servance of which was a condition precedent to the exercise of the statutory power. But from the minutes founded on by the defender, it is made certain (1) that no previous notice on the door of the parish church whatever was made, and consequently no intimation of that having been done was or could have been made at a meeting of the trustees; and (2) that no ultimate decision which could have been appealable was actually pronounced—the *ex parte* resolution of the trustees being prospective only, and made dependent on the altered line of footpath being found satisfactorily completed, by a committee of district trustees. The proceedings were thus at variance with the express words of the Act, and the trustees, in giving authority to shut up the footpath, did so without notice of any kind to the public, as prescribed by the very words of the enactment. This being so, it cannot be held that this footpath was legally shut up in 1824.

The defender contended that he was entitled to the presumption, especially after so long a lapse of time, that *Omnia rite et solemniter acta fuisse.* But the presumption to this effect, even were it applicable to so great an omission as here occurred, must yield to the fact; and, as already said, there is demonstrative evidence afforded by the minutes of the trustees themselves, that no publication of the intention to shut up this footpath was made, and that no ultimate decision to shut up the road, after the public had been certiorated of the intention to do so, was ever adopted by the trustees. This also affords a conclusive answer to the plea of finality of the decision to shut up the road after the lapse of twelve months. There was no ultimate decision in terms of the statute to admit of it.

On the whole, keeping in view that the jury have affirmed the use of this public footpath for time immemorial prior to the institution of this action, and have found for the pursuers, conditional only upon the decision of the Court upon this reserved point being in their favour,—I am of opinion that the verdict must be entered for them, and that their motion to have decerniture in terms of the conclusions of the summons should be granted.

Lord Benholme said that it was plain that there was an obvious distinction between the powers given to the trustees to alter or suppress roads. If they proceed under section 21 they could do no more than alter; if they shut up a road, they must proceed under the 22d section. It was plain that this was a shutting up, and not an alteration of the road, and it was also plain that the intimations required by the 22d section had not been made. It appeared from the minutes and petition that the trustees had proceeded under the 21st section.

Lord Neaves concurred.

The Lord Justice-Clerk said that it appeared to him to be an open question whether Road Trustees were entitled by these statutes to exercise any right of altering or suppressing a road like the present, upon which they had never expended any funds in its construction or maintenance.

The Court accordingly applied the verdict as in favour of the pursuer, and decerned and declared in terms of the conclusions of the summons, with expenses.

Agents for Pursuer—Wotherspoon & Mack, S.S.C.

Agents for Defenders—Mackenzies & Fraser, W.S.

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## *Tuesday, November* 29.

### HUNTER FINLAY *v.* BLAIR.

*Mineral Lease—Mining—Water—Injury.* Premises which had been let as print-works for forty years were supplied with water from neighbouring springs. The proprietor granted a lease of minerals in adjacent land, and in working the pits the springs were dried up, and the water pumped to the surface. The lessee of the minerals having sold the water to the tenant of another print-work,—*interdict granted* against the removal of the pipes which the latter laid down for carrying away the water to his own works.

*Opinion,* that in subterranean operations a mineral tenant was not responsible for depriving a neighbouring tenant of water which he had used for forty years, so long as the workings were fair and ordinary.

This was an appeal from the Sheriff-court of Lanarkshire, in a question between Blair & Co., calico printers, Maryhill, and Hunter Finlay & Co. calico printers, Dawsholm. Blair & Co. presented a petition to the Sheriff, to the effect that they had leased from the tenants of a pit which was being sunk near to their print-works, the water which should be pumped up from said pit, for the sum of £20 per annum. They alleged that they had received permission of the North British Railway Company to put down pipes upon their property to carry the water to their print-works, and that the respondents had forcibly broken these pipes for the purpose of abstracting the water for their own use, and they asked for interdict.

The respondents replied, that they held their printworks under a lease from Sir George Campbell, and that the subjects let to them included certain subterranean springs which were necessary for the supply of the water for carrying on calico-works. That two years ago Sir George let the minerals of his lands adjacent to those print-works, and that the tenants Messrs M'Nair, Stokes, & Co. sunk a pit close to the springs, and that the water supplied by the springs to the petitioners was thus pumped to the surface. The Messrs M'Nair and Stokes continued to allow the water thus pumped up to flow in its natural direction, whereby it was available for the print-works of the respondents, until recently, when they granted a lease of it to the petitioners Blair & Co., and the pipes in question were put down. They pleaded "(1) The mineral tenants having no proprietary right in the water pumped out of their pit, they could not legally sell the same to the petitioners, or any one else. (2) The water in question being in most part drained from one or more of the sources from which the respondents obtained the supply necessary for their works, the mineral tenants were bound to discharge the same in such a way as to allow it to flow in the direction which (but for their operations) it would naturally have done."

