CHARLES WILLIAM CAMPBELL, claiming to be EARL OF BREADALBANE AND HOLLAND, &c. . . . . APPELLANT.

JOHN ALEXANDER GAVIN CAMPBELL, OF GLENFALLOCH, claiming to be EARL OF BREADALBANE AND HOLLAND, &c. . . RESPONDENT(*a*).

1864. *May 6th, 9th, 10th, 12th, and 27th.*

Judicial factor pendente lite.—The Court below, in the exercise of a judicial discretion, where an estate was in competition, refused the Appellant's petition for a judicial factor *pendente lite*; but with liberty to renew the application "on any such change of circumstances as might make the appointment proper." This refusal affirmed by the House, Lord Wensleydale dissenting.

A judicial factor will not be appointed where one of the parties has attained peaceable and unequivocal possession before the competition arises.

The Court in such a case will not act on mere allegation, unsupported by proof.

Costs.—The general rule, that costs shall follow the result, enforced, although one of the Judges below dissented from the decision, and one of the Law Peers dissented from the affirmance.

JOHN, second Marquis and fifth Earl of Breadalbane, died abroad on the 8th November 1862, leaving no issue; but leaving the Breadalbane estates in the Highlands of Scotland, alleged to exceed the annual value of 50,000*l.*

The marquisate being extinct by the death of the late Marquis, the succession to the earldom and to the estates became the subject of competition between the Appellant and the Respondent.

The litigation out of which the present Appeal arose had no reference to the peerage; it was confined to the estates, and commenced with a Petition addressed to "The Lords of Council and Session," on the 30th

(*a*) Fully reported in the 3rd series of the Court of Sessions Cases, vol. i. p. 991.

CAMPBELL v. CAMPBELL.

May 1863, by the Appellant, then in India, described as a "Lieutenant in the 12th Regiment of Bengal Cavalry." The Petition prayed for the appointment of a judicial factor to take charge of the estates until the question of right between the rival claimants should be determined.

In support of his Petition, the Appellant alleged that the Respondent's father, through whom he (the Respondent) claimed, was illegitimate; for that the Respondent's grandmother, when she married the Respondent's grandfather, was the wife of another man, namely, one Christopher Ludlow, from whom she had eloped. It seemed to be agreed that this allegation, if true, must destroy the Respondent's case, unless it were shown that after the death of Ludlow the parties were remarried before the birth of the Respondent's father.

To this Petition, the Respondent, described as the "Right Honourable John Alexander Gavin Campbell, Earl of Breadalbane and Holland," &c., gave in an Answer on the 11th June 1863, representing that, on the death of the late Marquis, his trustees and executors at once recognized the Respondent as the "heir "apparent entitled to the said estates, the whole "charge of which had been transferred to him." The Answer concluded by submitting to the Court that "there were no grounds for the appointment of a "judicial factor."

The Respondent denied the alleged marriage of his grandmother with Ludlow; and averred that he and his father had been acknowledged invariably not only as unimpeachably legitimate, but as the undoubted presumptive expectant successors of the Breadalbane estates and of the earldom.

The Respondent moreover asserted important family arrangements in which his father's priority had been acknowledged by the Appellant and his father. The

Respondent alleged especially that money had been borrowed for the improvement of the estates under the Montgomery Statute (*a*), with the consent of the Appellant and his father, as coming *after* the Respondent under the family entail.

The Respondent also alleged that, "On the death " of the late Marquis his trustees and executors at " once recognized the Respondent as the heir appa- " rent entitled to succeed to the said estates, and the " whole charge of them was transferred to him; and " the rents were collected under joint instructions " from the Respondent and the said trustees and " executors."

On the 27th June 1863, the Lords of Council and Session (*b*), after hearing Counsel, refused the desire of the Petition, but with liberty to the Petitioner (*i.e.*, the Appellant) to present another application in the event of any such change in the state of the proceedings or circumstances of the case as might make the appointment of a judicial factor proper.

The *Lord Advocate*, Mr. *Rolt*, and Mr. *Anderson*, for the Appellant, contended that where there was a competition and no one in actual possession, the appointment of a judicial factor was a matter of course in Scotland. And even in England they urged that a receiver would be appointed under similar circumstances. *Wood* v. *Hitching* (*c*), *Atkinson* v. *Henshaw* (*d*), *Rutherford* v. *Douglas* (*e*), *Bainbrigge* v. *Baddeley* (*f*).

