had been obtained. *Held* that such "proper security" means a good and marketable security such as would be accepted by an ordinary creditor, and that the statutory condition is not satisfied by giving to the apparent heir a security "over the estate" which is duly constituted as a security, but which is not such as a prudent lender would accept.

Where, therefore, the heir in possession offered a security for the heir's ascertained interest over the lands to be disentailed, but owing to other burdens, and to the nature and occupation of the lands, the security offered was not such as an ordinary prudent lender would accept, the Court appointed the amount of the heir's interest to be paid into bank.

This was a petition under the Entail Acts by Lieutenant-Colonel Farquharson of Invercauld for authority to disentail part of the lands of Invercauld.

The petitioner was heir of entail in possession of and duly infeft in the lands of Invercauld and others, under a deed of entail executed by his great grandfather in 1788, and a deed of additional nomination of heirs dated in 1796. He was of full age, and not subject to any legal incapacity, and born before 1st August 1848.

The next heir in succession was A. H. Farquharson, the petitioner's only son, a minor, who was heir-apparent under the entail, and to whom Mr Patrick Blair, W.S., was appointed curator *ad litem*. The nearest heirs of entail after him were the petitioner's daughters Louisa E. Farquharson and Elo Janet C. Farquharson, to whom Mr W. S. Fraser, W.S., was appointed curator *ad litem*. No consent by A. H. Farquharson or his curator *ad litem* was obtained.

Section 13 of the Entail Act 1882 provides—"In any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir, or the curator *ad litem* appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and *shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security therefor shall be given over the estate*, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sections 5 and 6 of the Entail Amendment (Scotland) Act 1875, shall apply to the nearest heir as well as to the other heirs, and shall apply to all applications to which consents are required." . . .

A remit was made to ascertain the value of the lands proposed to be disentailed and the value of the expectancy or interest of A. H. Farquharson. The value of the lands was thereby fixed at £48,500, and that of A. H. Farquharson's expectancy at £21,930. The petitioner proposed to grant as security therefor a bond and disposition in security for £21,930 over the lands to be disentailed.

Mr Blair, as curator *ad litem* for A. H. Farquharson, objected to the sufficiency of the security in respect (1) the valuation of the lands to be disentailed was made up thus—

Mansion-house, policies, and amenity as a residence, £25,000; salmon-fishings, £2000; factor's house, &c., £800; arable and grass and hill land, £11,000; growing timber, &c., £11,700—in all (after deducting £2,000 for public burdens), £48,500; while the rental of the mansion-house and policies, home farm, shootings and fishings, after deducting public burdens, was £777, 6s. The curator *ad litem* maintained that even supposing the subjects were let, and kept fully let, the rental was not sufficient to meet public burdens and interest at 4 per cent. on £21,000, the value of the expectancy to be secured, even though no deduction was made for management and repairs. (2) He also maintained that as there was already a bond for £21,000 over the whole lands of Invercauld, which bond included or partially included the lands of which the disentail was craved, the security was not only not first-class, and therefore such as a prudent lender would accept, as appeared from the previous objection, but also was postponed. He therefore maintained that the security offered was an unmarketable security.

As to the latter point, Mr Galletly, S.S.C., the reporter to whom the Lord Ordinary remitted the petition, stated in his report that it appeared from the petitioner's statements that the lands were free of debt except the loan of £21,000, which was the amount of a bond to secure younger children's provisions over the whole estate of Invercauld except the mansion-house, offices, and policies, which latter formed a considerable and valuable portion of the lands now to be disentailed; that therefore, according to the petitioner's contention, the bond would form a pecuniary debt upon the lands remaining under the entail, and the proportion effeiring to the lands which formed the subject of the application would be comparatively trifling.

The Lord Ordinary suggested that the petitioner should offer additional security so as to satisfy the curator *ad litem*. The petitioner then offered as further security the lands of Auchallater, without prejudice to his contention that the requirements of 38 and 39 Vict. c. 61, sec. 5, sub-sec. (2) B (Act of 1875), were satisfied by a bond and disposition in security for the value of the expectancy over the whole lands to be disentailed, and that he could not be called on to do more. That section of the Act of 1875 provides that on the value of the expectancy being ascertained "the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid."

