tween her and her husband. If this was not antecedently known to Mr Robson, I think he was bound to inform himself regarding it before allowing Mr Bywater, towards whom he then was holding a professional relation, to complete the transaction. But I put aside all inquiry into this matter, on the ground that, in the present question, such alleged ignorance is, in my apprehension, irrelevant. Where one of two parties so situated engages another in a transaction for the benefit of himself, or of others in whom he is interested, into which other transaction that other would certainly not have gone if a particular claim had been set forward, and the transaction cannot be, or is not proposed to be undone, it will not, as I think, warrant a prosecution of the claim to say that, at the moment, the parties were not conscious of its existence. If the fair deduction from the circumstances be, that if the claim had been present to their minds as a claim still enforceable, the transaction would not have been gone into, it is against equity to hold by the transaction and still to enforce the claim. The transaction cannot be maintained in validity, and yet a claim made, the disclosure of which at the time would beyond doubt have prevented the transaction being engaged in. Undoubtedly it must be made very clear that such would have been the result of disclosure. But in the present case I consider it to be beyond the shadow of a doubt that if the claim now made had been stated to Mr Bywater, as a claim still held over him, he would not have made the arrangements he did, whatever others he might have framed. It therefore appears to me that the pursuers are barred from prosecuting the present claim, in whatever precise condition of knowledge or ignorance all concerned stood at the time.

I am of opinion that the Lord Ordinary has rightly assoilzied the defenders.

LORD PRESIDENT—I have nothing to add.

Agent for Reclaimer—Thomas Landale, S.S.C.
Agent for Respondent—L. M. Macara, W.S.

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## *Thursday, March* 17.

### BAILLIE AND OTHERS *v.* DURHAM.

*Heir and Executor—Vesting—Lease—Lordships—Rent—Sale.* Under contract the minerals in an estate were let to tenants for a fixed rent payable at Whitsunday. The proprietor, however, had the option of taking, instead, the lordships on the minerals "raised, sold and carried off, or consumed on the ground," as estimated at Martinmas for the year preceding, deducting the rent paid at the previous Whitsunday. He died on 31st May 1869. *Held*—(1) that the contract was one of lease and not of sale; (2) that the executors were entitled to half of the year's lordships, less the rent paid at Whitsunday 1869; and (3) that lordship was not exigible on minerals raised to the surface and lying unsold at 31st May 1869.

The late Thomas Durham Weir, proprietor of the lands of Boghead and others, by tack dated 22d July and 25th August 1851, let to Messrs Russel & Son, coalmasters, Blackbraes, the minerals in the lands for thirty years from Martinmas 1849, which was declared to be the commencement of the lease and entry of the lessees. "The lessees were by the tack taken bound to pay a fixed rent of £100 annually for the coal and other minerals let (with the exception of the first year of the lease, during which the royalties only, and no fixed rent, were to be charged); or, in the option of the proprietor, certain royalties specified in the tack. Then followed a declaration as to the term of payment, in the following terms—viz., 'Declaring hereby that the foresaid fixed rent or optional lordships shall be paid as follows, *videlicet:* at the term of Martinmas 1850 the lordship on the several minerals raised, sold, and carried off or consumed on the ground (except colliers' coal and others aforesaid) in the preceding year shall be reckoned up at the several rates hereinbefore provided for, and the amount thereof shall then be paid to the proprietor, and at the term of Whitsunday 1851, and at every subsequent term of Whitsunday, during the currency of this lease, the fixed rent for the half-year preceding shall be paid, and at Martinmas thereafter, and also at each subsequent term of Martinmas during the currency of the lease, the lordships payable in respect of the whole minerals raised, sold, and carried off or consumed on the ground as aforesaid, except as before mentioned, shall be reckoned up when the proprietor shall declare whether he is to take the other half-year's fixed rent due at each respective term of Martinmas, or the lordship for the bye-gone year, and if he shall prefer the lordship for the year past, the same shall then be paid by the lessees under deduction of the half-year's fixed rent, paid to account at the preceding term of Whitsunday, with a fifth part more of each term's payment of the said respective rents or royalties of liquidate penalty in case of failure, and the legal interest of each term's payment from the time the same shall become due during the not-payment thereof, and so forth half-yearly and termly thereafter, during the foresaid period of thirty years, excepting the first year, as aforesaid.'"

