

terms of the contract of copartnery of the Carron Company.

The case was advised to-day. The Court—Lord Curriehill dissenting—adhered to the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—It appears that the late Mrs Lothian had ten shares of the Carron Company, which had belonged to her first husband, Mr Caldwell. These she held by herself and her trustees till her death in 1846. She was all that time the registered owner in the books of the company. In 1828 she married Mr Lothian, when a contract of marriage was executed by which the shares were conveyed to trustees. Mr Lothian's *jus mariti* and right of administration were excluded, and the dividends were to be paid over to Mrs Lothian herself. The trustees had power to give Mr Lothian such part of these dividends, not exceeding one-fifth, as they should think proper. There was a clause of pre-emption in the contract of the company in its favour, and in 1847 the company agreed to purchase Mr Lothian's shares for £6800. Mr Lothian afterwards married a Mrs M'Fie, and she, as his executrix, raised an action against the company to have the sale reduced, on the ground of the company's fraud, and this action the company compromised by a payment to Mrs M'Fie or Lothian of £11,000, she granting an assignation of all her rights. The pursuers in this action say that the first Mrs Lothian was cheated during her life, and that no discharge has been granted for what she was defrauded of betwixt 1824 and 1846. It is maintained, on the other hand, that what was transferred to Mr Lothian by his wife's codicil was ten shares of what the company had to divide, and that the defenders have satisfied his executrix by the payment made to her. The question is whether the pursuers have still a title and interest to sue this action. I think there is an interest to make out that certain sums were not paid to Mrs Lothian, which, if the contract had been honestly acted on, would have been paid to her. I think it would be premature to dismiss the action without inquiry. There must be some inquiry as to how the profits were laid aside instead of being divided. If this was honestly done in order to increase their stock or otherwise, I don't see how the pursuers can complain; but the contrary is averred, and I am not for excluding light from the transactions.

LORD CURRIEHILL said—The pursuers are not here claiming damages, but an accounting on the footing that they are the parties to whom the profits in question still belong. In considering the pleas before us, we must, of course, assume the pursuers' statements to be true. On the other hand, we must keep in view the nature and extent of their allegations. Now, it is not alleged that the profits were purloined by those conducting the business. On the contrary, it is said that the profits have been accumulated. Nor is it alleged that any of the conditions of the contract of copartnery have been contravened. It is only said that there was concealment. In order to ascertain whether the pursuers have a title to sue we must attend to the history of these shares. This his Lordship proceeded to narrate; and then put the question—Suppose a multiplepounding were raised as to the right to the profits in question, whether would Mr Lothian's executrix or Mrs Lothian's representatives be preferred? Undoubtedly the former. The trustees had divested themselves in favour of Mr Lothian. They say that they only transferred the stock. I think that is not only erroneous in law, but inconsistent with what I gather to have been the intentions of the parties. If the other party were preferred such a result would be very startling on all the stock exchanges of the country, where it has always been understood that a transference of stock includes a transference of all accumulated profits which have not been set apart as dividends. These accumulations are always dealt with as accessories to the capital. This was illustrated by considering the respective rights of fiars and liferenters. A fiar has right, as accretions to the

capital, of all profits not made during the liferenter's life. This was ruled by the House of Lords in the case of *Irving v. Rollo*, 27th July 1803 (4 Paton 521 and M. 8283); and where a dividend is declared during a liferenter's life, but is not payable till after his death, it belongs to the fiar. This was decided in the case of *Thomson v. Lyell*, 18th November 1836 (15 S. 32). Mrs Lothian's trustees were bound to know, and plainly did know, that the profits were, under the contract, to be appropriated in part to increasing and extending the company's business: and the benefits of this they were to reap not by increased yearly dividends, but by the gradual increase of the value of the shares. Accordingly, Mr Lothian sold his shares to the company for £680 a share. I think therefore that, had matters remained as they were, the pursuers would have had no title. But the state of matters is not now the same. Mr Lothian's executrix has raised her action for the remedy which she was advised to ask. This action she has compromised, and, in addition to the £6800 paid to Mr Lothian, she received from the company £11,000 for stock, the original value of which was only £2500. She granted a discharge to the company in the most comprehensive terms. I think, therefore, that if any claim ever existed it has been extinguished and discharged. I am therefore of opinion that the Lord Ordinary's interlocutor should be altered and the defenders assolvit.

