

as administrator, with powers unlimited and uncontrollable, for the heir, for his other children, and for himself; and because it is contrary to all principle and precedent, to subject any person in damages, or to make him answer in his separate estate, for doing that which he had a complete right to do, both in justice and in law. The lands being placed, by the sale, beyond the control of the parties, it is the value they then brought, not that which they might have possessed at the death of the late Earl, that the appellant is entitled to.

After hearing counsel,

THE LORD CHANCELLOR said,*

“I shall state my view of this case very shortly. Looking into the case with great attention, and having regard to the marriage-contract which is the foundation of the claim, I offer my opinion that the law of Scotland has been rightly applied by the judgment appealed from to such a marriage contract as this, and, therefore, that the judgment ought to be affirmed.”

It was ordered and adjudged that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellant, *Sir Saml. Romilly, Geo. Cranstoun, Fra. Horner, J. H. Mackenzie.*

For the Respondents, *Alex. Maconochie, F. Jeffrey.*

1818.

EARL OF
WEMYSS
v.
EARL OF HAD-
DINGTON, &c.

[Fac. Coll. Vol. xviii. p. 362.]

JOHN THOMSON, Writer in Jedburgh, . . . *Appellant;*

Dr Wm. SOMMERVILLE, Deputy-Inspector of
Army Hospitals, *Respondent.*

1818.

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SOMMERVILLE.

House of Lords, 8th June 1818.

DAMAGES—SERVICE—MALA FIDES IN OPPOSING DO.—PRESUMPTION OF LIFE OR DEATH—FACTORY.—The respondent's wife was next heir to the estate of Knowsouth, belonging to her brother, a Lieutenant in the navy. Word was sent home by the officers of his ship, that being under arrest to stand trial, he had dropped overboard to escape to land, and was believed to have been drowned. The appellant, a writer, was married to a Miss Rutherford, who was entitled to succeed to the estate, failing the respondent's wife. He was also factor for the deceased brother in managing the estate. He accepted of a mandate from the respondent's wife, who was the next heir, to make up her titles to the estate. He had also made out the respondent's marriage contract, by which his wife left the

* From Mr Gurney's Short-hand Notes.

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respondent in, in the event of her predeceasing, the liferent of this estate. Action was raised by him for damages and indemnification against the appellant, and John Rutherford, for entering into a fraudulent conspiracy or compact to obstruct and oppose his wife's service, while she was dangerously ill by delays devised to defeat the purpose of the service ; whereby (his wife having died) he was deprived of his liferent of the estate, provided to him by his marriage contract. Held him entitled to damages to the extent of the rents of the estate, from Mrs Sommerville's death, and found him also entitled to the liferent thereof, during his life. Reversed in the House of Lords.

The estate of Knowsouth, situated in Roxburghshire, was vested in John Rutherford, under a destination in his marriage contract, in favour of the heirs male of his body, whom failing, in favour of heirs female, "the eldest always having preference, and succeeding without division."

John Rutherford left four children, two sons and two daughters. Thomas succeeded to the estate ; John was in His Majesty's navy ; Jean, one of the daughters, was married to Mr Scott, and the other daughter to the appellant.

Thomas Rutherford, after succeeding to the estate, executed a conveyance to himself in liferent, and to his son John, his heirs and assignees, in fee, and upon this conveyance, his son John took infestment. Upon John's death, without issue, he was succeeded by his brother George, then a Lieutenant in the Royal Navy. Upon his death, his sister, Miss Rutherford (who was married to the respondent), was entitled to succeed to the estate.

His death, in 1806, had been reported by Admiral Elliot and Lord Minto, acquaintances of the family, under the following circumstances. While in charge of His Majesty's ship "Trident," in the East India station, he had sentenced certain seamen to an illegal punishment, namely, "flogging and running the gauntlet," which resulted in their death ; and when he came home with his ship, he was arrested and removed from his ship to the flag-ship at Plymouth on this charge ; but the night before the officer arrived to take him into custody for trial, he dropt from the quarter gallery into the sea, evidently with a view to escape, but as the weather, it was said, was tempestuous and extremely cold, he was generally believed to have perished.

Upon the most minute inquiries on the part of the sister, the general belief was that Lieut. George Rutherford was drowned.

She married Dr Sommerville, the respondent, and by the

marriage settlement, the respondent was secured in the event of her predecease, in the liferent right of the estate.

In proceeding to serve his wife heir to her brother, opposition was experienced from the appellant; upon doubts insiduously suggested as to the truth of the reports of the death of Lieut. George Rutherford. It was believed by some, that as he had stripped himself to swim, that he had got off in a wherry there ready to pick him up. This idea was supported by a reward having been offered by the Admiralty for his detection at the time. This contradictory statement led to the delay of the service.

