Counsel for Petitioners James Menzies & Company and Others—D.-F. Asher, Q.C.—King. Agents—Sturrock & Sturrock, S.S.C.

Counsel for County Council of Lanarkshire—Cullen. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for Landward Committee of Parish Council of Rutherglen—Horne. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Respondents the Magistrates and Councillors of Rutherglen—Balfour, Q.C.—Salvesen. Agents—J. & A. Hastie, Solicitors.

Saturday, February 6.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WHITSON *v.* EASTERN DISTRICT COMMITTEE OF COUNTY COUNCIL OF PERTHSHIRE.

Road—Turnpike Act 1831 (1 *and* 2 *Will. IV. cap.* 43), *sec.* 80—*Statutory Right of Road Authority to Procure Material for Repair of Roads from Enclosed Lands—Notice—Specification of Locus—Jurisdiction of Sheriff.*

Section 80 of the Turnpike Act 1831, which is incorporated with the Roads and Bridges (Scotland) Act 1878, empowers the trustees of any turnpike road to "search for, dig, and carry away materials" for repairing such road, "provided always that before taking such materials from any enclosed land from which the same shall not previously have been in use to be taken, fourteen days' previous notice in writing . . . shall be given to . . . the proprietor . . . to appear before the sheriff or any two justices of the peace acting for the shire where such lands are situate . . . to show cause why such materials shall not be so taken, and . . . such sheriff or justices shall authorise or prohibit the trustees to take such materials, or make such order as they shall think fit."

In a notice served by the district committee on a proprietor under this provision they notified their intention to search for, dig, and carry away materials at a spot within a specified arable field of eight acres, "which spot so to be entered on will, on application by you" to the road surveyor, "be also specifically pointed out on a map of the locality or on the ground," the proposal being to continue the working of an existing quarry into the arable field at this point. In the procedure before the Sheriff the surveyor pointed out the spot in question. The Sheriff's order, repeating the words of the notice, bore that the "spot so to be entered on will, on application" to the road surveyor "be also specifically pointed out in a map of the locality or on the ground." The order was also qualified by the conditions that if the district committee in their operations penetrated 50 yards into the field they were to build a service bridge, and that blasting was not to take place when agricultural work was being performed within 100 yards.

In an action of reduction of this notice and decree by the owner of the lands in question, *held* (1) that the decree must be read as referring to the place already pointed out in the proceedings before the Sheriff, and as thus sufficiently identifying the place where the operations were authorised; (2) that it was unnecessary to specify any limit of time; (3) that the right to obtain material by blasting was covered by the words of the statute; and (4) that the conditions attached to the order, although they might be inoperative, did not affect its validity."

Section 80 of the Statute 1 and 2 Will. IV., c. 42, incorporated as part of the Roads and Bridges Act 1878 (41 and 42 Vict. c. 51) provides—"And be it enacted that it shall be lawful for the trustees of any turnpike road, or any person authorised by them, to search for, dig, and carry away materials for making or repairing such road and the footpaths thereof . . . in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such material not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction . . . for the surface damage which shall be done to the lands from which such materials shall be dug and carried away . . . as such trustees shall judge reasonable," or, in the case of difference, as the sheriff or justices of the peace for the shire shall determine, "provided always that before taking such materials from any enclosed land for which the same shall not have been in use to be taken, fourteen days' previous notice in writing, signed by two trustees, shall be given to or left at the usual residence of the proprietor and occupier of the soil or quarry from which it is intended to take the same, or his or her known agent, to appear before the sheriff or any two justices of the peace acting for the shire where the said lands are situated, to show cause why the said material shall not be so taken, and in case such proprietor, occupier, or agent shall attend pursuant to such notice, or shall neglect or refuse to appear, proof on oath in such case being duly made of the service of such notice, such sheriff or justices shall authorise or prohibit the trustees from taking such materials or make such order as they shall think fit."

