

## HOUSE OF LORDS.

Friday, February 13.

(Before the Lord Chancellor (Cairns), Lord Hatherley, and Lord Blackburn.)

LIVINGSTONE v. THE RAWYARDS COAL COMPANY.

(*Ante*, May 20, 1879, 16 Scot. Law Rep. 530, 6 Rettle 922.)

*Mines and Minerals — Encroachment — Mutual Error as to Title — Measure of Damages where Defender in bona fide and Property invaded of Small Extent.*

The lessees of a coal mine wrought out certain coal belonging to a coterminous proprietor, in the *bona fide* belief that the coal was included within their lease—a belief shared in by the true owner himself. The mine possessed by the lessees entirely surrounded the property encroached upon, which in extent amounted only to 1 acre 30 falls 21 ells. *Held*, in an action for damages at the instance of the coterminous proprietor, that the measure of damages was to be calculated upon the basis of the royalty of the surrounding mine, together with a sum for the surface damage, on the ground that there was perfect *bona fides* on the part of the trespassers, and that in the circumstances of the case the only possible way in which the owner could have made a profit out of his coal would have been by leasing it on these terms to the lessees of the adjoining mine.

*Observations (per cur.)* on the mode of calculating the measure of damages in a case where the encroachment is intentional and *mala fide*.

This action was at the instance of James Livingstone, and concluded for payment of £2000 of damages on account of encroachments made admittedly in ignorance by the defenders the Rawyards Coal Company, who were the lessees of certain coal mines upon a piece of ground adjoining a feu belonging to the pursuer. The defenders had wrought out the whole coal under the pursuer's feu in the *bona fide* belief that it had been let to them by the superior of both subjects along with the ground of which they were lessees. The Lord Ordinary (CRAIGHILL) gave decree against the defenders, and on a reclaiming-note at their instance the First Division adhered, with a reduction in the amount of damages awarded—*ante*, May 20, 1879, 16 Scot. Law Rep. 530, 6 R. 922.

Livingstone appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, there are two minor points in this appeal which I may mention in the first place for the purpose of putting them on one side—I mean the question of an allowance for “way-leave,” and the question of an allowance for what is termed the advantage obtained “by working direct through instead of round the feu” of the appellant. Both those points were insisted upon before the Lord Ordinary, but when the matter

came before the First Division, the contest of the appellant with regard to those points does not appear to have been renewed, and therefore to enter upon them now would be in substance to entertain in this House an appeal from the Lord Ordinary and not from the First Division.

My Lords, upon the main question which has been argued, the case is one of some peculiarity. The appellant is the owner of a small feu of about an acre and a-half in extent near Airdrie. The surface of the ground is occupied by miners' cottages or houses, and underneath there was coal. When the appellant bought the feu some time ago, he appears to have been under the impression that the minerals under this feu, as under all the ground which surrounded it, had been reserved by the superior. In point of fact that was a mistake. The superior kept in his hand the minerals under all the ground around, but under this acre and a-half the coal had not been reserved in the grant of the feu to the appellant. The appellant, therefore, although he did not know it, was the owner of the coal under this acre and a-half of ground. The superior granted the whole property in all the surrounding land to the company, who are the respondents before your Lordships, and they, just as the appellant was ignorant of his rights, appear to have been ignorant of theirs. They appear to have been under the impression that they had the whole of the coal, including the coal under the acre and a-half. They had the coal which surrounded the acre and a-half, but they had not the coal which was underneath the acre and a-half. In the process of their working they worked out the coal under the acre and a-half, and when that was done it was ascertained (it is unnecessary to observe how the discovery came to be made) what the real titles were, and that this coal really belonged to the appellant, and did not belong to the respondents, who had got it and disposed of it. I ought to add that in working under the acre and a-half of ground they had by letting down or cracking the ground caused some damage to the miners' cottages which stood upon the surface of the acre and a-half.