The *Attorney-General* (*g*), the *Solicitor-General* for Scotland (*h*), and Sir *Hugh Cairns*, for the Re-

(*a*) 10 George 3. c. 51., entitled "An Act to encourage the Improvement of Lands held under strict Entail."

(*b*) Lord Deas dissenting. (*c*) 2 Beav. 289.

(*d*) 2 Ves. & Beames, 85. (*e*) 1 Sim. & Stu. 111.

(*f*) 3 McN. & G. 413. (*g*) Sir Roundell Palmer.

(*h*) Mr. Young.

CAMPBELL v. CAMPBELL.

spondent. The Appellant has assigned no reason for the appointment of a factor, except the fact of competition. His averments are unsupported by proof. The Court will not proceed on mere allegation. *Munro* v. *Graham* (*a*).

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

My Lords, the late Marquis of Breadalbane was tenant in tail of very large estates in Scotland, under two deeds of entail, one dated the 5th May 1775, and the other dated 7th March 1839. In both these deeds the destination was the same. The late Marquis died in November 1862. He left no lawful issue. On his death, and by reason of the failure of certain intermediate substitutions, the succession opened to the next substitutes called in the deeds of entail, viz., to William Campbell of Glenfalloch, and the heirs male of his body. This William Campbell had seven sons, but the issue of his eldest son failed before the death of the late Marquis. The Respondent alleges that he is the grandson and heir of James Campbell, the second son of Glenfalloch, and therefore nearer in the substitution than the Appellant, who claims as the grandson and heir of John Campbell, who was the sixth son of Glenfalloch.

The contest between the parties arises from the Appellant alleging that James Campbell, the grandfather of the Respondent, was never lawfully married to the Respondent's grandmother, and that therefore the Respondent's father was an illegitimate son of James Campbell, and consequently that the Respondent is not entitled to the succession.

The competition arises by both parties having presented petitions for service under the statute of 10 & 11 Vict. c. 47, intituled "An Act to amend the

(*a*) 11 Sec. Ser. 1202.

(*b*) Lord Westbury.

Law and Practice of Scotland as to the Service of Heirs." The Respondent's petitions were presented on the 4th March 1863, the Appellant's petitions were presented on the 25th March following. There had been an earlier but informal petition presented by the Appellant on the 27th February 1863.

The Sheriff having conjoined the petitions, the proceedings were advocated to the Court of Session, where the case will proceed to a jury trial, and the adverse claims of the Appellant and Respondent will be adjudicated upon.

In the meantime the Appellant made an application on the 30th May 1863 to the Court of Session that a judicial factor or receiver might be appointed to receive the rents and administer the estate during the pendency of the litigation. And the present Appeal is presented from an Interlocutor of the Court of Session, by which that application was refused.

The application for a judicial factor or receiver *pendente lite* is an appeal to the prætorian or equitable jurisdiction of the Court of Session, and it does not appear to me to be possible to extract from the decided cases, or to lay down upon principle, any general rule that should govern such applications. The decision of each case must, in my opinion, depend on its own peculiar circumstances.

By the law of England, if on the death of an owner of land in fee simple, a controversy arises between the heir at law and alleged devisee, the former denying the validity of the alleged will, power is given by the recent statute (*a*) to appoint a receiver of the real estate of the deceased owner; but no such power

(*a*) The Probate and Administration Act of 1857, 20 & 21 Vict. c. 77. s. 71., whereby the Court of Probate is empowered to appoint a receiver pending a suit as to the validity of a will of real estate.

CAMPBELL v. CAMPBELL.

Lord Chancellor's opinion.

existed anterior to that statute; nor has any Court in England power to interfere by the appointment of a receiver of real estate, where the ownership is disputed by two persons, each claiming to be heir at law of a deceased owner. Or where the dispute lies between two persons, claiming under successive limitations in a settlement of real estate, the more remote remainder man for example, alleging that the prior remainder man is illegitimate, there is no power in any Court in England to appoint a receiver of real estates pending the litigation (*a*). No example or analogy therefore can be derived from the law of England which is applicable to the subject of the present Appeal.

Some few general principles may be collected from the cases decided by the Court of Session on this subject.

First, a judicial factor will not be appointed by the Court as against competing parties where one of such parties has already attained possession. Such possession, however, must be unequivocal and peaceable; that is to say, possession must have been clearly attained before the competition arose. Such does not appear to have been the case in the present instance the petitions for service being so nearly contemporaneous.