The Blairgowrie or Eastern District Committee of the County Council of Perthshire, on 28th February 1895, served a

notice under this section upon Mr Charles Hill Whitson, of Parkhill, Blairgowrie, in the following terms:—"Take notice that the Blairgowrie or Eastern District Committee of the County Council of the County of Perth, appointed under the Local Government (Scotland) Act 1889, and as Road Trustees acting under and in virtue of the Roads and Bridges (Scotland) Act 1878, adopted in the said county, in exercise of the powers conferred upon them by the said Acts and statutory provisions therewith incorporated, but always upon the terms and conditions thereby provided for, intend, by themselves or such persons as may be authorised by the said Committee, to search for, dig, and carry away materials for making or repairing highways (as 'highway' is defined by section 3 of said Act of 1878) within the said district, and the footpaths thereof, and for building, making, or repairing bridges or other works within the said district connected with such highways, from inclosed land whereof you are the proprietor, and of which David Fernie, farmer, Westfields, Rattray, is the present occupier, situated within the said district, in the parish of Rattray, and on the estate of Parkhill, and at a spot on such land within an arable field on the farm of Westfields, situated on the west side of the den or ravine known as Catscraig Quarry, which spot so to be entered upon will on application by you to Robert Grant, residing at Bengarth, Rattray, the road surveyor for the said district, be also specifically pointed out on a map of the locality or on the ground; and you are hereby required to appear before the Sheriff of the said county or his Substitute."

The den or ravine known as Catscraig Quarry was situated entirely within a piece of rough ground on Mr Whitson's estate. The District Committee and their predecessors the Road Trustees had been for a number of years in the habit of obtaining whinstone from the quarry for the purpose of metalling the adjoining roads. The whinstone vein ran through the rough ground from east to west, and thence westwards through the arable field referred to in the notice. It had been worked by the District Committee to the limits of the rough ground.

After sundry procedure, in the course of which the road surveyor pointed out on a plan the spot where the quarry terminated and where it was proposed to enter upon the arable land, the Sheriff-Substitute (GRAHAM) on the 29th March 1895 pronounced the following interlocutor:—"Repels the respondent's objection to said notice upon the plea of incompetency: Finds that said Committee are entitled to proceed with their proposed operations, but under the restriction and condition that should these operations be carried into the respondent's enclosed land beyond a distance of 50 yards, they shall provide a service bridge which shall afford a sufficient and convenient access from the lower portion of the respondent's lands to the upper or northern part thereof, and that the blasting operations in connection with the quarry shall be conducted in such a way and at such times as not to interfere with the agricultural operations of the tenant of said lands, and in particular that no blasting shall take place when agricultural work is being performed by the occupier, or anyone authorised by him, within 100 yards of the spot where the blast is made."

The decree was extracted by the Committee on 29th April. The extract-decree bore that the Sheriff found that the Committee were entitled "to search for, dig, and carry away materials for making or repairing highways (as 'highway' is defined by section 3 of said Act of 1878) within the said district, and the footpaths thereof, and for building, making, or repairing bridges or other works within the said district connected with such highways, from enclosed land whereof the said Charles Hill Whitson is the proprietor, and of which the said David Fernie is the present occupier, situated within the said district, in the parish of Rattray, and on the estate of Parkhill, and at a spot on such land within an arable field on the farm of Westfields, situated on the west side of the den or ravine known as Catscraig Quarry, which spot so to be entered upon will, on application by the said Charles Hill Whitson or the said David Fernie to Robert Grant, residing at Bengarth, Rattray, the road surveyor for the said district, be also specifically pointed out on a map of the locality or on the ground." Then followed the conditions as to building the bridge and as to blasting.

Mr Hill Whitson raised an action against the District Committee concluding for reduction of the notice, the interlocutor of the Sheriff-Substitute, and the extract thereof.

The pursuer averred that serious injury would be done to his property by driving the quarry through the arable field in question; that the vein of whinstone being 30 feet in breadth, the result would be to split the field in two by a chasm, which would prove a constant source of danger to animals, and destroy the amenity and utility of his property.

He further averred—"(Cond. 7) The said statutory notice, decree, and extract are invalid, and not authorised by the statutes, in terms of which they bear to proceed, and they are further void from uncertainty and ambiguity. Neither the said notice nor the said decree and extract identify the spot or place from which the materials are to be removed, or specify any limit to the proposed operations, either in respect of the quantity of material to be removed, or in respect of the length or distance to which the operations are to be carried along the line of said whinstone vein or otherwise. The defenders have no right to apply for, and the Sheriff has no authority to grant a licence to remove materials without specifying both the locality and extent of the operations necessary for that purpose. Moreover, such licence should be limited to the necessities of the particular occasion in

respect of which the application is made. In the circumstances above condescended upon, the licence as granted by the Sheriff is not only illegal and unwarranted, but grossly injurious and oppressive to the pursuer. The said extract is further incompetent in respect it is disconform in material particulars to the Sheriff's interlocutor."

