contract he could not resort at the same time to another. Accordingly I think that that case affords no support to the argument advanced by the defenders in the present case.

LORD SKERRINGTON—Although this contract was not drawn by a lawyer, I should be slow to say that the parties did not mean what they said when they described the 10s. a-day as a "penalty." I think that they intended to protect the interests of the seller by providing the purchaser with a strong motive for punctually fulfilling his contract. But that consideration by itself does not make this stipulation unenforceable. The question still remains, as Lord Robertson pointed out in the *Clydebank* case (7 F. (H.L.) 77, at p. 84, 42 S.L.R. 74), whether the one party had no interest to protect by that clause, or whether that interest was palpably incommensurate with the sum agreed on. In other words, if this 10s. a-day is a random sum the Court will not enforce payment. On the other hand, if it represent a reasonable pre-estimate of the loss which the pursuer might suffer by delay in having her ground cleared, then the stipulation ought to be enforced. In my view it was a stipulation not merely in the interests of the seller but also in the interests of the purchasers, because one object was to protect the purchasers against possible claims of an exorbitant kind which they might find it difficult to meet.

As has been pointed out, the subject-matter of this contract is one which made it peculiarly appropriate that the parties should in their several and separate interests assess the damages in advance. The injury which the seller of the trees might suffer through her ground being for an undue time occupied by trees either standing or cut down would probably arise under three heads—injury to amenity or to sport or to estate management. The damage under each of these heads is obviously difficult to translate into pounds, shillings, and pence. Accordingly it was reasonable on the part of the contractors to fix a specific sum as the damages which should be recoverable in respect of a breach of this particular stipulation.

There is nothing in the circumstances so far as we know to suggest that 10s. a-day was at all exorbitant, and I think it right to note that the Dean of Faculty pointedly declined to ask for a proof of facts and circumstances to elucidate this question. The fact that the agreed-on sum is so much per day goes far to show that what the parties had in mind was not a random sum but a true estimate of conventional damages.

I was at first unfavourably impressed by the fact that no attempt had been made to fix some proportion between the number of trees left standing or lying or the acreage occupied by them on the one hand, and the penalty on the other hand, On further consideration it becomes clear that it would be difficult, if not impossible, to assess the damages on any such basis, because a group of trees left standing or felled in any one place might cause much more injury to amenity, sport, or estate management than a larger group in another part, and accordingly if the parties were to assess the damages in advance the only practical way was to take an average figure.

The only other question is whether this penalty was intended to become due from day to day, or whether it was not to accrue as a debt until the contract had been completely executed by the purchaser. Counsel for the contractors argued that the purchaser had it in his power to reduce this stipulation to a mere nullity, because they had only to be bold enough to throw up the contract and say that they would not fulfil it in order to relieve themselves of it. For my part I do not understand how a contract which has been entirely executed with the exception of the removal of felled timber which is the property of the purchaser could be rescinded in the manner suggested. Even if that could be done, a right already vested would not be thereby divested. The purpose which the parties had in view would be defeated if the penalty could not be exacted immediately, but was to be payable only if and when the purchasers thought fit to complete their contract. Accordingly I agree that the Lord Ordinary has come to a sound conclusion.

The LORD PRESIDENT and LORD CULLEN were absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—MacRobert--Aitchison. Agents--Mackintosh & Boyd, W.S.

Counsel for the Defenders (Reclaimers)—Dean of Faculty (Murray, K.C.)—T. Graham Robertson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Thursday, June 12.

SECOND DIVISION.

THE HAMILTON TRUSTEES, PETITIONERS.

Trust — Sale — Special Powers — Nobile Officium — Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3.

Testamentary trustees, upon whom powers of sale had been conferred by the testator, proposed to sell the materials of a residence together with certain pictures and pieces of plate which were in the nature of heirlooms. They had, however, doubt as to the powers of sale covering their proposed action. There being no contradictor, procedure by way of an action of declarator or by a special case was not open to the trustees, who accordingly presented a petition to the Court for authority. *Held* that, as the petitioners already possessed the special powers they craved, the petition was unnecessary and fell to be dismissed.

