LORD MURE concurred.

LORD SHAND—On the question of the pursuer being called upon in a case like the present to find caution for expense, I think this matter is one very much for the discretion of the Court. Here, no doubt there are circumstances which must be taken into account in considering the matter. The pursuer has left the country He has not paid his debts and he is notour bankrupt within the meaning of the Debtors Act 1880. If the action had been an ordinary one for the recovery of money, it might have been different. It is, however, an action to vindicate character, and the letters which have been laid before us disclose a case of deliberate written slander. In such a case I do not think that anyone in the circumstances of the pursuer ought to be required to find caution.

As regards the second issue, now that the pursuer is willing to take it as amended I have no objection to offer.

LORD ADAM concurred.

The Court adhered to the interlocutor in so far as it repelled the first plea-in-law for the defender; *quoad ultra* recalled the interlocutor: Approved of the issues as adjusted at the bar, appointed the same to be the issues for the trial of the cause, reserved all questions of expenses, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuer—M'Kechnie—Forsyth. Agent—D. Barclay, Solicitor.

Counsel for the Defender—Comrie Thomson—Rhind. Agent—Thos. Dalgleish, S.S.C.

Friday, February 8.

FIRST DIVISION.

[Lord Trayner, Ordinary.

KENNEDY *v.* STEWART.

Entail—Entailed Estate—Contract to Sell—Ratification of Court—Specific Implement—Entail Act 16 *and* 17 *Vict. cap.* 94, *sec.* 5; 38 *and* 39 *Vict. cap.* 61, *secs.* 5 *and* 6; 45 *and* 46 *Vict. cap.* 53, *secs.* 13, 19, 21, *and* 22.

An heir of entail in possession by holograph letter offered to sell an entailed estate at a certain price, under the condition that the sale was made "subject to the ratification of the Court." The offer having been accepted the heir of entail presented a petition to the Court under the 19th and following sections of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), craving the Court to ratify and confirm the contract of sale, and to grant an order of sale of the estate. To this application the next heir lodged answers, objecting to a sale by private bargain.

In an action by the purchaser against the heir of entail for implement of the contract, the Court *held* that the latter was under a legal obligation to apply to the Court for authority to sell and dispone the estate, under 16 and 17 Vict. cap. 94, sec. 5; 38 and 39 Vict. cap. 61, secs. 5 and 6; 45 and 46 Vict. cap. 53, sec. 13; and the Court appointed the pursuer to lodge in process the draft of a disposition by the defender of the estate in favour of the pursuer in fulfilment of the contract of sale.

Sir Archibald Douglas Stewart was the heir of entail in possession of the entailed estates of Grandtully, Murtly, Strathbraan, and others, in the county of Perth.

In the summer of 1888 he received certain communications on the subject of a proposed sale of the estate from Mr Peter Glendinning, acting on behalf of an intending purchaser, whose name was not at first disclosed, but who was afterwards ascertained to be John Stewart Kennedy, banker in New York. On the 18th of September 1888 Mr Kennedy and Mr Glendinning went to Murtly, and saw Sir Archibald Douglas Stewart, and were shown over the castle and grounds, and other portions of the estate.

On 19th September 1888 Sir Archibald Douglas Stewart wrote the following holograph letter to Mr Kennedy:—"Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation, of the nett rental thereof, as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash, unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time, it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court.—Yours truly, A. D. STEWART."

On 20th September Mr Kennedy sent the following holograph letter in reply:—"Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.—Yours faithfully, JOHN S. KENNEDY."

On 5th October Sir Archibald wrote to Mr Kennedy as follows:—"My dear Sir,—Since I wrote to you on the 19th ulto. I have thought a good deal, as you may suppose, about the important transaction which in that letter I proposed to enter into with you. I am quite satisfied on reflection that my offer was a very foolish one, and I should never have made it if I had not been hurried and pressed, or if I had taken proper legal advice, as I certainly should have done. I am told now that there are legal difficulties in the way, of which I was not then aware, and it

appears that it is by no means matter of certainty that the Court will agree to ratify the proposed arrangement. That may involve unpleasant publicity and the interference of the next heir of entail. I should be well pleased if you see your way to release me altogether from it. I repent it both on my wife's account and my own, as well as on account of the heir of entail entitled to succeed me, who is even now more interested than I am. If, however, you insist upon it, I am ready to endeavour to obtain the ratification of the Court, which I am advised can only be done for an order or authority to sell in terms of our contract. I shall be glad to hear from you at your earliest convenience.—Believe me, yours sincerely, A. D. STEWART."

Mr Kennedy, however, declined to cancel the transaction, and on 23rd October the agents of the parties fixed the price of the estate at twenty-five years' purchase, according to an adjusted rental, to be £372,983, 10s. 10d.

Sir Archibald Douglas Stewart had already in 1885 presented a petition (referred to below) to the Court under the Entail (Scotland) Act of 1882 for an order of sale of the estates of Grantully, Murtly, Strathbraan, and others, and certain procedure had followed thereon. The petition, however, was not carried to a conclusion, but on the motion of the petitioner was dismissed on 26th October 1888.

On 6th November 1888 Sir Archibald Douglas Stewart presented another petition under the Act of 1882 craving the Court "to ratify and confirm the contract constituted by the missives of sale set forth in the petition" (being the letters of 19th and 20th September quoted above); and to grant an order of sale of the estates of Grantully, &c., in favour of John Stewart Kennedy at the price of £372,982, 10s. 10d., in terms of the said missives. The petitioner set forth that he was upwards of 21 years' of age and subject to no legal incapacity, and that Walter Thomas James Scrymsoure Fothringham of Pourie and Tealing was the only existing heir of entail under the destinations contained in the deeds of entail affecting the estate.

