

not stated that there is any irregularity apparent *ex facie* of the valuation, but it appears that an augmentation was awarded to the minister of Bathgate in the year 1793, and a locality was fixed consequent thereon early in the year 1800, and as no step has been taken since then to obtain an approval of the valuation, this action is now met by a plea of dereliction. That is a well-known plea which has been sustained in many cases. The question is, whether it is applicable to the circumstances of the present case. The stipend, which was modified in 1793, consisted partly of money and partly of victual. Since that time there have been a great many years during which payments have been made by the heritor of the lands in question in excess of that required by the sub-valuation; and the inference deduced is that the heritor must be held to have relinquished his right. It is not very easy to see on what principles the previous cases have proceeded. It is sometimes stated that the ground of the plea is that the heritor supposes that there is a defect in his decree, and therefore has abstained from asking its approval. In some cases again, it is said that the decree had not been used because it was not for the interest of the heritor to do so. On the part of the heritor it is argued that a person is not to be presumed as intending to abandon a right which he has acquired, but it may be apparent that at all events he has intended not to insist on it. The question is—Do the circumstances of this case justify us in holding that the heritor relinquished his right? The cases where overpayments have been made are much more numerous than those where they have not. Sometimes the overpayments were very small, and sometimes they were considerable. In the first year after 1799 the overpayment was very considerable. But there are also circumstances favourable to the heritor. It does not appear that prior to 1793 there was any overpayment. Then the years 1799 and 1800 are well known to have been years of great scarcity, and therefore exceptional. Again from 1805 to 1818 the heritor in possession of the lands was a pupil, and although I do not say that the years of pupilarity are to be deducted as in prescription, the fact is a circumstance in the case of some importance. Then from 1821 downwards there seem to have been 20 years of overpayment, and only 10 of under-payment, but the average sum overpaid is only £1, 7s. a year. It appears to me therefore that in the circumstances of this case the heritor cannot be held to have relinquished his right. He could not seemingly have raised the question without litigation, which was expensive, and not very desirable in such a matter. It is therefore reasonable to suppose that he waited until now when there has been a new augmentation, and a new locality, and therefore an increase of the interest he had to have the valuation approved of.

The pursuer asked for expenses, but his motion was refused, the difficulty having been caused by his own delay.

## FIRST DIVISION.

### PET.—THE LORD ADVOCATE.

*Nobile officium.* An *interim* appointment made to the office of Lyon King-at-Arms on the application of the Lord Advocate.

Counsel for Petitioner—Mr H. J. Moncreiff.  
Agent—Mr Andrew Murray, W.S.

This was an application by the Lord Advocate for the appointment *ad interim* of a person to discharge the duties of Lyon King-at-Arms for Scotland, now vacant by the death of the Earl of Kinnoull. The Court appointed Mr George Burnett, advocate, the Lord Lyon's depute, to act as Lord Lyon *ad interim*.

## SECOND DIVISION.

### MACALISTER v. MACALISTER.

*Reparation—Warrandice—Eviction—Lease.* A person having granted a sub-lease with absolute warrandice which was found by the Court to be *ultra vires* of the granter, and the lands having been evicted from the granter, held that the latter had a relevant claim of damage against the granter's representatives founded on the warrandice.

Counsel for Macalister's Trustees—Mr Gifford and Mr J. G. Smith. Agent—Mr Andrew Macintosh, S.S.C.

Counsel for Archibald's Representatives—Mr Millar. Agents—Messrs Adam & Sang, S.S.C.

The trustees of the deceased Alexander Macalister of Strathaird, in accordance with instructions in his trust settlement, executed in 1834 a deed of lease by which they let "to Jessy Macalister," his daughter, and Duncan Macalister, her husband, "and the longest liver of them, whom failing to their son Norman Macalister, and his heirs and assignees, the farm and lands of Glasnakill, as presently possessed by the said Duncan Macalister, and that for the space of 28 years, from and after the term of Whitsunday 1832," as to the houses and grass, and the separation of the crop as to the arable ground. The rent payable was £10 per annum.