Sir John Arbuthnot Fisher, Baron Fisher of Kilverstone, and others, the Hamilton trustees in the sense of the Hamilton Estates

Act 1918, *petitioners*, acting under the trust-disposition and settlement and relative codicils of the Duke of Hamilton, Brandon and Chatelherault, presented a petition under the Trusts (Scotland) Act 1867, sec. 3, or alternatively in the exercise of the *nobile officium* of the Court, wherein they craved the Court "to grant power and authority to the petitioners as trustees foresaid (1) to sell and dispose of the materials of which Hamilton Palace is constructed, or any part or parts thereof; (2) to sell and dispose of the whole fittings, fixtures, furniture, plenishing, panelling, pictures and furnishings, including the said marble staircase within the said Hamilton Palace; and (3) to sell and dispose of the whole silver plate and plated articles which belonged to the testator, and that either by public roup or private bargain, at such price or prices, and upon such terms and conditions, as the petitioners consider to be most beneficial to the trust estate, and to authorise the petitioners as trustees foresaid to enter into all necessary contracts of sale, and to grant all necessary deeds containing all usual and necessary clauses for effecting the said sales."

The *trust-disposition and settlement* contained in its sixth purpose this declaration —"Declaring, with reference to Hamilton Palace, which is not now used by me as a place of residence, that it shall be in the power of my said trustees if they, in their sole discretion, shall think it advisable to do so, to entirely displenish and dismantle the palace, and take down and remove the building, or allow the same to fall into disuse, as they shall think fit. . . ."—and in conferring powers to lease, feu, &c., it spoke of "Hamilton Palace and policies which they" (*i.e.*, the trustees) "shall be entitled to deal with . . . as if the said Palace and policies did not exist as a mansion-house and policies on my said estates."

The petition set forth that the mineral workings under and around Hamilton Palace would damage and might sooner or later destroy the fabric of the edifice, and contained the following further averments: —"7. The last purpose of the said trust-disposition and settlement is in the following terms:—[*Here followed a direction along with the necessary instructions in certain events to execute a new deed of entail*] 'And with reference to any moveable or personal estate in the hands or under the management of my trustees at the time when the said entail or entails fall to be executed and not otherwise disposed of, including the contents of any houses upon the estates to be entailed as aforesaid, and the silver-plate deposited in bank, and any accumulations of income from my heritable and real estate, I hereby direct my trustees to pay and make over the same to the institute or heir of entail, to whom the said entail or entails are granted and delivered, and that for his own absolute use and behoof. . . .' . . . 9. In particular, the testator conferred upon his trustees *a power of sale* in the following terms:—As also 'to sell and dispose of any parts of the estate and effects, heritable and moveable, hereby conveyed, or that may be held by my trustees, whenever they in their sole discretion may consider such sales expedient with reference to the purposes of the trust, including specially the payment of the debt affecting my estates or any part thereof in England or Scotland, and particularly without prejudice to the said general power I hereby authorise my trustees to sell at their discretion any outlying and detached portions of my estates in Lanarkshire, Stirlingshire, or Linlithgowshire which they may think it advisable to realise, and I give this power as a recommendation to them with the view of consolidating my estates in these counties, declaring that all such sales of any portions of my estates may be made either by public sale or private bargain, and as to any landed property which may be so sold, the same may be sold either with or without reservation of mines and minerals or of feu-duty or ground annuals, and on such terms and conditions otherwise as my trustees may think fit, and with power to my trustees to enter into and execute all agreements, contracts, articles of roup, and minutes and missives of sale, and upon such sales to grant dispositions or other conveyances containing clauses binding my trust estate and my heirs in absolute warrandice, and all other usual and necessary clauses.' . . .' 19. In these circumstances the petitioners have had to consider what course should be adopted with reference to the preservation or otherwise of the fabric of the Palace. Mining engineers of standing have been consulted, and in view of the expense of the works which in their opinion would be required to counteract the effect of the working out of the minerals the petitioners have come to the conclusion that the time has arrived when the discretion conferred upon them by the testator with regard to the Palace should be exercised. They have accordingly decided to take no steps for the maintenance of the Palace as a residence, and have resolved to displenish and dismantle it and to take down and remove the building. 20. The Palace contains a large quantity of valuable furniture, pictures, panelling, and other articles which belonged to the testator, and which have been allowed to remain in the Palace during the occupancy of the present duke. It is necessary that the petitioners in pursuance of their said resolution should make arrangements for the removal of such furniture, &c. 21. The decision referred to was communicated to and has the approval of the present Duke, and such furniture and plenishing as he desires to have the liferent use of has been or is about to be taken to his other mansion-houses in Scotland and England. There still remain undisposed of, in addition to the usual fittings and fixtures:—(1) A valuable marble staircase; (2) decorative panels and panelling in the palace; (3) articles of furniture, pictures, &c., and (4) a quantity of silver-plate at one time deposited in bank. 22. The petitioners have given careful consideration to the question of the disposition of these assets of the trust. They are advised that the cost for storage and insurance of them in some suitable repository where they