Now, my Lords, under these circumstances the question arises, What is the measure of damage to which the appellant is entitled? We may put aside some elements which might occur in some cases, but which do not occur in the present case. There is absent here the element of any wilful trespass or wilful taking of coal which the person taking it knew did not belong to him. What was done was done in perfect ignorance, and there was no bad faith or sinister intention in that which was done. We may put aside another element which might have occurred. It might have been the case that the support of the coal under this acre and a-half of ground had been of some peculiar advantage or benefit to the appellant, for which no money would compensate him. Either by some use made of the surface, or by some specific use intended to be made of the surface, there might have been a peculiar need for the support of the minerals underneath, which might either have made it impossible to estimate the damage, or might have made the estimate of the damage exceptionally high. Neither of these elements occurring—neither the element of what I will call wilful trespass, nor the element of special and exceptional need for support—the case is one in which your Lordships have simply

to ascertain what is the ordinary measure of damage for the coal taken, or what, in other words, is the value of the coal that was taken. Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule in this country or in Scotland that you have a right to follow the article which is taken away—the coal which is severed from the inheritance—into whatever place it may be carried, or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is—What may fairly be said to have been the value of the coal to the person from whose property it was taken, at the time it was taken? Now, my Lords, I own that it appears to me that the Court of Session have adopted a principle which is not unsatisfactory for the purpose of ascertaining that value. They have said—The value to this appellant is not the value which he could have derived from himself working the coal and taking it into the market, because he could not have worked it; the area is so small that it would have been impossible for himself to have worked and used the coal and earned a profit, or put an additional value upon the coal by so working it; he must have gone to some person, or waited till some person came to him, who had the power of working the coal from adjacent workings; therefore (say they) the value is that which he could have obtained from somebody else, who would have come and taken the coal as it stood *in situ*, and who would have worked it and turned it to account. Then they go to the witnesses of the appellant, and they must take Mr Rankine, his principal witness; and I observe that another witness of the same stamp and character as Mr Rankine immediately follows, who wishes his testimony to be taken as repeating Mr Rankine's *in omnibus*. Therefore these two witnesses must be taken to say this:—Mr Rankine is asked this question—“Suppose you had been asked by pursuer whether it would be advisable for him to sell the whole of these minerals to defenders for £100, the defenders paying compensation for the damage to the houses, would you have advised him to take it?” and his reply is—“The advice I have invariably given—I have done it in two instances within the last two years—is, ‘Don't let your coal for a less lordship than that obtained by the adjoining proprietor;’ and in that case I would have said to the pursuer—‘Don't take less than £171, 7s. 6d. for the coal, plus the damage to the houses.’” He says that the advice which he would have given to his client would have been not to sell for less than (which implies of course to sell for) £171, 7s. 6d., plus the damage done to the surface—that is to say, that if there had come to him some person who from the possession of the adjoining property had been able to work this coal, and had asked the appellant to sell the coal to him, the appellant would have been advised to reply—“I will sell you the coal for a royalty—that is to say, a sum per ton—which will produce to me £171, 7s. 6d.; but in addition you must undertake to pay me whatever damage is done to my houses which are upon the surface of the land;” and for the purpose of the present argument the amount of damage as ascertained and not objected to is a sum of £200.

Upon that evidence the Court of Session say—“We are of opinion that the value to this appellant of this coal was the money that would have been produced if he had sold the coal, and the money that he would have got if he had sold the coal would have been £171, 7s. 6d.; but that would have been accompanied and guarded by a further payment which would have indemnified him for the damage done to the houses upon the surface in getting the coal, and that further sum he must have in addition to the £171, 7s. 6d.” My Lords, I own that under the very peculiar circumstances of this case, there being only the element to consider to which I have referred, namely, the element of value to the appellant, I think he has received in the judgment of the Court of Session that which is the proper value, and I see no reason from differing from the judgment of the learned Judges. I therefore advise your Lordships and move your Lordships that the appeal be dismissed with costs.

LORD HATHERLEY—My Lords, after carefully considering the case I have come to the same conclusions, though at one time I was under the impression that there was more in the question of the sale by royalty being, as it were, enforced than I at present think. The case is certainly a very peculiar case, and, without withdrawing from any of the principles which I found, in the case of *Jeggon v. Vivian*, 1871, L.R., 6 Chan. 742, to be established by the prior authorities, I think this case may be disposed of, and will be disposed of, by your Lordships in entire consistency with these principles. There is no doubt that if a man furtively and in bad faith robs his neighbour of property, and because it is underground is probably not for some time detected, the Court of Equity in this country will struggle, or I would rather say will assert, its authority to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been, the one working, and the other permitting the working, through a mistake. The Courts have already made a wide distinction between that which is done by the common error of both parties and that which is done by fraud. In the present case it is clear on both sides that each party was ignorant of the rights of the pursuer, and consequently the matter is not to be treated as a case of forced sale, but as a case of sale which has taken place by inadvertence; and what we as a court of justice have to do is to see that under these untoward circumstances that which never ought to have been done at all, but which has been done either through want of watchfulness or through want of knowledge, as the case may be, and which has occasioned the doing an injury to either of the parties, is remedied and set right, so far as can be, upon equitable principles. Those principles are no doubt settled by the authorities, many of which have been cited in the course of this argument. They are that the owner shall be repossessed as far as possible of that which was his property, and that in respect of that which has been destroyed or removed or sold or disposed of, and which therefore cannot be