Secondly, it may be deduced from the cases, particularly the case of *Munro* v. *Graham* (*b*), that the Court will not act upon mere allegation.

(*a*) See *Talbot* (*Earl*) v. *Hope Scott*, 4 Kay & Johnson, 96. A tenant who does not know to which of two claimants to pay his rent, may come to the Court of Chancery by bill of interpleader, *Jew* v. *Wood*, Cr. & Phil., 185.

(*b*) Second Series of Scotch Cases in the Court of Session, vol. ii. p. 1202. In this case of *Munro* v. *Graham*, which occurred in 1849, the Court of Session refused to sequestrate, one of the Judges, Lord Mackenzie, observing, "This is the case of a child "who has been always acknowledged by his parents, claiming "to succeed to another child, who was also acknowledged by

Here the case of the Appellant rests entirely on the averment that the Respondent's father was illegitimate. He has undoubtedly stated a circumstantial case, but it at present rests entirely on allegation. All presumptions and probabilities are in favour of the apparent prior title of the Respondent. For fifty years preceding the present claim of the Appellant, the legitimacy of the Respondent's father was recognized and treated as an undisputed fact. The lands and barony of Glenfalloch are held under an entail containing the same limitation to James Campbell and the heirs male of his body as is contained in the entail of the Breadalbane estates, and under which those estates are now claimed both by the Appellant and Respondent. If the Appellant therefore is entitled to the Breadalbane estates, he would also claim in the same right the barony of Glenfalloch.

But on the death of William Campbell, the common ancestor of the Appellant and Respondent, in the year 1812, William John Lombe Campbell, the father of the Respondent, who is now alleged by the Appellant to have been illegitimate, was duly served nearest and lawful heir of taillie and provision in the lands and

" them. I do not say that in no case can such an application as " this be granted, but it requires a very strong *primâ facie* case " to warrant us in doing so." " The averments made here may " be made in any case; and if we grant this petition, there is no " saying where it will end. It will not do to act in such a matter " on mere averments." Lord Fullerton, another Judge, said, " I concur. No doubt there is here a competition, in one sense, " as there is in every case where the averments on one side are " met by relative averments from the other. But it is a compe- " tition of such a kind as that the parties stand on equal titles? " There may be a case in which the *primâ facie* evidence is strong " enough to warrant us in granting such an application; but " that is not the case here. The child has been all along " acknowledged as theirs by Mr. and Mrs. Graham; and looking " to the great weight we are bound to give to that recognition, I " think no case has been made out to warrant us in granting the " appointment craved."

CAMPBELL v. CAMPBELL.

Lord Chancellor's opinion.

barony of Glenfalloch, and was afterwards infeft in the same lands and barony. He continued in the undisputed possession and enjoyment of the Glenfalloch estate as heir of the body of William Campbell until his death in 1850, and upon his decease the Respondent was in 1850 served nearest and lawful heir of taillie and provision to his said father, and in that right completed his title to the said lands and barony, and has ever since had the undisputed enjoyment thereof. Practically, therefore, there has been for the last fifty years an assertion of right by the Respondent and his father, adverse to the title which is now set up by the Appellant. To this must be added the fact, which is not disputed, that the Respondent's father was throughout his life recognized and treated as being without question the legitimate son of his father, James Campbell, and that in several legal proceedings he was called by the late Marquis of Breadalbane as the heir next entitled to succeed to him in the estates in question.

These are undisputed facts, and they constitute a strong *primâ facie* title in the Respondent. They are met by a statement of circumstances which (to adopt the words of the *Lord President*) are at present mere matters of assertion. But the uncontested facts which I have stated furnish strong *primâ facie* evidence that the Respondent is the heir apparent of the late Marquis, and he ought not to be deprived of any rights which belong to that character until some stronger proof to the contrary has been adduced on the part of the Appellant. The Appellant and Respondent are not on an equal footing before the Court. The Respondent, if his father was legitimate, is confessedly the person entitled, and the fact of that legitimacy is not at present brought into any reasonable doubt.

It is on this ground, and not on the ground of the insufficiency of the averments of the Appellant, that

I concur with the majority of the Judges in the Court below, and am of opinion that the Interlocutor should be affirmed and the Appeal dismissed with costs.

Lord WENSLEYDALE:

Lord Wensleydale's opinion.