John Thomson, the appellant, it appeared had a factory in his favour, to manage the estate in Lieut. Rutherford's absence. But it also appeared, notwithstanding this factory, that he had drawn out the marriage contract between the respondent and his wife, containing obligations under which she came bound to give a liferent to the respondent on his survivance. He also, as their agent, had accepted of a mandate authorizing him to make up her titles to the estate. Notwithstanding all this, he thought it his duty to take steps to delay, if not to oppose, the service. But before doing so, it appeared that he had laid a memorial, in name of the next of blood entitled to succeed after Mrs Sommerville, for opinion before Mr Blair, then Dean of Faculty, upon the following queries, 1st, Whether the memorialist was entitled to appear in her service, as her legal contradictor, on account of the uncertainty which still existed in regard to the death of her brother?

2d, Whether the appellant, as the legally appointed factor of Lieutenant Rutherford, was entitled to appear?

3d, Whether the *onus* of proving his death, rested on the claimant or contradictor?

4th, What was the most regular and proper means of ascertaining, by judicial investigation, whether Lieutenant Rutherford be dead or alive?

Mr Blair's opinion was not obtained in writing; but it was stated by the appellant that he appeared as counsel for the appellant in the service, and asserted his right and duty as factor for Lieutenant Rutherford, to be heard upon the merits of that service.

It was also stated that the other appellant, Captain John Rutherford, who was entitled to succeed after the death of Mrs Sommerville, joined with the appellant in opposing the service; and this they did at a time when they knew that Mrs Sommerville was in extreme danger of her life.

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A commission was issued to take the evidence of the officers on board the ship, and others, as to Lieutenant Rutherford's death. Afterwards, the appellant's title to appear before the macers in the service, was sustained by the Lords Assessors, after a full argument. The commission was delayed, it was said, by the interference of the appellant; and in the midst of all those proceedings, and while the commission and proof were about commencing, the whole was put a stop to by Mrs Sommerville's death.

Vide next Appeal.

The respondent then brought the present action against the present appellant, and also against Captain Rutherford, who stands appellant on a separate appeal, to hold them liable in the loss, and to indemnify him for the consequences of opposing the service of his deceased wife, whereby he was prevented from enjoying the liferent of the estate provided to him by their contract of marriage, because they, "*from selfish and improper motives,*" and with a view to deprive the pursuer and his wife of their just and legal rights, did *mala fide* oppose the service of the said Ann Rutherford, thereby to defeat the same, and entered into an illegal and fraudulent concert to obstruct the said service, and to oppose the same.

June 23, 1813.

A condescence was ordered and answered, and a proof taken; and upon this being reported the Court pronounced this interlocutor: "Find that the factory held by the defender, Thomson, from the late Lieut. Rutherford, was limited in its nature, and did not give him any authority and title to oppose the service of the late Mrs Sommerville, as heir in special to her brother, John Rutherford, who died last vest and seized in the estate of Knowsouth: Find further, that the defender, Thomson, by accepting of the employment of the late Mrs Sommerville, and writing her contract of marriage, in which she came under obligations, as proprietrix of the estate of Knowsouth, and accepting a mandate from her to complete her titles to said estate, did thereby virtually abandon the said factory, and was thereafter not entitled to recur to it, and use it to her prejudice: Find, that both the defenders did enter into an illegal and fraudulent concert to obstruct, oppose, and delay the service of the late Mrs Sommerville, as heir in special to the late John Rutherford, in the said lands of Knowsouth, at a time when they knew that the said Mrs Sommerville was in extreme danger of her life, and when delay might entirely defeat the purpose of the service: Find that the said defenders had no probable grounds for *bonâ fide*

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“ believing that Lieut. Rutherford was still in life, and that
 “ this pretence of opposition was assumed by them to cover
 “ their own unlawful purpose of securing the estate to them-
 “ selves, disencumbered of the liferent provided to the pur-
 “ suer by his contract of marriage with Mrs Sommerville:
 “ Find that the service of the late Mrs Sommerville was
 “ delayed and defeated by the said illegal opposition main-
 “ tained by the said defenders, and that the pursuer was
 “ thereby prevented from entering on the liferent of the said
 “ estate on the death of his wife: Find that the brief of in-
 “ quest is not a pleadable brief, and that every objection
 “ thereto (bastardy excepted) stated even by a person having
 “ a legal title and interest to oppose a service, must be
 “ proved *instanter*, unless he has himself a counter-brief for
 “ serving himself heir, or shows a special right to the subject:
 “ Find, that it was therefore incompetent and illegal for the
 “ said defender, Thomson, to demand a term for providing,
 “ and that, in making said demand, he acted *suo periculo*,
 “ and must be answerable for the consequences, and the
 “ more especially, as his opposition was without a legal title
 “ or interest, and originated in a fraudulent intention and
 “ combination to injure the pursuer: Therefore, find the
 “ said defenders, conjunctly and severally, liable in damages
 “ to the pursuer; modify the same to the free rents and
 “ profits of the lands and estate of Knowsouth, from and
 “ after the day of Mrs Sommerville’s death, to the date hereof;
 “ and decern and ordain the defenders conjunctly and seve-
 “ rally to hold count and reckoning with the pursuer for the
 “ same: Further, find and declare, that the pursuer is entitled
 “ to the liferent of the said lands and estate during his life,
 “ from and after the date hereof, in terms of the contract of
 “ marriage between him and the late Mrs Sommerville, and
 “ decern against the defender, John Rutherford, in terms of
 “ the leading conclusion of the libel against him, towards
 “ the formal establishment of such right of liferent in the
 “ pursuer’s person, according to the true intent of the said
 “ contract of marriage: Remit this process to the Lord
 “ Ordinary (Reston) to proceed and to do farther therein, in
 “ terms of this interlocutor: Find the said defenders,
 “ conjunctly and severally, liable in the expenses of pro-
 “ cess; allow an account thereof to be lodged, and remit
 “ the same when lodged to the auditor of Court to tax and
 “ report.”

