

working of coal below the level is only to begin after the upper coal is exhausted. I think these writings amount at most to a toleration of simultaneous working above and below the level so long as such working suited the views and wishes of both parties; and such consent to the existing mode of working as the Carron Company may be held to have given is of the same character. In our judgment in the previous case, in which we applied the successive rates of royalty specified in the lease to the altered state of circumstances, we gave full effect to the principle that the landlord is not entitled to be indemnified against acts which he has authorised. But I find nothing in what has been done which amounts to the introduction of a new term into the contract of location, or which bars the Carron Company from reverting to the mode of working prescribed by the lease.

LORD KINNEAR—I agree with your Lordships and the Lord Ordinary on all the points.

The Court adhered and found the respondents entitled to two-thirds of their expenses in the Inner House.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Guthrie—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders—Sol.-Gen. Dickson—Clyde. Agents—Davidson & Syme, W.S.

Thursday, July 9.

## SECOND DIVISION.

[Lord Low, Ordinary.]

### DAVIDSON'S TRUSTEE v. SIMMONS.

*Expenses—Finding of Expenses to Trustee—Taxation—Whether to be Taxed as between Party and Party or Agent and Client.*

In an action by a trustee for discharge the Court held him "entitled to expenses in the Outer House subject to modification to the extent of one-half of the taxed amount thereof, as also to the whole expenses of his reclaiming-note, and on . . . said expenses being paid," appointed a disposition to be delivered to a beneficiary, which would have had the effect of denuding the trustee of the whole trust-estate. The Auditor taxed the account as between party and party. The trustee objected to the Auditor's report, and claimed expenses as between agent and client. In support of the Auditor's taxation it was maintained that the claim ought to have been made when the interlocutor was pronounced, and that there was nothing in the interlocutor to indicate any departure from the ordinary rule. The Court sustained the objection, and allowed the trustee expenses as between agent

and client on the ground that he was entitled to be kept *indemnis*.

David Stewart, solicitor, Dundee, sole surviving trustee acting under a mutual trust-disposition and settlement granted by John Davidson, formerly mason in Lochee, and Janet Peat or Davidson, formerly his wife, dated 23rd October 1871, brought an action against John Davidson Cooper, Otago, New Zealand, and Isabella Stewart or Simmons, Lochee, and her husband as her administrator-in-law and as guardian of his pupil children, concluding for declarator that the pursuer and his co-trustees, now deceased, had fully accounted for his whole intromissions, and for a discharge for himself and his co-trustees upon his granting a valid and sufficient conveyance of certain heritable property in favour of the defenders for their respective rights of fee and liferent.

The defender Cooper did not enter appearance, and decree in absence was pronounced against him.

On 19th March 1896 the Lord Ordinary (Low) pronounced the following interlocutor—"The Lord Ordinary having considered the cause decerns against the defender Mrs Simmons for payment to the pursuer of the sum of £6, 4s., being the balance brought out as due by her in the note annexed to the accountant's report No. 88 of process, and on said sum being paid appoints the clerk of the process to deliver up to Mrs Simmons the disposition No. of process, executed by the pursuer in conformity with the interlocutor of 4th February last, and on said delivery being made, discharges the pursuer of the office of trustee referred to on record, and also exonerates and discharges the pursuer and his co-trustees conform to the conclusions of the summons thereanent: And after hearing counsel on the question of expenses, finds the pursuer entitled to expenses subject to modification to the extent of one-half of the taxed amount thereof: Allows an account," &c.

Against this interlocutor the pursuer claimed.

On 5th June the Court pronounced the following interlocutor—"Recal the interlocutor reclaimed against, and decern against the defender Mrs Simmons for payment to the pursuer of the sum of £6, 14s. sterling, being the balance due as per note to the Accountant's report No. 88 of process: Further, find the pursuer entitled to expenses in the Outer House, subject to modification to the extent of one-half of the taxed amount thereof, as also to the whole expenses of his reclaiming-note, and on said sum of £6, 4s. sterling and the said expenses being paid to the pursuer, appoint the clerk of the process to deliver to Mrs Simmons the disposition No. of process, duly executed, and thereafter discharge the pursuer and his co-trustees in terms of the conclusions of the action, and decern: Remit the said accounts of expenses to the Auditor to tax and to report."

The Auditor taxed the expenses as between party and party, but also stated what in his opinion would be the proper

sum if the account were taxed as between agent and client.

The pursuer lodged a note of objections to the Auditor's report, and claimed expenses as between agent and client.