The Sheriff-substitute (Steele) pronounced this interlocutor and note:—*Dumbarton, 22d August* 1870.—The Sheriff-substitute having heard parties' procurators *viva voce*, and resumed consideration

of the process, Finds that the pursuers and defenders have each a calico printing-work on the banks of the river Kelvin, at a place where the stream forms the march-line between the counties of Lanark and Dumbarton, the pursuer's works being in Lanarkshire, and the defenders' in Dumbartonshire: Finds that, about two years ago, an ironstone pit was sunk by the firm of M'Nair, Stokes, and Dixon in the neighbourhood of the defenders' works, and it was arranged between that firm and the pursuers that the water pumped from the pit should be carried across the Kelvin to the pursuers' works for the purposes of their trade: Finds that the pursuers agreed to pay a rent of £20 a-year for the water thus assigned to them, and they obtained from the North British Railway Company permission to make use of their viaduct, which crosses the Kelvin near the spot, for laying pipes for the conveyance of the water across the river: Finds that, these matters having been thus arranged, the pursuers proceeded to lay their pipes, but were interrupted by the defenders, who broke or disconnected the pipes, so as to prevent the water from passing along them, and the present action of interdict has been resorted to by the pursuers with the view of preventing such interference in future: Finds that the plea maintained by the defenders is to the effect that the water pumped from the pit has been drained from sources from which they formerly obtained their water supply, and that they have thus a preferable claim to it, and that it is *ultra vires* of M'Nair & Co., as tenants and possessors of the pit, to dispose of the water to the pursuers: Finds it not denied by the defenders that it was competent for M'Nair & Co. to sink the said pit, and to remove and appropriate the minerals found therein; and this being conceded, it appears to follow that the water accumulating in the excavations thus made, and forming a *surrogatum* for the abstracted minerals, became the property of M'Nair & Co., and has therefore been competently disposed of by them to the pursuers: Therefore, and for the reasons stated in the annexed note, repels the defences, and declares the interdict perpetual.

"*Note.*—It is no doubt true that a proprietor is not entitled to deal with the water on his ground so as, unnecessarily or capriciously, to subject his neighbour to loss and inconvenience. He cannot, for instance, alter the course of a stream so as to deprive the inferior proprietor of the use of it, or collect the surface water and discharge it upon his neighbour's ground at a point to which it does not naturally flow. At the same time, he is entitled to do every ordinary act for the improvement and management of his property, such as the drainage of his fields, conducted in the usual and approved manner. In this way, the proprietor of minerals is not to be prevented from sinking pits, and working coal or ironstone seams, though the result may be to drain injuriously the surface of the ground belonging to a different party. The defenders plead that this has taken place in the present instance, and that a spring from which they derived a portion of their water supply for the purposes of their trade has been interfered with and dried up. The defenders do not maintain that this was an illegal act on the part of the occupiers of the pit, but they maintain that when these parties, by means of machinery, and in order to restore their pit to an available condition, have again brought the water to the surface, they must either hand it over to the defenders, or place it in a position in which it may be available to them. There is no authority for this doctrine. The water as soon as it quits the surface, and seeks a lower level occupied by a different party, ceases to be of any value to the surface proprietor, and he loses his interest in it, and the proprietor of the lower level becomes the owner of the water, for the reason,—apparently satisfactory,—*that he alone has access to it;* and the result of this is, that if, by machinery or otherwise, and at his own expense, he again raises the water to the surface, he may dispose of it to any party he chooses. This view is supported by the authority of the case of *Irvine* v. *The Leadhills Mining Company*, 11 March 1856, in which it was found that a mining company was entitled, for their own advantage and convenience, to alter the drainage of their mine so as to send away the water by a different burn or stream from that which they had been in the practice of using; and that a neighbouring proprietor was not entitled to interfere with their operations, though he was thereby deprived of the use of water which he had formerly enjoyed. See also the cases of *Campbell* v. *Bryson*, 16 December 1864; *M'Kenzie* v. *Woodrop*, 24 January 1854; and *Lord Blantyre* v. *Dunn*, 28 January 1828."

The respondents appealed to the Court of Session.

FRASER and MACLEAN, for them, contended that the general proposition that springs may be interfered with by subterranean operations, only holds when there has been no lengthened use and possession of the spring for a specific purpose. Here the spring had been used as a part and pertinent for the purposes of the print works for forty years; and quoted *Major and Chadwick*, 9 L. J. (Q.B.) 159; *Dickens* v. *Great Junction Canal Co.*, 21 L. J. (Ex.) 242; *Popperwell*, 4 L. J. (Ex.) 248; and *Whitehead*, 27 L. J. (Ex.) 248.

R. V. CAMPBELL, in answer, quoted Broom's Com. 796; and *Fletcher* v. *Rylands*, 3 Law Rep. (Ex.) 330.

At advising—

The LORD JUSTICE-CLERK said that the law of the case was plain. On the authority of *Fletcher* v. *Rylands* (quoted *supra*) a lessee of minerals was entitled to work them in any way he pleased, without reference to the injury he might inflict on a neighbouring proprietor, so long as he works them in a fair and ordinary way. He was not responsible for pumping dry springs which had formerly been advantageous to a neighbouring tenant, although it might be, that if the landlord had guaranteed the water of these springs to the tenant under the lease, he would be liable in damages for the withdrawal of it. In the present case the respondents had purchased the water from its proper owner, and had conveyed it by pipes through land which did not belong to the appellants, and consequently the appellants must be interdicted from injuring or lifting these pipes.

The other Judges concurred.

Appeal dismissed.

Agent for Appellants—John Galletly, S.S.C.

Agents for Respondents—Maitland & Lyon, W.S.

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*Wednesday, November* 30.

## FIRST DIVISION.

### MACLEOD *v.* INGLIS.

*Process—Reclaiming Note—Withdrawal—Expenses.*