

plainly shown to be that his wife should have the benefit of his means during her life, and at her death his means should go to his own nephews and nieces. My opinion is that that can be ascertained from the deed itself, but that construction is strongly confirmed by the codicil in which Mr Walker says that he appoints certain persons to be trustees, and confirms the will, "with the exception that I leave my wife Eliza Walker sole trustee, to use principal of money if she requires it." That is inconsistent with the idea that the wife was already owner of the whole, for the purpose of the codicil is not to cut down a right already given to the widow but to give her more than the will gave, viz., a power to encroach on the capital.

I therefore agree with the result arrived at by the Lord Ordinary, my opinion being based on the testator's intention in my view of it.

LORD YOUNG—I think the Lord Ordinary's conclusion is right, that the nephews and nieces are entitled to the whole property, but I am not satisfied with the reasons by which he reaches that result, though I agree that if you take the case as a gift of the fee to the widow, there is substitution in favour of the nephews and nieces on her death with out having evacuated the destination. But I am disposed to take this view, that we have here only a trust-deed in which the will of the truster is expressed to be carried into execution by the trustees, to whom he commits the execution of the whole. I do not think the wife was sole trustee, for this codicil appoints other trustees. She is the sole trustee to whom the property is conveyed, but he appoints others, and he goes on—"I confirm the above will, with the exception that I leave my wife, Eliza Walker, sole trustee, to use principal of money if she requires it"—that is to say, the other trustees are not to interfere with the use of the funds if she requires it. The other trustees never accepted, and upon the wife's death the estate was handed to a factor to act as trustee. What was the wife to do with the estate of which she was trustee? I look for the expression of the truster's will, and I think it is that the estate should pass to the wife as sole trustee, and then at her death to the nephews and nieces. The wife is to pay the following legacies, viz., "At my wife's death what she had from me shall go to my nephews and nieces," *i.e.*, the estate conveyed to her in trust shall by her death pass to her husband's relations. There is no doubt of his intention that she shall be entitled to use the principal sum, but I think he intended that she should have the income of the estate to do with as she liked while she lived. It would be absurd to say that a man gave power to use the capital but not to use the income. I think his meaning and intention too clear to be resisted that his wife should have the income while she lived. If that should not be enough, she should use as much of the capital as she required, but that upon her death it should go to her husband's nephews

and nieces. Her own will shows that she thought her whole property consisted of the property which she disposes of, viz., £80 in the bank in Dundee. The truster meant that the whole should be handed over to his nephews and nieces. Therefore, arriving at the same conclusion as the Lord Ordinary, I should prefer to put their right on the ground I have stated.

LORD TRAYNER—I offer no opinion on the question of substitution. I am satisfied that the Lord Ordinary has given effect to the intention of the testator.

LORD MONCREIFF—I concur. I think it is immaterial to decide whether the wife was only a trustee or whether she was fiar, and there was a substitution in favour of the husband's nephews and nieces. I think if the right interpretation be given to the will and the terms of the codicil, it will be seen that what the testator intended was that the lady might use the principal sum till her death, but that it should then go to his nephews and nieces. Had the writing stopped at the end of the will a case of substitution would have been raised, but the codicil indicates a trust.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Reclaimers—Craigie—W. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for Respondent—Sym. Agents—Wishart & Sanderson, W.S.

Friday, November 24.

## FIRST DIVISION.

(Without the Lord President.)

### MACKAY v. MACLACHLAN.

*Expenses — Withdrawal of Reclaiming-Note.*

Where a reclaiming-note was withdrawn before the case was put out for hearing, the Court refused to grant an award of expenses exceeding £2, 2s., although the respondent had printed a plan produced by him at the proof, after four letters to the claimer's agent inquiring what documents he proposed to print had remained unanswered.

D. E. Maclachlan, of South Aros, Mull, brought an action against John F. Mackay, W.S., in which, after a proof, the Lord Ordinary (KYLACHY) assolizied the defender.

On 3rd July 1899 Maclachlan reclaimed.

On 23rd November the claimer lodged a note craving leave to withdraw the reclaiming-note on payment of £2, 2s. of modified expenses.