The lands of Auchallater thus offered in additional security belonged to the petitioner in fee-simple. They were valued in 1884 at £32,000, but were burdened to the extent of £21,700, so that the surplus value was £10,300. The agricultural rental was £820, the sporting rental was £705, and the total rental, after deducting local burdens, was £1196, from which fell to be deducted £868 as interest on the preferable bond for £21,000, leaving a surplus free rental of £428.

Mr Blair objected that this subject was already heavily burdened; that the rental was chiefly a sporting rental, and that no prudent lender would accept such a security even if the preferable charge did not exhaust the whole agricultural and a large part of the sporting rental. He therefore craved the Lord Ordinary, as the security offered was not a proper security for the value of the heir's expectancy, before dispensing with the heir's consent to direct the petitioner to pay the value of the expectancy—£21,930—into bank in name of A. H. Farquharson, his ward.

The Lord Ordinary ordained the petitioner to pay into bank in name of A. H. Farquharson the sum of £21,930, which was the amount of his expectancy and interest.

"*Opinion.*—This is a petition at the instance of the heir of entail in possession of the entailed lands and estate of Invercauld and others for the disentail of a portion of the entailed estate, and it is necessary in the circumstances before the petition can be granted that the consent of the next heir should be obtained, or the value of his expectancy lodged in bank, or properly secured over the estates. The next heir is a minor, who does not consent to the disentail. The value of his expectancy has been ascertained, but the curator *ad litem* appointed to the minor has objected to the security offered by the petitioner.

"The lands sought to be disentailed are valued at £48,500, but they and the other lands included in the entail are burdened at present with a debt of £21,000. The value of the next heir's expectancy is £21,930. The curator *ad litem* in these circumstances objects to take a bond over the lands sought to be disentailed as a proper security for the next heir's expectancy. His objections are fully stated in the answers.

"The petitioner maintains, in the first place, that all that can be required of him is that he shall grant a bond and disposition in security for the value of the next heir's expectancy over the lands to be disentailed, and he refers to the terms of the statute as supporting this view. The statute [of 1875] provides, 'Upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs, the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate, which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid.'

"The purpose and intention of that provision is apparent. The Court is to see that the heir's expectancy is secured to him before the lands shall be disentailed, and that either by the value of that expectancy being deposited in bank or properly secured over the lands themselves. It is said that the latter condition will be fulfilled if a formal and valid bond and disposition in security is granted over the lands in question, and I agree with that if the lands afford sufficient security for the amount of the expectancy. But I demur to the view that in all circumstances an heir of entail in possession is entitled to have lands disentailed simply in return for such a bond. If the lands do not afford sufficient security for the expectancy the purpose of the statute would not be accomplished merely by granting a bond over them. The words 'proper security' do not in my opinion refer primarily to the nature or character of the writ by which the security is constituted. That writ may, in a technical and conveyancing sense, be a proper security, and

yet as regards the next heir be no security at all, or very inadequate security. In my view 'proper security' means adequate or sufficient security—security to the heir which is as good as money. In the ordinary case the lands to be disentailed will afford such adequate security, because the expectancy being calculated on the ascertained value of the lands, and being of necessity less than the value of the lands, the lands will afford security for a sum less considerably than they are worth. But it may be otherwise, and accordingly, if the Court is not satisfied with the security of the lands, it may order consignation of the value of the expectancy in bank. The question therefore is, whether the lands now sought to be disentailed afford proper, that is, adequate security for the amount of the heir's expectancy. The curator says they do not, and the reporter to whom the petition was remitted agrees with him. I think they are right. The lands are worth £48,500, but burdened with a first bond for £21,000 they are only worth £27,500 as security to the next heir. Now, no prudent lender will give a loan to the extent of £21,930 (the amount of the heir's expectancy) on a subject worth £27,500, even on a first bond, much less on a postponed security. There are other reasons against the security in respect of the rental, but on this matter I refer to the objections stated by the curator.

