

too late, and unnecessary for the purposes of the roll of 1883-84, to begin an investigation of all the disputed facts in order to ascertain whether the methods of valuation now suggested by the assessor would support the valuation proposed by him upon the principle of taking the Tobermory case as in point. It will be for him to consider the true principle of valuation in making up the roll for the year now current.

I think that the determination of the Commissioners for the year in question was right.

LORD FRASER—I think we are able to dispose of this case without any further remit. The rule laid down by the statute is, that the yearly value of heritages "shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year." There are various modes of ascertaining what rent might be reasonably expected for a subject. If it be of the nature of a manufactory, or a gas work, or any other similar work, the most obvious of all means of ascertaining what a tenant could afford would be to ascertain the net profits made at the work; and this being found, a tenant could then settle as to how much he would be able to pay as rent. In other cases, again, resort is had to a percentage upon the cost of erecting the building, a mode which does not commend itself to me, because, whether the expenditure on the building be great or small, it is not easy to see how this could indicate the amount which a tenant would be willing to give. The assessor and the Commissioners in the present case have adopted neither of these modes. What the Commissioners have done is to ascertain the valuations put upon other distilleries throughout Scotland, and especially in Argyll, and on a consideration of these to determine what valuation ought to be put upon the Islay distillery. I do not think that this is the best course that could be adopted, but at the same time it is a mode by which a fair enough conclusion could be drawn. The rents payable from other distilleries in the country would be not a bad guide for a tenant in arriving at a conclusion as to what rent he might afford for the particular distillery in question. The assessor, the owners of the Islay distillery, and the Commissioners, are all agreed in resorting to this mode, and such being the case, the only question is, whether the Commissioners have drawn a right conclusion from the other cases. The assessor thinks they have not, and appeals to the case of the Tobermory distillery, which is let, and for which a very high rent is paid. I agree with the Commissioners in thinking that the Tobermory case is very exceptional, and that the sum paid in name of rent covers something more than what is usually understood under that term. There are exceptional privileges given to the tenant of a very valuable description, and in particular the privilege given to the firm of M'Kill Brothers of being the sole agents for the selling of the whisky. A case so peculiar as this cannot be held to overturn the inference drawn by the Commissioners—and as I think rightly drawn—from the thirty-two other cases specified by the Commissioners, and therefore I am of opinion that their decision was right. No question was raised as to the valuation of the pier, which is entered at £50.

The Judges were of opinion that the determination of the Commissioners was right.

Counsel for Assessor—J. P. B. Robertson—Maclachlan. Agents—Maclachlan & Kinloch, W.S.

Counsel for Islay Distillery Company—Low. Agents—J. B. Douglas & Mitchell, W.S.

COURT OF SESSION.

Wednesday, May 21.

SECOND DIVISION.

[Sheriff of Caithness.

SIMPSON v. MACKENZIE.

Lease—Right of Tenant to Solum of his Farm—Right to Exclude Neighbouring Tenant from Use of Quarry covered by Water on his Farm.

On a farm there was situated an old quarry filled with water. The tenant of a neighbouring farm on the same estate claimed right to use the quarry for watering his cattle, on the ground that the use of the quarry for that purpose was common to all the tenants on the estate. *Held*, on a proof that he had not established any right of use of the quarry or the road to it, and that the tenant on whose farm it was was entitled to interdict him from using it.

William Simpson, farmer, Reiss, Caithness, presented a petition in the Sheriff Court at Wick against George Mackenzie, also farmer there, "to interdict the defender, his servants and all others employed by him, and for whom he is responsible, from entering or trespassing upon the lands of the pursuer's farm in Reiss, situated in the parish of Wick, with the defender's horses or other bestial, and from watering his horses or other bestial at a quarry situated in the centre of the said farm, or for any other purpose, or in any other way, interfering with or disturbing the pursuer in the possession of the said farm or quarry."

The pursuer averred that the defender had for some time past, and on certain specified occasions, without any right or title, and notwithstanding his remonstrances, unlawfully trespassed in the manner against which interdict was now craved.

The defender averred that he had been in use to water his horses and other bestial at that quarry since he became tenant of his farm eight years before, and that his right to do so had never before been challenged; that the tenants who had preceded him on the farm had done the same; that the pursuer had no right to the quarry or the road leading to it except for the same purpose as the defender and the rest of the tenants on the estate; that in fact the quarry had been common to all the tenants of the Reiss district as well as to the Reiss blacksmith for half a century. He pleaded, "No title to sue."

