general disponee. I own that I was perhaps in forming this opinion under the influence of the consideration that the children in getting the £2000 even out of this policy of insurance, which they are strictly entitled to in my judgment, are getting just so much more than their father intended them to get, but I thought, notwithstanding that, that I could not deny them what the marriage-contract undoubtedly gave them. I was inclined, however, to limit their right strictly to the sum of £2000, so that their father's intention might receive some effect. That was my inclination, but I do not hold a very strong opinion in that direction, and should not care to insist upon it if the contrary is the prevailing opinion of your Lordships, and no doubt a great deal is to be said for this view that there was no obligation in the wife's part of the marriage-contract to provide £2000 for the children, but only a direction to the trustees to create an insurance estate by means of a £2000 policy, and if that policy had proved to be worth less than £2000 there would have been no claim at the instance of the children to have had the deficit made up. As a fact the policy amounts to considerably more by the addition of bonuses. Perhaps as they would have suffered if there had been a loss, the children are entitled to profit by the increase. In that view the children will be entitled to all provided by the marriage-contract not modified in any way by testamentary deeds of Sir James, to the policy not only to the extent of £2000, but to the policy and the bonuses which have accrued on it.

LORD RUTHERFURD CLARK—I have no doubt that the children are entitled to the provisions in the marriage-contract in their favour both by their father and their mother. Upon the question whether they are entitled to the whole proceeds of the policy or only to £2000, I am clearly of opinion that they are entitled to the whole. I look upon the language of the marriage-contract not as settling a definite sum, but as providing for a policy of insurance and the entire proceeds payable under it.

LORD LEE—I have come to the same conclusion. Upon the question of the bonuses I agree with Lord Rutherfurd Clark that the proceeds must follow the policy. If the value of the policy had fallen below £2000 the children would have had no claim for more than they could actually get under the policy, and if that is so, there is strong reason for saying that the thing provided by the marriage-contract was not the sum of £2000, but the policy with all its accessories.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the negative, and the second question to the effect that the parties of the third part were entitled to the entire sum of £3183, 5s. in the proportions of one-third to each of the two surviving sons of the marriage, and one-third equally among the children of the deceased daughter.

Counsel for the First and Third Parties—Sir C. Pearson—W. C. Smith. Agents—Baxter & Burnett, W.S.

Counsel for the Second Party—Comrie Thomson—Macfarlane. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, June 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

HOWARD & WYNDHAM *v.* DICKCLELAND AND OTHERS (RICHMOND'S MARRIAGE-CONTRACT TRUSTEES).

Right in Security—Sale by Heritable Creditor—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101)—*Premonition — Advertisement — Title — Expenses.*

The Titles to Land Consolidation (Scotland) Act 1868 provides in section 119, with reference to the right of the heritable creditor to sell under the powers in his bond and disposition in security, that if the debtor in the bond fails to pay the sum due within three months after a demand has been made upon him, the creditor may without further intimation sell the lands by public roup "on previous advertisement stating the time and place of sale, and published once weekly for at least six weeks subsequent to the expiry of the said three months . . . and also that in carrying such sale or sales into execution it should be lawful to the grantee to prorogate and adjourn the day of sale from time to time as he should think proper, previous advertisement of such adjourned day of sale being given in the newspapers above mentioned once weekly for at least three weeks."

In March 1882 a heritable creditor served formal notice calling up the bond, and in August, after six weeks' advertisement, exposed the subjects for sale. The sale was adjourned, and the subjects were subsequently exposed on nine other occasions between 30th August 1882 and 31st October 1888, when the subjects were sold. A little over three years elapsed between the ninth and tenth exposures. Sales were effected upon the fourth and sixth exposures, but each of these proved abortive. Previous to each exposure after the first, advertisements were made for three successive weeks, except in the cases of the fifth and seventh exposures, on which occasions six weeks' advertisement was made. One of the titles offered by the sellers proved to be a disposition by a trustee in favour of himself and another.