Counsel for the respondent moved for the expenses of printing a plan which had been produced by him at the proof. He stated that he had printed it when the case stood eleventh in the roll from the last case put out for hearing, and that he had previously

addressed four letters to the reclamer's agent inquiring what he proposed to print without getting an answer. He argued that the case was ruled by *Little Orme's Head Limestone Company, Limited v. Hendry & Company*, November 25, 1897, 25 R. 124, where expenses were allowed.

The reclamer explained that he had produced a similar plan, which it would have been his duty to print had he gone on with the case, and argued that it was the duty of the respondent to wait to see what the reclamer printed, and as the note had been timely presented, the usual award of £2, 2s. was enough—*Robertson v. Robertson's Executors*, November 8, 1899, *ante*, p. 58.

The Court awarded £2, 2s. of modified expenses.

Counsel for the Reclamer—Cook. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Cullen. Agent—J. F. Mackay, W.S.

Friday, November 24.

## SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

### MERCER HENDERSON'S TRUSTEES v. DUNFERMLINE DISTRICT COM- MITTEE.

Road—Repair of Road—Taking Materials from Enclosed Land—General Turnpike Act 1831 (1 and 2 Will. IV. c. 43), sec. 80.

By section 80 of the General Turnpike Act 1831 (incorporated with the Roads and Bridges Act 1873, by section 123 thereof) it is enacted, *inter alia*, that it shall be lawful for the road trustees to search for, dig, and carry away materials for making and repairing the road out of enclosed land and through the ground of any person “(such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees).”

Prior to 1831 the road authorities had quarried stone for the repair of a road from certain craigs within an enclosed policy with the consent of the proprietor, and thereafter they continued to do so. In course of time these workings approached within thirty yards of a planted walk which ran from the avenue to the mansion-house and passed to the east of the quarry along the top of the craigs through a plantation of trees.

The proprietor brought an action of declarator and interdict to prevent the road authorities from continuing to work the quarry, or at all events from

extending the superficial area of their workings. The defenders maintained that under the Act they were entitled to continue quarrying stone out of any part of the craigs.

*Held* (rev. judgment of Lord Ordinary) that the defenders were not entitled to quarry or remove materials from the craigs to the east of the present face, as further operations in that direction would endanger the amenity and security of the planted walk, which was one of the excepted subjects in the statute. Interdict granted accordingly.

*Opinion* (by Lord Young) that if the quarry was originally opened without statutory sanction, use *de facto* could confer no right as against the proprietors.

*Opinion* (by Lord Trayner) *contra*.

*Opinion* (by the Lord Justice-Clerk and Lord Young) that the words “previously in use” mean previously to the ground having been brought within the excepted subjects, and not previously to the passing of the statute.

*Opinion* (by Lord Trayner) *contra*.

By section 60 of 49 Geo. III. cap. 31, a local Act for more effectually making and repairing the Great North Road leading from North Queensferry to Perth and Dunfermline, dated 1809, it is enacted “that it shall and may be lawful for the surveyor or surveyors appointed by the said trustees, or for such persons as he or they shall appoint, by an order of any two or more of the trustees, to dig, gather, take, and carry away any gravel, sand, stones, furze, heath, or other materials for making or repairing the said roads out of any waste or common in the said counties, without paying any consideration on that account, and also out of the property or lands of any person or persons where such materials are and may be found (paying for the same), not within 200 yards of the mansion-house or ordinary residence of the proprietor of the ground qualified as aforesaid, nor out of any garden, orchard, park, or ground set apart and used as a nursery or plantation for trees before the passing of this Act; but it shall not be in the power of any proprietor or occupier of such lands, by any operations he may carry on, to deprive the trustees of the right of resorting to such quarries and gravel pits as they have been in use to work for that purpose, and have actually worked at any time within three years preceding, but the said trustees shall pay to the owners and occupiers of the said grounds respectively from whence stones, gravel, or other materials have been taken away, or over which the same shall have been carried, such damage as they shall sustain thereby, the amount of which shall be settled by any two or more justices of the peace living in the neighbourhood from whence the same materials are taken: And in case of any difference between such owners and occupiers and the said trustees touching such damages as aforesaid, the said justices shall and may judge and finally determine the same, but such disputes or differences shall