of Ross, for I think there is evidence to show that there was an invoice of this soda sent to Ross, which made him cognisant that a definite and specific quantity of soda was lying for him in Newcastle, and I think he must have known the very place where it was, and to which he was to send for it. The evidence I refer to is this,—William Mackintosh, a partner of Mackintosh Brothers, exhibits an order book containing an entry of 28th January 1861—"James Ross, shipowner, Inverness, invoice the 5 tons soda from Smart, and the 5 tons from Aitchison & Sons, at £4, 15s., f. o. b." That is a direction to make out and transmit such an invoice, and Mr M'Culloch, in Mackintosh's employment, says he saw this note in the order book, and that he knows it to be in William Mackintosh's handwriting. He exhibits a diary and depones that he posted on 31st January 1861 an invoice of the goods in question to Ross. That evidence in uncontradicted. I see that the Sheriff in his note says that Ross in his defences says he didn't get an invoice. ' That is not evidence, and only shows that Ross is willing to aver what he is not willing to swear to; and when the Sheriff says that that was added on revisal and was not answered, it must be remembered that that was as much the fault of the Sheriff-substitute as of the parties. Suppose the matter went no farther, and that all Ross knew was that a specific quantity of soda was lying for him at Newcastle, that would be enough for the case. But it is plain from other documents that Ross knew more. The Chemical Company wanted to get rid of the soda, for Barrow writes to Smart that the people at the works want Ross to take his soda immediately, as it is lying in their way; and Smart in a reply to Barrow says that he has written to Ross about the soda. His Lordship then examined the evidence of Smart, to the effect that when he said in his letter that he had written to Ross he meant Mackintosh, as he did not know Ross except through Mackintosh, and said that the documentary evidence must be held as the most trustworthy,and continued—These letters prove that in February Ross had direct and specific intimation that the soda lay for his orders in the hands of the Washington Chemical Company. If so, at whose risk was it? Without doubt, at the risk of the purchaser. Can there be any doubt that if Ross had sent then or a month or two later, or at any time before the bankruptcy of Smart, for the soda, he would have got delivery? Who is to be answerable for Ross' delay? Is Mackintosh, who procured the goods, and made them deliverable at the very place stipulated? That is out of the question. If the soda had perished, or there had been any legal obstacle by the lapse of time to prevent Ross getting delivery, I should say that Mackintosh had fulfilled his contract, and that Ross must suffer the loss.

But, in fact, I think the soda was delivered to Ross, for in July, nearly six months after the time when this soda was in the hands of the Chemical Company for Ross' orders, he sends a ship to take it. That was a ship belonging to Ross and going on his own business, and the shipmaster was told at the same time to take on board this soda as belonging to his owner, and take it to Inverness. Now what happens? The shipmaster comes to the company and asks the soda. The company were undoubtedly bound to deliver that soda. But it is said that it has not been proved by Mackintosh that the price was ever paid to the company. No such burden lies on Mackintosh. The company never suggested that the price was not paid, or that they had any right of retention. The company try to create a security over this soda in favour not of themselves but of Barrow, and the device is to take from the shipmaster of Ross' ship a bill of lading in favour of Barrow. That is an inept proceeding, and that bill of lading creates no contract of affreightment between the owner of that ship and Barrow. The master was not in a position to grant a bill of lading binding his owner. He was to take a cargo of coals and to get the soda, and he had no right to grant a bill of lading in favour of a third party. That bill of lading, therefore, is a mere nullity, and creates no obligation between the master or owner of the vessel and Barrow. So that when the soda arrived in Inverness it was in the possession of Ross, and had been so from the moment of shipment. It was therefore goods delivered to Ross. In these circumstances, Ross, behind the back of Mackintosh, entered into a new contract of sale with Barrow by which he purchased the same specific quantity of soda, as if it had not formed the subject of any previous contract. Ross must take the consequence of his own rashness and folly. He has no defence or shadow of defence against the action by Mackintosh. Therefore I come, without hesitation, to the conclusion that Mackintosh is entitled to decree against Ross in the original action, with expenses. As to the multiplepoinding, parties have no great interest, if your Lordships agree with me as to the first action. The fund is not what is claimed by Mackintosh, but it is either the goods or the price of the goods under the contract with Barrow and Ross, or their value after a judicial sale. Whichever it is, it seems to me that Mackintosh has nothing to do with this fund *in medio*. Mackintosh Brothers understood their case when they pleaded that "having no concern with the transaction between Ross and Barrow, on which the action of multiplepoinding is founded, said action should be disjoined from the action at their instance."

The other judges concurred.

Agents for Reclaimers—Murdoch, Boyd, & Co., S.S.C.

Agents for Ross—Horne, Horne, & Lyell, W.S.

Agent for Barrow—John Ross, S.S.C.

Monday, November 4.

SECOND DIVISION.

BAIN *v.* DUKE OF HAMILTON AND OTHERS.

Superior—Title—Proprietor—Mineral Tenant—Improper Operations. Circumstances in which *held* that a reserved clause in a superior's titles to sink shanks for the purpose of working the minerals underneath the ground did not exclude the proprietor of the ground's claim for surface damage occasioned by the improper working of the pit.

This is an action at the instance of John Bain, Esq. of Morriston, proprietor of the lands of Morriston in Lanarkshire, and the defenders are the Duke of Hamilton, as superior of that estate, and Messrs Colin Dunlop & Co., the tenants of the minerals. The summons concludes for damages on account of injury done by the improper working of the pits underneath the estate.