Mr Fothringham lodged answers to the petition, in which, referring to the former petition presented by Sir Archibald Douglas Stewart, he stated:—"The present alleged sale by private bargain purports to be dated 19th and 20th September 1888, when the petition of 9th April 1885 was still depending before the Court, and to be a private agreement to sell the estates at twenty-five years' purchase, which the petitioner in the present petition states has, by agreement between him and Mr Kennedy, been fixed at the sum of £372,983, 10s. 10d. sterling. The nett rental of the estates, as agreed to between the petitioner and Mr Kennedy for the purpose of the present application, is not admitted. In the procedure authorised by the Entail (Scotland) Act 1882, the respondent, as next heir, has right, by intimating within one month after an order for sale that he desires the sale to be by public auction, to prevent any sale by private bargain. No notice was given, either to the Court before which the petition of 9th April 1885 was depending or to the respondent, of the alleged sale by private bargain to Mr Kennedy. On 26th October 1888 the petition of 9th April 1885 was dismissed by the Junior Lord Ordinary, on the motion of the petitioner and in the absence of the respondent. A sale in the manner and at the price proposed would very injuriously affect the patrimonial interests of the respondent. . . . . The respondent submits that the petition should be dismissed as incompetent, and that he should be found entitled to the expenses of his appearance."

On the 6th November 1888, the same day as Sir Archibald Douglas Stewart presented to the Court the second petition above mentioned, Mr Kennedy raised an action against him concluding that it should be found and declared "that by a holograph letter, dated 19th September 1888, by which the defender offered to sell the entire estate of Murtly, &c., to the pursuer, the said John Stewart Kennedy, on the basis of twenty-five years' purchase of the present or even an appraised valuation of the nett rental, and holograph acceptance thereof by the said pursuer, dated Edinburgh the 20th September 1888, a valid contract was entered into between the said pursuer and the defender for the sale by the defender to the said pursuer of the estate of Murtly, including the lands and estates of Grantully, Murtly, Strathbraan, and others, situated in the county of Perth, belonging to the defender as heir of entail in possession thereof; and that in respect of the said contract the defender is under legal obligation to apply to our said Lords for authority and power under the Entail Amendment Acts to sell and dispone the said estate; and the defender ought and should be decerned and ordained, by decree foresaid, to implement the said contract, and forthwith to present a summary application to our said Lords, under and in terms of the Entail Acts, and specially the following sections thereof, viz., the 4th section of the Act of the 11th and 12th of our reign, cap. 36, the 5th and 6th sections of the Act of 38th and 39th of our reign, cap. 61, and the 13th section of the Act of 45th and 46th of our reign, cap. 53, or otherwise in terms of other sections of the said Acts, all as the said petition or application may be adjusted at the sight of a person to be appointed by our said Lords in the process to follow hereon, for authority to sell and dispone the said lands and estates to the said pursuer, and to adopt and carry out with all due speed the procedure prescribed by the said Acts, including, if necessary, the compensating of the next heirs for obtaining such authority; and thereupon, after having obtained such authority, to make, execute, and deliver, at the sight of our Lords, a formal disposition of the said lands and estates to the pursuer, the said John Stewart Kennedy, containing all usual and necessary clauses, and to make and execute such other deeds of conveyance, and other deeds as may be necessary for giving effect to the said contract of sale, the defender duly making payment of the price as the same is or may be fixed in terms of the letters above mentioned; or otherwise, the defender ought and should be decerned and ordained to make such application, in terms of said Entail Acts, as shall entitle him to carry out and implement his said contract or agreement with the said pursuer; and failing implement of the foresaid contract, the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £50,000 sterling in name of damages."

The pursuer was subsequently allowed to amend his summons, when he inserted the following conclusion—"Or otherwise, the defenders ought and should be decerned and ordained by decree foresaid forthwith to implement the said contract, and to execute a formal disposition of the said lands and estates by the defender to the pursuer, the said John Stewart Kennedy, containing all usual and necessary clauses as the same shall be adjusted at the sight of our said Lords, and to make and to prosecute to a conclusion an application to the Court for the sanction and approval of the said sale and disposition, all in terms of the Acts 11 and 12 Vict. c. 36; 16 and 17 Vict. c. 94; 38 and 39 Vict. c. 61; 45 and 46 Vict. c. 53, or any of them, and upon the Court sanctioning and approving as aforesaid to deliver the said disposition to the said pursuer."

The pursuer founded on the holograph letters of 19th and 20th September 1888 above quoted and averred—(Cond. 12) "The defender now declines or delays to implement the contract libelled, and to take the appropriate steps for securing the authority of the Court to the foresaid sale, and in these circumstances the present action is necessary. With reference to the statements in answer it is explained as follows—When the agreement was entered into the petition referred to in condescendence 2 was still pending (*i.e.*, the petition presented in 1885), the defender first offered to proceed with it, and to get the transaction ratified in that petition. Instead, however, of proceeding therewith the defender at his own hand, and without any notice to the pursuer, on 26th October enrolled the said petition, and obtained an interlocutor dismissing it. Thereafter the defender presented the petition referred to after the present action was raised, and he did so not for the purpose of enabling him to carry out the contract, but in order to secure that the contract should not be carried out. For this purpose he has been and is in communication with the next heir of entail so as to prevent any sale by private bargain, or any approval of the sale to the pursuer. Further, the next heir has lodged answers to the petition by the defender, in which, *inter alia*, he founds upon section 22 of the Entail (Scotland) Act 1882, which provides that a sale under the procedure adopted by the defender shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction, and the next heir asks the Court to dismiss the petition as incompetent. A copy of the said answers is produced and referred to. The first interlocutor in said petition was obtained on 7th November, but nothing further has been done since as regards the said petition by the defender."

