the month of October; and (2) Even supposing the goods were there, they failed to discharge the obligation to engage freight-room. The burden of proving a breach by the pursuers lies in the first instance on the defender. It lies on him to prove that the goods were not at Dunkirk timeously. It is not an easy thing for the defender to prove that, and therefore he will easily discharge the onus. If he can show reasonable cause to think they were not there, the pursuers will have to show that they were. In regard to the other matter, the burden is more seriously on the defender.

I think, on the evidence, there can be no doubt the pursuers have proved that the goods were at the port of shipment in October, and I do not think the defender has proved his other point either.

The consequence of the non-arrival of the sugar was that on 16th November 1874 the defender wrote to Mr Dunn, the broker, in terms amounting to a positive repudiation of contract, and this repudiation of the contract was intimated to the pursuers by Dunn. They were not left in doubt, and got good advice from Dunn, who pointed out their remedy as having suffered a breach of contract. Re-sale is the only proper remedy for parties in the position of the pursuers to adopt, and there was nothing to prevent the sale of the sugar before it arrived in this country. It could have been sold when in transition. But the pursuers did nothing even after the two vessels arrived. Dunn wrote to them again on the 25th that the market was dull. In fact the pursuers were fully certiorated, even if they were not themselves bound to know, that the contract having been broken their proper remedy was to re-sell the goods and claim the difference as damages against the defender. If they had sold immediately, it is admitted the sugars would have brought 23s. 6d. No doubt the market fell in December, and if they had sold then I cannot help thinking they would have had more to say, as the case ultimately turned out. But they did not sell until the 20th January.

A seller's right to recharge against a buyer a loss upon a re-sale of goods cannot be properly exercised by a re-sale occurring three months after the breach of contract. That would be a very loose and inexpedient proceeding to sanction, and I am not aware that any such privilege of delay has been admitted. A seller is certainly not entitled to speculate either for himself or for any other party. He is not entitled to consider his own interest. He must re-sell whatever the state of the market, and it is only if he immediately does that that he can charge the difference between the contract and the market price against the buyer. What was done here in January should have been done in November, and I therefore cannot agree with the Lord Ordinary on this point. The true estimate must therefore be the difference between the contract price and what the goods would have brought if sold in November. Whatever loss has arisen by the postponement of the sale till January must be deducted from the sum of damages found due to the pursuers.

Lord Deas—The only question about which I have any difficulty in this case is that of the amount of damages. I entirely agree in the law as stated by your Lordship. But my hesitation has arisen from the fact of the very short period to which we are confining the seller in order to effect a re-sale. That is a very narrow part of the case. But on the whole I agree with your Lordship that it is somewhat safer and sounder to be strict than loose upon that point.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the defender David Forrester against Lord Craighill's interlocutor, dated 5th June 1876, Adhere to the said interlocutor except in so far as it decerns the defender to make payment to the pursuers of the sum of £436, 7s. 4d., with interest thereon at the rate of five per centum per annum from 26th February 1875, the date of the summons in the present action, until payment, in terms of the conclusions of the summons: Recal the decerniture, and in place thereof decern the defender to make payment, to the pursuers of the sum of Two hundred and ninety pounds and eightpence sterling, with interest thereon at the rate of five pounds per centum per annum from the date of citation until payment: Find the pursuers entitled to additional expenses, modified to two-thirds of the taxed amount thereof: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers — Balfour — Darling. Agents—J. & R. D. Ross, W.S.

Counsel for Defender — Trayner — Alison. Agents—Webster & Will, S.S.C.

Saturday, December 2.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LUCAS AND OTHERS (BERESFORD'S TRUSTEES) *v.* GARDNER.

Suspension—Caution.

A creditor was in right of an *ex facie* absolute disposition of certain lands, which, it was declared by a relative minute of agreement, were to be held in security and for repayment of a certain sum, "and of all other sums for which the respondent might become liable." In the event of failure to pay, there was a power to sell either by public roup or private bargain upon one month's notice.—*Held* that a note of suspension and interdict against the exercise of the power should be passed without caution, on the ground that the sum in respect of the non-payment of which it was proposed to enforce the power was not liquid, nor one *quod statim liquidari poterat.*

This was a note of suspension and interdict for Edward Averil Lucas, Charles David Lucas, and Lady Elizabeth Lucas or Beresford, trustees of the late Sir George de la Poer Beresford, against

James Gardner, residing at Laroch House, Ballachulish, in the following circumstances:—