The Sheriff-Substitute (SPITAL) allowed a proof, at which it appeared—Both parties to the action were tenants on the estate of Mr Duff

Dunbar of Hempriggs. Neither tenant had a lease, but each had occupied his farm—the pursuer for twenty-four years, and the defender for upwards of eight years—from year to year by tacit relocation. The quarry in question was situated on the pursuer's farm about 5 chains from the public road called the Reiss Road, and about 2½ chains from an estate road (which was not a public road) called the Nordwall Road, which branched off from the Reiss road. The quarry was entirely surrounded by the arable land of the pursuer's farm, of which the Nordwall road formed the boundary in that direction. There was a road to the quarry from the Nordwall road, which had been made by the pursuer himself when he ploughed up the ground from hill pasture, in place of the road which formerly existed. The road which pursuer had made was not a metalled road, the ground being merely in its natural state. There was a spring of water in the quarry, and a well had been made there. There were two quarries with water in them on the defender's farm, one of which was close behind his house, and was liable—the defender said—to be polluted by the liquid refuse from his farm buildings. The other was dry, or nearly so, in summer. There was also another quarry with water at a corner of the defender's farm across the Reiss road, about 24 chains from his house. The landsteward of the estate deponed that he had no instructions from the proprietor as to the quarry on pursuer's farm, and knew of no regulations regarding it; he took it to be a private quarry.

Pursuer deponed that he paid rent for the whole of his farm, but the quarry was not specially mentioned. He had challenged defender's right to water his horses at the quarry for the past five years, and the defender replied that he might take out an interdict against him. Defender's horses and cattle used to come to the water of themselves and pass right through pursuer's corn. The adjoining tenant on the other side of pursuer's farm watered at the quarry by his permission, and the blacksmith had a shodding-stone there, and came there to shod his wheels, but this was also—on the blacksmith's own evidence—by permission of the pursuer. The ground-officer of the estate and several other tenants deponed to the custom among the tenants of watering at the quarry, but none of them regarded it as a public quarry or considered that they did so otherwise than by permission of the pursuer. One tenant had been stopped doing so by pursuer.

The Sheriff-Substitute pronounced an interlocutor finding, *inter alia*—“(4) That the defender, who is tenant of the adjoining farm marked ‘George Mackenzie's farm’ [on a sketch produced], and others of the neighbours, have been in use for several years to take occasional supplies of water from said quarry; but finds (5) that the defender has failed to prove any right on his part to take such supplies of water, or to visit said quarry without the leave of the pursuer: Therefore grants interdict in terms of the prayer of the petition,” &c.

“Note.—There is no doubt that the pursuer's neighbours have been for long accustomed to take supplies of water from the pursuer's quarry whenever it was convenient for them to do so, and as there seems to be a good supply of water there it is not easy to see that the pursuer suffered

any injury through these visits of his neighbours so long as they kept on the road and did not trespass and allow their beasts to trespass on the pursuer's fields. But unfortunately the pursuer and defender are not on good terms, and the pursuer has chosen to forbid the defender from using the quarry. I think he is legally entitled so to forbid him, and that the defender must get his water elsewhere. Where he is to get it in future is, I think, immaterial to the present case.”

The defender appealed to the Sheriff (THOMAS), who pronounced this interlocutor:—“Sustains said appeal, and recalls the interlocutor of 6th November last submitted to review: Finds that the pursuer is not tenant of the quarry as regards access to which the present action of interdict is brought: Sustains the defender's plea of no title to sue, and assolizies the defender,” &c.

“Note.—An agricultural tenant is not tenant of a quarry of stone or other minerals on his farm without special bargain. Mr Hunter (Dove Wilson's edition, i. 206) says—‘The rule is express that the landlord is entitled *ex lege* to the minerals, and consequently to work them, with a right of access and other accommodations.’ The pursuer here has only proved that he is a yearly agricultural tenant of a farm. When the pursuer ploughed up the old road to the quarry on his farm he very properly made a new one. The pursuer proves that Sir George Dunbar at one time proposed to take the water of this quarry for his house of Ackergill Tower, and asked and obtained no leave of the pursuer to do so. Thus, on the pursuer's own showing, he is not tenant of the quarry to which solely this action relates, and has no title to interdict the defender from going to it. Had he averred any trespass on his fields by the defender the case might have been different, but as his petition only sets forth trespass against the defender ‘by passing through the lands of the said farm with his horses or other bestial to a quarry,’ and particularly ‘with two horses on the 17th, 18th, and 20th days of September current 1883,’ and this alleged trespass is shown by the proof to have been by the road which the pursuer made to give access to the quarry, no case for interdict has been made out.”

The pursuer appealed to the Court of Session.

The Court called upon the respondent's counsel, who argued—The defender had shown a customary right of the tenants on the estate to water horses and cattle at the quarry, and therefore of access to it over pursuer's farm. Access to a supply of water for these purposes was at common law a necessary accessory of an agricultural subject. The scarcity of water on defender's own farm made access to this quarry—as against the landlord, and therefore as against the pursuer, his tenant—a right necessarily involved in the defender's tenancy, as without it his farm would be untenanted.

