

wall is cut off from the seaward part of the foreshore by the ground acquired from the Crown in 1874, and part of which was conveyed by the pursuers to the Caledonian Railway Company.

The case is unusual and of some importance in this respect, that the Crown claims to interject another grantee between the pursuers' property and the sea at low-water mark. But for the reasons which I have stated I think the Crown is within its rights, and that the pursuers have failed sufficiently to establish such prescriptive use and possession of the foreshore as to entitle them to the declarator and interdict which they seek.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Mackenzie, K.C.—Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Defenders and Respondents the Caledonian Railway Company—Campbell, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defender and Respondent the Lord Advocate—Pitman. Agents—Davidson & Syme, W.S.

Tuesday, March 1.

SECOND DIVISION.

HARRIS'S TRUSTEES v. HARRIS.

Revenue—Estate-Duty—Settlement Estate-Duty—Raising Amount of Estate-Duty by Bond on Lands—Petition for Authority to Charge—Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 9 (5)—Expenses.

Trustees acting under a last will and testament made up a title to the heritable estate of the trustor and paid the estate and settlement estate-duties payable under the Finance Act 1894. Thereafter they presented a petition to the Court for authority to burden the estate with the amount of these duties and the expenses incurred in settling the duties and the expenses of the application. They averred that there was no power to borrow contained in the trust-deed, and that no lender could be found willing to advance the money unless the authority of the Court was received.

The Court, while of opinion that the trustees were entitled in terms of section 9 (5) of the Act to charge the estate with the duties without any authority, authorised the trustees to burden the estate by way of bond and disposition in security for the amount of the duties paid and the expenses incurred in settling these duties, but not the expenses of the petition to the Court.

Process—Petition to Charge—Petition to Charge Estate with Estate-Duties Competently Presented to Inner House.

Held that a petition by trustees for authority to burden an estate with

the amount of the estate-duties paid under the Finance Act 1894 was an appeal to the *nobile officium* of the Court, and had been competently presented to the Inner House.

Section 9 of sub-section (5) of the Finance Act 1894 enacts—"A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of, or a terminable charge on, that property or any part thereof."

Colonel Henry William Harris, who died on 14th November 1899, left a last will and testament dated 30th July 1892, by which he conveyed to trustees for certain trust purposes his whole means and estate, including the lands and estate of the Cairnies.

The trustees made up a title to the Cairnies by notarial instrument, recorded 13th February 1902, and paid estate, succession, and settlement estate-duties due under the Finance Act 1894, amounting to £1079, 11s. 11d., and obtained official certificates for the said duties.

Thereafter the trustees presented a petition to the Court for authority to burden the estate of the Cairnies with the amount of the duties, together with the expenses incurred in respect thereof, including the expenses of the application.

Answers to the petition were lodged by Miss Edith Maud Winifred Harris and Miss Hilda Muriel Harris, who were conditional institutes to the fee of the estate under the will. They maintained (1) that the petition should be refused as unnecessary, and (2) that even if the petition was granted the prayer should be refused so far as it craved authority to burden the estate with the expense incurred in settling the amount of the duties and the expenses of the petition.

The petitioners stated that there was no power to borrow contained in the trustor's will, and that they were unable to lend or borrow on account of the doubts entertained as to whether they were entitled to burden the estate without obtaining the authority of the Court.

They argued—(1) The petition was competently presented in the Inner House. It was an appeal to the *nobile officium* of the Court—*Laurie, infra*. (2) In the circumstances above stated the Court should grant the petition. In doing so they would follow the example of the First Division in *Laurie*, February 22, 1898, 25 R. 636, 35 S.L.R. 496. There was no distinction between the present case and *Laurie*; an heir of entail was in the same position as a fee-simple proprietor burdened with conditions. (3) It was proper that expenses incurred in settling the duties and the expenses of the petition should be charged against the heritable property and not against the general estate. In order that they might be so charged they must be included in the bond granted under authority of the Court.

