rence of his tutor *ad litem* appointed by the Court. Sequestration of the deceased's estate was obtained on the 10th of August 1866, on the petition of Charles Dick & Son, brewers, Edinburgh, upon a bill amounting to £103, 10s., payable four months after date, and bearing date 10th August 1863. The petitioner stated that Smith, having found himself in embarrassed circumstances, called a meeting of his creditors, which was attended by the petitioning creditors, and that they, along with the other creditors, agreed to accept of a composition of 4s. in the pound, and thereby discharged all prior claims; and therefore it was maintained they were not entitled to apply for sequestration. The respondents, on the other hand, said that the said composition had never been paid by Smith, and they accordingly pleaded their right to keep up the whole debt due by Smith to them, and to rank for it in the sequestration. The petitioner further stated that upon the death of his father in November 1864, the respondents had lodged a claim for £111, 3s. 6d. with his executrix, and which was paid to them. This was admitted by the respondents. The petition for recal contained the following additional statement:—

"The said bill, which is dated 10th August 1863, is for the sum of £103, 10s., and is payable four months after date. It was not subscribed by the said Thomas Smith, and the words "Thomas Smith" written therein were not written by him. He (Mr Smith) never saw the said bill, and never knew of its existence. It was not delivered by him to the respondents, and they became possessed of it without his knowledge. No value was given by the respondents for that bill.

On 13th February 1867 the Lord Ordinary (MURE) pronounced the following interlocutor:—

"The Lord Ordinary having heard parties' procurators, and thereafter considered the closed record and productions; Before answer, allows the petitioner a proof of his averment that the bill for £103, 10s. on which sequestration proceeded was not the writ of the deceased Thomas Smith, and to the respondents a conjunct probation; Appoints the proof to take place on Thursday the 7th day of March next, at 10 o'clock A.M., and grants diligence against havers and witnesses. One word delete.

"DAVID MURE.

"*Note.*—As the bill and relative affidavit on which sequestration are awarded are *ex facie* free from all objection, the Lord Ordinary does not, as at present advised, think it would be competent to allow the petitioner to enter into a general accounting with the respondents, in order to show that they were not creditors of the late Thomas Smith to the amount of the bill in question, and that the sequestration ought on that account to be recalled; But if the petitioner can show that the bill was not signed nor granted by the deceased, or, in other words, is a forgery, the Lord Ordinary is disposed to think that that will be a sufficient ground for recalling the sequestration. "D. M"

The petitioner then abandoned his allegation that the bill referred to in the petition for sequestration was not the genuine writing of the bankrupt, whereupon the Lord Ordinary discharged the order for proof and circumduced. The Lord Ordinary thereafter pronounced the following interlocutor:—

"*8th March* 1867.—The Lord Ordinary having resumed consideration of the Closed Record and proceedings: Finds that there is no sufficient reason for recalling the sequestration; Therefore refuses the petition, and decerns: Finds the respondent entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report.

"DAVID MURE.

"*Note.*—The challenge of the genuineness of the bill, founded on by the petitioning creditor in proof of his debt, having now been given up, the case falls to be disposed of on the footing that the affidavit and relative voucher on which sequestration was awarded were *ex facie* unobjectionable. And as the Lord Ordinary on further consideration adheres to the opinion indicated in the note to his interlocutor of the 13th of February, as to the incompetency of allowing the petitioner to enter upon a general accounting as to transactions between the petitioning creditor and the bankrupt, going back to the year 1862, with a view to the recal of a sequestration duly awarded in terms of the statute, he has refused the petition. "D.M."

The petitioner reclaimed.

MAIR, for him argued—The petitioner is, *de plano*, entitled to recal of the sequestration in respect of the admissions of the respondents as to the composition which the creditors agreed to take from the bankrupt, and which discharged the original debt of the respondent, and also as to the payment to the respondents of the debts claimed by them from the executrix. At any rate, the petitioner is entitled to an inquiry into the circumstances set forth in the record, in order to have it ascertained whether the composition was paid, and whether any debt was due to the respondents. *Milne* v. *Milne*, June 13, 1850, 11 D. 1007.

