not depend upon double distress, but upon the right to exoneration. But then it has been decided that the mere existence of a dispute as to a single debt of the testator's is not a sufficient reason for throwing a whole trust-estate into Court, and, although it does not appear that in any of these cases the trustees themselves were the real raisers of the multiplepoinding, I do not think that should make a difference, unless it can be shown that the multiplepoinding was required for their exoneration. It is not reasonable that every creditor and every special legatee should be compelled to come into Court and lodge a condescendence and claim before he can obtain payment because of a question about some other claim—it may be of inconsiderable amount—with which he has no concern, and which cannot affect his own either in principle or amount; and therefore, if this action had been otherwise well founded, it appears to me that the fund *in medio* should not have included the entire estate. There is nothing alleged to make the process competent, except as to the particular sum in dispute. But I agree that even as to that sum the multiplepoinding is unnecessary. The averment is that the trustees informed the beneficiaries that a claim had been brought against the estate which they were advised was not well founded. It is not surprising that some of the beneficiaries should have said that, if that were so, it ought not to be paid. But it now turns out, as we were told at the bar, that it is a good claim, and that it must be paid. I agree that in these circumstances the action was premature.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as incompetent.

The reclaimer moved for expenses against the trustees as individuals.

LORD PRESIDENT—My view is that these trustees would have got exoneration and discharge in due course without resorting to this unusual procedure for their own protection, and, as they have used inept and inappropriate means, I think they must be held personally liable.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I have doubts, but on a question of expenses I am not prepared to dissent.

Counsel for the Pursuers—Cheyne—Cook. Agent—Horatius Stewart, S.S.C.

Counsel for the Defenders—Abel. Agent—Alex. Morison, S.S.C.

Friday, January 11.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

AITKEN AND OTHERS *v.* MERRY & CUNINGHAME, LIMITED.

Interdict—Trespass—Private Road—Coal Mine—Use of Private Road leading to Coal Mine and Colliers' Houses—Pickets.

The tenants of a colliery built on land, let to them along with the mine, houses which were occupied by miners employed in the colliery. These houses and the coal mine were approached by a private road through land included in the lease.

Early one morning a picket composed of members of a miners' trade union, none of whom were employed in the colliery, entered the private road in spite of the remonstrances of the mine officials, and attempted to persuade the miners inhabiting the houses not to work on that day.

The tenants of the colliery brought an action of interdict against the members of the picket. The defenders alleged but failed to prove that the miners inhabiting the houses desired to be interviewed by the picket.

Held that a trespass had been committed by the picket, and interdict *granted* against their trespassing on the private road or the lands adjoining occupied by the pursuers.

Sheriff—Process—Proof—Mode of Recording Evidence—Sheriff Court Act 1853 (16 and 17 *Vict. cap.* 80) *sec.* 10—*Evidence Further Amendment Act* 1874 (37 *and* 38 *Vict. cap.* 64).

Observed by Lord Young that it is the duty of the Sheriff hearing a proof to dictate the evidence to the shorthand writer, and that the practice of permitting the shorthand writer to take it down at length was irregular and contrary to statute.

Messrs Merry & Cuninghame, coal and ironmasters, Glasgow, raised an action in the Sheriff Court at Hamilton, against William Aitken and other miners at Blantyer, praying the Court to interdict the defenders from "entering or trespassing" upon any portion of the lands of Bardykes, Spittal, or Mavishill, or any of the private roads therein, so far as the said lands or roads were occupied and possessed by the pursuers in connection with their colliery known as Bardykes Colliery, and to grant interim interdict.

The facts of the case were as follows:—The pursuers were tenants of the colliery known as Bardykes Colliery near Blantyre in virtue of a thirty-one years' lease dated in 1879. By the said lease powers were conferred on them, *inter alia*, to make and use the roads necessary for their workings under the lease, to build workmen's houses, and to take and occupy any portions of the surface required for the above

purposes. The pursuers erected on land taken under the lease workmen's houses, which they permitted their employees to occupy. Between 150 and 170 miners out of 400 employed in the colliery occupied these houses. The houses were approached by a private road branching off from the public road between Cambuslang and Blantyre. The land taken under the lease included the site of this private road. A gate leading to the coal mine was situated upon the private road between the miners' houses and the public road.

