character of riparian proprietors, the fact that there was no obstruction on his part to such apparent exercise of rights by them is indicative of their possessing the rights which they apparently exercised. I therefore think, my Lords, that the right by possession alleged has not been established, and I think that the interlocutor appealed from must be reversed. I am not surprised that there has been a difference of opinion in this case, seeing the way in which the matter has been dealt with since 1607 in the titles and otherwise; but, upon the whole, with all deference to the learned Judges composing the majority in the Court below, and for whose opinion I entertain every possible respect, I cannot arrive at the conclusion, that the right of Lord Napier has been established. In this case it was necessary for him to make out his right. He set up an exclusive title and right as against what would be the ordinary construction of the titles of other parties, and he having failed in that, I see no alternative but to reverse the judgment of the Court of Session.

LORD CAIRNS.—My Lords, I entirely agree with the opinions expressed by your Lordships; and inasmuch as the reasons I proposed to offer you in support of that view have been entirely exhausted by what has been already said, and more especially by my noble and learned friend who has just sat down, I do not think I should he justified in going over the same grounds again. I simply, therefore, wish to give my adhesion to the motion proposed to be made.

Interlocutors appealed from reversed, with declaration.

The declaration in the *order of the House* was as follows: "That Mr. Scott has, along with the other proprietors whose lands lie around, and border on the same, a joint right or common property in St. Mary's Loch, and the Loch of the Lowes, and a joint right of using boats, fowling, fishing, floating timber, and exercising all other rights in or over the said lochs, and that Lord Napier has no exclusive right either of property or of use in or over the said lochs or either of them, and that the defender Lord Napier should be decerned and ordained to desist and cease from molesting and interrupting the appellant in the exercise of any of the rights aforesaid, and further, that the appellant should be entitled to the expenses in the Court below, but that there should be no costs of this appeal, and that the cause be remitted to the Court of Session to do therein as should be just and consistent with this declaration and judgment."

Appellant's Agents, Scott, Moncreiff, and Dalgety, W.S.; Connell and Hope, Westminster. —*Respondent's Agents*, Hunter, Blair, and Cowan, W.S.; Preston Karslake, Regent Street, London.

JULY 15, 1869.

DONALD CAMPBELL, *Appellant*, *v.* THE EARL OF DALHOUSIE and Others, Trustees of THE EARL OF BREADALBANE, *Respondents*.

Process—Exhibition of Documents—Title to Sue—Production not within power of Witness—5 and 6 Vict. c. 69—22 Vict. c. 20—*In course of a suit in England to perpetuate testimony, the pursuer applied to the Court in Scotland to order A. B.'s trustees, who were not parties to the suit, to appear before the examiner appointed by the Court of Chancery, and produce certain documents in their possession. The trustees of A. B. had no power to get the documents alluded to, which were in a muniment room of the late A. B., and the title to which was then questioned by a third party, and the list of documents called for was mainly a fishing list.*

HELD (affirming judgment), *The Statutes 5 and 6 Vict. c. 69, and 22 Vict. c. 20, did not authorize the order asked for, as the parties had no power to produce the documents.*

The petitioner appealed against the interlocutor of the Court of Session, which refused the prayer of his petition. The petition had asked the Court to order the examination of the trustees of the late Earl of Breadalbane before the examiner appointed by the Court of Chancery, and also prayed, that the said trustees should produce and exhibit the papers and writings mentioned in the *subpœna duces tecum* set out in the petition, of such of the said papers and writings as were in their custody, possession, or power.

The appellant in his *printed case* stated the following reasons for reversing the interlocutor of the Court below:—1. Because the appellant was by virtue of the Statute 5 and 6 Vict. c. 69,

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[1] See previous report 6 Macph. 632; 39 Sc. Jur. 478; 40 Sc. Jur. 329. S. C. L. R. 1 Sc. Ap. 462: 7 Macph. H. L. 101: 41 Sc. Jur. 584.

