ground "that the trustee now proposes to ask questions regarding the details of an account, that account being the subject of a criminal charge against Mr Wright." The objection substantially is that if the witness is allowed to go on something may be said that may be used in a criminal charge, not against the witness but against his partner. Now, it is a valuable provision of our law that a person cannot be called upon to criminate himself, but it is a novel suggestion that a third party—I do not speak of parties in the relation of husband and wife—shall come forward during the examination of a witness and say "this examination shall not proceed, for the evidence of this person may lead to a criminal charge against me." There is no ground whatever in our law for such a proposition.

The only question that remains is whether the examination should proceed in private. This is a question that should be determined by the trustee, and the considerations which have been suggested by the counsel for the appellant might very well and very properly be entertained by the trustee. The Sheriff cannot interfere with the trustee's discretion, and it would be exceedingly difficult, to say the least, for this Court to interfere.

The Court therefore dismissed the appeal.

Counsel for Appellant—J. G. Smith—Dickson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—C. J. Guthrie. Agent —Lockhart Thomson, S.S.C.

Tuesday, December 10.

FIRST DIVISION.

[Lord Adam, Ordinary.

CHRISTIE, PETITIONER.

Entail—Provision to Widow—Aberdeen Act (5 Geo. IV. cap. 87), sec. 1—Effect of Mineral Rents in computing Widow's Provisions.

In estimating the annual rental of an entailed estate for the purpose of ascertaining the amount of the one-third part of the free yearly rent which the first section of the Aberdeen Act allows to be charged thereon as a provision to the widow of an heir of entail, the rent payable under a mineral lease current at the time is to be taken *in computo*, provided it can be said to have a "reasonable permanence."

A mineral lease for twenty-one years, two of which had run at the date of the death of an heir of entail, was thrown up by the tenant in virtue of a break in his favour in the seventh year of its currency, as he found that there were no minerals to work. No new tenant had been found five years afterwards. *Held* that the rent under that lease fell to be taken into account in estimating the annual rent of the estate with a view to fixing the amount of provision to the widow of the deceased heir.

Braithwaite Christie, the petitioner, was heir of entail in possession of the estate of Baberton, and Mrs Christie, the respondent, was widow of Alexander Christie, who died on 7th August 1868, and who was the previous heir in possession of the estate.

In virtue of the powers conferred by the 1st section of the Aberdeen Act, 5 George IV., cap. 87, Mr Alexander Christie had granted in favour of the respondent two bonds of annuity, dated respectively 1st December 1864 and 1st April 1867, which, amounting as they did to £375 yearly between them, exceeded the sum of one-third of the free yearly rent or value of the estate which he was entitled to grant.

The free agricultural rental of the estate amounted to £764, 16s. 8d.; the minerals upon it were let to Mr Gowans by a lease dated 26th January and 2d February 1866. The rent was £200 per annum, the first half-year's rent being payable at Lammas 1867 for the half-year preceding, and the next at Candlemas 1868, and so during the currency of the lease. It was further thereby stipulated that the first year's rent should not be exacted, but that if the tenant removed any minerals from the ground during that period, he should pay £100 in name of rent. The lease further contained a break in the tenant's favour on giving six months' notice prior to any term of Candlemas occurring at the end of the third, seventh, or fourteenth year of the lease.

Mr Gowans in 1870 brought a reduction of the lease, on the ground that the minerals thereby let were not workable to profit. That case was decided against him in the Court of Session, on the ground that by the special terms of the contract he had undertaken the risk of profit; and in the House of Lords, upon that ground, and also upon the further ground that there had been no failure of the subject let, and that there was in law no implied warranty that the subjects should be workable to profit.—*Gowans* v. *Christie*, Feb. 8, 1871, 9 Macph. 485; H. of L., Feb. 14, 1873, 11 Macph. 1. Mr Gowans accordingly took advantage of the second break in the lease, and put an end to it at Candlemas 1873.