On 12th December 1842 Duncan Macalister (his wife being dead) executed a deed of sub-tack in favour of his son, Archibald Macalister, by which he let to the said Archibald Macalister and his heirs "all and whole the farm and lands of Glasnakill, as presently possessed by the said Duncan Macalister, and that for all the days, years, and space of twenty-eight years, being the remaining years still to run of the tack of the said subjects aftermentioned, under which the said Duncan Macalister holds and possesses the same, from and after the said Archibald Macalister's entry to the premises, which is hereby declared to have commenced at the term of Whitsunday last 1842 as to the houses, grass, and pasturage, and at the separation of the crop of that year from the ground as to the arable ground." After the death of Duncan Macalister in 1854 his son, Norman Macalister, in whose favour, failing his father and mother, Strathaird's trustees had executed the original lease, took proceedings against his brother Archibald, for the purpose of having it found that this sub-tack was *ultra vires* of their father, who had only, as he contended, a liferent interest in the lease. It was maintained, on the other hand, that the words "whom failing," in the lease, left in the person of Duncan Macalister an unqualified right of tenancy in the first instance, and that Norman Macalister, who was only introduced failing his father and mother, was either a mere conditional institute, who only took if his father and mother had not taken, or a substitute who succeeded only if the right was not disposed away by the primary holder. After a long litigation, the Second Division, on 22d February 1859, held that the sub-tack was *ultra vires* of Duncan Macalister, so far as extending beyond his own lifetime, and so brought to a period the right of sub-tenancy in Archibald Macalister (21 D. 560).

The representatives of Archibald now insist against the representatives of Duncan, his father, for payment of the loss and damage incurred through this eviction of the subjects—holding an obligation of warrandice for the full space of twenty-eight years to have been incurred by Duncan as granter of the sub-tack.

The Lord Ordinary (Kinloch), held that the sub-tack contained a proper obligation of warrandice for the whole space of twenty-eight years for which the right bears to be granted, and that there is a relevant claim of damage under the obligation,

leaving it for the jury to say whether any damage has been sustained.

To-day the Court adhered.

### JURY TRIAL.

(Before Lord Ormisdale.)

WATT *v.* MENZIES (*ante*, p. 124).

*Reparation—Culpa.* In an action against an omnibus proprietor for personal injuries sustained by a passenger through the fault of the parties in charge of it—verdict for the pursuer.

Counsel for the Pursuer—Mr Scott and Mr Brand. Agents—Messrs Macgregor & Barclay, W.S.

Counsel for the Defender—The Lord Advocate and Mr R. V. Campbell. Agents—Messrs Hamilton & Kinnear, W.S.

In this case, in which Mrs Janet Watson or Watt is pursuer, and Andrew Menzies, coach and omnibus proprietor, Argyle Street, Glasgow, is the defender, the following is the issue sent to trial:—

“Whether, on or about 6th June 1865, and in or near Argyle Street, Glasgow, in consequence of the parties in charge of an omnibus belonging to the defender, in which the pursuer was travelling as a passenger, failing to take due precautions in setting her down from the said omnibus, she was knocked down and injured by another omnibus, through the fault of the defender, to her loss, injury, and damage.”

Damages laid at £300.

Lord ORMIDALE, in charging the jury, observed that he never saw a case more completely for a jury. There was no principle of law involved in the case in regard to which there was any dispute. The whole matter resolved itself into a question of fact as to the party on whom the fault of the accident lay. If the jury were satisfied that damages ought to be awarded, these must not be vindictive damages.

The jury, after having been absent for about an hour, returned a unanimous verdict for the pursuer. Damages, £50.

Thursday, March 1.

### FIRST DIVISION.

RATPORT *v.* THE TAYPORT PATENT SLIP COMPANY (LIMITED) AND DERRICK.

*Servitude—Bleaching and Drying Clothes—Pasture—Issue.* Form of issue to try a question of servitude.

*Reparation—Culpa—Contractor.* Form of issue to try a question of damage caused by a contractor, for which his employers pleaded that they were not responsible.