entitled to perpetuate testimony which might be material for establishing his claim or right to the honours, titles, and dignities of the Earl of Breadalbane and others, on the death of his elder brother without male issue. 2. Because the remedy of the Statute 5 and 6 Vict. c. 69, is not limited to the perpetuating of mere oral testimony, but extends to the exhibition and proof of written documents material to the claim, and the appellant would have been entitled to examine witnesses in England, and require them to bring to the examiner any written documents in their possession, custody, or power, and, subject to any just exceptions the witnesses might have, to produce or exhibit the same before the examiner. 3. Because the remedy given by the Statute 22 Vict. c. 20, is of an ancillary character, and the appellant having obtained an order in the principal suit for the examination of witnesses in Scotland, was entitled to apply to the Court of Session for the auxiliary remedy of the Statute 22 Vict. c. 20, and it was part of the auxiliary remedy given by the last mentioned Statute that the Court should direct the production of writings or other documents by the witnesses who might be examined. 4. Because it was the duty of the Court of Session to assist in carrying out the order of the Court of Chancery for the examination of witnesses, without regard to the question, whether, by the law of Scotland, the appellant would have been entitled to the possession, production, or exhibition of the papers, or could have instituted any proceedings in Scotland for the purpose of compelling their production or exhibition. 5. Because the appellant did not seek to have possession or production of the writings and documents in the sense imputed to the term production in the Court below, but he sought merely, that the writings should be exhibited and dealt with as they would have been in England under a *subpœna duces tecum*. 6. Because the writings contained in the charter room at Taymouth Castle were in the possession or within the custody or power of the respondents, the trustees of the late Marquis of Breadalbane, and the trustees were bound to search for the documents and writings mentioned in the schedule served upon them, and to bring these writings, or such of them as they should find, with them, for the purposes of the examination.

Anderson Q.C., *Prentice* Q.C., and *Steele*, for the appellant.

The counsel for the respondents were not called upon.

Sol. Gen. (Young), *Sir R. Palmer* Q.C., and *Mellish* Q.C., for the Earl of Dalhousie.

Pearson, Q.C., and *Agnew*, for the trustees of the late Earl of Breadalbane.

LORD CHANCELLOR HATHERLEY.--My Lords, the order which is complained of in the present case is an order of the Court of Session, by which they declined to give any relief to the appellant on a petition which is presented praying, that the Earl of Dalhousie and others might be ordered "to search for, and to exhibit before the examiner appointed by the Court of Chancery, the writings and other documents above mentioned and described in exhibit (A) referred to in the depositions, or such of the said writings and documents as are in their custody, possession, or power, and if it shall appear to your Lordships to be necessary so to do in order to give due effect to the said order or to the prayer of this petition, to grant diligence for the production of the foresaid writings."

Now the gentlemen against whom this order is asked are not in any way parties to any suit or litigation whatever. They are simply witnesses who are subpœnaed in the course of the proceedings in a suit in which a bill was filed in England for the purpose of perpetuating testimony with regard to possible rights to the earldom of Breadalbane, which may arise to the appellant in the case of the death of his brother without issue. A bill having been filed to perpetuate testimony, certain proceedings, upon which it is not necessary for me to dwell at any length, took place in the Court in England. All that it is essential to observe is, that a *subpœna duces tecum* was issued with which the Vice Chancellor Stuart dealt in a particular manner.

That order of the Vice Chancellor was discharged by the Lords Justices, and especially Lord Justice Turner, saying, that they remitted it entirely to the Court in Scotland, and that the application should be made in Scotland, that the witnesses were out of the jurisdiction of the Court of England, and that it was for the Court in Scotland to say what was right and proper to be done. The following passage occurs in the Lords Justices' judgment. Lord Justice Turner says:—"There is therefore a distinct power (as I understand this Act) given to the Court (of Session) in Scotland, where the Courts in England have considered testimony to be necessary for the purposes of the suit in England, to compel the attendance of witnesses for the purpose of giving that testimony; and, as I understand the Act of Parliament, to compel the production of documents for the purposes of that examination. For I think that clause 'or for the production of documents' must be understood to mean for the production of documents for the purpose of the examination."