returned in specie, there shall be such compensation made to him as will, in fairness between both parties, give to the one party the whole of that which was his, or the whole of the value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that being done which has, by misfortune and inadvertence on both sides, and through no fault, been done. Perhaps the law may have gone a step further than in some cases might be necessary. Each case must stand upon its own particular foundation in that respect; but regard being had to the rule *vigilantibus non dormientibus*, it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, as far as possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

My Lords, in this case we are singularly free from any difficulty upon the point, and the parties seem to have carried on the litigation on a principle which does them credit, and on which one wishes to see all litigation carried on. They say—"The misfortune has taken place; we neither of us knew anything about this at the time; and now that it has taken place let us see what can best be done to remedy the misfortune which has so occurred." We find the position of the case to be a very singular one indeed, and one which is not likely to recur in many, though it may in some, instances. It is this—A small piece of ground, an acre and a-half in extent, being the property of the pursuer, is surrounded by the property of the defenders; and the defenders thought (and the pursuer thought so too) that it was included in their property instead of being a separate portion surrounded by their property. That being the case, one thing was perfectly clear (and I shall make it clearer presently by reading the pursuer's own evidence) that nothing could be made by the pursuer of this acre and a-half of ground by working it himself. He would not sink a shaft or put up a steam-engine, or use any of the ordinary modes of working a mine in respect of this acre and a-half of ground; and indeed that is what he tells us himself, because, in words which were read by the learned counsel who last addressed your Lordships, the pursuer says in re-cross examination—"If the defenders had not taken away this coal, I might have arranged with them to take it away through their pit, but I don't think it would have been profitable to have done so; I would rather have it standing. I don't think there was any way in which I could have turned this coal into money;" and then he goes on to another subject. Several houses were built upon this property—they were apparently small cottages, not of a very heavy description in themselves, and he complains that if he were minded (though it does not appear that he ever was so minded) to build a

manufactory or some large building upon the ground, he would not, in consequence of its being so worked by the defenders, be in a position to find a foundation for his building. Whether he refers to that when he says that he would rather have it remain as it was I do not know, because in his evidence he touches upon it very lightly; but he says that he could not work it himself, and that there were no other people to whom he could dispose of it but the defenders themselves.

My Lords, that being so, I do not know what better mode there could have been for ascertaining what the value of the property in this case was than by doing what the pursuer himself says he should have been obliged to do in order to turn it into money, and what his own witness Mr Rankine said he always advised him to do. Mr Rankine, his witness, said—"It is not workable by yourself in consequence of its small size, and of its being so surrounded by other property; so make the best you can of it, only do not let yourself be driven into a corner. You may perhaps find yourself put to a disadvantage by having only one purchaser; nevertheless, do not part with it for a less royalty than you could get from anybody else, and whatever others are willing to pay I should stand upon, and if you cannot get that I should insist upon retaining the property in its present shape." That being so, the pursuer says in his evidence—"I don't think there was any way in which I could have turned this coal into money. It was about the middle of 1875, when the houses began to crack, that I first knew the defenders were in the course of working out coal under my feu. I spoke about the matter to Mr John Motherwell. I did not ask that the working should be stopped. I suggested that it should have been wrought stoop-and-room for the sake of protecting the property as much as possible. I made no objection to their going on with the working out of the coal below the feu; I was quite content that they should go on with the working." That was before he knew that the coal under the property was his own. Up to that time he could not of course know very well what rights he had to stop this working; but when you put the two sentences together—one that he could not have disposed of the property to any other person, and the other that he did not think of taking any steps to stop the working, I think he cannot complain that he has got from these gentlemen the very same terms that he would have got from all the adjoining proprietors with whom he had to deal. The learned Judges in the Court below seem to have proceeded upon that footing. The Lord President says—"In addition to the consideration above mentioned, it must be kept in view that the coal in question was surrounded on all sides by the coalfield of the superior, which is leased to the defenders. As the pursuer's estate is only one and a-half acres in extent, it is evident that the coal under it could not have been worked to profit by himself working independently. Nobody but the superior or his lessees could have worked the coal to any profit. Now, let us consider the position of the pursuer before the defenders commenced to work his coal. He was then in possession of a certain piece of coal, and his object must be assumed to be to make the most of it. It cannot be assumed that he could contemplate keeping the coal as a support of his cottages in-