The minerals had not since been let, or worked; and the petitioner averred that there were not now, and never were, minerals on the estate capable of being worked to profit, or, in other words, minerals of any yearly value. The respondent averred that there were then, and were now, minerals in the estate of the yearly value at least of the rent paid by Mr Gowans.

So long as Mr Gowans continued to pay rent for the minerals, no question arose between the parties. An annuity of £300 was paid to the widow, as being one third of the yearly rent or value of the estate, but this sum was made up by including the rent paid by Mr Gowans in the yearly rent or value of the estate; and this rent having ceased to be paid, Mr Christie presented this petition to have the annuity restricted to one-third of the rental of the estate, maintaining that the rent should never have been taken into account.

The sum agreed opnu between the parties as the sum falling to be paid to the respondent, if the mineral rent was included, was £300, whereas if it were deducted the sum would be £242, 4s.

The Lord Ordinary (ADAM) allowed an inquiry as to the value and extent of the minerals in the estate, adding a note, which, after narrating the facts, proceeded:—

"*Note.*—It appears to the Lord Ordinary that the rule of the statute that the free yearly rent of the lands and estate when they are let is to be taken as determining the amount of the provision, is intended to apply to the ordinary case of agricultural subjects where the present rent affords a sufficiently true criterion of the future value.

"But the case of a lease of minerals is essentially different.

"In such a case the subject let is consumed in the use, and therefore the rent or lordship payable may afford no criterion of the value of the minerals either at the date of the granter's death or for the future. It is not difficult to see that cases of great hardship must arise to the heir of entail if the principle were to be adopted that where minerals are let the rent or lordship payable must be taken as determining the amount of the widow's annuity. Take, for example, the case of the heir of entail dying when a mineral lease is approaching its termination, and when the minerals are nearly all worked out. In that case if the rent or lordship is included in fixing the amount of the widow's provision the result would be that the heir of entail might have to pay during a long series of years a larger sum to the widow than the whole rents of the estates remaining to him after the expiry of the mineral lease.

"In the present case it is an admitted fact that the minerals have not been let, and have been yielding no return since 1873, and the petitioner avers that there are no minerals in the estate workable to profit. If this be so, and if the rent of £200 which was payable by Mr Gowans is taken into computation in fixing the amount of the annuity, the result will be that the present, and it may be future, heirs of entail will be deprived of more than two-third parts of the free yearly rent or free yearly proceeds of the lands. But it is by the 13th section of the Act provided that the powers therein granted shall in no case be exercised to such an extent as to deprive the heir in possession of any entailed lands of more than two-third parts of the free yearly rent or free yearly proceeds of the same.

"On the other hand, it may be truly said that it is an equally great hardship on the widow where there are valuable minerals in an estate, but which do not happen to be let at her husband's death, but may be let immediately after, that she should not participate in the rent obtained from them. Whether or not the widow would be entitled in such a case to have the value of the minerals taken into consideration in fixing the amount of her annuity it is unnecessary to determine in this case.

"But the Lord Ordinary thinks that when minerals are let at the death of the granter of the provision, if the rent actually paid is not to be taken in computing the amount of the widow's annuity, the only other alternative is to allow an inquiry as to the value and extent of the minerals, and what was the free yearly value of them at that date. In this case the respondent avers that there were valuable minerals in the estate, and the petitioner denies it, so that an inquiry into the facts seems to be necessary.

"Although the Lord Ordinary proposes to allow an inquiry into these facts in this case he sees the difficulties attending such inquiries. It may be that there are at the granter's death valuable minerals in an estate, yet if these minerals are capable of being worked out in a few years the result will be that the whole proceeds will go into the pocket of the heir in possession at the time, while if their value be taken into account in fixing the amount of the widow's annuity the burden will be laid not only on him, but on future heirs, who may receive nothing. There is also this further difficulty, that where the minerals, as in this case, are not let, and there is neither rents nor proceeds derived from them, if any value be put upon them in fixing the amount of the provision the result will be that the heir of entail will for the future be liable to pay more than two-third parts of the free yearly rents or proceeds actually received by him, which appears to be contrary to the provisions of the 13th section of the statute. Assuming, however, as the Lord Ordinary must assume, that minerals are to be taken into computation in determining the amount of the provision he sees no other way of extricating the case than by allowing an inquiry as to their value and extent."