GIFFORD and MACKINTOSH, for respondents, were not called upon.

The Court agreed with the Lord Ordinary in holding that the procedure was regular, and that the sequestration was properly awarded upon an affidavit and relative voucher, which was *ex facie* unobjectionable. They further concurred in holding that it was incompetent to allow the petitioner an accounting with the petitioning creditors; and even if that were competent, there was nothing to induce the Court to follow that course, because there was nothing suspicious in the statement of the petitioning creditors, and much that was improbable in the statement of the petitioner for recal.

Agent for Petitioner—W. Officer, S.S.C.

Agent for Respondents—George Cotton, S.S.C.

Tuesday, May 21.

SECOND DIVISION.

WYLIE AND HILL *v.* BELCH.

Suspension—Lease—Minerals—Working to Profit—Report. Circumstances in which held, under a lease which provided that the minerals let might be given up upon the report of an engineer, named in the lease, that they had become unworkable to profit, that the report, which has a condition of taking benefit under the lease, had not been set up, and suspension of a charge for rent due under the lease accordingly refused.

The ironstone and coal in the lands of Teucharhill, near Govan, were let by Mr Belch, the proprietor, to the suspenders, who were coalmasters in Glasgow. The lease contained a provision that upon its being shown to the satisfaction of George Simpson, Esq., mining engineer, that the minerals were not workable to profit, the tenants should be free as from the date of Mr Simpson's final award. Mr Belch having charged for the rent of the coal due at Martinmas 1861 and Whitsunday 1862, this suspension was brought by Wylie & Hill. They contended originally that the coal had been found by Mr Simpson to be unworkable to profit in terms of an award dated 27th December 1860. The respondent, Mr Belch, on the other hand, maintained —(1) that the whole minerals must be unworkable before the tenants could seek relief, and that the tenants could not give up the coal alone; and (2) that the award of 27th December 1860 did not find the coal unworkable to profit.

The Lord Ordinary (MACKENZIE), on 8th January 1864, remitted to Mr Simpson to report whether the coal and ironstone were together unworkable; and both were reported unworkable at the date of the remit. Lord Mure, his successor in the case, remitted again to Mr Simpson for a report as to when the coal alone became unworkable; and he reported, in May 1865, that he had evidence of its having become unworkable by itself in December 1860. Both remits were before answer, and his Lordship ultimately decided in favour of the landlord, on the ground that the coal could not be given up alone.

The tenants (suspenders) reclaimed against this interlocutor, and maintained that they could give up the coal alone. It was answered that they were not within the clause in the lease in respect of their not having obtained a final award in their favour upon the coal prior in date to Martinmas 1861. The tenants thereupon undertook to prove that when they applied to Mr Simpson in December 1860 they laid before him all the information upon which he proceeded in finding the coal alone unworkable under Lord Mure's remit. This information consisted mainly in two bores made in 1858, which Mr Simpson stated he had never seen till they were produced before him under the remit in 1864. The Court, before answer, allowed the suspenders a proof of their averment upon making payment of the expenses incurred by their neglect to state it in time; and the case now came before their Lordships upon the proof.

SCOTT and GIFFORD (with them BRAND) were heard for the suspenders on the import of the proof.

A. R. CLARK and R. V. CAMPBELL, in answer.

At advising—

The LORD JUSTICE-CLERK—The ground of suspension is that, according to the provisions of the lease, the lease, in so far as the coal rent is concerned, ceased to be obligatory when it should be found that these minerals, the gas-coal and free-coal, were not workable to profit; and that this must be held to have been found as at December 1860.

The case is not that of exhaustion, but of difficult and costly working, and the case must be determined by the terms of the condition in the lease as to which parties have deliberately expressed their matured view, as it appears to me the common law has nothing to do in the question.

The terms of the condition in the lease are these [reads].