stead of working it out. It was situated in a part of the country where every available bit of mineral is in use to be wrought. Now, at that point of time, had the parties come together, the coal would in all probability have been disposed of to the defenders on terms mutually advantageous. The pursuer says, indeed, that he could have made exceptionally good terms for himself, as his coal stood in the way of the defenders working. But I think when Mr Smith spoke of the "defenders' necessity being the pursuer's opportunity" he went too far. I do not think that the purchase of the pursuer's coal was a matter of necessity for the defenders, but only a matter of convenience. There was nothing to prevent their working round his coal. But, on the other hand, if the pursuer wished to make the most of his coal, he must have taken what the defenders would give him or let it stand." In that state of things, and finding that the coal has so been worked out, the learned Judges say—"We find that the best mode in this particular case of ascertaining the proper measure of damages is to give the pursuer what the books and cases tell us we are to give him—that is to say, as far as possible the value of his coal; and that we will do by saying that he shall be compensated to the same extent as others have been compensated in adjoining properties; besides that, he shall be compensated, and he has been by the decree compensated, for any damage done to the buildings upon the surface." That has been estimated and agreed upon by the parties subsequently at £200, or agreed upon in this sense, that it was acquiesced in by both parties. He is paid for the royalty £171; he is paid for the value of the coal which has been disposed of; and therefore it seems to me that all he can possibly ask for has been given.

The question of way-leave does not seem to have been argued in the Court below, but if it had been argued I should have been prepared to say that I acquiesce, in this particular case, and under all the circumstances of this case, which I think are extremely different in many remarkable particulars from those of *Jeggon v. Vivian*, 6 Chan. 742, in the interlocutor pronounced by the Lord Ordinary. But looking at the form in which this case has been brought before us, no question of this kind arises. Nothing could have been properly estimated and given as the value of the right exercised by the defenders of taking their waggons and coals from time to time through the ground of the pursuer, they assuming it to be their own ground. What profit can be said to have been derived from that? The profit is this—that you save distance; you save other payments which you might have had to make; and therefore inasmuch as the pursuer cannot make out that the slightest damage has accrued to him in respect of that user, what you have to pay to him is only the value of his coal, plus the damages to the surface. It appears to me to be quite consistent, and that the pursuer rightly has not pressed that case of the way-leave, because he would have done so with very little effect. Therefore, my Lords, under all these circumstances, I am prepared to acquiesce entirely in the judgment of the Court below.

LORD BLACKBURN—My Lords, I also think that

the judgment of the Court below should be affirmed, and that consequently the appeal should be dismissed with costs. The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer. Many things which you would properly allow in favour of an innocent mistake or trespasser would be disallowed as against a wilful and intentional trespasser, on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal believing it to be their own, when in fact it belonged to the pursuer, then comes the question—How are we to get at the sum of money which will compensate them? Now, my Lords, there was a technical rule in the English Courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty, and converted into a chattel, then instantly on its becoming a chattel it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would, in fact, have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do. Such, my Lords, was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean 25 years ago) Mr Baron Parke put this qualification on it, as far as I am aware, for the first time—*Wood v. Morewood*, 1840, 3 Adolp. and Ellis, 440. He says—"If, however, the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence, and so forth, and if the jury in estimating the damages are convinced of that, then you should consider the mischief that has been really done to the plaintiff, who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the

wrongdoer had bought it whilst it was yet a portion of the land, as you would buy a coal-field." That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jeggon v. Vivian*, 6 Chan. 742, which has been so much mentioned; it was followed in the Court of Chancery; and, so far as I know, it has never been questioned since that where there is an innocent wrongdoer, the point that is to be made out for the damages is, as was expressed in the minutes of the decree—"The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district"—that I understand to mean, as if the mines had been purchased while the minerals were yet part of the soil.

