

—for to the extent of confining the operations to that season the defenders have yielded to the injunction *Sic utere tuo ut alienum non lædas*. It was explained at the bar that the minerals of Loganbank and Penicuik crop out there, and that the consequence of interdicting the working and calcining them there would be to sacrifice a considerable part of the mineral field. But although there is some evidence on this subject, it is slight, and I cannot say satisfactory. On the other hand, the pursuer does not, as I understand, suggest that No. 1 as a place of working and calcining was not properly selected with reference to the legitimate interests of the mineral field, and could be abandoned without a great sacrifice to the defenders and their landlords, or that it is an inconvenient place otherwise than with reference to the wellbeing of the fir trees in the neighbourhood. In the circumstances, and considering the decision that is about to be pronounced, it is probably an idle thing for me to pursue this topic. I should, however, wish to say for myself that I think the legality of an act, and the reasonableness of doing it at the particular place, are to be taken account of, and may be sufficient to defend it notwithstanding that it causes damage to a neighbouring property. The nature and extent of the damage are of course to be considered on the one hand, as well as the nature and extent of the proprietary interests sought to be sacrificed in order to avoid it on the other. It is according to the evidence that iron ore, such as that here in question, must be calcined at the pit-head where it is brought to the surface, and that a field of such ore cannot in fact be worked on other terms. I cannot assent to the contention that it is necessarily sufficient for the pursuer's case that he has proved damage to his fir trees such as would entitle him to protection and remedy against a wrongdoer. I think magnitudes and proportions are to be considered, and also whether or not the defenders have acted with a reasonable regard to their neighbours' interests in selecting the places for operations, which are in themselves quite legitimate. I am not prepared to hold that the case is made out with respect to Incline No. 1, although had my views on the case generally prevailed I should have been prepared to allow further evidence regarding it, not as to whether damage had been caused or not, but as to whether it was a convenient and reasonably chosen place for working and calcining, having regard to the defenders' legitimate interests as well as those of the pursuer.

LORD CRAIGHILL concurred with the reasons and conclusions arrived at by the Lord Justice-Clerk.

The Court therefore adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimers—Asher—Mackintosh—J. P. B. Robertson. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondent—D.-F. Kinnear, Q.C.—Balfour, S.-G.—Trayner—Murray. Agents—Inglis & Allan, W.S.

Tuesday, July 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILSON v. CARRICK AND OTHERS.

Arrestment—Building Society—Right in Security.

Held that instalments paid by the borrowing members of a building society formed under the provisions of the Act 6 and 7 Will. IV. c. 32, the rules of which provided that the borrower should take shares to the full amount of his loan, and that the instalments as they were paid should be carried to the credit of the borrower's account in name of payments for these shares, are not liable to arrestment if at the date of the arrestment the amount of the loan made to the member is in excess of the sum at his credit in name of instalments on shares.

This was an action of multiplepointing raised in the Sheriff Court of Lanarkshire at Glasgow by John Carrick and others, as trustees of the North British Building Society, Glasgow, for the purpose of determining the right to a sum of £243, 18s., being the amount of instalments paid into the funds of the society towards the full sum payable for 160 shares therein standing in name of a person named William M'Kay. Two competing claimants entered appearance and lodged claims, viz., David Martin and Hugh Wilson. Martin claimed to be preferred to the fund *in medio* in respect that he himself had paid the instalments standing in the company's books at M'Kay's credit. Wilson claimed the fund in respect of arrestments used by him on the dependence of a Court of Session action against M'Kay in which decree was subsequently obtained. The facts as they appeared from the averments of the parties and the proof led were as follows:—On 22d February 1878 M'Kay, who was then proprietor of certain property in Hillhead, obtained from the North British Building Society a loan for £4000, and in security for repayment granted in favour of the building society a bond and disposition in security in ordinary form over his property. Martin and another person named M'Neill granted jointly and severally with M'Kay their personal obligation to repay the sum in the bond. On the same day (22d February 1878) M'Kay conveyed the property to Martin by an *ex facie* absolute disposition unqualified by any back bond or other obligation. By the rules of the society only members holding shares on which six months subscriptions had been paid were entitled to borrow, and the directors of the society invariably required that the number of shares taken by the borrowing member should be equal in value to the amount of his loan. M'Kay was thus compelled to take shares in the society of the nominal value of £4000, and to pay up six months' subscription thereon as a condition precedent of his right to borrow. He accordingly made application for 160 £25 shares of the society, six months' instalments on which amounted to £138. That latter sum was placed to his credit in the books of the society on 22d February 1878, but he did not actually pay it in. It was simply deducted from the amount of his

