

than Cambuslang. The complainer alleged that he had recently become aware that the late Duke of Hamilton had, by lease in 1852, let to the Messrs Dunlop the coal in Morristoun, and in 30 acres of Cambuslang, and that, by minute of agreement in 1862, the lease had been made to comprehend the coal under Clydesmill; that the Messrs Dunlop were in the habit of carrying through the lands of Cambuslang coal raised from seams in lands not belonging to the complainer. This, the complainer contended, the respondents were not entitled to do, and he accordingly brought a declarator against them, and also presented this note of suspension and interdict.

The respondents, besides other defences, alleged that the complainer had known for some considerable time of the operations complained of, and was not entitled to this summary remedy. Interim interdict was granted by the Lord Ordinary before answer, but after answer his Lordship passed the note, but recalled the interim interdict, not being satisfied that when a superior, in feuing out land to different proprietors, has expressly reserved the minerals, he can be prevented from working them underground as one continuous field, and holding that he would not be warranted in continuing an interim interdict which might cause serious loss to the respondents from stoppage of their works during the trial of the question of right.

The complainer reclaimed, and asked the Court to continue the interim interdict. After some discussion, the complainer offered caution for any damage to be sustained by the respondents through the granting of interim interdict.

YOUNG and WATSON for complainer.

CLARK, THOMSON, and KEIR for respondents.

At advising—

LORD PRESIDENT—This case is one of very considerable delicacy, much greater than usually attends the granting or refusing of interim interdict. I have had a strong impression throughout that it would not be altogether consistent with justice to adhere to this interlocutor of the Lord Ordinary as it stands, or to refuse this interdict without any condition at all.

There are several points to be considered on both sides. There is no doubt that it is very strongly alleged on the one side, and not contradicted on the other, that by imposing this interdict on the passage of coal through the complainer's mines, very considerable damage may be done, especially if that continues for any length of time through the question in the declarator being found to be difficult of solution, and the process depending for long. That there will be damage in the event of those works being stopped no one can doubt. On the other hand, the interest of the complainer is very peculiar, and is not to be secured by any ordinary caution for the consequences of the right of passage which the respondents allege through his waste. If they are allowed to exercise that right until they have worked out all the coal, all the complainer would have in the end would be a claim of damages for their having, without legal right, used this passage. Now, there may be no damage in any proper sense of the term. Indeed, it is pretty plain there will be none; and if the question of damages be submitted to a jury, the verdict would probably be *nil*. The value of the complainer's right, if he has it, is the means he has of compelling them to pay for the passage of the coal. The fear is that the right to demand payment for its passage through his mine may not be

a legal right enforceable at law, and the only way is to refuse passage unless on payment, and that is what the complainer asks here. It rather appears that if this interdict is not immediately imposed the respondents will work out all the minerals which they require, and, when the main question comes to be determined, there will be no interest on either side. If this interdict were asked without caution, I should have had great difficulty in imposing it on any terms, or even attaching a condition to its refusal, for I should have seen that the imposition of it would inflict very considerable damage on the one side, and the non-imposition would not have caused much on the other side. If the complainer had not offered caution I should not have been disposed to listen to him. But his offer of caution changes the aspect of the question, and leads me to conclude that we cannot refuse interdict except on a condition. The condition I intend to suggest appears to me to be reasonable, and such as I think ought not to be objected to by the respondents. It is, that they should consent, not to admit any liability, but during the process of declarator to pay a certain way-leave, to be fixed by a man of skill; and in the event of their succeeding in the declarator, then they shall have right to repetition; and if they fail, and are found to have no right, then the payments shall remain and become absolute payments, and nothing more shall be demanded for the period when the case is being tried. Then, in the declarator the question will be tried, and after the conclusion of it the complainer, if successful, may make his own terms. If your Lordships agree with me, I propose to remit to a man of skill to fix what would be a reasonable way-leave, and to make that a condition of refusing the interdict.

LORD CURRIEHILL concurred. He thought the superior would have great difficulty in showing that, when once he had excavated the whole minerals below the lands feued out, he had any right to enter these lands for any purpose whatever; but that question would be tried in the declarator, and in the meantime was kept open.