The pursuer pleaded, *inter alia*—"(2) The said statutory notice being defective in essential particulars, and wanting in specification, the same is invalid, and should be reduced. (3) The said decree following on said notice, and the extract thereof, being irregular and incompetent and unauthorised by statute, the pursuer is entitled to decree in terms of the conclusions of the summons."

The Lord Ordinary (KYLLACHY) on 1st July 1896 assoilzied the defenders from the conclusions of the action.

Opinion.—"I do not think I need make avizandum with this case. It appears to me that the pursuer's objections to these proceedings are hypercritical. The extract decree is, as far as I can see, quite in terms of the Sheriff's interlocutor; and the Sheriff's interlocutor—putting out of view in the meantime certain conditions which he adjects, and which are not in controversy—seems to me to be just in terms of the defenders' notice. The question therefore is as to the validity of the defenders' notice. Is it or is it not a notice within the statutes, and particularly section 80 of the Statute 1 and 2 William IV?

"Now, it is said that the notice is bad in respect that it does not define the area within which the powers in question are to be exercised. In my opinion it does sufficiently define that area. It defines it, in the first place, as being within the estate of Parkhill. That may or may not be enough. Probably it would not be enough. But it further defines it as being within the farm of Westfields, of which David Fernie is the tenant. I do not know whether or not that would be enough. I incline to think it would perhaps be enough. But the notice goes further, and defines the area as an area to be pointed out within a certain arable field—an arable field which, according to the plan, consists of about 8 acres, and of which the situation is well defined. I am not prepared to say that a notice to take minerals within a certain field consisting of 8 acres is a bad notice—a bad notice under the statute. The statute does not define the maximum magnitude of the area to be specified in the notice. The question whether the area within which the powers are proposed to be exercised is or is not too wide is a question which the statute leaves to the Sheriff, and on which I take it the Sheriff is final; and therefore as regards this objection my opinion in the first place is, that the area here does seem to be sufficiently specified, and does not *prima facie* seem to be too wide. But even if it were thought to be too wide, that is not in my view a ground for reducing the Sheriff's judgment, because the matter is—as I read the statute—a matter for the Sheriff, and the Sheriff has either dealt with it, or, what comes to the same thing, was not asked by the pursuer to deal with it.

"But then it is said that the notice, interlocutor, and decree are bad because they do not define the time for which the power is to be exercised. Now, it is quite true that they do not. The power which has been granted—or rather the power with respect to which the notice was given, and which the Sheriff has granted—is a power to take materials from this enclosed land for an indefinite time—a time only limited by the necessities of the roads in this neighbourhood, which necessities will probably be continuous. But I do not find that the Scotch statute (I say nothing as to the English statute mentioned in argument) requires that the notice shall specify a time limit. I think it, on the contrary, leaves it for the road trustees to give notice either for a certain time or for an indefinite time, and leaves it to the Sheriff to define time if the time in the notice is indefinite, and the landlord is able to satisfy the Sheriff that a definition should be made. In this case the time being indefinite, I have no doubt that the Sheriff, if asked, would have considered the question, whether a time limit should be fixed, as he might quite possibly have come to the conclusion that such should be fixed; but nothing of that kind appears to have been suggested. But, as I said before, either the Sheriff was asked to fix a limit and declined, or the matter was not brought before him as a matter on which the pursuer desired his intervention.

"On the whole, therefore, I see no reason for disturbing the Sheriff's interlocutor sustaining the defenders' notice."

The pursuers reclaimed, and argued—(1) The power given to road authorities by section 80 of the Turnpike Act was to "search for, dig, and carry away," and that did not give them the right to blast. An Act such as this, which must be more or less oppressive, should not be extended to allow the modern system of quarrying—*Henderson's Trustees* v. *Dunfermline District Committee of Fife County Council*, May 14, 1896, 23 R. 727. (2) The defenders ought before going to the Sheriff to have searched and found out where the stone was, and then have applied for his authority to take it from a definite spot. Instead of doing that they had applied for and obtained a roving commission applicable to the whole field of eight acres, and for an unlimited time, which was clearly incompetent—*Manvers and Browne* v. *Bartholomew*, Nov. 12, 1878, 4 Q.B.D. 5; *Rex* v. *Manning*, June 22, 1757, 1 Burr, 377, at 382. The Sheriff-Substitute had no statutory authority to insert the condition as to making a bridge, and the fact that he had done so showed the extensive nature of the operations contemplated, and the generality of the power given.

