than the establishment of a dishonest practice of foisting off goods of an inferior quality to that which the parties understood they were to get, and that that was a practice to which no Court could possibly give effect however fully it might be established."

Counsel for Pursuer—R. V. Campbell. Agents—T. & W. H. M'Laren, W.S.

Counsel for Defender—Jameson. Agents—Renton & Gray, S.S.C.

Friday, November 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* STEUART.

Property—Running Water—Recompense—Exaction of Rates for Water.

A raised an action against B, an adjoining proprietor, for a certain sum as the value of water supplied from A's lands to certain feuars and tenants of B, the supply having been introduced at a time when the lands of A and B were in the hands of one proprietor. *Held* that (1) A could not exact water-rates without a contract or an Act of Parliament; and (2) that he had no claim in the nature of recompense, his remedy being to cut off the supply.

Recompense.

Observed per Lord President Inglis that to found a claim for recompense there must be a loss to one party resulting in a gain to the other.

In 1857 Sir William Drummond Stewart made an application to the Court for power to feu part of his entailed estate of Murthly called Inchewan. He obtained that power subject to the condition that the feu-charter to be granted should be drawn according to the form fixed by the Court. In the feu-charters granted in compliance therewith it was conditioned that Sir William should supply from another part of the entailed estate water to the feus at Inchewan, and that the feuars should pay a yearly sum for that supply of water. In 1864 he excambed that part of the entailed estate called Inchewan for certain other lands held by him in fee-simple, and from that date Inchewan ceased to be part of the entailed estate. He still went on granting feus of Inchewan with the same feu-charter as he had previously used. In 1869 he had conveyed Inchewan to Franc Nichols Steuart, the defender, and it had been held by him as his property from that date down to May 1877, when it was sold. In a previous case between these parties, July 5, 1877, *ante* vol. xiv., 608, 4 R. 981, it had been found that in so far as regarded the feus granted before the excambion the water-rate was payable to the heir in possession of the entailed estate, and in regard to other feus granted after the excambion that as fee-simple proprietor of Inchewan Sir William had no right at all to give his feuars a water supply from the entailed estate.

Sir Archibald Douglas Stewart, the heir of entail in possession, Sir William having died in April 1871, raised the present action to obtain payment from the defender of a sum of £62, 16s. 6d., which he described as the amount due to him for water supplied to the feus from 15th May 1871 to 15th May 1877, with interest thereon, if the rates so due were calculated on the same principles as the water-rates in the feu-charter previously granted under authority of the Court; or alternatively, he claimed such sum as should be fixed to represent the fair and true value of the water supply.

The circumstances will be found more fully narrated in the previous report, and below in the Lord Ordinary's note and the opinion of the Lord President.

The defender pleaded, *inter alia*—"The defender having only used the water which he found upon his own lands, was entitled so to do, and the pursuer having had it in his power to stop the supply if so advised, is not entitled to maintain the present claim."

The Lord Ordinary (Rutherfurd Clark) assoilzied the defender, adding this note:—

"*Note.*—The late Sir William Steuart in order to feu Inchewan brought water to it from other parts of the entailed estate. Some feus were given off, and thereafter Inchewan was disentailed. After the disentail additional feus were granted, and to all the feu-rights, whether before or subquent to the disentail, Sir William attached the privilege of using the water which he had introduced, on payment of a certain rate.

"By his last settlement Sir William conveyed Inchewan to the defender, so that he was vested with the *dominium directum* as regards those parts which were feued, and the *dominium utile* as regards those parts which had not been feued.

"Sir William died in 1871. The defender ceased to be proprietor of Inchewan at Whitsunday 1877.

"In July 1877 it was decided that Sir William had no power to confer on the feuars subsequent to the disentail any right to the water introduced from the entailed estate. The consequence of that decision was that the pursuer as heir of entail was entitled to cut off the water from the proprietor and feuars of Inchewan other than those whose feu-right was anterior to the disentail.

"The pursuer alleges that during the period between Whitsunday 1871 and Whitsunday 1877 the defender by himself and his tenants—almost exclusively by the latter—used the water which had been introduced by Sir William Steuart, and he claims that he shall be recompensed for this use either by a rate at 5 per cent. on the annual value of the subjects which were supplied by the water, or on some other reasonable principle. He does not allege that he gave any notice of the claim until the decision of the Court was pronounced. He explains that the reason was that the defender had claimed a right to the water, and a right to levy the water-rates stipulated in the feu-contracts, whether before or after the disentail. On the other hand, the defender maintains that he continued to possess Inchewan just as his predecessor had left it, and that the only right of the pursuer was to cut off the water if he so desired.

"The Lord Ordinary is of opinion that the defence is sufficient. It is not alleged on the record that any change was made by the defender, nor

is it said that the pursuer has suffered any damage. The defender has merely made use of an artificial stream which had been introduced into his lands before he came into possession. It seems immaterial whether the stream flowed in a pipe or in an open channel. The right of the pursuer was in both cases the same, viz., to cut off. But having permitted the use, he cannot, it is thought, claim any payment or recompense."