Lord DEAS concurred with the Lord President. In reference to the cases cited by Lord Curriehill, he said they were cases where everything had been fairly and honestly done. But if there is fraud, the cases don't apply. Here it is alleged, and must admittedly be assumed. The fraud alleged is the fraud of the managers of the company, who are said to have committed it for their own personal benefit, and these parties are all made parties to this action. They took advantage of the clause of pre-emption in the contract in order that they might acquire the shares, and so reap the benefit of their own fraud. The dividends prior to 1846 were not made over to the Carron Company by Mr Lothian, and it was not the intention to do so. His executrix in the former action did not assert any right to these dividends, and she did not by the compromise discharge any claim to them. Then Mr Lothian's representatives are made parties to this action, and they do not even yet make any claim to them. It would therefore be extremely hazardous to dismiss the action at this stage.

Lord ARDMILLAN concurred with the majority.

SECOND DIVISION.

COWANS *v.* LORD KINNAIRD.

Property—Running Water—Stagnum—Compensatory Supply—Acquiescence. In a declarator that operations on a running stream by an upper heritor whereby the rights of a lower heritor were injured, were illegal—held (1) that it was not a relevant defence that the upper heritor had provided a sufficient compensatory supply by draining a stagnum into the stream, it not being alleged that all the lower heritors had agreed to accept this as sufficient; and (2) that the defender had not relevantly averred acquiescence. Counter issues founded on these defences disallowed.

Counsel for the Pursuers—Mr Patton & Mr Glog. Agents—Messrs Wilson, Burn, & Glog, W.S.

Counsel for the Defender—The Lord Advocate and Mr Fraser. Agents—Messrs Leburn, Henderson, & Wilson, S.S.C.

This is an action at the instance of Charles and John Cowan, surviving partners of the company carrying on business at Valleyfield as papermakers, under the firm of Alexander Cowan & Son, and

heritable proprietors of parts of the lands of Bullion and others situated partly within the united parishes of Liff, Logie, Benvie, and Invergowrie, in the county of Forfar, and partly within the parish of Longforan, in the county of Perth, and of the Mills of Bullion, situated thereon; and is directed against Lord Kinnaird, as heir of entail in possession of the estate of Rossie. The conclusions of the action have reference to certain operations performed upon two different occasions by the defender—viz., in 1853 and 1842—whereby the pursuers say that a large portion of a stream of water which formed part of a burn, which burn was a feeder of another burn which passed through the pursuer's lands, and was used as part of the motive-power of their mills, has been illegally and unwarrantably taken away. The complaint against the operations of 1853 is withdrawn, and the summons is only insisted in to the extent of the conclusion referable to the works of 1842. The conclusion is thus expressed:—"And that the dams, embankments, or other obstructions, and the drain water-course, or water-pipe, or other works or operations executed by the defender, or by those for whom he is responsible, in or about the year 1842 or thereby, at or about the farm or distillery of Dron, belonging to the said defender, whereby a large portion of the water of the said Burn of Dron was diverted from its natural channel, and from the said Benvie Burn, and was thereby conveyed away from the said lands and mills of the pursuers to a farm and works belonging to the said defender, were illegal and unwarrantable acts, and were executed to the prejudice of the pursuers, and in violation of their right and interest in the said water." Two special defences were put in for Lord Kinnaird, to the effect that although he took away a certain amount of water at one part of the stream he returned as much at another, and that the pursuer had acquiesced in the operations which had been made. The plea of acquiescence is founded on the following statements:—