At advising—

LORD JUSTICE-CLERK—In deciding this case I am sorry to differ from the Sheriff, but I think he has misapprehended the real question raised. He seems to have thought the action was brought to assert a right to the exclusive use on the part of the pursuer of a quarry of stones on the farm which he has on lease. But that is not the object

of this action. Its object is to prevent a person who has no right coming on the farm and taking water at the well which is in the quarry. That can raise no question of the use of the quarry as such, and was not intended to do so. The quarry is situated on pursuer's farm and it has a well on it, which he is of course entitled to use; the defender, who is a neighbouring tenant on the same estate, chooses to use the well also for watering his cattle, and he uses as an access a road which was made by the pursuer through his field in place of another road which he had ploughed up, and which in a question with the landlord he would probably be bound to restore and keep open. The question is, Is the defender entitled to use this road as a matter of right? There is no doubt that the quarry is situated entirely on the pursuer's farm. On this point Mr Dunnet, the land-steward, says—"The quarry is surrounded by Simpson's land; and the quarry and road are entirely on Simpson's farm." The only point, then, is the allegation that this was an estate well, and that the tenants had a right to use it, involving a right of access to it as a right of servitude. There are such things as rights of this kind, and I think there is not sufficient evidence of any such right here. Some tenants say they thought they had such a right; others know nothing of it. It would require a much stronger case than we have here to set up such a right. I therefore think we should recal the Sheriff's interlocutor, and revert to the Sheriff-Substitute's view, which substantially disposes of the merits of the case.

Lord Young—I am of the same opinion. I can scarcely comprehend the Sheriff's view of the case. There is, indeed, something to be said against that of the Sheriff-Substitute on its own proper merits, but there is nothing to be said in support of the Sheriff's. One can see how a question of quarrying minerals would be determined with a tenant who objected to give access to them. He would be turned out. But we have no parties before us raising any question of quarrying minerals. A hole has been made in this farm by stones having been taken out; that is all. Many farms have such holes. I do not know whether all the stones have been taken out here, but if they have, there is no longer a quarry but only a hole made by a quarry. Now, if such a hole is on a man's land, he is entitled to use it to the exclusion of all the world, apart from any question of quarrying. It appears that this quarry is covered by water. It might have been covered by soil and vegetation, and if it had been so, being within the boundaries of his farm, the tenant would be entitled to the exclusive use of it, and he is equally entitled to a part of the *solum* of his farm covered as this is with water. Therefore I say the Sheriff's view of the case is not intelligible. There remains the question—meeting the Sheriff-Substitute's view—whether a right on the part of the adjoining tenant has been established? He alleges a right to go to this quarry for water, but a right which he has not except in common with other tenants of the same landlord. Now, if all the tenants have a right, it is impossible to imagine that the landlord would not have been here to assert the right of all against one. But the landlord is asserting no such right. I am of opinion with the Sheriff-Substitute that there is no evidence of any such right

on the part of the defender. On the whole matter, therefore, I concur in the result of the Sheriff-Substitute's judgment, and differ from that of the Sheriff. Of course if there are any stones in this quarry the landlord is entitled to quarry them himself or grant the right to do so to anyone, and to use the most direct road to it on paying surface damage to the tenant according to the common law, but no such question arises here.

Lord Craighill—I have come to the same conclusion. The first question which arises here is that which has been dealt with by the Sheriff, relative to the pursuer's title to complain of the defender making use of this quarry for watering purposes. He is within the boundaries of his farm, and the burden of proof therefore lies on the defender to show a right to use the road and the quarry. The second question therefore is, Has the defender established any right to use the road and quarry? and if he has not, the pursuer must prevail. After reading the evidence in this case, I do not think that the defender has shown anything like a right which could be made good against the landlord, and so against the man whom the landlord has put there in his place. I therefore concur in your Lordship's judgment.

Lord Rutherford Clark concurred.

The Court pronounced this interlocutor:—

"The Lords . . . find that the *solum* of the quarry in question and the road thereto form integral parts of the subjects held by the pursuer as tenant of the proprietor, and that the defender has not proved that he has by use or otherwise acquired right of access by the road to the quarry, or right to take water from the quarry: Therefore sustain the appeal; recal the interlocutor of the Sheriff appealed against; affirm the interlocutor of the Sheriff-Substitute of 6th November last," &c.

Counsel for Pursuer (Appellant)—Graham Murray—M'Lennan. Agent—William Gunn, S.S.C.

Counsel for Defender (Respondent)—Watt. Agents—Sutherland & Clapperton, W.S.

Friday, May 23.

FIRST DIVISION.

SPECIAL CASE—BEATTIE AND OTHERS.

Husband and Wife—Marriage-Contract—Mutual Settlement—Donatio inter Virum et Uxorem—Revocation.

By antenuptial contract of marriage, provisions, including an annuity of £500, were made for the wife—who had no estate—in the event of her survivance. After the marriage the spouses executed a mutual settlement, by which in the event of there being no children of the marriage the survivor was to take the whole estate of the predeceaser. The husband was then possessed of estate of the value of £16,000, the wife having nothing but expectations from a maternal uncle. The wife's