In 1861 Sir George Beresford purchased the lands and estate of Ballachulish, inclusive of the slate quarries upon the estate, and some years afterwards he executed a deed of directions and declaration of trust in favour of the present complainers, assigning to them his whole interest in the property for certain purposes named. They entered into possession in May 1873, and in order to pay off a debt of about £50,000 upon the estate, they procured, through Mr George Gardner, writer in Glasgow, two loans on the security of the estate—one of £40,000, and the other of £8000. Other claims were, however, made, and to pay these Mr George Gardner offered to get a loan from his father James Gardner, the respondent, of £6500, at 6 per cent. The offer was accepted, and the complainers thereafter signed an *ex facie* absolute disposition of the estate, dated 26th May 1873, in favour of the respondent, of the nature of which they alleged they were not then aware. This disposition was qualified by a minute of agreement between the parties, dated the 26th May and 4th June in the same year, which was also signed by the complainers without, as they stated, their being aware of its contents. By that minute of agreement it was, *inter alia*, declared—"*First*, That the said disposition was granted in security and for repayment of said sum of £6500, interest, and consequents, and of all other sums for which the second party might become liable on account of, or advance to, said trustees; and on the same being paid to him, or his being fully relieved thereof, and of all relative expenses, that he should reconvey the said lands, quarries, and others to the complainers under burden of the existing securities thereon, viz.—£40,000 and £8000. *Second*, That in the event of the complainers failing to pay and relieve as aforesaid, upon the respondent giving them or George Gardner, writer in Glasgow, their agent, one month's previous notice that he desired payment or relief, he should be entitled to sell the said quarries and others by public roup or private bargain in Glasgow or Edinburgh, under burden of said existing securities, and should account for and pay over to the complainers the free residue of the price after full settlement of his own claims and the expenses of and incident to the sale." It afterwards appeared that the £6500 had been borrowed upon three bills from the City of Glasgow Bank, to which George Gardner procured the signature of the complainers.

The complainers stated that after the execution of these documents the respondent applied to Lady Beresford for a lease of fifteen years of the Ballachulish slate quarries—the lease of the existing tenant expiring at Whitsunday 1874,—and that Lady Beresford agreed to give it, upon the stipulation that it was to be on similar terms with the preceding one. The lease as drawn up was in very different terms from the previous one, but in ignorance that this was the case it was signed. Although George Gardner had been appointed by the complainers their factor and commissioner, it was stated that he had become very neglectful of their business, and that representations to that effect had been made to his father, who with his son John (as the former admitted in his answers) agreed to attend to any duties belonging to his son connected with the estate. But George Gardner's neglect became so great that his appointment was recalled in March 1876, and the new factor then appointed had been unable to obtain from the respondent any proper state of his accounts.

The true nature of the documents signed by the complainers was then made known to them, and after much difficulty the factor, in August 1876, obtained from the respondent an account bringing out a sum of £9424, 6s. 9d. as due by the complainers. On 16th September the complainers received an intimation from the respondent requiring payment of that sum, and stating that if not paid within a month from that date he would proceed to sell the lands and estate, under the second head of the agreement above mentioned. The complainers accordingly brought this note to have these proceedings suspended and the sale interdicted, but stated their willingness to pay any balance that might be found due to the respondent. They averred that the respondent and his son had been acting throughout in collusion, and explained that they were about to raise an action against George Gardner to compel an accounting with him, and another action of reduction of the lease.

With reference to the account of £9424, 6s. 9d., they averred, *inter alia*—"This amount consists only to the extent of two sums of £2619, 13s. 3d. and £1112, 9s. 10d., of payments alleged to have been made by the respondent to the City of Glasgow Bank in respect of the said £6500 debt (the remainder of the said debt having been paid by the said George Gardner, the complainer's factor, on their behalf), and the balance of the said £9424, 6s. 9d., consisting of a great variety of miscellaneous charges and alleged payments, many of which ought to have been made, and which the complainers believe were made, by George Gardner, their agent and factor, out of moneys belonging to them which came into his hands, and which will form entries to his credit in his accounts with them, but with which the respondent had no concern, unless he may have paid them as acting on behalf of his son George as above mentioned, and which do not form proper items of credit in his accounts with the complainers, and were not covered by the foresaid security. Further, in the portion of the accounts relative to the said quarries, the complainers are improperly debited with very large sums, whereby the apparent profits of the quarries are reduced to a very small amount; and the said accounts contain many charges which, even assuming them to be legitimate entries therein (contrary to the complainers' contention), are not properly vouched. The complainers believe and aver that upon a just accounting, if any balance at all is due by them to the respondent, which they do not admit, it will be of very small amount."

The respondent answered that the statement of accounts which he produced showed "the advances made by him to and on behalf of the complainers from September 10, 1873, to May 15, 1876, state of interest on the said advances, and the sums at the credit of the complainers in respect of their claims under the lease. Besides the advances, the complainers are indebted to the respondent in the sum of £68, 12s. 1d. for goods supplied to Sir George Beresford between

17th December 1872 and 20th July 1873. The whole amount of the said advances, account for goods, and interest, is £12,796, 8s. 7d., from which there falls to be deducted the sum of £3572, 1s. 10d., as shown in the said statement. No part of the said advances, or of the said account, has been paid by the complainers, and the sum now due and resting-owing by them to the respondent is £9424, 6s. 9d."