My Lords, the rule of law on this subject, as explained by Mr. Erskine (*a*), is that "Sequestration of lands (under which may be comprehended every heritable subject) is a judicial act of the Court of Session, whereby the management of the subject sequestered is taken from the former possessor, and entrusted to the care of a factor or steward named by the Court, who gives security for his administration, and is by his commission accountable for the rents to all having interest. This diligence is competent where it is doubtful in whom the property of the lands is vested if sequestration be demanded before either of the competitors has attained possession."

I take it to be clear that there is in this case no possession of such a nature as to deprive the Court of its right to exercise its prætorial jurisdiction. All the Judges have concurred in that opinion that there is no *undisputed* possession. There is some possession in the Respondent, no doubt, which as evidence of title I will afterwards notice, but that is not enough.

Under the circumstances of this case, ought the Court to interfere? Is there a fair disputable question between the competitors, as the case now stands, on which either may succeed? If there is, it is certainly most desirable to put an end to the inconvenience that arises from the heir in tail, whoever he is, being incapable of giving valid discharges for rent. Payment by the tenant to one may be questioned by the other hereafter; no leases in renewal can be granted, no rights of a landlord can be exercised by either

(*a*) B. 2, t. 12, s. 55.

CAMPBELL v. CAMPBELL.

Lord Wensleydale's opinion.

competitor, so as to be valid. No improvements can take place until the question is decided. This is a great evil. If sequestration is granted there will be ultimately no mischief whatever. The rents may be received, and all proper measures taken for the good of the tenancy; and when the question is decided the real party entitled will have all his rights.

I think there is a fair disputable question between the Appellant and Respondent. The Respondent has a very good *primâ facie* case, and a strong one, on which, unanswered, he must certainly prevail. He has been always reputed legitimate. He was so treated by Lord Breadalbane in his lifetime. His father was sued by Lord Breadalbane under the Montgomery Act, 10 Geo. 3. c. 51., as heir in tail. He succeeded to the entail of Glenfalloch, as heir in tail to his father and grandfather, and was in possession many years. Lord Breadalbane's executors put him in possession of part of the estate on his death. He is alleged to have granted leases. He was also recognized as his heir in the will of the late Marquis.

It is, however, to be noticed that some of the acts done by him after the late Marquis's death may have been done when the estate was in contest after caveat. But, even allowing that, a case was made on the part of the Respondent amply sufficient to constitute him *primâ facie* heir in tail to the late Lord Breadalbane; and, if unanswered, that case must unquestionably prevail.

On the part of the Appellant, by way of answer to this case, it is averred that the grandfather of the Respondent was illegitimate, being the son of a marriage contracted with his grandmother when she was already married to another man, who was living at the time of that marriage. If that fact is sufficiently averred, and, it being denied by the Respondent,

CAMPBELL v. CAMPBELL.

Lord Wensleydale's opinion.

should be proved on the trial in competition, the Respondent's *primâ facie* case would be entirely done away with, and be of no avail whenever the Respondent's father may happen to have been born; unless the Respondent could prove a subsequent marriage between his grandfather and grandmother after the first husband's death, he is most certainly illegitimate. The Respondent has not alleged or suggested that there was any subsequent marriage of any sort, regular or irregular, after the first husband's death; but suppose that he can, on the trial, give evidence of an irregular marriage, very nice and difficult questions would arise as to its validity.

There is a preliminary question made, whether the fact of the previous marriage has been sufficiently averred. I had some doubt at one time, but now I think sufficient facts or evidence of facts are stated, which, if true, establish that previous marriage. It is alleged that the competing claimant's grandmother herself stated that she was married to Captain James Campbell in September 1782, which is clearly admissible evidence as to the period of her marriage. The non-production of a regular register of that marriage is accounted for.

It is averred that at the time of this alleged marriage in 1782, she was a married woman, and her husband did not die until some time afterwards; that her husband was Christopher Ludlow of Chipping Sudbury, to whom she was married on the 5th June 1776, the register of which is stated. It is averred that the real husband died in January 1784.

The fact of that previous marriage is denied by the Respondent in very loose and general terms, but whether it be true or not, is the principal, and may be the sole question. The case upon the present allegations of both parties depends entirely upon its

CAMPBELL v. CAMPBELL.

truth, and the only method of trying the truth is by the trial in competition.

Lord Wensleydale's opinion.