Argued for the pursuer—The Court were entitled to construe the finding of expenses in their interlocutor—*Henderson's Trustees v. Tulloch*, February 4, 1834, 12 S. 399. Upon payment of the expenses found due by the Court, the trustee would be denuded of the whole estate, so that if he only got expenses as between party and party he would have to bear all his extra-judicial expenses himself. The presumption, on the other hand, was that he was entitled to be kept *indemnitas*, and it was to be presumed that this was what the Court intended. He was therefore entitled to expenses as between agent and client.

Argued for the defenders—It was too late now to move for expenses as between agent and client, the Court having made the ordinary finding as to expenses, which, apart from something appearing in the interlocutor to the contrary, meant expenses as between party and party—*Fletcher's Trustees v. Fletcher*, July 7, 1838, 15 R. 862. That case ruled the present. It would be most unjust to grant the motion, as it was impossible that the whole circumstances could be before the Court now. This was not a case in which the trustee was entitled to be kept *indemnitas*, as appeared from the Lord Ordinary's interlocutor by which he was only found entitled to half his expenses. Any presumption which there might be in the ordinary case for interpreting a finding of expenses in favour of a trustee to mean expenses as between agent and client was rebutted in this case.

LORD YOUNG—*Prima facie* the trustee must be kept *indemnitas*. This is a debt for which the trust-estate is liable. I am not disposed to let any technicality interfere with the trustee getting what he asks for.

LORD TRAYNER concurred.

LORD MONCREIFF—It would have been better if this question had been decided when expenses were awarded. But our intention was that the trustee should be kept *indemnitas*, and this could not be done if he only gets expenses as between party and party, as he is bound to denude of the whole trust-estate on payment of expenses.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

“Having heard counsel on the note of objections by the pursuer to the Auditor's report on his account of expenses, Sustain the same: Find that the proper taxed amount thereof is £183, 10s. 5½d., and subject to this alteration approve of said report and decern against the whole defenders except John Davidson Cooper for said sum of £183, 10s. 5½d.”

Counsel for the Pursuer — Salvesen.  
Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders — Clyde.  
Agents—Drummond & Reid, S.S.C.

Thursday, July 9.

## FIRST DIVISION.

### SMITH AND OTHERS (DAWSON'S TRUSTEES) v. DAWSON.

*Succession—Heritable and Moveable—Jus relictæ—Legitim—Act 1661, c. 32.*

A deed of acknowledgment of a loan was in the following terms:—“Received from” D “the sum of five thousand pounds sterling (£5000) as a deposit for mission purposes, to bear interest at the rate of 4 per cent. per annum, payable half-yearly at Whitsunday and Martinmas, and to be repaid on three months' notice.”

*Held* (1) that the sum of £5000 contained in the above acknowledgment was heritable as regards the widow's *jus relictæ*, but moveable, in virtue of the Act 1661, c. 32, as regards legitim; and (2) that in fixing legitim the said sum fell to be divided into two equal parts.

*Observations* (by Lord Kinnear) as to the circumstances in which a widow who has made an election between her legal and testamentary provisions is entitled to rescind that election.

Mr Michael Dawson, 12 Millar Street, Glasgow, died on 20th February 1895, and was survived by his widow Mrs Cannon or Dawson, and two daughters Mrs Wallace and Miss Catherine Dawson. He left a trust-disposition and settlement by which he directed his trustees to pay an alimentary annuity to his wife and to his eldest daughter, the said Mrs Wallace, and to hold the residue of the estate in liferent for his younger daughter the said Miss Catherine Dawson, and in fee to her children, whom failing to the Archbishop and Chapter of the Roman Catholic Diocese of the Western District of Scotland. The net value of Mr Dawson's estate was £5990, and £5000 of it was deposited with the Roman Catholic Archdiocese of Glasgow upon the terms contained in the following deed of acknowledgment:—“*Archdiocese of Glasgow—Glasgow*, 23rd February 1892.—Received from Mr Michael Dawson of 47 King Street, Glasgow, the sum of Five thousand pounds sterling (£5000) as a deposit for mission purposes, to bear interest at the rate of 4 per cent. per annum, payable half-yearly at Whitsunday and Martinmas, and to be repaid on three months' notice.” The document was subscribed across a penny stamp by the Archbishop and the Diocesan Treasurer, and was indorsed as follows:—“The sum acknowledged on the other side has been allocated as follows to the under-noted missions on loan, but Mr Dawson is to receive his interest half-yearly direct