The circumstances of this case are certainly somewhat singular. It behoves us, I think, to be very careful in watching over the course of procedure under the powers given by the Act of the 5th and 6th of the Queen, and the extensive jurisdiction which is afterwards given to foreign Courts by the 22d and 23d of the Queen. It was not intended, I apprehend, by these Acts to give a litigant, who wished to perpetuate testimony as against a person with whom he contemplated litigation afterwards, rights of any stronger character than those which would be possessed by him in case the defendant were an actual defendant in a suit, and there were no obstacles to the

immediate prosecution of the suit, and where the proceeding was simply to enforce those rights against the defendant. It was not intended in any way to enlarge the rights which he might possess, and I cannot help thinking, that throughout the whole course of these proceedings there is abundant evidence, in the facts as they stand before us, of an intention on the part of this appellant to press this Act of Parliament to an extent, which certainly appears, as far as I read the Act, to be very foreign to the objects contemplated by that Act. He has an opponent against whom, when the due time comes, he sees that he shall have a case to make, and the course which he takes at present is this: He says—I will summon as witnesses all those who are in possession of documents which relate to the property and the title of my opponent or of myself, and I will not (perhaps "cannot," seeing that the time for the litigation has not yet arisen)—I cannot proceed against my opponent himself in person with reference to the production of documents relating to this title; but this I will do: I will find out who is in custody of the documents which relate to the title in question, and I will summon them as witnesses to produce those documents, not for the purpose in any way of obtaining information especially from them with relation to the matters to which the documents may refer, but simply because they are the persons in custody of those documents, and I shall be able to obtain from them at once a mass of information which undoubtedly, if I were in a position to litigate the title immediately with my opponents, I should not be able to get from my opponents. Because, of course, when parties are in immediate litigation, you cannot, on such allegations as are here made, investigate your opponent's title deeds. I think, therefore, that the case is one which ought to be jealously watched.

That being so, the course which has been taken is this: Having obtained a *subpœna duces tecum* in England, and finding that some of the witnesses were resident abroad, the appellant wished to avail himself of the Act of 22d and 23d of the Queen, and he proceeds to apply to the Scottish Court for an order to examine those witnesses, and to compel them to search for and produce any documents in their possession. He having made that application, the Court in the first instance thought it right to grant him simply a power of examination. The witnesses therefore were ordered to be examined, but the rest of the application was either postponed or passed by. That being so, he proceeded to examine the witnesses, and in so doing of course he had full power to put himself in exact possession of all the facts with relation to the documents which he desired to have produced, and which he might think of importance either as regards their possession, or as regards the power or otherwise of the witnesses over them, in order that he might make a further application to the Court upon a matter which hitherto they had not substantially dealt with.

Accordingly some correspondence takes place between the appellant's solicitor and the solicitor to the gentlemen who had been summoned as witnesses, those gentlemen being the trustees under the will of the late Marquis of Breadalbane, and having in that sense become possessed of the key of his muniment room at Taymouth Castle, in which muniment room were contained documents which the appellant considers important to his case. The correspondence between the solicitors takes such a form as plainly and sufficiently indicates what the real point in contest is. The point in contest is really confined simply to those documents at Taymouth Castle, and it appears evident from the fact of Lord Jerviswoode being selected as one witness without calling upon the other trustees to appear, that it was understood, both by the appellant and by those who acted for the respondents, the trustees, that the whole matter in dispute between them was, whether or not the trustees should produce the documents which they as trustees had obtained under the will of the late Lord Breadalbane, namely, the documents in Taymouth Castle. That I apprehend is apparent to everybody, because you find a letter dated the 2nd of August from Messrs. Davidson and Syme, who act as solicitors for the respondents, to Messrs. Steele and Son, who act for the appellants, saying "We are not prepared to state that any of the papers you refer to are under our control, nor even that they exist at all. After the recent decision of the House of Lords, we question our being entitled to part with any of the Breadalbane papers, unless with the consent of the Earl, or an order pronounced in a suit to which his Lordship is a party. You are aware his Lordship has a suit in the Scotch Courts against our clients for delivery of all the papers, which tends to complicate matters. We would be very glad if your client and the Earl could arrange as to the papers, whatever they may be, being delivered over to one or other of them or to a neutral party, and have no doubt our clients would readily order us to give effect to such an arrangement."

Then there is another letter from Messrs. Davidson and Syme, also to Messrs. Steele and Sons, of the 3rd of August, in which they say this: "We wrote to you yesterday, and are now advised by our English correspondents that neither we, nor our clients, the trustees of the late Marquess of Breadalbane, would be in safety to produce to your clients any of the papers in their or our possession, or under their control, without a special order to that effect." Then they say this: "You are already aware that the trustees personally have none of the papers wanted," (that indicates what the papers were,) "but once an order for them is obtained, we will cause search to be made for them where they are likely to be, if they exist at all."