That, I apprehend, is what is to be done here, and that is what both the Lord Ordinary and the First Division of the Court of Session have endeavoured to do. They have come to different pecuniary results, and the question really comes to be, which is correct. Upon that, my Lords, the Lord Ordinary, as I understand, has gone upon this position. He said—"I have taken evidence, and the result of that is that it is agreed on all hands that this coal when it was brought to the surface actually did sell for £1768, 5s. 10d. I look at the evidence, and I take the evidence to be that the actual amount expended by the defendants (there is contradictory evidence on such points, as might have been expected, and it is not all very clear) was 4s. 3d. per ton, and deducting that from the £1768, 5s. 10d. he makes it £515, 12s. 1d., which is what he says is the sum that the pursuer ought to recover, taking off all the expenses that the defenders have incurred. But, then, as it would necessarily follow when you took away the coals that were below the land, that the surface of the land would come down, you must not take the sum which would be given as compensation for the injury to the surface twice over; you must not take that sum as being a matter which you are to be paid for, and also take the coals as if they had been got out without damage." On the Lord Ordinary's figures, as it seems to me, the £515, 12s. 1d. would be right, and if there was no other way of getting at the figures, if you could get evidence of the value of the coal *in situ* in a more correct way, I suppose it would be right to take it in that way. It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can. But then the Lord Ordinary himself observes, that taking that way of getting it, and giving the pursuer £515, 12s. 1d.—"The truth of the matter is, that the removal of the pursuer's coal by the defenders, in place of being a misfortune, has been to the pursuer a singular stroke of luck. The size of his feu is less than an acre and a-half, and the coal which it contained could not have been wrought to profit by itself. The expense of sinking a pit and providing machinery would many times over have exceeded the value of the minerals. Possibly, no doubt, the pursuer might have endeavoured to make with the defenders terms upon which his coal might have been raised along with the coal of which they were the tenants. But the return which would have been rendered to him under such an arrangement must have fallen far short

of what has been awarded by the Lord Ordinary. The lordship in the circumstances could not be expected to be higher than that paid by the defenders for the adjoining portions of the seam, and this upon the quantity taken out, even if increased by reasonable damages for injury through subsidence to the houses on the surface, would certainly have fallen considerably short of £500." Now, when you find that the Lord Ordinary himself, who is professing to ascertain what is the money value of the damage that the pursuer has received, says, "I have got at it in this particular way, but that money value is very considerably above the damage you have received, and it has been a singular stroke of good luck to you that you should get it," it occurs to one at once, *prima facie*, that there must have been something wrong in the way in which that money value was got at, and I think that there was an error in it, and that error was that the Lord Ordinary thought that he was bound by decisions (which I do not think he was) to take that mode, and that mode only, of getting at the value of the coal *in situ*, namely, the price which the coal fetched when it was sold, deducting from that the cost of hewing and drawing and so forth, and so to ignore totally the fact that this was an isolated small patch of land from which the pursuer, as he himself admits, could not possibly have got coal by any practical means whatever except by bargaining with the defenders. I think there the Lord Ordinary was under a mistake. It is there, I think, that the Lord President and the First Division go right when the Lord Ordinary went wrong. The Lord President points out very clearly to my mind that the pursuer could not have made any use of his coal at all as long as he did not let it to the defenders, who were the only people who could take it. He cannot do more than ask for his damage to the surface. That he is of course entitled to, as the defenders have taken his coal without his leave and against his will. If they had taken it with full knowledge *scienter*, there would have been very much more damage given, but they have innocently and ignorantly taken away his coal. "And then," says the Lord President, "we must see what was the value of the coal *in situ* as it stood there to the pursuer at the time when the defenders by mistake took it away, and for that we must give compensation." Then he takes the evidence of Mr Rankine and says—"That is the best evidence that we could have of the value of the coal;" and that sum is what the Court of Session has given. My Lords, I only wish to say one word to guard against misapprehension on a point which I at first a little misapprehended. I do not think that this decision of the Court of Session is that the royalty is the measure of the damages. It is only that it is evidence of the value which is the measure of the damages.

As to the other matters about the way-leave and so forth, I quite agree with what has been said by my noble and learned friend on the woolsack, that inasmuch as in the Court of Session on appeal from the Lord Ordinary those questions were not raised again, they were not before this House at all. If they were, I should be inclined to agree with what has been said by my noble and learned friend opposite (Lord Hatherley), and the pursuer would gain very little benefit from that contention.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for the Appellant—Davey, Q.C.—Guthrie Smith. Agent—Andrew Beveridge, Solicitor.