The complainers pleaded, *inter alia*—"(1) The complainers are entitled to have the proposed sale interdicted, in respect that the sum claimed by the respondent is not truly due, and that they have all along been, and still are, ready and willing to settle accounts with him, and pay any balance which may be found due. (2) The respondent having, in the matters above mentioned, been acting in collusion with the said George Gardner, adversely to the complainers' interests, and having by the said actings created or attempted to create improper charges against the complainers, and deprived them of the means of speedily settling accounts, they are entitled to have suspension and interdict as craved."

The respondent pleaded, *inter alia*—"(1) The respondent being infeft in the lands and others described in the note of suspension, under an absolute disposition, is entitled to sell and dispose of the same under burden of the existing securities, he being always liable to account to the complainers, in terms of the minute of agreement, for the residue of the price after full settlement of his claims against them, and under deduction of the expenses incident to the sale. (2) The complainers being absolutely divested of the said subjects, have no right or title to interfere with the sale thereof by the respondent, except on condition of making full payment of the whole sums due to him, as set forth in the foregoing statement, and that within one month from the 16th September 1876, in terms of the said minute of agreement."

The Lord Ordinary, on caution, passed the note of suspension.

The complainers reclaimed.

At advising—

Lord President—Although this is merely a question whether the note should be passed without or upon caution, it involves considerations of delicacy. Where a creditor is armed with a power of sale the Court will not interfere to prevent it unless it can be shown that an occasion for the exercise of it has not arisen. This is a peculiar case. No doubt here, as in every other instance, the power of sale is just a part of the security, and the security of the creditors is not so good without it. And therefore to stop it is to deprive the creditor of a part of the security he holds. On the other hand, the Court are still quite entitled to interfere if they are satisfied that the occasion for exercising the power has not fairly arisen.

The consideration of the present case seems to me to be influenced by the terms of a minute of agreement between the parties, by which the disposition in favour of the respondent was qualified. The sum advanced by the respondent was £6500, and I assume that the complainers were in straits for money, and could not borrow on the usual terms, and that they took this unfavourable form of obtaining an advance because they could not get a more favourable. They granted an absolute disposition, and it was followed by an agreement that it was to operate only as a security, and not only for the sum of £6500 then raised, but also for any other advance that might be made by the respondent to the complainers. It appears to me that the true construction of the second head of the agreement is that the respondent, when he proceeds to exercise the power of sale, shall be in a condition to show that the £6500 has not been repaid, that any other advances have been constituted so as to be immediately liquidated, and that the other sums due are in the same position. If that were the nature of the account before us, it seems to me that the sum in respect of the non-payment of which the power of sale would be proposed to be exercised would be a liquid sum, or one *quod statim liquidari potest*, and that there would be relative vouchers on both sides without need for further inquiry or accounting. If an account of that nature had been given to the complainers, and due intimation were made of the intended exercise of the power of sale, I should have been sorry to stop it even upon caution.

But this case is very different. The balance in respect of the non-payment of which the respondent proposes to put his power of sale in force amounts to £9424, 6s. 9d. It is clear that that balance must be brought out on an accounting of a peculiar kind. It is not alleged that in addition to the £6500 there are definite advances, which, with the interest, make up the debt. That is not the nature of the respondent's statement. His statement is that upon an account, which is produced, the balance I have mentioned arises.

The account begins with a certain portion of the £6500 which appears to be still outstanding, but which it is admitted is to a certain extent paid up. But from July 1874 to May 1876 the account proceeds in such a way as to show that it is not a proper account between debtor and creditor under the security, but that there is something else entering into it totally alien to such a relation. The respondent, it appears, has entered into the possession and management of the estate in respect of his son being factor, and while he charges all the reckless expenditure made from day to day on the complainers' behalf, he credits on the other side the rents and lordships due to them, and upon the whole account brings out the balance of £9424, 6s. 9d. That is not at all the kind of balance contemplated by the second head of the agreement; and for that reason it is not a balance which we can test in a question of this kind.

It seems to me that under existing circumstances the respondent is not entitled to exercise the power of sale. Upon the question how soon he may be so entitled I desire to give no opinion. It is quite possible that even a cursory examination, more searching only than we are able to make in a hasty discussion in the Bill Chamber, may show that there is a balance as between debtor and creditor upon the footing of this particular agreement; and when that so appears the respondent will be in a different position from that in which he now is. He may then apply to the Lord Ordinary for recall of this interdict. But upon the nature of this account as at present presented to us, all that I determine is that in my

opinion it is not such an account as should be followed by the exercise of a power of sale, and therefore I think the note should be passed without caution or consignation.