Surely, therefore, the truth of the fact ought in proper course to be ascertained by proceeding to proof; and the Respondent ought not to be allowed to try to uplift the rents, and to attempt to act as owner in all respects, to the great inconvenience of the tenants, and their possible injury, whilst the question upon which, as at present appears, all depends, remains undecided. If the fact alleged of the previous marriage is true, the Respondent ought not to have any profit by wrongfully denying it; he ought not to have all the advantage of taking possession and receiving the enormous rents, pending the litigation of that question, which he has improperly put in issue. His denial of the allegation of previous marriage, therefore, seems to me to be wholly immaterial with respect to the question of appointing a judicial factor. Had he admitted the previous marriage of his grandmother, and not alleged a previous valid marriage after the death of the first husband, he would have been out of Court. This important question of the previous marriage, on which all at present appears to turn, ought to be regularly tried; and in the meantime I feel very strongly that the judicial factor should be appointed, and the trial proceed.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, the question which the House is called upon to determine is of some nicety and difficulty. It is appealed to, to supersede the exercise of a judicial discretion by a majority of the Judges of the First Division of the Court of Session in refusing to sequestrate and place under the management of a judicial factor, estates of considerable value which are the subject of a pending litigation.

CAMPBELL v. CAMPBELL.

Lord Chelmsford's opinion.

The discretion which is vested in the Court, upon applications of this description, is not an arbitrary discretion, but one that ought to be guided by a careful consideration of the circumstances of each particular case, of the respective positions of the litigant parties, of the nature of the claim of the competitor who invokes its interposition, and of the necessity of intermediately protecting the property in dispute for the common security. The exercise of such a discretionary jurisdiction ought not to be disturbed unless it can be clearly made to appear either that it proceeded upon erroneous principles, or that the evidence upon which the discretion of the Court was founded, should have conducted a correct and reasonable judgment to the opposite conclusion.

Upon a careful consideration of the case and of the able arguments at the Bar, I cannot find any sufficient reason why your Lordships should overrule the discretion of the Court of Session, and direct a sequestration of the estates in controversy.

The competency of the application for the appointment of a judicial factor with reference to the character of the Respondent's possession of the estates is asserted by all the Judges, and upon this ground there is no impediment to the Appellant's right to invoke the intervention of the Court. By his petition he stated certain facts as the ground of his claim to have the property placed in security, until the contest for it shall be decided. He alleged that the Respondent is not the lawful heir of entail of the estates in dispute, because his father was the illegitimate offspring of his grandfather and grandmother, whose marriage took place at a time when his grandmother's former husband was still living. And he produced certain documents in support of his allegation, which he

CAMPBELL v. CAMPBELL.

Lord Chelmsford's opinion.

contended raised a sufficient *primâ facie* case to entitle him (if unanswered) to the interposition of the Court.

It must be observed that there is a great deal wanting in the statements in the petition, and in the documents, to establish a complete *primâ facie* case, or any thing more than a probability that upon a future occasion a case of the description suggested will be forthcoming. The allegations of facts and circumstances are so loosely and imperfectly made, that the Appellant seems to have considered it necessary to do nothing more in support of his application than to give the Court a general description of the nature of the case with which he proposed at the proper time to encounter the claim of the Respondent. He did not establish nor profess to establish any such title as would call upon the Respondent for the same sort of answer as may be hereafter necessary upon the competition of brieves.

In this incidental proceeding the Respondent in my opinion is not called upon to do more than rebut the incomplete and presumptive case of the Appellant, by showing a state of things utterly inconsistent with the supposed illegitimacy of his father. This he appears to me to have fully done by the facts and circumstances which he has presented to the Court. He is legally clothed with the character of heir apparent, and entitled to the enjoyment and exercise of all the rights which belong to that character. His father lived and died not only with his legitimacy unchallenged, but with a solemn and deliberate recognition of it on many important occasions. The event which is supposed to impeach that legitimacy occurred more than eighty years ago, and during this long period all the acts of the family (which speak more

strongly than declarations) are nothing but repeated admissions of the legitimate claims of the Respondent's line of succession.

The circumstances connected with the lands and barony of Glenfalloch are peculiarly striking, because the destination in the deeds of entail of those estates, and of the estates in question, are the same, and it was as heir male of the body of James Campbell that the Respondent's father succeeded to the lands of Glenfalloch, and it is in the same character that the Respondent is now become the apparent heir of the Breadalbane estates. The service of the Respondent's father as heir of taillie and provision to the lands of Glenfalloch was carried through by the grandfather of the Appellant, who would himself have been entitled to the property if the Respondent's father had been illegitimate. For thirty-eight years the Respondent's father held these estates to which it is now alleged he had not a shadow of title, and was succeeded peaceably in 1850 by the Respondent, who has been in possession ever since. More than half a century has therefore elapsed since the title which is now in competition has been acquiesced in by the family of the Appellant whose right it displaced.

