

that the lessor, his heirs and successors, should be bound to take over from the lessees and their forefathers at the end of the lease the entire stock of whisky and casks at a valuation. Thereafter the complainer retired from the business in consequence of his inability to contribute his share of the capital required, and on 1st November 1880 John M'Kill issued a circular to the customers of the distillery, in which he intimated, that as the complainer had retired from the firm of N. Campbell & Co. he proposed to assume his brother Alexander as a partner in the concern, and to carry on the business in the future under the name of M'Kill Brothers, and further, to sell the whisky of the distillery under the new name of "The Mull Whisky." In these circumstances the complainer brought this action, contending (1) that these proceedings would be injurious to his interests. The lease had been granted exclusively in favour of N. Campbell & Co. and the then partners of the firm. There was no right to assign the lease, but only a power to assume partners into the said firm of N. Campbell & Co. It was implied by the lease that the firm should be continued during the currency of the lease. At the end of the lease the complainer was bound to continue the business under the name of N. Campbell & Co., and it would be injurious to the business if the respondents were allowed to change to the name of M'Kill Brothers during the currency of the lease. (2) That it would injure the business of the distillery and the value of it to the complainer at the end of the lease to have the name of the whisky altered and the product of the distillery placed on the market under any other name.

The Lord Ordinary (RUTHERFURD CLARK) refused the interdict, and the complainer having reclaimed, the Court adhered.

Counsel for Reclaimers—Trayner—Alison.
Agent—John Gill, S.S.C.

Counsel for Respondents—D.-F. Kinnear, Q.C.
—Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Tuesday, July 12.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

COLVILLE v. MARINDIN.

Entail—Irritancy—Process—Form of Interlocutor where Reclaimer's Counsel submitted no Argument.

Where decree for the pursuer had been pronounced by a Lord Ordinary in a declarator of the invalidity of a deed of entail on the ground that one of the cardinal prohibitions was not fenced by any irritant clause, the defender reclaimed with the view of obtaining an Inner House judgment, but no argument was offered in support of the reclaiming note in respect of the authority of previous decisions. The Court pronounced the usual interlocutor—"Having heard counsel, refuse the reclaiming note"—*ad. lib.* Lord Justice-Clerk (Moncreiff), who was of opinion that the words "In respect

the counsel for the reclaimer has submitted no argument" should be inserted.

Observations (per Lord Young) that an Outer House judgment, and even a decree in absence, would be sufficient to give the party in right of the estate a good marketable title. Eden Colville of Ochiltree and Crombie, in the county of Fife, brought an action to have it declared that three deeds of entail, dated respectively in the years of 1727, 1819, and 1833, under the terms of which he was in possession of the lands of Craigflower and others, were invalid and ineffectual, and that he was therefore entitled to hold them as proprietor in fee-simple.

The three deeds of entail were all conceived in the same terms. In each of them the prohibition against altering the order of succession ran as follows—"And lastly, it is not only hereby expressly provided and declared that it shall not be in the power of myself, or of any of the heirs of tailzie and provision above mentioned to alter or innovate the destination of succession above set down, and that the same shall remain inviolable by me and them in all time coming; but also that it shall not be lawful for myself, or for any of the said heirs of tailzie and provision above mentioned, to possess, bruik, and enjoy the said respective properties hereby conveyed by virtue of any other right and title than this present tailzie, and the charters, sasines, retours, and infestments following thereupon, and that the said heirs from time to time succeeding as said is, shall cause the whole provisions, conditions, limitations, and clauses irritant and resolutive above mentioned to be inserted and engrossed in their charters, services, retours, precepts, and infestments: And in case any of the said heirs shall fail or neglect to cause the same to be so inserted and engrossed, or shall contravene any of the clauses, provisions, or conditions aforesaid, then the person so contravening, and all the descendants of his or her body, shall amit, forfeit, and tyne their right of succession, and the same shall immediately devolve upon the next heir in course of succession by this tailzie, sicklike and in the same manner as if the contravener and the descendants of his or her body were naturally dead; and it shall be leision to the next heir either to serve himself or herself heir to the contravener without being liable for his or her debts, or to serve to the person who stood last vest immediately before the contravener, and to prosecute his or her right by way of adjudication, declarator, or any other way best consistent with the laws of this realm."

The pursuer pleaded that the prohibition against altering the order of succession being fenced by no irritant clause, the deeds were invalid and ineffectual in all respects in terms of section 43 of the Rutherford Act (11 and 12 Vict. cap. 36).

The action was defended by Mrs Isabella Colville or Marindin, one of the next heirs of entail under the said deeds.

The Lord Ordinary (CURRIEHILL) found that the deeds of entail libelled were defective as regards the prohibition against alteration of the order of succession, in respect that there was no irritant clause applicable to said prohibition, and the same must be regarded as defective in all the prohibitions; therefore found, decerned, and declared in terms of the summons.