The defender answered — "Admitted that the petition referred to in condescendence 2 was on 26th October 1888 dismissed on the motion of the petitioner, and without notice to the pursuer, who was no party thereto. Thereafter the defender proceeded without the smallest delay to apply to the Court for ratification of the contract constituted by the missives of sale set forth on record; on 6th November 1888 he accordingly presented a petition to the junior Lord Ordinary for the purpose of enabling him to carry out the contract setting forth the said missives, and craving ratification thereof, and an order of sale of the said estates in terms thereof, and authority to execute a disposition in favour of the pursuer. That application is in dependence before the said Lord Ordinary, and the defender is willing to proceed with it with all reasonable dispatch. He has thus implemented so far as has been possible the terms of his agreement with the pursuer. A print of said petition is produced herewith. It is denied that it was presented in order that the said contract should not be carried out, or that the defender has been or is in communication with the next heir of entail, so as to prevent any sale by private bargain or any approval of the sale to the pursuer. The answers to the said petition are referred to. The pursuer's agents were made aware that the said petition was being prepared, and that it had been lodged before they sent the summons in the present action to the defender's agents to accept service. In these circumstances the action is unnecessary or at all events premature."

The pursuer pleaded—"(1) In respect of the letters condescended on, the pursuer is entitled to decree of declarator and implement as concluded for. (2) Failing implement of the said contract the pursuer is entitled to damages as concluded for. (4) In respect the defender has not presented, and is not prosecuting any petition in *bona fide* in order to carry out the sale, but, on the contrary, the only petition presented by him being for the purpose of securing, if possible, that the sale should not be carried out, the defences and pleas founded on the said petition should be repelled. (5) The pursuer being entitled to have the authority of the Court so far as necessary for having the said sale carried out, obtained in any competent form, the decree to that effect should be granted."

The defender pleaded—"(1) The action should be dismissed in respect that it is unnecessary, *et separatim*, that it is premature. (2) The pursuer's averments are irrelevant. (3) The defender not being bound to implement the said missives in the manner specified in the summons, should be assoilzied. (4) The defender should be assoilzied in respect that he has not failed to implement the terms of the said missives. (5) In the event of it being held that the said letter and acceptance import a finally concluded obligation on the defender to sell the said estates and make compensation to the next heir as set forth in the summons, he is entitled to have the said transaction reduced and set aside on the ground that it was obtained from him under essential error, fraudulently induced by the pursuer or his representatives. (6) The defender, not being liable in damages to the pursuer, should be assoilzied from the conclusion for payment of £50,000."

The Lord Ordinary (TRAYNER) on 21st December 1888 pronounced the following interlocutor:—"Repels the 1st, 2nd, and 3rd pleas-in-law for the defender: Finds, decerns, and declares in terms of the declaratory conclusions of the summons: Ordains the defender to implement the contract referred to in said conclusions, and forthwith to present a summary application to the Court as concluded for in the first petitory conclusion of the summons, or otherwise to make such application to the Court, in terms of the Entail Acts, as shall entitle him

to carry out and implement the said contract; *quoad ultra* continues the cause, and grants leave to reclaim.

"*Opinion.*—Had it not been for the concluding paragraph of the defender's letter of 19th September 1888, I suppose it is not open to doubt that that letter, and the pursuer's letter in reply, dated 20th September (if not reduced), would have constituted a valid and binding contract of sale between the parties of the Murtly estates. It is the meaning and effect of that paragraph, therefore, which has to be considered. The paragraph is as follows—'In the event of your acceptance the sale is made subject to the ratification of the Court.'

"It is said by the defender that what he had in view when he conditioned for the 'ratification of the Court' was a proceeding under the Act of 1882, and not a disentail under the Rutherfurd Act and amending Acts. I hesitate to accept that statement on the evidence referred to in support of it, consisting chiefly of statements made in letters by the defender to the pursuer, when asking that he might be relieved of the bargain he had made. But, however that may be, it is not so material to inquire what the defender meant or intended; the question rather is, what he said, and what meaning the pursuer, in considering the defender's offer, might fairly put upon the language used? The circumstances surrounding the transaction, as known to both parties, afford some aid in the solution of these questions. The parties were dealing with an entailed estate, and knew that some proceeding before the Court was necessary to enable the heir of entail in possession to sell the property to a stranger. But what the precise form of the proceeding should be, and on what statute the application to the Court should be based, were matters on which neither of the parties could be supposed to have correct information, or be able to form an opinion. These were matters of detail requiring professional assistance which the parties would leave to their professional advisers. But it needed no professional knowledge or skill for the defender to make, and the pursuer to accept, such an offer as this—I will sell you the entailed estates of Murtly at a specified price, provided the Court will pronounce such an order as will enable me to carry out the sale and give you a valid title. And that, I think, is the offer which the defender made and the pursuer accepted.

"The defender, however, says that his offer was one dependent on the 'ratification' of the Court, and that the Rutherfurd Act and Acts amending the same, make no provision in terms for such a ratification. But neither does the Act of 1882; for while that Act prescribes (sec. 19, *et seq.*) certain procedure under which an order for the sale of an entailed estate may be obtained, it does not provide at all for the case of the Court being asked to ratify or approve of a sale already made—or made provisionally on the Court's approval being obtained. The Court cannot, under the Act of 1882, at any time or under any form of procedure, ratify the sale by the defender to the pursuer. It could only authorise the estates to be sold publicly (for the next heir does not consent to a private sale), and at that sale the pursuer might not be the successful offerer. In short, the Act of 1882 refers to and provides for a sale yet to be effected—not to a sale already made.

"The defender pleads that this action is premature, because he has presented an application under the Act of 1882 asking the Court to ratify the sale to the pursuer. I repel that plea, because if I am right in the view I have taken of that statute the application is inappropriate; and equally so, as it appears from the answers lodged to that application by the next heir of entail, that he does not consent to a private sale; and the Court could not authorise anything but a public sale if the next heir insists upon it.

"The defender having sold the estate in question to the pursuer subject to the ratification or approval of the Court, he is bound to adopt all proper means to obtain such an approval or ratification. By disentailing, or by obtaining the consent of the next heir to a private sale to the pursuer at the price and under the conditions already fixed, he will be able to carry through the transaction with the 'ratification' of the Court, in the sense in which (according to my view) that word is used in his offer to the pursuer."

By section 4 of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) it is enacted 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, lease or 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," &c.