Argued for respondents — (1) The word "dig" meant to take such measures as might be necessary for removing stone. If

its meaning were confined to the sense contended for by the pursuers, the privilege given by the statute would be practically nullified. In point of fact the Sheriff had not expressly authorised blasting, but had only imposed restrictions in case of blasting taking place, so there was no ground for interfering with his interlocutor. If blasting were illegal the pursuer's remedy was by interdict hereafter. (2) As regards the want of limitation, there was nothing said in the Scotch statute about time, no limit being imposed except the requirements of the roads, and so the English cases quoted by the pursuer had no application. It was the practice to give orders in terms which admitted of continuous working, or it would not be worth while to open a quarry at all. There was really no indefiniteness as to place, the intention clearly being to carry on the quarry, which had already been worked through the rough ground westwards into the arable ground. (3) The conditions imposed by the Sheriff were all for the protection of the pursuer, and need not be fulfilled unless he wished.

At advising—

LORD PRESIDENT—We have no jurisdiction to review on its merits any order made by the Sheriff, and the only question before us is, whether the Sheriff has exceeded his statutory powers in making the order libelled.

Now, it cannot be disputed that the District Committee is entitled to take stones for the roads from a quarry or enclosed land (with the exception of orchards and other places specified), and to go on taking them so long as the roads require the stones. In the case of enclosed land from which stone has not been previously taken, notice must be given to the proprietor, and the Sheriff must either authorise or prohibit the taking the material, the Sheriff having power to make such order as he thinks fit. This last provision shows that it is competent to the Sheriff to give a conditional or qualified permission.

When we turn to the proceedings in this case, the notice at first sight certainly reads as if the District Committee were asking very wide powers, and I am not surprised if it caused some alarm. But when the notice is examined it appears that the authority craved was to take stones by quarrying into the field named at a particular spot. The notice, at first sight, reads as if the Committee wished to have a roving power over this field of eight acres; but this perhaps arose from a mistake on the part of the Committee as to what they required to notify. They have given notice of their intention to search for as well as to carry away, and the Sheriff's order echoes the notice on this point. But as I read the section, no notice is required to entitle the Committee to search for stone in the lands; all they require to give notice of is their intention to take materials from the lands. Well then, in the proceedings before the Sheriff, Mr Grant, the surveyor, according to the promise in the notice, pointed out the place of the proposed taking of materials; and in substance what is proposed is simply to carry a quarry from which materials have hitherto been got for the roads further westwards into the field in question. I may remark in passing that the Sheriff's order, rather mechanically adopting the words of the notice, speaks of the place of operations as one which will (in the future) be pointed out by Mr Grant. I do not read this as meaning that the authority will apply to any spot or spots which Mr Grant may from time to time point out, but as applying to the place already pointed out by Mr Grant. It would have been better had it been otherwise expressed, but the words of the order may be justified if they are read as meaning that, if anyone likes Mr Grant will point out the place again.

Well now, if this operation which the Sheriff has authorised had been likely to be accomplished by a few cartfuls of stone being taken away, I really do not see what objection could be taken to it. And the next thing to observe is, that the Act imposes no limit, except the requirements of the roads, on the amount which may be taken. It would appear that in this case it is contemplated that the Committee will go on taking materials for an indefinite time; and the Sheriff has made some conditions as to access when the operations have gone on a certain distance. I can only say that I do not think that these conditions (which are in the interest of the landlord, if the workings are lawful, and need not be enforced unless he desires them) are either in themselves illegal or denote a contemplation of endurance which makes the order illegal.

I agree with the Lord Ordinary in what he says of the absence from the order of the specification of a limit of time. A further objection was taken that blasting is not a lawful operation under sec. 80, and that the order is bad because it conditionally authorises blasting. I think this objection untenable. The Committee have right under the section to remove materials for making and repairing roads, and also for building. In my opinion they are entitled to do what is usual and necessary to effectuate that power, and blasting is an operation usual and necessary for these purposes.