LORD DEAS concurred on the whole with the Lord Ordinary.

LORD ARDMILLAN concurred with the majority. He thought the Lord Ordinary was right at the time when no caution had been offered by the complainer. The question now was, What was the best for the interests of all parties? and it rather seemed that the injury to result from stopping the works would be greater than from allowing them to go on. The caution which the complainer would have to offer, if his claim for interdict was sustained, would be very large. By the proposed arrangement the complainer would in the end get all he was entitled to.

Remit to Mr Landale, mining engineer, to fix way-leave.

Agents for Complainer—Graham & Johnston, W.S.

Agents for Duke of Hamilton—H. & A. Inglis, W.S.

Agents for Dunlop—G. & G. Dunlop, W.S.

Tuesday, June 30.

MURRAY'S TRUSTEES v. CAMPBELL AND OTHERS.

Trust—Residuary legatee—List of items of estate. A testator left a list of the items comprising a

certain portion of her estate, which list was to be conclusive. Certain parties, to whom that portion of the estate was destined, claimed to have included therein a sum which had at one time formed part thereof, but was not included in the list. Claim *repelled*.

Lord Murray by his settlement vested his whole estate, real and personal, in his surviving wife, as in the first instance sole trustee, and gave power to her to appropriate to herself the fee of the whole. Lady Murray exercised this power in her own favour by her deed of 25th April 1859.

By an after deed, of 7th September 1860, Lady Murray conveyed to trustees specially named what she called her "appropriated estate," or more fully described as "the whole of my late husband's estate, both heritable and moveable, real and personal, which has now been appropriated by me and made my own, and which I propose hereafter in this and my other deeds and writings relative thereto to distinguish as my appropriated estate." By a separate deed she declared the purposes of the trust in favour of various of Lord Murray's relatives. In the first-mentioned deed she stated—"I hereby expressly provide and declare that any list, or account, or other statement, already signed or otherwise sanctioned, or to be hereafter signed or otherwise sanctioned by me, of the property and funds of which my appropriated estate consists, or shall hereafter consist, shall be held as conclusive, and that it shall be an inherent condition of right to the payment of all my husband's specific bequests, and also of all my own bequests, whether specific or residuary, that the parties in right thereof shall acquiesce in the amount and particulars of my appropriated estate as so ascertained, without question, and shall also, without question, acquiesce in my intentions, as expressed in my said deed of declaration, appropriation, and conveyance, and in this and the other deeds of settlement to be left by me." In her separate deed of directions she anew says—"I hereby declare that the whole bequests, specific and residuary, now made, or to be hereafter made by me, are and shall be subject to the whole conditions and declarations contained in my trust-disposition and settlement; and that if any of the parties in right of the said bequests shall question the amount and particulars of my appropriated estate, as ascertained in the manner pointed out in my said trust-disposition and settlement, or shall in any respect question my deed of declaration, appropriation, or conveyance of my husband's estate, or my said trust-disposition and settlement, or any of my other deeds of settlement, such parties shall entirely forfeit all bequests, specific and residuary, made by me to them; and I hereby declare that their acquiescence in all my arrangements shall be an inherent condition of their right to receive payment of their several legacies, whether specific or residuary."

There was afterwards made out by Lady Murray, or under her authority, what was entitled "List of Lady Murray's Appropriated Estate, as at the 31st December 1861." Lady Murray, on 15th March 1861, subscribed this list, and a docquet attached to it, which declared "that the foregoing is a list of my appropriated estate, as at the 31st day of December 1860, and is to be taken and held as my appropriated estate, devised and dealt with under that name in my trust-disposition and settlement of my appropriated estate, and relative deed of directions in relation thereto, which, as they now stand, I hereby confirm and repeat."