Then in the next letter, dated the 9th of August, the solicitors for the appellant say the object

of examining Lord Dalhousie (who is one of the trustees) is to procure the production of such documents as are in Taymouth Castle, and are important as evidence in the case.

Then in answer to that Messrs. Davidson and Syme say, "Lord Dalhousie not having a single document in his possession connected with the Breadalbane estates, you may safely assume that he cannot produce them. The key of the room at Taymouth Castle in which there are a variety of papers was delivered to us after the funeral of the late Marquess, and upon an order of the Court of Session we would be bound to produce the deeds or papers to such parties as the Court might name." Then there is a further correspondence, much to the same effect, from all which it is clear and plain, that the matter is reduced to a very simple issue, namely, whether or not the trustees are bound as witnesses to produce the papers which are at Taymouth Castle, and what makes it more plain, is the fact, that the appellant is content to take any one of the trustees as a witness, because it appears from the subsequent correspondence, that the private or personal information of any one of the trustees is not regarded as of any importance in the litigation between the parties, but all depends upon the papers, and that, therefore, they may just as well take one of the trustees as the whole, and it is finally settled and agreed between the parties, that Lord Jerviswoode, as one of the trustees, shall be the person selected. He is accordingly selected, and the appellant has it in his power to procure from Lord Jerviswoode all such information as he may think important or proper with reference to the matters in question before proceeding to apply again to the Court with regard to those papers.

In that examination with reference to the papers, Lord Jerviswoode mentions the disposition made by the will. He says the disposition contains a general disposition of heritable and moveable property. The trustees took possession of the property so disposed, and the trustees have since carried on the administration of the trust. A list of papers is exhibited which is certainly a list of a most extraordinary character, with reference to a founding of a motion for a *subpœna duces tecum*. The list is plainly a fishing list, suggesting everything which the ingenuity of a reader could suggest with reference to documents that might possibly be found in Taymouth Castle; and the only question founded upon that is, whether Lord Jerviswoode has or has not the documents there referred to? There are few, very few, which are specifically described. The first few documents, comprising letters patent and deeds of entail down to the fifth paragraph, certainly appear to be specifically described; but after that came a long series of general headings, such as various letters and correspondence which have passed for two centuries in the family, and any of those letters containing any reference to the first Earl and his son about two centuries ago. Then there are a number of other things headed in the same way, as "Various Deeds and Documents," and other things of that sort, which are plainly intended to sweep in all the information which could possibly be obtained from the trustees. That is the list which is given as the foundation for this application to search the muniment room of Taymouth Castle, and to ransack the whole of that muniment room for the benefit of the plaintiff in his present investigation. It is that which, I think, justifies one in saying, that certainly the Statute would be pressed to its extremest limit, if it were carried to such an extent with regard to information to be obtained from witnesses by an application for a *subpœna duces tecum*.

Proceeding with the evidence given by Lord Jerviswoode, he is asked afterwards about the letters. He says, "I am not aware whether there is or is not a charter room at Taymouth Castle. I do not know where the titles and family papers were preserved. Messrs. Davidson and Syme, Writers to the Signet, are the agents to the trustees. I have been informed by them that a list of documents and papers, which the plaintiff desires to have now exhibited, has been communicated to them as agents for the trustees, and that list I have now received from Mr. Bogle, of the firm of Davidson and Syme. I have none of these documents or papers with me."

Then the question is asked—Are the trustees willing to exhibit before the examiner the documents and papers specified in that list, or any of them? Lord Jerviswoode answers—"I cannot answer for the trustees as a body. I am only one of the number. I have not directed any search to be made for these documents or papers, or any of them; and I am not aware of any search having been made. I am not aware that the trustees are in possession of any of the documents or papers referred to, but if so, I, as an individual trustee, have no objection to their exhibition. The call made by the plaintiff for the documents and papers referred to was under the consideration of myself and Mr. Currie as a quorum of trustees, and we arranged to take the opinion of counsel for our guidance." Then he says, "I cannot say that the trustees are prepared to make a search for the documents and papers called for, or if found to exhibit them. There was a key taken possession of by the trustees after the late Marquess's death, which was understood to be the key of the charter room at Taymouth Castle. This key was in the hands of Messrs. Davidson and Syme as agents for the trustees. It is still in their hands. I have not been at Taymouth Castle since the death of the late Marquis. The documents now produced, marked A., is the list of the documents and papers referred to by me. There has been no search, so far as I am aware, of the room of Taymouth Castle understood to be the charter room, for any of the documents or papers in said list. I cannot say that the trustees will undertake a search of this room. I may say that they will not make such a search unless under the authority or order of the Court."