The pursuer reclaimed, and argued—The water could not have been cut off—*Blantyre* v. *Dunn*, Jan. 28, 1848, 10 D. 509; *Mackenzie* v. *Woddrop*, Jan. 24, 1854, 16 D. 381. But there was a good claim for recompense to the extent to which the defender has been made richer by having these subjects supplied with water. The pursuer here might have made money by that which has been taken from him, and *lucrum cessans* is loss just as much as *damnum emergens*—Stair, i. 8, 6, *et seq.* Lord Kames in his Principles of Equity dealt with (1) considerations that entitled a man to have his loss made up out of another's gain; (2) considerations where there had been no loss that entitled participation in another's gain. It was under the second head that the pursuer's claim arose. There was no right of property claimed here, but merely a recompense for the trouble and expense of bringing the water.

The defender argued—It was assumed by the pursuer that he had a right of property in the water; that was the only ground on which he could found a claim to these rates; but water was *inter res communes*. The expense of bringing it had already been received by the pursuer's author, for it was taken into account in the excambion. There had been no expense or loss to the pursuer here so as to found a claim for recompense.

At advising—

Lord President—In this case I agree with the Lord Ordinary that the defender is entitled to decree of absolvitor, and I think that becomes very clear when the state of the facts is attended to.

The defender became proprietor of Inchewan in 1869 by disposition from Sir William Drummond Stewart, and in 1871 Sir William died, and was succeeded in the entailed estate by the pursuer of the present action, Sir Archibald Douglas Stewart. From 1871 to 1877, when the defender sold Inchewan, the pursuer never made any such claim as he now makes. That is a very unaccountable delay; and the only explanation of it that is given is to be found in the twelfth article of the condescendence—"So long as the defender claimed the said water-rate or assessment as payable to himself as proprietor of the foresaid portion of the lands of Inchewan, and until it had been decided, as it has now been, that this claim was unfounded, the pursuer was prevented from demanding payment from the defender of the sums sued for in the present action in respect of the water supplied to the parts of the said lands of Inchewan, in the personal occupation of the defender or in the occupation of his tenants." How he was thereby prevented from making his demand I am quite at a loss to understand. Nothing could be more natural than that he should have made that demand in the previous action; it was a most appropriate opportunity for making the demand. But it is now made for the first time. During the whole interval the statement is that the defender has been using this water and giving nothing for it. Was it not a strange thing that the pursuer should not have intimated his claim? That he did not do so is not a bar to the action; but it raises a suspicion as to the justice of his grounds of action that is difficult to remove from one's mind. The first conclusion of his summons is that "the defender should be ordained to pay in respect of the water supplied from the said estates of Grandtully, Murthly, and others to that portion of the lands of Inchewan in the parish of Little Dunkeld and county of Perth of which the defender was proprietor, and which was either in his personal occupation or in the occupation of tenants under him during the period foresaid," and it was almost entirely by his tenants that this water was used, and rates calculated in the same way as the water-rates were calculated in the feu-charter granted under the authority of the Court. It is a sufficient answer to say that water-rates can only be demanded under an Act of Parliament or the terms of a contract, and we have neither of these here.

The second conclusion is in the nature of a claim for recompense. What he claims is such a sum for recompense as shall be found "to be the fair and true value of and consideration for the water supplied from the pursuer's entailed estates foresaid to the said lands of Inchewan belonging to the defender, and occupied by him or his tenants for the period from 15th May 1871 to 15th May 1877." Now, there is an obediential obligation of recompense well known to the law, but that obligation is founded on this—that the party making the demand has been put to some expense or some disadvantage, and by reason of that expense or disadvantage there has been a benefit created to the party by whom he makes the demand of such a kind that it cannot be undone. The best and most familiar example of that is the case of one building on another's land. But in every case there must be, in order to ground the claim, the loss to one party resulting in a benefit to the other.

Now, the only expenditure here is the expenditure made by Sir William Drummond Stewart when heir-of-entail in possession of Inchewan for bringing in the water supply to Inchewan. That was most legitimately incurred for the purpose of benefitting a portion of the entailed estate. It does not appear upon the record that that expense was charged upon the entailed estate. I have little doubt it was, and it might certainly have been most properly so charged as a benefit to the rest of the entailed estate and the succeeding heirs. It improved the lands of Inchewan, and these passed into the possession of a third party by excambion. Now, that is the only expense incurred here. It is no doubt maintained that the commodity—the water—has a marketable value, and that if it had not been supplied to the defender and his tenants it might have been going elsewhere to the benefit of the pursuer. The defender had no right to prevent diversion of the water. The pursuer could have diverted it when he pleased, and can divert it now by cutting it off from these houses. In the case I have put of a house built on another man's land, the house must remain there, but the benefit said to be given to Inchewan by this water can be taken away. The simple view of the Lord Ordinary seems to be the correct one,

that the only right the pursuer has is to divert the water. He has no other right and no other claim.

LORD DEAS and LORD SHAND concurred.