The buyers suspended a charge to pay the price of the subjects, and in the course of the proceedings the sellers delivered a deed of discharge and ratification by the beneficiaries of the aforesaid disposition by the trustee to himself.

Held that the premonition given in 1882 had not fallen from lapse of time between that date and 31st October 1888, that the fifth and seventh exposures were properly preceded by six weeks, and the final exposure by three weeks advertisement, and that as the objection to the title was not frivolous, the purchaser was entitled to have it adjudicated upon at the expense of the seller.

Stewart v. *Brown*, November 22, 1882, 10 R. 192, *commented on.*

In 1878 Andrew Yuille and Robert Rae, merchants in Glasgow, borrowed from Mrs Anderson £13,000, and granted a bond and disposition in security over heritable subjects in Hope Street there, of which the "Theatre Royal" formed part. Yuille and Rae had obtained these subjects by disposition in their favour from the Scottish Heritable Security Company and the trustees of James Baylis. Mrs Anderson assigned the bond to the extent of £1500 to other parties, and on her death her trustees made up title to the extent of the balance of £11,500 which remained vested in her, and in January 1879 they called up the bond.

In October 1879 Yuille was sequestrated, and in 1880 John Rae was sequestrated and Mrs Anderson's trustees entered into possession of the security-subjects under the powers contained in the bond.

In February and again in March 1882 the trustees again served formal notice calling up the said bond, and on 2nd August of the same year, the subjects, having been advertised in the newspapers for six weeks, were exposed for sale by public roup, at the upset price of £18,000. No offerers appeared at the sale, which was adjourned, and the property was subsequently exposed for sale on nine other occasions between 30th August 1882 and 31st October 1888. The ninth exposure was made on 29th July 1885. Previous to each exposure, subsequent to the first, advertisements were inserted in certain newspapers, but that for only three successive weeks, except in the cases of the fifth and seventh exposures on which occasions six weeks' advertisement was given immediately prior thereto. A sale was effected on each of the fourth and sixth exposures, but in neither case was it carried out by the offerer; and on the occasion of the tenth and last exposure, the subjects were purchased by Howard & Wyndham, theatrical proprietors.

In 1886 Mrs Anderson's trustees assigned the bond in question to the marriage-contract trustees of Mrs Anderson's daughter Mrs Richmond.

By article 7 of the conditions of roup it was, *inter alia*, provided—"Declaring that the offerers and purchaser shall be held to have satisfied themselves as to the validity and sufficiency of the said title deeds, and of the right of the exposers, and shall not be entitled to object to the same after the sale upon any ground whatever: . . . Further declaring, that the offerers and purchaser shall be held to have satisfied themselves of the right of the exposers to bring the said subjects to sale, and of the accuracy and sufficiency of the said bond, whole notices, advertisements, and preliminary proceedings required by statute or otherwise in the case of sale under the power to that effect contained in a heritable security, and shall not be entitled to object to the same, or to withhold payment of the price on any ground or pretext whatever, the exposers' right being taken *tantum et tale;* declaring further, that the offerers, by subscribing their offers, accede to and become bound to adhere to and fulfil this condition, and renounce and depart from any right to object to or challenge any of the titles, rights, and proceedings, or the right of the exposers to sell the said subjects."

On 6th October 1888 the agent of Howard & Wyndham wrote the agents of Richmond's trustees for the titles and the draft articles of roup, and after receiving them, he again wrote—"With reference to the other points in your letter, of course it is possible that Messrs Howard & Wyndam may not be the successful offerers, but in the meantime I think it is only right that in their interest I should reserve for subsequent treatment any questions that may arise on the title, including those dealt with in my former letter; . . . (2) and (3) in connection with the important question as to the regularity of the proceedings antecedent to the sale, I have no wish to suggest any unnecessary difficulties, more especially as I have not had time to look into the matter fully; but I think it right to point out to you what occurred to my mind on a cursory perusal of the articles of roup. In this connection I would suggest that before the sale you should consider the bearing and effect of *Stewart and Others* v. *Brown and Others*, 17th November 1882, reported in the S.L.R. vol. xx., p. 131, and especially the opinions of the Lord President and Lord Shand, containing certain *obiter dicta* relating to premonition and advertisement in a question with the proprietor; (4) I would suggest that the clause in the articles should be altered."