"Stat. 5. A contract or deed of agreement was entered into between the defender and Lord Gray, and Mr Webster of Balruddery, dated the 17th day of February 1843, and subsequent dates. By this deed the defender consented, agreed, and bound and obliged himself and his heirs, executors, and successors, at their sole expense, to enlarge and deepen the mill-dam at Dron, and to form a new dam in Redmyre wood, where there was then a stagnant and marshy loch, and to redd and deepen the different ditches in his wood, situated between Dron and Redmyre, so as to permit the water to flow freely therefrom into the mill-dam of Dron; and on the other hand, and in consideration of the said obligations by the defender, Lord Gray and Mr Webster did thereby consent and agree, and bound and obliged themselves, and their heirs and successors respectively, that the defender and his foresaids should be entitled to divert a portion of the water in said burn to his said farms of Carmichaels and Millhill, and that by a cut to be made at a point of said burn immediately below the wheel of Dron mill; and all the parties consented and agreed that the working of said cut, and the diverting of a portion of said water to Carmichaels and Millhill should be managed by placing in the course of the stream in a substantial and permanent manner a sharp wedge-shaped stone, or other lasting material, so as to throw a portion of the whole water running in the burn at that point, whether original or acquired, into the new cut, but always so as such portion should not exceed the acquired water to be obtained by the operations before described, to which acquired water the defender had a right, the remainder running in the old line of said burn; and all parties consented and agreed that the several operations specified in the agreement should be executed at the sight of Mr Webster, and of James M'Laren, residing at Castlehill, and of James Bell, residing at Rochdale Cottage, or an oversman to be named by them, whose actings and award in the premises should be final and binding on all parties; and the

defender further thereby bound and obliged himself and his foresaids, not only to be solely at the expense which would be then incurred in carrying the foresaid alterations into effect under the agreement, but also in all time to come to repair the erections, and keep clean the drains, ditches, and dams, so as to secure, as far as practicable, the continuance of the surplus or additional water to the extent to be originally attained by the operations contemplated in the agreement.

"Stat. 6. Acting on the faith of this agreement, the defender proceeded to execute, and did execute, the operations under the agreement, at the sight of the parties therein named, and the flow of the water was regulated accordingly, and continues still to be carried in terms of the said agreement, by sending into the Dron Burn a quantity of water more than equal to that diverted from the burn by the defender, and which, but for such diversion being allowed, the defender would not have sent into the Dron Burn, but would have carried direct to his farm of Millhill. The arrangement was a fair and equitable adjustment of the rights of parties, and was carried out at considerable cost to the defender. Had it not been in consideration of the division of the water of the Dron Burn, as augmented under the agreement, and on the faith of the continued use and enjoyment of the water so divided, the defender would have drained his lands in a way more beneficial to his estate, and the water would have naturally flowed westward where water has always run; and he would also by such means have supplied his farms of Carmichaels and Millhill in another manner than from the Dron Burn.

"Stat. 7. There were two persons who took advantage of the arrangement, although they were not subscribers to the agreement. These were James Miller, bleacher, Bullionfield, and Alexander Clayhills of Invergowrie. The agreement was entered into in 1843, and the works were immediately executed. James Miller was the predecessor and author of the pursuers. He saw and well knew of the operations now complained of being executed, and acquiesced in and agreed to the same being executed; and the pursuers, his successors, came into his rights after the whole operations were completed, with his knowledge and sanction. The pursuers' right to the subjects of which they claim to be proprietors was acquired after the date of the agreement and completion of the works—viz., in 1846. The pursuers have acquiesced in the operations ever since, and have also taken benefit under the agreement by using the water brought by the defender into the burn in lieu of that portion of the water which he diverted from it under the agreement. The pursuers have never till lately attempted to quarrel the agreement, or the arrangement under the same, but they have now instituted the present proceedings after a period of sixteen years' acquiescence in the arrangement, and taking benefit as aforesaid."

The case was before the Court on a report by the Lord Ordinary upon issues and counter-issues that were lodged for the parties.

Objections were stated to the pursuers' issues; but the discussion was mainly on the defender's counter-issues, which the Court have disallowed.

The counter-issues proposed were—1. Whether the pursuers or their authors acquiesced in the formation of the said cut, drain, or lade, and the diverting the water thereby? 2. Whether the defender, in or about the said year 1842, or thereby, made to flow, and still makes to flow, into the Dron Burn, so as to be available to the pursuers, as much water as he diverted therefrom by the said cut, drain, or lade?