By the 5th section of the Act 16 and 17 Vict. cap. 94, entituled "an Act to extend the benefits of the Act of the eleventh and twelfth years of Her present Majesty for the amendment of the law of entail in Scotland," it is provided as follows—"It shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispone, charge with debts or incumbrances, lease, feu, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion, and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Act being obtained, containing express consent to and approval of such deed of conveyance, or contract of excambion, or other deed executed as aforesaid, and on the Court being satisfied that the procedure is regular and in conformity with the provisions of the said recited Act and of this Act, the Court shall pronounce an interlocutor approving of such sale, disposition, charge, lease, feu, or excambion, as the case may be, and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the

same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act."

Section 5 of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), contains the following provisions—"Whereas it is expedient that section 3 of the Act of the eleventh and twelfth years of Her Majesty, chapter 36, should be amended: Be it enacted as follows—(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the first day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may competently be given after such application has been presented to the Court, and in the course of the same: (2) And in the event of any of the foresaid heirs, except the nearest heir for the time, whether an heir-apparent or not, entitled to succeed declining or refusing to give, or being legally incapable of giving, his consent, the Court may dispense with such consent in terms of the provisions following."

Then follow provisions for ascertaining the money value of the expectancy of such heirs, for having the amount lodged in bank or secured over the estate for their behoof, and for dispensing with their consents.

Section 6 of the same Act provides—"The provisions of the preceding section with reference to applications for authority to disentail shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to 1st August 1848, applies for power to sell, alienate, dispone, charge with debts or incumbrances, lease or feu, or excamb such estate in whole or in part; provided always that nothing contained in this Act shall render it necessary in any application with reference to an entailed estate to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of this Act."

By the 13th section of the Entail Act of 1882 (45 and 46 Vict. cap. 53), it is enacted as follows—"In any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir . . . 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 the 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 other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the first day of August 1848 as well as to entails dated prior to that date." "Provided that if the application is opposed by any creditor of such heir who shall prove that prior to the passing of this Act he has lent money to such heir on the security of his right of succession to or interest in the entailed estate, or by the wife or children of such heir in whose favour he shall have granted provisions under the Entail Acts, the consent of the heir shall not be dispensed with until arrangements have been made for the payment or security of the creditor or wife or children to the satisfaction of the Court," &c.

Section 19 of the same Act provides—"It shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person who if the land had been entailed would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it."

Section 21 provides—"The Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper: Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it will be for the benefit of the applicant."

Section 22 provides—"The Court shall fix the time and place and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price, or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty, instead of a price to be immediately paid, or partly for a feu-duty and partly for a price." "Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction." "When the estate is sold by public auction any creditor or person interested other than the applicant may be the purchaser."

The defender reclaimed, and argued—The offer contained in the defender's letter of 19th September was made "subject to the ratification of the Court." The defender had all along been quite willing to implement the bargain as he understood it, and the petition of 6th November 1888 had been presented for that purpose. He had a material interest to proceed under the Act of 1882 for an order of sale, because in that case he would still have the estate by him in money, if not in land, and thus would retain the benefit arising from his chance of surviving the next and only other heir. He had also reason to have that Act in his mind because of the previous application he had made under it. On a fair construction of the concluding words of the defender's offer they referred to proceedings for an order of sale under the Act of 1882. The word "ratification" was applicable to proceedings taken under that Act, and not to proceedings under the Act of 1848, sec. 4. Under the Act of 1848 a sale was just a disentail followed by a sale by the heir of entail as fee-simple proprietor. In no sense was there a "ratification" of the sale by the Court under that Act, as the Court had not to apply its mind to the question of the value of the estate, but was bound to approve of the application, provided the interests of creditors

and heirs were safeguarded. The Act of 1882, on the other hand, implied a judicial approval of the sale after inquiry into the value of the estate. Under the Act of 1848 the consents were antecedent to the presenting of the application, so that no difficulty could thereafter arise as to the amount of compensation payable. The pursuer's argument with regard to an application under the 5th section of the 1853 Act was ill-founded. The defender could not obtain the "ratification" of the Court under that section unless he obtained the consent of the next heirs to the transaction into which he had entered, for the dispensation of consents contained in the Act of 1875 and 1882 did not apply to an application under that section, as it was not an application to sell, alienate, or dispone, but for approval of a transaction already entered into. Section 5 of the Act of 1875 was also in express terms stated to be an amendment of section 3 of the Act of 1848. There was no doubt that the heir might under the 1882 Act come forward and insist on a public sale. That was, however, just a difficulty to which the agreement was subject. If no "ratification" were possible under any Act the result would be that the bargain would fall as involving an impossible condition. Further, specific implement was impossible, as the approval of the Court could not be given without the voluntary consent of the next heirs in the case of a completed transaction such as this was on the pursuer's contention. The objection here taken was never raised in the case of *Merry & Cuninghame* v. *Lord Glasgow's Trustees*, and so that case could not be cited as an authority here. There was no case in which decree had been given for specific implement where what was to be done was not a single act but a course of conduct. This was not a case in which the Court would do anything more than find the defender due a sum in name of damages—*Moore* v. *Paterson*, Dec. 16, 1881, 9 R. 337; *Winans* v. *Mackenzie*, June 8, 1883, 10 R. 941; *Hendry* v. *Marshall*, Feb. 27, 1878, 5 R. 687. The result of this bargain might be grossly unfair to the defender, who might be entirely stripped of his property if the compensation payable to the next heir were fixed at a high rate. The fact that the pursuer measured the damage for non-implement at £50,000 implied that this was a very imprudent contract on the defender's part. It was also clear that if the pursuer's construction of the bargain were right there had been great misunderstanding on the part of the defender. In England the Court would not interfere to enforce specific performance where that would either result in gross unfairness to one of the parties to a contract, or where there would be great difficulty in working out the contract—Fry on Specific Performance, pp. 36–37, 167 *et seq.*; *Thomas* v. *Dering*, 1 Ke. 729; *Wycombe Railway Company* v. *Donnington Hospital*, 1 Ch. App. 268.