In the mean time Lord Breadalbane had been made a party to the bill for perpetuating testimony, and Lord Jerviswoode is cross-examined on behalf of Lord Breadalbane. On his cross-examination he says, "Without judicial authority the trustees will certainly not exhibit any of the documents. I do not know of my own knowledge that there is a charter room at Taymouth Castle, but I believe that there is from information. I am aware that the custody and control of the charter room and its contents (this is important) are claimed by the present Earl of Breadalbane." On re-examination Lord Jerviswoode says, "I understand the reason why the trustees will not search for or exhibit the documents or papers called for without judicial authority, to be, because there is a question raised as to the party who has a right to the documents in the charter room or connected with the family or estate, and that they think it proper to do nothing in the matter without authority."

Therefore you have Lord Jerviswoode stating, that his reason for the non-search in the charter room, and the consequent non-production of the documents, (for he knew nothing until he had searched,) is, that, although the trustees have the key of the room, there is a dispute (he does not precisely say a litigation) between them and Lord Breadalbane, or, at all events, the other claimant, who is in possession of the property, with regard to the right to the possession of the deeds. It is upon this answer of Lord Jerviswoode that the petition was presented, to which the Court in Scotland refused to accede, and it is that decision of the Court which your Lordships are now asked to reverse.

In the petition itself there is stated the litigation between the present possessor of the estate and the trustees with reference to the custody of those documents. We know, therefore, on the face of the proceedings themselves, and without going any further, that there is a litigation pending, and that when the application was made to the Court of Session, there was a litigation pending between the trustees and the persons in possession of the estate, and of the castle where this muniment room is of which the trustees possess the key, as to whether or not he is really entitled to the possession of these deeds. Further than that, since the presentation of the petition on the 26th November 1867, and the judgment given on the 18th March following, another proceeding took place in which an interdict was asked for against the Earl, because he had threatened to enter into this muniment room, and in some way to deal with it. And in the pleading which took place upon that proceeding, the Earl positively again asserts (besides having asserted it in a litigation of his own) that neither the trustees nor any one else but himself had any right to approach that muniment room at all. We are further informed by the respondents, the trustees, that as a matter of fact, and to this the Earl accedes, although it is a matter upon which I think it would perhaps be hardly necessary to rely, because, there being a positive litigation, and the title being distinctly in dispute, it would be impossible to say, when the Earl is in possession of the castle, and is disputing the right, that those documents were in possession of the trustees at all for the purpose of a *subpœna duces tecum;* but independently of the Earl's having possession of the castle itself, he has put a special lock upon this particular room, so as to debar the trustees from access to that room without his concurrence. Now, in that state of circumstances, if all that had been detailed by Lord Jerviswoode occurred, there could be no doubt whatsoever, that no Court whatever would say, that under a *subpœna duces tecum* you could compel those persons to take any steps to solve the question of right which is in litigation when it is brought to its legitimate conclusion. But to deal with the case as if it were already solved, and to stand upon what may be argued (if it could be argued successfully before decision) to be the legal possession of the trustees, and to say that because they may have, by virtue of having the key of the room, some claim or other to the possession of the documents, they are therefore in a condition in which they can comply with the exigency of a *subpœna duces tecum*, is impossible. It is perfectly manifest that they can do no such thing. It is perfectly manifest, that in this state of things, there is a legitimate litigation not raised collusively, as it is suggested that it might be done, but it is not done here for the mere purpose of escaping from the exigency of a *subpœna duces tecum*, but a real *bonâ fide* litigation carried on between the Earl and the trustees with regard to the possession of these very documents; and what your Lordships are now asked to do is to reverse the decision of the Court of Session, which has declined, under this peculiar state of circumstances, to order a search for the documents, or the production of them.

