

tenant's executors notwithstanding the bankruptcy of the other tenant.

**LORD JUSTICE-CLERK**—I have had very great difficulty in this case, and very much on the grounds which Lord Rutherford Clark has stated. But in considering the views which have been stated by Lord Young I am inclined on the whole to concur with him. I think the action is a stringent one, and proceeds on a view of the rights of the landlord of a somewhat hard and oppressive description. No doubt it is argued that the contract has provided that the rights of parties shall be so determined, and that we should give effect to the words of the contract. But I am inclined to think that there is a great deal of force in Lord Young's reading of that clause by which the executors of the two tenants are made liable for the prestations of the lease. The lease is taken to two tenants and the survivor, and I think that the clause in question may be read as binding the heirs, executors, and successors of both the tenants for the prestations incurred while both survived, and that there is nothing inconsistent with this construction in reading the clause as applicable to the heirs, executors, and successors of the survivor only for the prestations incurred after one of the tenants had predeceased. Indeed, I think that is the equitable result, because this is a lease in which the executors of the predeceaser can have no interest in the way of working or managing the subject. They cannot enter into possession, because when the predeceaser dies the survivor takes the whole right of management and possession. I say therefore it is not inequitable to read the clause as binding the executors of the survivor only for the prestations coming due after the lease has devolved upon him alone. But a complication was introduced here which I rather think, followed to its legitimate results, brings us to the conclusion which Lord Young has suggested. The pursuer in stating his case as against the executors of the predeceaser says expressly that the ground of it is that the whole right in the lease vested in the predeceaser before his death, and that Logan therefore was entirely divested of all right under the lease. I think the legitimate result upon that, as the true statement of the rights of the parties, is that this lease and its prestations has come to an end. Logan is disqualified from holding the right, and it vested in Martin, and Martin having died the lease comes to a termination entirely. On the whole matter I concur in the view expressed by Lord Young.

**LORD CRAIGHILL** was absent.

The Court recalled the Lord Ordinary's interlocutor, decerned against the defender for the amount tendered, and found her entitled to expenses.

Counsel for Pursuer (Respondent)—Solicitor-General Robertson—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defender (Reclaimer)—Balfour, Q.C.—Rhind. Agents—R. P. Stevenson, S.S.C.

Saturday, July 18.

## FIRST DIVISION.

[Lord Trayner, Ordinary.

SCOTT PLUMMER, PETITIONER.

*Entail—Entail Amendment Act 1848 (11 and 12 Vict. c. 36), sec. 4—“Such and the like Consents.”*

Sec. 4 of the Entail Amendment Act 1848 provides that an heir of entail in possession of an entailed estate may sell, alienate, dispose, charge with debts or incumbrances, &c., “with such and the like consents” as would enable him to disentail the estate. *Held* that an heir in possession may avail himself of the provisions of sec. 4 though he is in a position to disentail without consents.

This was a petition under section 4 of the Rutherford Act, presented by Charles Henry Scott Plummer, heir of entail in possession of the lands and estates of Middlestead, &c., to charge the estates with a debt or incumbrance of £6000.

Section 4 of the said Act provides—“That it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispose, charge with debts or incumbrances, lease and feu such estate, in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided; and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted.”

The petitioner held the estates under a deed of entail dated 21st October 1799, and was born in October 1859. He was therefore entitled, under sec. 2 of the same Act, to disentail without any consents, being an heir of entail born after 1st August 1848, of full age, and holding under an entail dated before 1st August 1848.

The Lord Ordinary (**TRAYNER**) remitted to Mr H. B. Dewar, S.S.C., to inquire into the proceedings. Mr Dewar in his report doubted whether, seeing that sec. 4 only enabled heirs to avail themselves of the powers thereby conferred, “with such and the like consents” as would by the Act enable them to disentail, the petitioner could avail himself of the provisions of sec. 4, as he was in a position to disentail without any consents.

The Lord Ordinary thereafter pronounced this interlocutor—“Having heard counsel for the petitioner, appoints the petition, with this interlocutor and note, to be boxed, with the view of reporting the same to the Judges of the First Division of the Court, and grants warrant to enrol.