When the lands were feued in 1653 the superior reserved to himself the minerals by the following clause—"Reserving, nevertheless, to me, my heirs and successors, full power, right, and liberty to win

coals and coalheughs within the bounds of the said lands of Morriston, and to use and dispone therefrom at our pleasure, with free ish and entry thereto, I and my foresaid giving satisfaction and payment to the said Robert Miller and his foresaid for all skaith, damage, or interest that they shall happen to sustain or incur therethrough." In the renewal of the investiture by the Duchess of Hamilton in 1698, the clause of reservation was—"Reserving always liberty and power to us, as superior of the said lands, to minerals and coalheughs, and for that effect to set down shanks within any part of the said lands; we always giving satisfaction for the damage they shall happen to sustain through leading or setting down of said shanks." This clause was inserted in all the after renewals of investiture, and is that which is contained in the deed by which the pursuer personally holds of the Duke of Hamilton. The defenders contend that the original form of the reservation was superseded by that of 1698, and that the special provision thus made for damages incurred by setting down shanks in the lands of Morriston must be read as having the effect of excluding all other descriptions of damage. The Lord Ordinary (KINLOCH) repelled this plea and "found it relevant to infer a liability for damages that the defenders, or either of them, have produced injury to the pursuer's land or the houses thereon by working the minerals beneath the same without leaving sufficient support to the surface; and appoints the cause to be enrolled, in order to the determination of the facts."

The defenders reclaimed.

W. M. THOMSON for them.

CLARK and SHAND in answer.

The Court adhered, LORD COWAN observing, that it was by no means clear that the precept in 1698 altered the reservation. It must be read with due reference to the original title. But, at all events, there was nothing in the titles which could deprive the pursuer of his claim to damages at law, apart from contract of any kind, if his lands had been injured by improper operations on the part of the defenders.

Agents for Pursuer—Donald & Ritchie, S.S.C.
Agent for Defenders—George Wilson, S.S.C.

Tuesday, November 5.

FIRST DIVISION.

ROBSON *v.* WALSHAM.

Jurisdiction — Executor — Foreign. A domiciled Englishman was decerned executor-dative in a Scotch Commissary Court to a party deceased. He gave up no inventory, and was not confirmed. He held no funds in Scotland. *Held*, in an action against him as executor-dative by a creditor of the deceased, that he was not subject to the jurisdiction of the Court.

George Robson, accountant in Glasgow, brought this action against Sir John Walsham of Knill Court, in the county of Hereford, Baronet, as executor-dative decerned by the commissary of Edinburgh to the deceased Francis Garbett of Knill Court, for the purpose of receiving payment of certain sums due under bonds by Garbett and another, of which sums the pursuer was now in right. The defender pleaded no jurisdiction.

The Lord Ordinary (BARCAPLE) sustained the plea of the defender, and dismissed the action, adding the following note to his interlocutor:—

"The sole ground on which it is alleged that there is jurisdiction against the defender, who is domiciled and resident in England, is, that he has been decerned executor-dative *qua* next of kin of Francis Garbett. He has not given up an inventory, or been confirmed executor. Jurisdiction has not been constituted against him by arrestment, and it is not alleged that there are any funds in Scotland belonging to him, either as an individual or as executor; the action is for an ordinary debt, alleged to have been owing by Francis Garbett, at his death. In this state of the facts, the Lord Ordinary does not think that any of the recognised grounds for sustaining jurisdiction against a foreign defender can be held to exist in the case.

"The defender, before he was decerned executor, had obtained letters of administration in England. The Lord Ordinary does not doubt that if jurisdiction were constituted against him in the ordinary way, he might be sued in this Court for payment of Garbett's debt, as executor, and administrator in respect of his having taken up the estate in England, *Morrison* v. *Kerr*, M. 4601; *Munro* v. *Graham*, 1 D., 1151. In like manner, the Lord Ordinary must hold that, if the defender has realised executry funds under the title which he obtained in Scotland, which he has carried away, or which never were here, he might be sued in the English Courts independently of his obligation to account there for his administration under his English title. Any other rule would enable an executor to escape from all liability by leaving the jurisdiction in which he has confirmed and administered, and taking the funds with him.

"This is no violation of the principle fixed by the House of Lords in the case of *Preston* v. *Melville*, 2 Rob. App., 88, that 'the domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased.' There is no question in the present, or any similar case, as there was in *Preston* v. *Melville*, as to the right and duty to administer. In the case of *Munro* v. *Graham*, above quoted, this was well illustrated. While the Court there sustained the jurisdiction, and was prepared, if necessary, to go on to dispose of the case, and decern against the executor, the action was sisted to abide the issue of an administration suit in the Court of Chancery as the primary and appropriate judicature, if an effectual decree could be obtained there.

"If there had been funds in Scotland carried by the defender's decree-dative, the pursuer's proper course would have been to arrest them *jurisdictionis fundandæ causa*. There are no such funds here now, and the Lord Ordinary greatly doubts whether it can be maintained that there ever were any in Scotland, at or after the date of the defender's decree-dative. A number of Carron Company shares which had belonged to Francis Garbett were confirmed to by an executor-creditor of Garbett, who sold them to Mr Stainton in 1817. The defender, as executor of Garbett, and holding letters of administration in England, took proceedings in Chancery against Stainton, on the ground that the sale had been brought about by his fraud, in which he sought to have the sale set aside, or for other remedy. After these proceedings had commenced, and, apparently, in aid of the defender's title to pursue them, he got himself decerned executor in Scotland. He afterwards compromised the Chancery suit by taking payment from Stainton of the sum of £60,000. The pursuer contends that the