Counsel for Pursuers—The Solicitor-General and Mr Gifford. Agent—Mr L. M. Macara, W.S.

Counsel for Defenders—Mr Patton and Mr N. C. Campbell. Agents—Messrs J. M. & J. Balfour, W.S.

The pursuer is an inhabitant of the village of Tayport or Ferryport-on-Craig, and she is also heritable proprietor of certain heritable subjects there, which have been held by her and her predecessors for upwards of two hundred years. In this action she sought to have it declared that a road leading from the west commony of Ferryport-on-Craig and the public highway between Tayport and Newport to the old pierhead of the village is a public right of way and footpath, or otherwise that it is a servitude road over subjects, claimed by or in the occupation and possession of the defenders, which is available to the pursuer as a feu in the village in common with the other feuars. There were also conclusions for declarator that a branch road leading from the said road to a well called the “Strynd Well” was also a servitude road available to the feuars, and that the pursuer and the other feuars have a servi-

tude right of drawing and carrying water from the said well, and also a right of access to the shore of the river Tay between the said well and the old pier of Ferryport-on-Craig, and that the defenders have no right by any operation of embanking, quarrying, or otherwise to interfere with the pursuer's rights, or to intersect their shipbuilding premises, and patent slip and other works so as to exclude the feuars from the enjoyment of their servitude rights. The pursuer further concluded for declarator of servitudes of bleaching and drying clothes and pasturing cattle upon a piece of ground through which the said branch road passes, and that the defenders should be ordained to restore the said roads, bleaching-green, and pasture ground to the same condition in which they were prior to their operations thereon and interference therewith. There is also a conclusion for damages caused by the defenders' blasting operations. The defenders did not dispute on record the servitude rights claimed by the pursuer, but they denied the public right-of-way claimed.

The pursuer proposed four issues, the first having reference to the right-of-way claimed, the second to the servitude right-of-way claimed, the third to the servitude rights of bleaching and pasturing claimed, and the fourth to the claim of damages. The defenders objected to the first two issues being allowed, because under the conclusions of the summons the pursuer could not demand more than the servitude rights, which the defenders did not dispute. They also objected to the third issue that the pursuer was not entitled to found upon the possession of the other feuars in the village (Duke of Hamilton *v.* Aikman 6 W. and S. 64). In regard to the fourth issue, there was an objection that the pursuer was only entitled to it against the defender Derrick, on the ground that the company was not liable for its contractor.

To-day the Court adjusted issues. The first two were rendered unnecessary by the defenders lodging a minute, in which they consented to decree of declarator in terms of the first conclusion of the summons on the line of the road being marked out, for which purpose the Court made a remit to Mr H. J. Wyllie, C.E. The other two issues were adjusted in the following terms:—

“1. Whether for forty years prior to the year 1864, or from time immemorial, the pursuer and her predecessors and authors, as proprietors of the house and ground at the west of Ferryport-on-Craig, and also as proprietors of a house in the east of Ferryport-on-Craig, have possessed and enjoyed servitudes of bleaching and drying clothes, and of pasturing cattle, or either and which of these, over the ground through which the rights of way claimed by the pursuer pass, lying between the high-water mark of the river Tay on the north, and the garden walls of the properties or feus which formally belonged to or were possessed by John Doig, afterwards Robert Pride and spouse, Mrs Euphemia Duncan or Greig, Mrs May Duncan or Mitchell, David Duncan, Euphemia Welsh, and George Clerk, or some of them, on the south, and which ground is delineated on the plan No. 100 of process, and marked with the letters K K K K K K; and whether the defenders in or about the year 1864, and subsequent thereto, have wrongfully interfered with the pursuer's right to the said ground—to the loss, injury, and damage of the pursuer?”

“2. Whether in or about the months of June, July, August, September, October, and November 1864, the defenders—The Tayport Patent Slip Company (Limited), and Robert Derrick, or either and which of them—blasted or caused to be blasted, rock and other materials near the pursuer's property in Ferryport-on-Craig, culpably, recklessly, and in a dangerous manner—to the loss, injury, and damage of the pursuer?”

Damages laid at £500.