Upon various grounds Howard & Wyndham delayed to make payment of the purchase price, and upon 21st November 1888 they were charged to pay at the instance of Richmond's trustees.

They suspended the charge, and averred—"(Stat. 13) That the respondents' proceedings were irregular and illegal, and that they are unable to give the complainers a valid title to the said subjects, in respect (1) the said John Rae was one of the trustees of the said James Stevenson Baylis when the said trustees, who were then the proprietors thereof, sold the subjects to Mr Yuille and Mr Rae in 1878; . . . (3) no intimation was made to any of the proprietors of the said subjects or other parties entitled

to said notice after 1882 of the calling up of the bond, or of any of the said exposures for sale, nor of the change of creditors in the bond; (4) no valid, legal, or sufficient advertisement was made of any of the said exposures after that on 21st February 1883, or otherwise, and in any event after that on 3rd September 1884, and in particular, no legal advertisement was made of the exposure of 31st October 1888."

The respondents replied—"In regard to the first point stated in the second last paragraph of your letter, we have to repeat what Mr Tait stated verbally, viz., that the beneficiaries under Mr Baylis' testamentary deeds ratified and approved of the trustees' whole actings, and discharged them. When Mr Macdougall purchased the property in May 1883 that deed of discharge was obtained at some expense by his agents, Messrs Burns, Aiken, & Company, writers, Glasgow, who now hold it as hypothecated for their account against Mr Macdougall, and they refuse to part with the document. Of course it is arguable that Mr Baylis' trustees were bound to deliver such a deed at the settlement of the sale to Messrs Yuille & Rae, and we are perfectly willing to carry out certain proceedings which we threatened some years ago if you insist upon the delivery of the discharge."

By section 119 of the Titles to Land Consolidation (Scotland) Act 1868 it is provided that the clauses of the short form of bond and disposition in security scheduled to that Act "reserving right of redemption, and obliging the grantor to pay the expenses of assigning or discharging the security, and on default in payment granting power of sale, shall have the same import, and shall be in all respects as valid, effectual, and operative as if it had been in such bond and disposition in security specially provided and declared . . . that if the grantor should fail to make payment of the sums that should be due by the personal obligation contained in the said bond and disposition in security within three months after a demand of payment intimated to the grantor, whether of full age or in pupillarity or minority, or although subject to any legal incapacity, personally or at his dwelling-place, if within Scotland, or if furth thereof at the office of the keeper of the record of edictal citations above mentioned, . . . then and in that case it should be lawful to and in the power of the grantee immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose, in whole or in lots, of the said lands and others by public roup at Edinburgh or Glasgow . . . on previous advertisement, stating the time and place of sale, and published once weekly for at least six weeks subsequent to the expiry of the said three months, in any newspaper published in Edinburgh or Glasgow, ... and also that in carrying such sale or sales into execution it should be lawful to the grantee to prorogate and adjourn the day of sale from time to time as he should think proper, previous advertisement of such adjourned day of sale being given in the newspapers above mentioned once weekly for at least three weeks."

A short proof took place before the Lord Ordinary, the import of which was that Mr Andrew Yuille, who was the survivor of himself and Mr Rae, and therefore the debtor in the bond, had been present at most and was cognisant of all the various exposures, and that as he was present when the subjects were sold no question arose as to the debtor not being certiorated of the sale.