The case was reported under the 6th sec. of the Distribution of Business Act (20 and 21 Vict. cap. 56). The petitioner argued—There must be a reasonable permanency in the return to justify the reckoning of it as part of the rental of the estate—*Wellwood* v. *Wellwood*, July 12, 1848, 10 D. 1480—December 20, 1848, 11 D. 248; *Douglas* v. *Scott's Trustees*, December 17, 1869, 8 Macph. 360; *Sinclair* v. *Duffus*, November 24, 1842, 5 D. 174. Now, here there was no such permanency.

The respondent argued—Mineral rent must be taken into account. Many things much more uncertain and fluctuating had been, *e.g.*, game, in case of *Sinclair* v. *Duffus*. Any hardship was obviated by the 13th clause of the statute, which provided that the heir was not to lose more than two-thirds of the rental. The cases of *Wellwood* and *Douglas* were cases where the payment was by way of lordship, and the principle adopted there was to take an average of these lordships for a number of years, and hold that to represent the fixed rent. But here you had a fixed rent assigned by the terms of the lease.

At advising—

Lord President—In this case the parties are quite agreed as to what is the rental of the estate apart from the rental of the minerals—the gross rental is £925, 16s. 8d., the free rental is £764 16s. 8d. The Lord Ordinary states that—"The only question at issue between them is whether a yearly sum of £200, which was payable by Mr Gowans under a lease of the freestone and other minerals in the estate, current at the date of Mr Christie's death on 7th August 1868 is to be taken *in computo* in fixing the amount of the respondent's provision."

Now, the answer to that question depends on the clause of the Aberdeen Act which is quoted in the petition. It runs thus—"It shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made in that part of Great Britain called Scotland, under the limitations and conditions after mentioned, to provide and infeft his wife in a liferent provision out of his entailed lands and estates by way of annuity, provided always that such annuity shall not exceed one third part of the free yearly rent of the said lands and

estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children hereinafter specified, and the yearly amount of other burdens, of what nature soever, affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the granter." The estimate of the rental is to be made as matters stand at the death of the granter of the bond. The actual rental of the estate is to be taken on the one hand whether let or unlet, estimating the rental where the property is under lease by the actual rent, where it is not under lease by the annual valuation; on the other hand the burdens are to be taxed as they stand at the granter's death and to be deducted. The question is whether the rent payable by Mr Gowans is to be taken into account as part of the rental of the estate.

The granter of the bond died in 1868, the bond having been made four years before. As regards Mr Gowans' lease I note these particulars:—The lease was dated 26th January and 6th February 1866, and was for 21 years; the rent was £200 per annum. It was provided that no rent should be payable for the first year if there was no working of minerals; if there was working, then £100 was to be paid in name of rent; after that time the fixed rent of £200 came into operation. This is not a case where there are any lordships; the payment is a payment of fixed rent. The only other peculiarity was that the tenant might throw up his lease at the end of the first year; if he did not do that he was entitled to a break at the end of the third year, another at the end of the seventh, and another at the end of the fourteenth year. Gowans did not work any minerals for a year after he entered into possession; but he did not throw up his lease; he went on to the third year, but did not take advantage of the break then; and so the lease was at that time in this position—that it must endure for seven years. In the meantime the granter deid, and the present petitioner succeeded to the estate. The lease stood for five years subsequent to his succession, and the rent of £200 was regularly paid. The petitioner therefore has received £1000.