Lord Deas—I agree with your Lordship on all the grounds which you have stated for passing this note without caution or consignation. But there are some other grounds. I have no doubt that where a heritable creditor has lent money, whether on a bond and disposition in security or on an *ex facie* absolute disposition and back-bond, that it is in the power of the Court to interfere upon equitable grounds with the exercise of the power of sale. If it can be shown that no hardship or prejudice will be caused to the creditor, and that there may be such to the proprietor of the estate, I have no hesitation in saying that it may be in the power of the Court to interfere to stop the sale.

Considerations of that kind would apply to this case. The stipulation is that upon the failure of the debtors to pay and relieve, the power of sale may be put in force upon one month's notice, and the sale is to be either by public roup or private bargain. That is such a power as I do not remember to have seen before. The premonition is generally three months, and coupled with it is a provision for advertisement for a certain period of time. There is nothing of that kind here. There is a power of sale at any time if the debtor has declined to pay after one month's notice. That is unusual either in a back-bond or in a bond and disposition in security. The circumstances are such as that the Court would more readily interfere than in the ordinary case. I do not see any prejudice that can happen to the creditor, and ruin perhaps may befall the other. The moment the month expires, and without any competition, the estate may be sold.

I am clearly of opinion that we ought to pass this note without caution or consignation.

Lord Mure—I agree with your Lordship in the chair that the account produced is *ex facie* not an account falling under the terms of the second head of the agreement between the parties. It is a factorial account between the complainers and the son of the respondent. It is distinctly averred by the complainers that the account partly consists of "a great variety of miscellaneous charges and alleged payments, many of which ought to have been made, and which the complainers believe were made, by George Gardner, their agent and factor, out of moneys belonging to them." If that is true, the account will be cut down to a very large extent. It will be necessary for the respondent to instruct the Lord Ordinary that the account falls within the second head of the agreement before he can have the interdict recalled.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming-note for the complainers against Lord Rutherfurd Clark's interlocutor, dated 1st November 1876, Recal the interlocutor, and remit to the Lord Ordinary in the Bill Chamber to pass the note and continue the interim interdict without caution or consignation."

Counsel for Complainers — Lord Advocate (Watson)—Balfour—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent — Kinnear — Asher. Agents—Adamson & Gulland, W.S.

Tuesday, December 5.

FIRST DIVISION.

[Lord Shand, Ordinary.

THE LORD ADVOCATE *v.* EARL OF ZETLAND.

(Before seven Judges.)

Succession—Succession Duty Act (16 *and* 17 *Vict. cap.* 51), *sec.* 2—*Predecessor—Disposition—Devolution by Law—Entail.*

An entailed estate, destined to A "in liferent, and to the heirs-male procreated or to be procreated of his body in fee," passed in terms of the destination to B, who was served as nearest heir-male of tailzie and provision to C, his uncle, the immediately preceding substitute. *Held* (by a Court of seven Judges) that in the sense of the Succession Duty Act, B took not by disposition but by "devolution of law; that accordingly C, and not A, was his predecessor, and that he was therefore liable to pay a duty of three per cent.

In the succession to an entailed estate, where a class (*e.g.*, of heirs-male) is called, and it is left to the law to determine who is the person to take in the event of a death amongst the class, the transmission of the estate is, for the purposes of the Succession Duty Act, a "devolution by law."

By deed of entail, dated 25th May 1768, Sir Lawrence Dundas, of Kerse, Bart., destined certain lands to his son Thomas Dundas, "in liferent, for his liferent use only during all the days of his natural life after my death, and to the heirs-male lawfully procreated or to be procreated of his body in fee," whom failing to certain other substituted heirs in their order as specified in the deed. On the death of Sir Lawrence Dundas in 1781, the said Thomas Dundas, afterwards Lord Dundas, succeeded to the estates under the destination to him in liferent. In 1813 he disentailed portions of the estates in virtue of a Private Act. Under that Act other lands of equivalent value were entailed, the destination in the deed of entail being exactly similar to that in the first deed —"To and in favour of myself in liferent, for my liferent use only, during all the days of my natural life, and to the heirs-male lawfully procreated or to be procreated of my body in fee," whom failing to the same series of substituted heirs as in the above mentioned entail by Sir Lawrence Dundas.

On the death of Thomas Lord Dundas in 1820 he was succeeded by his eldest son Lawrence First Earl of Zetland, who died in 1839, succeeded again by his eldest son Thomas Second Earl of Zetland. He was succeeded by his nephew the present Earl of Zetland, who was duly served and retoured as nearest heir-male of tailzie and provision to his uncle. Certain of the lands and estates were held by him under an arrangement by which they had been disentailed partly in 1852