The respondents' agents wrote to the complainers' agent on 22nd July 1889—"Referring to record, stat. 13, ans. 13, we undertake, as from the date of settlement of this transaction by your clients, to obtain and deliver the deed of discharge and ratification by the Baylis' beneficiaries therein referred to."

On 30th July 1889 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, together with the minute, No. 40 of process, and relative letter of obligation by Messrs Tait & Johnston, the respondents' agents, No. 41 of process, and the complainers' counsel having at the bar stated that the complainers would be satisfied with such a letter of obligation, in respect of the proof adduced, and the said minute and letter, Repels the reasons of suspension: Finds the letters orderly proceeded: Finds neither party entitled to expenses, and decerns."

The complainers reclaimed.

Before the case came on for hearing in the Inner House the deed of discharge and ratification above referred to was delivered to the complainers, and the principal objection taken by them to the title was thus removed.

Argued for the reclaimers—There were two objections which could still be taken to the title—First, the premonition was invalid owing to lapse of time, and also to a new creditor having arisen. The time between the date of the premonition and the date of the sale was six and a half years, and three years had elapsed between the last exposure of the subjects and their sale. In order to have complied with the spirit of the statute a new premonition was necessary. Second, the advertisement here was insufficient, as three years had elapsed since the last exposure of the subjects; there ought to have been advertisement for six weeks, and not merely for three, as took place. The adjournment of the sale ought in the interest of the debtor, if he was not to get a new premonition, to have been to a fixed date; on the nature of an adjourned sale see *Melville* v. *Dundas*, January 28, 1854, 16 D. 419. The selling creditor is the mandatory of the debtor, and he must adhere strictly to the terms of the statute—*Nisbet* v. *Cairns*, March 12, 1864, 2 Macph. 863, and at 871, opinion of Lord Justice-Clerk Inglis. Here, as the statutory requirements had not been complied with, the title was bad—*Stewart* v. *Brown*, November 22, 1882, 10 R. 192.

Counsel for the respondents were not called upon.

At advising—

LORD PRESIDENT—When this process of suspension was raised there was one very serious objection to the title tendered by the sellers of the subjects, arising from the fact that one of the titles in the progress was a disposition by a trustee to himself, and that would have been a very fatal objection indeed if it had not been capable of being remedied.

It had not been remedied at the time when the suspension was brought, but it was remedied after the action was in Court. Therefore it does not require to be noticed any further in disposing of the merits of this case. The only point that remains for consideration is one arising upon the Statute of 1868, and that question is, whether the terms of the statute have been completely complied with in carrying through the sale that was made. The subjects had been exposed a good many times—ten times in all—and it was only upon the tenth occasion that a successful sale was accomplished. It is stated in the record, and I do not think that was matter of controversy, that previous to these exposures subsequent to the first, advertisements were inserted in certain newspapers, but that for only three successive weeks, except in the cases of the exposures on 21st February 1883, and on 6th August 1884, on which occasions six weeks' advertisement was given immediately prior thereto.

Now, the reason why six weeks' advertisement was made upon those two occasions was that a sale had on each of the previous occasions been actually made, but one which afterwards proved abortive; and it was thought—and I think justly thought—that after a sale had been made, though not actually carried through in the end, six weeks' advertisement was necessary in place of three. There is no question arising about that here, but it is right to make that observation in passing. Upon the occasion of the exposure on which a sale was effected ultimately—on 31st October 1888—the advertisement preceding the exposure was for three weeks only, and that is the objection that has been argued chiefly before us upon this reclaiming-note.