The question therefore comes to be whether this rent of £200 is or is not to be taken *in computo* in fixing the amount of the provision as part of the rent of the estate in terms of the statute. I am humbly of opinion that we must take it into account. The strict words of the statute may require relaxation in particular cases, and some such cases have been cited to us; but to attempt to substitute in this case any other calculation for the plain rent of £200 would be, I think, to go against the words of the statute. There may be cases in which it may be necessary to apply some different rule to ascertain what the rent to be taken into account amounts to; but in this case I find the statute giving me a very plain and clear rule to apply. I find an existent current lease, which remains current for a considerable period after the death of the granter, and accordingly I think that the rent due under it must be taken to fix the annual value of the estate as regards its mineral wealth, and therefore I am for refusing all inquiry.

Lord Deas — There may be cases where we must not apply strictly the words of the statute "at the death of the granter;" but there is no ground for doing otherwise than applying them strictly in this case. All we have to inquire into here is, whether there is that degree of permanency in this lease that makes it reasonable to apply the words of the Act of Parliament. All that has taken place proves that there was such permanency here, although in different circumstances the words might not have been applied according to their precise terms; and therefore without deciding any general question, I am of opinion that in this case the words of the statute apply in terms.

Lord Mure—The words of the statute point very clearly at the date of the death of the last heir as the time when the calculation is to be made of the sum that is payable under the bond. Ever since 1868 in arranging what was to be paid parties have taken into consideration the amount of fixed rent paid under this lease, and the amount of the annuity was fixed at that rate. Now, ten years after the death of the granter, it is proposed to restrict the amount of the annuity in respect this lease has come to an end. But I do not think it is competent now to go into any inquiry as to what may have been the value of the minerals at the granter's death.

Lord Shand—It is quite settled that in estimating what is rent the returns from mineral property may be taken into view. The only question is, whether this particular rent is to be taken into view in respect that it has ceased. The answer to that question depends on whether—to use the words of my brother Lord Deas—the rent has "such a degree of permanence" as to bring it within the provisions of the statute. The statute provides that the amount of the rents is to be taken as at the death of the granter; that is of course to be reasonably construed. If we had a case where the heir died in the last year of a lease, and the next heir was in a position to show that the minerals were exhausted, it would be unreasonable to say that the mineral rent which was about to cease should be taken into computation; if, again, the tenant had intimated his intention of taking advantage of a break in the next year, and again the minerals could be shown to be exhausted, I do not think there could be said to be such a degree of permanence as to make the words of the statute applicable.

But we have circumstances here which give this lease such a degree of permanence as to entitle us to take the rent under it into consideration.

The Court pronounced the following interlocutor:—

"Find that the yearly rent of £200 payable to the proprietor of the entailed estate under a lease of the freestone and other minerals in the estate, current at the date of the death of the granter of the respondent's provision, is to be taken *in computo* in fixing the amount of the said provision: Remit to the Lord Ordinary to proceed in terms of

the above finding, with power to his Lordship to dispose of the Inner House expenses."

Counsel for Petitioner — Balfour — Pearson. Agents—J. & J. Gardiner, S.S.C.

Counsel for Respondent — Lord Advocate (Watson)—Rhind. Agents—Ferguson & Junner, W.S.

Friday, December 13.

FIRST DIVISION.

[Sheriff of Fife.

BONTHRONE *v.* DOWNIE.

Property—Running Water—Primary Uses—Right of Burgess to Water for Secondary Purpose as against Lower Heritor holding Title.

In a disposition by the magistrates of a royal burgh a right to a supply of water from a stream which ran through it was included. The water was used to supply mills erected by the disponee upon the subjects conveyed. From time immemorial the inhabitants of the burgh had been in use to lift the water in pitchers from the stream for all necessary purposes. A portion of the stream above the place where the mills were situated having been afterwards diverted for the purpose of supplying water-closets in houses erected by a party whose property did not abut upon the stream, *Held* that that was an illegal interference with the right under the deed above-mentioned, and interdict granted accordingly.