By minute of agreement between the parties, dated 8th February 1860, certain alterations were made on the amount of the fixed rent and lordships; and in regard to the term and mode of payment it was stipulated as follows:—"And further, that the said second party, the tenants, shall, at the term of Whitsunday next, 15th May 1860, and at each subsequent term of Whitsunday during the currency of said tack or lease, pay to the said first party, the landlord, or his successors, the sum of £350, being the increased optional fixed money-rent as aforesaid; declaring that at Martinmas next, and at the term of Martinmas of each year thereafter during the currency of said tack or lease, the lordship payable on the several minerals for the twelve months preceding, shall be reckoned up; and the amount thereof, so far as the same shall be found to exceed the said sum of £350, shall thereupon be paid by the tenants to the landlord at said term of Martinmas in each year yet to run of said lease, as in full of each year's rent and lordships."

At Whitsunday 1869 the fixed rent of £350 was paid to Mr Weir by the tenants. He died on 31st May following, and questions arose in regard to the rights of the executor to lordships on minerals sold and carried off or consumed during the year ending at Martinmas 1869, and on minerals raised to the surface and lying unsold at 31st May 1869.

HORNE and DEAS for the executors.

SOLICITOR-GENERAL and MACKENZIE for the heir.

At advising—

LORD DEAS—The late Thomas Durham Weir was proprietor of the lands of Boghead and others. He granted a lease of the minerals to the Messrs Russel for thirty years after the term of Martinmas 1849, at a fixed rent payable half-yearly at Whitsunday and Martinmas, and with an option to the landlord of certain lordships. Afterwards a change was made on the lease of the fixed rent to £350, and it was to be payable at Whitsunday alone; but still with the option of taking the lordships. The proprietor died on 31st May 1869, and the question raised before us is, what portion of the mineral rents go to his heir and what to his executor? The heir claims the whole lordships from the minerals after Mr Weir's death, and so does the executor. And each claims the minerals raised to the surface and unsold at 31st May 1869.

The first question to be considered is, how far the first agreement is of the nature of a lease or of a sale? There is only one element of the contract of sale present—viz., that what is to be taken away is part and portion of the substance of the estate. Minerals are not properly a crop. Properly speaking they are a part of the substance of the estate. As respects endurance the contract is of the nature of lease. It is to last for thirty years; and that is not a sale. In short, in the important results, if not in all, it is of the nature of a contract of lease. The landlord may sequestrate the rents. And it certainly is a contract to which an action of removing is applicable. When you look at the deeds themselves they are contracts of lease and not of sale. I have come, therefore, without difficulty, to hold that this is a contract of lease and not of sale, whatever the effects may be.

Now, what are the stipulations of the lease. Only lordships are to be paid at the first term, as it would take some time to get the machinery into operation. But thereafter a fixed rent is to be paid. By agreement that was afterwards made the rent was increased; and a bonus was to be paid to the landlord. The tenants no doubt had good reason for agreeing to pay an increased rent. It is easy to see why the fixed rent was increased. But it is to be noticed that, though the rent is to be payable at Whitsunday, it is judged on the rent ascertained at Martinmas; and the payment at Whitsunday is to be held only as a payment to account. In these circumstances I have come to be of opinion in regard to the legal question that the rent is to be treated as payable at Whitsunday and Martinmas. The one party contends, that like house rents, the rent vested at once; and that the executor is therefore entitled to the rent of the year. Whilst the other side say it is payable like the rent of grass parks. I am humbly of opinion that there is no ground for the analogy of house rents. The reason why the rent of an agricultural subject is payable at a postponed term is, that the tenant from the sale of the crop may be enabled to pay his rent. Now, minerals are not saleable regularly. At some periods of the year the sale is not so great. And in this particular case, it might turn out that the lordships at Whitsunday, though less than the fixed rent, might at Martinmas greatly exceed it. I am therefore of opinion that one-half goes to the heir and one-half to the executor. And in regard to the second question, I am of opinion that the minerals brought to the surface by the labour of the tenant, and not carried off are the property of the tenant, subject to the landlord's hypothec.

LORD ARDMILLAN—I concur with Lord Deas in the statement he has given of the case. The fixed rent is, I think, just a payment to account of the entire rent as payable at Martinmas. I think the rent must be held as payable half-yearly; and that one-half ought to go to the heir and one-half to the executor. There is no reason for treating the lordship as other than a rent.