I confess, my Lords, that it appears to me, that if there had been (as there possibly might have been under the peculiar circumstances of the case) some difficulty of a technical nature or otherwise, from the fact, that the Judges, as has been contended, had up to the present moment given no order whatever for the production of the papers to be produced, and had suspended any order as to the production of the papers, there might have been some question as to whether an order of that kind ought or ought not to be made, supposing, that it could in any way have reasonably been suggested, that there were such papers, or that there were any other points which might possibly arise as between the appellant and those witnesses who were summoned, calling for the intervention of your Lordships' House in order to redress a grievance arising from the procedure of the Court in Scotland, or to obviate any defect which would arise to justice in consequence of having no substantial order for the production of the papers. The correspondence, and all that

took place in the case, shews, that the papers in the muniment room at Taymouth Castle, and those alone, are in question; and the correspondence shews, that so little are any of the trustees personally acquainted with the matter, that the parties, by consent, and properly by consent, were content to take the evidence of one of the trustees as the evidence of all, inasmuch as any one of them had the same knowledge as all had, which was in truth no knowledge at all of anything beyond the fact, that there was a muniment room with papers in it; and when they proceeded to press Lord Jerviswoode with respect to that matter, it is quite true, that the case which he set up was only this, that he would not make the search or produce the documents without the order of the Court. But at the same time he informed those who were examining him, that his reason for taking that course was, that the whole matter was in litigation between the trustees and Lord Breadalbane, and he therefore threw it upon those who were cross-examining him to probe the matter further; and when we do so, and we come to see the facts before us, even as stated in the petition itself, we find the facts to be, that there is such a litigation existing, and that therefore legally in point of law, as well as physically in point of fact, those documents are not such as the Court could by any possible means call for, and that they would have been taking a step which would have been utterly informal, and utterly unnecessary, and which in the result could have had no beneficial effect whatever as regards the administration of justice, if they had pronounced a formal order, that the witnesses were to search for and examine those things, while the matters were matters which could not be investigated by them, and the documents could not be produced.

It appears to me, therefore, that all that is right and just has been achieved between these parties by the order which has been made, and that therefore that order should be allowed to stand, and that the appeal should be dismissed, and, I should suggest to your Lordships, with costs.

LORD COLONSAY.—My Lords, I have no doubt at all, that the interlocutor of the 18th March 1868, the judgment appealed from, was the proper order to be pronounced in the circumstances in which the case then stood. It is unnecessary to go through all these letters and papers, especially after the detail which has now been given by my noble and learned friend; but I think, that it is perfectly manifest, that the object of this proceeding was to obtain access to the documents in the charter room at Taymouth Castle, and to get from the trustees authority to produce those documents, or to get from them the production and exhibition of those documents in order to make them available for other purposes.

I think, that there is no question raised about documents other than those which were supposed to be in the charter room at Taymouth Castle. And, accordingly, the arrangement made as to the examination of one of the trustees is in perfect consistency with that view of the matter, and with none other.

Now that trustee, when he was examined, did not bring with him any documents; he did not agree to search for or to produce any documents; but I think he stated sufficient reasons for not having brought documents with him, and for not searching for or producing documents without the authority of the Court.

It is said, that the order, under which he was examined, was an imperfect order, that it was merely an order to examine him as a witness, without an order on him to bring with him documents, though he might not produce or exhibit them. I do not think there is anything in that objection. It is said to have been a defect on the part of the Court. But the order that was made as to the examination of this person was precisely in conformity with what had been asked for by the appellant in the petition which he presented. He asked for the examination of the trustees, and for requiring them to produce and exhibit documents. The Court superseded the production and exhibition of the documents, but they granted all that he had asked beyond that. If it was implied in the demand made by the party, that there should be an expression in the judgment, to the effect, that they were to bring with them documents, though not to exhibit or produce them, it is equally to be implied in the order that was made. But the statement in the evidence given by the trustees is a sufficient answer to any objection to his not having brought with him any documents, because he stated the reasons which prevented him from having any documents to produce.

He stated reasons for not searching, which were perfectly sufficient. He stated, that a litigation was in existence. We know, that the question which was in litigation was, that the person that was in possession of the estate, the present Earl of Breadalbane, or Glenfalloch, (now called Earl of Breadalbane,) had demanded, that the key of this charter room should be given over to him, and that he should be held to be the party entitled to all those documents; and not only so, but he seemed to conclude in the summons in that litigation, that he was to be held, under the circumstances, to be actually the party in legal possession of the documents. In that state of matters, I think it was quite a sufficient answer on the part of the trustees.