The pursuer argued—There were two reasons against carrying out the contract as the defender proposed. 1. The Act of 1882 did not contemplate the interposition of the authority of the Court to a bargain already made. 2. Under that Act the next heir might come in and defeat the contract by insisting on a sale by public roup. The bargain meant no more than that the seller undertook to apply to the Court for ratification of his offer. Parties need not have had in view any particular statute at all. No doubt under section 4 of the Act of 1848 it was necessary to go to the Court *ab ante*, whether the application was to sell or to disentail, but that was not so under section 5 of the Act of 1853, under which an already executed deed might be produced for the sanction of the Court. "Ratification" was a very appropriate word in view of the Act of 1853. To "ratify" meant to "approve" or "sanction," as defined by Webster, and these were the very words used in the Act of 1853. The characteristic of that Act was that it assumed the bargain made, and dealt with it *ex post facto*. The defender had it in his power to obtain the ratification of the Court by the payment of the amount of money necessary to secure the rights of creditors and compensate the next heir. The dispensation of consents introduced by the Acts of 1875 and 1882 applied by the express provision of the latter Act to all applications to which consents were required, and necessarily therefore to an application under the Act of 1853. The defender's interests were amply safeguarded in the bargain. In the event of a disentail, the value of the estate being calculated at twenty-five years' purchase, the next heir would get £257,000, and the defender £115,000, which, deducting a sum to meet the widow's jointure, would leave him a very handsome annuity, larger indeed than the rental he at present enjoyed. It was therefore quite reasonable for the defender to have entered into a bargain of that kind. Suppose the word "ratification" were ambiguous, the meaning to be given to it would surely be that which made it possible to give effect to the contract, and not that which destroyed the contract. Dubious clauses in a contract were to be read against the granter. Where a contract were impossible of fulfilment, the Court had even corrected it to the extent of altering a term—Bell's Prin. sec. 524; Ersk. Inst. iii. 3, 87; *Coutts & Company* v. *Allan & Company*, January 9, 1758, M. 11,519. With regard to the question of specific implement, the cases of *Paterson* and *Winans* had no application to the present case. In *Paterson's* case the Court treated the price demanded from the party called upon to implement the contract as prohibitory, and yet before that party could implement the contract he had to acquire the subject for which the price was demanded. In *Winans'* case the merits were not considered; the cottars were not called, and they were the parties most interested. It was not a sufficient objection against specific implement for the defender to say that he had arranged the price without calculating all the burdens, and that he found it inadequate, and must therefore be off with the bargain. Inadequacy of price might be an element to be considered in an action of reduction. The principle on which the Scottish Courts proceeded was that they would not pronounce an order when they had no means of giving practical effect to it. Here there was nothing out of the way in what the defender would have to do. There was nothing against specific implement in the nature of the acts required—*M'Arthur* v. *Lawson*, July 19, 1877; *Mackenzie* v. *Balerno Paper Mill Company*, July 12, 1883, 10 R. 1147; Fraser on Master and Servant (3rd ed.), 101. In the case of *Merry & Cuninghame* v. *Lord Glasgow's Trustees* specific

implement had been ordered of acts of the very same nature as the defender was here called upon to perform, the Court having found Lord Glasgow under a legal obligation to grant the lease. In another class of cases where the act required could be done by some other person specific implement would not be ordered, as not being necessary. Here, if the defender refused to authorise a petition to be presented, the Court would probably allow one to be presented in his name. The English cases founded on by the defender arose out of a doctrine of the Equity Courts, which was a refinement not accepted in Scottish Courts. The Court of Chancery went a much greater length in reforming contracts than the Scottish Courts would do—*Stewart* v. *Harcourt*, December 2, 1875, 3 R. 192. In England the Court would have had no difficulty in reforming the contract, and would have admitted parole evidence of the intention of parties. Error on the part of one of the parties with reference to a term used in a contract was never recognised in Scotland as a ground for annulling the contract.

At advising—

Lord President—The conclusion of this summons is for declarator that by certain missives a valid contract was entered into between the pursuer and defender for the sale by the defender to the pursuer of the estate of Murtly, "including the lands and estates of Grantully, Murtly, Strathbraan, and others situated in the county of Perth belonging to the defender as heir of entail in possession thereof, and that in respect of the said contract the defender is under a legal obligation to apply to our said Lords for authority and power under the Entail Amendment Acts to sell and dispone said estate." The Lord Ordinary has decerned in terms of that declarator. He has gone further and pronounced a decerniture, of which I shall have something to say hereafter. But the question really at issue between the parties is raised completely by that declaratory conclusion. Now, the missives which are said to constitute this contract of sale are dated on 19th and 20th September of last year. The defender writes in these terms—"*Murtly Castle, 19th September* 1888—Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof forever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation of the nett rental thereof as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash, unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court."

The answer of the pursuer is this—"*Edinburgh, 20th September* 1888—Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto."

The defender shortly thereafter was desirous of repudiating this bargain, but the pursuer declined to accede to the proposal, and brought this action for the purpose of enforcing it. I see that on the same date on which the principal summons was signeted the defender presented a petition to the Lord Ordinary apparently for the purpose of carrying out his obligation in terms of the conclusion of the summons. The date is in both cases 6th November 1888. Now, that was a petition presented under the authority of certain sections of the Entail Act of 1882, beginning with the 19th section, which confers a new power entirely upon heirs of entail to convert the entailed land into entailed money, and the conditions prescribed as applicable to the exercise of that power are somewhat peculiar, and require a very strict attention. The 19th section provides that "it shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person, who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person to apply to the Court for an order of sale of the estate, or part of it."

The 21st section provides that "the Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper: Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it shall be for the benefit of the applicant."

Then by the 22nd section it is provided that "the Court shall fix the time and place and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price: Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction."