Now, the objection is founded upon section 119 of the Act of 1868, which provides that if the granter of the bond "should fail to make payment of the sums that should be due by the personal obligation contained in the said bond and disposition in security within three months after a demand of payment intimated to the granter . . . it should be lawful to and in the power of the grantee, immediately after the expiration of the said three months, and without any other intimation or process at law to sell and dispose, in whole or in lots, of the said lands and others by public roup at Edinburgh or Glasgow," and so forth, "on previous advertisement, stating the time and place of sale, and published once weekly for at least six weeks subsequent to the expiry of the said three months" in certain newspapers, "and also that in carrying such sale or sales into execution it should be lawful to the grantee to prorogate and adjourn the day of sale from time to time as he should think proper, previous advertisement of such adjourned day of sale being given in the newspapers above mentioned once weekly for at least three weeks."

Now, the notice or premonition given was quite regular in this case. It was suggested in the course of the argument that after a sale was actually made, though it proved abortive in the end, it might be made a question whether there should not be a further premonition or notice to the debtor, or a demand of payment, but that, I think, is not a good contention. The only question therefore really is, whether in the case of a prorogation, and a prorogation without any fixed day to which the sale is prorogated, that requires six weeks' advertisement or only three. I am of opinion that three weeks is sufficient.

Now, a period of more than three years elapsed between the adjournment of the previous exposure on the 29th July 1885 and the day of the sale on 31st October 1888, but I cannot find anything in the statute which limits the rule of the exposer's right to prorogate and adjourn the exposure from time to time. It is not said that it must be made within a certain time. In point of practice we know that it is not limited to a day certain, and there is nothing to limit the time within which the exposer must bring the subjects to sale again. Therefore I should not lay down any rule that would limit the time in any way, because it is possible that circumstances might emerge in which a very long lapse of time might lead me to form a different opinion.

But I do not see anything in the statute that would entitle me to say that here there was too long an interval, or that an adjourned exposure requires more than the statutory amount of advertisement to be made. Therefore I think the Lord Ordinary's judgment is quite right in that matter, and that the objection is not a good one.

But there remains for consideration the question of expenses, which is one of some delicacy in the present case. The objection which I have been dealing with is, I think, not a good objection when it comes to be considered, and I should not have very much sympathy with one who raised such an objection if it had not been for what occurred in the case of *Stewart* v. *Brown*. In that case there was a good deal of countenance given to it, especially by Lord Shand, and I followed his example. But there was enough in that case, as I think, to suggest to a party in the condition of this seller that there might be a good deal in an objection of this kind. Now, taking that into consideration, one cannot say that the purchaser in this case was starting a frivolous objection. It is impossible to say that of the case to which I have just referred. And therefore, considering in the first place that there was one very serious objection to the title at the time the suspension was brought into Court, which was afterwards removed, and that this second objection had already

received some countenance in *obiter dicta*, I do not think there should be any departure from what I believe to be the ordinary rule of practice that where an objection is not frivolous the buyer is entitled to have a judgment of the Court at the expense of the seller. In that respect therefore I differ from the Lord Ordinary, who has found no expenses due. I think the reclaimers are entitled to expenses in the Outer House according to the ordinary rule and practice. If that be so, it is very difficult to see that they are not entitled to the expenses of the discussion in the Inner House, because the result of that discussion has been to give them their expenses in the Outer House. They have taken that by their reclaiming-note; they have been to that extent successful; and that in an action of this kind is rather an important element in their favour. Therefore upon the whole matter I think the reclaimers are entitled to expenses both in the Outer House and in the Inner House.

LORD SHAND—I have come to be of the same opinion as your Lordship both on the merits of the question that is here raised and in reference to the expenses.

First of all, there were three objections taken to the title after the sale was concluded. In the first place, one in regard to a sale that had been made by a trustee to himself which was a step in the progress. That objection was upon the face of the titles at the date when the action was raised; and, as your Lordship has pointed out, it was fatal, but it has since been entirely obviated by the production of a minute by the beneficiaries in the trust, in which they have adopted the sale made by the trustee.