LORD MURE was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Balfour—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defenders (Respondent)—M'Laren—Murray. Agents—Tods, Murray, & Jamieson, W.S.

REGISTRATION APPEAL COURT.

Monday, November 4 to Saturday, November 9.

(Before Lord Ormidale, Lord Mure, and Lord Craighill.)

[Peeblesshire.

BLACKWOOD *v.* VEITCH.

Election Law — County Franchise — Proprietor — Husband in Right of Wife who had Executed a Trust-Assignation.

The trustees under an antenuptial trust executed by the wife for her sole benefit, with full powers of sale and investment, purchased a feu and erected thereon a house in which the spouses lived, paying all taxes but no rent. There was a provision in the trust-deed for reconveyance to the truster on the husband's death. *Held* (*diss.* Lord Craighill) that as the trust was simply for the management of the wife's property, and the real interest remained with her, the husband was entitled to be on the roll of voters as proprietor in right of his wife.

Veitch was entered on the assessor's list of voters for the county as proprietor in right of his wife of a dwelling-house and garden of the annual value of £35. The spouses personally occupied the house, paid landlords' and tenants' rates and taxes, but no rent.

Blackwood objected to Veitch's name being continued on the roll, on the ground that the subjects belonged to certain trustees under an antenuptial trust assignation executed by Veitch's wife, the ground having been feued and the house built with the trust funds. The purposes of the trust were—(1) payment to the truster of the free income of the estate on her own receipt without consent of Veitch: (2) reconveyance to truster on dissolution of marriage by Veitch's death; (3) on dissolution of marriage by truster's death to pay or convey estate and effects among her nearest of kin, subject to her directions. The trust-deed gave full powers to call up, sell, and dispose of by public roup or private bargain any part of the estate and effects, and to lend out on such securities, heritable or moveable, or to invest in the purchase of any property, heritable or moveable, as the trustees might select, all sums they might judge expedient, and to call up loans or investments, and again to lend out or invest the sums received. Veitch renounced all his rights as husband in the estate conveyed.

By the feu-contract of the subjects in question, which was of date subsequent to that of the marriage, the trustees under the above-mentioned trust-assignation, in whose favour the feu was granted, bound themselves to erect a dwelling-house worth at least £700, which should yield a yearly rent at least double the feu-duty. The feu-duty was £4, 12s. 4¾d., and no other consideration was granted. There was no declaration that the trustees were to hold for Mrs Veitch's behoof in fee or in liferent, or subject to her orders or instructions. The cost of the house was paid out of the personal estate conveyed by the trust-assignation.

It was objected to Veitch's enrolment that his wife was not proprietor of the subjects; that the trustees were proprietors, and were entitled to dispose of them against her will; that at least her possession was defeasible; that the trust-subjects were moveable and could not qualify.

The Sheriff (NAPIER) held that the subjects were "virtually the property" of the truster, and repelled the objection, whereupon Blackwood required a Special Case.

Argued for appellant—The wife had no heritage at marriage. There was no direction to purchase land. The house was not an *acquisitum*, but a temporary investment, subject to amplest power of sale. In *Martin* v. *M'Lurg*, Dec. 19, 1868, 7 Macph. 299, the Court held that the right of a beneficiary to receive rents of trust-subjects during life was moveable and could not qualify. In *Wilson* v. *Cowan*, Dec. 19, 1868, 7 Macph. 299, a power of sale was held to render the beneficiary's right personal. In these cases there was heritage originally conveyed in trust, and in the first a direction to sell only after death of beneficiary. In *Skeete* v. *Duncan*, Oct. 24, 1873, 1 Rettie 18, the conversion was postponed till death of liferentrix. In *Stewart* v. *Campbell*, Oct. 21, 1869, 8 Macph. 13, the contingency of sale had passed.

Argued for respondent—The trust was created for Mrs Veitch's benefit, and solely for the protection of her interests. The estate was held for behoof of her and her next-of-kin. There was no emerging liferent for her husband if she predeceased him, and if she survived him she could demand a reconveyance. The feu therefore of this property was virtually hers — *Ramsay* v. *Ramsay's Trs.*, Nov. 24, 1871, 10 M. 120. The power of sale conferred on the trustees did not divest her of the radical right—*Lockhart* v. *Wingate*, Feb. 19, 1819, F.C.; *M'Millan* v. *Campbell*, March 4, 1831, 9 S. 551. The cases of *Martin* v. *M'Lurg* and *Wilson* v. *Cowan* were not in point, as in both the Court had before it a right merely of credit not of property. In *Wilson* v. *Cowan* the power of sale was given for purposes of distribution, but here the sole objects of the trust were payment of the revenue and preservation of the estate intact, and while it could not be pretended that for either object a sale was necessary or probable, the trustees could manifestly be restrained from exercising the power of sale except for the futherance of these purposes. As to the exclusion of the *jus mariti*, that did not prevent the husband being enrolled in respect of his wife's property—*Boylan* v. *Rutherford*, Jan. 26, 1865, 3 M. 414.