*Thursday, July 8.*

## BANNATINE'S TRUSTEES *v.* CUNNINGHAME.

*Accounting— Trust-disponee — Burden of Legacies and Conditions. Held,* on construction of documents and proof, that a party who had uplifted and paid away certain mineral rents was not bound to account therefor to a disponee of the property.

In 1834 the late Mrs Allason Cunninghame of Logan entered into an antenuptial marriage contract, by which she conveyed her estate of Logan to her husband in liferent and to their children in fee. On the other hand, by that deed Mr Cunninghame conveyed the estate of Enterkin to his wife in liferent and their children in fee. At this time no minerals had been wrought on the estate of Logan, but in 1845 ironstone was discovered, and a lease of it was granted to the Portland Iron Company. Mrs Cunninghame died in 1851 without leaving issue, and survived by her husband. At her death the working of the minerals was going on. She left a general disposition and settlement dated March 7, 1837, by which, *inter alia*, she conveyed her whole heritable and moveable property, including the estate of Logan, to the late Richard Bannatine, whom failing, to certain substitutes therein named. Mr Bannatine was appointed her executor. This deed contained a declaration that any memorandum signed by her, however informal, giving additional legacies or annuities, or otherwise expressive of her will, should be equally binding upon her disponees as if forming part of the disposition. In a holograph writing, dated 1849, Mrs Cunninghame left several legacies, and she stated—"I wish the income from the minerals to go to the Miss Logans, Flatfield, during their lives, and afterwards to be equally divided between the children of the late Major Baird, Falkland, and Mrs Craig, at present residing at Ayr." Upon Mrs Cunninghame's death, in 1851, the defender succeeded to the liferent of the estate of Logan under the marriage-contract. In 1857 Mr Bannatine, who had been in Australia at the time of Mrs Cunninghame's death, returned to this country, and he then intimated to the defender a claim to the mineral rents of the estate of Logan. The defender, in reply to this claim, stated that they fell to him under his liferent of the estate, or, at all events, that they fell to the Misses Logan under the holograph writing of 1849. He further stated that he had paid to the Misses Logan the mineral rents, which it was averred had amounted to upwards of £2000. Mr Bannatine died in 1857, and the present action was instituted by his trustees in order to compel the defender to account for the rents of the minerals.

The Lord Ordinary (BARCAPLE) found that the defender had not produced or founded upon any valid and effectual settlement or conveyance of the minerals, or of the income derived from them, by the deceased Mrs Allason Cunninghame in favour of the Misses Logan during their lives, and ordered the case to be put to the motion roll, in order to decide in what form the questions of fact should be ascertained.

The defender reclaimed.

CLARK and J. MARSHALL for reclaimer.

MILLAR, Q.C., and CRICHTON for respondent.

At advising—

LORD PRESIDENT—We have here two interlocutors under review, one of 29th May, and the other of 26th March 1869. The last mentioned is the more important; and, as regards one part of it, I find it impossible to agree with the Lord Ordinary. In so far as regards the first and second pleas, I have no objection to the way in which the Lord Ordinary has disposed of them, but he proceeds to find that the defender does not produce or found upon any valid and effectual settlement or conveyance of said minerals, or of the income from the same, by the deceased Mrs Allason Cunninghame in favour of the Miss Logans, Flatfield, during their lives, and that he has no good defence against this action in respect of such settlement or conveyance. I, on the contrary, am of opinion that the defender has produced and founded on an effectual settlement in favour of the Misses Logan by Mrs Allason Cunninghame of the income from these minerals, and that that affords, particularly in connection with the proof that the income was paid to them, a good defence against this action of accounting so far as concerns the income from the minerals. Mrs Cunninghame executed a disposition and settlement on 7th March 1837, by which she conveyed her whole heritable and moveable property to herself and her heirs, whom failing, to the deceased Richard Bannatine and his heirs, whom failing, to the defender, &c. Then comes a provision for payment of the testator's debts, and the burden of certain special legacies, and then, after the usual feudal clauses, there is this declaration, that any memorandum signed by her, however informal, giving additional legacies or annuities, or otherwise expressive of her will, should be equally binding on her said disponees as if forming part of the said deed. Taking this deed by itself, without going farther, it presents to my mind an instrument for construction that is not susceptible of any ambiguity. The disponee under this deed is burdened with certain special debts, legacies, and so on, sums of money; and cannot take the lands without foregoing that duty, and subjecting himself to that burden. But he is farther subjected to another condition, and that is, that he shall give effect to any other writing, however informal, which the granter may execute previous to her death, expressive of her will.