Counsel for the Respondents—Kay, Q.C.—Gloag. Agents—Simson & Wakeford, Solicitors.

## COURT OF SESSION.

Wednesday, February 18.

### SECOND DIVISION.

[Sheriff of Argyllshire.

M'EACHAN v. MACDONALD.

*Sheriff—Process—Expenses of Appeal where no Finding of Expenses in Sheriff-Principal's Interlocutor, and Judgment Affirmed by Court of Session.*

In an action in the Sheriff Court of Argyllshire, the Sheriff-Substitute (GARDNER) after decerning in favour of the pursuer, found him entitled to expenses in the usual terms. The defender appealed to the Sheriff (FORBES IRVINE), who dismissed the appeal, and added, "Affirms the interlocutor appealed against, and decerns." The Second Division dismissed an appeal to them, and found the respondent "entitled to expenses from the date of the Sheriff's judgment," and remitted to the Auditor "to tax the same and also the expenses found due in the Sheriff Court."

The Auditor in his report draw the attention of the Court to the fact that the Sheriff Principal had made no finding of expenses in the pursuer's favour as regarded the appeal to him, and reserved the question whether he was to be found entitled to them for the consideration of the Court. Counsel for the appellant contended that the pursuer was not entitled to these expenses in respect they were not decerned for—*Gordon v. Walker*, March 5, 1872, 10 Macph. 520; *Wilson's Sheriff Court Practice*, 302. Counsel for the respondent stated that in point of fact an interlocutor in the terms of that of the Sheriff-Principal was understood and acted on in the Sheriff Court of Argyllshire as carrying expenses, and he produced a letter from the Sheriff-Clerk to that effect; further, that the First Division had held that such an interlocutor carried expenses.

The Court *disallowed* the expenses in question, observing that the practice followed in the Sheriff Court of Argyllshire was a bad one, and that it was preferable to follow the course taken in the Court of Session in a case where a Lord Ordinary had made no finding as to expenses.

Counsel for Pursuer (Respondent)—Baxter. Agents—A. J. & J. Dickson, W.S.

Counsel for Defender (Appellant)—J. C. Smith. Agent—John Macmillan, S.S.C.

Friday, February 20.

### FIRST DIVISION.

M'NEILL v. CAMPBELL AND OTHERS (SIR JOHN CAMPBELL'S TRUSTEES).

*Process—Proof—Competency—Diligence.*

In an action for reduction of a settlement on the ground of facility and circumvention, the Court (following the case of *Livingstone v. Dinwoodie*, June 28, 1860, 22 D. 1333) refused a diligence at the instance of the defenders to recover a diary containing entries by a body-servant of the testator with regard to his master's health and state of mind.

Counsel for Pursuers—Asher—D. Robertson. Agents—M'Neil & Sime, W.S.

Counsel for Defenders—Balfour—Mackintosh. Agents—Waddell & M'Intosh, S.S.C.

Friday, February 20.

### FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.

TAYLOR AND OTHERS (TRUSTEES AND EXECUTORS OF THE MARQUIS OF TWEDDALE) v. THE EARL OF HADDINGTON.

*Real and Personal—Real Burden—Condition of Tenure—Singular Successor—Obligation to Relieve of Feu-duty.*

Lands were feued by a disposition "under the burden of the payment of eight bolls of wheat and eight bolls of barley to the Crown annually, . . . and these for crop and year Eighteen hundred and nine, and in all time thereafter; and which burdens are hereby declared real liens and incumbrances affecting the said whole lands and others above disposed, and shall be engrossed in the instruments of seasin to follow hereon, and in all the future investitures and transmissions of the said lands and others, otherwise the same shall be void and null." The payment of a blench-duty was the only condition of the tenure of the feu.

In a personal action at the instance of a singular successor of the disponent against a singular successor of the disponent, held (*rev.* Lord Rutherford Clark, Ordinary) that the defender was liable in payment of the converted value of the 16 bolls of victual feu-duty for the crops of the years during which he had held the feu.

*Opinion per Lord President (Inglis) and Lord Mure* that although the annual payment of the 16 bolls was effectually constituted a real burden on the lands, no personal obligation had been transmitted as against singular successors, arising either from the terms of the original contract or from the principles of tenure, but that the pursuers