The LORD JUSTICE-CLERK said—This case comes up before us on a report of the Lord Ordinary—a report made under one of the clauses of the Act of 1850—in respect that parties have failed in adjusting their issues. But the questions discussed go a great deal deeper than the form of issues, and involve the relevancy and effect of certain special

pleas stated in defence. It appears to me that if these special defences are bad or unsupported by sufficient averment, and if the defenders are not entitled to issues, the case comes to be a very simple one, because all the material facts of the pursuer are admitted. The parties stand to one another in the relation of superior and inferior heritors upon a running stream, and the interest of the pursuers as lower heritors to have the stream transmitted to them unimpaired is a question about which there is no doubt whatever in the law of Scotland. But in order to understand the precise complaint of the pursuers, it is necessary to attend to the geographical position of the lands in question. The Benvie Burn runs through part of the pursuers' property and their works, and discharges itself into the Invergowrie Burn, which again flows into the Tay. Among the important feeders of the Benvie Burn is the Dron Burn, and the Dron Burn rises in the defenders' lands, and flows through a portion of them. It appears that the water of the Dron Burn had been diverted at some unascertained period—but it seems to have been done in the time of the defender's father—for the purpose of driving the Dron mill, and a mill lade was formed with that object, and the water was returned into the main channel again. This was a perfectly legitimate exercise of the defender's father's undoubted right to use the water of a running stream by diverting and again returning it to its channel. The pursuers complain of two separate operations—one in 1842 and another in 1853—but the part of the case on to 1853 has been withdrawn, and the defender therefore is entitled to that extent to absolver. The only question relates to the operations performed by the defender in 1842. The allegation of the pursuers is contained in the 7th article. Now, upon that state of the facts—and there is no dispute about the facts—the pursuers, *prima facie*, are entitled to judgment; so that the importance of the case comes to depend on the relevancy of the special defences. These we must consider separately. That which is intended to form the subject of the second issue may conveniently be taken up first. It appears that in Lord Kinraird's high grounds, at a part called Redmyre, there has been a stagnant marsh from time immemorial, and this marsh was undrained up to 1842, and no stream of water flowed from it. Now, there is no doubt in point of law that this being a *stagnum*, according to the meaning of the word both in the Roman law and in the law of Scotland, it was the undoubted right of the defender to drain that *stagnum* and to carry off the water in any way he chose. He says that he chose to carry it into the Dron Burn. Then again the law is clear, that although he carried it into the Dron Burn, he was entitled at any time within forty years to divert it. But he goes on to say that having carried this water into the Dron Burn, and thereby increased the volume of stream at a higher point, he is entitled to take off an equal quantity of the Dron Burn at a point lower down, and to divert and not to return it; in short, that having made a compensatory supply above, he is entitled to one below. This is the subject of the defence which is sought to be embodied in the second issue. I think it is a proposition bad in law, and for very obvious reasons. In the first place, water derived from a *stagnum* is very precarious as a supply—totally different from a perennial stream, and the law distinguishes between these two kinds because of their difference in value, the one being precarious and the other constant. Therefore the supply which is brought into the Dron Burn from the *stagnum* never can be a sufficient compensation for what is drawn off below, because the latter is a constant supply, and the former is not. The defender no doubt alleges that since he commenced these operations he has continued to bring in as much water as he has taken off, but he does not admit he can be compelled to do that, and this makes it quite clear that while an arrangement of this kind may be fairly enough made the subject of agreement, it

