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ing taxation, and both specially exempting the College of Justice. Besides, there stands the most unequivocal immemorial use and possession in favour of the College, which of itself is decisive of the question.

After hearing counsel,

LORD CHANCELLOR said :—

" MY LORDS."

" There was no doubt, but that almost every exemption from public burdens was in itself odious; but in this case, the respondents had clearly made out a usage for nearly two centuries. It would be a difficult matter to overturn a custom, most likely originated when the members of the College had only transient habitations in the city, such as inmates ; but when they became settled householders, it certainly did appear partial to except them from parochial impositions. On the other hand, there were several other acts of Parliament, besides that for the support of the poor, from which they had continually claimed exemptions, and claimed successfully.—The argument, that it would injure *the charity*, was downright nonsense; it was, in other words, to say, that it would injure a fund for the support of idleness and dissipation :—Voluntary charity was indeed a noble principle, inasmuch as it distinguished its objects, and by selecting the worthy, and rejecting the unworthy, became highly useful to society. His Lordship moved the interlocutor be affirmed."

Accordingly, it was ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed.

For Appellants, *Sir John Scott, Solicitor General, and Lord Advocate.*

For Respondents, *Mr. Wright and Mr. Tait, Wm. Adam.*

By the recent act 8 and 9 Vict. c. 83, this privilege, as to the poor rates, is done away with.

GEORGE STEWART, Younger of Grandtully, Esq., and HENRY HEPBURN, Slater in Perth, . . . } *Appellents;*

JOHN BELL, Slater in Muirend, and JAMES BELL, Slater in Scone, . . } *Respondents.*

House of Lords, 12th April, 1790.

LEASE.—A lease let to two parties, the whole slate quarries in the Hill of Birnam. No mention was made in the lease of the slate

quarries of Obney; but their predecessor in the lease, (whose lease was in precisely similar terms to that of the respondents), had possessed the slate quarries of Obney as part of those of the Hill of Birnam, and they took possession of these latter quarries as part of the subject, and wrought it without molestation for five years. Thereafter the landlord let the Obney quarries to Hepburn, Held, in a question raised, that the respondents were entitled to retain possession of Obney quarries, as a part of the subject of their lease, though not expressly mentioned therein; it being the understanding of the lessees that these were included in the bargain, and their possession for 5 years without objection being an homologation on the part of the landlord.

Sir John Stewart let in lease the slate quarries in the hill or mountain of Birnam, to the respondents, Bells, in the following terms:—" All and haill the whole slate and skailly " quarries in the said Sir John his hill of Birnam, with free " access, ingress, and regress, to and from the *same*, and " with power to them and their foresaids to open the said " hill, at any place or places they shall see proper, for find- " ing out new posts, lying within the parish of Little Dun- " keld and shire of Perth, and during the whole space of " nine years from and after the said John and James Bell, " their entry thereto, which is hereby declared to have been " and commence at the term of Martinmas last 1779, and " from thenceforth to be possessed by them and their above " written, during the space aforesaid."

Under a lease, in precisely the same terms, the respondents' predecessor, Anderson, had possessed the quarries; and it was admitted by the appellants, and proved by a number of witnesses, that Anderson, under his lease, had been in the practice of working the quarries of Obney now in dispute.

But Sir John Stewart, sometime after granting this lease to the Bells, conceiving that the quarries of Obney were not included in the lease to them, granted a disposition of the same to his son, the appellant, George Stewart, who thereupon granted a lease of these to Hepburn, the other appellant.

In the meantime, the respondents had possessed, without molestation, the quarries of Obney for five years. They began their labours there in 1780, and one of them continued to do so until the process for ejecting them was raised by the appellants in May 1785. The appellants having applied to the Sheriff, stating that the Bells had taken possession of the

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quarries in the hill of Obney, on pretence that they belonged to Birnam hill, and praying to have them ejected and removed. In defence, it was stated that they had bargained for the subject as possessed by Anderson, and that their possession of the whole subject had been homologated by Sir John Stewart. They further stated, that they knew of no "division between the two hills, or of two separate "names belonging to the parts possessed by them. On the "contrary, they believed at first, and do still believe, that "all which they possess is under the name of the Hill of "Birnam." In reply, it was stated that their lease contained no express reference to Anderson's possession, and that they had been permitted to continue to possess the quarries in Obney from Mr. Stewart being ignorant that Obney hill was not expressly comprehended in their lease.

May 20, 1785. The Sheriff ordered a survey of the grounds, and, upon report of the surveyor, he found "that the hills of Birnam and Obney are separate and distinct hills; and that the "burn of Craigleish is the march betwixt them, and ordains "the defenders (respondents) to cede to the pursuers (ap-"pellants) the slate quarries to the south of the foresaid "burn, and to remove therefrom forthwith; but in respect "it appears from the plan that there is a small slate quarry "on the said march burn, betwixt the moss of Birnam and "the mid moss, finds the said small quarry belongs to the "parties equally, and falls to be used and digged by them;" and interdict was thereupon granted to prohibit the respondents from working the said quarries.