“*Note.*—The petitioner, who is the heir of entail in possession of the lands of Middlestead, &c., seeks the authority of the Court to charge the estate with a debt or incumbrance of £6000. The entail is dated and recorded in the year

1799, and the petitioner was born in October 1859. He is therefore an heir of entail born after 1st August 1848, is of full age, and possesses under an entail dated before 1st August 1848. In these circumstances the petitioner would be entitled under the provisions of the Rutherford Act (11 and 12 Vict. cap. 36, sec. 2) to acquire the entailed estate in fee-simple by executing, under the authority of the Court, an instrument of disentail, without the necessity of obtaining any consent from other heirs of entail. He is, however, not desirous of disentailing the estate, but seeks, as I have said, to burden it with a debt, and he maintains that he is entitled, under the authority of the Court, to burden the estate, as he could certainly have disentailed it, without the consent of any of the next heirs of entail.

“By section 3 of the Rutherford Act provision is made for disentailing lands by the heir in possession with certain consents; and section 4 provides that ‘it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland, *with such and the like consents* as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances,’ &c. &c. The question therefore arises, whether under section 4 just quoted an heir of entail can burden the entailed estates without any consent whatever when he is in circumstances which enable him to disentail without consents?

“It appears to me that sections 3 and 4 were not originally intended to apply to cases where the heir in possession was in a position to take advantage of the provisions of section 2, it probably not having been anticipated that an heir who could disentail would content himself with merely burdening the estate. If this had been anticipated, the words of section 4 would probably have run thus, ‘with such and the like consents, *if any*,’ or ‘if necessary,’ &c. But although section 4 (under which alone authority to burden is provided for) appears from its language to contemplate the necessity of some consent, I am humbly of opinion that the petitioner’s application may be granted without requiring any consent from the next heir or heirs. The greater power of disentailing the estate without consents seems to me to include the lesser power of burdening without consents. Besides, when the Act provides that ‘such and the like consents’ must be had to authorise an incumbrance on the property, as are needed to disentail, and also provides that no consents whatever are necessary to disentail, I think it follows that no consent is necessary to burden, or otherwise the consent to burden would be something different, and not ‘such and the like’ as is required for a disentail. If any consent is necessary it is scarcely possible to discover from the Rutherford Act whether the consent of the next heir would be sufficient, or whether the consent of the three next heirs would be required. I understand that this question has never arisen before, and I have therefore deemed it right to report it to the Court for authoritative decision.”

Argued for the petitioner—The words “if any” were implied in sec. 4. There was no reason why an heir should not do directly what he could do indirectly by disentailing, charging, and re-entailing.

At advising—

LORD PRESIDENT—By the first three sections of the Rutherford Act certain powers of disentailing are given to heirs of entail, and according to the position in which any heir stands; the power is given subject to a number of conditions. There is one case under section 1 in which an heir is entitled to disentail without any consents, another under section 2, and another under section 3. Under all these sections there are also cases in which consents are required, and in these cases the consents vary according to circumstances.

Now, I cannot help thinking that section 4 was intended to apply to all the cases that are dealt with by the three preceding sections. The 4th section is not happily expressed, for there is an omission of words which would make the meaning of the section quite clear. But I agree that the fair meaning of the section is that stated in the opinion of the Lord Ordinary. The opposite view would lead to this very anomalous result, that there would be three cases of heirs under sections 1, 2, and 3 very highly favoured in respect of their power of disentailing, which they can do without any consents, who would be deprived altogether of availing themselves of the provisions of section 4. I say altogether deprived, for I do not see how one could extract from section 4 alone, or from section 4 in combination with the previous sections, any statements as to the consents which would enable these most favoured heirs to exercise the powers conferred by section 4. If consents are necessary in order to enable an heir in the most favoured position to avail himself of the provisions of section 4, the question arises what consents must be got to entitle him to burden. He cannot find that from the statute, for no consents are required in the case of an heir in his position with regard to disentailing.

I think the interpretation suggested by the reporter would lead to this very anomalous result, that an heir of entail in such a position would be altogether deprived of the benefit of section 4, which I think is entirely against the scope and meaning of that section.

LORD MURE—I concur, and on this broad ground, that the plain object of the 4th section of the statute was to enable all heirs of entail who could disentail to do the other things mentioned in the section, on the same conditions as they could disentail, and these words even as they stand do not, I think, exclude that construction.

LORD SHAND—On a fair construction of section 4 I think the words “if any” are clearly to be implied. If consents require to be given in order to disentail the estate, then the consents required by the preceding sections are to be obtained, but if no consents are required to disentail the estate, then the heir of the estate can burden the estates without any consents.

LORD ADAM—If you take the case which is also provided for by section 4, of leasing and feuing, I think it brings the matter to a *reductio ad absurdum* if you are to say that an heir must disentail and re-entail in order to grant these leases or feus.