Upon the recital of this statute and of the missives which passed between the parties, what the defender prayed the Court to do was this, to ratify and confirm the contract constituted by the missives of sale set forth in the peti-

tion, and to grant an order of sale of said estate at the said price of £372,982, 10s. 10d., which is the rental of the estate at twenty-five years' purchase in terms of the said missives. This petition was presented apparently for the purpose of carrying out that clause in the missives which is the concluding clause of the defender's letter of 19th September—"In the event of your acceptance the sale is made subject to the ratification of the Court." Now, it appears to me that the procedure taken by the defender under the Act of 1882 is not a proceeding for the purpose of obtaining the ratification of a sale already made, except in so far as that professes to be done by the terms of the prayer, because with reference to the sections of the statutes which are quoted in the petition it is very plain that the Court could not ratify in any sense of the word a sale already completed. And accordingly the next heir of entail appeared in answer to this petition, and he stated in the first place that the petition was incompetent, that it was not in conformity with or warranted by any of the Entail Statutes. And he said further, that a sale in the manner and at the price proposed would very injuriously affect the patrimonial interests of the heir, which, I think, in other words means as plainly as if he had used those other words—"I will object to a private sale." In these circumstances it must be perfectly obvious, I think, that that petition is an extremely incompetent proceeding. It is clearly not competent, because the prayer of the petition is not only unwarranted by the clause of the statute, but is in direct contradiction with the provisions of the statute; and in the second place, because the petitioner has not obtained, and apparently never will obtain, the consent of the next heir to a private sale at the price fixed by the missives. Therefore it comes to be considered what the defender is bound to do in execution of his contract of sale—what he is bound to do for the purpose of obtaining the Court's ratification of that sale.

I think there are means under the Entail Acts of obtaining such a ratification of this concluded sale, not under the clauses referred to in the petition and founded on by the defender, but upon other clauses, and particularly under the authority granted by the Act of 1853. The first section of any statute authorising a sale of entailed estates is the 4th section of the Act of 1848, the original Entail Amendment Act. It contains power to any heir of entail who was in the same position as an heir of entail who could disentail the estate, to sell the estate with the same consents and subject to the same conditions as he required to have under the clauses which enabled him to disentail. But the Act of 1853 introduces an amendment upon that 4th section. It is the 16th and 17th Vict. c. 94, and it is entitled "An Act to extend the benefits of the Act of 11th and 12th years of Her present Majesty for the amendment of the law of Entail in Scotland." It provides by section 5 that "it shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispone, charge with debts or incumbrances, lease, fee, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion; and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit, or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Acts being obtained, containing express consent to and approval of such deed of conveyance or contract of excambion, or other deed executed as aforesaid, the Court shall pronounce an interlocutor approving of such sale, disposition, charge, lease, feu, or excambion, as the case may be, and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act."

The peculiarities introduced by this Statute of 1853 are these—that an heir of entail is entitled to come to the Court after having made a contract of sale at a specified price, and to lay before the Court the disposition which he proposes to execute giving effect to such sale, and if the Court are satisfied that due provision has been made for the interests of heirs of entail and creditors, then it is imperative upon the Court to approve of the sale. The words are, "the Court shall pronounce an interlocutor approving of such sale." But no doubt under this clause the Court must be satisfied that the proper consents have been given by the heirs of entail interested, and also that all the burdens upon the estate have been duly provided for. Now, if there had been no subsequent statutes, of course the defender here could not have proceeded with the petition under that statute without the consent of the next heir of entail, the only existing heir of entail, as it happens in this case, and he must have obtained his consent to the application and to the proposed deed of conveyance. But then there are other sections which require to be attended to before we arrive at the full effect, as the law now stands, of a petition presented under this Act of 1853. In the first place by the Act of 1875 (38 and 39 Vict. c. 61) there is a very important provision in the 5th section—"(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may be competently given after such application has been presented to the Court, and in the course of the same. (2) In the event of any of the foresaid heirs, except the nearest for the time, whether an heir-apparent or not, entitled to succeed, declining, or refusing to give or being legally incapable of giving his consent, the Court may dispense with such consent, in terms of the provisions following."

Then there follows a provision for ascertaining the money value of the expectancy of such heirs, and upon such money value being ascertained the Court shall direct the amount to be lodged in bank for the benefit of the heirs whose consents would have been required under the previous Act; and then they shall dispense with the consent of such heirs. Now, under the statute there still remains the necessity

for the consent of the nearest heir, and this section is also confined to the case of disentail only, and further it is confined to the case of tailzies executed before 1848. But the immediately following section of the same Act introduced another provision in these terms:—"The provisions of the preceding section with reference to application for authority to disentail shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to 1st August 1848, applies for power to sell, alienate, dispone, charge with debts or incumbrances, lease or feu, or excamb such estate in whole or in part: Provided always that nothing contained in this Act shall render it necessary in any application with reference to an entailed estate to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of this Act."

Now that makes the provision of the Act of 1875—the 5th section of the Act of 1875—applicable to cases of application to sell as well as to disentail. And lastly, we come to the 13th section of the Act of 1882, which introduced still further innovations. The 13th section of the Act of 1882 is an amendment of the previous Act in those particulars, and is not in any way connected with the clauses of that Act of 1882 which I have already read, for the purpose of enabling an heir of entail to convert an entailed estate from land into money. There is no connection between those two parts of the statute at all. This 13th section has reference entirely to applications authorised by the previous statute, whereas the 19th and following sections introduced a new form of application for a new purpose. The 13th section was this—"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 the 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, and shall proceed as if such consent had been obtained, and the provisions of section 5 and 6 of the Entail Amendment (Scotland) Act 1875 shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August 1848, as well as to entails dated prior to that date."