would receive the attention necessary to reduce depreciation to a minimum would amount to a large sum per annum, which *in cumulo* would in the course of time seriously diminish if not entirely exhaust the value of the articles themselves, even assuming that damage or depreciation would not result from storing. In any event the petitioners have no authority to apply the funds in their hands, either capital or income, in payment of the heavy charges which such storage would involve, and which they apprehend could not be debited against the revenue of the trust payable to the present Duke."

No answers were lodged.

On 24th May 1919 the Court, after a debate, remitted to James A. Fleming, Esq., K.C., and to Mr Lancelot Hannen, auctioneer, London, to make inquiry into the facts and circumstances set forth in the petition, and to report.

Mr Fleming's *report, inter alia*, ran as follows:—"The power of sale quoted in the petition is immediately followed by a power to acquire lands as follows:—'As also with power to my trustees to purchase or to acquire absolutely, or in feu or on lease, from time to time, any lands or heritages which they in their sole discretion may consider it to be for the advantage of my estates to obtain, and that upon such terms as they may deem advisable, and if considered necessary by them, to charge the price or prices of such lands when and if purchased on the fee of the estates, including the fee of the lands so purchased.'

"The purposes of the trust are two—First, to hold and apply the income in paying an allowance to the Duke for the time, and with the balance to pay off debts affecting the estate. Second, when the whole debt is paid off, should the present Duke be still alive, to make over to him during his life the whole free income of the estates, and on his death to execute a deed of entail of the lands on the successor to the title when he attains full age, and is in the opinion of the trustees 'from his circumstances, mentally or otherwise, in a position competently to occupy the position of Duke of Hamilton in possession of the estates.' At the same time the trustees are directed to hand over to the institute of entail absolutely all the moveable or personal estate which may then be in their hands.

"The truster has conferred upon the petitioners a general power of sale of heritage and moveables, but it is a question for your Lordships' decision whether that power is not limited by the words 'wherever they in their sole discretion may consider such sales expedient with reference to the purposes of the trust, including specially the payment of the debt affecting my estates,' to sales for the purpose of paying off debts. Your Lordships will compare this clause in the deed with the immediately succeeding clauses giving power to sell outlying portions and acquire other lands so as to consolidate the estates. The whole debts have now been paid off, and the sole remaining purpose of the trust is to hold the estate until the entail can be executed. Should your Lordships decide that the power of sale is not restricted the petition seems needless, and your Lordships will not intervene to grant to the petitioners a power which they already have. Should your Lordships hold that the power of sale is restricted, then it is for your Lordships to consider whether the restriction should be relaxed to the extent craved in the petition. This the Court has power to do under section 3 of the Trusts (Scotland) Act 1867 upon being satisfied that the powers of sale craved are expedient for the execution of the trust and not inconsistent with the intention thereof.