I know no difficulty about a deed of that kind. The disponee may take the subject or let it alone, but if he takes it he must do so under that burden. Now this lady, under this power of reservation, on 5th September makes a holograph writing in which she expresses herself thus: "Logan 15th September 1849.—I wish the income from the minerals to go to the Miss Logans, Flatfield, during their lives, and afterwards to be equally divided between the children of the late Major Baird, Falkland, and Mrs Craig, at present living in Ayr." But it is said she could not effectually give the income to them, because this is not a disposition. No doubt it is not. But it is a condition of the conveyance to Bannatine, and he cannot take the deed without conforming himself to that condition as much as to the other conditions. For nothing is clearer than that this condition is to be read as part of the testator's deed. Whether we look at this as a conveyance under a burden, or as incorporated into a conveyance in trust for the Logans, it comes to the same thing. On either ground there is no doubt that Bannatine and his representatives are bound by that codicil as effectually as if it was a conveyance to him in trust for the Misses Logan, so far as the mineral rents are concerned. I think therefore that the Lord Ordinary is wrong on that

point. It may be said that Cunninghame has nothing to do with this conveyance, and that that will afford him no defence, for Bannatine was infeft in the entire feudal estate, and his was the active title to uplift the rents, though he might have to account for them to the Logans. But it is sufficiently evident that Cunninghame, being liferenter and also factor for the deceased Mr Bannatine, and having in him thus two characters, one or other of which would entitle him to uplift these rents did, in fact uplift and pay them to the Misses Logan; for I look on that assignation now produced as perfectly conclusive on the question of fact, that the income from the minerals was fully accounted for by Cunninghame to the Misses Logan. The assignation has a statement which is a complete discharge to him, and it also conveys to him any right still in them to ask for payment of rents due to them and not yet received. The codicil and the assignation, read together, constitute for him a complete defence, so far as concerns the rents of these minerals. In connection with that, I must observe that there is nothing in the interlocutor of 29th May that requires to be recalled, or that is inconsistent with what I have said. The Lord Ordinary refuses the motion to open up the record to add a statement to the defences, that the defender had obtained the assignation No. 29 of process from Miss Anne Logan of her and her sister's right and interest to the income of the minerals referred to in the record. It is not necessary that the record should be opened up for that. The introduction of the assignation is enough, and the record stands well enough as it is. Cunninghame in his 12th article states that the bequests of the income of the minerals was not binding on him, but he resolved to give effect to what might be his wife's wishes, and accordingly handed over to the Misses Logan the whole of the mineral rents received by him after his wife's death, so far as might not be necessary for payment of his wife's debts and legacies; and he pleads in the 4th plea —(*reads*). This assignation I read as evidence that this payment was made as averred, and therefore it is not necessary to interfere with the interlocutor of 29th May.

It is only necessary, in conclusion, to say that there is here some matter as to which I am not in a position to offer any opinion. There is a sum of £179 paid by the Glasgow and South-Western Company for part of the minerals in question that they wished to have left unwrought. To whom that belonged, and to whom it ought to have been paid, we are not in a position to judge. That depends on a variety of circumstances. It may be that it is a part of the mineral field which, in all probability, would never have been wrought during the lives of these ladies; and if that is so it would be a strong ground for saying that that belonged to the fiar and not to the liferenter; but if it was mineral that was just about to be broken into by the mineral tenant, the case would be altered; but on that I give no opinion.

The practical effect is to recal that finding in the interlocutor of 26th March which follows the disposal of the first and second pleas.

The other Judges concurred.

Agent for Pursuers—W. K. Thwaites, S.S.C.

Agents for Defenders—A. & A. Campbell, W.S.

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*Thursday, July 8.*

## BRODIE AND OTHERS *v.* MUIRHEAD.

*Reclaiming Note—Competency—Court of Session Act* 1868. An interlocutor pronounced by a Lord Ordinary allowing before answer a proof of the parties' averments, and appointing the proof to proceed before him on a day to be named, *held* not to fall within the 28th section and the fourth sub-division of the 27th section, and therefore a reclaiming note presented more than six days from the date of the interlocutor *held* competent.

In this case the Lord Ordinary, on 30th June 1869, pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators and made avizandum, Allows, before answer, a proof of the facts set forth on the Record, so far as parties are at issue regarding the same, and appoints said proof to proceed before him on a day to be named, and appoints the cause to be enrolled for that purpose."

On 6th July he pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the motion of the defender to obtain leave to reclaim against the interlocutor of 30th June last, Grants leave to reclaim against said interlocutor."

On 7th July a reclaiming note was presented.

In the Single Bills.

CATTANACH, for respondents, objected that under the 27th and 28th sections of the Court of Session Act 1868 the reclaiming note was incompetent, not being presented within six days from the date of the interlocutor reclaimed against.

NEAVES for reclaimer.

At advising—

LORD PRESIDENT—One important circumstance here is that the Lord Ordinary has granted leave to reclaim, showing that his Lordship did not think this interlocutor fell under the 28th section, under which no leave is required. It is the right of the party to reclaim within six days; but if he does not reclaim in six days the interlocutor is final, and cannot be opened up at any stage of the case. It becomes absolutely final. It is not like an interlocutor that may or may not be reclaimed against. The class of interlocutors which fall under the operation of the 27th and 28th sections would require to be pretty strictly defined, and I think they are so by the 27th section. The finality is provided for in the 28th section in these words—"Any interlocutor pronounced by the Lord Ordinary, as provided for in the preceding section, except under sub-division (1), shall be final in law within six days from its date; the parties or either of them shall present a reclaiming note against it," &c. We must be satisfied that the interlocutor before us is within the description of those declared to be final before we can refuse it as incompetent. Is this then an interlocutor, pronounced by the Lord Ordinary, provided for under the preceding section? The only part of that section said to apply is the fourth sub-division, and that is—"The Lord Ordinary shall think farther probation should be allowed, but that such probation should not be taken before a jury." These words express merely the motion of the Lord Ordinary—"He may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken or inquiry is to be made, and make such order as may be necessary for giving effect to such interlocutor." The first obser-