May 19, 1815.
June 2, 1815.
June 8, 1815.

On reclaiming petitions to the Court, the Court adhered.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, The charge of *mala fides*, is unsupported by legal evidence, and is altogether false; and the Court below proceeded on the principle of assuming *mala fides* as a necessary ingredient in awarding damages, but have judged erroneously in holding that *mala fides* has been proved. There is no proof of dole, or of circumstances from which it can be legally deduced. At first, no doubt, the appellant proceeded on the faith of the information received from Admiral Elliot and Lord Minto as to George Rutherford's death, and had no hesitation then of accepting the respondent's employment in the matters referred to; but it is a total fiction to say, that when he learned the precarious state of Mrs Sommerville's health, that he did all in his power, in fraudulent concert with the other defender, to obstruct and delay the service. The delay arose entirely independent of this circumstance; and from information received from the same sources as formerly of rumours existing, that George Rutherford had succeeded in getting to shore without being drowned, and that he had got off to America. 2d, In his whole proceedings as *factor* for George Rutherford he was governed by a conscientious sense of duty to his absent constituent, and he acted according to the advice of eminent counsel, and with no "fraudulent intention to injure the pursuer."

Pleaded for the Respondent.—The measures adopted and pursued for delaying and stopping the service, were the joint acts of Captain Rutherford and Mr Thomson. They originated in a preconceived plan of defeating the respondent's right of liferent, suggested by the desperate state of Mrs Sommerville's health, and they were carried out deliberately on the principle of accomplishing the object by delay, obtained by means of the most false and colourable pretences. 2d, The service and infestment of Mrs Sommerville and the respondent's right, which depended on them, were defeated by the appellants. 3d, He who unwarrantably interferes to stop or delay a service, is liable in damages to the party, the legal establishment of whose right is thereby prevented. Neither Captain Rutherford nor Mr Thomson had any legal title to appear in the service; the opposition having been made without a legal title or interest was necessarily made at their peril. Even if there had been a sufficient title and interest, no person was entitled so to interfere, without being

prepared to verify his objections instanter; and it was contrary to law, to demand terms for proving.

After hearing counsel,

It was ordered and adjudged that the interlocutors therein complained of, be and the same are hereby reversed; and that the defender be assoilzed.

For the Appellant, *Mr Thomson, John Leach, William Erskine.*

For the Respondent, *Sir Saml. Romilly, John Clerk, James Moncreiff.*

NOTE.—Unreported in the Court of Session.

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THOMSON
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JOHN RUTHERFOORD, Esq., *Appellant;*

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Dr WM. SOMMERVILLE, Deputy Inspector of
Army Hospitals, *Respondent.*

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House of Lords, 8th June 1818.

This was the separate appeal, alluded to in the preceding case, taken by the other defender, John Rutherford; but as it arose out of the same circumstances, and the same action and judgment pronounced in the Court below, it is unnecessary to detail these here.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby reversed, and that the defender be assoilzed.

For the Appellant, *Geo. Gos. Bell, Geo. Cranstoun.*

For the Respondent, *Sir Saml. Romilly, John Clerk, James Moncreiff, Henry Cockburn.*

NOTE.—Unreported in the Court of Session.

JAMES OCHTERLONY LOCKHART MURE,
Esq. of Livingstone, a Minor, and Mrs
HENRIETTA MORRES, his sole Curatrix, } *Appellants;*

1818.

MURE, &C.,
v.
MURE, &C.

JOHN RAE MURE and Mrs MARION LOCK-
HART, Spouse of John Smith, residing at
Gatehouse of Fleet, the son and daughter
of Mrs Jean Mure, late of Livingstone, } *Respondents.*

House of Lords, 9th June 1818.

DEATHBED—CANCELLED DEED.—Power was given by an entail