LORD KINLOCH—By the deeds executed between the late Mr Durham Weir and Messrs Russel, Mr Durham Weir "sets, and in tack and assedation lets" the coal, ironstone, iron ore, limestone, and fireclay in the lands of Boghead and Falside for thirty years from Martinmas 1849, with the usual powers of working. For this right the lessees became bound to pay, in the option of the landlord, a fixed rent (so expressly called) of £350 payable at Whitsunday yearly, or a lordship of so much per ton "on the several minerals raised, sold, and carried off or consumed on the ground (except colliers' coal and others foresaid) in the preceding year," payable at Martinmas yearly. The fixed sum of £350 was always to be paid at Whitsunday; and if at Martinmas the lordships for the preceding year were found to exceed this amount, they were to be paid under deduction of this sum.

Mr Durham Weir, the landlord, died on 31st May 1869. At Whitsunday immediately previous he had received the fixed sum of £350. At Martinmas it was found that the lordships for the preceding year on minerals disposed of amounted to £2317, 16s. 8d., or, deducting the sum of £350, to £1967, 16s. 8d. Mr Durham Weir left a trust-disposition conveying to the trustees named in it his whole personal property. The question now arises, What are the respective rights in the above lordships of these trustees, as his disponees and executors, and of Mr Robert Weir Durham, who succeeds as proprietor in entail to the estates of Boghead and Falside? In other words (for so the question is convertible), What are the respective rights in this matter of heir and executor?

I consider the question to be determinable on the footing of the right given by Mr Durham Weir to Messrs Russel having the proper legal character of a lease. It is so in form and expression, in conventional estimation, and I think in legal principle also. It is a right to the use of the lands, for a particular purpose, for a term of years. The use no doubt implies the destruction, to a certain extent, of the substance of the property. But this, which is a not uncommon circumstance, does not prevent the contract being, what it calls itself and is commonly reckoned, a proper lease. I can find no other legal category in which to place it.

Again, the lordships payable under this contract I can consider nothing else than rent, in the proper legal sense of the term. The specified lordships only form the means of computing the sum of money rent payable at Martinmas yearly. In drawing these lordships the landlord is neither acting as partner with the lessees, and as such drawing a part of the produce, nor as in any other character drawing a commission on the sales. He is exclusively a landlord drawing rent. The calculation of the lordships is simply to the effect of

estimating the money rent he is to draw. The case must be disposed of in precisely the same way as if a fixed sum of money rent was payable at Martinmas yearly. The sum is, from its nature, fluctuating; but it is fluctuating in amount only. In legal character it is a money rent, and nothing else.

In regard to the sum of £350 payable always at Whitsunday, it comes, after the lordships are estimated at Martinmas, to be nothing but a payment to account. It is the same as if the rent was all a lordship; with this sum an instalment of the whole amount, paid during the currency of the year.

In this state of things the question arises, How the money rent thus payable at Martinmas yearly is to be dealt with as between heir and executor? We have on this point no express decision to govern our course, and must determine the case according to a sound application of general principles.

In the case of arable farms the rule is well settled. The rent is held paid for the crop, and one-half is considered legally due at Whitsunday, the other half legally due at Martinmas of the year in which the crop is reaped, to whatever after term its payment is conventionally postponed. Hence, if the proprietor survive Whitsunday of that year, he transmits one-half of the year's rent to his executors, even though conventionally not payable till Martinmas or some after term.

The same principle has, in substance, been applied in the case of grass farms. The grass has been considered the crop: and survivance of the Whitsunday of the year's crop has been considered sufficient to transmit to the landlord's executors one half of that year's rent. Hence has arisen a result, which at first sight appears anomalous, that where entry is made to a grass farm at Whitsunday, the first-half year's rent is considered due at the moment of entry, and transmits to executors. This, however, is just following out the principle, which makes Whitsunday always the term when the first half-year's rent is legally due. So exactly it will happen if the entry is in April previous. The first half-year's rent will be legally due at the Whitsunday immediately following. So, if at any previous date within the year. If the entry could be supposed to be at Martinmas previous, the principle would still make the first half-year's rent legally due at the succeeding Whitsunday.