cannot be legally brought about without such an agreement, because all the heritors on the stream have a right to prevent its being done, and therefore the consent of all is necessary. It is rather remarkable that the defender himself, in 1842, felt the necessity of asking the consent of his neighbours, because he entered into an agreement with Lord Gray and Mr Webster, who consented to his operations on condition of his draining the *stagnum*. But Lord Gray and Mr Webster were not the only inferior heritors on the stream. The pursuers' predecessor was also one, and he had as much interest to be consulted as the other two; but he was not consulted, and he did not consent. This agreement *per se* therefore has no bearing on the case, and, accordingly, apart from the other defence of acquiescence, the case of the defender is unfounded. But then the defender further maintains that the pursuers are barred by acquiescence from making complaint. We must consider the grounds of acquiescence. [His Lordship read the 5th article of the defender's statement, setting forth the substance of the agreement above referred to, and also the 6th and 7th articles.] This is the whole ground of acquiescence. There are several things mixed up together in this statement which it is necessary to separate and analyse. In the first place, the statement regards Miller, the predecessor of the pursuers, and it regards the pursuers. With regard to both, it is said that they have taken advantage of the arrangement, and have taken benefit by the arrangement. What is meant by that just seems to me to be nothing else than that they used the Dron Burn as the water came down to them. But nothing else could be said. It could not be said that they used the Dron Burn, as the water did not come down to them. They could not repudiate particular drops of water as belonging to the *stagnum* and take the remainder. It is not said that they got any benefit of an increased supply of water, of which they took advantage by increasing their works. But then it is said that Mr Miller saw and well knew of the operations now complained of, and notwithstanding remained silent. That may be so; but supposing Mr Miller in 1843 did not think fit at once to challenge, and although knowing them to be illegal, perhaps to avoid rupture with his neighbours, said nothing about it, does it follow that his singular successors are debarred from challenging the illegal operations? I think that a party may stand by and see an illegal act done without challenging it for many reasons, but still with no intention of consenting. Nothing in what is alleged against Mr Miller implies consent on his part, and still less on singular successors. Then follow certain ambiguous words, that Mr Miller "acquiesced in and agreed to the same being executed." Now, the counsel for the defender was asked what was the meaning of the words "and agreed to," and if they had any significance, and he answered in the negative; and indeed this could not be taken as an averment of agreement, because for that it is necessary to specify the parties to the agreement—the subject, the time, and the manner. Therefore I discharge these words altogether; and then there is nothing more than that Mr Miller saw and acquiesced, and the same phrase is used as regards the pursuers. I take the word acquiescence to be used in both places in the same sense. It is nothing else but saying that they have been silent. In interference with rights of property, it is sufficient to bar an injured party that he has been silent? Certainly not. The law of acquiescence has never gone that length. Mere silence will never bar a right to complain of an illegal encroachment upon property. It was argued that acquiescence means more than silence, and so it does; but the defender says that in alleging acquiescence he must be understood as saying that there are facts and circumstances from which acquiescence may be inferred. I am clear that if there are facts and circumstances that may bring the case within the doctrine of acquiescence,

but I am equally clear that such facts and circumstances must be set out on the record, and there are no such facts here. Nothing of the kind is set out either against Mr Miller or the pursuers. Therefore I think that both the defences for Lord Kinnaird sought to be embodied in the issues fall to be repelled. The one founded on compensatory supply fails because it is bad in law, and the other because there is no relevant averment to support it.

The other Judges concurred.

The Court accordingly disallowed the issues for the defenders.

Saturday, Dec. 16.

FIRST DIVISION.

PET.—KEITH MACALISTER OF GLENBARR.

Entail—Bond of Provision. Petition to charge an entailed estate with a bond of provision refused (diss. Lord Deas) as contrary to the intention of the maker of the entail and the granter of the bond.

Counsel for Petitioner—Mr Gifford and Mr M'Ewan.
Agent—Mr George Cotton, S.S.C.

Counsel for Tutor *ad litem* to Petitioner's son—Mr Blair. Agent—Mr James Finlay, S.S.C.

This was an application for authority to charge an entailed estate with debt under the following circumstances:—The petitioner's father, the late Colonel Matthew Macalister of Barr, in the year 1813 executed a bond of provision for £6000 in favour of his wife in liferent, and his only son Keith in fee, payable after the granter's death. This deed contained clauses reserving power to revoke, and dispensing with delivery. In 1829 the Colonel, who held the estate of Glenbarr in fee-simple, executed a deed of strict entail in favour of himself in liferent and of the petitioner, his only son, and the heirs whomsoever of the petitioner's body in fee; whom failing, a series of substitutes therein specified. The deed contained, *inter alia*, the following clauses:—"And also to render this tailie and settlement the more effectual, I hereby bind and oblige me and my heirs-at-law, executors, and successors whomsoever, to free and relieve my lands and estate before disposed, and the heirs named and to be named to succeed thereto, of and from the payment and performance of all the debts and obligations to which I for myself, or as representing any of my ancestors, am or shall be liable, and of and from all claims and demands whatever whereby the said lands and estates, or any part thereof, may be evicted or affected. And I hereby revoke and recall all former deeds of entail and settlements, or other conveyances of any of the said taillied lands executed by me, excepting always the provisions executed or to be executed by me in favour of my spouse."