Argued for the respondents—(1) The petition should have been presented in the Outer House. (2) The trustees being vested in a fee-simple estate were entitled, in terms of section 9 (5) of the Finance Act 1894, to raise the amount of the duties paid, and the expenses properly incurred by him in respect thereof, by the mortgage of part of the estate, and no authority was required to enable them to do so. The case of *Laurie, supra*, was different from the present, as in that case the property was entailed. The only case where the Court was empowered by the Act of 1894 to grant such authority as was here required was where the property was not vested—Section 23 (18). (3) In any event the expenses of the petition should not be charged against the estate. They were expenses unnecessarily incurred, and the estate should not be charged with the expenses incurred in the settlement of the duties. These expenses were not allowed to be charged in *Laurie, supra*.

At advising—

LORD TRAYNER—The Finance Act 1894 makes provision in section 23, sub-section 18, for the manner in which (in Scotland) a person who has paid estate-duty on any property, “and in whom the property is not vested,” may operate his relief by obtaining from the Court (1) an order for the sale of the property or part thereof, or (2) an order on the person in whom the property is vested to grant a bond and disposition in security over the property for the amount of the duty paid. These provisions do not avail the present petitioners, for they are themselves vested in the property in respect of which duty has been paid. By section 9, sub-section 5, however, it is provided that any person who pays the duty shall be entitled to sell or mortgage the property for the amount of the duty paid, “and any interests and expenses properly paid or incurred by him in respect thereof.” I should have thought, in view of that provision, that the petitioners would not have had any difficulty in borrowing upon the security of the estate the amount of the duty and interests and expenses (if any) connected therewith. I do not at present see why a lender should not have been satisfied with such a title as the petitioners under statutory authority are authorised to grant. The petitioners, however, state that they cannot get the necessary loan unless the authority of the Court now craved is granted, and in these circumstances no good reason occurs to me why the Court should not lend its aid to the petitioners. I think therefore the prayer of the petition should be granted except in so far as it asks that the amount to be borrowed should include the expenses of the present application. I think these are not within the “expenses” contemplated by section 9 (5), but these expenses may fairly be charged by the petitioners against the trust estate as expenses incurred in its due administration.

It was suggested that this application could only competently be presented to the

Junior Lord Ordinary, but I think we may competently deal with it as an appeal to the *nobile officium* of the Court.

LORD MONCREIFF—I am also of opinion that we are justified in granting the authority asked for in this petition. My only doubt is as to whether the authority of the Court is required. I am disposed to think that under sub-section (5) of section 9 of the Finance Act of 1894 the trustees are entitled to charge the property with the succession duties without any authority. This view receives support from the terms of section 23, which provides that where any person in whom the property is not vested is authorised by the Act to raise the estate-duty paid by him for such property by the sale or mortgage of the property, he may do so by means of an application to the Court.

The present petition has, however, come before us under peculiar circumstances. I understand (1) that there is no authority to borrow in the trust-deed, and (2) that no lender can be found willing to advance the money unless the authority of the Court is obtained. I therefore think that the Court is justified in granting the authority asked. In doing so we shall follow the example set in the case of *Laurie*. In that case the First Division of the Court adopted the present course, although, as here, it was doubtful whether their authority was required. It might have been said in that case that the provisions of the Finance Act over-rode the prohibition against contracting debt in the entail, just as in this case it is said that they supply a power to borrow on the security of the estate which is not contained in the trust-deed.

I am also of opinion, with Lord Trayner, that the expenses of the present application should not be included in the amount authorised to be charged on the estate.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

“Authorise the petitioners as trustees of the deceased Henry William Harris to burden the estate of The Cairnies with the sum of £1079, 11s. 11d., being the amount of estate-duty, succession-duty, and settlement estate-duty paid by them in respect of the said estate, and the further sum of £26, 6s. 1d., being the amount of the expenses incurred in settling the said duties, amounting together to the sum of £1105, 18s., and to grant a bond and disposition in security or bonds and dispositions in security in ordinary form for the said sum of £1105, 18s. over all and whole the lands described in the prayer of the petition, and here held as repeated *brevitatis causa*, and that in favour of such person or persons as may advance the said sum, and decern.”

Counsel for the Petitioners—Sandeman.
Agent—F. J. Martin, W.S.