"It is right, however, to notice that the £21,000 bond already existing is one which affects not only the lands in question, but also the whole entailed estate, and it is said by the petitioner that if the creditors in that bond were to do diligence upon it and operate payment out of the disentailed lands, the next heir would have his relief against the other lands. I feel the force of this; but it appears to me to be the duty of the Court, imposed upon it by statute, to give the next heir in such a case as this an actual and adequate security, which he can make immediately available, if necessary, for the amount ascertained to be due to him. He is not to be paid, in whole or in part, by a right of relief. Even if such a right of relief were regarded as a security it would not be the security provided by the statute. It would not be a security over the lands disentailed, but over other and different lands.

"I regard the next heir as a creditor, in the amount of his expectancy, who cannot be compelled to take as a security therefor subjects upon which no prudent lender would advance on loan the amount of that expectancy.

"At the discussion before me I suggested that the petitioner should endeavour to satisfy the curator *ad litem* by the offer of some security additional to the lands to be disentailed. Acting upon that suggestion, the petitioner has offered the farther security of the lands of Auchallater. But I agree with the curator that the offer made does not afford any additional security, or at least such as the curator should accept. The lands of Auchallater (as valued in 1884) are said to be worth £32,000. They are already burdened to the extent of £21,700, and are therefore burdened to the full amount (two-thirds of their value) which any prudent lender would advance. Besides, I cannot compel the curator to accept any such additional security if he is unwilling to accept it. By the statute the Court has only two courses open to it—(1) To order consignation in bank of the amount of the expectancy, or (2) to see that expectancy properly secured over the lands to be disentailed. As I think that the lands to be disentailed do not afford 'proper security' for the amount of the heir's expectancy, I have ordered the amount to be paid into bank."

The petitioner reclaimed, and argued—It was admitted that the question was ruled by sec. 13 of 45 and 46 Vict. c. 53, above quoted, and the terms of which were on this point practically the same as those of the Act of 1875. The matter at issue was the adequacy of the security offered by Colonel Farquharson to his son and heir-apparent. 1. It was the best security which the estate to be disentailed would yield, and that was what section 13 allowed. It was true that there was a burden of £21,000, which affected both the lands to be disentailed and the rest of the estate, but this was a burden under which the heir-apparent would have to take the lands in question if they were not disentailed under the present petition. 2. It was in itself a good security that was offered, for as the burden of £21,000 affected the whole estate of Invercauld, which was worth £100,000, the heir-apparent would have a right of relief against the estate.

At advising—

LORD PRESIDENT—I think that the interlocutor of the Lord Ordinary is right. The heir is a creditor, and need not take worse security than any other creditor. And the estate of Auchallater, which is offered to him in additional security, is burdened to the extent of two-thirds of its value, which is all that a prudent lender would advance. The order of the Lord Ordinary that the money must be paid into bank is right.

LORD SHAND—The security is not a "proper security" unless it is good and sufficient security. The Court must see that the security is really good, and if it is not, then the money must be paid into bank. The Court is bound to make this choice in favour of the heir.

LORD ADAM concurred.

LORD MURE was absent.

The Court adhered.

Counsel for Petitioner—Graham Murray—C. N. Johnston. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Curator *ad litem*—Sol.-Gen. Robertson, Q.C.—Blair. Agents — Hunter, Blair, & Cowan, W.S.

Friday, December 17.

FIRST DIVISION.

MACKINTOSH *v.* LORD LOVAT.

Lease—Landlord and Tenant—Removing—Agricultural Holdings Act 1883, *secs* 28, 35, *and* 42.

Held that the Agricultural Holdings Act 1883 did not apply to subjects which consisted of a hotel and offices with a farm of 28 acres adjoining, such subjects not being in the words of section 35 of that Act "wholly agricultural