"The intention of the truster seems to have been that his estates, once cleared of debt, should be made over to an heir in the dukedom along with the moveable and personal estate, the latter *in forma specifica* so far as consisting of the contents of his houses and the silver plate deposited in the bank, and it is for your Lordships to dispose of the question whether the proposal to convert specific moveables into cash for the purpose of making a more beneficial investment is one which is either expedient for the execution of the trust or consistent with the truster's intention.

"As regards the sale of the materials of the fabric of Hamilton Palace, and the usual and ordinary fittings and fixtures, there can be little question but that this is expedient in the interests of the estate. Specific power is given to the trustees to demolish the building, and it would seem to be only good management to dispose of the materials for what they will bring. This, I venture to think, would also apply to the marble staircase and to the panels and panelling, but more difficult questions arise with regard to the pictures, furniture, and silver plate.

"I have seen the report by Mr Hannen of Messrs Christie's. It there appears that there have been already removed from Hamilton Palace a considerable number of family portraits and other pictures, and that there are also in their hands some twenty-five chests of decorative and table plate. I assume this is the plate described in the petition as 'at one time deposited in bank.' I have no further information as to the furniture still in Hamilton Palace.

"I would venture to submit that such articles may have a value from their family association to the ultimate fiar, who must be a Duke of Hamilton, much in excess of any money value, and that your Lordships will not authorise the scattering abroad of what may be unique family treasures until satisfied that it is the most expedient course for carrying out the wishes of the truster. The case of *Galloway* v. *Campbell's Trustees*, 7 F. 931, 42 S.L.R. 712, is interesting as showing that a distinction has been drawn between property with a family interest and property which has no such value.

"In regard to this question the proper contradictor would seem to be the next heir—that is, the individual in whose favour the lands are to be entailed after the death of the present Duke.

"The heir-apparent is the Marquess of Douglas and Clydesdale, the eldest son of the present Duke. He was sixteen on 3rd Feb-

ruary last. He has three younger brothers and three younger sisters. The brothers are —Lord George, aged thirteen, Lord Malcolm, aged nine, and Lord David, aged six.

"The petition has been served on them and on the present Duke as their curator and tutor-at-law.

"The present Duke's health is not good, but without founding on that I must report to your Lordships that I greatly fear the interests of the next heir are not sufficiently represented by the present Duke of Hamilton. The Duke being entitled to the free income of the whole estate has an interest to increase the income-yielding part of the estate. The conversion of these articles into cash automatically increases his income, while it divorces them for ever from the family of whose history they may form part. I venture to submit that the interest of the fiar of the estate, whoever he may be, is adverse to that of the liferenter, and that this interest should be adequately represented. I would suggest that this should be done by the appointment of a *curator ad litem* to the Marquess of Douglas and Clydesdale.

"I am informed that the present Duke has assigned to trustees for the benefit of his younger children his whole income beyond a certain fixed sum for a period of years. The interest of these younger children is thus not adverse to that of the present Duke, but I would suggest for your Lordships' consideration whether another *curator ad litem* might not be appointed to them.

"The case of the silver plate, if my assumption be correct, is slightly different. What is directed by the truster to be handed over to the institute of entail is the whole moveable estate then existing, including specifically 'the silver plate deposited in bank.' An inference might be drawn from this against any intention of the truster that this silver plate should be sold except possibly as a last resort in a case of necessity. There is no case of necessity here.