The result is that I agree in the conclusion of the Lord Ordinary. It may be well to say, however, that I am not to be held as concurring in the observations made *obiter* by the Lord Ordinary as to what would or would not in other cases be sufficient specification of the place from which it is proposed to take materials. The burden which this section imposes on landlords is a heavy one, and is not to be augmented by a latitude which might embarrass the use of property. The Sheriffs have, as I read the statute, no power to dedicate for all time the whole of a large enclosed field to the operations of the District Committee. Shorter views are to be taken. In the present instance

there is nothing to prevent the pursuer from using the field in any way he thinks fit, and if any use so made should in the future bring the ground within the protected subjects specified in this section, then I see nothing in this order which will entitle the District Committee of the day from encroaching on such ground.

I am for adhering.

LORD ADAM—I am of the same opinion. With reference to the condition imposed by the Sheriff upon the Committee, that in case of their operations being carried into the field beyond a distance of 50 yards, they should build a service bridge, it may be that he had no power to insert any such condition since the pursuer's land would be required for building such a bridge. But the only result of that is that if the quarry does reach that point the Committee may have either to stop working or to go back to the Sheriff. There are accordingly, in my opinion, no grounds for interfering with the Sheriff's order.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defender—Balfour, Q.C.—Guthrie—Craigie. Agent—James Russell, S.S.C.

Tuesday, February 16.

FIRST DIVISION.

M'KIE'S TRUSTEES *v.* M'KIE.

Succession — Testament—Revocation—Conditio si testator sine liberis decesserit.

A testator sixteen months after his marriage executed a testament by which he bequeathed his whole estate to his wife. Five years subsequently a child was born, whose birth her father survived for fourteen and a half months. The child would have been entitled to £3680 out of her father's estate by way of legitim, the total estate amounting to £14,046

Held that these circumstances were not sufficient to rebut the presumption that the testament was revoked by the birth of the child.

Mr Peter Lawrie M'Kie died on 8th July 1896, leaving a disposition and settlement dated 5th February 1890. He was married on 26th September 1888 to Miss Anne Kennedy, who survived him; there was no marriage-contract between them. There was one child of the marriage Angela M'Kie, who was born on 24th April 1895. By his disposition and settlement Mr M'Kie bequeathed his whole estate, heritable and moveable, to his wife, whom he appointed as his sole executrix and administratrix. The nett value of his personal estate was about £14,000, of which sum £3000 was contained in a bond and disposition in security, so that the legitim fund was about £3680, and the *jus relictæ* a similar amount. There was no other heritable estate.

Mrs M'Kie as guardian of her child presented a petition for the appointment of a factor *loco tutoris* to her, and Mr William Crawford, Duns, was appointed.

A Special Case was presented to the Court by (1st) Mr Crawford, and (2nd) Mrs M'Kie, for the purpose of determining what share of her father's estate Angela M'Kie was entitled to.

The first party contended that the birth of a child subsequent to the date of the disposition revoked it, and that consequently Mr M'Kie died intestate, while the second party contended that it had not that effect, and that consequently she was entitled to the whole estate less her child's claim for legitim.

The first question submitted to the Court was, "Did the birth of the child subsequent to the execution of the said settlement by the said Peter Lawrie M'Kie have the effect of revoking the said settlement or rendering it invalid?"

Argued for first party—There were no circumstances here to overcome the presumption that the subsequent birth of a child revoked a will, the only circumstance at all in point being the lapse of time between the birth of the child and the death of the truster. But the mere lapse of time was not in itself enough to reinstate a will thus revoked—*Dobie's Trustees* v. *Pritchard*, October 19, 1887, 15 R. 2; *Munro's Executors* v. *Munro*, November 18, 1890, 18 R. 122; *Millar's Trustees* v. *Millar*, July 20, 1893, 20 R. 1040. The fact that the will was made sixteen months after the marriage showed that it was improbable that the truster when making it contemplated the birth of children of the marriage. There was accordingly nothing to show that he intended to disinherit children, and accordingly the will must be held to be revoked—*Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709.

Argued for the second party—There were special circumstances here sufficient to displace the presumption for revocation. These were the facts—that the will was made sixteen months after marraige with a family in prospect; that the child would receive a large share of the estate by way of legitim; that the testator survived the birth of the child by fourteen and a half months without indicating a wish to revoke the will; and that the estate was left to the testator's widow. The lapse of time, coupled with the other circumstances, was enough, though it might not be so alone—Ersk. iii. 8, 46. Erskine's doctrine may have been modified, but the *obiter dictum* of Lord Rutherfurd Clark in *Dobie's Trustees* went much too far. There was no case quite like the present one, where the point was so fine, and as this would be the most equitable division of the estate, the Court should exercise an equitable discretion in