This is a very comprehensive section. It dispenses with all consents whatever, and in place of consent introduces a rule of buying off those whose consents were previously required, including the next heir as well as more remote heirs; and it makes the provisions of the Act of 1875 applicable to all applications to which consents are required, and to all entails whatever, no matter what their date may be. What is the result? It comes to this, that under the Act of 1853, as amended by these subsequent Acts, an heir of entail in possession is entitled to come to the Court and state to the Court that he has sold the entailed estate, and to produce a disposition for the purpose of giving effect to that sale. He requires no consents to enable him to do so, but the Court of course still require to see that the expectancy of the succeeding heir or heirs of entail is valued and money secured, and the burdens on the estate duly provided for before they will sanction and approve of the sale already made. But if they are satisfied upon these two points that the expectancies are duly valued and provided for, and that the burdens upon the estate are all provided for, then it is imperative upon the Court to sanction the sale, and the sale shall have the same effect, as the Act of 1853 provides "it shall have the same force and effect as if the same had been executed at the sight of the Court in terms of the said recited Act." Now, it appears to me that when an heir of entail has carried through an application under the Act of 1853 in the manner which I have now detailed he has obtained the ratification of the Court to a sale already made, and thus has fulfilled the very words of that clause in the missives which provided that the sale shall be ratified by the Court.

I am therefore of opinion that it is the duty and obligation of the defender in this case to apply to the Court under the statutes which I have thus enumerated; that he is bound to produce to the Court a disposition of the estate in terms of the missives, and to pray the Court to approve of that, and to give it their sanction—that that is the only way in which he can fulfil the obligation imposed upon him by the contract with the pursuer into which he entered in the month of September last. Therefore, while agreeing with the Lord Ordinary to decern in terms of the declaratory conclusions of the summons, it rather appears to me that the next step to be taken is to have a disposition of the estate executed by the defender in favour of the pursuer, and I think we should take the course which we did in the *Earl of Glasgow's* case, and appoint that disposition to be prepared at the sight of the Court by some conveyancer to whom we may remit for the purpose. And when that disposition comes before us we can then decern further in terms of the petitory conclusions of the summons as to the presenting by the defender of the requisite application to the Court for carrying that sale into effect.

Lord Mure—The main question we have now to decide, dealing with the reclaiming-note from the Lord Ordinary's interlocutor, is, what is the meaning of that passage in Sir Douglas Stewart's letter in which he says—"In the event of your acceptance the sale is made subject to the ratification of the Court." It is contended by the defender that this is to be done by means of a petition which I understand he presented under the Act of 1882. But I think we must take it that the ordinary meaning of the words "ratification of the Court," and what must have been in the minds of the parties, was that they should apply to the Court to get under some of the Acts of Parliament applicable to entails, by which the Court had power given to them to sanction such a step as that which was proposed when the offer was made and accepted. Now, I quite agree with your Lordship that the only Act of Parliament which appears to point at proceedings of the nature which would come up to the expression "ratification of the Court" are proceedings taken under the Act of 1853, dealing with the case

where an heir of entail is authorised to sell an estate and make a disposition of it, and then come to the Court for ratification. I understand your Lordship's opinion to be that that is the course which the heir of entail ought to take, and I concur in your Lordship's view. Your Lordship has made a clear exposition of the statutes, and I concur in the course which your Lordship suggests should be adopted.

Lord Shand—I concur with Lord Mure in thinking that the only question to be determined in this case is in regard to the meaning of the words—"In the event of your acceptance the sale is made subject to the ratification of the Court," and I think in determining the meaning of these words we must have regard to what the purchaser was entitled to take to be their meaning. It is not a question entirely of what was in the mind of the seller when these words were used, but the question is, how was the purchaser entitled to read these words when he gave a written acceptance of the offer? Now, I think the word "ratification," as used here, simply means confirmation or approval. Both parties knew the estate was entailed, and of course before the Court can either confirm or approve of the sale of an entailed estate, it must be shown to the satisfaction of the Court that the interests of the heirs of entail entitled to compensation have been protected, and that creditors who may have claims against the estate have also had their debts provided for. It is essential that in every proceeding by which there is to be a dealing with an entailed estate it shall be under the statutes subject to the approval of the Court. Now, looking at the contract in that aspect of it, and without going over the various provisions of the statutes to which your Lordship has referred, it is quite plain that on the one hand there is a mode of proceeding by which the seller of this estate is in a position of exercising a right to get the approval or confirmation of the Court. He may, under the section of the Act of 1853, to which your Lordship referred, execute a deed of conveyance, he may present it to the Court, and ask for the confirmation or approval of it, and the Court, if satisfied that the interest of the heirs of entail and creditors have been provided for, will grant approval accordingly. There would have been a block in the way of a proceeding of that kind if this contract had been entered into in 1853 or immediately afterwards, because the next heirs of entail who had a material interest might then have refused their consent. But in 1875 there was a statute passed which enabled the heir in possession to compel the consents of the second and third heirs next entitled to succeed, and under the Act of 1882 the heir in possession can equally compel the next heir to himself to give his consent. It is important to observe that such next heir is not entitled to enforce such a payment for his interest as shall amount to a prohibitory price for it, for the statute contains provisions declaring that a reluctant heir may be compelled to give his consent upon reasonable terms. If the consent be refused the Court are in a position to make such inquiry as will enable them to ascertain the true value of the heir's consent, which being ascertained, the value of it is fixed, the money is consigned, and the Court has thereupon power to dispense with the consent altogether. And so it is quite clear that in that view of the case there is no difficulty whatever in this contract being carried out to the very letter of it according to the view which I think any buyer of this estate upon that letter was entitled to entertain.

The proposal that is made in defence to this action is—not to adopt a proceeding under the Entail Acts which will secure the end which the seller of the estate became bound to secure if he could—the proposal is to present an application to the Court in such a form that the approval of the Court cannot be obtained. The proposal is, as I understand, to apply to the Court for authority to have the estate sold at the price agreed on to the present pursuer for the purpose of substituting entailed money in room of the estate. But one condition of carrying out a proposal of that kind is that you must carry the next heir with you in some respects, and if he refuses to give his consent to the arrangement he can block the proceedings entirely. Your Lordship has read the section which provides that in an application of that kind to convert an entailed estate into entailed money, the next heir has nothing to do but appear and say, "I object to a private sale, and insist on a sale by auction." In this way he can absolutely prevent a private sale. And if he takes up that position, what is the effect upon a bargain of this kind? Why, it destroys the bargain, because it is a sale by private bargain, and if a public sale were ordered, Mr Kennedy would have to appear in the market as a competitor with any others who might come forward for the estate. In point of fact, as I read the answers which Mr Fothringham, the next heir, has lodged in the application by Sir Douglas Stewart, in which he says he declined to consent to a sale "in the manner proposed," I understand he means that if a sale were to take place under that petition, he would insist that it should be a sale by public auction.