A bill of advocation having been brought, and a proof allowed, as well as the judicial examination of Sir John Stewart and his son taken. A supension of the interdict was also brought, which being conjoined, the Lord Ordinary (Lord Braxfield) reported the whole cause to the Lords. After hearing counsel at great length on the report of the

July 22, 1788. proof, the Court pronounced this interlocutor:—"Advo-"cate the cause, sustain the defences pleaded for John and "James Bell to the original action before the Sheriff, as-"soilize them therefrom, and decern: repel the reasons of "suspension pleaded for George Stewart and Henry Hep-"burn; find the letters orderly proceeded, and prohibit "them from interrupting the defenders in their possession "of the quarries in question during the period of their "lease; find the pursuers liable to the defenders (respond-"ents) in the expense of process hitherto incurred, and ap-

"point an account thereof to be given in," &c. Thereafter the Court pronounced this interlocutor on the account of expenses; "modify the account to £105 sterling, including "agent fee, and decern."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The quarries let by Sir John Stewart were those in the Hill of Birnam, in the parish of *Little Dunkeld;* and the respondents have not only failed to prove that this description includes the quarries in question, but the contrary has been proved on the part of the appellants. It is submitted, that the evidence establishes, that Obney and Birnam are distinct hills, with known boundaries, and these boundaries likewise divide the parish of Auchtergaven from the parish of Little Dunkeld. The map of the county ought to have considerable weight in the scale, because the lines there drawn between the parishes must have been from the information and general understanding of the inhabitants, collected with no view to such a question as the present. Considering all the circumstanes in evidence, it is impossible to believe, either that Sir John in granting, or the respondents, in accepting of the lease in the terms it is conceived, could imagine that subjects, to which those terms were altogether inapplicable, or rather, which those terms expressly excluded, were comprehended.

Besides, it was irregular to allow the respondents a proof of all the facts and circumstances, which was permitting the written agreement to be explained by parole testimony, contrary to a fixed principle of law. Further, the respondents having referred the truth of the facts alleged by them to the oaths of Sir John Stewart, and the appellant Mr. Stewart; and they having deposed *negative* to all the allegations, these oaths, according to established law, were conclusive against the respondents, and who ought not to have been permitted afterwards to resort to other evidence.

The acts of possession or working of the quarries in dispute, from whence the respondents infer Sir John's, as well as their own understanding, that they were included in the lease, were not of right but of tolerance; and therefore cannot be set up against Sir John, and much less against the appellant Mr. Stewart, who stands infeft in the lands of Obney, and of the quarries, as pertinent thereof, free of all leases which did not exist at the date of the right. The quarries, at the time when the respondents were allowed to

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work in Craig Obney, were not reckoned of value, nor had they any competitor. It is observable that what the respondents principally rely on as acts of possession on their part, and homologated on the part of Sir John, is digging slates for the landlord's own use; but as the expense of digging, and not the value of the slates, was then the chief object, his not challenging the respondents for going out of the limits is noways extraordinary; nor can it support the respondents' inference, that he must have supposed they were keeping within the limits.

Pleaded for the Respondents.—A lease is a *contractus bonæ fidei*, and of course the extent of the subject let must depend on what the lessee understood he bargained for, and what the proprietor appeared at the time to have granted. In the present case, the circumstances that have been stated from the proof, ascertain the real import of the bargain between Sir John Stewart and the respondents: namely, That *Anderson*, the immediate preceding tenant, possessed the quarries in dispute, under a lease in exactly similar terms to the respondents: That the respondents understood at the time that they bargained for the quarries possessed by Anderson, and so described their bargain to Daniel Clark, whom they wished to take a share in the lease: That they immediately on obtaining their lease, took possession of the disputed quarries, and continued to possess them undisturbed from Nov. 1780 to spring 1785: That during this long period (the respondents' rent being chiefly payable in kind), they furnished large quantities of slates, chiefly if not altogether from these disputed quarries of Obney, to Sir John Stewart: That Sir John Stewart signified his orders in regard to these slates personally at least on two occasions. All which facts and circumstances are quite inconsistent with the supposition that they held the quarries of Obney not to be included in the lease.

In point of fact, the hill or mountain of Birnam is a generic term, comprehending a track of country. That name, "Birnam," comprehends the muir of Birnam, the forest of Birnam, and the mountain of Birnam; and the hill of Obney is just a part of the latter mountain of Birnam. Formerly the woods which surrounded it were of great extent, and are accordingly spoken of as a distinguished object in Shakespeare's Macbeth; but the mountain is now skirted round with cultivated farms.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *W. Grant, W. Adam.*

For Respondents, *Alex. Wight, Al. Maconochie, J. Anstruther.*

[M. 4617.]

ELIZABETH BRUCE, and MARGARET BRUCE, Daughters of the deceased DAVID BRUCE of Kinnaird, ... } *Appellants;*

JAMES BRUCE of Kinnaird, Esq., *Respondent.*

House of Lords, 15th April 1790.

SUCCESSION—FOREIGN—LEX DOMICILII.—An officer in the East India Company's Service had made several remittances home, with the view of returning to his native country of Scotland. Remittances were on their way home, to the extent of £5708, and were on shipboard when he died in India. He left other estates in India worth £2198, and, together with other remittances to London, his whole personal estate amounted to £9000. James Bruce, the son of the first marriage, and brother consanguinean of Major Bruce, contended, that as the division of this intestate's personal estate must be regulated by the law of England, as the *lex domicilii*, he was entitled to a share of the estate with the brothers and sisters of the full blood. Held, in the Court of Session, and affirmed in the House of Lords, that he was so entitled to claim.

David Bruce of Kinnaird, at his death, left issue by his first wife, a son, James Bruce, (who became the Abyssinian traveller), and William, Robert, Thomas, and two daughters, the appellants, Elizabeth and Margaret, by his second marriage.

William, the eldest of the second marriage, went to India, and having entered into the East India Company's service, attained the rank of Major, and acquired a fortune of £9000.

With the view of coming home to his native country, he had made various remittances to agents for his own behoof.