The second objection taken was founded upon the fact that a long interval of time had occurred between the requisition or demand for payment and the date when the sale was actually made. Upon that matter I agree with your Lordship in thinking that a requisition once made so as to give the debtor the opportunity of paying his debt with an intimation that failing payment of that debt the subject of security will be exposed to sale and may be sold is sufficient, and a requisition once made is good with reference to a sale made, although it may be after a long interval of time. The third objection relates to the sales which occurred after the diets of exposure had been prorogated upon several occasions. The statute upon that subject provides that the original exposure shall be preceded by six weeks' advertisement, and that exposures made upon minutes prorogating and adjourning the sale may be made upon three weeks' advertisement. I think this means that the exposer shall be bound in the cases in which a sale was made to give six weeks' advertisement before the next exposure, because in those cases there was no adjournment of sale. There was no provision to prorogate and adjourn any sale, but there had been a sale which had been supposed to take effect, although it proved to be abortive. As in neither of these cases had there been a prorogation and adjournment of the sale, I think the seller was quite entitled to give six weeks' advertisement. Where you have a prorogation of a sale from one time to a future time, is six weeks' advertisement required? I have come to the same conclusion as your Lordship that that is not so. The statute does not contain any declaration that if an adjournment is necessary, as it might be, and the sale should be adjourned for one month or for two months or for any other time not definitely fixed, the adjourned sale must follow upon six weeks' advertisement. Having considered the matter carefully with your Lordship, I have come to the conclusion that we cannot add a term of that kind to the statute. If, as your Lordship suggests, any prolonged period—an extraordinary and prolonged period—occurred, and suppose there had been some recklessness in the sale, or that the subjects had been sacrificed because they had not been duly advertised—as to whether in such circumstances a remedy would be available to the owner—I should desire to reserve my opinion. All that I should say here is that in this case I have come to the conclusion with your Lordship that three weeks' advertisement was sufficient for the purpose of making an effectual sale having regard to those special terms of the statute upon that subject.

The respondents in the reclaiming-note offered an argument which would have excluded some of these objections, particularly the objection I have now mentioned as to advertisement, upon the ground that the articles of roup took the purchaser bound to be satisfied with the advertisements. But I think that has been answered by the circumstances that the law-agent for the purchasers in his correspondence distinctly intimated that he meant to keep that point open.

Upon the question of expenses I also agree with your Lordship. It is clear that opinions were expressed, particularly by ourselves in the case of *Stewart*, dealing with this matter of advertisement. Mr Cameron, I think, in his letter of 29th October 1888 properly says these opinions contain "*obiter dicta* relating to premonition and advertisement in a question with the proprietor." I think that the circumstance that opinions to that effect particularly mentioned had been expressed in this way was quite sufficient to entitle a party to say—"This is not a title absolutely clear from doubt or difficulty," and it may be to go the length of saying that it could not be regarded as a marketable title without some judgment of Court. So I do not think that the gentleman who wrote that letter was putting it too high when he said the title is not an absolutely clear one, or that it could be represented that the objection was a frivolous objection. That being so, I think the ordinary rule is in this class of cases that when the title is not absolutely clear, and the property is not marketable in the proper sense, in addition to the title, the purchaser is entitled to

decree showing that the objections which have occurred to him and which are not frivolous are not well founded. Accordingly, I think on that ground the Lord Ordinary ought to have given expenses in this case. I think that it was maintained before the Lord Ordinary that these reclaimers were entitled to the expense of clearing their title. As we have reversed the Lord Ordinary upon that point, I concur with your Lordship in thinking that we should give expenses in the Inner House. How far it may be the right of the party in cases of this kind to get a decision not only of the Lord Ordinary, but also of the Inner House is a question that I think may come up for decision hereafter. At this moment I am not prepared to say that in every case a party who gets his title cleared by a Judge of the Supreme Court sitting in a Court of first instance in a question of this kind is to hold that as sufficient. I have very great doubt as to whether a purchaser can say that in every case he should have the advantage of a decision of the Inner House as well. But that point does not arise for decision here, because upon the special grounds in this case which I have mentioned I think the expenses of the Inner House should be given as well as the expenses in the Outer House.