The defenders were members of a Trade Union called the Blantyre Miners Association. After the close of the coal-miners strike in November 1893, the officials of the Bardykes Colliery used their influence with the miners in their employment to get them to break through what was called by the Miners' Union "the five days policy," and to work six days a week. Before this, it had been customary in the Bardykes Colliery, in common with the whole collieries in the district, for the miners to be idle on Saturdays.

In order to counteract the action of the colliery officials twenty or thirty members of the Blantyre Miners' Association, including certain of the defenders, went down to the colliery as pickets between 3 and 4 a.m. on Saturday 23rd December. The defenders led evidence to show that they had gone to the colliery on the invitation of the miners living in the colliery houses, but the Court held that the evidence was insufficient to prove this. The pickets were met at the junction of the public road and the private colliery road by the colliery officials, who told them that the road was private and that they had no business there. The pickets, however, marched past the officials down the private road to the gate leading to the coal mine. There they met the men coming from the houses and endeavoured to persuade them to abstain from working. There was no rioting, and no violence was used or even language of a threatening nature. The evidence of the pursuers' general works manager was to the effect that, when the miners came up to the pickets, the latter accosted them with "Do you not know that this is an idle day?" and if any miner walked on the pickets said, "You are a low mean cur." The pickets succeeded in turning some of the men, but the colliery worked that Saturday. On 6th and 20th January similar proceedings took place, others of the defenders being present as pickets. The action was brought in order to exclude the pickets from the colliery roads and grounds.

On 19th January the Sheriff-Substitute (DAVIDSON) granted interim interdict, and on appeal by the defenders the Sheriff (BERRY) adhered on 20th February.

After proof the Sheriff-Substitute, on 15th November 1894, continued the interdict formerly granted, and continued it as long as the pursuers continued to be in occupation of the subjects in respect of which interim interdict had been granted.

"*Note.*—I cannot say that I think the proof in this case has made any material difference to the position of parties. The pursuers have established their title, and the defenders have led evidence to show that the road on which they are said to have trespassed is the only road to certain houses inhabited by the pursuers' workmen, and that these workmen, or some of them, invited them to the ground. As to the rights of the people who live in these houses over this road, I am not called upon to give an opinion; what is involved or included in the right of access it would probably be difficult to say. But it is clear to me that they can have no right to invite others, not to their houses, but to private grounds of the pursuers, to perform acts which, whether legal or illegal, are a source of annoyance to the latter. I am not sure that such an invitation is proved to have been given, but even if it were, it could give the defenders no title to trespass on ground merely because such ground was a road, and happened to be the access to the workmen's houses. I think the pursuers have established their right to interdict, so long as they are in the occupancy of the subjects, against those of the defenders who confessedly trespassed, and who in their pleadings have averred and maintained a right to do so."

The defenders appealed to the Court of Session, and argued—(1) The defenders had not trespassed on the property of the pursuers. They had a perfect right to be there. They came at the invitation of the miners inhabiting the pursuers' houses. Even if no direct invitation was proved, the pickets were there with the approval of the miners, and that was tantamount to an invitation. (2) Even if the defenders had no right to be there, interdict was not the appropriate remedy. The maxim, *De minimis non curat praetor* applied. Interdict was only granted in cases where an actual and serious wrong had been done, which either was likely to be repeated, or had been continued down to the period of complaint. Here no appreciable wrong had been set forth. There had been no disturbance, only an interchange of opinions by a few men on a roadside—*Hay's Trustees* v. *Young*, January 31, 1877, 4 R. 398; *Winans* v. *Macrae*, June 3, 1885, 12 R. 1051. (3) If it was a case for interdict, the terms of the interdict were too wide. It would prevent any of the defenders going to visit the miners in the pursuers' houses, or going there for any purpose whatever.

Argued for pursuers—They were entitled to say that this road was private and belonged to them, and to prevent anyone coming upon it for the purpose of obstructing persons in their employment. The pickets were not for the purpose of visiting the mines, but in order to persuade them to the pursuers' prejudice to abstain from work. The form of interdict was taken from the Juridical Styles, and was the one always used in questions of trespass. They were quite willing, however, to amend the prayer of their petition so as to make the interdict only apply to trespass.