Counsel for the Respondents—Laing.
Agents—Forbes, Dallas, & Company, W.S.

Wednesday, March 2.

SECOND DIVISION.

[Sheriff Court at Hamilton.

WARNOCK v. THE GLASGOW IRON AND STEEL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Second Schedule (14) (c)—Stated Case on Appeal—Question of Law—Question whether Death Resulted from or was Accelerated by Accident is Question not of Law but of Fact—Expenses.

In a stated case on appeal in an arbitration under the Workmen's Compensation Act 1897 the following question was submitted for the opinion of the Court:—"Whether in the circumstances stated the death of the deceased J. W. resulted from or was accelerated by an accident within the meaning of the Workmen's Compensation Act 1897."

Held that the question was not a question of law but one of fact, and the appeal dismissed with expenses against the appellant.

This was an appeal from the decision of the Sheriff-Substitute at Hamilton (Thomson) in an arbitration under the Workmen's Compensation Act 1897, in which Mrs Margaret Graham or Warnock, widow of the deceased John Warnock, claimed compensation for the death of her husband from the Glasgow Iron and Steel Company, Limited.

The claimant obtained a Case, in which the Sheriff-Substitute stated that on 9th May 1903 the deceased met with an accident occurring out of and in the course of his employment by a stone falling from the roof of the pit where he was working and injuring the great toe of his right foot; that he had to leave his work on account of the injury; that he suffered much pain and depression of spirits so that his physical condition was lowered by the accident and never entirely recovered; that he never made any claim for compensation, and insisted on going back to work on 3rd June; that he worked regularly till 17th June, when he was taken ill in the pit and had to go home; that he remained at home till 27th June, when he had a stroke of paralysis, from which he died on 29th June, aged 79.

In these circumstances the Sheriff-Substitute found "that it was not proved that death resulted from or was accelerated by the accident, and that the applicant was not entitled to compensation under the Workmen's Compensation Act 1897.

"The question of law for the opinion of Court of Session is—Whether in the circumstances stated the death of the deceased John Warnock resulted from or was accelerated by an accident within the meaning of the Workmen's Compensation Act 1897."

Argued for the appellant—The death resulted from or at least was accelerated

by the accident. [LORD TRAYNER—Is not that a question of fact which has been decided against you by the Sheriff-Substitute?] It was no doubt largely a question of fact, but in recent cases questions involving an examination of facts like the present had been treated as questions of law—*Golder v. Caledonian Railway Company*, November 14, 1902, 5 F. 123, 40 S.L.R. 89; *Fenton v. J. Thorley & Company, Limited* [1903], App. Cas. 443.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—The question submitted in this case for our judgment is not one of law. The question whether the death resulted from or was accelerated by an accident is a pure question of fact.

LORD TRAYNER and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court dismissed the appeal and found the appellant liable in expenses.

Counsel for the Claimant and Appellant—G. Watt, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Thursday, March 3.

FIRST DIVISION.

[Railway and Canal Commissioners.

CALEDONIAN RAILWAY COMPANY v. NORTH BRITISH RAILWAY COMPANY.

Railway—Local Traffic—"Traffic Arising and Terminating on the Railways of the Company"—Caledonian and Scottish Central Railways Amalgamation Act 1865 (28 and 29 Vict. cap. cclxxxvii), sec. 73, 74, and 75—Caledonian and Scottish North Eastern Railways Amalgamation Act 1866 (29 and 30 Vict. cap. ccl.), sec. 108.

By the Caledonian and Scottish Central Railways Amalgamation Act 1865 the Caledonian Railway Company was bound to send goods received at their stations, and falling within the category of "Scottish East Coast Traffic" as defined by the Act, to their destination by the route prescribed by the sender.

By the Caledonian and Scottish North Eastern Railways Amalgamation Act 1866 it was provided (sec. 108) that the North British Railway Company should not be entitled "to carry or interfere with any traffic arising and terminating on the railways" of the Caledonian.

The Caledonian claimed the right to carry coal consigned at Barnockburn (on their system) for Aberdeen (also on their system) by the Caledonian line