LORD ADAM—The 119th section of the Titles to Land Consolidation Act specifies certain conditions upon compliance with which a creditor shall be entitled to give a valid discharge to a purchaser of the property over which his security extends. These conditions, so far as I see, are that it is specified that the creditor should give notice of his intention to sell. That is the first condition. Then it is specified that if any sale is to take place there shall be, in the case of an original sale, previous advertisement for a period of six successive weeks, and in the case of an adjourned sale for a period of three weeks. Now, that is the only condition as to advertisement. The only other condition is as to title; and the condition as to title is this, that "immediately after the expiration of the said three months"—that is to say, after the notice—"and without any other intimation or process at law," he may proceed to sell. He may do it immediately after, but as far as regards an original sale there is no time specified within which he must do it. He may do it immediately after the three months, having once given prior notice. The notification of time there is limited, it being that after the lapse of three months there must be six weeks' advertisement made before the creditor can proceed to sell. When we come to the matter of a prorogated sale, what is it we find? That the creditor may "prorogate and adjourn the day of sale from time to time as he should think proper." It seems to me that it is left entirely in the hands of the creditor to fix the periods of adjournment at intervals of time at which he shall expose the property for sale. This being the only provision of the statute, I concur with your Lordship and Lord Shand. I see the greatest difficulty in drawing the line and saying that as matter of construction three years shall be the proper time, or that it should not be proper after five or six years. Accordingly the construction which I should be disposed to put upon the statute is this, that if a creditor can produce evidence that he has given a premonition of three months of his intention to sell, if he produce advertisements showing six successive weeks in the case of a first sale, or three weeks in the case of an adjourned sale, there has been a sufficient compliance with the statute, and therefore the creditor had a right to sell the subjects.

The only other question is the question of expenses. Now, I think with your Lordship that whether it is a good practice or not—and it may be doubtful—according to all my recollection the practice has been that if a seller offers to a purchaser what, as Lord Shand called it, was not a clear or marketable title, he was entitled to come into Court and to have that matter ascertained by a judgment of the Court. And I think the practice always was that the purchaser, although the result of the judgment of the Court was that the title was really a good title, still if the objection is not a frivolous objection he was entitled to have a judgment, and it was part of the expense of giving a clear title. I think that always has been the practice of the Court, and I am therefore disposed to give it here. Now in this case, in the first place, it was necessary that the purchaser should suspend, because at the time he received the charge there was a fatal flaw, viz., that one of the writs of the progress was a conveyance by a trustee to himself, which clearly was bad unless it was cured, as I understand in the course of the proceedings it was, by the production of a confirmation on the part of the beneficiaries of the sale. I understand it was cured in the course of the process, but there was a flaw which I also think justified the purchaser in suspending the charge. Looking to the fact that a very considerable time—three years—had taken place between the last prorogation and the actual sale, and looking to what has been stated in Court by two of the Judges of this Division, there was great doubt as to whether such a title should be taken. I think that also justified the purchaser in suspending this charge. Therefore I think it follows from what I have said that the Lord Ordinary should have given expenses. As the reclaimers have been successful on that matter I think they should be found entitled to expenses.

LORD M'LAREN—I had occasion to consider this point in the case of *Stewart* v. *Brown*, and gave an opinion in conformity with the view which your Lordships have now expressed. I then held that the statute had prescribed the necessary amount of the advertisements, first, for an original sale and secondly, for an adjourned sale. And while it was always open to the owner or person having the reversionary interest to apply to the Court for interdict if he thought that a sale was being hurried