A question now arose concerning two several sums, which originally formed part of Lord Murray's estate, but were not comprehended in this list. Of these sums, it was said by Sir George Campbell and others, who were in right generally of the appropriated estate, "Neither Lady Murray, nor any one acting on her behalf, knew of the existence of the sums which form the fund *in medio* at the time the list was signed, or at any other time during Lady Murray's life." By another claimant, also interested in that estate (Mr James Wolfe Murray), it was said—"At the time when the list mentioned in the 4th article of the condescendence for Sir George Campbell of Succoth, Bart., and others, above referred to, was prepared, Lady Murray was not aware of the existence of the said two funds." This ignorance of the funds in question on the part of Lady Murray these claimants offered to establish by evidence.

In regard to these two sums, it was maintained on one side that, being clearly part of Lord Murray's estate, and only omitted from Lady Murray's list in consequence of her ignorance of their existence, they must be dealt with in the same way with the articles comprehended in the list, and as if they had been themselves comprehended. On the other hand, it was contended that the effect of their omission from the list was to incorporate the sums in Lady Murray's own estate, and to cause them to pass to those in right of that estate, as proper parts of it.

The Lord Ordinary (KINLOCH) gave effect to the latter contention, and preferred the residuary legatees of Lady Murray's own estate.

Sir George Campbell and Wolfe Murray reclaimed.

H. J. MONCREIFF (CLARK and KINNEAR with him) for reclaimers.

SHAND and SELLAH, for respondents, were not called on.

At advising—

LORD PRESIDENT—I am satisfied that the Lord Ordinary's interlocutor is unassailable. The general purpose of Lady Murray was to include in what she called her "appropriated estate," the estate left to her by her husband, and that she disposed of to her husband's relations. But she found a good deal of difficulty in ascertaining precisely what was Lord Murray's property and what was her own, and in order to put an end to all disputes, she declared in language that could not be more distinct or precise that the list of items made up by her should be binding on all concerned. I think she showed a great deal of practical good sense in so doing, and we should be defeating her manifest intention if we interfered. I think all the parties taking under this settlement are bound to hold that what is contained in that list is the appropriated estate, and that there is nothing else included in it.

LORD CURRIEHILL concurred.

LORD DEAS—I am of the same opinion. I think there is no doubt that Lady Murray intended to distribute the whole of her husband's estate in the way in which he himself might have done. But it was necessary to ascertain what that estate consisted of. She took all the means she could to ascertain that, and made up a list as correctly as she could make it. But she had the sense to know that there might be some mistakes in it either way, that some things were in it which really were investments from her own funds, and some things might be omitted which were investments from

her husband's estate; and so, to prevent all such questions, she made up a list as complete as she could in order to carry into effect the intention of her husband, and prevent all disputes. It is not easy to prevent disputes, but she did all she could do, and it would be defeating her intention if we allowed a question to be opened up which she took all the means in her power to foreclose.

LORD ARDMILLAN concurred.

Agents for Reclaimers—Macallan & Chancellor, W.S., and Tait & Crichton, W.S.

Agent for Respondents—Lockhart Thomson, S.S.C.

Wednesday, July 1.

MILNE'S TRUSTEES v. COMMISSIONERS OF
H. M. WOODS AND FORESTS.

Salmon-Fishing—Barony—Prescription—White-Fishings—Express Grant. Held (1) that a grant of barony was a good title by prescription to carry salmon-fishings (2) notwithstanding an express grant, in the charter, of white-fishings.

The Magistrates of Aberdeen, trustees *ex officio* under the trust-deed of the late Dr John Milne, of Bombay, proprietor of the lands and barony of Muchalls, in the county of Kincardine, brought this action against the Commissioners of Her Majesty's Woods and Forests, for declarator "that the pursuers have the sole and exclusive right to the salmon-fishings in the sea and sea-coast *ex adverso* of the lands and barony of Muchalls, in the county of Kincardine, excepting the parts and portions of the said lands and barony under-mentioned, viz. . . . and that the said pursuers have good right and title to fish for salmon, grilse, salmon trout, and other fish of the salmon kind in the sea and sea-coast *ex adverso* of the said lands and barony, excepting as aforesaid, and that by stake-nets, bag-nets, net and coble, and every other legal mode: Further, it ought and should be found and declared, by decree foresaid, that the defenders have no right to the said salmon-fishings, and that they are not entitled to fish for salmon, grilse, salmon trout, or other fish of the salmon kind in the sea and sea-coast *ex adverso* of the said lands and barony, excepting as aforesaid, and from erecting or using stake-nets, bag-nets, net and coble, or any other engine or apparatus for catching salmon, grilse, salmon trout, or other fish of the salmon kind within the said lands; and ought and should be decerned and ordained, by decree foresaid, to desist and cease from disturbing and molesting the pursuers in the peaceable possession and enjoyment of the said salmon-fishings."