Now, I think in that aspect of the case the question is quite simple. On the one hand the seller, who has stipulated for a ratification or approval of the sale, proposes to adopt a proceeding under the Entail Acts under which he cannot obtain the approval of the Court, because the next heir, having the power under the statute to do so, has interposed a block which will absolutely prevent that. On the other hand, the seller has it in his power to carry out the sale by taking a proceeding, not for selling this estate with a view to substituting entailed money, but for selling the estate so that he shall himself get the reversion of the price. He can have the interest of the next heir valued, and so he can carry out his contract of sale in that way. I am clearly of opinion that upon the question of construction of this contract and obligation the defender is bound to adopt a proceeding which will enable him to fulfil the contract, which it is clear he can fulfil, the matter being absolutely within his power, and that it is no implement of that contract to offer to take proceedings of another nature which a third party has power to frustrate, and with reference to which in this particular case the next heir of entail intimates that he will exercise his power, and so frustrate and prevent the sale being carried out. I am therefore of opinion with your Lordships that, following out the proceedings which are autho-

rised by the Statute of 1853 and subsequent Acts, the defender should be ordained to execute a deed as your Lordship proposes, and that the terms of this deed in the meantime should be adjusted by a man of business.

It is right to notice that when the point as to the mode of working out the different stages of the case with the materials for so doing was argued before the Lord Ordinary when the case was before him, the conclusions of the summons did not describe the proper course to be adopted, but there has been an amendment made on the conclusions to the effect that the defender should be decerned and ordained to execute a disposition of the estate, and thereafter to take and follow out proceedings to have the sale and disposition approved of, and I think that alternative conclusion enables the Court to deal practically with the case as your Lordship proposes.

LORD ADAM—In my opinion if this had not been an entailed estate and missives in the terms of the offer and acceptance had been exchanged, in that case there would have been a completed contract of sale, and that would be all that was required. But this was an entailed estate, and therefore such a contract of sale could not be carried out without the use of statutory words, the "approval" or, as it is sometimes called, the "sanction" of the Court, because an application must be presented to the Court to obtain approval in respect of the interests of the heirs of entail and creditors upon the estate. Therefore we find that the concluding words of the offer here are—"In the event of your acceptance the sale is made subject to the ratification of the Court." As I read that, it means this—subject to the sanction or approval of the Court. I think that is the only sensible meaning that can be given to the word ratification there. Well, then, if that be so, so far as I am aware or know, there is only one way in which the approval or sanction or ratification of the Court can be obtained, and that is by a proceeding under the 5th section of the Act of 1853, because that gives authority to the heir of entail to execute and produce, either during or before he presents an application, a disposition of the estate. Now, it is quite true, as Lord Shand pointed out, that if the entail legislation had stopped with the Act of 1853 this sale could not have been carried out, and the sanction or approval or ratification of the Court could not have been obtained, because at that date the consent of the heir or heirs of entail was requisite and there would have been a bar, just as there is a bar to any other proceedings under the Act of 1882 here, because the consent in this case clearly would not have been given. But then have come the subsequent Entail Statutes, which I think it would be a waste of time, after your Lordship's exposition of them, to go over again; but the result of them is just this—that under the Act of 1882 there is a means by which the consent of the heir of entail, which was necessary under the Act of 1853, may be dispensed with by ascertaining the money value of his expectancy or interest in the entailed estate. That is entirely a matter which can be done, and done as a matter of certainty. The Court, if it be done, cannot say anything against the sale; it must just give its sanction and approval of the sale if all the statutory formalities are carried out. There is no difficulty here, it appears to me, therefore in Sir Douglas Stewart doing what he is bound to do, I think, by the offer and acceptance, viz., in the first place, to execute a disposition of this entailed estate, and after having done that to proceed under the 5th section of the Act of 1853 and the subsequent Entailed Statutes, and get the sanction and approval of the Court, which will follow as a matter of course if the statutory requisites are all attended to. Therefore I agree with your Lordship that the first thing is to ordain Sir Douglas Stewart to execute a disposition of this estate.

The Court adhered to the interlocutor of the Lord Ordinary in so far as it repelled the first, second, and third pleas-in-law for the defender, and found, decerned, and declared in terms of the declaratory conclusions of the summons: *Quoad ultra* recalled the interlocutor *in hoc statu*, and appointed the pursuer to lodge in process within fourteen days the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer in fulfilment of the contract of sale constituted by the missives of sale dated 19th and 20th September 1888 founded on by the pursuer.

Counsel for the Pursuer (Respondent)—Lord Adv. Robertson, Q.C.—D.-F. Mackintosh, Q.C.—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Reclaimer)—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, February 9.

FIRST DIVISION.

[Lord Trayner, Ordinary.

THE DISTILLERS COMPANY (LIMITED) *v.* DAWSON (W. & J. RUSSELL'S TRUSTEE).

Sale—Constructive Delivery—Undivested Owner—Bankruptcy.

A company of distillers sold to a customer certain parcels of whisky lying in their bonded warehouse, and received payment of the price. The warehouse was only used for the storage of whisky made by the company on which duty had not been paid. The purchaser sub-sold the whisky, and granted a delivery-order to the vendor, which was duly intimated to the company, and an entry notifying the sale was made by them in their books, but no delivery of the whisky ever took place. The vendor became bankrupt. In an adjustment of accounts between the trustee on his sequestrated estate and the company, *held* (*per* the Lord President, Lord Adam, and Lord Kinnear, *rev.* Lord Trayner) that there had been no delivery of the whisky actual or constructive, and that the company therefore remained the undivested owners, and were not bound to deliver it to the trustee as a condition of their obtaining a ranking in the sequestration (*diss.* Lord Mure and Lord