The proceedings of the late Marquis of Breadalbane under the Montgomery and the Rutherford (*a*) Acts, in which the Respondent's father at first, and himself and his sons afterwards, were called as the heirs of entail next in order of succession to the Marquis, are very important. In all the petitions under the Rutherford Act, in which the consent of the three next heirs of entail is required, the father of the Appellant was cited as next in succession to the Respondent and his sons, and was thereby almost challenged to dispute the right of the Respondent to

(*a*) The Rutherford Act.

CAMPBELL
v.
CAMPBELL.

Lord Chelmsford's opinion.

the position which was given him, and by which he was recognized as having a voice in the burthening an estate to which it is now said he had no sort of title.

So, in the proceedings for the purchase of the portion of the entailed estates sought to be sequestrated under the power contained in the deed of entail, which required that the purchase should be made at the sight and by the authority of the Court of Session or of the *Judge Ordinary*, upon citing the two nearest heirs of entail to the estates of Breadalbane, a species of judicial sanction seems to be given to the same order of succession.

I quite agree that all these recognitions (however strong) will be of no avail against clear and satisfactory proof that the Respondent's grandmother was married to his grandfather at the time when her former husband was living, and that if such proof should hereafter be given, it will be necessary for the Respondent to show a subsequent lawful marriage between them. But the present question is whether, as an answer to the application for a sequestration based upon the materials presented to the Court, the circumstances stated by the Respondent are not abundantly sufficient to rebut the presumption raised by the Appellant's statement, and to warrant the Court in refusing to displace the Respondent from his position of apparent heir, and to deprive him of any of the rights which belong to him in that character.

The Judges who decided against the sequestration proceeded entirely upon the case as it then stood, and all of them expressly stated that the application of the Petitioner might be renewed if, in the course of the competition of brieves, its aspect should be changed, and the statements of the Appellant receive further confirmation. And accordingly the Interlocutor re-

serves to the Petitioner "to present another application in the event of any such change in the state of the proceedings or circumstances of the case as may make the appointment of a judicial factor proper." I think the discretion exercised by the Court (more especially with this reservation) was a sound one, and I agree with my noble and learned friend on the woolsack that the Interlocutor ought to be affirmed.

Lord WENSLEYDALE: My Lords, I wish to inquire whether it is usual to give costs where there is a difference of opinion between the Judges in the Court below. Of course, I wish to conform exactly to usage, and I know that the general rule is, that the costs should follow the result; but as here the learned Judges have been divided in opinion, surely there was ground for the person against whom a majority of the Judges have pronounced, coming to the Court of Appeal.

Lord CHELMSFORD: My Lords, I believe there is no doubt whatever that the invariable course is, that unless there are some very peculiar circumstances, the costs should be given to the successful party.

Lord WENSLEYDALE: The general rule is so, undoubtedly; but there have been two or three instances since I have sat in the House in which exceptions have been made.

LORD CHANCELLOR: My Lords, I should be extremely sorry if any sanction were given by your Lordships to the suggestion now made by my noble and learned friend. There is hardly an Appeal from Scotland in which there is not some difference of opinion between the learned Judges. Having regard to that fact, and to the smallness of the amount of property frequently involved in these cases, it would be productive of the greatest possible mischief if your

CAMPBELL v. CAMPBELL.

Lordships were to abstain from abiding by the rule which is the only wholesome one, namely, that save under particular circumstances the costs should follow the decision.

Lord CHELMSFORD: My Lords, I entirely agree with my noble and learned friend upon the woolsack. The general rule unquestionably is, to give the costs to the successful party; but there have been particular cases in which, under peculiar circumstances, that rule has been departed from. I see nothing peculiar in this case, except a difference of opinion amongst the learned Judges of the Court of Session, which, as my noble and learned friend upon the woolsack says, frequently occurs, and I therefore think that there is no ground for departing from the general rule in this case.

Lord WENSLEYDALE: I will not press it further; but certainly there have been cases within my recollection in which, where there has been a difference of opinion between your Lordships, and also in the Court below, the costs have not been insisted upon; but of course I acquiesce in the decision of your Lordships.

Interlocutor affirmed, and Appeal dismissed with Costs.

MARTIN & LESLIE—LOCH & MCLAURIN.