The pursuers founded upon a crown-charter of resignation, dated in 1806, wherein the lands conveyed are described as "Totas et integras terras et baroniam de Muchalls cum messuagio et maneriei loco ejusdem toftas croftas et pertinentiis earundem comprehendend. villas et terras de Pityot Contlahills Mothgatehead Blackbutts Stranathro Stratethin Denabucks Corthings et Greenhead una cum

decimis rectoriis et vicariis earundem et piscationibus alborum piscium et cymbis piscariis lie fisherboats cum molendino de Muchalls." &c. The pursuers alleged prescriptive possession on their barony title, and pleaded that, "in respect of the grant of barony to their authors, with the possession and exercise by their said authors and them of the right of salmon-fishings for upwards of forty years prior to 16th April 1862, they had at the said date, and have the sole and exclusive right to the salmon-fishings in the sea and sea-coast *ex adverso* of the lands and barony of Muchalls, excepting as above-mentioned."

The defenders pleaded—"There being no grant either of salmon-fishings or of fishings generally in the titles of the pursuers prior to 28th December 1844, the title on which the pursuers found is not a good basis for acquiring a right to salmon-fishing by possession. Even if a simple barony title, with possession for forty years, could in any case be held to confer a good title to salmon-fishings, that title founded on by the pursuers, containing as it does an express grant of 'fishings of white-fish,' without any grant either of 'salmon-fishings' or of 'fishings' generally, is not a good basis for acquiring a right to salmon-fishings by possession, on the principle *expressio unius exclusio alterius*."

The Lord Ordinary (BARCLAY) pronounced this interlocutor:—

"Finds that the barony title founded on by the pursuers is a sufficient title to the salmon-fishings in question if followed by prescriptive possession of such fishings: Repels the second and third pleas in law stated for the defenders: Finds that the pursuers are entitled to prove said prescriptive possession; and appoints the cause to be enrolled for further procedure, reserving all questions of expenses.

"*Note*—The pursuers found upon their barony title, as giving them right to the salmon-fishings. They produce a crown charter of resignation in 1806, in which the lands are described as the barony of Muchalls, and they aver prescriptive possession of salmon-fishings by them and their authors following upon that title. The Lord Ordinary thinks that it must be taken as settled law that, in the general case, the charter of a barony is a good title by prescription to carry salmon-fishing. To this extent all the institutional writers concur, whatever difference of opinion may have existed as to the stronger doctrine laid down by Lord Stair and Sir George Mackenzie. (St. 2, 3, 60, 61 and 69; M'K. 2, 6, 3; Ersk. 2, 6, 18; Bell Pr. § 754.) The Lord Ordinary is therefore of opinion that the pursuers have a good title on which they may establish right to salmon-fishings by prescriptive possession, unless the ordinary effect of a barony title can be held to be excluded in the present case by the specialty to be immediately noticed.

"The description of the subjects is in these terms: 'Totas et integras terras et baroniam de Muchalls cum messuagio et maneriei loco ejusdem toftas croftas et pertinentiis earundem comprehendend. villas et terras de Pityot &c., una cum decimis rectoriis et vicariis earundem et piscationibus alborum piscium et cymbis piscariis lie fisherboats cum molendino de Muchalls,' &c. The defenders contend that the special mention of white-fishing excludes the construction by which, on proof of prescriptive possession, the grant of barony might otherwise be held to have included a grant of salmon-fishings. The Lord Ordinary feels this to be a question of considerable difficulty. The defenders found upon a maxim—*Expressio unius est exclusio alterius*; and there is