The Colonel died in the same year, after having executed the deed. His general executry, which was considerable, was applied almost entirely in payment of a large debt incurred on a cautionary obligation, and there was not enough to pay the bond.

In terms of a remit from the Lord Ordinary, Mr Webster, S.S.C., reported on the application; and after hearing parties, his Lordship reported the case to the Inner House with a note, on account of the importance of the case, and the difficulty raised.

The case was argued fully on Wednesday, and the Court delivered judgment to-day. In support of the petition it was mentioned that the bond of provision constituted a valid and effectual debt against the granter on account of the nature of the deed; that the clause of revocation in the deed of entail did not apply, as it was only directed against "all former deeds of entail, and settlements or other conveyances of any of the said taillied lands," and did not extinguish or revoke the bond, which was a personal obligation; further, that the clause above quoted as to burdening the heirs with an obligation to relieve the estate of all debts which might be

made to affect it, was intended against the maker of the deed himself and his general estate apart from the entailed lands; and lastly, that the debt was not extinguished *confusione*, because although the petitioner was the grantee in the bond as well as institute in the entail, the two characters were quite different.

The Lords President, Curriehill, and Ardmillar thought the question raised was attended with very great difficulty, but were of opinion that both deeds being *mortis causa*, the Colonel's intention and desire was that the entailed estate should not be burdened with any provision such as this. They considered the bond a good obligation against the general estate, but not against the entailed lands which had been destined specially.

LORD DEAS dissented. The petitioner was not liable for the bond himself, either as executor or heir of his father, and yet it was a good obligation, and if it had been in favour of a daughter unquestionably might have been enforced. It could make no difference that the petitioner was the creditor in it as well as institute in the deed of entail.

The petition was therefore refused.

Friday, Dec. 15.

ANDERSON v. GLASGOW AND SOUTH-WESTERN RAILWAY CO. (*ante*, p. 68.)

Process—Act of Sederunt—Court of Session Act. Is section 12 of the Act of Sederunt of 12th July 1865 inconsistent with section 4 of the Court of Session Act of 1850?

Counsel for Pursuers—The Solicitor-General and Mr Anderson. Agents—Messrs Marshall & Stewart, S.S.C.

Counsel for Defenders—Mr D. Mackenzie. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

In this case Lord Kinloch on 29th November last ordered issues to be lodged in six days. On 4th December, before the expiry of the six days, the defenders gave a written consent to the time fixed being prorogated. On 5th December (being the sixth day) the pursuers enrolled the case, and moved the Lord Ordinary to prorogate the time, or otherwise then to allow issues to be received. Lord Kinloch refused the motion in respect of section 12 of the Act of Sederunt of 12th July 1865, which enacts—"All appointments for the lodging or adjusting of issues shall be held to be peremptory, and if the issue or issues be not lodged within the time appointed, it shall be competent to the opposite party to enrol the cause and to take decree by default, which decree by default shall not be opened up by consent of parties, but only on a reclaiming-note." The pursuers reclaimed.

The SOLICITOR-GENERAL, for them, maintained that the Lord Ordinary ought to have received the issues, because section 4 of the Court of Session Act, which could not be repealed by an Act of Sederunt, enacts—"That the periods appointed for lodging any paper may always be prorogated by written consent of parties; and the periods appointed for lodging any paper may always be once prorogated by the Lord Ordinary without such consent on special cause shown." Here there was a written consent; but the Lord Ordinary held that an issue was not a paper in the sense of this section. An issue, however, was a paper, and was always treated as such.

The LORD PRESIDENT suggested that before disposing of the reclaiming-note they should consult the other judges. A most important matter of practice, he said, was involved. The greatest abuse in the Outer House is the system of granting prorogations. Parties need not consent to prorogate unless they please, but without a strict rule such as was intended to be laid down in the Act of Sederunt, agents cannot resist the solicitations of other agents to give their consent. The thing in fact has become a matter of courtesy through which litigants suffer, and so does the credit of the Court. The case was continued till Tuesday.