"I am unable to appreciate the force of the considerations set out in paragraph 22 of the petition. The second purpose of the trust-disposition provides for maintaining and upholding Hamilton Palace (so long as the trustees think right) and the contents thereof, and that would seem to apply to the contents wherever they are. Further, if Hamilton Palace is demolished and the contents stored there will be no increase of expense in insurance, and I doubt the possibility of warehouse rent exceeding the present cost of maintaining and upholding Hamilton Palace. That cost will be saved to the estate, and the cost of storing elsewhere could fairly be set against that saving. Short of depreciation, which is not very strongly put forward by the petitioners, there seems to be no reason why either these articles of family interest or the estate should suffer. The suggestion of debiting these articles with the annual cost of maintenance would be appropriate in the case of a dealer, but seems out of place in the case of one who keeps them for his own pleasure.

"With regard to the appeal for an exercise of your Lordships' *nobile officium*, I would refer to the cases of *Berwick*, 2 R. 90, 12 S.L.R. 58; *Noble's Trustees*, 1912 S.C. 1230, 49 S.L.R. 888; and *Scott's Hospital*, 1913 S.C. 289, 58 S.L.R. 199."

Mr Hannen reported that owing to the present high scale of prices the proposed sale would, if authorised, take place at a very opportune time, but that the present prices might not continue.

Argued for the petitioners — No contradictor to the trustees having come forward, the petitioners were unable to proceed by way of an action of declarator or by a special case. The trustees were not bound to avail themselves of the power of sale without making certain that they could safely do so, and they were within their rights in coming to the Court for guidance in the matter. It was all the more expedient to follow this course, as the reporter had made a suggestion to the effect that the power of sale was fettered, and had doubted whether the proposed sale would coincide with the testator's wishes. Counsel referred to *Galloway* v. *Campbell's Trustees*, 1905, 7 F. 931, 42 S.L.R. 712.

LORD JUSTICE-CLERK—It was quite right that the course of making remits was adopted, because it has cleared up the possibility of there being any question as to what the terms of the trust-deed were, and it relieved Mr Macmillan from the very awkward position of being required to argue that his petition was unnecessary as he had the powers already. The course followed has also relieved us from the idea that there were points which had not been sufficiently put before us, and therefore the reports have served quite a good purpose.

Having these reports before us, and considering the terms of the trust-disposition and of the petition which are now before us, I am of opinion that we ought not to grant the prayer of the petition because it seems to me the trustees have sufficient powers of sale already. [*His Lordship then examined the terms of the trust, and continued*]—I am therefore of opinion that the trustees have, in the circumstances disclosed in this petition, and with the averments they make as to the matters in hand, all the powers they require to enable them to carry out the sale which they refer to in the prayer of their petition, and that accordingly we should refuse this petition as being unnecessary.

LORD DUNDAS—I agree. It was probably more satisfactory that we should have a report from a wise and experienced *amicus curiæ* before proceeding to dispose of this application. But I confess my opinion that my impression was at the last hearing, as it still is, that the trustees already possess the powers and authorities which they crave in the petition. The petition should accordingly be refused as being unnecessary.

LORD SALVESEN—I agree. [*His Lordship referred to the report, and continued*]—The trustees appear to have considered the question as to the disposal of the plate and pictures, which are really the only subjects about which there could be any conceivable

doubt, and they state that they are of opinion that the pictures which they ask authority to sell ought to be disposed of in the interests of the trust as a whole. I have no doubt that they have come to that decision with the sole view of discharging their duty as trustees, and, if so, their decision cannot afterwards be successfully challenged.

I agree with your Lordship, as we all think that they have the powers which they ask us to confer, this petition is unnecessary and should be dismissed.

LORD GUTHRIE concurred.

The Court pronounced this interlocutor:—"... Allow the petition to be amended as proposed at the bar; and having considered the petition as amended, along with the reports by Mr Fleming and Mr Hannen respectively, and having heard counsel for the petitioners, dismiss the petition as unnecessary, and decern: Find the expenses incurred in connection with the present application and proceedings are chargeable against the trust estate in the hands of the petitioners."