Question, Whether a burgess, with the approval of the Magistrates, can claim the ordinary rights of a riparian proprietor in a stream that passes through the burgh, although his property does not abut upon the stream.

William Bonthrone, M.D., Crail, raised an action in the Sheriff Court against George Downie asking decree "ordaining him instantly to remove the pipes or conduit under ground which he has recently laid or made for the purpose of taking water from the stream called the Bye burn, which flows from the St Andrews road through the town of Crail by the Tolbooth Wynd to the sea, and to restore the bank or side of said Bye burn where he has made a breach for abstracting and diverting water from the burn for supplying said pipes or conduit, and that to the same state it was in before the defender interfered therewith." There was a further conclusion for interdict.

The pursuer had in 1835 acquired from the Magistrates of Crail, which was a royal burgh, the ground where the King's Mills once stood, and the mill rood of land. The disposition further conveyed to him "all and sundry privileges and pertinents thereof, and particularly with a right to the use of the stream of water that was formerly employed in driving the mills, for the purpose of supplying such manufactories, engines, mills, or other machinery as the said William Bonthrone and his foresaids shall think proper to make, and which they shall be at liberty to erect and use; declaring that the said William Bonthrone and his foresaids shall take the water by conduits or pipes (under ground) as shall best suit them, from the opening in the lead at the east side of the dwelling-house belonging to the town, and possessed by Bailie Fleming, and from the Bye burn at the east side of William Elder's yard; they shall have liberty also to make a water-turn in the Bye burn, and to make conduits, and lay pipes under the street, which they shall be bound to repair when necessary, so that the streets shall not be injured thereby; and further declaring, that although the town has become bound not to interrupt or divert the course of the water, yet it shall be in the power of the Town Council to regulate it at the dams, as at present, so that an equal quantity shall be sent down the mill-lead and Bye burn till the opening in the stone in the lead at the West Knaps shall run full, then the rest shall be sent down the Bye burn." The Magistrates further bound the pursuer four times a-year to turn his sluice so as to send the water to flush the common sewer.

He thereafter erected a meal-mill, with machinery, upon the ground, and formed a conduit for conveying water from the burn to a reservoir at the mill.

The defender in 1878 began to erect a row of villas on his property, which was on the other side of the Bye burn from the pursuer's property, and at some distance from the burn, and proposed to supply the water-closets in these villas by means of the pipe which the pursuer sought by this action to have removed.

The following admissions, *inter alia*, were minuted:—"That at all places where there is access to the Bye burn, the inhabitants of Crail, including the owners and occupants of the houses on the sites of which the defender's villas are erected, have been in use for time immemorial of taking water from it by lifting it in pitchers or such like for all necessary purposes, but not hitherto by pipes. That the defender has only led a single pipe from the Bye burn to the tank at the back of his villas. The extremity of the pipe within the defender's tank has been fitted with a ball-cock, which is intended to prevent the passage of water along the pipe after the water within the cistern has reached a certain level. That the defender has no property conterminous to the Bye burn, and the water proposed to be taken therefrom by the pipe complained of will not be returned thereto. The defender explains that it is intended to use on the premises all the water taken from the burn, and the sewage will be conveyed by drain to the sea. That the water in the Bye burn in its passage through the town and Tolbooth Wynd is not suitable for the preparation of food or drinking or culinary purposes. The said water has never before been used for water-closets, nor conveyed from the burn in its passage through the town by means of pipes by the inhabitants. One object which the defender has in conveying said water to his villas is to supply twelve water-closets therein when his rain-water supply fails. The defender explains that he will also use the water for washing clothes and such other purposes as it may be fit for."

The Magistrates declined to interfere with the question raised between the parties.

The pursuer pleaded, *inter alia*—"(2) The defender having no right or privilege in the water of said burn, is not entitled to divert the same by conduit or pipes to his villas. (3) Even if the defender had a right of servitude of taking water by pitchers or similar means from the burn, that