through or made under conditions which were inconsistent with the best price being obtained, yet if this was not done in time, and if a sale took place after all these statutory formalities had been complied with, the right of the purchaser was not open to challenge on such grounds. I think it is satisfactory that we have been enabled to come to a decision on this point, which your Lordship held not to be necessarily raised in *Stewart* v. *Brown*, because it is extremely desirable that in the case of sales under powers by heritable creditors, which are of very frequent occurrence, there should be no dubiety as to what is necessary advertisement. The object of advertisement of course is to ensure that the sale should be sufficiently known, so that intending purchasers—persons looking out for investments—may come forward. In these days of wide diffusion of intelligence through the newspapers, I should think that an advertisement in a leading journal for three successive occasions in three successive weeks was ample notice, and any person having money which he meant to invest on heritable property would not be likely to overlook a sale so advertised. And that reason applies, of course, however long be the time between the original and the adjourned sale.

With regard to the question of expenses, I think that we have an absolute discretion in cases of this kind in awarding them. As your Lordship has observed, where a title is challenged on merely frivolous grounds, expenses might be awarded to the seller against the purchaser making this frivolous and perfectly unfounded complaint. Where an important question is at issue we may give the expenses to the purchaser, even though he has not succeeded in establishing the objection. It seems to me to follow that there may be an intermediate class of cases where we would not award expenses to either party. That was the view that the Lord Ordinary has taken of this case, and there is a great deal to be said for it. But I agree with your Lordship in thinking that having regard to the difficulties expressed in *Stewart* v. *Brown* this rather falls within the class of cases in which the pursuer is entitled to try the question at the seller's expense.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [of 30th July 1889] in so far as it finds neither party entitled to expenses, and in place thereof find the complainers entitled to expenses in the Outer House; *quoad ultra* adhere to the interlocutor and decern: Find the complainers entitled to additional expenses since the date of the interlocutor reclaimed against," &c.

Counsel for the Complainers—H. Johnston — W. Campbell. Agent — John Cameron, S.S.C.

Counsel for the Respondents — Comrie Thomson—Napier. Agents—Tait & Johnston, S.S.C.

Saturday, June 21.

FIRST DIVISION.

[Lord Trayner, Ordinary.

MUIR *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Street—Police Board—Arbiter—Reparation—Title to Sue—Irrelevancy.

A railway company were required by their Act to submit for the approval of the police board of a burgh plans for work affecting the streets, and they were bound to restore any street interfered with to its original level. It was further provided that any difference between the railway company and the police board as to any such matter should be referred to arbitration. A difference between the parties regarding a certain street was referred to an arbiter, who first ordered certain works to be done, and finally found that these had been properly carried out, and the street restored to its original level.

An individual proprietor in this street, on the ground of injury to her property, brought an action against the railway company and the police board to have it found that the street had been wrongfully altered, and to have it restored, or for damages. *Held* that she had no title to sue for setting aside the statutory arrangement between the parties, and that no damages were due at common law as neither a wrong nor a breach of contract was alleged, although if injury had been done the railway company would be liable in compensation under the Railways Clauses Act.

In June 1889 Mrs Catherine Muir, as owner of certain tenements in Inverkip Street, Greenock, sued the Caledonian Railway Company (1) for declarator that the defenders had wrongfully altered and raised the level of the street; (2) for decree ordaining the defenders to restore the street to its original level; and (3) alternatively for damages.

In 1884 the Caledonian Railway were authorised by Act of Parliament to construct a railway known as the Greenock Railway.

Section 22 of the Act provided—"The company may, in the construction of railway No. 1, and of the quay or pier, by this Act authorised, deviate from the levels thereof, as shown on the deposited sections, to any extent not exceeding 5 feet, and may, in the construction of railway No. 1, deviate from such levels and from the gradients of the said railway, as shown on the said sections, to such further extent as may be found necessary or convenient for avoiding, accommodating, preserving, or improving the drainage or sewers or other works in or under the streets, roads, lanes, footpaths, and places through which the said railway will be made, anything in the Railways Clauses Consolidation (Scotland) Act 1845 to the contrary notwithstanding: Provided