Houses present a case having an essentially different character; for here the payment is not for crop, but occupation: and there are strong reasons why the division should be made on the footing of a debt becoming due *de die in diem*, and, therefore, to be apportioned according to the respective periods of possession. But the law has not so proceeded, but, holding the case as still one of termly payment, has applied to houses the rule applicable to grass farms. So it was done in the well known and much abused case of *Binny* v. *Binny*, 28th January 1820. Under this decision, I hold it settled that where entry on a yearly lease is made to a dwelling-house at Whitsunday (the usual term of entering to houses in Scotland), the first half-year's rent is legally due that very day, so as to transmit to the landlord's executors. It would seem to follow, by application of the analogy of the grass farm, that if a Martinmas entry had been made to the house, the first half-year's rent would be legally due, not then, but at the succeeding Whitsunday. I find authority for so holding noted in Mr Bell's Book on Leases, 4th edition, vol. i, p. 492.

Having regard to these and similar analogies, I come to consider how the mineral rent in this case, arising on a Martinmas entry, and due at Martinmas yearly, is to be dealt with in the question between heir and executor. I cannot apply to this rent the principle applicable to a debt falling due *de die in diem*: for it is a termly payment, and so must be considered as legally due at a term, whatever that term may be. One mode of dealing with it would be to regard the legal and conventional term as one and the same, viz., Martinmas yearly: and so to give the whole year's rent to the heir, the landlord not having survived Martinmas. But I do not think that this conclusion would tally with the general principle applied to rents in Scotland. It would seem anything but equitable to hold that if the landlord should live to the very day before Martinmas, the whole of the year's rent should go to his heir, no part to his executor. It seems to me on the whole to be most consistent with legal principle to consider the rent, like other rents, although conventionally payable at Martinmas, to have been legally due in two half-yearly portions of equal amount, the one at Whitsunday, the other at Martinmas. In this point of view, the half due at Whitsunday 1869 will belong to the trustees of the late Mr Durham Weir; the half due at Martinmas to Mr Weir Durham the heir of entail. And so I think we ought to decide.

Allowance must of course be made for the payment of £350 received by the proprietor before his death; and for which, as going into his general estate, his executors are accountable.

The executors have clearly no right to any part of the lordships on minerals raised, and on the hill, but not sold before Martinmas 1869.

LORD PRESIDENT—I concur with my brother Lord Deas in the principles of law he has stated as applicable to the case; and I come to the same conclusion as I understand all your Lordships do. The total lordships for the year are £2317, 16s. 8d. If you halve that it gives £1158, 18s. 4d.; and from that must be deducted the £350 Mr Weir had already received. The balance is what the executors are entitled to.

The following was the interlocutor pronounced:—"*Edinburgh, 17th March* 1870.—The Lords having heard counsel for the parties on the Special Case as amended; find and declare that the fixed rent and lordships payable in terms of the current lease for the year 1869 (the fixed rent at Whitsunday of that year and the lordships under deduction of the fixed rent at Martinmas following) fall to be divided equally between the heir and the executors of the last proprietor of the estate, who died on the 31st May 1869; find that the total amount of the said lordships, ascertained at the said term of Martinmas for the year 1869, amounted to £2317, 16s. 8d., but became payable by the tenants only under deduction of the said fixed rent, which had been paid to the last proprietor at the said term of Whitsunday, or at least before his death; find and declare that the party of the second part is entitled to payment of £1158, 18s. 4d., being one-half of the said total amount of lordships; and that the parties of the first part are entitled to payment of £808, 18s. 4d., being the other half of the said total amount of lordships, after deducting

the sum of £350, being the amount of fixed rent payable at the said term of Whitsunday, and paid to the deceased proprietor before his death; find that the parties of the first part have no right to any lordships or minerals raised to the surface prior to the said term of Martinmas 1869, but not payable in terms of the lease till the arrival of a term or terms subsequent to the said term of Martinmas 1869; and decern."

Agents for Executors—Duncan Dewar & Black, W.S.

Agents for Heir—Mackenzie & Kermack, W.S.

## *Thursday, March* 17.

### BROWN *v.* ORR.

*Custody of Children—Expenses—Trust-Estate.* In a competition for the custody of children between their maternal grandmother and their paternal aunt and uncle, the Court assigned the care of the children to the former, on the ground of her possessing a larger income than the two latter put together, and therefore being able to make the children more comfortable, and also because the uncle was somewhat irritable from ill health. As, however, the petition by the uncle and aunt was approved by the majority of the tutors nominated by the father of the children, they were allowed expenses out of the trust-estate.