Counsel for the Petitioners—Macmillan, K.C.—D. P. Fleming. Agents—Webster, Will, & Company, W.S.

Wednesday, July 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MACKINNON'S TRUSTEES *v.* LORD ADVOCATE.

Succession—Domicile—Husband and Wife—Acquisition of Independent Domicile by Wife stante matrimonio.

A husband and wife were both originally domiciled in Scotland. The husband became addicted to drink and maltreated his wife. They executed a voluntary deed of separation, and he proceeded to Australia, where he lived in Brisbane from 1899 to January 1918, when he died. The wife continued to live on in Scotland, and there was no communication whatever between the spouses. In 1902 the husband contracted a bigamous marriage in Australia. In 1910 the wife heard of the bigamous marriage, and in 1915 she raised an action of divorce against her husband on the grounds of desertion and adultery. She died on 9th September 1915, when the service on the husband of the divorce summons had not been carriedout. In a question of the liability of her estate to succession duty, *held* (*dis.* Lord Mackenzie) that although the husband had deserted the wife in a popular sense, though perhaps not in the sense of the Act 1573, c. 55, the wife was never in a position to acquire a domicile independent of that of her husband, that the husband was domiciled in Queensland at the date of the wife's death, and that her domicile was therefore in Queensland at the date of her death.

Dolphin v. *Robins*, 1859, 3 Macq. 563, *per* Lord Cranworth at p. 576 *et seq.*, *commented on.*

Thomas Jaffrey and another (Mrs Mackinnon's trustees), *pursuers*, brought an action against the Lord Advocate as representing the Commissioners of Inland Revenue, *defender*, and, for any interest he might have, against Robert Mackinnon, the husband of the pursuer, who died *pendente processu*, concluding, *inter alia*, for declarator (first) that Mrs Mackinnon died domiciled in Queensland; (second) that legacy duty and residue duty were not exigible in respect of the bequests of legacies and residue contained in her trust-disposition and settlement; and (third) that succession duty was exigible for the estate of Mrs Mackinnon only in respect of the heritable property situated in Scotland of which she died possessed.

The pursuers *pleaded*—"(1) The deceased Mrs Isabella Henderson Watson or Mackinnon having been domiciled in Queensland at the date of her death, her estate is not liable in payment of legacy or residue duty, and is liable to succession duty only in respect of her heritage situated in Scotland, and the pursuers are therefore entitled to decree in terms of the declaratory conclusions of the summons."

The defender *pleaded*—"(5) The said Mrs Isabella Henderson Watson or Mackinnon having been domiciled in Scotland at the date of her death, this defender should be assoilzied from the conclusions of the summons."

On 18th March 1919 the Lord Ordinary (ORMIDALE) assoilzied the defender from the conclusions of the summons. To his interlocutor was appended the following opinion, from which the *facts* of the case appear.

"*Opinion.*—In this case three questions were presented for determination. (*First*) Whether at the date of Mrs Mackinnon's death on 9th September 1915 her husband Robert Mackinnon had acquired a domicile in Queensland? (*Second*) In the event of its being held that he had, whether the domicile of Mrs Mackinnon was at the date of her death also in Queensland in respect of the rule that a wife's domicile follows that of her husband? and (*Third*) If Mrs Mackinnon's domicile was at the date of her death in Queensland, whether succession duty is exigible from her estate only in respect of the heritable property situated in Scotland of which she died possessed?

"*First.*—The domicile of Robert Mackinnon at the date when he left Aberdeen for Australia was in Scotland. He was born at Campbeltown in Argyll, and it is not suggested that he had at that date lost his domicile of origin.

"After leaving Scotland Mackinnon proceeded to Australia, and in Australia he continued to live until his death on 7th January 1918, that is to say, for a period of between twenty-four and twenty-five years. Residence, whatever may be its duration,