£4000 loan. Of the balance of that loan he obtained payment at once of £1550, and the remainder (£2101) was carried to his credit in a suspense account, to be paid by instalments on the certificate of the company's inspectors as the buildings (which were not at the date completed) on his ground progressed. On the same day (the 22d February 1878) M'Kay authorised the society to place the above-mentioned sum of £2101 to Martin's credit, and to accept Martin's receipt for payment of instalments therefrom as sufficient. The society agreed to do so, and accordingly Martin granted receipts for the instalments of the loan, and otherwise acted as true obligant in the bond. The interest due thereon to the society at Whitsunday and Martinmas 1878 was paid by being deducted from the amount thereof in the suspense account, and in the same way were deducted the instalments or subscriptions due on M'Kay's shares at 30th November 1878, viz., £134. That sum, however, just as the sum of £138 deducted on 22d February, was placed to M'Kay's credit in the company's ledger. These two sums, which, under certain small deductions regarding which no controversy arose, constituted the fund *in medio*, were on 29th January 1879 arrested by Hugh Wilson on the dependence of an action in the Court of Session against M'Kay. Martin subsequently paid up the whole loan to the building society without receiving credit (which he claimed to be entitled to) for the two sums in question. He now claimed the whole fund *in medio*.

On 13th February 1880 the Sheriff-Substitute (LEES) pronounced the following interlocutor:—
“ Finds that William M'Kay, builder, Glasgow, having become a shareholder of the pursuers' society in order to obtain a loan of money, granted to them a disposition in security over certain heritable subjects owned by him in Hillhead, and *simul ac semel* granted (1) a disposition of the same subjects to the claimant Martin, who had become personally bound along with him for repayment of the loan, and (2) an order to the society to hold the balance of the loan at Martin's credit and subject to his control: Finds that the whole of the money paid to the society in connection with said loan was paid by Martin, and that he was dealt with by the society as the true grantee thereof: Finds that the fund *in medio* consists of two sums deducted from the loan, and falls to be viewed as money paid by Martin, and therefore repayable to him: Finds that in these circumstances the arrestments used by the claimant Wilson of any funds in the pursuers' hands belonging to M'Kay could not validly attach the fund *in medio*, seeing that at no time was M'Kay a creditor of the society under the transactions that took place in regard to the loan or to his acquisition of shares in the society: Therefore repels the claim of the party Wilson; ranks and prefers the claimant Martin for payment to him by the nominal raisers of the whole fund *in medio*; finds them liable in only once and single payment thereof; and on payment as aforesaid, or consignment with the Clerk of Court, exonerates and discharges them of their whole actings and intrusions had with said fund, and decerns: Finds the party Wilson liable to the party Martin in payment of his expenses so far as due to the unsuccessful opposition of his claim,” &c.

To this interlocutor the Sheriff (CLARK) adhered on appeal.

The claimant Wilson appealed to the Court of Session, and argued—The effect of the transactions which took place on the 22d February 1878 was to make Martin absolute proprietor of the property and true obligant in the bond: And in that position of matters he should, under the rules of the society, have taken a transfer of the shares, but not having done so, and having to serve his own purposes left them in the hands of M'Kay, the subscriptions paid to account of these became arrestable by M'Kay's creditors, who were ignorant of their true ownership. Martin's claim here was, assuming him to be true owner of the shares, simply a personal claim for repayment by M'Kay, and could not stand against Wilson's arrestment. It was impossible to contend that there were here in reality no funds to arrest at the date when the arrestments were used, inasmuch as M'Kay was a shareholder of the society entitled to participate in profits and liable for losses to the extent of his holding. He was therefore the society's creditor to the extent of the subscriptions standing at his credit in their books, Martin being the true debtor and the society having by their actings recognised him as such; the instalments of the loan paid to him could not in a question with M'Kay's creditors be deducted from or set against the amount of the subscriptions paid upon the shares.

Authorities—Bell's Com. i. 269-71; *Redfearn v. Somervail*, 5 Pat. Ap. 707; *Burns v. Lawrie's Trustees*, 2 D. 1348; *Hunter v. City of Glasgow Bank*, 6 R. 728.

Argued for Martin—There was here really nothing to arrest. At the date of Wilson's arrestment M'Kay's indebtedness to the society in respect of instalments paid to account of the loan much exceeded the amount at his credit to account of subscriptions on shares. Setting the one against the other, at the date of the arrestment the result was, so far from M'Kay being a creditor of the society, it was in a much greater degree his creditor.

The Court adhered to the Sheriff's interlocutor on the ground that at the date of the arrestments used by Wilson there were in reality no funds standing at M'Kay's credit in the books of the society, and that therefore nothing had been attached.

Counsel for Wilson—Ure. Agent—J. Gillon Fergusson, W.S.

Counsel for Martin—Guthrie Smith—Jameson. Agent—Knight Watson, L.A.

Wednesday, July 6.

FIRST DIVISION.

MACPHERSON *v.* CALEDONIAN RAILWAY COMPANY.

Process—Jury Trial—Change in Place of Trial.

This was an action of damages for injury sustained in an accident at Pennilee, on the Glasgow and Paisley joint line, partly owned by the defenders. The defenders admitted liability,