The condition-precedent of any determination of the case is that it shall be proved to the satisfaction of the referee that the minerals are not workable to profit; and the period at which the lease is to terminate is not the time at which it shall have been found that the minerals were no longer workable to profit, but the time of final determination of the question from the date of the final award of the referee. It contemplates, on failure of Simpson, an arbitration to two parties who may differ, and a settlement by an oversman. Even in that case of necessarily protracted discussion, the rent is made to run not only up to the date of that of the judgment of that one of the two arbiters, whose judgment is ultimately found right by the oversman, but at the date of the oversman's judgment itself.

A question of difficulty arises upon the meaning of the words "minerals in the lands hereby let," which might in one aspect of the case be important. It has been found by the Lord Ordinary that the two minerals let—the ironstone and the coal—together must cease to be workable to profit before the obligation of payment for either can be held to cease. I hesitate to adopt that construction, which, if sound, would lead to an easy solution of the question raised, because there is no allegation as to the ironstone being exhausted. The coals are let with a rent or reddendo specially applicable to themselves, and the very charge under suspension is for the half-year's rent of the gas-coal and free coal. It is difficult to understand why, if no coal is raised, and only a small profit made by the ironstone, the payment for coal should continue when the coal may be actually exhausted. A reading which would terminate the coal lease on the ascertainment of the exhaustion or unworkability to profit of the coal, or the ironstone lease on its being in the sea, seems to recommend itself more to the presumed minds of parties entering into such a transaction; and although difficult to reconcile with the particular expressions of the condition, may not be inadmissable. I do not desire to decide that question. It happens, in the view which I take of the case, to be unnecessary to do so. I shall consider the case on the footing that the lease of the coal may be separately dealt with.

The point upon which the decision of the case seems to me to turn is as to the period at which the coal lease, assuming that it is substantially a case of two leases in the same contract, must be held to terminate. The question which we have to decide, and the only question, is, whether it had actually terminated at or before Martinmas 1861, or at or before Whitsunday 1862? If the lease was then at an end in reference to the coal, the judgment must be for the suspender. If otherwise, the letters must be found orderly proceeded.

The question, if put under terms of the condition, is this—Had it then been proved, to the satisfaction of the referee, that the gas-coal and free-coal had become unworkable to profit before Whitsunday 1861, or Martinmas 1861, or Whitsunday 1862? Had the referee expressed that opinion in his final award.

Literally, the condition of a final award being proved had certainly not been complied with. We have no final award until the middle of November 1865. We have no award at all favourable to the suspenders of any earlier date. We have an examination of the actual workings of the coal mine in operation so early as December 1860. But he found, rightly or wrongly, but he certainly did find,

that he was not in a condition to come to any conclusion in reference to the unwrought portion of the field, and he mentioned a fact inducing him to come to that conclusion. He said as to the northern portion of the field, which is not being worked, it may be without those slips which make the worked portion so costly to work, it having been so found in reference to the southern portion formerly developed.

I hold that, in order to the determination of this lease, it was incumbent on the tenant to have proved to the satisfaction of the referee that the entire field was exhausted. I subscribe to the doctrine stated in reference to such clauses by Lord Barcaple, in the case quoted to us in debate, that the tenant must establish, by evidence sufficient to satisfy the arbiter, as a necessary condition-precedent to the determination of the lease, exhaustion or unworkability to profit—that he must make out the case to the referee's satisfaction. In this case it is, in event of its being proved, that is proved by the tenant to the satisfaction of George Simpson. Any failure of the arbiter to intimate that he desired evidence, which, if he got, would satisfy him, is not relevant as a *ratio* upon which it shall be held against the landlord that the fact as to which the evidence was awanting must be held as proved.

Prima facie the case seems clear enough, but the suspenders say that the arbiter had evidence before him in 1860, not only sufficient to have satisfied him, but the very evidence upon which he came to his ultimate determination neither more nor less; that the referee has made in a certain explanatory note mis-statements and falsehoods, which being establishad by them, put them in a position to invoke the equitable interposition of the Court in construing the terms of the condition. They raised issues impugning the conduct of the arbiter, and plead, as I understand the plea, that if the arbiter did not decide in their favour he should, according to his own showing, have done so.