The Court pronounced this interlocutor:—

“Find that the petitioner is entitled under the 4th section of the Entail Amendment Act 1848 to charge the entailed estate with debt as proposed without any consents, and remit to the Lord Ordinary to proceed in accordance with the above finding.”

Counsel for Petitioner—Pearson—Kermack.  
Agents—Mackenzie & Kermack, W.S.

Saturday, July 18.\*

FIRST DIVISION.

[Lord Curriehill, Ordinary.

WALKER, HENDERSON, & COMPANY v.

J. & P. HUTCHISON.

*Ship—Contract to Build Ship—Damages for Deficient Carrying Capacity—Mode of Estimating Damage.*

Where a shipbuilder has undertaken to build a vessel of a certain carrying capacity, and the vessel is found on delivery not to be of the stipulated capacity—held that the damage to the purchaser ought to be estimated by deducting from the total price a sum proportional to the difference between the actual and the stipulated capacity.

This was an action by the builders of a vessel to recover from the purchasers a sum alleged to be still due for the cost of the vessel. The total price was to be £12,550. The defenders made counter claims of damage, and it was proved to have been agreed by the parties in the course of their correspondence that the vessel should be retained by the defenders, subject to all claims of damage for breach of contract. It was also agreed that these claims should be pleadable, if well founded, by way of compensation. The carrying capacity of the vessel, according to the contract, was to be 470 tons (including 70 tons in bunkers), and the defenders maintained that there was a deficiency in carrying capacity. It was proved that there was such deficiency, and that it amounted to 25 tons. There was a dispute as to the manner in which damages thereby arising should be estimated, it being maintained (1) that the proper mode of assessing it was by estimating that the ship would earn less than if she had been of the proper capacity by the number of tons she was short, and then multiplying that deficiency by the number of years which the vessel might be expected to last; or (2) by the method adopted by the Lord Ordinary in the following passage of his note:—“Various modes of calculating the damage are suggested by the defenders’ witnesses, but that which most commends itself to my mind is to deduct from the total price a sum proportional to the difference between the actual and stipulated weight-carrying capacity of the vessel [470 : 25 :: £12,550 : the damage to be ascertained] which gives as the result the sum of £667, 15s., which I propose to allow under this head.”

\*Decided 19th July 1878.

His Lordship accordingly gave effect in the interlocutor to the view thus stated.

The pursuers reclaimed, and the First Division adhered.

Agents for Pursuers—Ronald & Ritchie, S.S.C.

Agents for Defender—J. & J. Ross, W.S.

Tuesday, July 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY v. THE GLASGOW COAL EXCHANGE COMPANY (LIMITED).

(*Ante*, vol. xx. p. 855).

*Reparation—Interdict—Unjustifiable Application for Interdict—Application periculo petentis.*

A railway company who had power by their Special Act, subject to liability to make compensation, to “appropriate and use” the subsoil under a street, were delayed in their operations and suffered damage in consequence of an interim interdict obtained by a proprietor in the street, on the ground that the company were bound before proceeding with their operations to “purchase and take” the subsoil in question. This interdict having been recalled as erroneous in law—held that a sum of money only having been exigible in any event, the interdict was wrongous, and the proprietor was liable in damages to the company for the consequences of it.

This was an action by the Glasgow City and District Railway Company for £5000 as damages against the Glasgow Coal Exchange Company, Limited. The action arose out of the proceedings for interdict at the instance of the defenders the Coal Exchange Company, against the pursuers the railway company, which are fully reported *ante*, July 20, 1883, 20 Scot. Law Rep. 855, and 10 R. 1283. As there reported, the defenders, as proprietors of property bounded on the north by the centre of W. Regent Street of Glasgow, beneath which street the company’s railway was to pass, and which the company had, in the alleged exercise of a power conferred by sections 34 and 55 of their Act (Glasgow City and District Railway Act 1882), opened up and excavated to a considerable depth, and the subsoil of which they had interfered with, had petitioned in the Sheriff Court for, and obtained from the Sheriff-Substitute interim interdict against the operations of the company. That interdict was subsequently recalled by the Sheriff, to whose judgment the Court adhered on appeal. The pursuers averred that the petition for interdict was unjustifiable and improper, that defenders were well aware, and had been warned, of the loss which would be caused by interim interdict being granted, but had insisted on moving for interim interdict on the petition instead of waiting for a record to be made up, that the result had been a stoppage under the interdict