The defender reclaimed. On the case being called, the defender's counsel stated that the reclaiming note had been presented merely with the view of securing a judgment in the Inner House, which the parties considered to be more authoritative than the decree of the Lord Ordinary in the Outer House, and that in the face of the decisions on the subject, which he considered to be conclusive against the validity of the deeds of entail in question, he did not propose to take up the time of the Court by any argument. He referred to the cases of *Dewar v. Dewar*, July 20, 1852, 14 D. 1062; *Cunyngham v. Cunyngham*, March 9, 1852, 14 D. 636; *Ferguson v. Ferguson*, November 18, 1852, 15 D. 19; *Hamilton v. Hamilton*, April 29, 1870, 8 Macph. (H. of L.) 48.

At advising—

LORD YOUNG—I am averse to doing anything unusual, but in this case I am quite prepared simply to refuse the reclaiming note, and for this reason—the law is quite well established that where in a deed of entail there is no irritancy directed against the clause prohibiting the alteration of the order of succession, then the whole entail is invalid. The contrary, indeed, is not maintained by the counsel for the claimer, and that being so there is sufficient for a judgment simply of refusing the reclaiming note. I rather appreciate what was said by the claimer's counsel, for I know that there is a feeling among men of business in Scotland that the title to an estate is more safe, and in fact that the estate will command a better price in the market, where a question as regards it such as this has been settled by a judgment of the Inner House. This for my own part I regard as a mere superstition, and in my opinion a decree in absence in the Outer House is quite sufficient. It is no doubt this feeling which has prompted the defender to lodge defences in the present action and obtain a judgment from the Lord Ordinary, and further, to bring the case before your Lordships. That being so, I should not require any argument from counsel, and should have no hesitation in simply refusing the reclaiming note.

LORD CRAIGHILL—I certainly have some difficulty here, but I agree with Lord Young in the main, and I am of opinion that all which it is necessary for us to say is, that having heard counsel for the claimer, we refuse the reclaiming note. The claimer's counsel has stated that the view he is instructed to maintain is met everywhere by contrary decisions; and if that were not so, it would be necessary to hear the argument out. But as it is, I repeat I think we may simply refuse the reclaiming note.

LORD JUSTICE-CLERK—I cannot say that I am judicially satisfied with this case. Indeed, nothing of a contentious nature has been argued before us. My view is, that if counsel feel that the case is such a clear one as not to admit of argument, then the proper form of judgment is—"In respect that counsel for the appellant has submitted no argument, adhere." I do not, however, wish to run counter to your Lordships, therefore our judgment will be—"Having heard counsel for the claimer, refuse the reclaiming note."

The Court pronounced this interlocutor:—

"Having heard counsel on the reclaiming note, refuse the reclaiming note."

Counsel for Pursuer (Respondent)—D. F. Kinnear, Q. C.—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Reclaimer)—J. P. B. Robertson—Low. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, July 13.

FIRST DIVISION.

MARSHALL v. NORTH BRITISH RAILWAY COMPANY.

Poor Roll—Where Reporters equally Divided in Opinion—Competency of Remit to other Reporters—Act of Sederunt 21st November 1842, sec. 1.

Where the reporters on the *probabilis causa litigandi* are equally divided in opinion as to the propriety of admitting an applicant to the benefit of the poor roll—held (*diss.* Lord Shand) (1) that it is incompetent to remit to any other reporters than those chosen in terms of the Act of Sederunt 21st November 1842; and (2) that the effect of an equal division of opinion among the reporters is to admit the applicant.

Margaret Ferguson or Marshall applied for the benefit of the poor roll, to enable her to carry on an action of damages against the North British Railway Company. The application was on 14th May 1881 remitted to the reporters on the *probabilis causa litigandi*. The reporters, after hearing parties, reported to the Court that they were equally divided in opinion as to the *probabilis causa litigandi*, one counsel and one agent being of opinion that the applicant had not, and one counsel and one agent being of opinion that she had, a *probabilis causa*. In these circumstances they craved the Court "to dispose of the remit," and referred to an unreported case of A B, May 1866 (Mackay's Practice, i. 337), where the reporters were equally divided and the Court admitted the applicant. Mrs Marshall then enrolled the case to have the remit disposed of.

The North British Railway Company objected to the applicant being admitted to the roll, on the ground that she had not produced a favourable report from the reporters on *probabilis causa litigandi*, and suggested that the case should be remitted of new to other reporters.

Authorities—*Clark v. Campbell*, July 6, 1833, 11 S. 908; *M'Callum*, June 26, 1841, 3 D. 1102; *Rutherford*, July 20, 1855, 17 D. 1140.

At advising—

LORD PRESIDENT—The Act of Sederunt of 21st November 1842 in its 1st section provides—"That the Faculty of Advocates, the Writers to the Signet, and Solicitors before the Supreme Courts, besides electing counsel and agents for conducting the causes of the poor as at present, shall also respectively name two advocates, one Writer to the Signet, and one solicitor each year, to act exclusively as reporters on the *probabilis causa* of the