Major Brown died in London in May 1869, predeceased by his wife, and leaving three children. He was also survived by a brother and sister, who have come to reside in Edinburgh. Major Brown appointed certain relatives and friends trustees in 1866, and nominated them also as tutors to his children. Four of these six tutors and trustees presented a petition to have the custody of the children given to Captain and Miss Brown, on the ground of the children's affection for their aunt, the suitability of Edinburgh for their education, and the desirability of aiding the income of Captain and Miss Brown by the board paid for the children. This application was resisted by the remaining two tutors and trustees, who thought it better the children should reside with their maternal grandmother. They stated, as grounds for their opposition, that of the petitioners one was the real applicant, Captain Brown, and another was his brother; and that Captain Brown, having suffered from a paralytic stroke, was of so peculiar and irritable a nature that his house would not be a suitable home for the children. The petitioners, on the other hand, replied that the respondents were sons-in-law of the children's grandmother; and that as Miss Brown for three years had taken charge of the children in India, where they were born, it was most suitable they should reside with her.

WATSON and BALFOUR for petitioners.

SOLICITOR-GENERAL and CRAWFORD in answer.

At advising—

LORD PRESIDENT—The question is one entirely in the discretion of the Court; and the exercise of that discretion involves many delicate considerations. On the whole matter, I am of opinion that the children ought not to be transferred from Mrs Ferrier to Captain and Miss Brown. Undoubtedly weight is due to the opinion of tutors. But in the present case that is greatly removed by the fact that the tutors are not agreed; that one of the four petitioners has a direct interest in making the application, and that another is in Australia; and I cannot but doubt whether he was fully informed of all the circumstances when he wrote the letter produced. Other two, Messrs Latham & Fraser, may be neutral; but whether they are well acquainted with the comparative merits of Mrs Ferrier and Miss Brown we are not informed. Upon the whole, while weight is due to the opinion of the majority, it is not an opinion to which the Court is bound to defer. It is only one of the circumstances of the case. Nor are we determining the place of education of the children. They are of very tender years. What arrangement may afterwards be necessary we cannot now say. Circumstances may change. The question now is, Where these young children ought to live? I cannot doubt that either Mrs Ferrier or Miss Brown is well qualified to take charge of them. The only question is, What is the best home for them? As to the wishes of the father, I cannot say we have distinct evidence of any preference. He had confidence both in Mrs Ferrier and Miss Brown. The incomes of both parties are very moderate. But it is of great consequence to children born in India that their home should be made as comfortable as possible. Now, it is clear that they are more likely to be so with a single lady living in Rothesay, with an income of £300 a-year, than with a lady and gentleman living in Edinburgh, with a joint income of £228. The health, too, of Captain Brown is uncertain. I think his paralytic stroke ought not to be disregarded. We know that the temper of people suffering from such a malady as his is not very certain. On the whole matter, I do not think the petitioners have made out a case, or that we can grant the prayer of the petition.

LORD DEAS—I agree with your Lordship. I see no sufficient ground for removing the children. Both ladies are unobjectionable; but we must make a choice, and I give the preference to the grandmother under present circumstances.

LORD ARDMILLAN—Tutors are not the custodiers of the children. The grandmother is the natural and becoming custodier. This has been recognised by decisions of the Court, and it is commendable to reason. Some of the strongest and warmest affections have subsisted between a husband and his wife's mother; and Major Brown seems to have been much attached to his wife's side of the house, as is shown by the letters we have seen. To her Major Brown sent his eldest child. Although his mind may not have been quite made up, the correspondence shows that the tendency of his inclination was to place them with Mrs Ferrier. It shows deep affection for her; and I have no doubt that his wish was that they should be under the roof of the lady he loved better than any other, except his wife.

LORD KINLOCH—I am of the same opinion. I have no doubt whatever that, if given to Miss Brown, the children would receive every care and attention; but, in the circumstances, I cannot for a moment think of removing them from their present home. I decide on existing circumstances. There is no need to grant any order to give their uncle and aunt access to them. They will, I am sure, get more frequent and more ready access without it.

On the question of expenses, the Court allowed