A case may be supposed raising a question as to whether, when a tenant has placed before an arbiter all the evidence necessary, and which the arbiter himself admits to have been sufficient, he shall suffer from the mere neglect or perverseness of an arbiter. Whether such a hardship as is pictured in that case would warrant the Court to temper the strict law of the contract with equity, so as to place the tenant in the position in which the arbiter shall have admitted that he ought to have stood, is a question which in my view it is not necessary to determine. I am of opinion that the case of the tenants here established no such case.

The case is, that Mr Simpson knew of two coal bores on the northern portion of the field at a time when, as the suspenders affirm, he says, in explanation of his final award, that if these two coal bores had been laid before him, he would have been in a condition to report as he has now done.

Mr Simpson, in his examination, denies that he would have been satisfied if these two bores had been before him; he denies that his explanation had been rightly construed, and he says that had the materials upon which his judgment was formed upon these two bores, and two others made in 1863 by Messrs Dunlop & Co., who were proving the field with a view to a surrender of the lease of ironstone, been before him, he would then have come to a conclusion.

It is certain that, in the passage of the note founded on, four bores are referred to. The expression is not very accurate, but I entirely believe Mr Simpson when, in explanation, he says that he referred to all; especially when I consider what he says as to the two bores being insufficient to test the field, and look to the plan of the field. The two bores were close together—88 yards distant only it is said by Mr Anderson, who paced the distance—on the same line, and both in the part of the field south of the road. The two bores at the corner of the northern portion of the field seem to me to be necessary to enable any person to predicate anything as to the field. That Mr Simpson speaks truly as to the insufficiency of the two bores, or rather one, in addition to the disclosure of strata in the actual pit, which superseded the use of No. 1 bore, is thoroughly confirmed by Mr Robertson, the civil engineer, who was examined as a witness for the suspender, for he says (p. 37)—"I should say that one bore, or even two bores, would not prove the character of the field."

Again, he says bores were not laid before him in 1860.

Now, I think that statement is perfectly true. If they were, where are they? That bores may have been spoken of in his presence is nothing to the purpose, or very little to the purpose. No man can be expected to carry all the details of boring in his mind, and to give effect to his recollections of them. Nothing short of actual production of such bores, with a verification of them, which in this case could not be given or attempted without involving one of the parties in just disgrace for a gross and unpardonable fraud.

The referee issued his award, and anyone with any sense could see that he spoke of the northern field as untried. If bores had been exhibited, why omit them? The suspenders write to him to get an explanation, but they make no reference whatever to these bores, which, if there be truth in their present case, must have been given if the bores had been brought forward.

It is not necessary to enter into any detailed examination of the evidence; but I am satisfied that the true period of the first production or reference to these bores was in 1864. If Morrison, referring to his notes, and stating from them what actually took place, is to be credited—and show me reason why he should not—there is an end to the question. It is confirmed by the passages in the pleadings of Mr Clark, by the evidence of Mr Belch, by the evidence of Mr Taylor, and by the absence of Clark. I am of opinion that the suspenders have failed to establish their case, and that they have not proved the existence of any good ground for having it found that the coal lease must be held terminated in 1860. They did not satisfy the referee, nor, in my opinion, did they supply him with such evidence as would have justified any finding different from that to which he then arrived. It may be a hardship that rent should be paid for an unworked coal-field, but the parties by their own act have created it. We, as a Court, must decide the case upon a sound construction of the agreement, and upon that construction there can be no doubt, in my view, that the lease continued to subsist during the currency of the two half-years for which the charge has been given.

The other judges concurred.

The note of suspension was accordingly refused.

Agent for Suspenders—John Walls, S.S.C.

Agents for Respondent—Maitland & Lyon, W.S.