The pursuers moved to amend their petition by striking "entering or" out of the prayer.

At advising—

LORD YOUNG—I think the judgment of the Sheriff-Substitute is right, and it does not occur to me that the circumstances of the case require me, in expressing my opinion, to enter into any details whatever. There is no doubt that the ground, which is a road leading to the houses of workmen in the employment of Merry & Cuninghame, belongs to them as tenants of the ground leased by them, and that the exclusive use of the road is with them, and with those to whom they may be pleased to give it during the subsistence of their lease. The question really presented to us is, whether the picketers on the occasions in question were entitled to be on the road for the purpose of advising or persuading the workmen in the pursuers' employment to abstain or to continue to abstain from work. We have not here any question about the right to use this road by those who in the ordinary course of human affairs have occasion to go to the workmen's houses, and whose going there is in the interest of the workmen themselves. Tradespeople, shopkeepers, and their emissaries, carrying necessary provisions, and a variety of other people whom the tenants may desire to call on them, are entitled to use this road, or rather the tenants are entitled to insist that such uses of the road shall be allowed. But we have no concern with any uses of that kind here; there is no complaint by the tenants that such people whom they desired to see at their houses on suitable occasions are not permitted the use of the road. We are only dealing with picketers who maintain a right to go there in numbers for the purpose of persuading in any manner they please, if they do not resort to actual violence, the pursuers' workmen from going to their works. I am of opinion that that contention of right on their part cannot be sustained. I take the same view as the Sheriff-Substitute, that the assertion of a right by the defenders to make such a use as they are proved to have made in the past, and the making of which has led to this action being brought, must be negatived, and interdict granted accordingly in respect of that negative.

I have quite in view the proposal that the interdict should be restricted to trespass, and that the words "entering or" should be struck out. The interdict as granted will thus not interfere with the use of the road by people legitimately there for the purposes I have already indicated.

I wish to enter a protest against the practice, which seems to have become common in sheriff courts, and which has been followed here, of allowing the shorthand writer to take down the evidence at large without restraint. I think this course is irregular. The law was stated correctly by Mr Dove Wilson in his Sheriff Court Practice, 176—"Evidence, however, is now usually taken in shorthand, which is a great improvement as regards speed, economy, and accuracy." . . . "The Sheriff dictates to the shorthand writer the evidence which he is to record." . . . "The practice of allow- the shorthand writer to take down the evidence without its being dictated to him is against the statute, and is apt to make the proof unnecessarily prolix." That is a correct statement of the law, and to do otherwise is contrary to the Act of Parliament.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Open up the record, allow the prayer of the petition to be amended, and the amendments having been made, of new close the record: Find in fact (1) that the roads in question are private roads; (2) that the pursuers are tenants in possession of such roads; and (3) that the defenders . . . have on various occasions trespassed on the said roads, or one or other of them, and on the lands of Bardykes and Spittalhill, and on the lands of Spittal and Mavishill adjacent thereto, and maintain a right to do so: Dismiss the appeal: Affirm the interlocutor appealed against: Of new continue the interim interdict formerly granted, . . . and continue the same as long as the pursuers continue to be in the occupation of the subjects in respect of which the interim interdict was granted."

Counsel for Pursuers — C. S. Dickson. Agents—Forrester & Davidson, W.S.

Counsel for Defenders—Dundas—Orr. Agents—George Inglis & Orr, S.S.C.

Wednesday, December 5.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MACNAB *v.* MACNAB'S EXECUTOR.

Succession — Legitim — Representation — Intestate Moveable Succession (Scotland) Act 1855 (18 *and* 19 *Vict. c.* 23).

A testator died in 1867 survived by three sons, Alexander, James, and John. James died in 1884 survived by five children. John died intestate and childless in 1891, without having elected between his legitim and the provisions made to him in his father's settlement. Thereafter one of the children of James brought an action against Alexander, who had been appointed John's executor-dative, for a share of the legitim which the latter might have claimed from his father's estate. The defender, who had the residuary interest in that estate, objected that James had barred himself by his actings from making any claim in respect of said legitim, and that the pursuer, as representing her father under the Intestate Succession