Then came the petition upon which the judgment now under appeal was pronounced. That petition asked for an order upon the trustees to exhibit and produce documents. In that discussion the Earl of Breadalbane made his appearance, and the whole matter, including both the

physical objection and legal objection to the trustees being required to produce the documents, was stated to the Court. The contention of the Earl of Breadalbane was put forward; and in those circumstances, all being explained, the Court did not make any order to produce documents, and they dismissed the petition, which asked for such an order. I think there was no other course to be followed. That litigation is said to be now very nearly ready for consideration. I think it was stated, that it was standing for hearing. When that matter is disposed of, it will be found, that one or other of the parties, either the trustees or the Earl of Breadalbane, is entitled to the custody of the papers; or it may be found, that the Earl of Breadalbane is entitled to the custody of some of the papers, and that the trustees are entitled to the custody of the others of the papers. Therefore, when that matter is disposed of, the present appellant will know very well against whom he has to direct his application for an order to exhibit and produce. But all questions, I apprehend, are still reserved, and must be reserved as to the right of those parties to withhold production for any reason which is good as against letting the documents be seen by this party, the appellant. I do not understand, that the Statute under which we are now proceeding gives a right to a party to get documents irrespectively of any valid objection which the possessor or custodier of those documents may have to state against the exhibition of them. All that matter I hold to be perfectly reserved. Indeed, as I read the order that was pronounced, and the judgment given by the Lords Justices on the appeal, that appears to me to be the view which they took of the matter, and I hold the same view, that it will be open to the present appellant to make his application, and that it will be open to those, who have the custody of those documents, then to say what objection they have to the exhibition of them, and the matter will then be properly determined. But at present to require, that the trustees shall produce and exhibit documents, when there are both physical and legal obstacles to the getting possession of them, appears to me to be quite out of the question.

LORD CAIRNS.—I have very few words to add to what my noble and learned friends have said. It appears to me, that in the first instance when the application was made by the original petition to the Court of Session in Scotland, if the present appellant had been dissatisfied with the order then made, and had come to your Lordships and had asked from your Lordships an order which would be an equivalent to a *subpœna duces tecum* in this country, your Lordships might have entertained that application, and perhaps might have given an order upon the person supposed to hold the documents, that, like any other witnesses, they might bring those documents with them, and say whether there were, or were not, grounds to resist their being produced in the proper manner as evidence in the case. But, in place of that, the appellant received from the Court the right of calling witnesses and examining them, and accordingly he went forward to that examination. But before he went to that examination he had that correspondence which has been referred to, and into the details of which I will not go again, with the agents of the trustees of the late Lord Breadalbane, who are the respondents in this appeal. In the course of that correspondence it became perfectly evident, and one who reads it must see, that the whole question between the parties was as to certain documents which were supposed to exist in the muniment room of Taymouth Castle. With regard to those documents the appellant was told beforehand, that the trustees conceived, that they had not the power to produce them except under some judicial order from the Court, if then. And moreover, that questions would clearly arise, as to whether they would have access to the documents even for the purpose of searching for what was required. In that state of things one of the three trustees was called as a witness to speak for himself and other trustees. And in that examination the state of things which was anticipated has now been put upon record, and in substance it amounts to this, that in their actual custody the trustees have not any documents, that there is a muniment room at Taymouth Castle, and that there is a key to the room which is in the possession of the trustees. But it does not appear, that they have any power to enter the castle, and to use that key for the purpose of searching. On the contrary, it is said in the case of the respondents, and not denied, that Lord Breadalbane has taken means, pending litigations between himself and the trustees, to prevent their entering the room or dealing in any way with those documents. My Lords, in that state of things, we are not in the same position that we should have been in, if the application had been made for a *subpoena duces tecum*, while as yet it was uncertain what would be the case alleged by those upon whom that *subpoena* would be served. Here their case has been stated, and it appears to me, that your Lordships must deal with the case just as if there had been a *subpœna duces tecum* in the first instance, and you were called upon to take some further steps in consequence of his disobedience to that *subpœna duces tecum*. It appears to me, that no case whatever of disobedience has been made out against the respondents, that it was incumbent upon those who ask for any further order now to shew, that there were some documents which the trustees could produce if they pleased, and that they are wilfully refusing to produce those documents. I think, that in substance the case entirely fails, and I quite agree with what my noble and learned friend on the woolsack has proposed to your Lordships, namely, that this appeal should be dismissed with costs.

Interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, Steele and Sons, Bloomsbury Square, London.—*Respondents' Agents*, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin; J. Graham, Westminster.

AUGUST 10, 1869.

JAMES HOWDEN, Accountant, and Others, *Appellants*, *v.* CHARLES HENRY ALEXANDER, FREDERICK CAMILLO EVERARD, JAMES JOHN ROCHEID of Inverleith, and Others, *Respondents*.

Entail—*Pro indiviso* Right to Lands—Defects in Clauses of Entail—*E., one of the heirs portioners of R., in* 1753, *executed an entail of her* pro indiviso *right to the lands of I. Afterwards the estate of I. was divided by the Sheriff under decree of division in* 1773, *but no deeds were executed as between the owners of the* pro indiviso *shares.*

HELD (affirming judgment), (1) *That a* pro indiviso *right to an estate may be the subject of an entail, at least where the estate is capable of division, as was the case here.* (2) *That if such estate be divided by a decree of division, no further deeds by the other co-owners as to the specific parts thereby apportioned need be executed.*

Comments *as to the language of the prohibitory, irritant, and resolutive clauses, and the words "deeds," "conditions and provisions," "restrictions and limitations."*[1]

This was an appeal from the interlocutor of the Lord Ordinary (adhered to by the First Division) finding, that the entail of the lands of Inverleith and others was a valid and effectual entail under the provisions of the Act 1685, c. 22.

Two actions of declarator and of declarator and adjudication were conjoined, and the pursuer, James Howden, accountant, trustee on the sequestrated estate of James Rocheid of Inverleith, sought to have it found and declared, that the deed of tailzie dated 1749, and recorded 1753, made by Mrs. Elizabeth Rocheid, daughter of Sir James Rocheid, was not valid in regard to the prohibitions against alienation and contraction of debt and alteration of the order of succession, and that the pursuer had power to sell and alienate the subjects, and that he had full title to obtain charters or writs of resignation or confirmation, &c. Mrs. Elizabeth Rocheid was one of the heirs portioners of Sir James Rocheid, and had right to two fourth parts *pro indiviso* of the lands of Inverleith, near Edinburgh, and others. The Court held the entail to be valid, whereupon the pursuer appealed to the House of Lords.

The *appellant* in his *printed case* stated the following reasons for reversing the interlocutors:—1. Because the subjects alleged to be entailed described in the deed of taillie, and which description is contained in the whole subsequent titles, being subjects held by the entailer *pro indiviso*, or in joint ownership with other persons, could not be validly entailed. And further, the fetters of the entail not being directed at least to a specific half of the lands allocated under the decree of division to the deceased James Rocheid, and belonging to him at the time of his death, there was no valid entail of said lands, and the same were possessed by him in fee simple, and were and are subject to his debts and deeds. 2. The entail is invalid in respect that the prohibitory, irritant, and resolutive clauses are not validly framed so as to lay the estate under the fetters of a strict entail.

The *respondents* in their *printed case* gave the following reasons for affirming the interlocutors:—1. Because it is competent to entail a *pro indiviso* right to lands. 2. Because the entail of a *pro indiviso* right to lands is not altered or affected by a subsequent division of the estate among the joint owners. 3. Because the prohibitory, irritant, and resolutive clauses of the Inverleith entail are complete and effectual, in terms of the Act 1685, c. 22. 4. Because these clauses were all fully inserted in the titles made up by the first James Rocheid to the entailed estate, in terms of the said Statute.

Lord Advocate (Moncreiff), *Anderson* Q.C., and *J. Pearson* Q.C., for the appellants.—It is not competent by the law of Scotland to make a *pro indiviso* right the subject of an entail. In the present case the estate, of which one half belonged to the entailer, was afterwards divided

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[1] See previous report 6 Macph. 300; 40 Sc. Jur. 166. S. C. L. R. 1 Sc. Ap. 550; 7 Macph. H. L. 110; 41 Sc. Jur. 588.